S. HRG. 114–203

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

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES,
WATER, AND WILDLIFE

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 30, 2015

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C O N T E N T S

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

WEDNESDAY, SEPTEMBER 30, 2015

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE,
Washington, DC.

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

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

OPENING STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM THE STATE OF ALASKA

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

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

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

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

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

Oversight is particularly important when we have a pattern of behavior from certain agencies, like the EPA, of consistently issuing rules that completely disregard the limits of their authority imposed by Congress. In fact, on June 26, just 3 days before the Supreme Court overturned the EPA's Mercury and Air Toxic Rule under the Clean Air Act, EPA Administrator McCarthy literally bragged on TV, on an HBO show, that the Supreme Court's deci-

sion ultimately would not matter because it took 3 years to get to the Supreme Court and, by then, most people subject to the rule had to abide by it anyways. "Investments have already been made," she said.

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

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

It's no secret that many of us think that the final WOTUS rule goes far beyond the authority granted by Congress. At a hearing back on March 4th, I asked Administrator McCarthy for her legal analysis that supports the rule. There was no response. On July 14th, the chairman of this committee, Chairman Inhofe, and my Republican committee colleagues joined in a letter asking again for the legal analysis of the WOTUS rule. No response. We received nothing.

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

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

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

EPA has not yet identified any specific scientific studies in response to Chairman Inhofe's letter. We are awaiting a response, as well as a response to our longstanding request for a legal analysis before scheduling a hearing with the EPA.

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

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

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

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

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

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

Finally, I want to remind her, respectfully, that we expect her to be candid in her answers. This subcommittee will not accept any attempts to evade answering questions based on claims of executive branch confidentiality interests, deliberative process privilege, or ongoing litigation. While these excuses may work in responding to FOIA requests or in defending litigation, they are not the basis of withholding information and truthful answers from the Congress of the United States.

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

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

[The referenced documents follow:]

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

JUL 17 2015

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510-6175

Dear Chairman Inhofe,

Thank you for your letter dated July 16, 2015 requesting a copy of the April 27, 2015 memorandum signed by Major General (MG) John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (Corps), along with its tabbed enclosures (collectively referred to Pe*abody I*). Further, you asked for a copy of the May 15, 2015 memorandum from MG Peabody (referred to as *Peabody II*) which forwards a memorandum from the Corps' Regulatory Program Chief, Ms. Jennifer Moyer (*Moyer* memorandum), as well as a copy of the analysis prepared by Paul Scodari (*Scodari* document), an economist on staff at the Corps' Institute for Water Resources. The *Moyer* memorandum and the *Scodari* document offer comments on the Economic Analysis prepared in support of the final Clean Water Rule that was published in the Federal Register on June 29, 2015.

In order to address your request for expedited handling of these documents, earlier today the Deputy General Counsel of the Army (Installations, Environment and Civil Works) delivered an electronic copy of the requested documents to the Committee's Chief Counsel. We shall now turn our attention to the other documents you requested in your letter.

I wish to emphasize several key points related to these documents. First, although *Peabody I* was produced more than three weeks after the Clean Water Act rule was provided to the Office of Management and Budget to initiate the interagency review process, the concerns raised in the memorandum, and its associated enclosures, were thoroughly considered prior to issuance of the draft final rule. Because these materials were considered internal deliberative documents, they were not released outside the Army. However, the issues raised therein were considered in detail and discussed with the Environmental Protection Agency (EPA), our partner in developing the rule, as well as with the larger Federal family during the interagency review process. After analyzing and discussing the issues raised by the Corps, the Army and EPA agreed to make three important changes to the rule, in addition to many other technical edits, for which the Corps was advocating, for example, inclusion of the 100-year flood plain in section (a)(8), modification to the ditch exclusion in section (b)(3)(ii), and inclusion of a flexible grandfathering provision in the preamble. Thus, the Army considered all the input received from the Corps throughout the drafting, vetting, and interagency review

processes. Secondly, I want to make it very clear to the Committee that the *Scodari* document was never provided to me until Tuesday, June 30, 2015, when I asked for a copy. In fact, my staff and I were completely unaware of the existence of this document until it was brought to our attention by Chairman Gibbs, House Committee on Transportation and Infrastructure - Subcommittee on Water Resources and Environment. Presumably, the comments offered by Mr. Scodari were incorporated into the *Moyer* memorandum. I wish to also remind the Committee that *Peabody II* was prepared six weeks after the Clean Water Act rule was provided to the Office of Management and Budget to undertake interagency review. Although received very late in the process, the concerns raised in the *Moyer* memorandum were in fact considered prior to issuance of the draft final rule. Like *Peabody I*, *Peabody II* and the *Moyer* memorandum were considered to be internal and deliberative Army documents. As such, these documents were not released outside the Army. However, I assure you the issues in *Peabody II* and the *Moyer* memorandum were likewise discussed in detail with the EPA. I emphasize that the Army considered all the input received from the Corps throughout the drafting, vetting, and interagency review processes.

Please note that the documents transmitted today to the Committee's Chief Counsel contain sensitive information exempt from the disclosure provisions of the Freedom of Information Act (5 U.S.C. § 552). The Army provides these documents with a full reservation of rights and with the understanding and intent that providing them shall not be deemed a waiver of any applicable privilege. The Army respectfully requests that these documents be shared only within your Committee and then only with those who have an official need for the information; that the documents not be disclosed outside the Committee or to the public; that appropriate steps be taken to safeguard the documents; and that the documents be destroyed after use. Safeguarding these documents is particularly important now that the Army and the EPA are actively involved in litigation associated with publication of the final rule.

Thank you for your continued interest in the Army Civil Works program.

Very truly yours,

Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF

CECW-CEO

27 April, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

SUBJECT: Draft Final Rule on Definition of "Waters of the United States"

1. As we have discussed throughout the rule-making process for "Waters of the United States" over the last several months, the Corps of Engineers has serious concerns about certain aspects of the draft final rule. On 3 April 2015, the Environmental Protection Agency delivered the draft final rule to the Office of Management and Budget to initiate the inter-agency review process by our federal partners. Once we obtained a copy of the draft final rule, I asked USACE legal and regulatory staff to review it to ascertain the extent to which Corps' concerns had been incorporated, and to conduct an analysis of the legal and technical impacts of its language. That just-completed review reveals that the draft final rule continues to depart significantly from the version provided for public comment, and that the Corps' recommendations related to our most serious concerns have gone unaddressed. Specifically, the current draft final rule contradicts long-standing and well-established legal principles underpinning Clean Water Act (CWA) Section 404 regulations and regulatory practice, especially the decision in *Rapanos* Supreme Court decision. The rule's contradictions with legal principles generate multiple legal and technical consequences that, in the view of the Corps, would be fatal to the rule in its current form.

2. The preamble to the proposed rule and the draft preamble to the draft final rule state that the rulemaking has been a joint endeavor of the EPA and the Corps, and that both agencies have jointly made significant findings, reached important conclusions, and stand behind the final rule. Those statements are not accurate with respect to the draft final rule, as the process followed to develop it greatly limited Corps input – a practice that has continued thus far in the inter-agency review process. Within these circumstances however, I believe that the Corps has done all that it could do to assist and support the rulemaking. The critical fact remains that the most important concerns regarding the defensibility and implementability of the draft final rule remain unaddressed, although we continue to believe, as we have previously explained, that a relatively few simple "fixes" that the Corps has offered would resolve the problems with the draft final rule.

3. The analysis of and concerns with the draft final rule developed by the Corps professional staff are respectfully forwarded for your consideration. I have reviewed all of the attached documents and have concluded that unless the draft final rule is changed to adopt the Corps' proposed "fixes," or some reasonably close variant of them, then under the National Environmental Policy Act, the Corps would need to prepare an Environmental Impact Statement (EIS) to address the significant adverse effects on the human environment that would result from the adoption of the rule in its current form. Thank you for your consideration of the Corps' serious concerns and recommendations on this issue.

Building Strong!

JOHN W. PEABODY
Major General, U.S. Army
Deputy Commanding General
for Civil and Emergency Operations

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DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECC-E

APR 24 2015

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief Counsel, U.S. Army Corps of Engineers (ATTN: David R. Cooper)

SUBJECT: Legal Analysis of Draft Final Rule on Definition of "Waters of the United States"

This memorandum responds to your request for a legal analysis of the draft final rule regarding the definition of the "waters of the United States" (WOUS) subject to Clean Water Act (CWA) jurisdiction, which the Environmental Protection Agency (EPA) submitted to the Office of Management and Budget (OMB) for inter-agency clearance on April 3, 2015.

Summary

The draft final rule regarding the definition of WOUS contains several serious flaws. If the rule is promulgated as final without correcting those flaws, it will be legally vulnerable, difficult to defend in court, difficult for the Corps to explain clearly, and challenging for the Corps to implement. The Corps has identified every serious area of concern in the draft final rule to both the Department of the Army (DA) and the EPA, and Corps legal and regulatory staff has provided numerous edits or "fixes" to rule language to correct those errors. However, to date, the fixes have not been adopted, so the flaws remain.

The fundamental problem reflected in every one of the flaws described below is that the proposed rule that was published on April 21, 2014, is based on sound principles of science and law, but many provisions of the draft final rule have abandoned those principles and introduced indefensible provisions into the rule. The following is a summary of the most serious flaws in the draft final rule; the proposed fixes are shown in track changes in the attached "Revised Draft Final Rule," which was provided most recently to DA and EPA on April 16, 2015.

Legal Standard

EPA and Corps staff agree with our colleagues at the U.S. Department of Justice that the final rule will survive the expected legal challenges that it will face in the federal courts only if the courts conclude that the rule complies with the test for CWA jurisdiction provided by Justice Kennedy in the *Rapanos* decision. The following is the essence of Justice Kennedy's test: a water body (such as a wetland) is subject to CWA jurisdiction if it has a significant nexus with navigable waters. The term "significant nexus" means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of the downstream navigable waters. For an effect to be significant, it must be more than speculative or insubstantial.

MEMORANDUM FOR DCG-CEO
SUBJECT: Legal Analysis of Draft Final Rule on Definition of WOUS

Loss of CWA Jurisdiction

The draft final rule excludes from jurisdiction of the CWA large areas of lakes, ponds, and similar water bodies that are important components of the tributary system of the navigable waters and that the Federal government has been regulating as jurisdictional from 1975 to the present moment. Those water bodies are important to the physical, chemical, and biological integrity of the entire tributary system of the navigable waters and to the navigable waters themselves. However, those lakes, ponds, and wetlands would lose all federal CWA protection under the draft final rule merely because they happen to lay outside and beyond a distance of 4000 feet from a stream's ordinary high water mark (OHWM) or high tide line (HTL). The 4000-feet cut-off line (or "bright-line rule") for jurisdiction has no basis in science or law, and thus is "arbitrary." The Corps believes that the 4000-feet limit on jurisdiction would cause significant adverse environmental effects as a result of the loss of jurisdiction over a substantial amount of jurisdictional "waters," based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA.

The arbitrary nature of the 4000-feet cutoff of jurisdiction is demonstrated by the fact that EPA staff engaged in drafting the rule told Corps staff during a conference call in March 2014 that EPA was going to cut off CWA jurisdiction at a distance of 5000 feet from the OHWM/HTL of traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries. Then, three days later, EPA staff changed its position and decided to cut off CWA jurisdiction at the narrower 4000-feet limit from an OHWM/HTL. EPA staff has never provided any scientific support or justification for either a 5000-feet or 4000-feet cut-off. Both distances are arbitrary and either limitation would be very difficult to defend in the federal courts when the final rule is challenged because neither limitation on CWA jurisdiction is supported by science or field-based evidence. It is significant that EPA's Science Advisory Board recommended against using any set distance to establish or limit CWA jurisdiction.

To abandon existing Federal CWA jurisdiction over ecologically important water bodies that significantly affect the biological, physical, and chemical integrity of the downstream waters would lead to significant adverse effects on the environment, because, shorn of CWA protection, those lakes, ponds, and wetlands can be polluted, filled, drained, and degraded at will, with no Federal regulation to prevent, regulate, or mitigate for those destructive activities. Pollutants dumped into no-longer-jurisdictional water bodies would flow downstream to the navigable waters, polluting drinking water supplies and killing or harming fish, shellfish, and wildlife, and harming human populations. Consequently, the abandonment of CWA jurisdiction over important parts of the tributary system of the navigable waters cannot be done without first preparing an environmental impact statement (EIS) to identify precisely what water bodies would lose CWA protection under the final rule and what significant adverse environmental effects would result from that loss of jurisdiction.

In a limited time frame during the development of the draft final rule (roughly the last two months), the Corps' professional staff has documented representative examples of the many lakes, ponds, and wetlands that are part of the tributary system of the navigable waters and that would lose CWA jurisdiction and protection under the draft final rule. This documentation has

been presented to both the Assistant Secretary of the Army (Civil Works) (ASA(CW)), and to EPA decision-makers and technical staff. Thus far, no one has refuted or denied the professional, technical, and well-documented examples of lost jurisdiction under the draft final rule. No one has presented any basis to refute or challenge the Corps' determination that the draft final rule would cause significant adverse effects on the human environment and thus would require an EIS before the final rule could be promulgated in its current form.

During discussions with EPA staff on April 9, 2015, EPA representatives suggested that, although the proposed abandonment of substantial parts of the CWA's long-standing jurisdiction would cause significant adverse effects on the human environment, those adverse effects might be offset by the hope that the final rule will lead to the assertion of CWA jurisdiction over five categories of "isolated" waters under section (a)(7) of the draft final rule. That argument is unpersuasive for at least two reasons:

First, a well-established principle of NEPA law states that a proposed Federal action that would cause significant adverse effects on any part or aspect of the human environment requires an EIS to address those significant adverse effects, even if the Federal agency believes that other aspects of its proposed action would have environmental benefits. For example, the Council on Environmental Quality's (CEQ's) legally binding NEPA regulations state the rule of law regarding how a Federal agency must determine whether its proposed action could cause significant adverse environmental effects as follows:

> "Significantly" as used in NEPA requires considerations of [...] intensity: (b) Intensity. This refers to the severity of the impact. . . . (d) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." (40 CFR 1508.27)

Secondly, in section (a)(7) of the draft final rule, EPA has determined that every hydrologically/geographically isolated water in each of the five defined subcategories of isolated waters is "similarly situated" with all other isolated waters in those subcategories in the watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea. Leaving aside the legal, scientific, and technical problems presented by section (a)(7), which are discussed below, section (a)(7) does not assert CWA jurisdiction over any of the isolated water bodies identified in that provision. CWA jurisdiction could be asserted over those isolated water bodies identified in section (a)(7) only if and when the Corps (or possibly EPA as a "special case") was to determine on a case-specific basis that those isolated water bodies have a significant nexus with navigable or interstate waters. Given the fact that, by definition, the vast majority of those isolated water bodies have no hydrologic connection with navigable or interstate waters, it is uncertain whether many, if any, of those isolated waters will pass the "significant nexus" test and be found to be subject to CWA jurisdiction. Even if the Corps or the EPA were to assert that those isolated waters are jurisdictional under the significant nexus test, it is doubtful that the federal courts would uphold such assertions of CWA jurisdiction.

The Corps has questioned what legal authority exists that would enable DA and EPA to abandon CWA jurisdiction over large areas of lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters, and over which the Corps and EPA have asserted CWA

jurisdiction since 1975. But even if such legal authority exists, at present there is no legally adequate administrative record to support such a move. The proposed rule did not propose any limitation for CWA jurisdiction comparable to the 4000 feet cut-off, which was presented for the first time in the draft final rule. Consequently, the public did not have the opportunity to evaluate that idea or to comment on it during the public comment period and thus the addition of this limitation likely violates the Administrative Procedures Act (APA).

In some ways the proposed abandonment of CWA jurisdiction over many lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters also has the effect of calling attention to legal and scientific questions regarding other parts of the final rule. For example, the draft final rule asserts CWA jurisdiction *by rule* over every "stream" in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert Southwest, even though those ephemeral dry washes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary. The draft final rule's assertion that the dry washes all have a "significant nexus" with navigable waters contrasts sharply with the contradictory position in the rule that large areas of lakes, ponds, and wetlands in the well-watered parts of the USA, which water bodies actually send large amounts of water, sediments, nutrients, and (potentially) pollutants to the navigable waters, would lose CWA jurisdiction under the 4000-feet cutoff.

When these flaws were described to EPA staff during the April 9, 2015 meeting, the response was that the agencies have legal authority to place any limitation that they choose on the extent of CWA jurisdiction, even if that would have the effect of excluding from CWA jurisdiction lakes, ponds, and wetlands that have already been determined by the Corps to have a significant nexus with navigable waters that would satisfy that jurisdictional test in any future site-specific jurisdictional determination. Even if that assertion is valid, that sort of abandonment of CWA jurisdiction cannot take place without having first prepared an EIS to analyze and seek public comment on the potentially significant, adverse effects on the natural and human environment that would result.

It is easy to fix the draft final rule to avoid the legal necessity of preparing an EIS. The Corps has suggested the necessary fix many times during the last several months. To date, consensus has not been reached to resolve the Corps' continuing concerns. The reason that EPA has given for not adopting the Corps' fixes is that EPA apparently believes that the 4000-feet cut-off of CWA jurisdiction would provide greater clarity (i.e., a "bright line") to the regulated public by limiting the Corps' ability to perform site-specific jurisdictional determinations. The Corps has explained why the EPA's 4000-feet limit would be more difficult to understand, identify, implement, or defend in the federal courts than the Corps' suggested approach, as explained in the technical memorandum accompanying this memorandum.

The Corps' fix is shown in the attached revised draft final rule. If this problem is not fixed, then the Corps must prepare an EIS before the final rule can be promulgated and leaves the rule vulnerable to an APA challenge.

MEMORANDUM FOR DCG-CEO
SUBJECT: Legal Analysis of Draft Final Rule on Definition of WOUS

Definition of "Adjacent"

On the day that the draft final rule was sent to OMB to begin the inter-agency review process, EPA introduced into the rule's definition of "adjacent" a new sentence that would exclude from the final rule's definition of "adjacent waters" large areas wetlands that are used, or have been used, for farming, forestry, or ranching activities. That sentence reads as follows: "Waters subject to established, normal farming, silviculture, and ranching activities (33 U.S.C. Section 1344(f)(1)) are not adjacent." On its face, the sentence is indefensible: it is a textbook example of rulemaking that cannot withstand judicial review. This is true because a wetland is, by definition, "adjacent" to a tributary stream if, as a matter of geographical fact, that wetland is "bordering, contiguous, or neighboring" to the stream, regardless of whether farming, forestry, or ranching activities are taking place on that wetland. That sentence must be removed or modified to retain credibility and legal defensibility for the final rule's definition of "adjacent."

According to the draft preamble to the draft final rule, the intended effect of the new sentence is to require a site-specific "significant nexus" determination before the particular adjacent waters could be determined to be subject to CWA jurisdiction, rather than to declare the waters jurisdictional by rule, as is the case with all other "adjacent" wetlands and other adjacent waters. For many years wetland areas adjacent to rivers and streams have been used for growing hay or other farming, ranching, or silviculture purposes. All normal farming, ranching, and silviculture activities have been exempted by statute from CWA Section 404 permitting requirements since 1977. The proposed rule that was published in the Federal Register did not propose to exclude from the definition of "adjacent" any categories of adjacent waters based on the activities that occur in those waters, so the public did not have an opportunity to comment on the new definition, again leaving the rule vulnerable to an EPA challenge. The last-minute decision to distinguish adjacent farmed wetlands from other adjacent wetlands is highly problematic, both as a matter of science and for purposes of implementing the final rule.

Nevertheless, if EPA and DA decide that the final rule should implement the idea underlying the sentence quoted above, then at the least the sentence should be revised as follows: "Waters subject to established, normal farming, silviculture, or ranching activities (33 U.S.C. Subsection 1344(f)(1)) are not jurisdictional by rule under sub-section (a)(6) of this paragraph as "adjacent waters," but may be determined to be jurisdictional on a case-by-case basis under subsection (a)(8)."

Definition of "Neighboring"

The draft final rule would provide a new definition of the term "neighboring," which would declare "jurisdictional by rule" all water bodies within 1500 feet of an OHWM or HTL, so long as the water body is located within a 100-year flood plain. The 1500-feet limitation is not supported by science or law and thus is legally vulnerable. The Corps has advocated the more scientifically and legally defensible distance of 300 feet for declaring by rule that all neighboring water bodies are jurisdictional, based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA. Site-specific significant nexus determinations of jurisdiction are necessary to justify the assertion of CWA jurisdiction over water bodies that lie more than 300 feet from an OHWM or

MEMORANDUM FOR DCG-CEO
SUBJECT: Legal Analysis of Draft Final Rule on Definition of WOUS

HTL. The definition of "neighboring" also contains other fixable flaws. The edits are shown and explained in the attached revised draft final rule.

Categories of Isolated Waters

The draft final rule's treatment of five categories of "isolated" waters (i.e., prairie potholes, western vernal pools, Carolina bays and Delmarva bays, Texas coastal prairie wetlands, and pocosins) is problematic. Such isolated waters undoubtedly are ecologically valuable and important, so the policy goal of providing CWA protection for such waters is understandable. However, to be subject to CWA jurisdiction, those isolated water bodies must be demonstrated to have a significant nexus with navigable or interstate waters, which nexus will be difficult to show for isolated waters that are not hydrologically connected to the tributary system of either navigable or interstate waters.

The draft final rule would declare that all isolated waters in each of those five listed categories of isolated waters are "similarly situated," but the Corps has never seen any data or analysis to explain, support, or justify this determination. In essence, section (a)(7) in the draft final rule provides a definition of each of five categories of isolated waters and then asserts that every water that fits into each definition is similar to all other waters that fit into that same definition within any single point of entry watershed. This approach is circular reasoning, making use of a tautology, so that the determinations of "similarly situated" do not have much substance.

Moreover, the determination that all isolated waters in each of the listed five categories of isolated waters are "similarly situated" is in conflict with the draft final rule's definition of "similarly situated," which is embedded in the definition of "significant nexus." The current draft final rule defines the concept of "similarly situated" as follows: "Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters." This definition requires findings on two matters: the functions of the waters and how close to each other those similar waters are located. However, the current definition for each category of isolated waters in section (a)(7) of the draft final rule is based entirely on the functions of those waters, leaving out the required findings regarding proximity. In other words, the definitions in section (a)(7) of the five categories of isolated waters are not based on any findings that those isolated waters are sufficiently close together to function together in affecting downstream waters, as required by the definition of "similarly situated." Significantly, EPA's technical staff has demonstrated that in some areas prairie potholes (for example) are located close together and, in other areas, they are spaced far apart. Yet, the assertion that all prairie potholes are "similarly situated" does not account for that discrepancy, which renders section (a)(7) legally vulnerable.

It is also worth noting that section (a)(7) asserts that every example of the five categories of isolated waters identified in that section have essentially the same functions regarding navigable and interstate waters, and the territorial seas, as every other isolated water in that category. But how can that be true, when some of those isolated waters have been hydrologically connected to the tributary system of the navigable waters by drainage ditches, while other isolated waters in that same category have not been so connected, and are truly "isolated?" Their functions would

not necessarily be the same and even if they share some of the same functions, the effects of the functions would be varied such that they would not be functioning "alike."

Functions of Wetlands/Water Bodies Indicating Significant Nexus

The draft final rule presents a limited and exclusive list of nine (9) functions that wetlands and other water bodies perform, which can be evaluated and documented to establish a significant nexus between that wetland or other water body and downstream navigable or interstate waters to establish CWA jurisdiction over that water body. The Corps on numerous occasions has advised EPA that the list of functions is incomplete, based on the Corps' experience and expertise in performing significant nexus evaluations in the nearly eight years since the release of the *Rapanos* guidance. During that period the Corps has made more than 51,800 significant nexus determinations by analyzing the biological, physical, and chemical functions provided by such water bodies. Nevertheless, thus far EPA has not expanded the list or revised the provision to designate EPA's list of functions as representative and non-exclusive. The proposed fix for this problem is presented in the attached revised draft final rule.

Transition to New Rule

The draft final rule does not include an adequate provision for "grandfathering," that is, for transitioning from the existing rule to the new rule. The transition could be difficult and fraught with problems, all of which require careful treatment in a well-conceived provision that has not yet been drafted. The needed provision should consider the various types of authorizations provided under the CWA, the different types of jurisdictional determinations provided to landowners, and various other types of actions related to jurisdictional determinations. Without a well-considered transition provision, implementation of the rule will generate significant legal problems.

Essential Principles in the Proposed Rule

To understand the fundamental legal problems with the draft final rule, all that one needs to do is read the language of the proposed rule and compare it to the very different language of the draft final rule. The comparison reveals that many essential principles that made the proposed rule legally defensible have been abandoned or obscured in the draft final rule. Given the fact that the proposed rule was carefully developed by the EPA and the Corps, and then reviewed and cleared by the EPA, the Corps, DOJ, the Department of Justice, OMB, and other Federal agencies, the draft final rule's deviation from fundamental legal and scientific principles that were essential components of the proposed rule reveals the basic problems of the draft final rule.

The fundamental legal and scientific principles of the proposed rule are fairly straightforward, elegantly simple, easily understood, based on sound scientific and legal principles, and thus very legally defensible. Those principles included the following:

The proposed rule would assert CWA jurisdiction by rule over all of the natural water bodies that constitute the tributary system of the navigable and interstate waters, subject to a limited number of specified exclusions from CWA jurisdiction. The proposed rule would do that by asserting

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CWA jurisdiction by rule over all tributaries of the navigable and interstate waters. Those tributaries are defined in the proposed rule as all water bodies (i.e., rivers, streams, lakes, ponds, wetlands, etc.) that contribute a flow of water (directly or through another water body) to the navigable or interstate waters, plus all other waters that are adjacent to those tributary water bodies. In accordance with the Supreme Court's legally binding, precedential decisions, the proposed rule and its administrative record would establish the reasonable proposition that the natural water bodies that constitute the tributary system of the navigable and interstate waters have a significant nexus with those downstream waters because they provide the water to those downstream navigable and interstate waters, and because pollutants, sediments, etc., flow from the upper parts of the tributary system down to the navigable and interstate waters.

Under the proposed rule, for truly isolated water bodies that have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters, those isolated water bodies could be evaluated on a case-by-case basis in site-specific jurisdictional determinations made by the Corps or EPA to determine whether various "aggregations" of those isolated water bodies might be "similarly situated" and might have a "significant nexus" with navigable or interstate waters, or the territorial seas, and thus might be subject to CWA jurisdiction despite the fact that they have no shallow subsurface or confined surface hydrologic connection to the navigable or interstate waters. Whatever result those specific significant nexus analyses might yield for various aggregations of truly isolated water bodies, at least the legal challenges to those jurisdictional determinations would be independent of, and would not undermine the legal defensibility of, the final rule as a whole.

The basic principles of the proposed rule described above reflect the controlling Federal law and undeniable scientific facts about pollution control and hydrology, and thus are legally sound and defensible. Unfortunately, the draft final rule has departed markedly from the sound legal and scientific principles of the proposed rule, in several important ways, and those basic changes make the draft final rule legally vulnerable.

Change in Definition of "Tributary"

The draft final rule would change the definition of "tributary" to exclude from that important definition all lakes, ponds, and wetlands that are part of the tributary system of the navigable or interstate waters and that send a flow of water into those waters. This change would have the effect of excluding from CWA jurisdiction potentially vast areas of lakes, ponds, and wetlands that are integral parts of the tributary system of the navigable and interstate waters. Those excluded wetlands, lakes, and ponds have been subject to CWA jurisdiction since at least 1975 and are subject to CWA jurisdiction now. Excluding those lakes, ponds, and wetlands from CWA jurisdiction under the draft final rule is not supported by an administrative record or EIS to provide the NEPA compliance for the significant adverse environmental effects that would result from such an action. Also, no notice of such a change was provided in the proposed rule to allow for public comment leaving the rule vulnerable to an APA challenge.

Attempts to remedy the problems that the new definition of tributary causes has led to the addition of several new provisions in the draft final rule, which were not in the proposed rule, and which try to patch the final rule to recapture CWA jurisdiction over some of the lakes,

ponds, and wetlands that the new definition of tributary would abandon. These patches are difficult to understand, explain, implement, or defend in court.

For example, the draft final rule adds new provisions to allow the agencies to assert CWA jurisdiction on a case-by-case basis over lakes, ponds, or wetlands that contribute flow to navigable or interstate waters and that are located no more than 4000 feet from a stream's OHWM/HTL. The same provision excludes from CWA jurisdiction altogether any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters, but that lies more than 4000 feet from that same OHWM/HTL. This 4000-feet bright line rule is not based on any principle of science, hydrology or law, and thus is legally vulnerable. The fundamental fact that the tributary lakes, ponds, or wetlands inside or outside the 4000-feet boundary all contribute the same flow of water, pollutants, sediments, etc., to the navigable or interstate waters is ignored in the draft final rule. This rule is not likely to survive judicial review in the federal courts.

Other examples of problematic patches in the draft final rule that are intended to correct problems created by the new definition of tributary can be found in the revised definition of "neighboring," which asserts that water bodies that are within 1500 feet of a stream's OHWM or HTL are neighboring to that stream. Once again, the 1500-feet figure is not based on any principle of science or law, and thus is legally vulnerable. Additionally, the federal courts may find that common sense dictates that a water body located 1500 feet from a stream is too far away from that stream to be defined as neighboring and thus adjacent to that stream. The fact that the draft final rule abandons the fundamental legal and scientific principle of the proposed rule that asserted CWA jurisdiction only over water bodies that are part of the tributary system of navigable or interstate waters, and substitutes for that principle 100% science-based tests based on distances from OHWMs/HTLs, makes the draft final rule legally vulnerable.

Site-Specific JDs for Water Bodies Draining into Jurisdictional Waters

A related example of a serious legal flaw in the draft final rule is the fact that it imposes novel limitations on the ability of the Corps and EPA to make jurisdictional determinations based on case-specific "significant nexus" determinations for any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters or to the territorial seas. The Corps and EPA can make such case-specific significant nexus determinations now, but not under the draft final rule. No final rule should be promulgated unless this flaw is fixed. The Corps' proposed edit is set forth in the attached revised draft final rule.

Isolated Waters Characterized as "Similarly Situated"

Another example of a provision of the draft final rule that makes the entire rule legally vulnerable is the provision that characterizes literally millions of acres of truly "isolated" waters (i.e., wetlands that have no shallow subsurface or confined surface connection with the tributary systems of the navigable waters or interstate waters) as "similarly situated." In at least three places in the preamble, it is stated that such a determination of "similarly situated" in a final rule would be tantamount to an inevitable future determination that all of those identified aggregations of similarly situated isolated waters do have a significant nexus with navigable or interstate waters, and thus will later be determined to be subject to CWA jurisdiction in future

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jurisdictional determinations. That part of the draft final rule creates legal vulnerabilities for the entire rule.

It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters (which have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters) do in fact have a "significant nexus" with navigable or interstate waters. Consequently, the draft final rule will appear to be inconsistent with the Supreme Court's decisions in *Rapanos* and *SWANCC*. As a result, this assertion of CWA jurisdiction over millions of acres of isolated waters may well be seen by the federal courts as "regulatory over-reach," which undermines the legal and scientific credibility of the rule.

The final rule should address isolated water bodies just as the proposed rule did --by leaving to future case-by-case determinations all findings regarding what isolated waters are similarly situated, which waters should be aggregated in what watersheds, and whether those case-specific aggregations of isolated waters actually have a significant nexus with navigable or interstate waters.

LANCE D. WOOD
Assistant Chief Counsel
Environmental Law and Regulatory Programs

cc: Revised Draft Final Rule

PART 328 - DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 continues to read as follows:

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections (a), (b) and (c) to read as follows:

328.3 Definitions

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters ~~which~~ that are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each paragraph (A) through (E)

of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. ~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets located in the upper Mid-west.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are pothole depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

Comment [DRC1]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that waterbody with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPDE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPDE watershed, merely because similar waterbodies happen to lie on one side or the other of a line that demarcates adjacency.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

Comment [DRC2]: Previous language, "found in southwestern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southwestern Oregon being omitted?

(8) All of the following waters, if they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section: (i) All waters located within 4000 feet of the high tide line or ordinary high water mark, or within the 100-year floodplain, whichever is greater, of a water identified in paragraphs (a)(1) through (5) of this section; and (2) wetlands that contribute a flow of water (either directly or through another water body) to a water identified in paragraphs (a)(1) through (5) of this section. ~~, where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.~~ The entire water is a water of the United States if a portion is located within 4000 feet of the high tide line or ordinary high water mark, or is within the 100-year floodplain, or if that water contributes a flow of water to a water identified in paragraphs (a)(1) through (5) of this section. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent

and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(1) through (8) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary or other jurisdictional waterbody, and that would not have the effect of draining a jurisdictional waterbody.

(B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county, or municipal road, and that are not a relocated tributary or excavated in a tributary.

Comment [DRC3]: Same comment as above on no "bootstrapping" under section (a)(7).

Comment [JAM4]: This language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lands fully constructed grassed waterways; and

(G) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.

(c) Definitions—In this section, the following definitions apply:

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes and the like. For purposes of determining adjacency, a ~~waterbody that includes~~ includes, and is considered a single waterbody with, all wetlands ~~within or~~that are bordering, contiguous to, or abutting that waterbody. ~~its ordinary high water mark is considered a single water~~. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. All waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water, are adjacent. ~~Waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.~~

(2) *Neighboring*. The term *neighboring* means:

~~(A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (a)(5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;~~

(B) all waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~1500~~300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~1500~~300 feet of the ordinary high water mark and within the 100 year floodplain;

Comment [DRC5]: This language would correct a problem presented by the comparable sentence found in the draft final rule submitted to OMB. The problem is that often it is impossible to identify an OHWM for a river, stream, lake, pond, or similar waterbody that has adjacent wetlands, any OHWM considered by the wetlands. The current wording would require the Corps or EPA to identify an OHWM where none can be found because of the adjacent wetland.

Comment [JAM6]: Including this language conflates geographic jurisdiction with activity-based exemptions. There is no scientific basis to support the notion that waters subject to specific activities are any more or less "adjacent" than other adjacent waters.

Comment [DRC7]: Per the Corps' prior comments, this language would capture all waterbodies that are separated vertically, which is inappropriate (e.g., wetlands and open waters on bluffs).

(C) all waters located within ~~1500~~100 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within ~~1500~~100 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located with 1500 feet of the high tide line.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* ~~each~~ mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a water excluded under paragraph (b) of this section, directly or through another water, to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Ditch*: The term ***ditch*** means a man-made channel whose physical characteristics are often straightened to efficiently convey water from a source to an outlet. Ditches are generally constructed for the purpose of drainage, irrigation, water supply, water management and/or distribution. A ditch may carry flows that are perennial, intermittent, or ephemeral.

(45) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(56) *Significant Nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, and biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to [waters performing similar functions to] function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (H) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the

Comment [JAM8]: This addition has been discussed previously and language provided previously. Many types of ditches are excluded and certain ditches are referred to in the definition of tributary; however, ditches are not defined. A common understanding is necessary for clarity.

Comment [JAM9]: This sentence, in particular, and in combination with the definition overall, does not work effectively for both paragraphs (a)(7) and (a)(8). Additionally, the sentence contains a partially incomplete thought. Waters are similarly situated when they function alike and are sufficiently close to *each other*? Downstream waters? Each other so it can be ascertained they are functioning as a single landscape unit? The bracketed language is offered to complete the thought.

This must be clarified and it may suggest clarification is necessary in (a)(7) to make it clear in what sense those waters are "similarly situated" – close to each other? Functioning as a landscape unit?

region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation ~~are~~ include, but are not limited to, the following:

Comment (JAM10): These changes were discussed and provided previously. Edits capture functions provided by Corps districts that are currently being used to demonstrate significant nexus in support of affirmative jurisdictional determinations.

(A) sediment and pollutant trapping, transformation, filtering, and transport;

(B) nutrient recycling, trapping, transformation, filtering, and transport;

~~(C) pollutant trapping, transformation, filtering, and transport;~~

(~~D~~C) retention and/or attenuation of flood waters;

(~~E~~D) runoff storage;

(~~F~~E) contribution of flow;

(~~G~~F) export, trapping, and transformation of organic matter, including food resources;

~~(H) export of food resources; or~~

(~~I~~G) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in, or dependent on, a water identified in paragraphs (a)(1) through (3) of this section;

(H) habitat supporting aquatic and wetland plant communities;

(I) groundwater discharge and recharge;

(J) carbon sequestration.

(67) *Ordinary High Water Mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of

soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(78) High Tide Line. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against an coast by strong winds such as those accompanying a hurricane or other intense storm.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECW-CO-R

24 April 2015

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief of Operations and Regulatory, U.S. Army Corps of Engineers (ATTN: Edward E. Belk)

SUBJECT: Technical Analysis of Draft Final Rule on Definition of "Waters of the United States"

1. References

a. Title 33 of the Code of Federal Regulations, Part 328, Definition of Waters of the United States (1986 Regulations).

b. 2003 Post-SWANCC Guidance (FR Vol. 68, No. 10, p. 1995) (Post-SWANCC Guidance).

c. 2008 Joint Agency Guidance, Clean Water Act Jurisdiction Following the U.S. Supreme Court Decisions in *Rapanos v. U.S. & Carabell v. U.S.* (*Rapanos* Guidance).

d. Draft Final Clean Water Rule: Definition of "Waters of the United States," submitted to the Office of Management and Budget for Interagency Review on 3 April 2015 (draft final rule)

2. This memorandum and its attachments provide a technical analysis of reference d. This technical analysis includes documentation of representative examples of aquatic resources over which the Corps has asserted Clean Water Act (CWA) jurisdiction in accordance with existing regulations and current guidance, but which would no longer be subject to CWA jurisdiction if the current draft of the final rule is in effect. CWA jurisdiction was appropriately asserted by the Corps over every aquatic resource described in these representative examples.

3. The examples included in Appendix A do not represent the only currently jurisdictional aquatic resources in the Nation over which CWA jurisdiction would be lost by adoption of the draft final rule in its present form; what is provided here is only a representative sample based on Approved Jurisdictional Determinations (AJDs) completed by Corps Districts and completed permit actions based on Preliminary Jurisdictional Determinations (PJDs), also completed by Corps Districts. It is important to note that the representative examples included in Appendix A as well as additional others used for discussion purposes were developed in a limited amount of time to facilitate discussion with the Environmental Protection Agency (EPA). It was unknown to the Corps until early February that Army and EPA were contemplating a "bright-line" cut off of CWA jurisdiction either 5,000 or 4,000 linear feet from the Ordinary High Water Mark (OHWM)/High Tide Line (HTL) and a robust interagency discussion of the potential effects of

the "bright-line" on currently jurisdictional water bodies has continued since that time. Throughout those discussions, the Corps has provided representative examples, including those in Appendix A, to factually illustrate its concern. To provide every example, both AJDs and issued permits with no JD or based on a PJD, where jurisdiction currently exists but would be extinguished if the draft final rule is adopted in its final form would take several months of multiple staff members working full time.

4. The examples were extracted from the Corps' existing database, ORM2, which is based entirely on what landowners request from the Corps. We have not undertaken any specific technical analysis of what aquatic resources may or may not be subject to CWA jurisdiction independent of requests for a jurisdictional determination or a permit decision. Therefore, the data discussed and conclusions reached in this memorandum are based on facts; that is, on actual AJDs and permit decisions, and not on assumptions about watershed areas that could contain jurisdictional waters.

5. Based solely on the data entered into ORM2 associated with AJDs, approximately 6.7% of all waters of the U.S. are wetlands that are adjacent to, but not directly abutting, relatively permanent waters/non-relatively permanent waters, and ~3.4% of all waters of the U.S. are wetlands adjacent to traditionally navigable waters, both directly abutting and non-abutting. The Corps' data demonstrate that 98% of the adjacent wetlands that require a significant nexus evaluation are jurisdictional waters under the CWA, *following the 2008 Rapanos Guidance*. Thus, approximately 10% of all waters over which the Corps has asserted CWA jurisdiction under its 1986 regulations and current guidance are non-abutting, adjacent wetlands. Under those 1986 regulations and current guidance, only wetlands can be determined to be jurisdictional because they are adjacent waters. Under the draft final rule, any type of aquatic resource (e.g., lake, pond, ephemeral wetland) can be determined to be jurisdictional because the aquatic resource is adjacent to a jurisdictional tributary.

6. Neither the *Rapanos* Guidance nor the form used to implement that guidance (which is used by the Corps to document AJDs) requires the Corps to indicate the distance that an adjacent wetland is located from the nearest jurisdictional tributary's OHWM or HTL when evaluating whether a significant nexus exists, and in making a jurisdictional determination concerning such waters. Rather, the Guidebook that accompanies the *Rapanos* Guidance indicates that consideration will be given to the distance between a *tributary* and traditionally navigable water (TNW) such that the effect of the tributary on the TNW is not speculative or insubstantial. The Guidebook further states that, "it is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW).

7. Thus, from the information collected and tracked within the USACE Regulatory Program database, it is not possible to estimate the specific percentage of the approximately 10% of adjacent water bodies that could be lost to CWA jurisdiction as a result of application of the 4,000 linear foot limitation if the draft final rule is finalized. A portion of the approximately 10% of all water bodies that are currently jurisdiction as adjacent, non-abutting wetlands fall outside of 4,000 linear feet of the OHWM/HTL. To verify the exact portion of the 10% of currently jurisdictional waters that would be lost to Federal jurisdiction as a result of adoption of

the draft final rule in its current form, the Corps would need to complete a robust analysis of its data that would yield statistically significant and reliable results. This is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS).

8. To remove from CWA jurisdiction what is potentially as much as 10% of the currently jurisdictional aquatic resources without the benefit of a detailed analysis, such as one that would be performed as part of an EIS, would present the potential for significant adverse effects on the natural and human environment. In its permit evaluations, the Corps is charged with keeping in perspective the functions and values of any given aquatic resource, recognizing that the functions and values of those resources rely heavily on their geographic location in relation to (as well as their hydrologic connection to) other waters, and to balance the need for the proposed use with the need for conservation of the resource. Nowhere in this process is it considered that important aquatic resources that are traditionally and legitimately part of the tributary system to navigable waters, contributing water to traditionally navigable waters of the U.S., are not within the jurisdiction of the CWA.

9. Additionally, by excluding as much as 10% of currently jurisdictional waters from CWA jurisdiction, the draft final rule is crafted in a manner that will be challenging for the regulated public to understand and for the Corps to implement. These implementation challenges are outlined in Appendix B to this memorandum.

10. I have read the legal analysis of the draft final rule prepared by the Office of the Chief Counsel and I agree with the conclusions of that document. Based on the evidence of the loss of CWA jurisdiction over currently jurisdictional aquatic resources as illustrated by the representative examples provided in Appendix A, and significant implementation concerns summarized in Appendix B, I recommend the following essential revisions to the draft final rule:

a. Allow case-specific significant nexus determinations for hydrologically isolated water bodies such as prairie potholes, vernal pools, Carolina and Delmarva bays, Texas coastal prairie wetlands, and pocosins, including determinations of whether such water bodies are "similarly situated". In other words, eliminate section (a)(7) and include those water body categories within section (a)(8).

b. Include within section (a)(8) (as waters regarding which a case-specific significant nexus evaluation can be completed to determine CWA jurisdiction) two additional criteria: i.e., waters located within the 100-year floodplain (regardless of distance) and those water bodies that contribute a flow of water to an (a)(1)-(a)(5) water.

c. Reduce the linear foot distance in the definition of neighboring under parts (B) and (C) from 1,500 feet to 300 feet.

d. Make additional edits to the draft final rule to enhance clarity and simplicity as indicated in the attached revised draft final rule previously submitted to EPA staff for their consideration.

MEMORANDUM FOR DCG-CEO
SUBJECT: Technical Analysis of Draft Final Rule on Definition of WOUS

11. If the changes recommended above are not adopted, then the draft final rule cannot be promulgated as a final rule without an EIS to evaluate the potential significant adverse effects on the natural and human environment that the final rule as currently written may cause.

12. The point of contact for this memorandum is Ms. Jennifer Moyer at 202-761-4598.

Jennifer A. Moyer

JENNIFER A. MOYER
Chief, Regulatory Program

cc: Revised Draft Final Rule

PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 continues to read as follows:

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections (a), (b) and (c) to read as follows:

328.3 Definitions

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters ~~which~~ that are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each paragraph (A) through (E)

of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. ~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

If waters identified in this paragraph are also adjacent waters under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets located in the upper Mid-west.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are pocosin depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

Comment [DRC1]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that water body with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPDE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPDE watershed, merely because similar waterbodies happen to fit on one side or the other of a line that demarcates adjacency.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

Comment [DBCZ]: Previous language: "found in southeastern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southeastern Oregon being omitted?

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All of the following waters, if they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section: (i) All waters located within 4000 feet of the high tide line or ordinary high water mark, or within the 100-year floodplain, whichever is greater, of a water identified in paragraphs (a)(1) through (5) of this section; and (2) waters that contribute a flow of water (either directly or through another water body) to a water identified in paragraphs (a)(1) through (5) of this section, ~~where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (5) of this section.~~ The entire water is a water of the United States if a portion is located within 4000 feet of the high tide line or ordinary high water mark, or is within the 100-year floodplain, or if that water contributes a flow of water to a water identified in paragraphs (a)(1) through (5) of this section. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent

and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

Comment [DRC3]: Same comment as above on no "bootstrapping" under section (a)(7).

~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even when they otherwise meet the terms of paragraphs (a)(1) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary or other jurisdictional waterbody, and that would not have the effect of draining a jurisdictional waterbody.

Comment [JAM4]: This language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

(B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county, or municipal road, and that are not a relocated tributary or excavated in a tributary.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.

(c) Definitions—In this section, the following definitions apply:

(1) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes and the like. For purposes of determining adjacency, a waterbody ~~that includes~~ includes, and is considered a single waterbody with, all wetlands ~~within or~~that are bordering, contiguous to, or abutting that waterbody, ~~its ordinary high water mark is considered a single water~~. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. All waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous or neighboring such water, are adjacent. ~~Waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.~~

(2) *Neighboring.* The term *neighboring* means:

~~(A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;~~

(B) all waters located within the 100 year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~1500~~300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~1500~~300 feet of the ordinary high water mark and within the 100 year floodplain;

Comment [DRC5]: This language would correct a problem presented by the comparable language found in the draft final rule submitted to OMB. The problem is that often it is impossible to identify an OHWM for a river, stream, lake, pond, or similar waterbody that has adjacent wetlands; any OHWM that is required by the wetlands. The current wording would require the Corps or EPA to identify an OHWM where none can be found because of the adjacent wetland.

Comment [JAM6]: Including this language conflates geographic jurisdiction with activity-based exemptions. There is no scientific basis to support the notion that waters subject to specific activities are any more or less "adjacent" than other adjacent waters.

Comment [DRC7]: Per the Corps' prior comments, the language would capture all waterbodies that are separated vertically, which is inappropriate (e.g., wetlands and open water on bluffs)

(C) all waters located within ~~1500~~300 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within ~~1500~~300 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located with 1500 feet of the high tide line.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* ~~each~~ mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a water excluded under paragraph (b) of this section, directly or through another water, to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Ditch*: The term *ditch* means a man-made channel whose physical characteristics are often straightened to efficiently convey water from a source to an outlet. Ditches are generally constructed for the purpose of drainage, irrigation, water supply, water management and/or distribution. A ditch may carry flows that are perennial, intermittent, or ephemeral.

Comment [JAM8]: This addition has been discussed previously and language provided previously. Many types of ditches are excluded and certain ditches are referred to in the definition of tributary; however, ditches are not defined. A common understanding is necessary for clarity.

(45) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(5b) *Significant Nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, and biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are *similarly* situated when they function alike and are sufficiently close to [waters performing similar functions] to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (H) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the

Comment [JAM9]: This sentence, in particular, and in combination with the definition overall, does not work effectively for both paragraphs (a)(7) and (a)(8). Additionally, the sentence contains a partially incomplete thought. Waters are similarly situated when they function alike and are sufficiently close to each other? Downstream waters? Each other so it can be ascertained they are functioning as a single landscape unit? The bracketed language is offered to complete the thought.

This must be clarified and it may suggest clarification is necessary in (a)(7) to make it clear in what sense those waters are "similarly situated" – close to each other? Functioning as a landscape unit?

region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation ~~are~~ include, but are not limited to, the following:

Comment [JAM10]: These changes were discussed and provided previously. Edits capture functions provided by Corps districts that are currently being used to demonstrate significant nexus in support of affirmative jurisdictional determinations.

(A) sediment and pollutant trapping, transformation, filtering, and transport;

(B) nutrient recycling, trapping, transformation, filtering, and transport;

~~(C) pollutant trapping, transformation, filtering, and transport;~~

(BC) retention and/or attenuation of flood waters;

(CD) runoff storage;

(DE) contribution of flow;

(EF) export, trapping, and transformation of organic matter, including food resources;

~~(H) export of food resources;~~

(FG) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in, or dependent on, a water identified in paragraphs (a)(1) through (3) of this section;

(H) habitat supporting aquatic and wetland plant communities;

(I) groundwater discharge and recharge;

(J) carbon sequestration.

(67) *Ordinary High Water Mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of

soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(78) *High Tide Line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

APPENDIX A

Representative Examples

EXAMPLE #1 ★

100 year floodplain example

Adjacent Wetlands to Ohio River, Indiana

37.868332°N, -87.633698°W

See map entitled, "Adjacent Wetlands to Ohio River, Indiana."

Wetlands currently jurisdictional as adjacent to the Ohio River, a TNW.

Subject wetland is approximately 3 acres in size.

Note that there are other wetlands present beyond the subject wetland. In addition there are other wetlands present that do not appear on the NWI map layer; this often occurs with Cypress sloughs such as the subject wetlands.

Multiple GP authorizations were provided for these activities in these wetlands (LRL-2011-696).

These wetlands are currently 10,000' from the Ohio River OHWM. They drain to the Ohio River as can be seen in the aerial map; they do not drain to the ditch observed in the northern portion of the map. They are also beyond 4,000' from the ditch.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of the Ohio River.

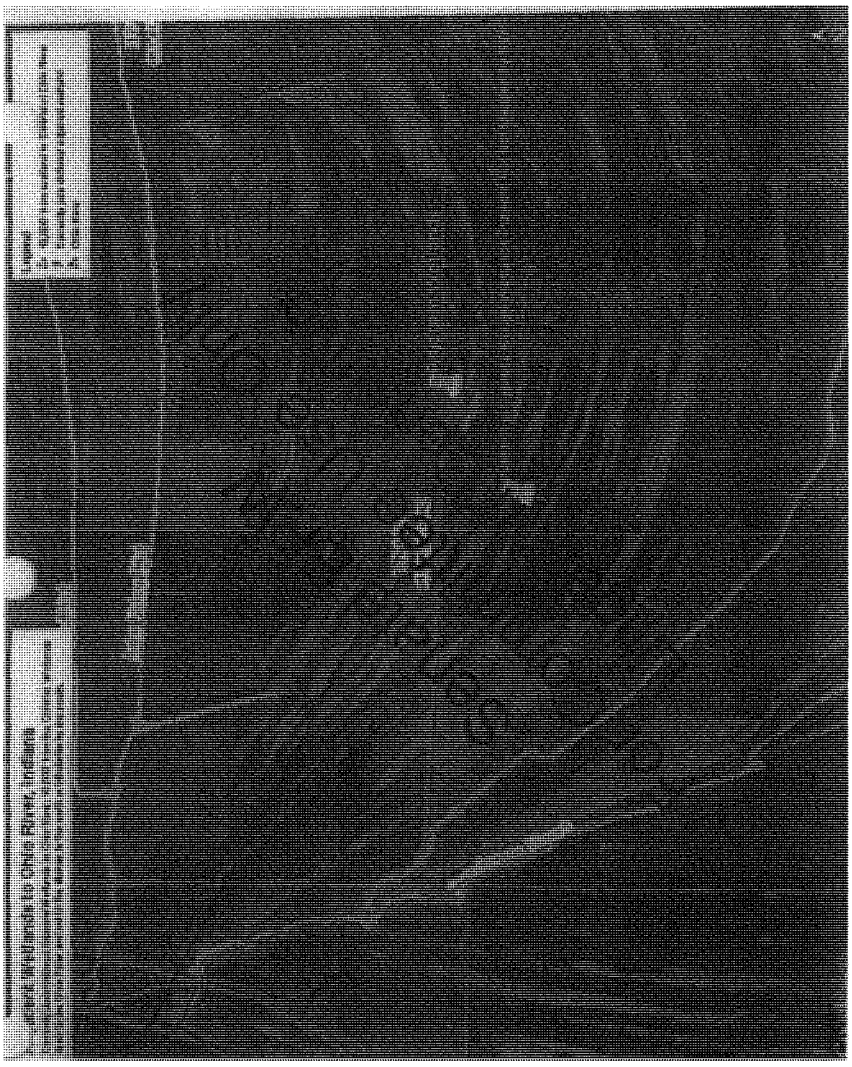
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the Ohio River.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

This scenario often occurs in the floodplains of major river systems, such as the Ohio River, Mississippi River, Missouri River, etc. Such large river systems have very wide floodplains, and the adjacent wetlands are often located behind natural levees that form in the floodplain which can be far beyond 4,000' from the OHWM of the major river to which the wetlands are adjacent.

Overall, ~3.4% of waters are wetlands adjacent to TNWs (based on ORM data), both abutting and non-abutting. Such adjacent wetlands currently jurisdictional are at risk of being non-jurisdictional under the draft final rule. ★

This JD example was not coordinated with EPA.



Floodplain example

EXAMPLE #2

Adjacent Wetlands to Similk Bay, WA

48.417797°N, -122.530224°W

See map entitled, "Adjacent Wetlands to Similk Bay, WA."

Wetlands currently jurisdictional as adjacent to the Similk Bay, a TNW.

Subject wetlands are approximately 4 acres in size.

GP authorization was provided for activities in these wetlands (NWS-2007-116).

These wetlands are approximately 5,000' from the HTL of Similk Bay.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the HTL of the Similk Bay.

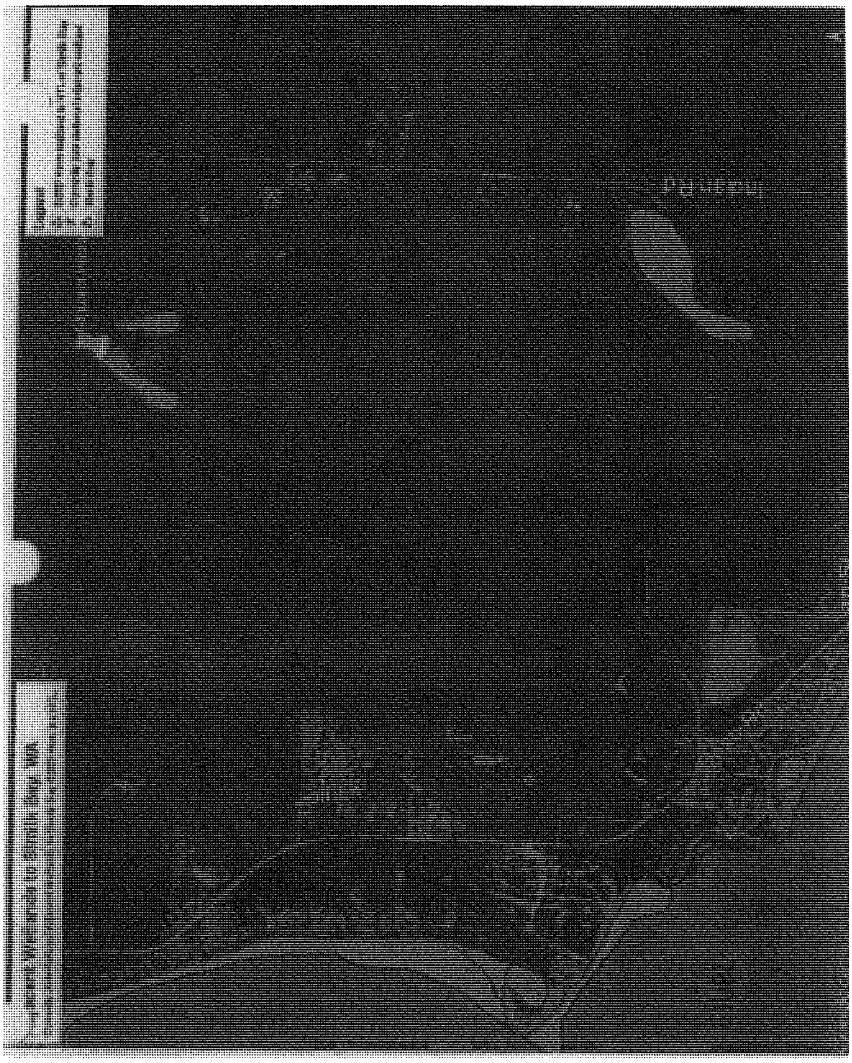
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the HTL of the Similk Bay.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

This scenario often occurs in the coastal floodplains. The coastal waters have very wide floodplains, and the adjacent wetlands are often located in the floodplain far beyond 1,500' from the HTL of the coastal waters to which the wetlands are adjacent.

Overall, ~3.4% of waters of the wetlands adjacent to TNWs (based on ORM data), both abutting and non-abutting. Such adjacent wetlands currently jurisdictional are at risk of being non-jurisdictional under the draft final rule.

This JD example was not coordinated with EPA.



Strong adjacency case – no drain

EXAMPLE #3

Adjacent Wetlands to Hickory Creek, TN

35.549058°N, -85.875673°W

See map entitled, "Adjacent Wetlands to Hickory Creek, TN."

Wetlands currently jurisdictional as adjacent to Hickory Creek, a perennial relatively permanent water, with the characteristics to meet the definition of tributary under the draft final rule; it is a TNW downstream.

Subject wetland is approximately 34 acres in size.

JD action only; currently in pre-application stage (LRN-2013-504).

These wetlands are approximately 5,700′ from the OHWM of Hickory Creek.

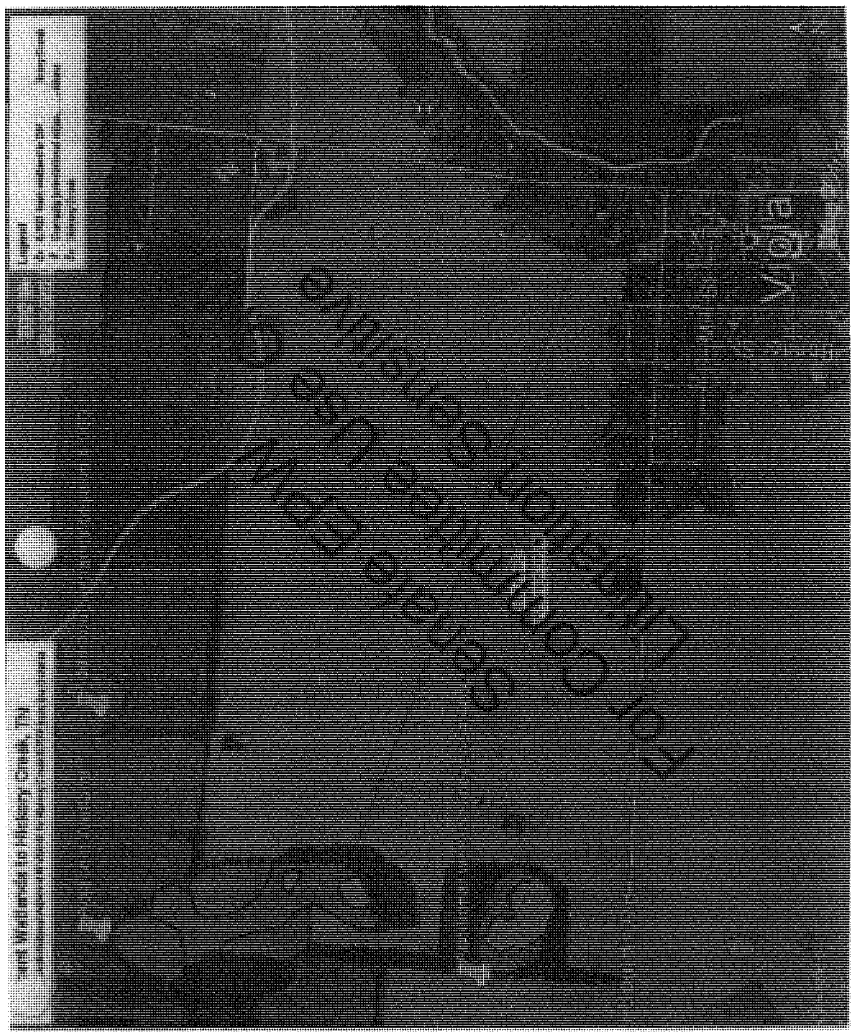
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500′ from the OHWM of Hickory Creek.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000′ from the OHWM of Hickory Creek.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

These adjacent wetlands are common throughout. We note there are several other wetlands beyond 4,000′ depicted on the map near the wetlands for which the JD action was completed.

This JD example was not coordinated with EPA.


Senate EPW
For Committee Use
Litigation Sensitive

EXAMPLE #4

Wetlands Associated with Sinkholes in Clarksville, TN

36.574052°N, -87.246477°W

See map entitled, "Clarksville, TN."

Wetlands currently jurisdictional as adjacent to the Red River, a TNW. In addition, the open water pond is a tributary to the Red River.

Subject wetlands are approximately 300 acres in size. Open water pond is approximately 100 acres in size.

Wetlands and open water ponds drain into sinkholes which carry the flow of water underground directly to the Red River; flow is documented.

SP authorization was provided for activities in these wetlands (LRN-2013-1047).

These wetlands are approximately 10,000-15,000' from the OHWM of the Red River.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of the Red River.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the Red River.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

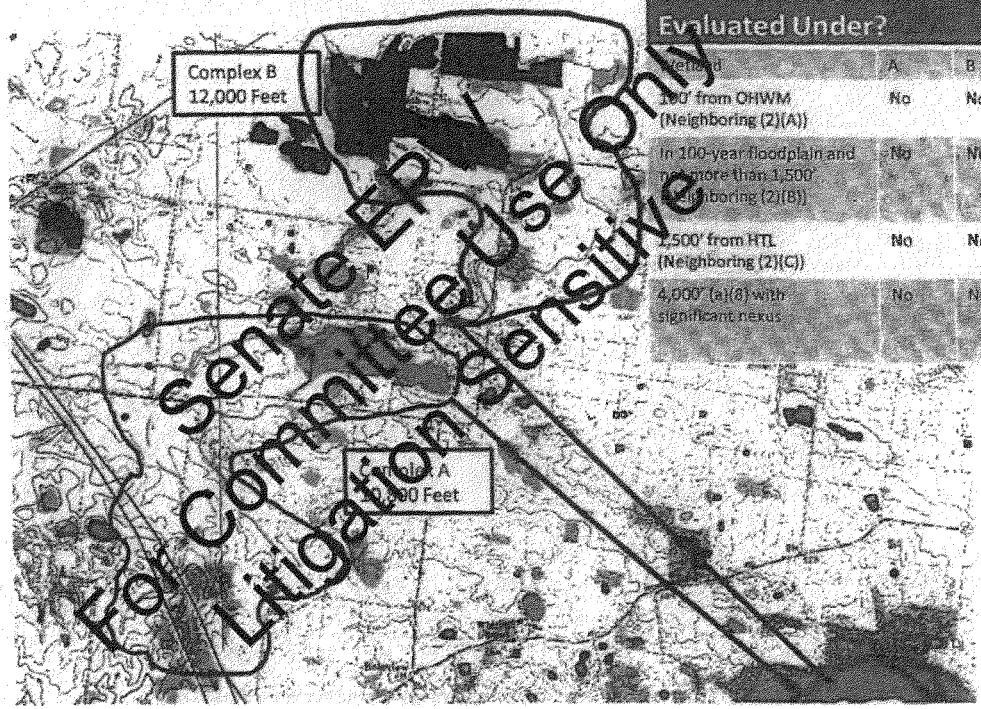
Currently the open water pond is considered a tributary to the Red River; the open water pond would not be considered a tributary under the draft final rule as ponds cannot be tributaries since it wouldn't have both bed/bank and OHWM. The open water pond would also not be considered adjacent due to the distance limitations discussed above. Therefore, the open water pond would be non-jurisdictional under the draft final rule.

These sinkhole systems are present throughout TN and generally have associated wetlands and ponds that are currently jurisdictional and have been found to have a significant nexus but would be non-jurisdictional under the draft final rule due to distance limitations and lack of the option to use shallow subsurface flow connections for case-specific significant nexus determinations.

This JD example was not coordinated with EPA.

Clarksville, TN

2 wetland and stream complexes which drain into sinkholes which are more than 4,000 feet away from the OWHM of an (a)(1)-(a)(5) water



Can Jurisdiction Be Evaluated Under?		
Wetland	A	B
100' from OHWM (Neighboring (2)(A))	No	No
In 100-year floodplain and not more than 1,500' (Neighboring (2)(B))	No	No
1,500' from HTL (Neighboring (2)(C))	No	No
4,000' (a)(8) with significant nexus	No	No

Grit here subsurface connect

EXAMPLE #5

Adjacent Wetlands in Grassy Cove, TN

35.831103°N, -84.916600°W

See map entitled, "Grassy Cove, TN."

All wetlands in the watershed are currently jurisdictional as adjacent to the Sequatchie River, a perennial relatively permanent water which meets the characteristics of a tributary under the draft final rule; it is a TNW downstream.

Subject wetlands are approximately 45 acres in size.

Wetlands, an open water pond, and a creek (Grassy Cove Creek) within Grassy Cove watershed drain into a sinkhole (Mill Cave) which carries the flow of water underground directly to the Sequatchie River; flow is documented.

JD action only; currently in pre-application stage for [illegible]oration activities under LRN-2017-649.

These wetlands are approximately 36,000' from the OHWM of the Sequatchie River.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of the Sequatchie River.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the Sequatchie River.

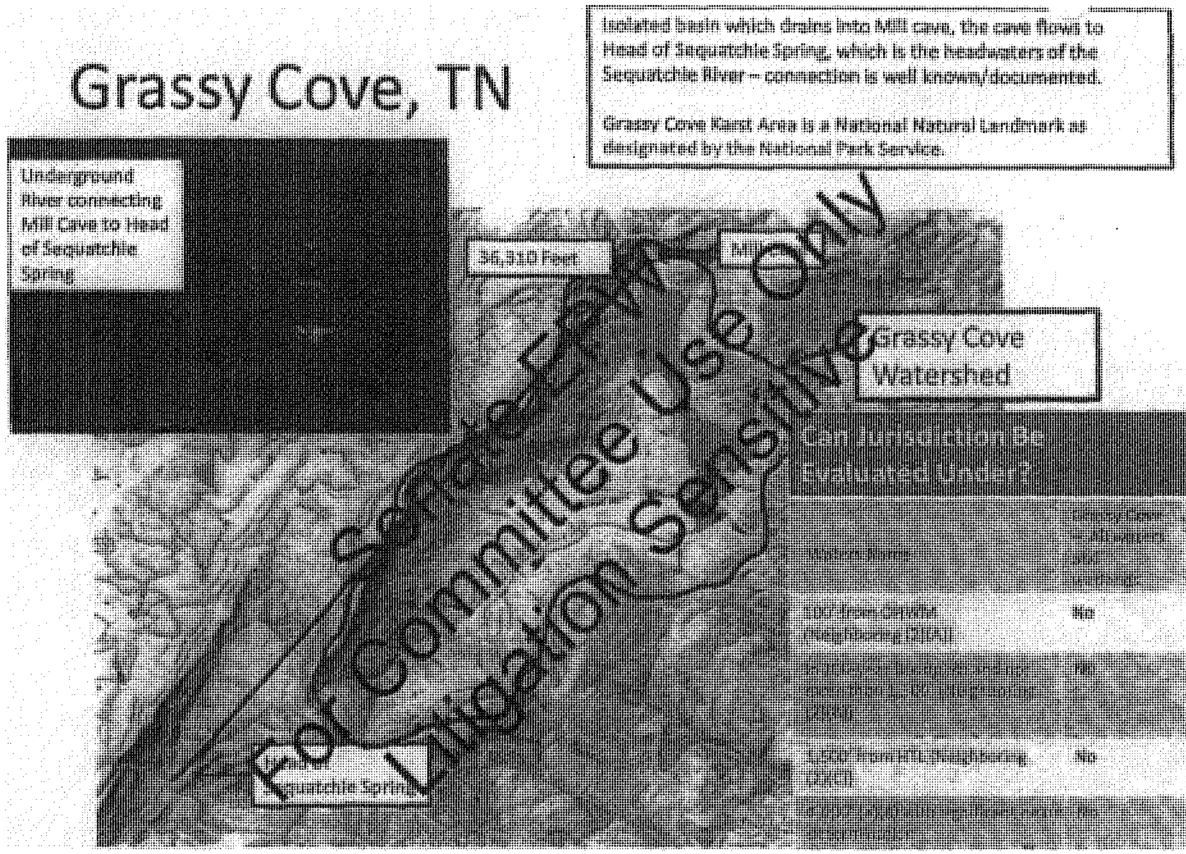
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

Currently the open water pond is considered a tributary to the Sequatchie River; the open water pond would not be considered a tributary under the draft final rule, as ponds cannot be tributaries since it wouldn't have both bed/bank and OHWM. The open water pond would also not be considered adjacent due to the distance limitations discussed above. Therefore, the open water pond would be non-jurisdictional under the draft final rule.

Currently the Grassy Cove Creek is considered a tributary to the Sequatchie River; however, the creek would not be considered a tributary under the draft final rule because it does not contribute flow directly or indirectly to the downstream tributary system. The Grassy Cove Creek flows north and does not have a "break" in the stream but rather ends at Mill Cave which transports the water via subsurface flow to south to the Sequatchie River. Therefore, the Creek would not be considered a tributary under the draft final rule and would be non-jurisdictional.

These sinkhole systems are present throughout TN and generally have associated wetlands and ponds that are currently jurisdictional and have been found to have a significant nexus but would be non-jurisdictional under the draft final rule due to distance limitations and lack of the option to use shallow subsurface flow connections for case-specific significant nexus determinations.

This JD example was not coordinated with EPA.


Grassy Cove, TN
Isolated basin which drains into Mill cave, the cave flows to Head of Sequatchie Spring, which is the headwaters of the Sequatchie River – connection is well known/documented.
Grassy Cove Karst Area is a National Natural Landmark as designated by the National Park Service.
Underground River connecting Mill Cave to Head of Sequatchie Spring
36,310 Feet
Grassy Cove Watershed
Can Jurisdiction Be Evaluated Under?
Waters Name
No
No
No
No
Senate EPW
For Committee Use Only
Litigation Sensitive

Shallow subsurface connections in Alaska

EXAMPLE #6

POA JD Appeals

64.767167°N, -147.362109°W

See map entitled, "Recent JD Appeals Vicinity Map."

Wetlands currently jurisdictional as adjacent to Channels B (Tin Cup and Gower) and C (HC Contractors and Universal Welding); perennial relatively permanent waters (ditches that are considered a tributary under current guidance and would also not be excluded under the draft final rule), with the characteristics to meet the definition of tributary under the draft final rule.

Subject wetlands total over 500 acres in size.

Associated with SP actions for the projects (e.g., POA-2010-1905; multiple JD appeal actions.

These wetlands are approximately 7,000'-12,000' from the OHWM of Channels B and C.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of Channels B and C.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Channels B and C.

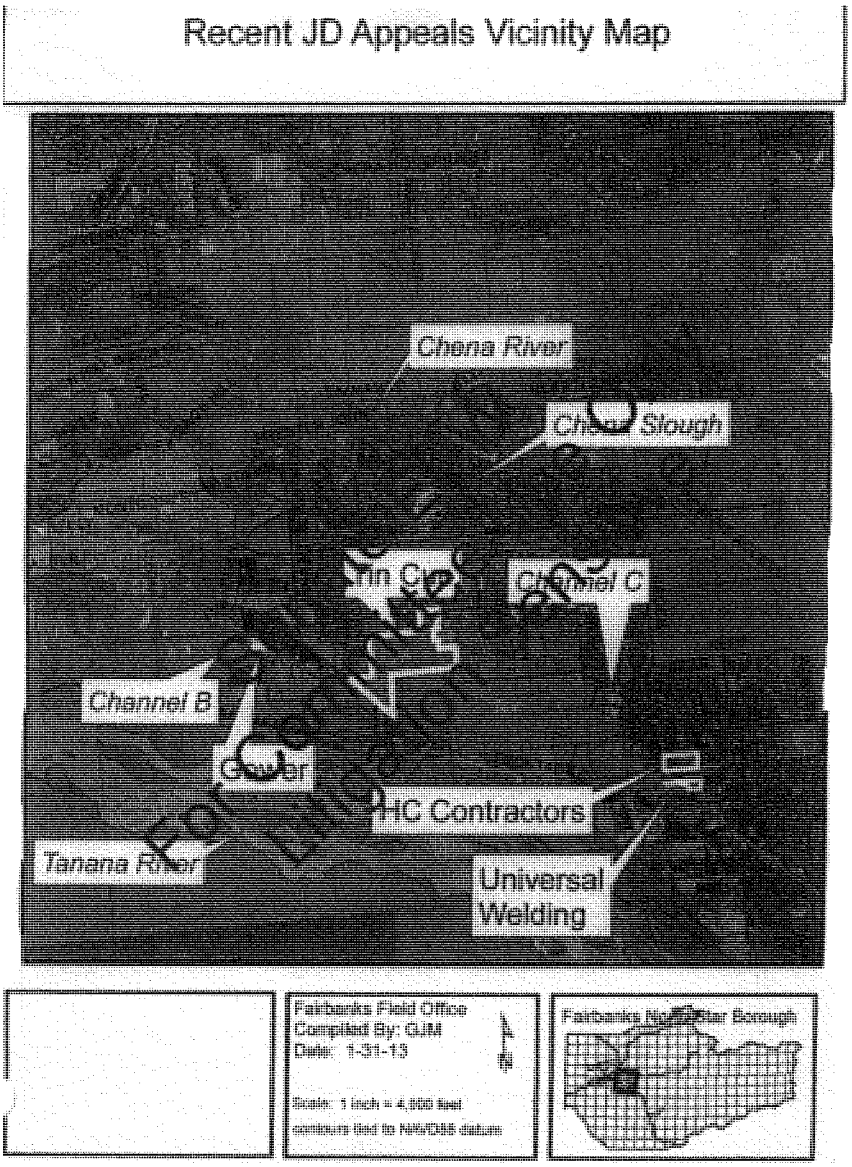
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

These wetlands were part of three separate JD requests and associated permit actions; all three JDs were appealed and related to a lawsuit (Great Northwest). According to the court decision the Corps was not successful in demonstrating that the wetlands were part of the same wetland complex and adjacent to a tributary; we instead had to demonstrate that the wetlands were jurisdictional via shallow subsurface flow connections to Channels B and C and were independently adjacent to the Channels despite wetlands and roads being present between the subject wetlands and the Channels.

If the draft final rule provided for the use of shallow subsurface flow connections to be used in a case-specific significant nexus determination, these wetlands would be found jurisdictional as they have been determined to have a significant nexus under current guidance.

We have many other examples to provide in Alaska demonstrating that the 4,000' distance would result in the loss of currently jurisdictional wetlands connected via shallow subsurface flow, as well as wetlands connected via confined surface flow. With Alaska alone having more wetlands than the entire contiguous lower 48 states, this could result in a significant loss of jurisdictional wetlands.

This JD example was not coordinated with EPA.


Recent JD Appeals Vicinity Map
Chena River
Chena Slough
Channel C
Channel B
Sewer
HC Contractors
Tanana River
Universal Welding
Fairbanks Field Office
Compiled By: GJM
Date: 1-31-13
Scale: 1 inch = 4,000 feet
contours tied to NAVD88 datum
Fairbanks North Star Borough

Woodcock ditches - confined surface connect.

EXAMPLE #7

Adjacent Wetlands Compensatory Mitigation Bank Near Klondike Cemetery, Strathcona, MN

48.588557°N, -96.068048°W

See maps entitled, "Klondike Cemetery, MN HUC 12 v1," "Klondike Cemetery, MN HUC 12 v2," and related maps entitled, "MN Adjacent Wetlands" and "Adjacent Wetlands to South Branch of Two Rivers."

Wetlands currently jurisdictional as adjacent to intermittent relatively permanent roadside ditches which contribute flow to the South Branch of Two Rivers, a perennial relatively permanent water, with the characteristics to meet the definition of tributary under the draft final rule.

Subject wetlands are approximately 500 acres in size.

These adjacent wetlands are part of an approved wetland compensatory mitigation bank (MVP-2008-1048).

These wetlands are directly abutting intermittent roadside ditches and are approximately 5,700' from the OHWM of the South Branch of Two Rivers.

Under the draft final rule, the intermittent roadside ditches would be excluded under (*b*)(3)(B) as they drain a municipal road and they are not dedicated tributaries or excavated in a tributary.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of the South Branch of Two Rivers.

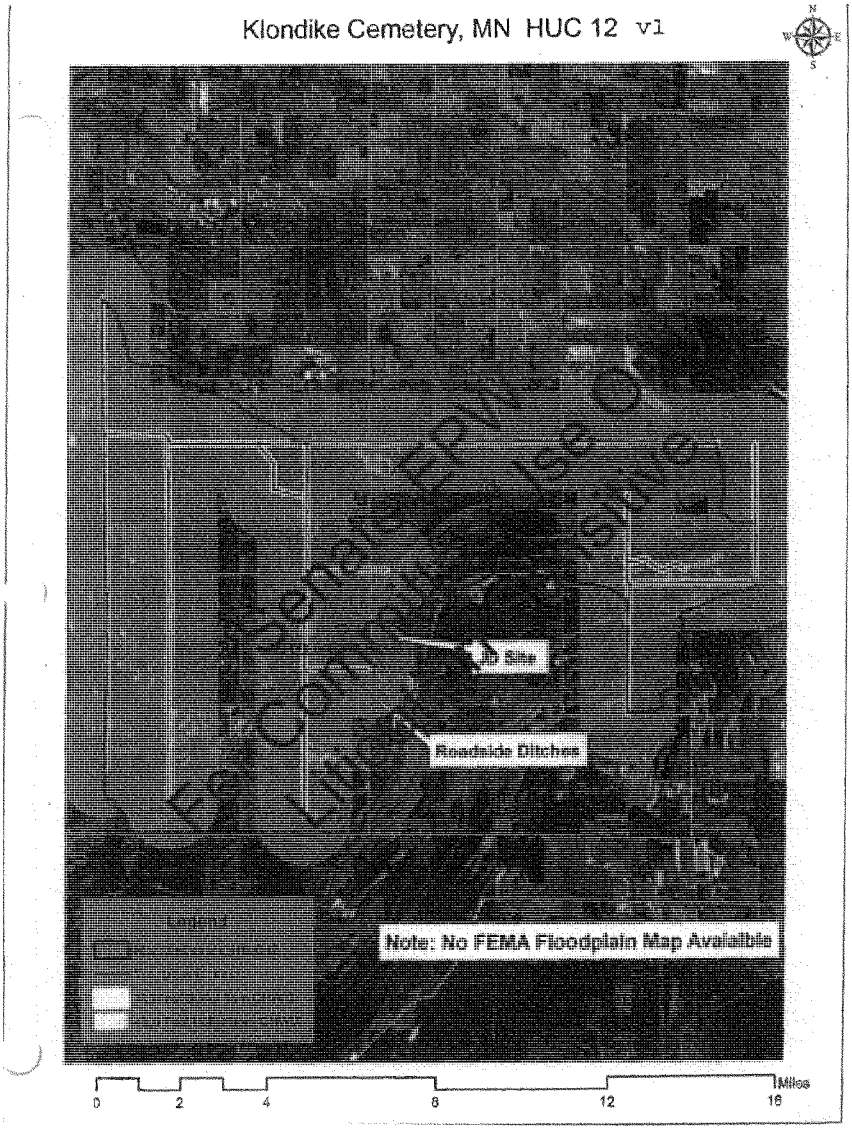
Under the draft final rule, these wetlands would *not* be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the South Branch of Two Rivers.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

If the draft final rule provided for the use of confined surface flow connections then a case-specific significant nexus determination could be applied to determine jurisdiction.

This may have serious implications for the efficacy and validity of the existing compensatory mitigation bank. It is unclear what the loss of jurisdiction over these compensatory mitigation bank wetlands means for existing authorized credits used to offset permanent impact losses to wetlands for authorized projects. It is also unclear what the loss of jurisdiction over these compensatory mitigation bank wetlands means for future credit sales at the bank. This would require a reconsideration and potential modification of the compensatory mitigation banking instrument.

In reviewing the initial map provided by EPA it was clear that they had not removed the 4,000' buffer around the excluded ditches under the draft final rule. Once that was communicated to EPA they corrected the map, which shows that the entire HUC 12 does not include any jurisdictional waters or 4,000' buffers. Another issue that was pointed out to EPA, but which was not addressed, was that the


Klondike Cemetery, MN HUC 12 v1
N
W
E
S
Site
Roadside Ditches
Note: No FEMA Floodplain Map Availalbie
0
2
4
8
12
16
Miles

From:	Jensen, Stacey M HQ02
To:	"Stokely, Peter"; Kaiser, Russell
Cc:	Moyer, Jennifer A HQ02
Subject:	RE: Klondike Cemetery HUC 12 (UNCLASSIFIED)
Date:	Wednesday, April 15, 2015 2:16:00 PM
Attachments:	Klondike Cemetery, MN HUC 12.jpg MN; 48.5888557, -96.068048 HUC 8.jpg MN; 48.5888557, -96.068048 HUC 12.jpg

Classification: UNCLASSIFIED
Caveats: NONE

Pete,

The ditches are intermittent roadside ditches maintained by the municipalities, and as such they should not be included in the mapping of the 4,000' buffer for (a)(8) waters since they would be excluded under the draft final rule language as they would not be considered tributaries. The nearest tributary to which this wetland drains is the South Branch of Two Rivers, which is approximately 9 miles away from the wetland via intermittent roadside ditches. I also want to note that this scenario is common throughout MN where there are many roadside ditch networks.

Another question I had about this one, and all of your other maps, is about the HUC boundary. I am assuming by drawing that boundary you are equating the HUC-12 to the SPOE boundary? This MN example in particular illustrates why that is not always possible, especially in the flat topography areas, like MN, and in the Arid West. To where is the HUC-12 draining? The SPOE must drain to the nearest (a)(1)-(a)(3) water, which is not present in the map. In fact, the nearest (a)(1)-(a)(3) water to which the wetlands on the map drain appears to be Lake Bronson according to the NHD flow lines, which is 25 miles to the west from the site, making the SPOE much larger than what was included in the HUC-12. I've attached some maps depicting the HUC and the flow path to the (a)(1) water. Let me know if you want to discuss. Thank you!

Best wishes,
Stacey

HQUSACE Regulatory Program Manager
441 G Street NW
Washington, DC 20314-1000
Phone (202) 761-5856

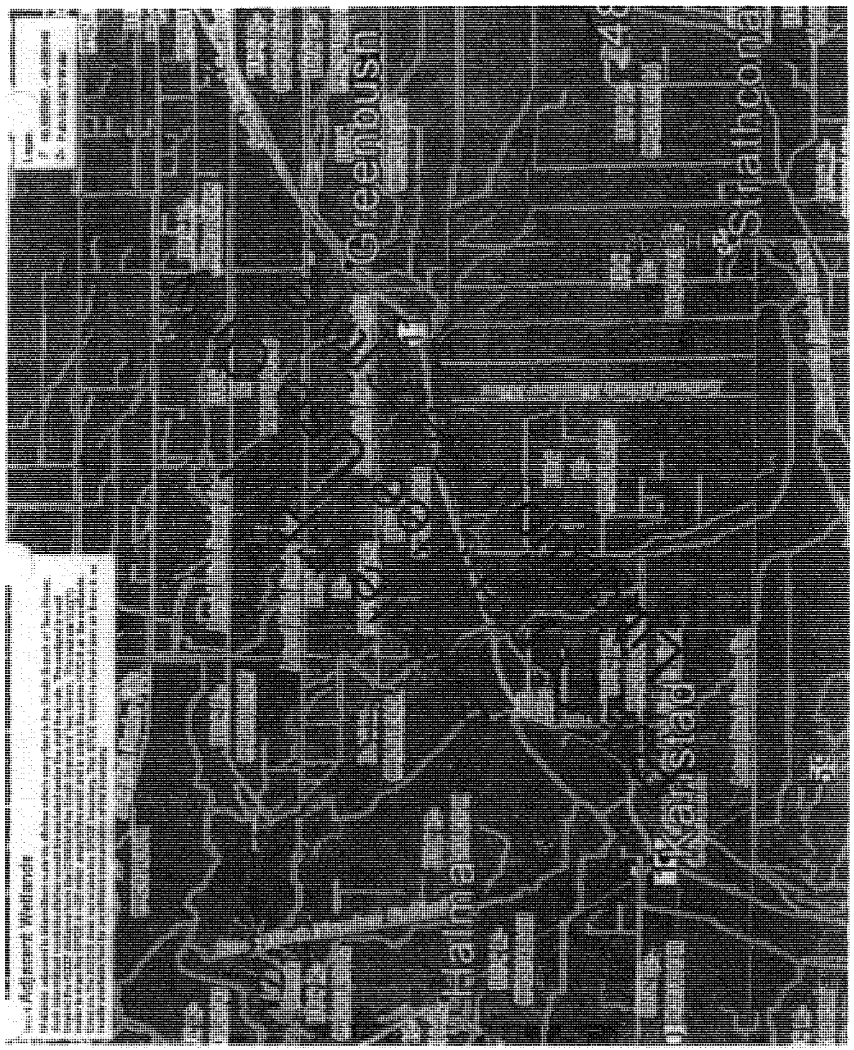
-----Original Message-----
From: Stokely, Peter [mailto:Stokely.Peter@epa.gov]
Sent: Wednesday, April 15, 2015 12:16 PM
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Klondike Cemetery HUC 12

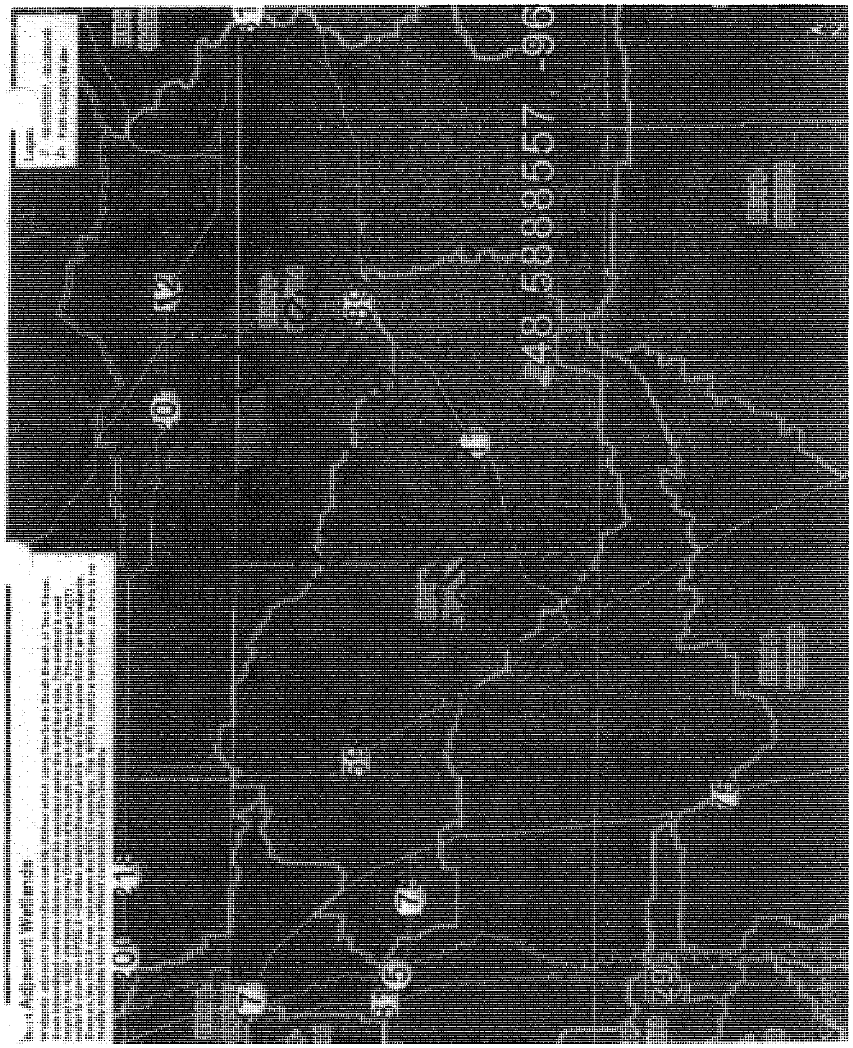
Attached is another map, this one is a ditched area in MN with relatively spare NHD mapped drainage, most of the mapped drainage appear to be roadside ditches (did not try to figure out their flow or whether they may have bee tribs), also there may be additional unmapped ditches near the site.

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW


Greenbush
Strathcona
Karlstad
Halma


48.5888557,-96

From: Stokely, Peter
To: Jensen, Stacey M HQ02
Cc: Kaiser, Russell
Subject: [EXTERNAL] RE: Last One (UNCLASSIFIED)
Date: Thursday, April 16, 2015 9:55:55 AM

Stacey, for the purposes of this exercise I selected HUC 12's because they are manageable data sets and illustrate the concepts of adjacency that would apply to the site whether I used HUC 12 or SPOE's. I did not look for SPOE's to TNW (I wouldn't know what is the TNW is many cases anyway) because that concept is for a SN analysis and the data sets would have been too big and there would have been too much editing to do. And as I said the smaller HUC 12 illustrate the adjacency concepts.

I noticed that the HUC 12 for the MN site (Klondike Cemetery) was odd, in some cases the ditch and the HUC boundary paralleled, so I agree in some areas of the country the SPOE will be difficult to delineate accurately. As for the roadside ditches at Klondike Cemetery, I labeled them, so EPA and Corps staff can tell folks that the buffer doesn't apply, I guess I didn't know which way the ditch was on that one anyway, but I will resend with the buffers removed.

Give the time constraints, I had to turn these around very quickly and given that and the data limitations we have discussed, the maps should be presented with caveats.

Peter Stokely
EPA Office of Civil Enforcement
1200 Pennsylvania Ave, NW
Washington, DC 20460
Room 4110
William Jefferson Clinton Federal Building South (WJC South)
Mail Code 2243A
202-564-1841

-----Original Message-----
From: Jensen, Stacey M HQ02 [mailto:Stacey.M.Jensen@usace.army.mil]
Sent: Thursday, April 16, 2015 7:59 AM
To: Stokely, Peter; Kaiser, Russell
Subject: RE: Last One (UNCLASSIFIED)

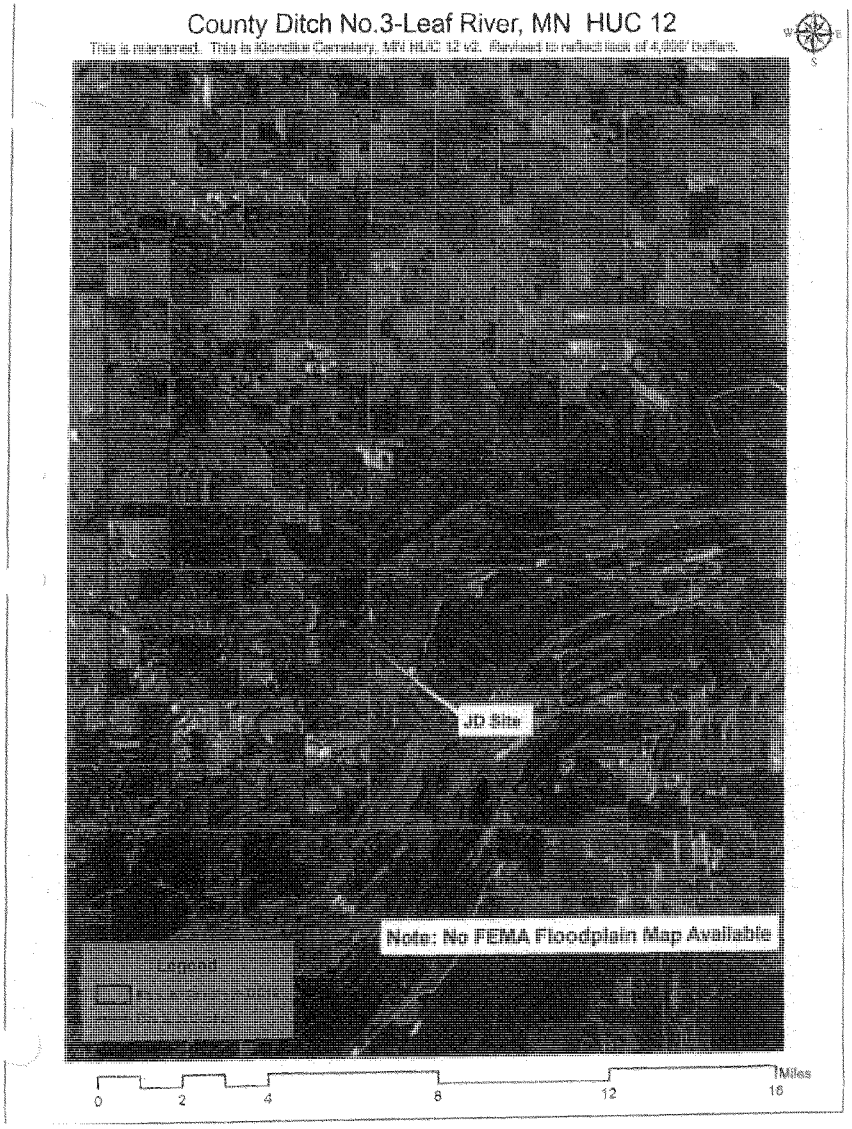
Classification: UNCLASSIFIED
Caveats: NONE

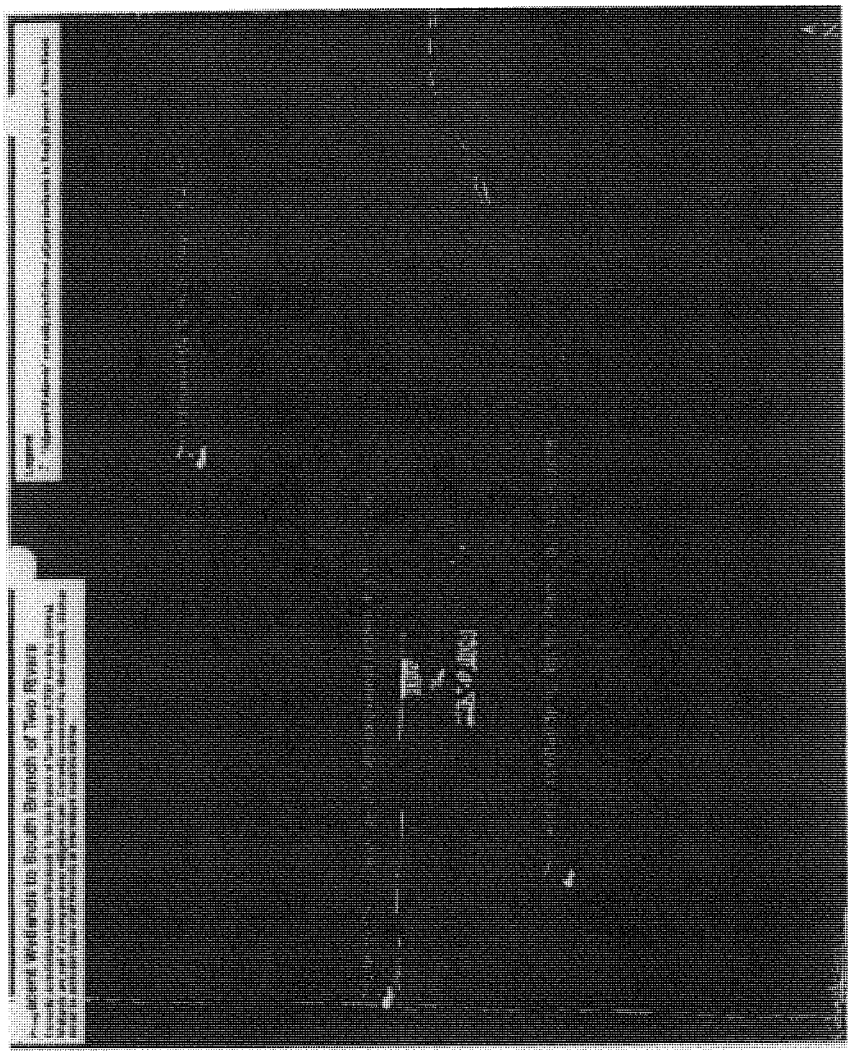
Pete,

Did you get my reply email yesterday regarding the MN Klondike site? I got a bounce back email so I'm checking to make sure. It is attached here again via PDF. Thanks!

Best wishes,
Stacey

HQUSACE Regulatory Program Manager
441 G Street NW
Washington, DC 20314-1000
Phone (202) 761-5856


County Ditch No.3-Leaf River, MN HUC 12
JD Site
Note: No FEMA Floodplain Map Available
Legend
0
2
4
8
12
16
Miles



EXAMPLE #8

Adjacent Wetlands Compensatory Mitigation Bank in Lower Tarmac, MN

48.243669°N, -94.52144°W

See map entitled, "Lower Tarmac, MN HUC 12" and "Lower Tarmac, MN HUC 12 NWI Map."

Wetlands currently jurisdictional as adjacent to ephemeral non-relatively permanent roadside ditches which contribute flow to the Upper Red Lake, a TNW.

Subject wetlands are approximately 150 acres in size.

These adjacent wetlands are part of an approved wetland compensatory mitigation bank.

These wetlands are directly abutting ephemeral roadside ditches and are approximately 15,000' from the OHWM of the Upper Red Lake.

Under the draft final rule, the ephemeral roadside ditches would be excluded under (b)(3)(B) as they drain a municipal road and they are not relocated tributaries or excavated in a tributary.

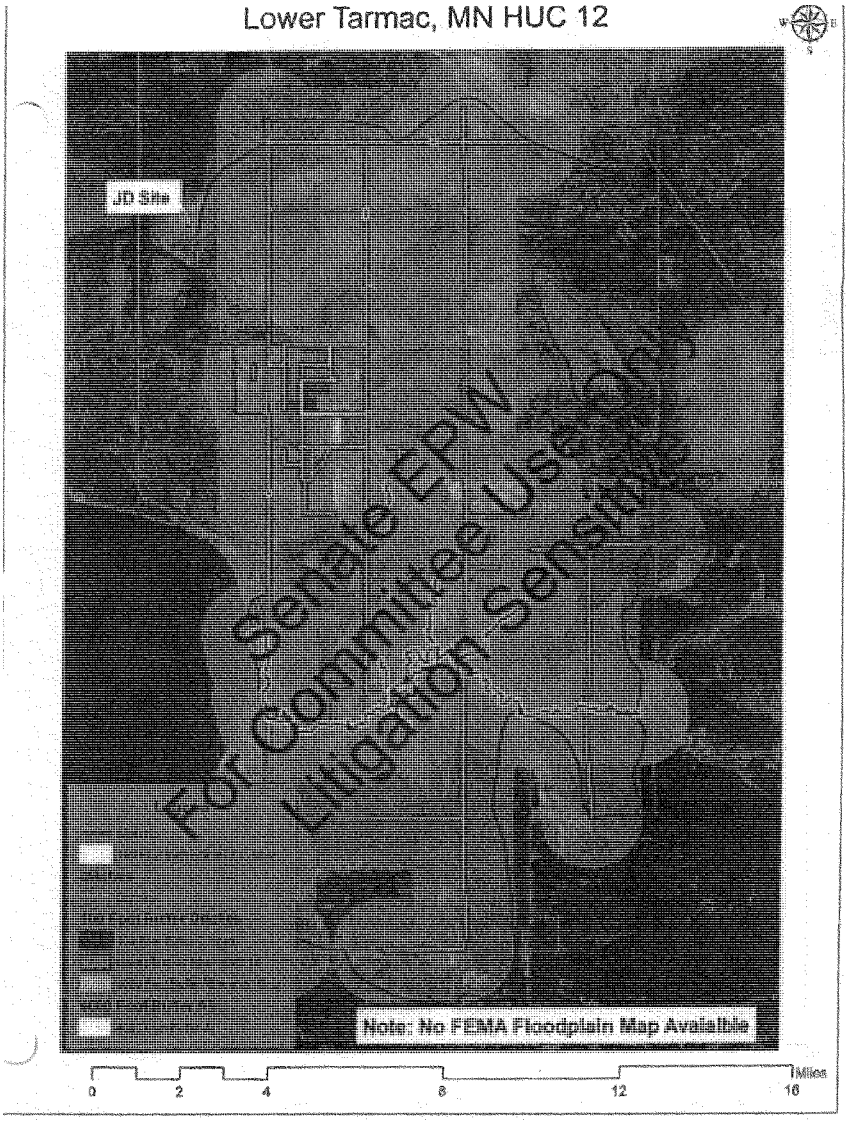
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of the Upper Red Lake. In addition, these wetlands are located in agricultural field which would preclude them from being considered adjacent when 404(f)(1)(A) activities occur in them.

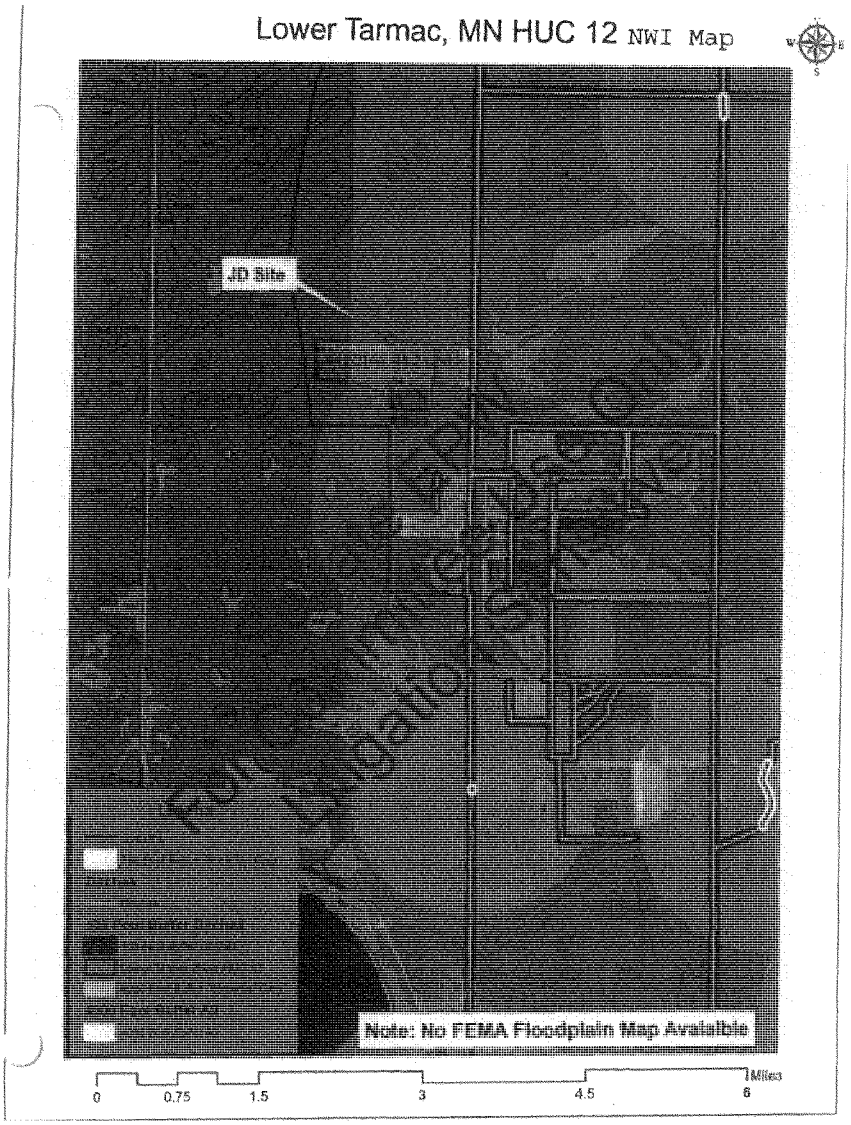
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the Upper Red Lake.

If the draft final rule provided for the use of confined surface flow connections to be used in a case-specific significant nexus determination, these wetlands may be found to be jurisdictional.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional. This may have serious implications for the efficacy and validity of the existing compensatory mitigation bank.

In reviewing the maps provided by EPA, they provided a version of the map with two different buffers; one buffer around only the mapped streams and one buffer around both the streams and ditches. It can be seen that if the ditches are excluded, which they would be under the draft final rule, then the subject wetlands lie outside the 4,000' distance, as does much of the HUC 12. The extensive area of wetlands in the area can be seen in the NWI map layer, of which many of them would be beyond 4,000'. There are also errors in the EPA map with small relict segments of what the NHD layer had determined to be streams but are now part of the ditch network. The 4,000' buffer around those small sections should be removed.


Lower Tarmac, MN HUC 12
JD Site
Note: No FEMA Floodplain Map Available
0
2
4
8
12
16
Miles
For Senate EPW Committee Use Only
Litigation Sensitive


Lower Tarmac, MN HUC 12 NWI Map
JD Site
Note: No FEMA Floodplain Map Available
0
0.75
1.5
3
4.5
6
Miles

EXAMPLE #9

Adjacent Wetlands, Wing River, MN

46.4231821°N, -95.065699°W

See map entitled, "County Ditch No. 3-Leaf River, MN HUC 12."

Wetlands currently jurisdictional as adjacent to Wing River; perennial relatively permanent waters, with the characteristics to meet the definition of tributary under the draft final rule. Tributary to Leaf River.

Subject wetlands are approximately 16 acres in size. Note that there are several other wetlands of equal or greater size beyond the subject wetlands in the area.

Associated with RGP action (MVP-2013-1426 and MVP-2013-997).

These wetlands are approximately 5,000' from the OHWM of Wing River.

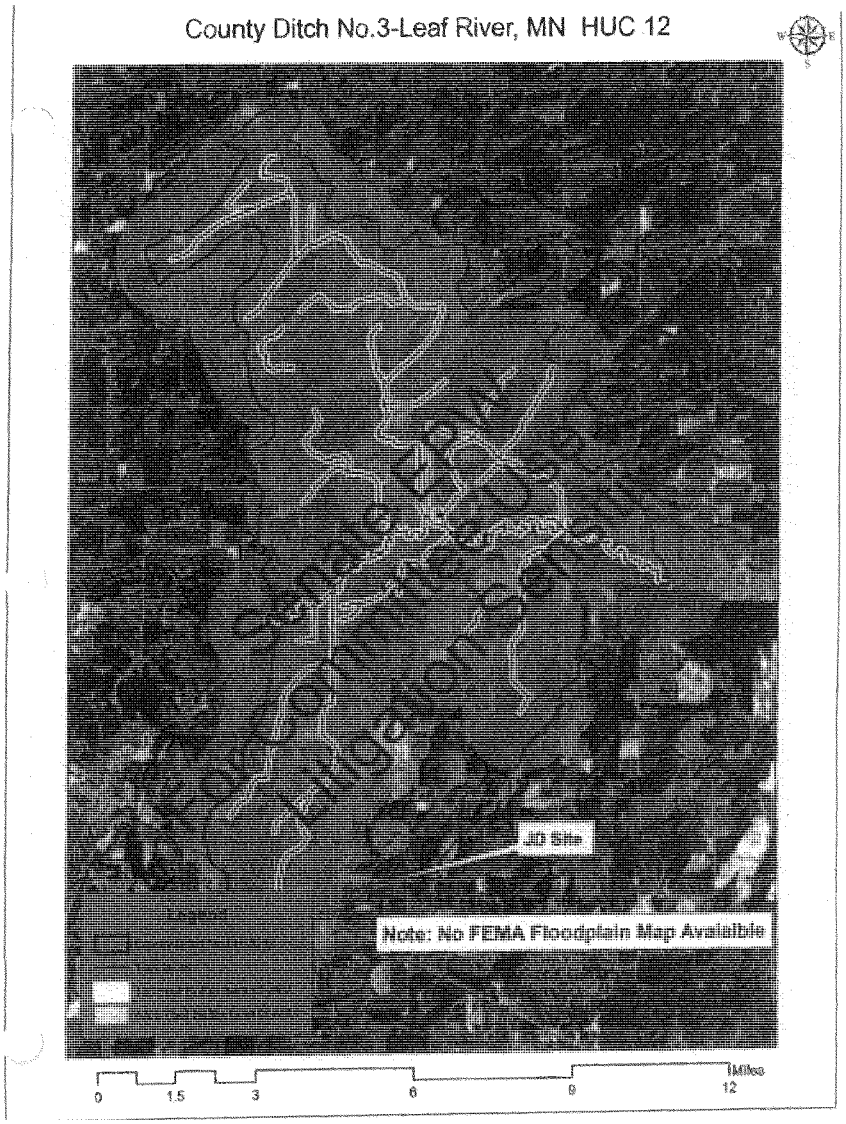
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of Wing River.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Wing River.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The acreage totals approximately 75 acres.

In reviewing the maps provided by EPA, it is evident that changes need to occur in order to make the map an accurate depiction of potential jurisdiction under the draft final rule. EPA has not drawn the single point of entry watershed boundary but has chosen to simplify the data by only depicting the HUC 12. The map NHD layer also includes relict segments of streams which should be removed with no 4,000' buffer around them. In addition, EPA stated that they only "cleaned" or edited the NHD layer data around the JD example site location as opposed to throughout the HUC 12, which gives a false sense of impression that almost the entire HUC 12 would be included within the 4,000' buffer. However, much of the buffers in the unedited portion of the HUC 12 are surrounding non-jurisdictional ditch features under the draft final rule. Therefore, a much larger portion of the HUC 12 would not be included in the 4,000' buffer if correctly and accurately drawn.


County Ditch No.3-Leaf River, MN HUC 12
JD 3 Sys
Note: No FEMA Floodplain Map Available
0
1.5
3
6
9
12
Miles

EXAMPLE #10

Headwater Adjacent Wetlands, English Creek, FL

28.018817°N, -82.053704°W

See map entitled, "English Creek, FL HUC 12."

Headwater wetlands currently jurisdictional as adjacent to English Creek; perennial relatively permanent water, with the characteristics to meet the definition of tributary under the draft final rule.

Subject wetlands total approximately 50 acres in size.

Associated with an NWP action (SAJ-2011-621).

These wetlands range from approximately 4,500'-10,000' from the OHWM of English Creek.

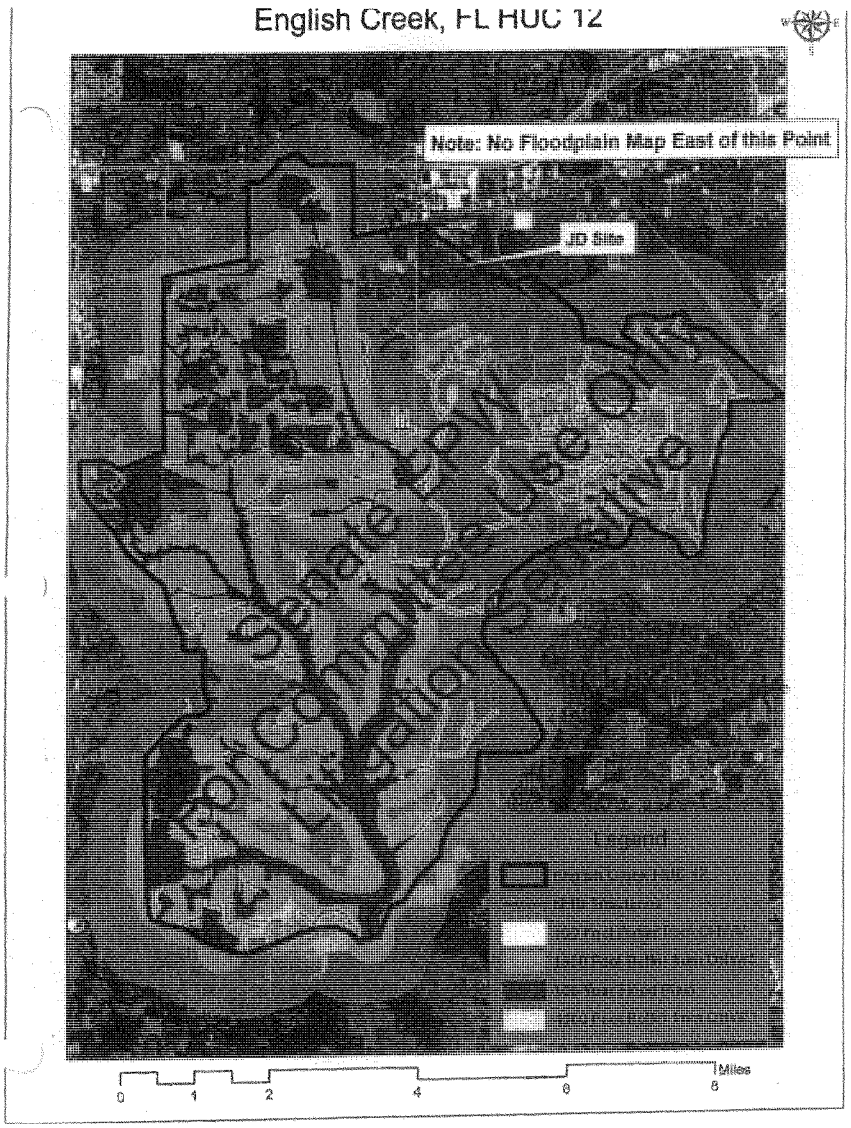
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of English Creek.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of English Creek.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 25 acres.

In reviewing the maps provided by EPA, it is evident that several changes need to occur in order to accurately depict the jurisdictional status of the wetlands. EPA concludes that the location of the JD site is the "only part of the watershed where there is gap in the 4,000 foot buffer." However, EPA then admits that they did not "clean up" or edit the NHD data layer anywhere else in the HUC 12. Much of the area where the 4,000' buffers are drawn on the map surround roadside ditches which would be excluded under the draft final rule. Most of the eastern portion of the HUC 12 should not have the buffer shading. In addition, EPA again depicts the HUC 12 for simplification purposes as the "watershed" as opposed to the single point of entry watershed that is used in the draft final rule.


English Creek, FL HUC 12
Note: No Floodplain Map East of this Point
JD Site
Legend
0
1
2
4
6
8
Miles

From: Stokely, Peter
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] English Creek FL
Date: Monday, April 13, 2015 4:53:43 PM

Attached is a WOUS analysis of English Creek HUC 12 in FL. A couple of things to note, first there was only partial GIS floodplain mapping available from FEMA. Secondly, as with most of these analysis, the NHD data needs to examined closely and cleaned up so that only jurisdictional tributaries and ditches remain (a laborious and imprecise process). I did some cleaning of the NHD data near the JD site, but nowhere else. I deleted unconnected drainages and small ditches near the site to be conservative. Interestingly, the resulting map matches what was reported by the Corps in that the JD site is further than 4000 feet from an OHWM. It is also interesting to note the JD site is the only part of the watershed where there is gap in the 4000 foot buffer (but I didn't clean up the NHD data anywhere else).

I should be able to complete a couple more tomorrow (this one took me about two hours once I received the coordinates)

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

Washington, DC 20460

Room 4110

William Jefferson Clinton Federal Building South (WJC South)

Mail Code 2243A

202-564-1841

EXAMPLE #11

Adjacent Wetlands, Rowell Creek, FL

30.26194°N, -81.87274°W

See map entitled, "Yellow Creek, FL HUC 12."

Wetlands currently jurisdictional as adjacent to Rowell Creek; perennial relatively permanent water, with the characteristics to meet the definition of tributary under the draft final rule. Rowell Creek is a tributary to Yellow Creek.

Subject wetlands are approximately 150 acres in size. Note that there are several other wetlands of equal or greater size beyond the subject wetlands in the area.

Associated with an NWP action (SAJ-2014-2054).

These wetlands are approximately 5,000' from the OHWM of Rowell Creek.

These wetlands currently have a confined surface connection to Rowell Creek via an ephemeral non-relatively permanent water non-jurisdictional ditch.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of Rowell Creek.

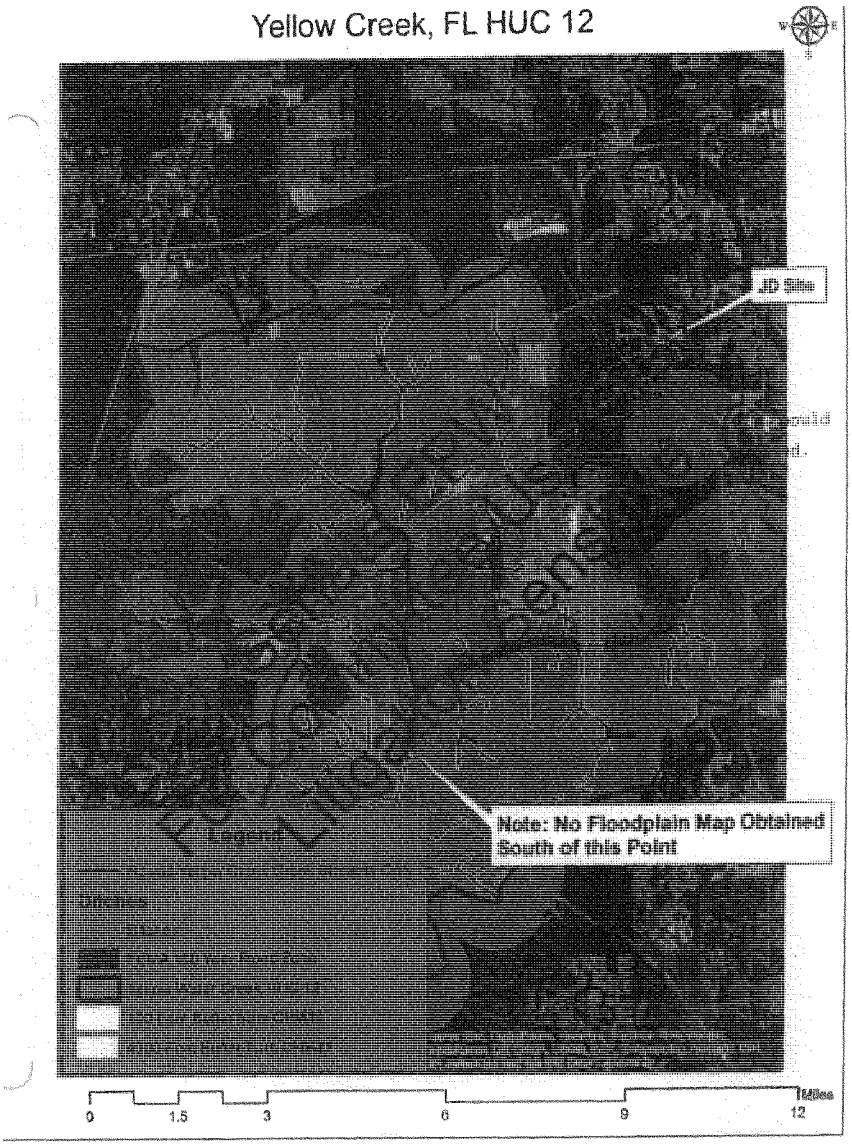
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Rowell Creek.

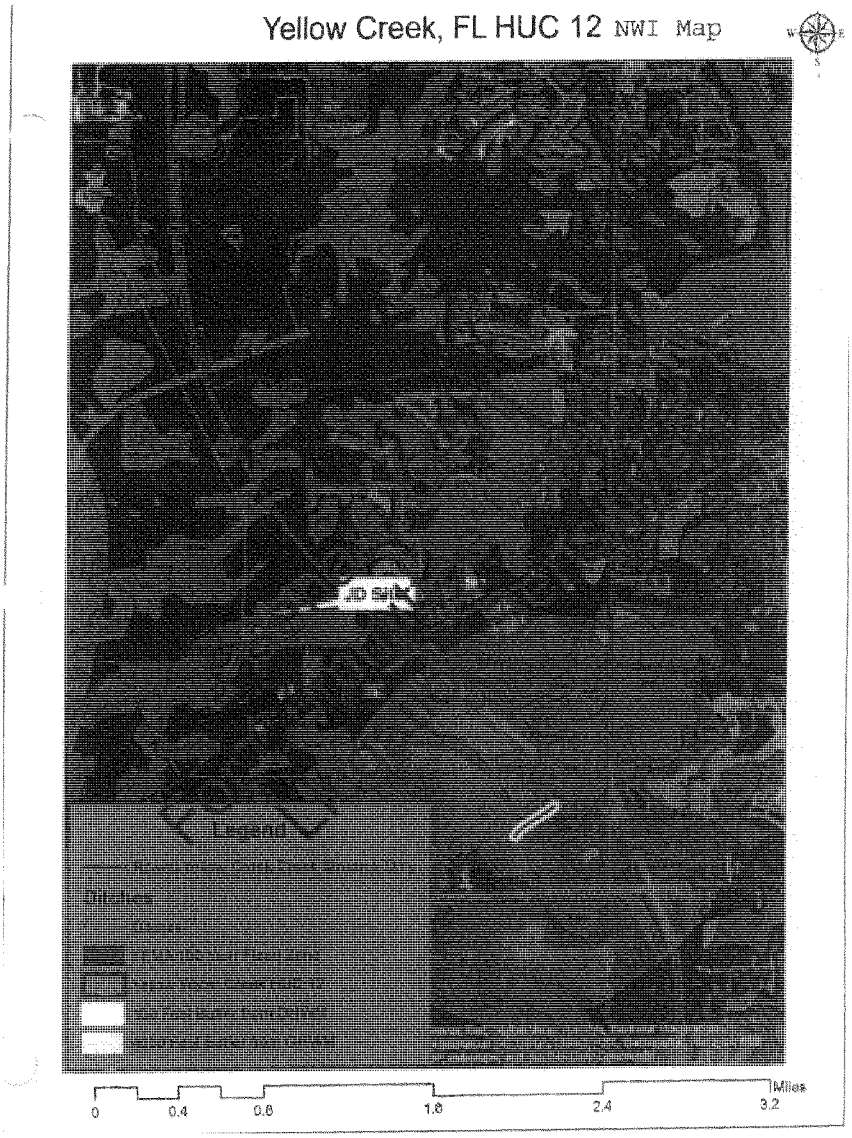
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 200 acres.

If the draft final rule provided for the use of confined surface flow connections to be used in a case-specific significant nexus determination, these wetlands may be found to be jurisdictional.

In reviewing the maps provided by EPA, it is evident that changes need to occur in order to make the map an accurate depiction of potential jurisdiction under the draft final rule. EPA has not drawn the single point of entry watershed boundary but has chosen to simplify the data by only depicting the HUC 12. The map NHD layer also includes relict segments of streams which should be removed with no 4,000' buffer around them. In addition, EPA only "cleaned" or edited the NHD layer data around the JD example site location as opposed to throughout the HUC 12, which gives a false sense of impression that almost the entire HUC 12 would be included within the 4,000' buffer. However, there are buffers in the unedited portion of the HUC 12 that are surrounding non-jurisdictional ditch features under the draft final rule. Therefore, a larger portion of the HUC 12 would not be included in the 4,000' buffer if correctly and accurately drawn.


Yellow Creek, FL HUC 12
JD Site
Note: No Floodplain Map Obtained South of this Point
0
1.5
3
6
9
12
Miles


Yellow Creek, FL HUC 12 NWI Map
0
0.4
0.8
1.6
2.4
3.2
Miles

From: Stokely, Peter
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Rowell-Yellow Creek
Date: Tuesday, April 14, 2015 11:06:04 AM

Here is another one, (Russ let me know if you need any more of these). Based on the description regarding Non-RPW ditches I only buffered NHD "streams" for this one, but included the ditches on the map so you can see them. I didn't bother with the 1500 limit from the OHWM in the floodplain because it didn't seem relevant to adjacency in this case. I have also included a close up of the site with NWI wetlands to give a sense how the ditches, the wetlands and the JD site connect

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

Washington, DC 20460

Room 4110

William Jefferson Clinton Federal Building South (WJC South)

Mail Code 2243A

202-564-1841

EXAMPLE #12

Adjacent Wetlands, Big Creek, OH

41.271053°N, -83.949624°W

See map entitled, "Big Creek, OH HUC 12." Also, see historic maps of the area depicting the existing ditch network dating back to 1909.

Wetlands currently jurisdictional as adjacent to Big Creek; perennial relatively permanent water, with the characteristics to meet the definition of tributary under the draft final rule.

Subject wetlands are approximately 2.5 acres in size.

Associated with an NWP action (LRB-2007-658).

These wetlands are approximately 30,000' from the OHWM of Big Creek.

These wetlands currently have a confined surface connection to Big Creek via an ephemeral non-relatively permanent water non-jurisdictional roadside ditch.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of Big Creek.

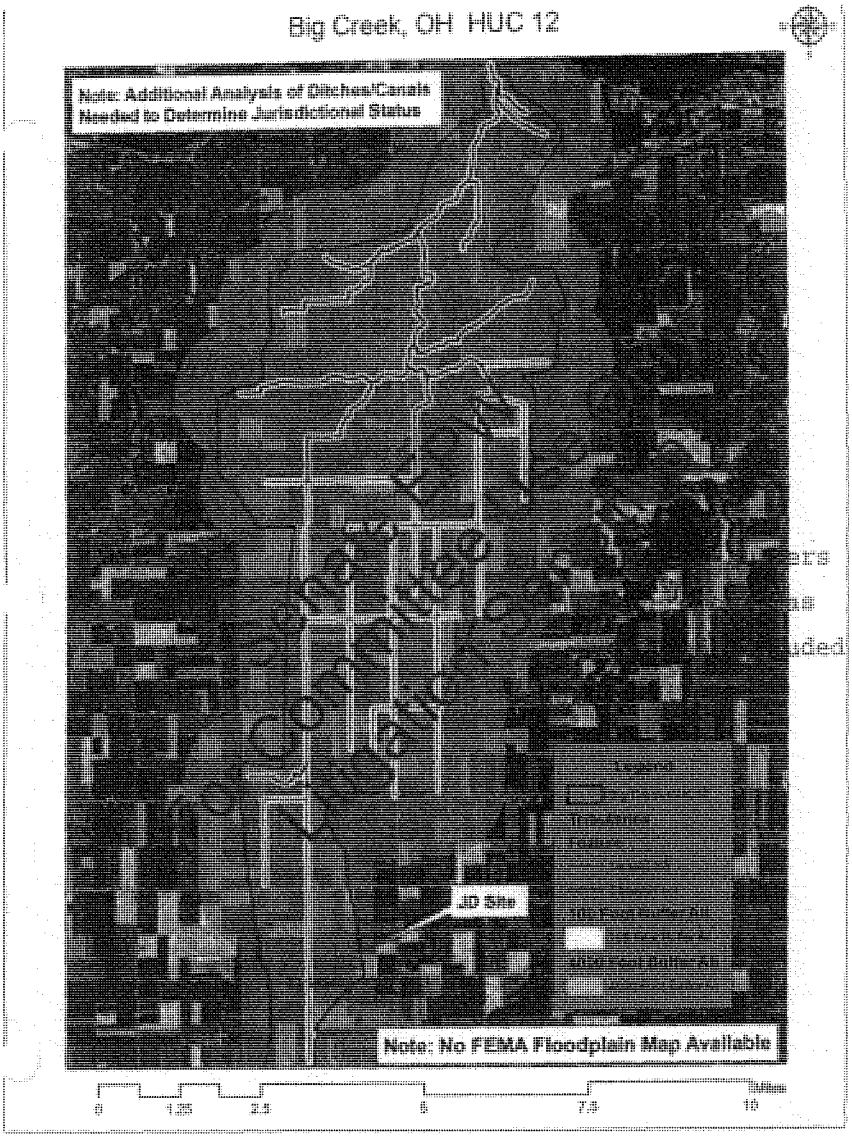
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Big Creek.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

If the draft final rule provides for the use of confined surface flow connections to be used in a case-specific significant nexus determination, these wetlands may be found to be jurisdictional.

Note that these pockets of wetlands adjacent to ditches are common throughout Ohio, and in particular in the agricultural areas. Without the use of the confined surface flow connections in a significant nexus determination, many of these wetlands would not be jurisdictional under the draft final rule.

In reviewing the maps provided by EPA, it is evident that changes need to occur in order to make the map an accurate depiction of potential jurisdiction under the draft final rule. EPA has not drawn the single point of entry watershed boundary but has chosen to simplify the data by only depicting the HUC 12. In addition, EPA did not "clean" or edit the NHD layer data throughout the HUC 12, which gives a false sense of impression that the entire HUC 12 would be included within the 4,000' buffer. However, much of the buffers in the unedited portion of the HUC 12 are surrounding non-jurisdictional ditch features under the draft final rule. Therefore, the bottom 2/3 of the HUC 12 would not be included in the 4,000' buffer if correctly and accurately drawn. EPA points out that they believe some of the ditches may be relocated tributaries and so would remain jurisdictional. However, in searching through aerial maps and USGS topo maps dating back to 1909 the area is depicted as currently exists, with a vast ditch network. It is clear at some point the tributary to the north, Big Creek, was likely ditched into


Big Creek, OH HUC 12
Note: Additional Analysis of Ditches/Canals Needed to Determine Jurisdictional Status
JD Site
Note: No FEMA Floodplain Map Available
0
1.25
2.5
5
7.5
10
Miles

From: Stokely, Peter
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Big Creek, OH HUC 12
Date: Thursday, April 16, 2015 11:44:33 AM

In this case the HUC 12 may be the SPOE (in most other maps, the HUC 12 was not the SPOE and was used only to represent adjacency measures).

Also on this one, it appears to me that some of the ditches/canals could be relocated tributaries and would remain jurisdiction, additional analysis is required. And again, additional surface water connections are likely present.

Peter Stokely

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Washington, DC 20460

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Mail Code 2243A

202-564-1841

Jensen, Stacey M HQ02

From: Jensen, Stacey M HQ02
Sent: Thursday, April 16, 2015 1:58 PM
To: 'Stokely, Peter'; Kaiser, Russell
Subject: RE: Big Creek, OH HUC 12 (UNCLASSIFIED)
Attachments: OH_Mc Clure_227790_1909_62500.jpg

Classification: UNCLASSIFIED
Caveats: NONE

Thank you, Pete. I think this one illustrates another good point. In searching through the records, the oldest imagery I have found of the area is an old USGS topo map dating to 1909 which depicts the area as it exists today with the ditch network (see attached; area around McClure for the tributaries that branch to become the network of ditches). It is clear that at some point the tributaries to the north, Big Creek and its tributary, were most likely ditched into roadside ditches. But which of those many ditches is to be considered the "excavated" or "constructed in" tributary? There are many more ditches than one or two tributaries. If the record does not exist dating back to the point when these ditches were constructed, to whom does the burden fall? The landowner or the Corps/EPA? It is also interesting to note that the direction of flow changes within the ditches even within a short distance as they are greatly manipulated. So what would the call be? This is a common occurrence and challenge that our districts and regions will face with the roadside ditches. Thank you!

Best wishes,
Stacey

USACE Regulatory Program Manager
1 G Street NW
Washington, DC 20314-1000
Phone (202) 761-5856

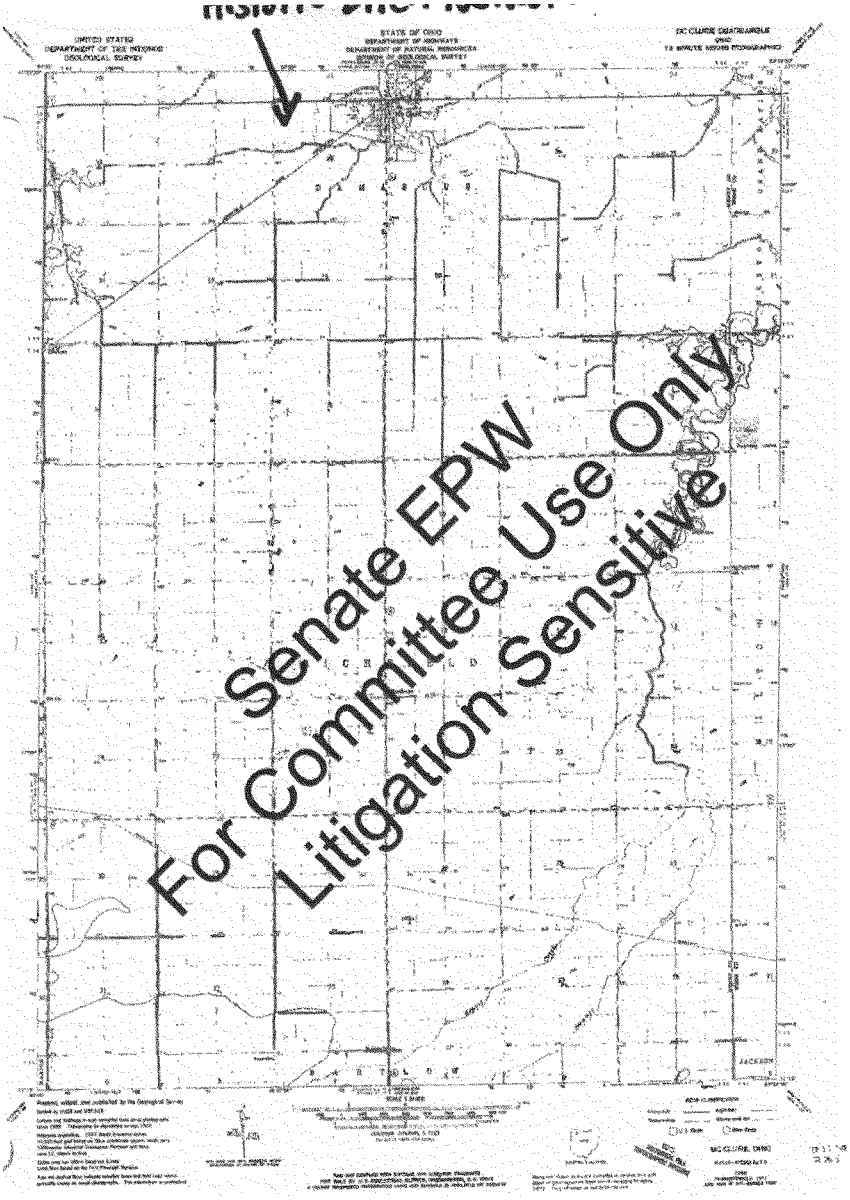
-----Original Message-----
From: Stokely, Peter [mailto:Stokely.Peter@epa.gov]
Sent: Thursday, April 16, 2015 1:03 PM
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Big Creek, OH HUC 12

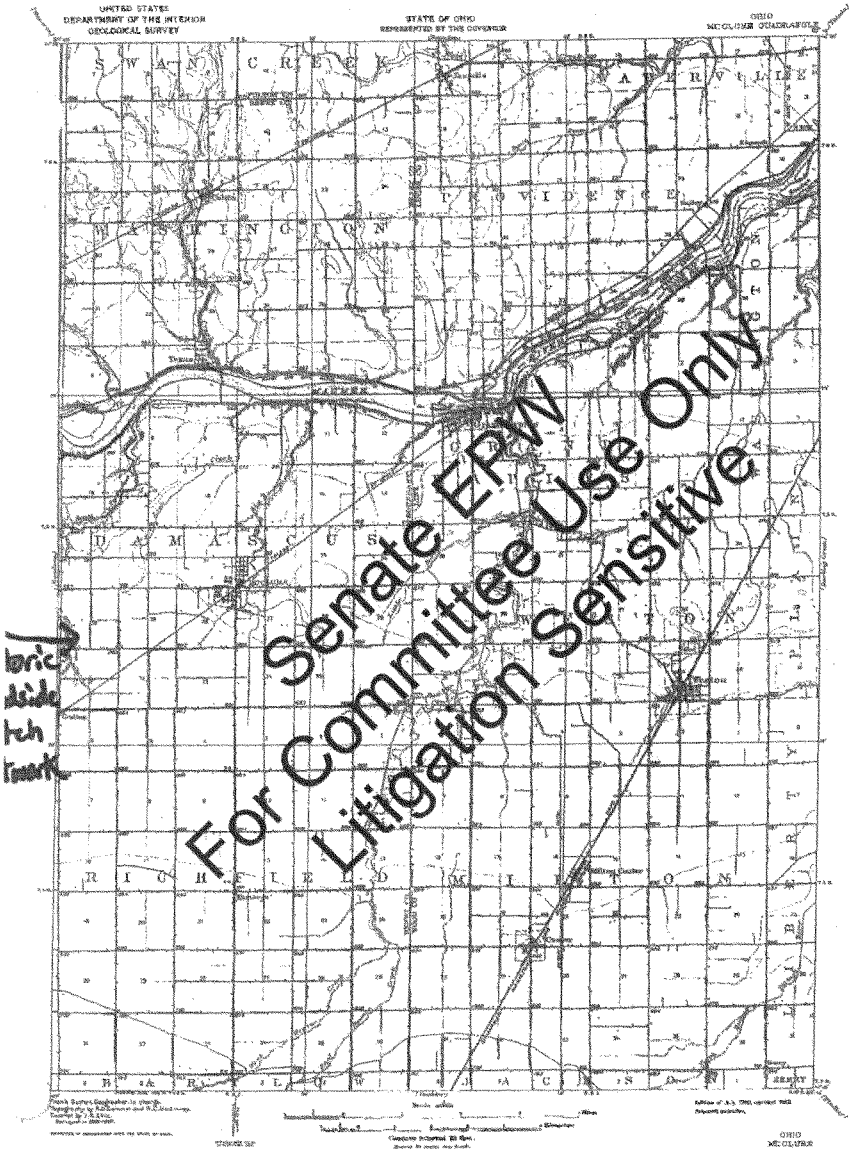
In this case the HUC 12 may be the SPOE (in most other maps, the HUC 12 was not the SPOE and was used only to represent adjacency measures).

Also on this one, it appears to me that some of the ditches/canals could be relocated tributaries and would remain jurisdiction, additional analysis is required. And again, additional surface water connections are likely present.

Peter Stokely

Office of Civil Enforcement


Senate EPW
For Committee Use Only
Litigation Sensitive



EXAMPLE #13

Adjacent Wetlands, Chickasawhatchee Creek, GA

31.345246°N, -84.446706°W

See map entitled, "Wolf Pond-Chickasawhatchee Creek, GA HUC 12."

Wetlands currently jurisdictional as adjacent to unnamed tributaries to Chickasawhatchee Creek; perennial relatively permanent water, with the characteristics to meet the definition of tributary under the draft final rule.

Subject wetlands are approximately 40 acres in size. Note that there are several other wetlands of equal or greater size beyond the subject wetlands in the area.

Associated with an unauthorized activity and an NWP action (SAS-2012-512).

These wetlands are approximately 10,000' from the OHWM of Chickasawhatchee Creek.

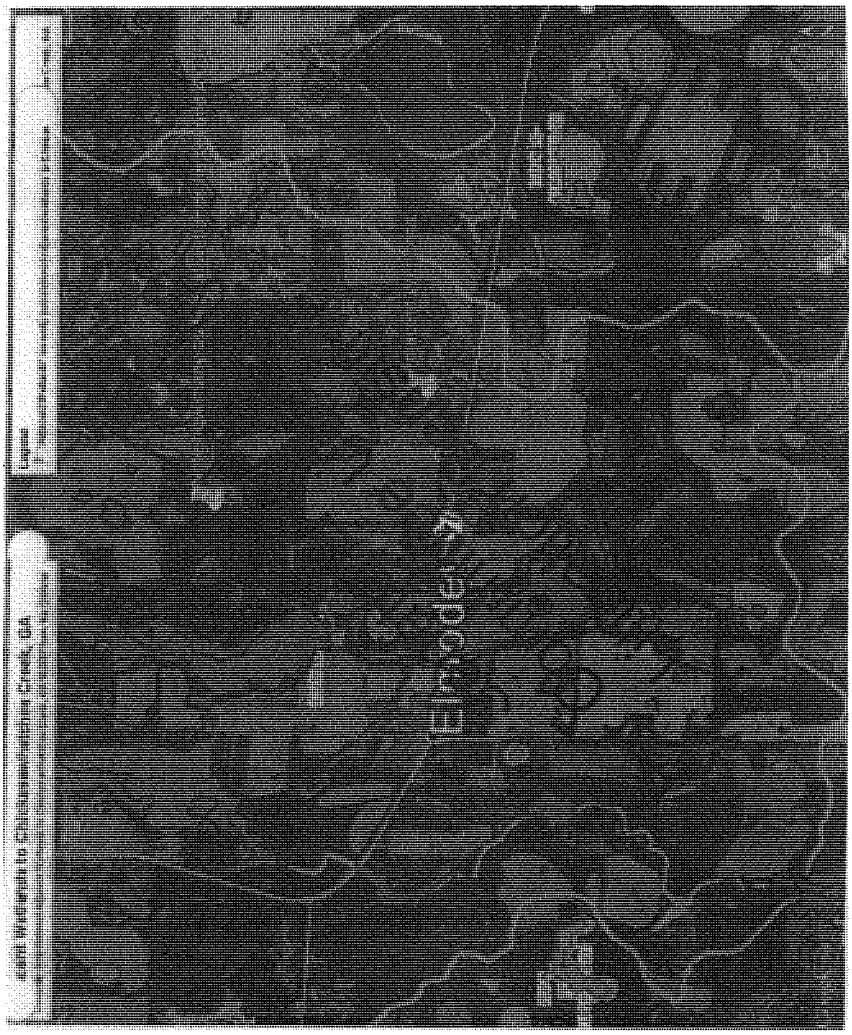
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of Chickasawhatchee Creek.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Chickasawhatchee Creek.

Therefore, under the draft final rule, these currently jurisdictional wetlands would be non-jurisdictional.

Note that the wetlands west of that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 300 acres.

In reviewing the maps provided by EPA, it is clear that the majority of the HUC 12 lies beyond the 4,000' distance.


Elevation A

From: Stokely, Peter
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Chickasawhatchee Creek, GA
Date: Tuesday, April 14, 2015 4:10:30 PM

This area in GA has very little NHD mapped drainage, hence the site is outside all the adjacency measures based on NHD. I don't know however if there are unmapped ditches and small tributaries that may link the site to Chickasawhatchee Creek.

There are two more sites, I should be able to get to those tomorrow.

Pete

Peter Stokely

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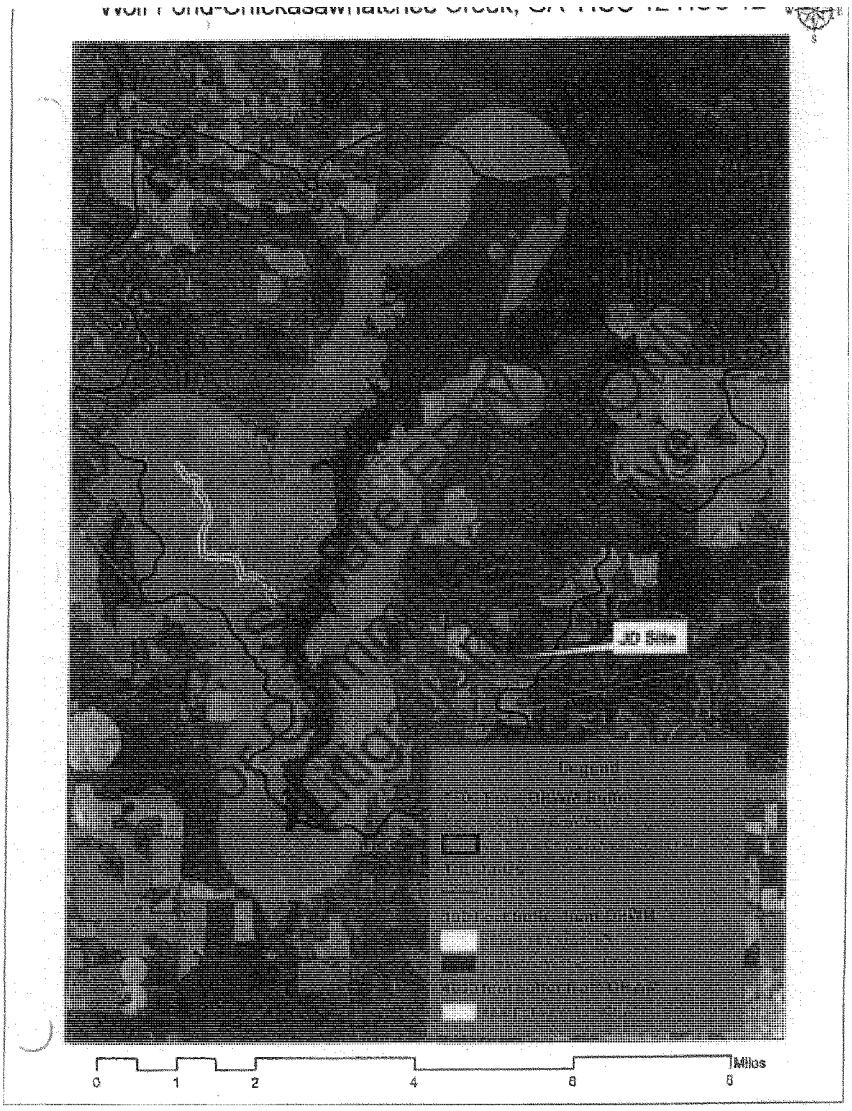
Mail Code 2243A

202-564-1841


JD Site
0
1
2
4
6
8
Miles

EXAMPLE #14

Adjacent Wetlands, California Creek, WA

48.929721°N, -122.635156°W

See map entitled, "Dakota Creek HUC 12."

Wetlands currently jurisdictional as adjacent to California Creek; perennial relatively permanent water, with the characteristics to meet the definition of tributary under the draft final rule.

Subject wetlands are approximately 18 acres in size. Note that there are several other wetlands of equal or greater size beyond the subject wetlands in the area.

Associated with an NWP action (NWS-2007-344).

These wetlands are approximately 6,000' from the OHWM of California Creek.

These wetlands currently have a confined surface connection to California Creek via an ephemeral non-relatively permanent water non-jurisdictional ditch.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of California Creek.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of California Creek.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

If the draft final rule provided for the use of confined surface flow connections to be used in a case-specific significant nexus determination, these wetlands may be found to be jurisdictional.

Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 100 acres.

In reviewing the maps provided by EPA it is clear that v2 is the more accurate map regarding jurisdictional status under the draft final rule. The map v1 assumes the ditches are jurisdictional, but the JD completed by the district stated that the ditches connected to the subject wetlands were non-jurisdictional ephemeral (non-relatively permanent) ditches. In addition, most of the ditches surrounding the JD site are intermittent roadside ditches which would also be excluded. Therefore, v1 should be disregarded and v2 should be viewed as the more accurate portrayal. However, there are still issues which must be amended in a new version to accurately depict the status of jurisdiction. The map NHD layer also includes relict segments of streams which should be removed with no 4,000' buffer around them. In addition, EPA only "cleaned" or edited the NHD layer data around the JD example site location as opposed to throughout the HUC 12, which gives a false sense of impression that almost the entire HUC 12 would be included within the 4,000' buffer. However, there are buffers in the unedited portion of the HUC 12 that are surrounding non-jurisdictional ditch features under the draft final rule.

From: Stokely, Peter
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Dakota Creek WA HUC 12
Date: Thursday, April 16, 2015 2:07:49 PM

For this one I have included two versions, v1 assumes all HND features are jurisdictional and v2 excludes ditches/canals from the analysis. It can be seen there is a small decrease in coverage with the ditches excluded, but the JD site is covered by both analysis.

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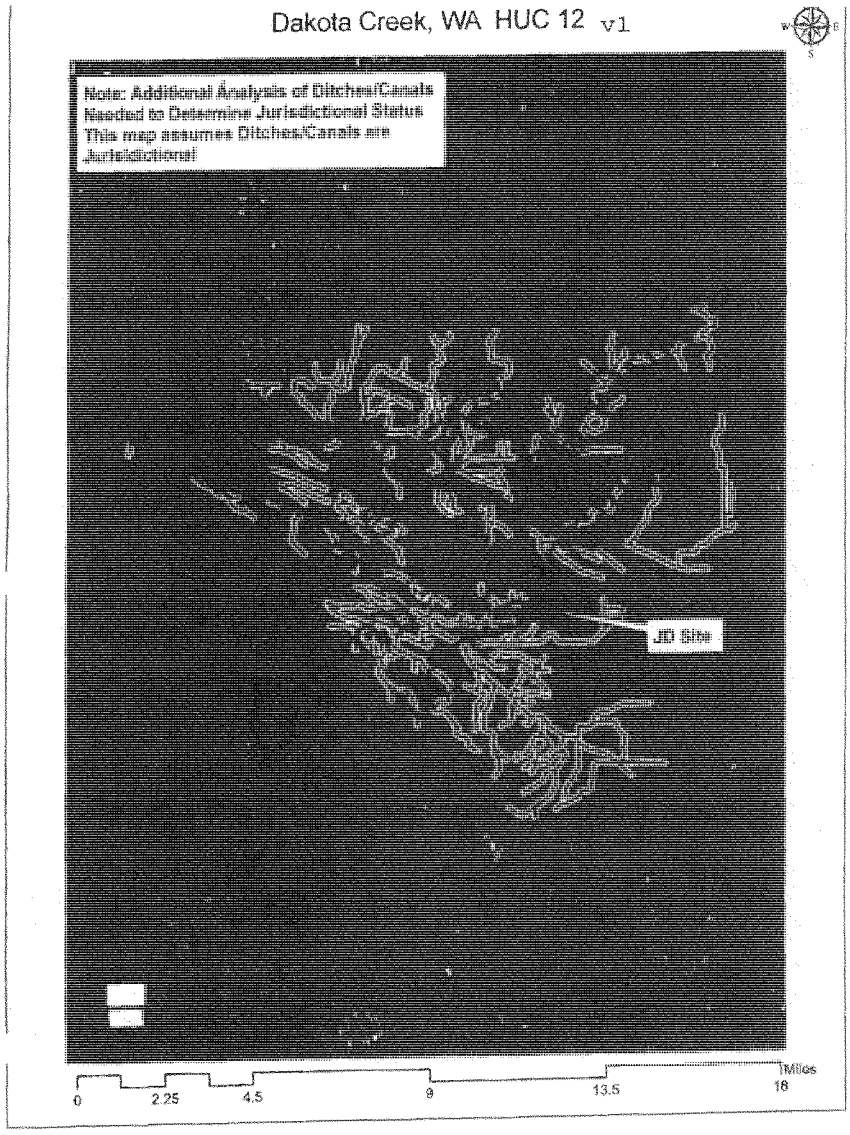
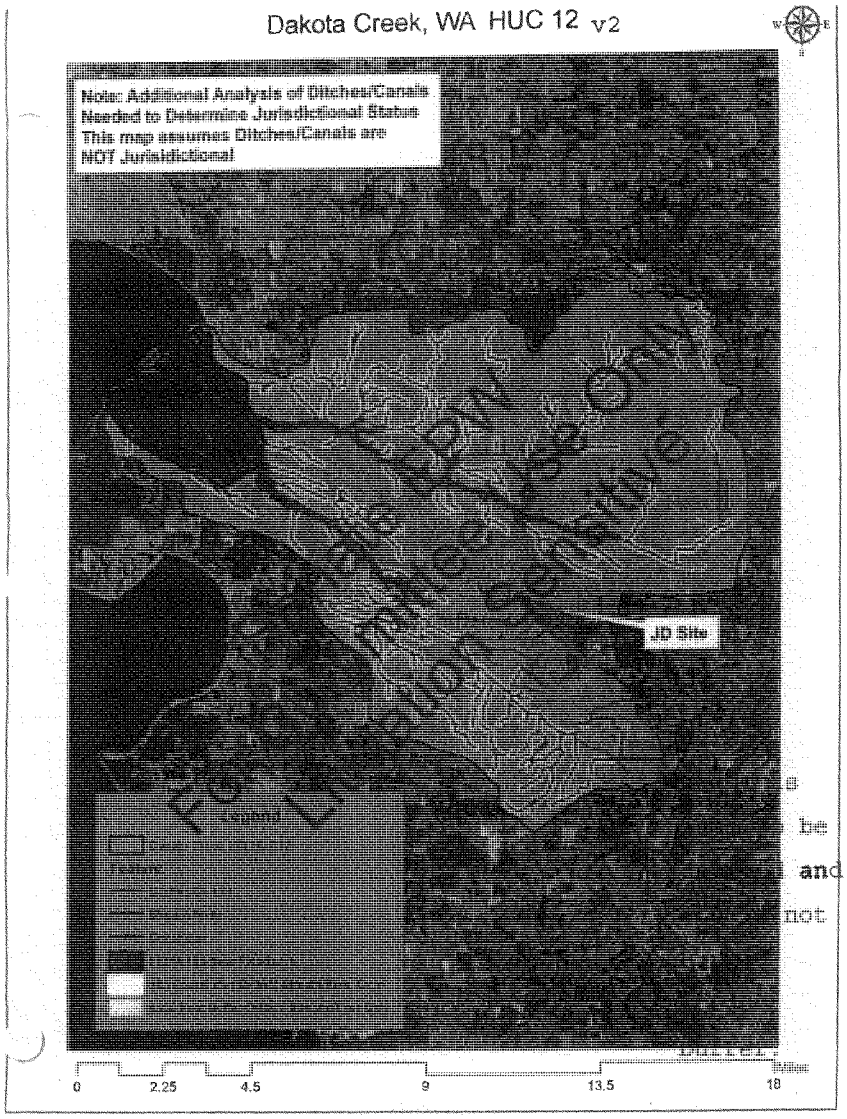
Mail Code 2243A

202-564-1841


Dakota Creek, WA HUC 12 v1
Note: Additional Analysis of Ditches/Canals Needed to Determine Jurisdictional Status This map assumes Ditches/Canals are Jurisdictional
JD Site
0
2.25
4.5
9
13.5
18
Miles


Dakota Creek, WA HUC 12 v2
Note: Additional Analysis of Ditches/Canals Needed to Determine Jurisdictional Status This map assumes Ditches/Canals are NOT Jurisdictional
JD Site
0
2.25
4.5
9
13.5
18

be

and

not

EXAMPLE #15

Adjacent Wetlands, Edmondson Slough, Mississippi River, MS

37.290869°N, -89.482414°W

See map entitled, "Edmondson Slough HUC 12."

Wetlands currently jurisdictional as adjacent to Mississippi River, a TNW.

Subject wetlands are approximately 9 acres in size. Note that there are several other wetlands of equal or greater size beyond the subject wetlands in the area.

Associated with an NWP action (MVS-2008-782).

These wetlands are approximately 8,000' from the OHWM of the Mississippi River.

Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of Mississippi River.

Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Mississippi River.

Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

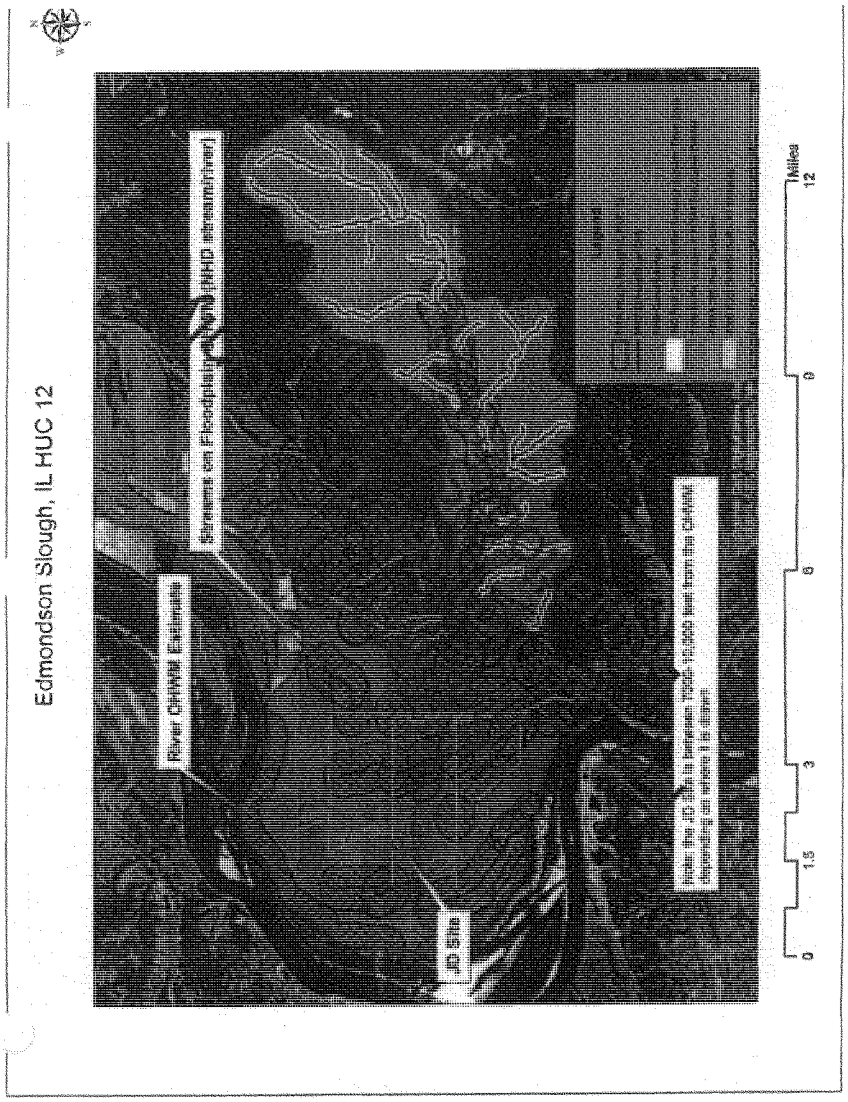
Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 50 acres.

In reviewing the maps provided by EPA it is clear that the JD review site would not be jurisdictional. The wetlands are adjacent to non-jurisdictional ditches which would be excluded under the draft final rule.

The wetlands lie within the 100-year floodplain of the Mississippi River but beyond 4,000' from the OHWM of the River. There are many wetlands in the area and the determination was made on all of them in the area. The NHD map layer includes several flow lines which are not actually tributaries and do not connect to the River. There are many surface features in the area which NHD has a difficult time distinguishing. EPA also indicated the challenges in drawing the map for this location, such as having to estimate an OHWM as the NHD map data drew the OHWM line down the middle of the River. These are typical challenges that our field staff will routinely encounter if they had to implement the draft final rule language.

This scenario often occurs in the floodplains of major river systems, such as the Ohio River, Mississippi River, Missouri River, etc. Such large river systems have very wide floodplains, and the adjacent wetlands are often located behind natural levees that form in the floodplain which can be far beyond 4,000' from the OHWM of the major river to which the wetlands are adjacent.

Overall, ~3.4% of waters are wetlands adjacent to TNWs (based on ORM data), both abutting and non-abutting. Such adjacent wetlands currently jurisdictional are at risk of being non-jurisdictional under the draft final rule.


Edmondson Slough, IL HUC 12
River CHAMP Extents
Extent of Floodplain (NHD stream/river)
JD Site
Miles
0
1.5
3
6
9
12

Jensen, Stacey M HQ02

From:	Jensen, Stacey M HQ02
Sent:	Thursday, April 16, 2015 10:46 AM
[illegible]	'Kaiser, Russell'; Stokely, Peter
ject:	RE: Last One (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Pete,

Here is one of our adjacent wetland determinations in the 100-year floodplain of the Mississippi River but beyond 4,000' from the nearest TNW. The determination was made on all the wetlands located in the surrounding area of the lat/long coordinates. Note that NHD includes several flow lines of "tributaries" in the area that do not connect to the Mississippi but whose indicators disperse prior to the "tributary" reaching the Mississippi. There are many surface features in the area that may demonstrate partial characteristics of a tributary but do not consistently present the indicators and do not directly, or indirectly, contribute flow to the Mississippi but rather turn into sheetflow and/or end in wetlands. These wetlands were determined to be adjacent to the Mississippi River.

Lat/long: 37.290869, -89.482414.

Since these wetlands are also located in an agricultural area, which is very common along these major river systems like the Mississippi River, if these wetlands cannot be considered adjacent to the Mississippi under the draft final rule language regarding the farming activities, would they then be considered under (a)(7). If so, since these wetlands are [illegible]ond 4,000' from the TNW these would no longer be jurisdictional under the draft final [illegible]e. Or are wetlands that cannot be considered adjacent under the draft final rule evaluated under significant nexus regardless of distance? That part is unclear in the draft final rule language and this example also illustrates the consequences of that decision.
Thank you!

Best wishes,
Stacey

HQUSACE Regulatory Program Manager
441 G Street NW
Washington, DC 20314-1000
Phone (202) 761-5806

-----Original Message-----
From: Kaiser, Russell [mailto:Kaiser.Russell@epa.gov]
Sent: Thursday, April 16, 2015 8:11 AM
To: Jensen, Stacey M HQ02; Stokely, Peter
Subject: [EXTERNAL] RE: Last One (UNCLASSIFIED)

I can't remember but are we doing one to look at broad floodplains such as those along the Missouri River. If not, that might be a good one - thoughts?

Russell L. Kaiser
[illegible]ief, Wetlands & Aquatic Resources Regulatory Branch
[illegible]01 Constitution Ave., N.W.
Room 7217M West Bldg.

From: Stokely, Peter
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Edmondson Slough IL HUC 12
Date: Thursday, April 16, 2015 6:20:33 PM

This was complicated to make, I digitized the flood zone from viewing a FEMA map (not digital GIS data), I had to create an OHWM along the Mississippi because NHD drew the blueline right down the middle. The OHWM is only a guess on my part. There were many "streams" , probably with OHWM's, and ditches in the floodplain/flood zone. I wasn't sure which streams with OHWM's on the floodplain to buffer with the 1500 measure, so I buffered all the NHD "stream/river designations and my own river OHWM estimate. It would take additional effort to map all the "streams" to determine which ones don't connect to the TNW. I didn't buffer the NHD canal/ditches.

Here is the write up from Stacey that describes the in the field complexity of the site, which is born out by the complexity and difficulty of making the map.

Here is one of our adjacent wetland determinations in the 100-year floodplain of the Mississippi River but beyond 4,000' from the nearest TNW. The determination was made for all the wetlands located in the surrounding area of the lat/long coordinates. Note that NHD includes several flow lines of "tributaries" in the area that do not connect to the Mississippi but whose indicators disperse prior to the "tributary" reaching the Mississippi. There are many surface features in the area that may demonstrate partial characteristics of a tributary but do not consistently present the indicators and do not directly, or indirectly, contribute flow to the Mississippi but rather turn into sheet flow and dissipate in wetlands. These wetlands were determined to be adjacent to the Mississippi River.

Since these wetlands are also located in an agricultural area, which is very common along these major river systems like the Mississippi River, if these wetlands cannot be considered adjacent to the Mississippi under the draft final rule language regarding the farming activities, would they then be considered under (a)(8)? If so, since these wetlands are beyond 4,000' from the TNW these would no longer be jurisdictional under the draft final rule. Would wetlands that cannot be considered adjacent under the draft final rule be evaluated under significant nexus regardless of distance? That part is unclear in the draft final rule language and this example can illustrates the consequences of that decision.

I will not be able to make any more calls until next week, I have dentist appointment in the AM then I am heading to a college orientation session with my step son in the afternoon.

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

Washington, DC 20460

APPENDIX B

USACE Implementation Challenges

CWA "Waters of the U.S." Implementation Concerns
HQUSACE
24 April

Overarching Concerns:

1. Rule text contains non-equivalent requirements for significant nexus determinations

2. Arbitrary limits for case-specific significant nexus determinations not rooted in science

3. Arbitrary limits within definition of "neighboring" not rooted in science and beyond reasonable reach of defining adjacency by rule

4. Lack of definitions for multitude of terms used within rule text (e.g. similarly situated, "a water", prairie pothole, western vernal pool, Delmarva & Carolina Bay, playa, Texas coastal prairie wetland, ditch, roadside ditch, etc.)

5. Grandfathering provisions lacking granularity and clarity

6. Preamble does not reflect Corps technical experience and expertise, nor does it accurately reflect the Corps understanding of the substantive public comments

Specifics:

- Need implementation clarification on when a waterbody meets more than one category which category to use in the determination – does one go down the list in order (TNW, then interstate waters, then territorial seas, etc.) until the first category that applies? With exclusions applied last overall.
- (a)(1) – Traditional Navigable Waters (TNW)
  - Districts may be challenged to identify whether there is an "upper limit" to the TNW, and if so, where.
    - These may take at least several months, similar to a Section 10 designation
  - Districts currently do not have a list of TNWs, as they do with the Section 10 waters.
    - Drawing single point of entry (SPOE) watersheds to the TNW may be a challenge without such lists and limits identified.
    - Need implementation clarifications on how to identify and make determinations for TNW designation. Rapanos guidance included an Appendix for TNWs.
- (a)(5) – Tributaries
  - Need a definition or further discussion on "bed and banks" to implement in the field and identify a tributary. Some areas, especially in the arid west, may have very wide tributaries with shallow "banks" or very gradually sloped "banks." Do these still constitute "bed and banks" as to the intent in the rule? The preamble only discusses that the slope may vary. Needs further clarification to implement.

- The specific indicators used in the OHWM manual and the term "active channel" need to be related back to the OHWM definition in the rule.
- Need implementation clarification and/or definitions to distinguish between excluded erosional features and ephemeral tributaries.
- What constitutes a "break" in a tributary? Is there need to distinguish a tributary upstream of a break but not downstream of a break? The Corps OHWM manuals state that you need to find the tributary both up and downstream of the break.
- How does a regulator or the public know if the two sections of a tributary are part of the same tributary when there is a break separating sections? How does a regulator or the public know they are connected? How far can a break go; any distance limitation? Ephemeral tributaries out west may hit an alluvial plain and fan out; are these considered "breaks" or do these result in isolation of the streams?

- (a)(6) – All waters, including wetlands, ponds, lakes, oxbows, impoundments, and similar water features, adjacent to a water identified in subparagraphs (a)(1) through (5) of this section.
  - Need a definition of "water." It may be hard to distinguish what constitutes a non-wetland adjacent water without definition of "water." A low depressional area on a farm field that ponds water after a rainstorm for ten days, would that be considered a non-wetland adjacent water? A puddle? Received many comments on this topic. Should there be a requirement for wetland parameters, hydrology, permanence of water, duration? A "delineation manual" for non-wetland waters?
  - New definition of adjacency includes a provision that waters subject to established normal farming, silviculture, and ranching activities are not adjacent.
    - This could result in large workload increases for those districts in agricultural areas as wetlands subject to such activities which are currently adjacent by rule would now require a case-specific significant nexus determination. For example, a wetland abutting a perennial tributary which was subject to farming activities currently would be considered adjacent without additional analysis; however, such wetland under the draft final rule could not be adjacent and instead would require a case-specific significant nexus determination.
    - Specific state example: Minnesota has 10.6 million acres of wetlands; ~50% of Minnesota's 54 million acres are farmland and an additional ~7% are forested wetland of which a large portion is managed in silviculture. The proposed definition may exclude a large amount of those 10.6 million acres of wetlands as adjacent, and would instead require a case-specific significant nexus determination.
  - Neighboring:
    - The indirect reference to the FEMA floodplain can lead to challenges in the field. Is the "list" of floodplains to use in the preamble considered a "hard preference" or a "soft preference" list? In any order? Landowners may want a different version to be used; need implementation clarification on which floodplain and which order to use in adjacency determinations.

        - FEMA redraws their floodplains often; which version do we use? Levee Improvement Districts apply for floodplain modifications frequently; almost monthly in some districts.
        - Other options for the 100-year floodplain do not match the FEMA floodplain; they serve different purposes. The NRCS soil maps suggested for use do not match the risk assessment that is used by FEMA. HEC-RAS is based on hydrology not flood risk.
        - Can vertical and elevation changes be used in determining distance? Deeply incised tributaries with waters on a bluff; would these be considered adjacent?
        - How is the distance measured? Remotely via aerial photography? Can't do the distance measurement in the field as it would take into account the elevation profile. Need implementation tools/resources on how to determine distance.
- (a)(7) and (a)(8) – Case-Specific Significant Nexus Determinations
    - How do we identify a prairie pothole, western vernal pool, Texas coastal prairie wetland, Carolina/Delmarva bays, or pocosins? Need delineation manuals for these waters or at least a definition of these waters, vegetation characteristics, etc.
    - Single point of entry watershed (SPOE) is a challenge to delineate. There are no readily available maps or tools. The tools used by EPA (NHD, WBD) do NOT delineate SPOE. It needs to be drawn manually which can be especially challenging in the arid west with very large SPOEs and in areas of flat topography. Can introduce inconsistency.
    - Need a mapping tool for districts to store the SPOE and to potentially use in future determinations. However, SPOE may change over time with development, climate, etc. Would need to be periodically reviewed if trying to use the same SPOE as used in a previous JD.
    - Need guidance on how to identify "similarly situated" waters. How close do they need to be to each other? How many and which type of functions do they need to similarly provide?
    - Need guidance on how to identify all of the "similarly situated" waters in a SPOE in order to do a significant nexus determination. This may be challenging to do remotely.
        - Must identify all waters similarly situated in a SPOE using remote tools, aerial photos, NWI maps. This may not be accurate as to the actual waters and of the same type to be used in significant nexus determination. May be a source for legal or appeal challenges.
    - Distance limit used in (a)(8) may modify state assumed waters in Michigan and New Jersey. Applicable Districts will need to work this out with the states.
    - Need guidance on appropriate procedural steps for (a)(7) and (a)(8) waters, as the procedures differ between them.
        - In (a)(7) the "similarly situated" waters are already identified then the SPOE is identifred then the significant nexus determination is completed.
        - In (a)(8) the SPOE is drawn first, then "similarly situated" waters are identified and then the significant nexus determination is completed.

        - If (a)(6) waters cannot be aggregated with (a)(7) or (a)(8) waters when doing a sig nexus determination, it is logical that first all the (a)(6) waters in the SPOE must be identified in order to "subtract" them out.
            - How can these be identified and upon what technical or scientific basis can these waters be "ignored" when conducting the sig nexus analysis? By what process that is repeatable?
    - Significant Nexus –
        - Need specific guidance on significant nexus determination.
        - Must clarify that those functions need to be tied to the (a)(1) through (a)(3) waters.
        - Only one of those functions? Needs to be clear that needs to be more than speculative or unsubstantial.
        - Exclusive list: what if other functions are performed: cannot use in significant nexus determination?
        - Courts have made clear that qualitative evidence supporting a significant nexus determination is all that is required. The legal term of significant nexus is not a scientific one and as such should not be made into a metric.
- Exclusions –
    - Do we need to map the excluded waters/features for a determination? In the determination do we need to "officially" exclude those waters/features as any part of the approved JD? We do so with "isolated" determinations currently, but would we need to do so for all of these excluded waters? For example, would we need to include in the determination documentation or map the feature, such as a gully or swale?
    - Only approved JDs can be used to make non-jurisdictional determinations. There may be an increase in approved JD requests if landowners understand that these features are excluded for the first time in rule, specially related to ditches and stormwater management features.
    - May be a challenge to distinguish between a ditch and a tributary. Need a definition or clarification on a ditch.
    - What is a roadside ditch? How close to the road does it need to be? Does it need to be parallel to the road?
    - May be a challenge to identify a ditch that is a relocated tributary or excavated in a tributary. How far back in history does a regulator need to go? If it can't be determined definitively, who bears the burden of proof? The landowner or the agency? Need to provide a set of tools/resources that the field can use to make the determination of the history of a ditch.
    - Need to distinguish between perennial, intermittent, and ephemeral flow regimes for ditches.
    - Need guidance on what perennial "flow" is; does it mean water is perennially present or that the water is flowing perennially? What about ditches that temporarily "pond" or "pool"?
    - Does the ditch exclusion extend to the banks of the ditch or does it extend only to the OHWM? What about wetlands that may be adjacent or within the ditch? Are these excluded with the ditches or if they meet the terms of adjacency (to a

tributary for example) could they could be jurisdictional? Need guidance on wetlands within and adjacent to excluded ditches.
    - May be challenging to determine whether some depressions were incidental to construction or mining in the past. Without the "abandonment" provision, these are excluded in perpetuity, and it may be a challenge for the PM to determine the historical use or creation.
    - What if the depressions develop wetland characteristics or there are fringe wetlands? Are these included in the "water-filled depressions" or are wetlands separate? Could they be considered an adjacent water if they meet the definition or are they excluded along with the open water depression?
    - "Lawfully constructed" for grassed waterways may be challenging to implement; does this mean they need a CWA permit or can it be funded by NRCS? Needs clarification.
    - If we have a definition of "water" a puddle may not be necessary in the excluded list. If we do not have a definition of "water" it may be difficult to distinguish a "puddle" from some non-wetland waters. We received many comments on this. Need guidance on how short of a timeframe water must be held for it to be considered a non-jurisdictional puddle or a depressional feature. No hydric soils? Other characteristics?
    - *Is tiling* included in the "drained through subsurface drainage systems"? Need guidance and clarification on the tiling; what forms of tiling are excluded under this exclusion? Tiling in the bottom of a stream or on the sides of the channel?
    - May be challenging in determining whether stormwater control features were constructed in WoUS in some areas with limited historical data and if not permitted or part of an approved plan.
    - Does the exclusion include all stormwater management features or do they need to be part of an approved local/county/state plan? Or simply designed to meet the requirements of the CWA like the waste treatment system exclusion? May be difficult to challenge an applicant's statement that it is constructed for the purpose of stormwater management. Technically all waters/wetlands may serve that purpose.
- Documentation
    - New JD form
    - No coordination required between agencies.
    - There are many points in the JD process that will require additional documentation and could be sources of appeal and legal challenges -
        - For adjacent waters: identifying for the first time adjacent non-wetland waters, identifying floodplain, identifying distance, etc.
        - For case-specific waters: identifying SPOE, identifying 'subcategory' of water, identifying similarly situated waters, identifying significant nexus, etc.
- Grandfathering –
    - How is the field going to transition into the new rule from current practice? Many considerations regarding existing permits, existing JDs, JD requests received during 60-day period between publication and effective date, enforcement actions, modifications to permits, etc.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECW-CEO

15 May, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

THRU Commanding General and Chief of Engineers, US Army Corps of Engineers

SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States"

1. I am forwarding the attached memorandum summarizing the Corps of Engineers' technical review of the Economic Analysis and Technical Support Document (TSD) produced by the Environmental Protection Agency (EPA), to support the on-going draft final rule on the definition of the "waters of the United States" (WOUS) under the Clean Water Act (CWA). The Corps received these final draft versions for the first time in the last two weeks. These documents were reviewed at my request by some of the Corps' most experienced experts in applying Section 404 of the Clean Water Act, including legal, regulatory, and scientific experts in the Corps Headquarters, Engineer Research and Development Center, and the Institute for Water Resources.

2. The Corps of Engineers' technical review indicates that both documents are flawed in multiple respects. The collective view of the Corps experts is summarized by our Regulatory Chief in the attached memorandum, which highlights the key aspects requiring your awareness, and deserving of your attention. To briefly summarize, our technical review of both documents indicate that the Corps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate data sets. In the Corps' judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies and logical inconsistencies. As a result, the Corps' review could not find a justifiable basis in the analysis for many of the documents' conclusions. The Corps would be happy to undertake a comprehensive review with the EPA to help improve these supporting documents, which we recognize are critical to the rule-making.

3. With respect to these two documents, the Corps provided the EPA with raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for aquatic resources within the span of control of the Corps' regulatory program (i.e., Section 404 of the Clean Water Act), and provided similar raw data for the Technical Support Document. However, the Corps had no role in selecting or analyzing the data that EPA used in drafting either document. As a result, the documents can only be characterized as having been developed by the EPA, and should not identify the Corps as an author, co-author or substantive contributor. To the extent that the term "agencies" includes the Corps of Engineers, any such reference should be removed. Finally, the Corps of Engineers logo should be removed from these two documents. To either

MEMORANDUM FOR ASA(CW)
SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States"

imply or portray USACE as a co-author or contributor to these documents, other than as the provider of raw unanalyzed data, is simply untrue.

4. The Corps of Engineers fully recognizes the importance of this rule-making, and of these documents to underpin the content of the final proposed draft rule. We stand ready to assist the EPA in improving the technical analysis and to develop logically supportable conclusions for these documents, if and when requested.

Building Strong!

JOHN W. PEABODY
Major General, US Army
Deputy Commanding General
for Civil and Emergency Operations

Encl.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECW-CO-R

15 May 15

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief of Operations and Regulatory, U.S. Army Corps of Engineers (ATTN: Edward E. Belk)

SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States"

1. References

a. *Draft Final Economic Analysis of the EPA-Army Clean Water Rule*, U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, 27 April 2015

b. *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States*, U.S. Environmental Protection Agency, June 2015

2. This memorandum responds to your request for a technical analysis of the documents in references a and b. Both documents were prepared by the U.S. Environmental Protection Agency (EPA). With respect to EPA's Economic Analysis, the Corps provided the EPA with raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for aquatic resources within the span of control of the Corps' regulatory program, but the Corps had no role in selecting or analyzing the data that EPA elected to use in drafting the attached Economic Analysis document. Similarly, with respect to the Technical Support Document (TSD), Corps data was also used by EPA when crafting the TSD, but the Corps also had no role in actually performing the technical analysis or drafting the TSD.

3. The following paragraphs summarize the Corps Regulatory Program concerns and provide as many examples as possible of what are fundamentally flawed products from a technical aspect. In essence, certain sections of both the Economic Analysis document and the TSD are devoid of any information about how the EPA obtained the results it has presented, rendering the methodology and subsequent results in the documents unverifiable by the Corps.

EPA's Economic Analysis

4. The document includes the EPA's review of Corps JDs from FY 2013 and FY 2014, which the Corps provided to the EPA for the purpose of identifying estimated changes in jurisdiction that would occur as a result of adoption of the draft final rule. However, the attached document fails to identify the actual draft final rule language that EPA applied in performing its review or the methodology used by EPA in applying such language to the Corps' JDs pertaining to isolated

water bodies from FY 2013 and FY 2014. Without an explanation of the methodology or which language was used in this exercise, the Corps cannot verify or provide cogent comments on the results presented by EPA.

5. The document mixes terminology and disparate datasets. For example, stream mitigation costs provided by the Corps appear to have been extrapolated and applied in States where no in-lieu fee program or mitigation bank data exist; there is no explanation of how such data were used or applied to obtain the results presented. Also, the Section 404 data provided by the Corps has been used out of context as if it were applicable to all Clean Water Act (CWA) programs, despite the fact that this data is only meaningful for a specific authority under the CWA (Section 404) and does not represent data under Sections 303, 401, 402, or other programs implemented by EPA and the States for different purposes under the CWA. Compliance costs under Section 404 are presented as representing seventy percent of the draft final rule's total costs and Section 404 benefits representing eighty-seven percent of the draft final rule's total benefits. When presented in this manner, Section 404 costs and benefits appear to far outweigh all other CWA programs combined, which greatly diminish the magnitude of the other, very important CWA programs. Using Section 404 data in this manner and in the absence of data from other programs cannot yield an accurate estimate of the true costs and benefits of those other CWA programs.

6. The document equates aquatic resources with JDs, which are two entirely different data sets. A single JD can provide the determination of jurisdictional status for multiple aquatic resources on a particular site. The revised analysis estimates an increase in the number of section 404 permits, the average impact acreage and corresponding total impact acreage, and an increase in total permit application costs. However, these changes are driven by using the highest number of individual permits and general permits issued in any one year over the five year period from FY 2009-2014 and average impact acreage for permits issued in FY 2013. It is unclear and not explained in the document why impact data from a single year was used to calculate average impact acreage for permits when a five year period was used to estimate the number of permits.

7. The document also makes certain assumptions that have no analytical basis. For example, to account for aquatic resources that are not captured in the Corps' data (e.g., isolated waters on properties of landowners who do not seek a JD from the Corps), EPA used the data from the Corps and simply doubled the number of isolated waters. Doubling data sets in the absence of analysis or basis for doing so cannot withstand even the most cursory technical review. All assumptions should have a justifiable basis, with reasoned logical analysis to support them.

8. The Economic Analysis grossly overestimates the amount of compensatory mitigation required under section 404 the CWA.

a. EPA assumed that all individual permits (IPs) and half of all general permits (GPs) require compensatory mitigation. The actual values are thirty-one percent and 8 percent, respectively, based on data in the Corps ORM2 database.

b. Mitigation totals used by the EPA represented only permittee-responsible mitigation (i.e. mitigation constructed by the permittee), but the totals are characterized as

representing all types of compensatory mitigation, including mitigation banks and in-lieu fee programs.

c. Mitigation totals used by the EPA also included a range of ratios from all compensatory mitigation sources (establishment, rehabilitation, enhancement, preservation), but EPA assumed a 2:1 ratio for all compensatory mitigation.

d. The mitigation cost data tables used are out of date. No quality checks from the Corps on the data that EPA used were requested or obtained. EPA appears to have placed its own data into tables originally provided by the Corps. This results in a gross misrepresentation of the Corps' raw data.

9. The EPA's use of compensatory mitigation as a benefit is also problematic. Estimated Section 404 benefits described in the document based on compensatory mitigation required for permitted impacts, while costs are based on compliance with a Section 404 permit. Both are based on the same unit impact acreage. As compensatory mitigation is typically greater than compliance (i.e. acres of required mitigation are greater than acres of authorized impact), the overall ratio of costs to benefits cannot change. Compensatory mitigation is provided to offset acreage and functions of aquatic resources lost through authorized impacts from Corps permitting with a programmatic goal of achieving no net loss; thus, it is unclear how this translates to a "benefit." Both should be costs.

10. The document is misleading in its geographic representation of data. Based on the sample set of JDs used for its analysis, in many instances EPA used one JD per state to draw conclusions regarding regional variations in the impacts of the draft final rule, such as the draft final rule section (a)(7) categories of isolated waters (prairie potholes, western vernal pools, Carolina bays and Delmarva bays, Texas coastal prairie wetlands, and pocosins). More specificity is necessary to inform the public on the true expected delta of changes in jurisdiction, either lost or gained, jurisdiction under the draft final rule.

11. Although administrative costs were included in the economic analysis accompany the proposed rule, there was no comparable cost requested or provided in the attached Economic Analysis document to accompany the draft final rule. The document estimates CWA jurisdiction to increase from its estimate of 2.7 percent in the proposed rule to 4.65 percent in this analysis of the draft final rule. Section 404 administrative costs are qualitatively described in this document; however, the cost estimate value is left blank. The Corps was not asked to provide information about the increase in administrative costs that would be expected to result from EPA's calculation of increased jurisdiction. Although the Corps is unable to validate how EPA arrived at its estimate of a 4.65 percent increase in jurisdiction, our preliminary review using EPA's estimate indicates that the Corps' administrative costs may increase by $4 million.

12. Several important aspects of jurisdiction were not considered as part of the analysis in the document, which contribute to its technical weakness. The analysis focused only on estimated increases in jurisdiction, not on potential decreases, thus it was limited in its scope. Some of

these aspects were disclosed as assumptions; however, the absence of robust analysis when that analysis is possible is not technically sound.

a. Significant nexus determinations on all types of aquatic resources (e.g. adjacent wetlands) were not reviewed to inform the estimated change in jurisdiction. Only approved jurisdictional determinations on isolated waters were reviewed.

b. A more extensive review of significant nexus determinations would have allowed for an accurate estimation of predicted changes in jurisdiction regarding adjacent waters and tributaries. The assumption was made that all tributaries would be jurisdictional under the final rule; however, some tributaries that are currently jurisdictional might no longer be jurisdictional under the draft final rule.

c. An assumption was made that all adjacent wetlands would be jurisdictional under the final rule; however, some currently jurisdictional adjacent wetlands may not be considered adjacent under the final rule as a result of the "bright-line" distance thresholds and the prohibition on using shallow subsurface and confined surface flow connections to establish adjacency. More analysis is necessary to quantify potential decreases in jurisdiction of these waters, which may offset the potential increase in jurisdiction predicted in the Economic Analysis.

13. Finally, the statement in the Economic Analysis document that "[t]his action does not have tribal implications as specified in E.O. 13175" is currently inaccurate. Both the expansion of and loss of current jurisdiction over WOUS may have significant effects on tribes and treaty/trust resources. These effects have not been identified and evaluated, and the tribes concerned apparently were not consulted as part of the Economic Analysis.

14. In sum, as stated above, the Corps cannot be identified as an author, co-author or substantive contributor to the EPA's Economic Analysis of the draft final rule defining WOUS. I request that all references to the Corps be removed from the attached document and reference made to the EPA only as the author of the product and all documents associated with the final rule.

EPA's TSD

15. As mentioned above, it appears the EPA used a considerable amount of Corps data in preparing the TSD; no data was requested by or provided to EPA to produce the TSD. The Corps also had no role in performing the analysis or drafting the TSD.

16. In the TSD, the EPA overestimates the number of case-specific significant nexus determinations (SNDs) the agencies have completed since 2008. The TSD states that the agencies have made more than 500,000 JDs since 2008, and of those approximately fifty percent included SNDs. This conflicts with Corps data and estimates and the Corps is unclear how and from what dataset EPA derived the estimate included in the TSD.

a. Corps data show that the Corps completed approximately 424,000 JDs on 710,000 aquatic resources.

b. The Corps estimates that, at the uppermost limit, it has completed SNDs on approximately seventeen percent of the aquatic resources for which JDs have been completed.

c. The seventeen percent includes both preliminary and approved JDs.

d. An even smaller percentage of the seventeen percent were required to be coordinated with EPA (e.g., non-relatively permanent waters, wetlands adjacent but not abutting those waters, etc.)

17. The TSD states that the SNDs are the "key" to the agencies' interpretation of the CWA. However, a policy decision has been made, which conflicts with the TSD. An SND cannot be performed outside 4,000 feet from the ordinary high water mark (OHWM)/high tide line (HTL) of an (a)(1)-(a)(5) water under the draft final rule, which eliminates use of the "key method" in determining jurisdiction for such waters. The 4,000-feet limit arbitrarily cuts off which waters can be determined "similarly situated" under an SND, as (a)(8) waters cannot be aggregated with other waters beyond 4,000 feet even if they are truly "similarly situated," further limiting the use of the "key" factor under the final rule. The 4,000-foot limitation under (a)(8) conflicts with the TSD regarding the importance of connectivity. The Connectivity Report, produced by EPA to support the proposed rule recommended against using linear distance limitations to establish jurisdictional boundaries.

18. The TSD states that the 4,000-foot distance threshold limit for (a)(8) waters "will protect the types of waters that in practice have been determined to have a significant nexus on a case-specific basis." This statement is unfounded. The isolated JDs reviewed for the Economic Analysis by EPA to estimate the change in jurisdiction were originally considered under the 2003 *SWANCC* guidance; therefore, jurisdiction was determined based on whether there was an interstate/foreign commerce connection, the jurisdiction was not analyzed through a SND. None of the isolated JDs resulted in a positive determination of jurisdiction. The EPA did not review any of the agency-coordinated SND JDs and as such could not have estimated how many of the SNDs would include waters that would be covered under (a)(8) of draft the final rule. Approved JDs are not required to indicate the distance from the aquatic resource to the nearest tributary OHWM. Therefore, the potential impacts to jurisdiction as a result of the (a)(8) distance limit cannot be estimated and the Corps cannot corroborate the numbers or conclusions in the TSD.

19. The TSD describes that wetland functions and wetland proximity to downstream waters determine where wetlands occur along the connectivity gradient. The TSD states that the science demonstrates strong evidence supporting the connectivity of waters in varying degrees in maintaining the structure and function of downstream waters. The appropriate conclusion would be that an SND should be performed for all waters not determined adjacent to determine where they fall along the connectivity gradient and whether that nexus is significant. However, under the draft final rule, if the subject water is greater than 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water, even if they are within an area that lies along the connectivity gradient of the tributary and may be providing important functions to the downstream waters, an SND cannot be performed under the draft final rule and the water would be non-jurisdictional. Thus, the TSD contains conclusions that conflict with the language of the final rule

20. The TSD describes that wetlands with channelized surface or regular shallow subsurface connections demonstrate connectivity and provide functions that can be generalized and can affect downstream waters. A shallow subsurface or confined surface connection should be a factor in determining jurisdiction based on the discussion in the TSD. However, such factors are not able to be used under the draft final rule as a factor in an (a)(6) adjacency determination and cannot be used in establishing jurisdiction under a SND for waters beyond 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water. The TSD provides evidence of studies that indicate the "substantial" functions provided by non-floodplain wetlands. The draft final rule forecloses on the ability to do a SND on waters beyond 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water despite the potential presence of such "substantial" functions described by the TSD. This conflicting language serves as a basis for technical conflicts during implementation.

21. The TSD emphasizes that evaluations of individual wetlands should be considered in the context of other wetlands within the same watershed and emphasizes the aggregation of waters in the watershed. The TSD also emphasizes that wetland complexes can be connected to downstream waters even if individual wetlands are isolated. As such, JDs for wetlands should consider the influence and effect in aggregate of other wetlands within the same watershed. However, the draft final rule does not allow for aggregation of (a)(6) waters when doing an SND for (a)(7) or (a)(8) waters, and does not allow for (a)(8) waters to be aggregated with waters beyond 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water. Caveats should be included regarding policy decisions that restrict and limit SNDs to the arbitrary distances and that limit the types of waters that can be aggregated within a watershed to reflect the situations where "in the region" and "similarly situated" are not allowed under the final rule.

22. The TSD emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule. This does not comport with or support the policy decisions made to restrict aggregation and SNDs under the distance limits. Furthermore, the Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that "the agencies" did this work or that it is reflective of the Corps experience and expertise.

23. The TSD does not provide support for the determination of how "significance" will be measured in the SND or what is "more than speculative or insubstantial?" How is that quantified beyond the list of factors to be considered in the definition of the final rule? The TSD also does not provide clarity for how "similarly situated" is defined. The TSD contains clearer and consistent language than the language in the preamble regarding bed/banks and OHWM, as well as the discussion on breaks in those indicators not limiting upstream and downstream reaches of the tributary. There is potential for the language in the TSD to conflict with the language in the preamble; such language on these topics needs to be consistent and clear between the TSD and the preamble.

24. The document does not provide necessary support for the draft final rule language and cannot be used by the field in implementing the final rule. The TSD recognizes that floodplains

of large river systems are much greater than 4,000 feet from the OHWM/HTL of the river. Arguably, it is the expansive floodplains of the larger river systems that provide the important exchange between waters within the floodplain and (a)(1)-(a)(5) waters rather than a linear distance.

25. The Corps provided substantial technical comments on the draft EPA Connectivity Report, which are still valid with respect to the technical validity of the concepts presented in the TSD. Thus, with respect to the TSD, as with the Economic Analysis, the Corps cannot be identified as having been involved in performing the technical analysis or preparation the actual document. It is inaccurate to reflect that the Corps experience and expertise is reflected in the conclusions drawn within the document. All references to the "agencies" or to the Corps should be removed from the TSD and the sole author of the TSD is appropriately EPA.

26. In conclusion, it should be made clear by EPA within each document the sections or subject matter areas for which the Corps provided data, but the documents should not be characterized as anything other than analyses performed solely by the EPA. The Corps should not be identified as an author, co-author or substantive contributor to either document. Additionally, all references to the "agencies" in the documents should be removed as well as references to conclusions drawn based on the agencies' "experience and expertise."

27. The point of contact for this memorandum is Ms. Jennifer Moyer at 202-761-4598

Jennifer A. Moyer

JENNIFER A. MOYER
Chief, Regulatory Program

Review Comments on *Economic Analysis of the EPA-Army Clean Water Rule* (April 27, 2015)

Paul Scodari, CEIWR-GW
May 11, 2015

The comments presented below are limited to the 2015 report estimation of CWA Section 404 permit application costs and compensatory mitigation benefits, and how these calculations changed from the 2014 report that was released for public comment. The comments are organized in two parts that address: 1) major revisions from the 2014 report, and 2) what did not significantly change from the 2014 report.

Major Revisions from 2014 Report

1. Revised estimate of increase in jurisdictional determinations.

   The 2015 report calculates that the rule will result in a 4.65% overall increase in positive jurisdictional determinations, while the 2014 report calculated the increase as 2.7%. The difference is due to different jurisdictional determination datasets used to produce the estimates—the 2015 report used a dataset corresponding to fiscal years 2013-2014, while the 2014 report used a dataset correspond to fiscal years 2009-2010. Use of 2013-2014 data in the 2015 report purports to respond to public comments expressing concern that the 2009-2010 dataset reflected a period of significant economic distress, and thus a relatively low level of Section 404 permitting.

2. Revised estimates of increase in Section 404 permits, average impact acreage, increase in total impact acreage, and increase in total permit application costs.

   These changes are driven by the revised estimate of increased jurisdictional determinations (4.65%) as well as a different permit datasets to which the revised estimate are applied. The 2014 report based this analysis on the total number of (and average impact acreage for) permits issued in FY2010, while the 2015 report relied on permit data from FY2009-2014. Specifically, the 2015 report used the highest number of individual permits and general permits issued in any one year over this five year period, and average impact acreage for permits issued in FY2013 (It is not clear why year 2013 was chosen to calculate average impact acreage for permits).

   The result of these revisions was to change the estimates of total additional individual and general permits and total additional impact acreage for those permits. For individual permits, the estimated number of added permits increased from 75 to 217, but the average impact acreage fell from 12.81 to 5.94, resulting in a net increase in added impacts due to the rule from 960 to 1290 acres. For general permits, the estimated number of added permits and average impact acreage both roughly doubled, resulting in an increase in added impacts due to the rule from 372 to 1200 acres.

   These revisions, when combined with the unit cost estimates and cost formulas for permit application (which did not change from 2014 report), result in an increase in estimated total annual

permit application costs. From the 2014 report to the 2015 report, the "high" estimate for annual permitting costs increased from $52.9 million to $80.3 million.

3. Representation of USACE views

For the 2014 report, USACE made a point of telling EPA to delineate which sections of the analysis USACE did and did not contribute to, and to characterize the entire report as an EPA analysis. In the 2015 report, by contrast, EPA seems to go out of its way to link report responsibility to USACE. While it is true that USACE cannot run from this rulemaking or this report, some of things in the report that seem overblown might be addressed at the margin. One example is the strange report title. Other examples involve assertions in the narrative about what the "agencies believe." For example, the last sentence of the second full paragraph on page 6 state, "For these and similar reasons, the agencies believe that positive jurisdictional determinations under the final rule will be less than assumed for the purpose of this economic analysis." These statements should be identified, reviewed, and modified as deemed necessary to accurately reflect USACE views.

What Did Not Significantly Change from 2014 Report

1. Section 404 dominates estimated rule costs and benefits

In both the 2014 report and the 2015 report, estimated effects for Section 404 drive the estimates of rule costs and benefits. In the 2015 report, the "high" estimate for all Section 404 compliance costs (sum of permit application and mitigation costs) represents 78% of total rule costs, and estimated Section 404 benefits accounts for 87% of total rule benefits. Note that the 2015 report did not include estimates of increase in USACE costs for administering the Section 404 program; revised estimates apparently were not yet available for inclusion in this draft.

2. Proportionality of estimated Section 404 benefits to costs

In both the 2014 and 2015 reports, estimated Section 404 benefits, which are based on compensatory mitigation for permitted impacts, outweigh estimated Section 404 compliance costs. This is because unit (mitigation) benefits are greater than unit (compliance) costs for a "typical" Section 404 permit, where both are based on unit impact acreage. So even though the 2015 report significantly increased estimated positive jurisdictional determinations and permitted impacts, this did not (could not) change the overall relationship between estimated benefits and costs for Section 404, and thus for the rule as a whole.

3. Section 404 benefits analysis

USACE has always recognized that the Section 404 benefits analysis is meaningless. However, agencies are required by Administrative policy to develop benefits estimates for rulemakings whenever possible. The OMB representative for this rulemaking encouraged and appears comfortable with the benefits transfer approach applied for Section 404 benefits analysis, and from the beginning EPA was intent on including a benefits analysis that would show that rule benefits outweigh costs (even though the CWA

does not require such a showing). There is nothing more to say or do relating to this benefits analysis, however. USACE is just going to have to live with it and leave responsibility for defending it to EPA and OMB.

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

[The prepared statement of Senator Sullivan follows:]

STATEMENT OF HON. DAN SULLIVAN,
U.S. SENATOR FROM THE STATE OF ALASKA

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

Congress has the constitutional authority, and indeed obligation, to conduct oversight of the actions of executive branch agencies.

Oversight is particularly important when we have a pattern of behavior from certain agencies, like EPA, of consistently issuing rules that completely disregard the limits on their authority imposed by Congress. In fact, on June 26, just 3 days before the Supreme Court overturned EPA's Mercury and Air Toxics Rule, EPA Administrator McCarthy bragged to HBO's Bill Maher that the Supreme Court's decision would not matter because it took 3 years to get to the Supreme Court, and by then most facilities were already in compliance—"investments have been made."

This arrogance and disregard for the law are evident in the WOTUS rule as well.

It's no secret that I think that the final WOTUS rule goes far beyond the authority granted by Congress. At a hearing back on March 4th, I asked Administrator McCarthy for her legal analysis that supports the rule. No response. On July 14th, Senator Inhofe and my Republican committee colleagues joined me in a letter asking again for that legal analysis. We never received it.

Today, we are focusing on the factual record for the WOTUS rule. Whatever your views are on the limits of authority under the Clean Water Act, we all should be able to agree that an agency rulemaking must be supported by a factual record.

In numerous places, the preamble to the final rule states that the rule's requirements are based on the science, agency expertise and experience, and case-specific jurisdictional determinations.

To understand what documents the preamble is referring to, back in July Chairman Inhofe sent a letter to EPA asking for copies of the scientific studies that the agencies relied on and a letter to Secretary Darcy asking for the examples of case-specific determinations that the agencies relied on.

EPA has not yet identified any specific scientific studies in response to Chairman Inhofe's letter. We are waiting for that response as well as a response to our long-standing request for a legal analysis before scheduling a hearing with EPA.

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

I would hope that all members of this subcommittee agree that when agencies make claims about a rulemaking record that are flatly contradicted by senior career staff within an agency, that is cause for concern. In fact, that strikes at the heart of the integrity of the rulemaking process.

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

I understand that this hearing puts Ms. Darcy in an awkward position. EPA may have been in the driver's seat in developing the legally questionable WOTUS rule, but Assistant Secretary Darcy signed this rule along with Administrator McCarthy. She, as well as EPA, is responsible for the veracity of the claims made in it.

I was surprised to learn of the degree of conflict between two agencies. To me, this is further confirmation that the EPA is truly an agency that is out of control.

I appreciate Ms. Darcy's willingness to do the right thing by sharing those memoranda with the committee as part of our oversight responsibilities. I also appreciate her willingness to appear before the subcommittee to discuss the Corps' participation in the Waters of the United States rule.

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

or defending litigation, these are not a basis for withholding information from Congress. It is important that Congress hear directly from you about why the views of your technical experts were largely ignored and why the record for the WOTUS rulemaking and the Corps memos contradict statements made in the preamble to the final rule.

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

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

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

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA

The Waters of the United States rule is not just another example of regulatory overreach by the Obama administration. This rule is not only unlawful; it is completely unfounded.

For most of its rules the Administration puts together a factual record and argues that the facts support more Federal control. This factual information can be reviewed and evaluated as part of the administrative record.

This did not happen in the waters of the United States rulemaking. According to the one court that has looked at the merits of this rule, EPA and the Army simply made up new tests for expanding Federal control over land and water without any support in the record.

On August 27, Judge Erickson of the District of North Dakota issued an injunction that prevented the WOTUS rule from going into effect in 13 States because the rulemaking record is "inexplicable, arbitrary, and devoid of a reasoned process."

In fact, Judge Erickson noted: "On the record before the court, it appears that the standard is the right standard because the Agencies say it is."

Judge Erickson is right. We have memoranda from the Army Corps of Engineers that document the fact that EPA believes it has authority to assert Federal control wherever they want. In fact, EPA even told the Corps that it has blanket authority to take control over millions of acres of isolated wetlands and can justify that power grab by giving up jurisdiction in other areas—even though these kinds of policy choices are the purview of Congress, not the executive branch.

Even if EPA had that kind of legislative authority—which they do not—the final rule does not make this tradeoff. In areas where the Corps expressed concern that the draft rule gave up jurisdiction, EPA made changes. Where the Corps expressed concern that the draft final rule went too far, EPA refused to address those concerns.

So what we have is a final rule that the Corps of Engineers career experts say is not "reflective of Corps experience or expertise." In fact, the Corps of Engineers asked that their name and logo be removed from the background documents that EPA developed to support the rule.

These facts alone are should have caused the EPA and the Army to withdraw the rule and start over. But unfortunately, the situation is even worse.

Not only is the final WOTUS rule unsupported by the rulemaking record, EPA and the Army have tried to hide that fact by affirmatively stating that the rule is based on the Corps' expertise and experience, including case-specific jurisdictional determinations. Based on the memoranda developed by the career staff at the Corps, we know that these statements are false.

I find this deeply troubling. It is one thing to disagree on law and policy. But it is quite another to make false claims to the American people.

We know EPA was in the driver's seat for this rulemaking, and I am very sorry that the Army is caught up in this mess. But after the career experts at the Corps of Engineers used words like "not accurate," "unfounded," "not supported by science or law," "inconsistent with the Supreme Court's decisions in Rapanos and

SWANCC," and "regulatory over-reach" to describe this rule I wish the Army had withdrawn its support.

But they did not.

Now that these facts have come to light it is time for EPA and the Army to admit that the WOTUS rule is indefensible.

Rather than put the American people through years of confusion while the rule challenges wend their way through the courts, the Administration should do the right thing—withdraw this arbitrary and capricious rule and start over.

Senator SULLIVAN. Secretary Darcy, why don't we begin 5 minutes with your opening statement? And if Senator Whitehouse or others come, we will hear from them.

STATEMENT OF JO-ELLEN DARCY, U.S. ASSISTANT SECRETARY OF THE ARMY

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

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

The process leading to the June 15th publication of the final rule started years ago when Members of Congress, key local and national stakeholders, and the American public spoke loudly and clearly, demanding that the Environmental Protection Agency and the Department of the Army deliver a new common sense set of rules that would add clarity and predictability to the implementation of the Clean Water Act following the U.S. Supreme Court's SWANCC decision in 2001 and the Rapanos decision in 2006, which called into question the agencies' decisions over which waters were considered to be waters of the United States.

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

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

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

I coordinate with senior leadership at the U.S. Army Corps of Engineers.

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

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

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

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

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

Clean water is vital to our health, to our communities, and to our economy. We need clean water upstream to have healthy and vibrant communities downstream. Almost 117 million Americans, that's 1 in 3 people in this country, get their drinking water from streams impacted by the types of waters whose jurisdictional status has been clarified by the Clean Water Rule. Our cherished way of life and our economy are dependent on having access to an abundance of clean water.

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

[The prepared statement of Ms. Darcy follows:]

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

THE HONORABLE JO-ELLEN DARCY
ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE
UNITED STATES SENATE

ON

The Army Corps of Engineers' Participation in the Development of the Final Rule, entitled "Clean Water Rule: Definition of Waters of the United States"

September 30, 2015

Chairman Inhofe, Ranking Member Boxer, Chairman Sullivan, Ranking Member Whitehouse, I am Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works. Thank you for the opportunity to come before the Subcommittee on Fisheries, Water, and Wildlife to discuss with you the Army's participation in developing the final rule, entitled, "Clean Water Rule: Definition of 'Waters of the United States.'"

As you know, the final Clean Water Rule was published in the Federal Register on June 29, 2015 and became effective in all but 13 states on the 28th of August. In those 13 states, which are subject to a preliminary injunction issued by the North Dakota District Court, the U.S. Army Corps of Engineers continues to implement its Clean Water Act section 404 responsibilities under the prior regulation when making jurisdictional determinations and issuing permits under the Clean Water Act.

The Clean Water Rule is being challenged by certain trade associations, States, and environmental groups. Currently, there are more than 12 pending matters in district courts throughout the nation. In addition, 15 petitions for review challenging the rule have been consolidated in the Sixth Circuit Court of Appeals.

The process leading to the June 2015 publication of the final rule started years ago when members of Congress, key local and national stakeholders, and the American public spoke loudly and clearly demanding that the Environmental Protection Agency (EPA) and the Department of the Army deliver a new common-sense set of rules that would add clarity and predictability to the implementation of the Clean Water Act following the United States Supreme Court's 2001 and 2006 decisions, specifically SWANCC and Rapanos, which called into question the agencies' decisions over which waters were "waters of the United States." President Obama therefore called upon the Administrator of the EPA and the Secretary of the Army to clear up the confusion by issuing a rule that would not only protect our Nation's waters, as contemplated by the Clean Water Act, but also improve regulatory predictability, certainty, and transparency. That was our charge and that is what the new rule accomplishes.

Alongside EPA Administrator Gina McCarthy and her predecessor, the Army was an active partner in developing the rule. As you know, the rule is definitional in nature and clarifies the scope of the term "waters of the United States" as used in the Clean Water Act. The rule affects all programs established by the Clean Water Act, one aspect of which is the U.S. Army Corps of Engineers' permit program for the discharge of dredged or fill material, commonly referred to as the "404 Program."

As Assistant Secretary of the Army for Civil Works, I am responsible for setting the overall strategic direction for the Army's Civil Works Program. I am therefore responsible for developing policy and guidance for administering the 404 Program. When undertaking these responsibilities, just as with my other Assistant Secretary of the Army for Civil Works responsibilities, I coordinate with senior leadership at the U.S. Army Corps of Engineers. The exercise of my discretionary authority is always informed by, among other valuable inputs, the technical expertise offered by the experienced regulators and program officials at the Corps and on my staff. This is precisely the process I established and used in formulating the Army's position on many of the policy decisions that arose during the drafting and vetting of the proposed and final rule. The inevitable internal differences of opinions encountered along the way to this final rule were not unusual in the course of a rulemaking process.

The final rule was not only the product of EPA and Army collaboration but was improved by a lively and productive interagency process. Numerous agencies actively engaged in the formulation and development of the final rule. The choices and decisions I made on behalf of the Army were reached after receiving the Corps' input and always in close consultation with EPA. I am proud of the Army's role in developing the rule. We stand shoulder to shoulder with our colleagues at EPA in support of the merits of the final rule and the process used to develop it. Both EPA and the Army will rely heavily on the expertise and judgment of our senior leadership teams as we move forward in implementing the new rule. I have personally spoken with the Chief of Engineers, LTG Thomas Bostick, and he has confirmed that the Corps is unequivocally committed to implementing the new rule as effectively and efficiently as possible. The Army and

EPA are continuing to closely monitor implementation of the new rule. Furthermore, to ensure openness and transparency, we are establishing a publicly-available automated tracking system for all determinations made under the new rule.

With respect to matters associated with the single administrative record supporting the final Clean Water Rule, I would note that the rule was issued under the Administrator's general administrative authority (33 U.S.C. §1251), as well as her authority to prescribe regulations (33 U.S.C. §1361(a)) under the Clean Water Act. As such, the Army is following EPA's Administrative Records Guidance manual. In accordance with this guidance, an administrative record has been assembled for judicial review purposes that contains all relevant non-deliberative information the agencies considered, including information that supports or is contrary to the action taken. Because the administrative record does not include deliberative documents, the record for this rule does not include materials such as internal e-mails, staff attorney opinions or work product, or documents exchanging preliminary opinions or recommendations. These materials are excluded regardless of whether they include supporting or conflicting opinions on the merits of scientific, technical, or policy issues, or contain recommendations for options not ultimately adopted by the agencies. The administrative record for this rule was recently filed in the Sixth Circuit Court of Appeals.

The final rule reflects many changes as a result of listening to the public and carefully considering the interests of all Americans, including America's farmers and ranchers. As stated by the National Farmers Union, "[w]hile the rule is not perfect from our perspective, the final rule is an improvement over the proposed rule. The final rule puts bright-line limits on jurisdiction over neighboring waters, offering farmers increased regulatory certainty and mitigating the risk of enforcement or litigation. The final rule also provides clarity on which ditches fall under the Clean Water Act jurisdiction, removing a gray area that has caused farmers and ranchers an incredible amount of concern." Again, the public demand for a common-sense rule was heard. The Clean Water Rule is a major and positive step forward. It represents years of scientific study and public outreach.

The Clean Water Rule addresses the tens of millions of miles of the Nation's streams and millions of acres of wetlands whose status under the Clean Water Act requires further clarification following the 2001 and 2006 Supreme Court decisions in SWANCC and Rapanos. The Clean Water Rule will protect those streams and wetlands that have been scientifically shown to have the greatest impact on the water quality of downstream traditional navigable waters and that form the foundation of our Nation's water resources. The rule ensures that waters protected under the Clean Water Act are more precisely defined, more predictable, easier for landowners and businesses to understand, and consistent with the law and latest science.

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

Now that the Clean Water Rule has gone into effect, the Army's focus has turned towards ensuring that implementation of the rule will achieve the goal of providing greater predictability, certainty, and transparency in identifying which waters are jurisdictional under the Clean Water Act.

Thank you again for the opportunity to be here today. I will be happy to answer any questions you may have that do not involve matters in litigation. This concludes my statement.

Subcommittee on Fisheries, Water, and Wildlife of the Senate Committee on Environment and Public Works Hearing entitled, "Oversight of the Army Corps of Engineers' Participation in the Development of the New Regulatory Definition of 'Waters of the United States.'" Wednesday, September 30, 2015 Questions for the Record for Jo-Ellen Darcy

Chairman Inhofe:

1. Analyses relied upon to inform your decisions.
You testified that "I had economists in my office review the economic analysis and the technical analysis." At my request, you also agreed to provide copies of these reviews. Please provide those to the Committee.

Response:
The economists in my office provided written analysis of the proposed rule. That analysis became part of the final Environmental Assessment (EA) for the Clean Water Rule: Definition of Waters of the United States. Their analysis in the EA is copied below.

4.2 SOCIO-ECONOMIC
Wetlands have a socio-economic value to the Nation and its residents and visitors, especially in providing positive ecosystem services that contribute to human well-being. Some of these services include preservation of food supply (i.e. rice farming); preservation of habitats and food supply for a variety of species including fish, migratory birds and other organisms; increasing water supply, purification, and quality; providing additional resiliency in coastal protection and flood regulation (per Section 4.3); and increasing recreational opportunities and tourism (per Section 4.1.3).

These services are difficult to quantify as monetized values, because they are not market goods with a direct dollar value, but instead are qualitative and can be derived by noting in addition to their services, their preventative contribution to flooding and general environmental degradation. Waters of the United States contribute to a desirable quality of life and sustainability of that quality of life. The EPA estimates that wetlands could have a value of up to $15 trillion (The Millennium Ecosystem Assessment, 1997) and studies of the role of coastal wetlands in reducing the severity of impacts from hurricanes in the United States found that they provided storm damage reduction services with an estimated value of $23.2 billion per year. (Costanza 2008)

7.0 CONCLUSION
In respect to the Socio-Economic analysis of the costs and benefits conducted by the EPA, indications are that indirect incremental benefits exceed indirect incremental costs. The analysis acknowledges that there is a possibility that costs (and benefits) may be overstated because each new jurisdictional water may not be affected by all Clean Water Act programs simultaneously, and in some cases a particular activity affecting a waters of the United States may be exempt from permitting under the Clean Water Act. The water in the "other waters" category represents the greatest potential for changes in jurisdictional determinations as a result of adoption of the rule. However, it is also likely that the benefits may be understated because the benefits are based primarily on

compensatory mitigation acres (from the Section 404 program) and that the willingness to pay analysis used to value these acres are from existing studies conducted between 1986 and 2000. In recent years the public has become more aware of the value of wetlands and updated studies might show a significant increase in willingness to pay associated with preserving wetlands, particularly when wetlands are tied to a concrete utility, such as improved water quality, hunting and fishing habitat, general recreation, or flood control.

2. Changes to TSD and Other Background Documents to Address Corps Criticisms
You have said changes were made to the Technical Support Document to respond to the Corps' criticisms.

A. May 15, 2015 memorandum from the Chief of the Corps' Regulatory Program to General Peabody – which General Peabody forwarded to you –states:

The [Technical Support Document] states that the 4,000-foot distance threshold limit .... "will protect the types of waters that in practice have been determined to have a significant nexus on a case-specific basis." This statement is unfounded.

The Corps' wetlands expert goes on to explain that this statement cannot be true because before the new WOTUS rule went into effect, isolated wetlands were analyzed based on whether they have a connection to interstate commerce, not whether they have a significant nexus to navigable waters.

Even though the Corps told you it is "unfounded" this statement about the 4,000 foot limitation is in the final Technical Support Document, at page 356.

Do you believe this is a true statement? What is your basis for that belief?

Response:
In promulgating the 4,000 foot boundary, the agencies have balanced protection and clarity, scientific uncertainties and regulatory experience, and established a line that is, in their judgment, reasonable and consistent with the statute and its goals and objectives.

To support your claim that you made changes to address the Corps' concerns, please provide the Committee with a red-line of the changes made to the preamble, the Economic Analysis and the Technical Support Document after May 15, 2015.

Response:
A red-line version of the proposed rule that shows the changes between the proposed rule and the final rule is attached to these responses.

3. Changes to final rule to address the Corps' concerns
You testified that changes were made to the final rule to address some of the Corps' concerns. In your July 17 letter transmitting the Corps memos you identified those changes as: "inclusion of the 100-year flood plain in section (a)(8),

modification to the ditch exclusion in section (b)(3)(ii), and inclusion of a flexible grandfathering provision in the preamble."

The rule changes have the effect of broadening jurisdiction to address concerns raised by the Corps that parts of the draft final rule were too narrow.

Were any changes made to address concerns that the draft final rule was overly broad? If yes, please identify those changes.

Response:
The Clean Water Rule provides increased clarity for landowners while fulfilling the Clean Water Act's goals of protecting waters of the United States. In that light, the Army and EPA made several changes that narrowed the reach of Clean Water Act jurisdiction. For example, the final rule established a bright line limitation on when a water may be considered "neighboring." In the proposed rule, the term "neighboring," an element of the definition of "adjacency," was defined as "waters located within the riparian area or floodplain of a water identified in [§ 325(a)(1-5)], or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule, 79 Fed. Reg. 22,188, 22,263 (Apr. 21, 2014). The Agencies requested "other reasonable options for providing clarity for jurisdiction over waters with these types of connections," including those "establishing specific geographic limits" for adjacency such as "distance limitations." *Id.* at 22,208. Based on that request and the corresponding comments, the final rule included bright line limitations on when a water could be considered neighboring. In particular, no water farther than 1500 feet from the ordinary high water mark of a water identified in § 328.3(a)(1-5) may be considered neighboring.

Furthermore, the scope of § 328.3(a)(7) waters was narrowed. In the proposed rule, all waters, including wetlands, were jurisdictional that had a significant nexus with a water described in § 328.3(a)(1-3). 79 Fed. Reg. at 22,263. In the proposed rule, the agencies requested comment on several directions for the definition of "other waters," including the aggregation of similarly situated waters. *Id.* at 22,215. After considering all the information before them, the agencies determined that only certain waters would be subject to a case-specific significant nexus analysis: certain similarly situated waters, § 328.3(a)(7), as well as waters located within the 100-year floodplain of (a)(1-3) waters and waters located within 4000 feet of the high tide line or ordinary high water mark of (a)(1-5) waters, § 328.3(a)(8).

The categorical exclusions were also increased from the proposed rule to the final rule, again narrowing the scope of the rule and improving clarity for landowners while still protecting the environment. Categorical ditch exclusions were added as well as further exclusions for "stormwater control features constructed to convey, treat, or store stormwater and cooling ponds that are created in dry land. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,059 (June 29, 2015).

Additionally, the final rule specifically excluded groundwater and lists a number of other

exclusions previously only discussed in preamble language. The exclusions will apply to waters regardless of whether they might otherwise be considered jurisdictional. Also, for the first time, the agencies excluded by rule ditches that have intermittent or ephemeral flow, and ditches that are not tributaries to traditional navigable waters, interstate waters, or the territorial seas, regardless of their flow regime. These excluded ditches cannot be "recaptured" under any of the jurisdictional categories of "waters of the United States" under the rule.

4. Statements about the record support for the definition of tributary (including ephemeral streams)
To justify jurisdiction over any water that meets the final rule definition of tributary – which include ephemeral streams that hold water only after it rains -- the preamble to the final rule states: Practical experience demonstrates that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters.

However, a May 15, 2015 memorandum from the Chief of the Corps' Regulatory Program to General Peabody states:

The [Technical Support Document] emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule... [T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that 'the agencies' did this work or that it is reflective of Corps experience or expertise.

Similarly, the Assistant Chief Counsel for Environmental and Regulatory Programs wrote in an April 24, 2015 memorandum to General Peabody that there are "legal and scientific questions" regarding the definition of tributary because:

That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert Southwest, even though those ephemeral dry washes, arroyos, etc. carry water infrequently and some time in small quantities...

Have you seen examples of the "practical experience" of the Corps that supports the determination that *all* ephemeral streams, even those that carry water infrequently and in small quantities, have a significant effect on navigable waters? According to the Assistant Chief Counsel, the Corps has not seen that analysis.

Response:
The Clean Water Rule does not include "the determination that all ephemeral streams, even those that carry water infrequently and in small quantities, have a significant effect on navigable waters."

The Rule's definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered a "tributary" under the Rule. The Rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. These significant effects on traditional navigable waters, interstate waters, and the territorial seas occur even when the tributary is small, intermittent, or ephemeral. The Corps has practical experience making jurisdictional determinations under the *Rapanos* analysis where the Corps considers whether any stream has relatively permanent flow to be jurisdictional or has non-relatively permanent flow to require a significant nexus determination. The Corps provided raw stream-related data to EPA from ORM2. These data reflected only approved JDs sought by applicants and the data included all types of streams – not just ephemeral. EPA did its own analysis of the data as part of the Economic Analysis.

Since we know the "practical experience" of the Corps does not support this determination, what is the preamble referring to?

Response:
See response to previous question.

5. Statements about the record support for regulating all waters within 4,000 feet or within the 100-year flood plain of other jurisdictional water on a case by case basis
The preamble to the final rule says,

Recognizing that there is no optimal line, in selecting both the 100-year floodplain for and the 4,000 foot boundaries the agencies looked principally to the extensive experience the Corps has gained in making *significant nexus determinations since the Rapanos decision.*

This statement is contradicted by the Chief of the Corps' Regulatory Program, who told you that before this new rule, the Corps did not make "significant nexus" determinations for isolated waters, like water that is 4,000 feet away but has no hydrologic connection to navigable water.

So, what "significant nexus determinations" are you talking about in the preamble? Has anyone assured you that these determinations exist? Have you seen copies? Are they in the administrative record? What categories of water do they apply to? Do any apply to water with no hydrologic connection to navigable water? Can you give me copies of these determinations?

Response:

After the U.S. Supreme Court's decision in *Rapanos*, the agencies signed the memorandum "Clean Water Act Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*." In that memorandum the agencies stated their intent to use Justice Kennedy's significant nexus text for the following categories of waters: non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. The EPA reviewed two hundred AJDs, including AJDs that used the significant nexus test. The approved jurisdictional determinations upon which EPA relied are part of the Rule's administrative record and are publicly available. They can be found on www.regulations.gov with the Docket Document ID EPA-HQ-OW-2011-0880-20876. Moreover, EPA's analysis of those approved jurisdictional determinations is also publicly available as part of the Rule's administrative record. One can access that document at www.regulations.gov with the Docket Document ID EPA-HQ-OW-2011-0880-20877.

6. Documentation of all case-specific determinations referenced in the preamble In my July 6 and July 27 letters to you I asked for jurisdictional determinations and other documentation memorializing field observations relied upon to support the factual determinations made in the final rule. You responded on August 28 by stating that the rule is not supported by individual field observations. On September 30, Senator Wicker asked for copies of the "case-specific determinations across the country and in diverse settings" that are referred to in the preamble to the rule. Specifically, at page 37065, the preamble states that: science along with the practical expertise developed through case specific determinations across the country and in diverse settings is reflected in the agencies' conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn boundaries demarking where "waters of the United States" end.

At page 37,080, the preamble also says: "The adjacency provision is based on the best available science, intent of the CWA, and case law, and is consistent with the experience of the agencies in making case-specific significant nexus determinations."

Senator Wicker asked for copies of these case-specific determinations and you responded that you will provide them for the record if at all possible, referencing the on-going litigation over the final rule.

Any case-specific determinations relied on by EPA or the Corps to develop the rule generally and the definition of adjacency specifically are not protected from public disclosure and certainly cannot be withheld from Congress, even if the rule is being litigated. So, I join Senator Wicker's request and ask you to provide the Committee with these determinations.

Response:
The approved jurisdictional determinations upon which EPA relied are part of the Rule's

administrative record and are publicly available. They can be found on www.regulations.gov with the Docket Document ID EPA-HQ-OW-2011-0880-20876. Moreover, EPA's analysis of those approved jurisdictional determinations is also publicly available as part of the Rule's administrative record. One can access that document at www.regulations.gov with the Docket Document ID EPA-HQ-OW-2011-0880-20877.

7. Percent of land within 4,000 feet of a body of water
I know that Corps expressed concerns that there might be some water that they wanted to regulate that is located more than 4,000 feet away from other water and asked EPA to allow case-by-case significant nexus determinations for all water in the 100 year flood plain. EPA made this change.

My concern is the opposite. Given the new definition of tributary, that includes all ephemeral streams, I am concerned that almost all land in the United States will be within 4,000 feet of a body of water. The American Farm Bureau Federation has done this analysis for few states. For example, 100 percent of the land in Virginia is within 4,000 feet of a body of water. 95% of the land in Oklahoma is within 4,000 feet of a body of water. So, all waters in Virginia and most in Oklahoma are potentially regulated, unless they meet the terms of one of the exemptions.

Has the Corps done any mapping to figure out what parts of the country are within 4,000 feet of other water? Will you develop that information and share it with the public? Otherwise, how is an ordinary citizen to know whether his property is potentially regulated?

Response:
The Corps has not done the mapping as you describe. Citizens can ask the Corps to complete a jurisdictional determination of a property. Maps of jurisdictional waters are developed by the Corps when a landowner requests a jurisdictional determination. The jurisdictional analysis, including any maps that are developed, are based on site-specific information at the time the request is made.

8. Acres of land affected by (a)(7) categories
In response to a question from Senator Rounds you promised to provide the Committee with the number of acres of land potentially jurisdictional as categories of wetlands identified in new subsection (a)(7) of the WOTUS Rule (Prairie potholes, Carolina bays and Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands). Please provide both the total acreage for each category as well as the break down for each category by state. You must have this information since you already determined that these wetlands are "similarly situated."

Response:
The Corps provides site-specific, approved jurisdictional determinations to determine whether there are or are not waters of the U.S. present in a specific review area, generally only at the request of a landowner. The preamble to the new rule describes the regions

where the (a)(7) subcategories of waters may be found (80 FR 37071). The Corps does not regulate land, only water bodies that may be subject to CWA jurisdiction. Accordingly, the Corps does not have acreage figures.

It is important to emphasize that the Rule would not assert jurisdiction by rule over the five categories of (a)(7) waters. Jurisdiction only exists where it is determined that these waters, once combined with similarly situated waters in the same watershed, have a significant nexus to (a)(1-3) waters. This represents a reduction in jurisdiction over so-called isolated waters compared to the previous definition of "Waters of the United States."

9. NEPA compliance
Under the Clean Water Act, EPA rules are exempt from NEPA, but Corps of Engineers rules are not. One of the issues raised in the Corps memos is whether or not the Corps needed to do a complete NEPA analysis, including an Environmental Impact Statement.

Is it your position that the changes made between the draft final rule and the final rule addressed any concerns that the rule gave up jurisdiction and therefore the Corps could make a Finding of No Significant Impact under an Environmental Assessment?

Response:
Your question states that "Corps of Engineers rules are not [exempt from NEPA]." The Clean Water Rule was promulgated under the Administrator's CWA authority to determine the scope of jurisdiction for all programs under the Act—including the section 404 program. Consistent with the Administrator's authority and the CWA exemption for EPA regulations from NEPA's requirements, the CWR is exempt from NEPA's requirements. I was the decision maker for the Department of the Army NEPA action and, after considering all of the data and analysis I received, made the decision that the implementation of the Rule would not result in a significant impact to the human environment.

The preamble to the final rule claims that "fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations." While I disagree with that statement, if it were true, wouldn't an EIS be needed?

Response:
See response to previous question.

Did all of your staff agree with the conclusion that you did not need to do an EIS?

Response:
See response to previous question.

The EA that you signed on May 27 lists Gib Owen as the first author of the

document. Did someone else have lead responsibility for the NEPA analysis for the WOTUS rule before Mr. Owen was assigned that task? Did that other person agree that no EIS was needed? Did you reassign responsibility for the NEPA analysis away from that other person?

Response:
Based upon the skills and expertise of those in my office, I asked Mr. Gib Owen to lead an effort to develop a NEPA document for the action. Mr. Owen has extensive experience with environmental compliance and therefore had the necessary skills and expertise to lead the environmental compliance effort for the Clean Water Rule. His effort led to the EA and FONSI, which represent my considered view.

Has that person seen any other change in his or her position and responsibilities this year?

Response:
That individual's grade, title, and position description have not changed.

10. Interplay with OSM Stream Protection Rule
In contributing to the development of the Clean Water rule, was the Corps involved in any way with the development of the Stream Protection Rule? If so, how did the Corps contribute in the development of that rule?

Response:
The Corps was not involved in the development of the Office of Surface Mining's (OSM's) Stream Protection Rule. The Corps participated as a Federal agency during the interagency review process coordinated through the Office of Management and Budget (OMB).

Can you describe the need to regulate waterways that lie under the surface but do not extend to the depth of the water table? It is the Committee's understanding that these waters were already protected from mining practices through reclamation and bonding requirements of the existing Stream Protection rule. What was the identified gap in current laws and regulations that required additional protections? Please be specific, and include examples.

Response:
The Clean Water Rule does not regulate groundwater and provides an exclusion for "(v) Groundwater, including groundwater drained through subsurface drainage systems." These questions refer to the Stream Protection Rule, not the Clean Water Rule. They are more appropriately directed to DOI.

Senator Rounds:

1. Economically and Politically Significant Rule

Ms. Darcy, on September 30th you told the Committee that you understood the

significance of the waters of the United States rule. You stated: "It is a very important rule. I think it is a generational rule for the Clean Water Act."

When I said -- "in terms of the significant changes it could make with regards to the number of 404 permits, the number of individuals, whether they are farmers, ranchers, this is one of the biggest, perhaps, political and economic deals you have been involved with in perhaps a generation," you agreed and stated: "I think it is one of the most important rules in order to protect the water quality of this country, yes."

When I characterized the rule as "Very, very important in terms of economic impact and very, very important in terms of the political impact," you said: "Yes, it is."

Given your testimony that the rule is "generational," "one of the most important rules," and very significant, both politically and economically, please explain to me how you and EPA could avoid the requirements of Executive Order 13132 on Federalism and the Regulatory Flexibility Act?

A. How could you certify the rule "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government"?

Response:
As the agencies stated in the preamble, this rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

B. How could you certify that the rule "will not have significant economic impacts on a substantial number of small entities?"

Response:
As stated in the preamble, under the Regulatory Flexibility Act, the impact on a substantial number of small entities that is of concern is any significant adverse economic impact on

small entities, 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 proposed rule on small entities." 5 U.S.C. § 603. The scope of jurisdiction in this rule is narrower than that under the previous regulations. See 40 CFR § 122.2 (defining "waters of the United States"). Because fewer waters will be subject to the CWA under the 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 will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

C. Why did you fail to do a regulatory impact analysis of the rule?

Response:
See Response to previous question.

D. Why did the Army Corps and OMB classify the rule as "not a major rule?"

Response:
The Army did classify the Rule as a major rule. 80 C.F.R. at 37, 104 ("This action is a "major rule" as defined by 5 U.S.C. 804(2) based on potential indirect costs.")

2. Basis for determining prairie potholes and other categories of isolated wetlands are "similarly situated"

During the September 30th hearing I asked you what your basis was for determining that all wetlands in these categories within a watershed are similarly situated, because on April 24, 2015, the Assistant Chief Counsel for the Corps said "the Corps has never seen any data or analysis to explain, support, or justify this determination."

You pointed to the Connectivity Report. However, that answer did not respond to my question. Please provide me with the information that you relied on to determine that the five categories of isolated wetlands in subsection (a)(7) of the new rule meet the new rule's definition of "similarly situated." Specifically, please provide me with the information that supports a determination that all wetlands in these categories "function alike" and if in the same watershed, "are sufficiently close to function together in affecting downstream waters."

A. Since all wetlands can have at least one of the functions listed in the rule's definition of "significant nexus," are all wetlands in a watershed "similarly situated," whether or not they fall within one of the (a)(7) categories?

Response:
No. The water must still fall in one of the (a)(7) categories.

Senator Fischer:

1. Similarly Situated Isolated Wetlands
At the September 30 hearing I asked you about the determination in the final rule that prairie potholes, vernal pools, and certain other isolated wetlands must be evaluated in the aggregate even though "the Corps has never seen any data or analysis to explain, support, or justify this determination"?

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

Can you please clarify this response? At page 6 of his April 24, 2015 memorandum, the Assistant Chief Counsel for the Corps very specifically stated that the Corps had not seen any analysis to support the conclusion that the five categories of isolated wetlands in new subsection (a)(7) of the rule meet the rule's definition of "similarly situated." He further said that the determination that these categories are "similarly situated" contradicts the definition of "similarly situated" in the final rule. Finally, he said:

In essence, section (a)(7) in the draft final rule provides a definition of each of the five categories of isolated waters and then asserts that every water that fits into each definition is similar to all other waters that fit into that same definition within any single point of entry watershed. This approach is circular reasoning making use of a tautology, so that the determinations of "similarly situated" do not have much substance.

This "circular reasoning" approach remains in the final rule. What, if anything, changed between the draft final and final rule to address the Corps' concerns about this determination?

Response:
See Response to previous question.

2. Definition of Water
During the September 30 hearing I asked you how "water" is defined in the final rule. You responded by pointing to the regulatory definition of "waters of the United States." That did not respond to my question. In her April 24th memorandum on "Implementation Challenges" the Chief of the Corps' Regulatory Program stated that the Corps needs a definition of "water" because "it may be hard to distinguish what constitutes a non-wetland adjacent water without a definition of 'water.'" Further, she asked:

A low depressional area on a farm field that ponds water after a rainstorm for then days, would that be considered a non-wetland adjacent water? A puddle?

The Corps has a definition of wetland and uses that definition to determine what is an "adjacent" wetland. But the new rule expands jurisdiction to now include adjacent water as well as adjacent wetland – without defining water. The Chief of the Corps Regulatory Program says that could lead to the regulation of puddles even though puddles are supposed to be exempt. If the Chief of the Corps' Regulatory Program does not know how to distinguish between an exempt puddle and a regulated adjacent non-wetland, how are Nebraskans supposed to be able to?

Response:
The ambiguity discussed by the Chief of the Corps' Regulatory Program does not exist in the final rule. Puddles are specifically excluded under the Clean Water Rule, as are other features that are created in dry land.

The Clean Water Rule in its entirety defines what is and is not a jurisdictional water. Exclusions that were previously used in practice, but not specifically defined, are now spelled out in the new rule. If any person wants clarification on whether a feature is a puddle or other non-jurisdictional water, they can contact their local Corps Regulatory office.

3. Definition of Ditch

On September 30, I asked you how the rule defines "roadside ditch." You said you would check. I do not see a definition of ditch or roadside ditch in the final rule. The lack of definitions for these terms was also raised in the April 24 memorandum from the Chief of the Corps' Regulatory Program. She said that "it may be a challenge to distinguish between a ditch and a tributary. Need a definition or clarification on a ditch." If the chief regulator for the Corps does not know how to distinguish between ditch and a tributary, how can you say that this rule increases clarity?

Response:
The ambiguity discussed by the Chief of the Corps' Regulatory Program does not exist in the final rule. Ditches were further defined in the final rule after her comment was made.

Ditches subject to regulation as "waters of the US" under this rule must meet the definition of a tributary, having a bed and banks and an ordinary high water mark and "contributing flow" either directly or indirectly through another water to a traditional navigable water, interstate water, or the territorial seas.

Under most circumstances, state roadside ditches are excluded from regulatory jurisdiction. Ditches may be excluded if they meet the definition of any of the exclusions under paragraph (b) of the Clean Water Rule, including stormwater control features. Perennially flowing ditches are not excluded under the (b)(3) ditch exclusion or (b)(6) exclusion for engineered stormwater control structures. They would be considered an

(a)(5) tributary if they meet the definition of a tributary.
The term "ditch" is not specifically defined in the rule. The agencies considered several options for addressing the definition of ditches but ultimately concluded that a definition of ditch may increase rather than decrease potential confusion. In reviewing the comments on the proposed rule, it is clear the terminology surrounding ditches varies widely regionally. The agencies will continue to rely on their existing practice of addressing the regulatory status and requirements with respect to ditches on more case-specific basis.

Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications, etc., as ditches are often created in a linear fashion with little sinuosity and may or may not connect to another Water of the United States.

Senator Carper:

1. As you may expect, low-lying Delaware depends on irrigation ditches for agriculture and other purposes. Many of Delaware's ditches have been in place for half a century or more. Often, it is difficult to determine where the ditch ends and where a tributary begins. Some of these ditches currently drain into wetlands that are now defined as Waters of the United States. Can you please clarify when a drainage ditch will be regulated and when it will not? In particular, please answer: 1) how the Army Corps, with guidance from the EPA, will determine between a ditch and a tributary; 2) how will the agencies determine that a ditch is redirecting a tributary in these type of situations; and 3) will a ditch be regulated if it leads into or drains a protected wetland?

Response:
Ditches subject to regulation must meet the definition of tributary, having a bed and banks and an ordinary high water mark and "contributing flow" either directly or indirectly through another water to a traditional navigable water, interstate water, or the territorial seas.

Staff can determine the historical presence of tributaries using a variety of resources, such as historical maps, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts. Evidence, such as current or historic photographs, prior delineations, or U.S. Geological Survey and state and local topographic maps, may be used to determine whether a ditch is an excluded ditch. Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications, etc., as ditches are often created in a linear fashion with little sinuosity and may not connect to another "water of the United States."

Jurisdictional ditches may include ditches with intermittent flow that drain wetlands and flow into a traditional navigable water.

2. Delaware's conservation districts have long regulated state conservation districts have long been managing Delaware's ditch system –including historical

maps of what has been a ditch and what has been a stream or tributary. Although it may be difficult for the Army Corps and the EPA to put together national maps on what is regulated and what is not regulated. However, can the Corps and the EPA work with conservation districts – like the ones in Delaware – that already have extensive maps to help provide more certainty on what is and is not regulated?

Response:
The Corps and other Federal agencies have been working with partners for many years to provide a clear and predictable process for making jurisdictional determinations under the CWA. The Clean Water Rule builds upon that effort and provides means to improve the clarity of the law and allows us to continue to work with our partners, such as the Delaware Division of Watershed Stewardship, to provide more certainty on what is and is not a jurisdictional Water of the United States.

3. Our state has many state roadside ditches which were constructed for storm water management. Will these types of ditches be regulated?

Response:
Under most circumstances, state roadside ditches are excluded from regulatory jurisdiction. Ditches may be excluded if they meet the definition of any of the exclusions under paragraph (b) of the Clean Water Rule, including stormwater control features. However, perennially flowing ditches are not excluded under the (b)(3) ditch exclusion or (b)(6) exclusion for engineered stormwater control structures. They would be considered an (a)(5) tributary if they meet the definition of a tributary.

Senator SULLIVAN. Thank you, Secretary Darcy.

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

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

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

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

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

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

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

Ms. DARCY. I was under no pressure to sign any rule, Senator. This has been a collaborative, joint development of this rule starting several years ago.

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

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

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

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

Ms. DARCY. Senator, those comments were on the draft final rule. The final rule that was published reflects some additional changes to the proposed and the draft rule that some of which the comments in those memos have been addressed.

Senator SULLIVAN. Some?

Ms. DARCY. Some, yes, sir.

Senator SULLIVAN. But not all.

Ms. DARCY. Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Yes. Thank you very much.

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

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

Not too long ago, Narragansett Bay, up in the north, was unfishable and unswimmable, and it is a really important resource to our State of Rhode Island to have Narragansett Bay be fishable and swimmable. And the Clean Water Act and the Waters of the United States rule have been essential to that progress, and while there can be argument over the scope and the details of the rule, that hasn't been what has been the issue. There has been just a full-on, party-wide, absolute attack on this rule, and I think it is very regrettable, because I think the Clean Water Rule has been very effective at helping particularly States like Rhode Island that tend to be downstream States, and it is a big deal for us.

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

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

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

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

I yield back my time.

Senator SULLIVAN. Do you want to ask questions?

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

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

Ms. DARCY. Thank you, Senator Whitehouse.

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

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

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

Ms. DARCY. Yes, I do.

Senator WHITEHOUSE. Thank you very much.

Senator SULLIVAN. Senator Barrasso.

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

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

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

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

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

The article says, "Mr. Johnson and his wife spent $50,000, most of their savings, to create a pond of water to help his 10 head of cattle and 4 horses." Now, this is the front page of the New York Times because of what is going on with the regulatory war in this country. "Mr. Johnson and his family have been threatened with fines, $37,500 a day, thanks to the EPA and the Corps' heavy-handed management of water policy."

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

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

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

Any answer to this?

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

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

Ms. DARCY. That is what we intend to this in this rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator SULLIVAN. Thank you.

Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman.

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

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

I would hope we are not arguing about the merits of the Clean Water Act. The Clean Water Act has been responsible for improving the public health of the people of this country. In my own State of Maryland, the Chesapeake Bay, which I have talked about frequently to the members of this committee, is critically important

to our life. It is our economic life, it is our social life, it is iconic to Maryland's history, and the Clean Water Act is a critical part. And knowing what waters are going to be protected that lead into the Chesapeake Bay is critically important.

I also hope it is not being disputed that the reason why the Obama administration initiated a rule is because of two Supreme Court decisions that confused the definitions of what are regulatory waters of the U.S. and required a response. And we have been waiting for a response, and the Obama administration has taken the initiative to bring forward a rule, and that is what it should be.

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

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

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

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

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

Ms. DARCY. Yes, Senator.

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

Ms. DARCY. Yes, Senator.

Senator CARDIN. Thank you. Thank you, Mr. Chairman.

Senator SULLIVAN. Senator Wicker.

Senator WICKER. Thank you, Mr. Chairman.

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

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

Ms. DARCY. Yes.

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

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

Senator WICKER. Individual cases.

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

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

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

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

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

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

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

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

Senator WICKER. OK, why wouldn't it be possible?

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

Senator WICKER. OK, we will deal with you on that.

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

Corps' input, a practice that has continued thus far in the interagency review process.

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

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

Senator WICKER. But not based on field observations?

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

Senator WICKER. Thank you. Thank you, Mr. Chairman.

Senator SULLIVAN. Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

Ms. DARCY. Yes.

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

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

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

Ms. DARCY. Yes, sir.

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

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

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

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

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

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

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

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

Senator ROUNDS. But would you agree with my statement?

Ms. DARCY. That it is the largest?

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

Ms. DARCY. Yes, it is.

Senator ROUNDS. Thank you. Appreciate it.

Thank you, Mr. Chairman.

Senator SULLIVAN. Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman.

And thank you, Secretary, for being here today.

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

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

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

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

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

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

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

Did you raise with the EPA the Corps' concern that "many thousands of miles of dry washes and arroyos in the desert southwest, even those ephemeral dry washes, arroyos, etcetera, carry water in-

frequently and sometime in small quantities"? Were any changes made to address that?

Ms. DARCY. In the final rule?

Senator FISCHER. Yes.

Ms. DARCY. I don't believe so.

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

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

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

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

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

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

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

Senator FISCHER. Puddles.

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

Senator FISCHER. How is water defined in the rule?

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

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

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

Senator FISCHER. Thank you.

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

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

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

Thank you, Mr. Chair.

Senator SULLIVAN. Senator Markey.

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

And thank you, Assistant Secretary Darcy, for being here today as the committee adds to the already very extensive consultation and review that the Army Corps and the Environmental Protection Agency have undertaken in crafting the recently finalized Clean Water Rule.

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

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

But given litigation in the last decade, the EPA and the Army Corps needed to update their implementation of the Clean Water Act, which leads to the new rule that we are discussing today.

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

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

Ms. DARCY. Yes, Senator.

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

Ms. DARCY. Yes, Senator.

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

Ms. DARCY. No.

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

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

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

Ms. DARCY. That's correct.

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

Ms. DARCY. Yes.

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

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

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

Ms. DARCY. Thank you, Senator.

Senator SULLIVAN. Thank you.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

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

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

But I would say this. It was about 6 years ago that there was an attempt to do this legislatively. It was Senator Feingold and Congressman Oberstar, from Wisconsin and Minnesota. Not only was the legislation defeated, resoundingly, but both Senator Feingold and Congressman Oberstar were defeated at the next election.

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

Now, he was talking about endangered species, talking about a lot of other things, certainly cap-and-trade, but he said the No. 1 concern of all the problems we are having with the overregulation that is killing us, and this is the Farm Bureau talking, is the

WOTUS issue. This is the one that they are most concerned about. And when you read it, you can talk about all these things, adjustments you are making, but in reality it didn't happen.

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

Ms. DARCY. Yes, sir.

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

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

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

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

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

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

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

Ms. DARCY. It is the job of the Army Corps of Engineers to inform me, as well as others, as to their experience and expertise, and it is up to me to make a final decision on behalf of the Army.

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

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

Senator INHOFE. So you disagreed with him?

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

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

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

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

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

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

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

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

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

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

We will be talking about this, as we have in the past, for a long period of time. Hopefully, we will be able to stop this again. This is considered to be, by the people in my State of Oklahoma, the most significant raid that they have ever had, and they are very much concerned about it. So I regret that you are in the position that you are in, but I am glad I am in the position I am in.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Inhofe.

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

Senator INHOFE. Could I interrupt just for a moment?

Senator SULLIVAN. Sure.

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

Ms. DARCY. Sure.

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

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

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

In the May 15th memo from the Chief of the Corps Regulatory Program, he stated to you, so this is like 2 weeks before the final rule is going to be issued, "It is patently inaccurate." This isn't gray. It is patently inaccurate. The final rule states that the action the rule does not have any tribal implications. That is in there.

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

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

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

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

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

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

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

So again you have a senior expert who is saying it is not true. So this narrative of, hey, we are threading the needle, one side is saying one thing, reasonable people can disagree, your senior people. And this wasn't a snapshot in time, this was at the end of a

year's long process with the top experts in your agency. They are coming out saying this is not a gray area.

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

That is why we are so concerned here. That is why we are so concerned here. How do you respond to the patently inaccurate? May 15th, your top expert says that the rule says this is not going to have any tribal implications. He comes back and says that is patently wrong. How do you explain that? How do you then go, no, you are wrong; I am right? How do you do that?

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

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

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

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

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

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

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

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

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

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

Senator SULLIVAN. Look, I am not trying to badger you here, but there is a broader issue at play; it is the issue of what I am sure you are familiar with, it is called Chevron deference. And the Congress, through the courts and the Supreme Court and through our roles here, provides agencies a lot of deference. We do it in laws. I actually think we do it too much. The courts certainly provide that deference, that Chevron deference to agencies.

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

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

Ms. DARCY. Correct.

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

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

Do you have a comment on that?

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

Senator SULLIVAN. OK. It is a very serious issue, and that is why we are holding a hearing.

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

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

I am amazed that my colleagues on the other side of the aisle don't look at that statement by the EPA Administrator and just drop their jaws in shock. That is the most arrogant thing I have seen.

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

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

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

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

Ms. DARCY. No, sir. My chief counsel believes it does. The deputy chief counsel for the Army Corps of Engineers at that point in time believed it would not.

Senator SULLIVAN. OK. OK.

Senator Whitehouse.

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

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

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

Ms. DARCY. No.

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

Ms. DARCY. Yes, sir.

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

Ms. DARCY. No.

Senator WHITEHOUSE. Thank you very much.

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

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

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

What we are trying to do, and Senator Barrasso mentioned it, if the rules don't do that, then what we should do is to work to pass a law. And we are working to pass a law, and we have bipartisan

support on a new clean water rule law, and I would encourage my colleagues on both sides of the aisle in this committee to co-sponsor that important piece of legislation by Senator Barrasso.

Thank you again. This hearing is adjourned.

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

[Additional material submitted for the record follows:]

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

July 6, 2015

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Dear Ms. Darcy:

On June 29, 2015, you and the Administrator of the Environmental Protection Agency (EPA) published a final rule to revise the definition of the term "waters of the United States" (WOTUS) in regulations issued by both agencies. 80 Fed. Reg. 37054 (Jun. 29, 2015).

Under a Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exceptions Under Section 404(f) of the Clean Water Act, dated January 19, 1989, the Corps of Engineers has primary responsibility for making jurisdictional determinations, subject to a "special case" designation by EPA, of which there have been fewer than a dozen.

In addition, under a June 5, 2007 Memorandum of Agreement between the Army and EPA, a jurisdictional determination for intra-state, non-navigable, isolated waters potentially covered solely under 33 C.F.R. §328.3(a)(3) is elevated to EPA and Corps headquarters. Since the *SWANCC* decision in 2001, *no such water* has been found to be regulated under the Clean Water Act.

In order to understand the bases for the decisions made by the Army in promulgating the WOTUS rule, please respond to the following requests.

Scientific studies and field observations

Please provide me with copies of jurisdictional determinations or other documentation memorializing the following field observations, including a reference to the page on which the requested information is found. If none exist, please so state. Do not create *post hoc* justifications for the final rule.

1. All field observations relied upon by the Army in developing the final rule that correlate the presence of an ordinary high water mark and the magnitude, frequency, and duration of flow (based on actual measurements) that therefore provide support the following

statements: "The science also supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark." 80 Fed. Reg. at 37066. "The physical indicators of bed and banks and ordinary high water mark (OHWM) demonstrate that there is sufficient volume, frequency, and flow in tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus." Technical Support Document (TSD), at 234.

2. All field observations relied upon by the Army in developing the final rule that correlate the presence of features on the ground identified using light detecting and ranging data (LiDAR), and the magnitude, frequency, or duration of flow that reaches a navigable water, based on actual measurement of flow.

3. All field observations relied upon by the Army in developing the final rule to support the statement that "lake and stream gage data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, the use of reference conditions, or through the remote sensing and desktop tools described above" are reliable indicators that a stream formerly existed in a particular location and the magnitude, frequency, and duration of flow to a navigable water from such a former stream, based on evidence of flow to a navigable water provided by such a stream. 80 Fed. Reg. at 37077.

4. All field observations relied upon by the Army in developing the final rule to conclude that all streams meeting the definition of tributary have a significant nexus to navigable water that (i) address ephemeral streams specifically, and that (ii) demonstrate that such streams provide flow to a navigable water. For such streams, please indicate whether such flow is provided through a surface connection, a shallow subsurface connection, or an aquifer and please include the quantification of such flow.

5. All field observations relied upon by the Army in developing the final rule that purport to find a connection between an ephemeral stream or geographically isolated body of water and navigable water through the movement of water through an aquifer, and any determination in such studies that the base flow of the navigable water came from the ephemeral stream or geographically isolated body of water.

6. All field observations relied upon by the Army in developing the final rule that support the conclusion that all waters located within 100 feet of the ordinary high water mark of a water identified in subsection (a)(1) through (5) of the WOTUS definition have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

7. All field observations relied upon by the Army in developing the final rule that support the conclusion that all waters located in the 100-year floodplain of a water identified in subsection (a)(1) through (5) of the WOTUS definition and not more than 1,500 feet from the ordinary high water mark of such water have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

8. All field observations relied upon by Army in developing the final rule that support the conclusion that all waters located within 1,500 feet of the high tide line of a water identified in subsection (a)(1) through (5) of the WOTUS definition and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

9. All field observations relied upon by the Army in developing the final rule that support the conclusion that "all water" in the 100-year flood plain of a navigable or interstate water or a territorial sea and "all water" within 4,000 of the ordinary high water mark of any jurisdictional water, including a tributary as defined above, potentially have a significant effect on navigable water. In particular, please provide copies of the jurisdictional determinations that support the following statement: "the agencies' experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters." 80 Fed. Reg. at 37059.

Significant nexus

Since the *SWANCC* decision in 2001, no intra-state, non-navigable, isolated waters has been found jurisdictional relying solely on 33 C.F.R. §328.3(a)(3).

Under the final rule, jurisdiction over such waters could be established by any one of the following functions:

> (i) Sediment trapping,
> (ii) Nutrient recycling,
> (iii) Pollutant trapping, transformation, filtering, and transport,
> (iv) Retention and attenuation of flood waters,
> (v) Runoff storage,
> (vi) Contribution of flow,
> (vii) Export of organic matter,
> (viii) Export of food resources, and
> (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

The preamble to the final rule says "non-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of this rule." 80 Fed. Reg. at 37094.

However, use of water as habitat by "resident" birds and other animals and the movement of insects and seeds via any kind of bird (referred to as "dispersal") can establish jurisdiction. *Id.*

According to the Connectivity Report "[p]lants and invertebrates disperse to and from prairie potholes via 'hitchhiking' on waterfowl." Connectivity Report at 5-5. Further, according to the Technical Support Document, any bird, even a migratory bird, can establish jurisdiction by dispersing seeds and insects. "Migratory birds can be an important vector of long-distance dispersal of plants and invertebrates between non-floodplain wetlands and the river network, although their influence has not been quantified." TSD, at 112.

The Technical Support Document refers 30 times to dispersal by organisms such as birds and mammals of plants (as seeds) and invertebrates (as eggs), including the following statement: "Plants and invertebrates can also travel by becoming attached to or *consumed and excreted by waterfowl.* Id. (citing Amezaga et al. 2002). Dispersal via waterfowl can occur over long distances. Id. (citing Mueller and van der Valk 2002)." TSD, at 334 (emphasis added).

According to the Technical Support Document, groundwater is a "hydrologic flowpath." *See* TSD at 129, 132, 148. Similarly, overland flow of water and shallow subsurface flow is considered a connection. 80 Fed. Reg. at 37063, 37070-72, 37085-86, 37089-90, 37093-94. For example, according to the discussion of vernal pools in the Technical Support Document, these pools "typically lack permanent inflows from or outflows to streams and other water bodies," they can be "connected temporarily to such waters via surface or shallow subsurface flow (flow through) or *groundwater exchange (recharge).*" TSD, at 344 (emphasis added). Finally, water storage is a connection. *See, e.g.*, TSD, at 99, 177. According to the Technical Support Document:

> Wetlands and open waters in non-floodplain landscape settings (hereafter called "non-floodplain wetlands") provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules (*e.g.*, seeds, eggs, spores) to downstream waters; and habitats needed for stream species. This diverse group of wetlands (*e.g.*, many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and groundwater flows and through biological and chemical connections. TSD, at 98.

1. Please explain the difference between a resident and non-resident migratory bird.

2. Has the Army ever sought to establish jurisdiction over water based on waterfowl or mammal excretions?

3. Has the Army ever sought to establish jurisdiction over water based on the attachment of insects and seeds to birds or mammals?

4. Has the Army ever sought to establish jurisdiction over geographically isolated water based on infiltration of that water into the ground, the allegation that the water reaches a groundwater aquifer, the allegation that the aquifer recharges surface water at some other

location, and the allegation that the surface water that obtains part of its baseflow from this groundwater recharge eventually reaches navigable water? If yes, please provide copies of the relevant jurisdictional determinations.

5. Is there any water within 4000 feet of a water identified in §328.3(a)(1)through (5) that could not provide at least one of the listed functions?

6. What makes a nexus provided by a function significant?

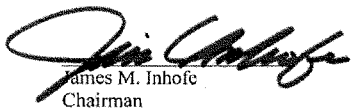
7. The 2008 *Rapanos* guidance states:

   It is clear … that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non jurisdictional by *SWANCC*.

   Could the significant nexus definition in the final rule allow the Army to assert jurisdiction over waters deemed non jurisdictional by *SWANCC*?

Given that the final rule is complete, and the information requested all pertains to the record basis for the final rule, we expect the information requested to be readily available. For that reason, please provide the requested information within 30 days.

Sincerely,



James M. Inhofe
Chairman
Committee on Environment and Public Works

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

July 27, 2015

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Dear Secretary Darcy:

Thank you for your prompt response to my July 16, 2015 letter to you requesting certain documents, the existence of which only recently came to my attention, relating to the development of the revised definition of the term "waters of the United States" (WOTUS). 80 Fed. Reg. 37054 (Jun. 29, 2015).

These documents, which include staff memoranda to Major General John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, and memoranda from Peabody to you, contain significant information that is highly relevant to this Committee's constitutional responsibility to oversee executive branch implementation of our nation's laws.

Specifically, while interspersed with staff recommendations and legal conclusions that I understand you wish to keep confidential and hidden from the American public, the facts in these documents support my conclusion, and the conclusion of the 30 states that have already filed lawsuits challenging the final WOTUS rule, that the rule is lacking factual, technical and legal support.

I also was surprised to learn that, even though the rule was purportedly a joint effort of EPA and the Corps, it appears that the Corps did not receive the draft final rule until EPA submitted it to interagency review on April 3, 2015, and, according to Peabody's April 27, 2015 memorandum to you, "the process followed to develop it greatly limited Corps input."

Some of the factual information in these documents also appears to be directly responsive to my July 6, 2015, letter to you asking for the documents in the administrative record that reflect the "agency experience and expertise" that is the purported basis for the final rule. These recently obtained documents, as well as some of your responses to hearing questions and statements in existing Corps guidance, confirm my suspicion that many of the determinations that purport to support expanded jurisdiction in the final WOTUS rule were not based on the experience and expertise of the Corps.

Accordingly, while I am still expecting a timely and complete response to my July 6 letter, please confirm by July 30, 2015, the following factual conclusions drawn from these materials.

Previous field observations requests

Request #1 from July 6 letter

All field observations relied upon by the Army in developing the final rule that correlate the presence of an ordinary high water mark and the magnitude, frequency, and duration of flow (based on actual measurements) that therefore provide support the following statements: "The science also supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark." 80 Fed. Reg. at 37066. "The physical indicators of bed and banks and ordinary high water mark (OHWM) demonstrate that there is sufficient volume, frequency, and flow in tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus." Technical Support Document (TSD), at 234.

Factual information from July 17 document production relevant to this oversight request

"[T]he draft final rule asserts CWA jurisdiction by rule over every 'stream' in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert southwest, even though those ephemeral dry wastes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary." April 24, 2015 Memorandum to Peabody (emphasis in original).

"The TSD emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters an wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule... [T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that 'the agencies' did this work or that is reflective of Corps experience or expertise." May 15, 2015 Memorandum to Peabody.

"The TSD does not provide support for the determination of how 'significance' will be measured in the SND [significant nexus determination] *or what is 'more than speculative or insubstantial?'"* May 15, 2015 Memorandum to Peabody.

"The Corps also had no role in performing the analysis or drafting the TSD." May 15, 2015 Memorandum to Peabody.

"It is inaccurate to reflect that the Corps experience and expertise is reflected in the conclusions drawn within the document." May 15, 2015 Memorandum to Peabody.

Given the above statements of fact from these recently obtained documents, please confirm that the Army does not have a record of field observations supporting the determination in the final rule that every "stream" that meets the final rule definition of "tributary" has a significant nexus to navigable water.

Request #2 from July 6 letter

All field observations relied upon by the Army in developing the final rule that correlate the presence of features on the ground identified using light detecting and ranging data (LiDAR), and the magnitude, frequency, or duration of flow that reaches a navigable water, based on actual measurement of flow.

Factual information from Corps guidance and the July 17 document production relevant to this oversight request

"A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States" (Aug. 2014) states that it is not appropriate to use remote sensing information alone to establish the presence of an OHWM.

Given this Corps guidance and the statement of fact quoted above that the TSD does not reflect the Corps experience and expertise, please confirm that the recommendations in the final rule relating to use of LiDAR to establish federal jurisdiction are not based on a record of Army field observations.

Request #3 from July 6 letter

All field observations relied upon by the Army in developing the final rule to support the statement that "lake and stream gage data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, the use of reference conditions, or through the remote sensing and desktop tools described above" are reliable indicators that a stream formerly existed in a particular location and the magnitude, frequency, and duration of flow to a navigable water from such a former stream, based on evidence of flow to a navigable water provided by such a stream. 80 Fed. Reg. at 37077.

Factual information from July 17 document production relevant to this oversight request

"May be a challenge to identify a ditch that is a relocated tributary or excavated in a tributary. How far back in history does the regulator need to go? If it can't be determined definitely who bears the burden of proof? The landowner or the agency? Need to provide a set of tools/resources that the field can use to make the determination of the history of a ditch." Appendix B to April 24, 2015 Memorandum to Peabody.

Given the above statements of fact and related questions, as well as the statement of fact that the TSD does not reflect Corps experience and expertise, please confirm that the

Army does not have a record of field observations that support a determination that the tools listed in the preamble to the final rule are reliable indicators that a ditch was a relocated tributary or an excavated tributary and that the former tributary had a significant nexus to navigable water.

Request #4 from July 6 letter

All field observations relied upon by the Army in developing the final rule to conclude that all streams meeting the definition of tributary have a significant nexus to navigable water that (i) address ephemeral streams specifically, and that (ii) demonstrate that such streams provide flow to a navigable water. For such streams, please indicate whether such flow is provided through a surface connection, a shallow subsurface connection, or an aquifer and please include the quantification of such flow.

Factual information from July 17 document production relevant to this oversight request

Given the statements of fact identified as relevant to Request #1, above, please confirm that the Army does not have a record of field observations supporting the determination in the final rule that every "ephemeral stream" that meets the final rule definition of "tributary" has a significant nexus to navigable water.

Request #5 from July 6 letter

All field observations relied upon by the Army in developing the final rule that purport to find a connection between an ephemeral stream or geographically isolated body of water and navigable water through the movement of water through an aquifer, and any determination in such studies that the base flow of the navigable water came from the ephemeral stream or geographically isolated body of water.

Factual information from responses to hearing questions and the July 17 document production relevant to this oversight request

In response to questions for the record from our February 4, 2015 hearing on the WOTUS rule you stated that: *"The Corps has never interpreted groundwater to be a jurisdictional water or a hydrologic connection because the Clean Water Act (CWA) does not provide such authority"* (emphasis added).

Further, with respect to the assertion of jurisdiction over geographically isolated water, your documents state that since the Supreme Court decision in *SWANCC*, no geographically isolated water has been found to be jurisdictional. *"None of the isolated JDs* [Jurisdictional Determinations] *resulted in a positive determination of jurisdiction."* May 15, 2015 Memorandum to Peabody.

Given the above factual statements, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over ephemeral

streams that do not have a surface connection to navigable water or over other geographically isolated bodies of water, by alleging a connection through a groundwater aquifer.

Request #6 from July 6 letter

All field observations relied upon by the Army in developing the final rule that support the conclusion that all waters located within 100 feet of the ordinary high water mark of a water identified in subsection (a)(1) through (5) of the WOTUS definition have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

Factual information from July 17 document production relevant to this oversight request

"Approved JDs are not required to indicate the distance from the aquatic resource to the nearest tributary OHWM." May 15, 2015 Memorandum to Peabody.

"Neither the Rapanos Guidance nor the form used to implement that guidance (which is used by the Corps to document AJDs) requires the Corps to indicated the distance that an adjacent wetland is located from the nearest jurisdictional tributary's OHWM or HTL [high tide line] *when evaluating whether a significant nexus exists, and in making a jurisdictional determination concerning such waters. Rather, the Guidebook that accompanies the Raponos Guidance indicates that consideration will be given to the distance between the tributary and traditionally navigable water (TNW) such that the effect of the tributary on the TNW is not speculative or insubstantial. The Guidebook further states that, "it is not appropriate to determine the significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW)."* April 24, 2015 Memorandum to Peabody.

Given the fact that the Corps' JDs do not include distance to the nearest tributary, and adjacency currently applies to wetlands, not all waters, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over all water located within 100 feet of the OHWM of a tributary.

Request #7 from July 6 letter

All field observations relied upon by the Army in developing the final rule that support the conclusion that all waters located in the 100-year floodplain of a water identified in subsection (a)(1) through (5) of the WOTUS definition and not more than 1,500 feet from the ordinary high water mark of such water have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

Factual information from July 17 document production relevant to this oversight request

Given the fact that, as noted by the factual statement quoted above, Corps JDs do not include distance to the nearest tributary, and adjacency currently applies to wetlands, not all waters, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over all water located in the 100-year floodplain and not more than 1,500 feet of the OHWM of a tributary.

Request #8 from July 6 letter

All field observations relied upon by Army in developing the final rule that support the conclusion that all waters located within 1,500 feet of the high tide line of a water identified in subsection (a)(1) through (5) [sic, should be "(3)"] of the WOTUS definition and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

Factual information from July 17 document production relevant to this oversight request

Given the fact that, as noted by the statement quoted above, Corps JDs do not include distance to the nearest high tide line, and adjacency currently applies to wetlands, not all waters, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over all water located within 1,500 feet of the high tide line of a water identified in subsection (a)(1) through (3) of the WOTUS definition and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes.

Request #9 from July 6 letter

All field observations relied upon by the Army in developing the final rule that support the conclusion that "all water" in the 100-year flood plain of a navigable or interstate water or a territorial sea and "all water" within 4,000 of the ordinary high water mark of any jurisdictional water, including a tributary as defined above, potentially have a significant effect on navigable water. In particular, please provide copies of the jurisdictional determinations that support the following statement: "the agencies' experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters." 80 Fed. Reg. at 37059.

Factual information from July 17 document production relevant to this oversight request

"The TSD states that the 4,000-foot distance threshold limit for (a)(8) waters 'will protect the type of waters that in practice have been determined to have a significant nexus on a case-specific basis.' This statement is unfounded. The isolated JDs reviewed for the Economic Analysis by EPA to estimate the change in jurisdiction were originally

> *considered under the 2003 SWANCC guidance; therefore, jurisdiction was determined based on whether there was an interstate/foreign commerce connection; the jurisdiction was not analyzed through a SND."* May 15, 2015 Memorandum to Peabody.
>
> I note that this statement remains on page 356 of the final TSD. Please confirm that the Army does not have a record of field observations that support the conclusion that "all water" in the 100-year flood plain of a navigable or interstate water or a territorial sea and "all water" within 4,000 of the ordinary high water mark of any jurisdictional water, including a tributary, potentially have a significant nexus to navigable water.

New request on isolated waters and significant nexus

Based on the concerns raised by these recently obtained documents, please also address the following:

1. All Army field observations relied upon by the Army to support the conclusion that Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands, "function alike and are sufficiently close to function together in affecting downstream waters" and therefore "are considered similarly situated by rule." 80 Fed. Reg. at 37059.

Factual information from July 17 document production relevant to this oversight request

"[T]he draft final rule ... characterizes literally millions of acres of truly 'isolated' waters (i.e., wetlands that have no shallow subsurface or confined surface connection with the tributary systems of the navigable waters or interstate waters) as 'similarly situated.' April 24, 2015 Memorandum to Peabody (emphasis in original).

"The draft final rule would declare that all isolated waters in each of those five listed categories of isolated waters are 'similarly situated,' but the Corps has never seen any data or analysis to explain, support, or justify this determination." April 24, 2015 Memorandum to Peabody.

"[T]he definition in section (a)(7) for the five categories of isolated waters are not based on any findings that those isolated waters 'are sufficiently close together [sic] *to function together in affecting downstream waters' as required by the definition of 'similarly situated.' [], EPA's technical staff has demonstrated that in some areas prairie potholes (for example) are located close together and, in other cases, they are spaced far apart."* April 24, 2015 Memorandum to Peabody.

"Need delineation manuals for these waters or at least a definition of the waters, vegetation characteristics, etc." Appendix B to April 24, 2015 Memorandum to Peabody.

Please confirm that the Army does not have a record of field observations to support the determination in the final rule that Prairie potholes, Carolina and Delmarva bays, pocosins,

western vernal pools in California, and Texas coastal prairie wetlands, "function alike and are sufficiently close to function together in affecting downstream waters" and therefore should be considered similarly situated by rule.

2. All Army field observations relied upon by the Army to support the significant nexus determinations in the final rule.

Factual information from July 17 document production relevant to this oversight request

> *"The TSD emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule.....[T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that 'the agencies' did this work or that is reflective of Corps experience or expertise."* May 15, 2015 Memorandum to Peabody.

> *"The TSD does not provide support for the determination of how 'significance' will be measured in the SND* [significant nexus determination] *or what is 'more than speculative or insubstantial?'"* May 15, 2015 Memorandum to Peabody.

Please confirm that the Army does not have a record of field observations to support the determination in the final rule that all waters in the categories that are jurisdictional by rule have a significant nexus to navigable water.

Given that the information needed to respond to these requests has already been compiled in these documents and are readily available to you, I request a response to this letter by July 30, 2015. Please organize your responses individually and in the same order as the questions appear in this letter.

Sincerely,

James M. Inhofe
Chairman
Committee on Environment and Public Works

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

28 AUG 2015

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Inhofe:

Thank you for your July 6, 2015 and July 27, 2015 letters regarding the Environmental Protection Agency (EPA)/Department of the Army ("the agencies") final Clean Water Rule ("the rule") defining the scope of Clean Water Act jurisdiction. The agencies developed the rule in response to requests from a broad range of interests nationwide who recognized the urgent need to make the process of identifying waters subject to the Clean Water Act easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources. Implementing the rule will reduce delays in making jurisdictional determinations, save time and money for permit applicants, and improve protection for clean water on which all Americans depend for public health and a strong economy.

Your letters seek field observations relied upon by the Army for certain statements in the Technical Support Document and the rule. The letters suppose that there are specific field observations in the administrative record that correspond to each statement. In fact, rather than relying on individual field observations, the rule was the product of years of collaborative decision-making, taking advantage of decades of peer-reviewed scientific studies and the EPA and the Army's cumulative experiences in administering the Clean Water Act. The result is a rule that will be more efficiently implemented in the field and that will give greater clarity and certainty to the regulated community.

You also asked about "the difference between a resident and non-resident migratory bird," as well as whether the Army has ever sought to establish jurisdiction over water based on waterfowl or mammal excretions or based on the attachment of insects and seeds to birds or mammals. Additionally, you inquired as to whether the Army has ever sought to establish jurisdiction over geographically isolated waters "based on infiltration of that water into the ground, the allegation that the water reaches a groundwater aquifer, the allegation that the aquifer recharges surface water at some other location, and the allegation that the surface water that obtains part of its baseflow from this groundwater recharge eventually reaches some navigable water."

Regarding your question about migratory birds, the passage cited in your letter from the preamble to the rule refers to "[r]esident aquatic or semi-aquatic species present in the case-specific water and the tributary system," such as "aquatic birds." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,094 (June 29, 2015). Such "[r]esident aquatic or semi-aquatic species" are distinguished from "species such as non-resident migratory birds," which "do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of this rule." *Id.* Thus, the passage distinguishes between those birds that reside in a case-specific water and tributary system and those migratory birds that do not reside in a case-specific water and tributary system. The relevant factors for demonstrating biological connectivity are described in the preamble. *Id.*; *see also* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* ("2008 Rapanos Guidance") at 6, *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf ("Migratory species, however, shall not be used to support an ecologic interconnection.").

Regarding your question about the impact of birds and mammals on jurisdictional determinations, to the best of my knowledge, since the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Army has not established jurisdiction over an isolated water body based solely on the presence of migratory birds as an indicator of interstate or foreign commerce. However, while not dispositive of jurisdiction, the presence of birds and mammals—and indicators of their presence, such as excretions, insects, or seeds—could be noted by practitioners in the field as one factor among many that demonstrates an ecological interconnection with jurisdictional waters, which in turn may support a finding of jurisdiction based on significant nexus to traditional navigable waters. The agencies' 2008 Rapanos Guidance acknowledged the "science-based inference" that wetlands that are reasonably close to other waters of the United States "have an ecological interconnection with jurisdictional waters." 2008 Rapanos Guidance at 5-6. The agencies noted that "such implied ecological interconnectivity is neither speculative nor insubstantial," because "species, such as amphibians or anadramous and catadramous fish, move between such waters for spawning and their life stage requirements." *Id.* at 6. Additionally, the 2008 Rapanos Guidance observed that "[t]ributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters," and instructed the agencies to "evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters," including "habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters." *Id.* at 9, 11. Thus, the presence of excretions, insects, or seeds could factor into a determination of the interconnectedness of a water to downstream navigable waters, but jurisdiction could not be based on the presence of excretion, insects, or seeds alone.

Regarding your question about isolated waters, to the best of my knowledge, since the *SWANCC* decision, the Army has not asserted jurisdiction over any isolated, intrastate, non-navigable waters. *See* 2008 Rapanos Guidance at 4 n.19; 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003). You also asked about how the Army determines "[w]hat makes a nexus provided by a function sufficient." The agencies discussed that question at length in the rule's preamble. *See* Clean Water Rule, 80 Fed. Reg. at 37,060-73. Finally, you asked about the *SWANCC* decision's impact on the rule. In drafting the rule, the agencies considered the limits of Clean Water Act jurisdiction as interpreted by the Supreme Court. *See, e.g., id.* at 37,056-57 (discussing *Riverside Bayview Homes*, 474 U.S. 121 (1985), *SWANCC*, and *Rapanos v. United States*, 547 U.S. 715 (2006)). The rule is wholly consistent with all of the Supreme Court case law interpreting the Clean Water Act, including the *SWANCC* decision.

I have also received a July 16, 2015 letter from you. In that letter you requested "all communications or documents, electronic or otherwise, sent to [me] or [my] office by employees of the Corps of Engineers of [sic] the Office of the Army General Counsel between ... November 14, 2014 and ... May 27, 2015, containing comments or concerns regarding the revisions to the regulatory definition of 'waters of the United States.'" Because of the voluminous number of records requested and considerations related to ongoing litigation, the less-than-one-month deadline suggested in your letter could not have been met. I have personally directed my staff to prepare the appropriate communications and documents for your office with utmost speed.

The Army hopes to respond to these requests in the most helpful manner possible, while respecting the ongoing legal challenges. Please contact me if you have questions, or your staff may contact Let Mon Lee of my staff at (703) 614-3977.

Very truly yours,

Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)