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S. HRG. 114–292

EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL—IMPLEMENTATION OF THE 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

SECOND SESSION

MAY 24, 2016

Printed for the use of the Committee on Environment and Public Works

Available via the World Wide Web: http://www.gpo.gov/fdsys

U.S. GOVERNMENT PUBLISHING OFFICE

20–604 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL—IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES

TUESDAY, MAY 24, 2016

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

The committee met, pursuant to notice, at 2:30 p.m. in room 406, Dirksen Senate Office Building, Hon. Dan Sullivan (chairman of the subcommittee) presiding.

Present: Senators Sullivan, Whitehouse, Barrasso, Capito, Boozman, 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.

Good afternoon. I want to thank all the witnesses for being here. I want to thank the members for coming out to this important hearing.

The purpose of the hearing is to discuss the implementation of the Waters of the United States and the expansion of Federal control that has come with it. Again, I would like to thank all the witnesses for their testimony. We have a distinguished panel of witnesses today, and it is very important for this subcommittee and for all of Congress to hear what is really happening on the ground when our constituents try to develop projects on their private property or build homes or expand economic opportunity in their States.

Erosion of property rights, that I think we are going to hear about today, has been happening for years, not just this Administration. But it has been happening without any change in the Federal Clean Water Act and without any change in the regulatory definition of waters of the U.S. In fact, based on testimony we will hear today, it is clear that the purpose of the Obama administration's WOTUS rule was to paper over the gross expansion of Federal control that the Corps and the EPA have been trying and focusing on expanding for years.

I want to take a minute to talk about what has been happening in my State, in Alaska. These are really important issues for Alaskans.

Already a huge percentage of Alaska falls under the Federal Clean Water Act jurisdiction. Alaska has 43,000 miles of coastline, millions of lakes, and more than 43 percent of our State's surface area is composed to wetlands, which accounts for 65 percent of all the wetlands in the United States. Let me say that again. Sixty-five percent of all wetlands in the United States of America are in one State. This is why this is such an important issue for us.

Now the Corps and the EPA are trying to expand their reach in terms of what constitutes a wetland by claiming that land with permafrost, a layer of frozen soil, is also within their jurisdiction, although there is no statutory or regulatory authority to grant them that jurisdictional expansion.

Permafrost can be found beneath 80 percent of the State of Alaska. Alaska is 663,300 square miles. That means over 530,000 square miles of Alaska overlays permafrost. That area, in case you are wondering, is twice the size of Texas and larger than three times the size of California.

Currently, permafrost does not meet the regulatory definition of a wetland, which has not changed in decades. To change the definition to include permafrost, the Corps would have to revise their 1987 manual following notice and comment and rulemaking, which they have not done. But they have expanded the definition anyways.

For example, the Corps is now telling constituents of mine, like the Schok family of North Pole, Alaska, that they cannot build on their land because of frozen soil. I want to thank the Pacific Legal Foundation for fighting for the Schoks and Damien Schiff for being here today to share their stories and other stories of landowners around the country who are experiencing similar Federal overreach.

The stories in the written testimony of today's witnesses are incredible, and in many ways shocking. Not only do the EPA and the Corps think frozen ground in Alaska is waters of the United States, but Federal agencies are asserting authority over even more features, such as previously converted crop land, stock ponds, water and soil far beneath the surface, puddles in dirt roads, tire ruts, and depressions in gravel parking lots, and on activities in adjacent lands such as plowing and changing crops.

Now, one of the things that I have tried to emphasize and seen in this committee is we all believe in the need for clean water, and we all believe in the need for clean air. And certainly there is no monopoly on the truth of that issue. Sometimes my colleagues on one side want to say it is only Democrats who believe in these things. We all believe in it.

But we also all believe, I hope, that agencies have to abide by Federal regulations and by statutes, and they cannot expand their jurisdiction on their own. The expansion of the jurisdiction of the Clean Water Act and the Clean Air Act belong in one realm in our Federal Government, and that is the Congress of the United States.

One of my biggest surprises on this committee is how often we are not conducting oversight for this kind of Federal overreach. The EPA and the Corps are bypassing Congress and ducking Supreme Court rulings to get to their jurisdictional conclusions, and this is

happening all over the United States, and even though the WOTUS rule has been stayed by a Federal Court of Appeals.

I want to thank the witnesses for being here this morning. I look forward to hearing the testimony of our witnesses.

Now I would like to provide the Ranking Member, Senator Whitehouse, with his opportunity for opening comments.

Senator Whitehouse.

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

Senator WHITEHOUSE. Thank you, Mr. Chairman. Before I get to my opening comments for this particular hearing, let me thank you again for the, I thought, terrific bipartisan hearing that you led on marine debris. It was a terrific opportunity, I think, for both sides of the aisle to come together on an issue where we have significant common cause in your very large ocean State and my much smaller ocean State.

Today, however, we have a rather different agenda. The subcommittee meets again to paint the Environmental Protection Agency and Army Corps of Engineers' implementation of the Clean Water Act as an overreach of Government authority and a minefield of regulations aimed at taking down the little guy.

In reality, for over 40 years the Clean Water Act, passed in a bipartisan manner, has strengthened the health of our waterways. Rivers and wetlands that were once unusable due to pollution are again swimmable and fishable.

Just last week the Providence Journal ran a column from its nature columnist, Scott Turner, called Savoring the Smell of Salt Water. He wrote, "When we moved to Providence in 1996, the smell of oil and sewage or rotting algae and shellfish signified the arrival of warm air. That was because the first southern air of the spring season showed up after passing over polluted Narragansett Bay. My, how things have changed," he continued. "On May 11th this year, for example, the first sustained southern winds of the season puffed into Providence. That warm welcomed air did not stink. Instead, those breezes conveyed the salty smell of the sea from the reaches of upper Narragansett Bay. Hallelujah!"

[The referenced article follows:]

Opening Statement
EPW Fish, Water, and Wildlife Subcommittee Hearing – "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States"
May 24, 2016

ProJo Op-ed

PROVIDENCE Journal | Providence Journal eEdition

MY TURN

Savoring the smell of saltwater

SCOTT TURNER

When I was kid, growing up in the west-central Bronx of the 1960s and 1970s, I associated cold fronts with the smell of biscuits, breadsticks and cookies.

That was because when cool air blew in from the northwest, it delivered the smell of goods baking in the former Stella D'oro Biscuit Company, located three miles up the road.

Late every summer, I could not wait for that first whiff of Stella D'oro because not only was it a lovely aroma, it meant that the first cool air of the season had arrived.

When we moved to Providence in 1996, I learned another lesson on linking atmosphere and a new season. In springtime, I found that the smell of oil and sewage, or rotting algae and shellfish, signified the arrival of warm air. That was because the first southern air of the spring season showed up after passing over polluted Narragansett Bay.

My, how things have changed! On May 11 this year, for example, the first sustained southern winds of the season puffed into Providence.

That warm, welcomed air did not stink. Instead, those breezes conveyed the salty smell of the sea from the reaches of Upper Narragansett Bay. Hallelujah!

As reported in this newspaper last summer and again last fall, the upper Bay is the cleanest it has been in years, although water quality in the most urban spots still had "a long way to go."

I work on College Hill in Providence. My office is a seven-minute walk from the Providence River. If I stroll south, I can make it to the hurricane barrier in 15 minutes. Thirty-five miles further, I would enter the open ocean. If I turned left, I would hit Portugal in about 3,200 miles.

I have never been overseas. Narragansett Bay is my link to all of the people and terrain down the coast, as well as the rest of planet earth.

Opening Statement
EPW Fish, Water, and Wildlife Subcommittee Hearing – "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States"
May 24, 2016

When I moved here, it saddened me that on some days Upper Narragansett Bay smelled like a festering wound. Now that it smells like the sea, and teems with life, from mussels to stripers to the occasional dolphin and whale, I smile.

As the saying goes, good things come to those who wait. What a wonderful addition to springtime in Providence that the change in seasons now delivers the smell of the sea.

While more is needed to clean up the upper Bay, as noted earlier, hurray for the progress!

This month, one thing I've noticed with a saltwater smell is that it mixes very well with the amazing scents produced by flowering plants.

Many fragrant spring flowers, such as lilac and lily of the valley, are in bloom now, while several scented blossoms, such as black locust and honeysuckle, are still to come. The aroma of local blossoms, spiced with salt, is a feast for my schnozzle.

With southern winds blowing in salty air and the landscape exploding in color, we're all pumped up to get outdoors and/or to dive into the garden.

In coming weeks, we will witness more amazing changes in the landscape. Even better, we may find that those surroundings provide us with beauty, peace, tranquility and renewal.

Senator WHITEHOUSE. That's Rhode Island's story.

Last October I traveled to Ohio, and there I went out fishing with charter boat captains on Lake Erie. Significant rains last summer washed fertilizer and manure into Lake Erie, turning the lake thick as soup with algae and bacteria, requiring a drinking water advisory and ruining fishing grounds.

I would like to submit for the record the September 2015 article from the New York Times that highlights one of the most toxic blooms in recent history, as well as the piece from the Providence Journal.

Senator SULLIVAN. Without objection.

[The referenced article follows:]

Opening Statement
EPW Fish, Water, and Wildlife Subcommittee Hearing – "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States"
May 24, 2016

NYT Article on Harmful Algal Bloom in Lake Erie – Sept. 30, 2015

The New York Times

Toxic Algae Outbreak Overwhelms a Polluted Ohio River
By MICHAEL WINES
SEPT. 30, 2015

The Ohio River, transformed by mining and industrial waste and sewage overflows into the nation's most polluted major waterway, has a new and unexpected tormentor this fall: carpets of poisonous algae.

Pads of toxic blue-green algae have speckled nearly two-thirds of the 981-mile river in the last five weeks, experts say, in an outbreak that has curbed boating, put water utilities on alert and driven the river's few hardy swimmers back to shore.

The only other recorded toxic algae bloom, in 2008, covered perhaps 40 miles of the river. In contrast, the latest bloom stretches 636 miles from Wheeling, W.Va., to Cannelton, Ind., and traces of algae have appeared as far west as Illinois.

The poisonous alga, called microcystis, increasingly plagues polluted waters across the country. The Ohio River blooms arrived as another persistent algae outbreak, in western Lake Erie, grew in recent weeks to near-record proportions.

The river outbreak has produced few consequences beyond canceled boat races and warnings in five states to avoid contact with the river. But scientists say it is not to be taken lightly. The toxin, microcystin, causes diarrhea, vomiting and liver damage, and it has been known to kill animals unlucky enough to drink water tainted with it. Last year's Lake Erie bloom, an annual event, peaked over the municipal water intake for Toledo, forcing the city to shut down drinking water supplies to 400,000 residents for four days in August.

What causes the blooms is clear: Tides of phosphates and nitrates, flushed into the river from fertilized fields, cattle feedlots and leaky sewers, provide food for the algae, which are actually bacteria. Hard rains in parts of the Ohio Valley basin this summer appear to have washed more than the usual amount of the chemicals into the river and into Lake Erie.

The algae need hot weather, sun and still water to flourish. All were abundant in August and September, when a dry spell reduced the Ohio's flow and cleared its usually muddy waters. But if this year's algae epidemic can be explained, why it has not appeared before is a murkier question.

The river absorbs a colossal amount of phosphorus — nearly 42,000 tons in an average year — but "while we have seen a very slight increase in phosphorus over the years, it's not something

that stands out," Richard Harrison, the executive director of the Ohio River Valley Water Sanitation Commission, said in an interview. "It's still something we're investigating." Some scientists, however, suspect changing weather patterns in the region. Since the 1970s, average temperatures and rainfall have been slowly increasing in the Ohio River basin. So has the frequency of heavy rains — the steady downpours that wash fertilizer off farmlands and overwhelm sewage systems in big cities along the river's course.

Richard Stumpf, an oceanographer at the National Oceanic and Atmospheric Administration, is leading an effort to forecast algae blooms. "These climate phenomena are consistent with our understanding of how these things work," he said of the blooms. "We do expect them to be more common when you have wet springs followed by long, warm summers."

Some states in the river basin are trying to rein in phosphorus discharge. Federal and state officials are working, so far with limited success, to reduce fertilizer use and runoff on farms.

Senator WHITEHOUSE. Thank you, Chairman.

Lake Erie has seen similar events over and over again in recent years. Large rain bursts—expected more often due to climate change—pour agricultural runoff through the Clean Water Act's blanket loophole for agriculture.

If you are an upstream State, you may say the Clean Water Act is too strong. Downstream States may have a different view.

As a downstream State, Rhode Island understands the importance of headwaters and the influence of upstream pollution. Our streams and wetlands are vital for fish and wildlife and for Rhode Island's vibrant recreational industry. What enters waters upstream affects our Narragansett Bay, our ocean, our beachgoers, and our fishermen. Rhode Islanders love fishing. People come from everywhere to fish our waters. It is an important business.

Strong enforcement of the Clean Water Act is our best defense against the upstream pollution that is marring our streams, rivers, lakes, and oceans. The jurisdictional confusion left in the wake of the Supreme Court's decisions in this area weakened the efficacy of the Clean Water Act and created uncertainty for both regulators and the regulated, which is why in 2014 the EPA and Army Corps promulgated the new Clean Water rule to provide brighter line rules for jurisdiction and add clarity to a blurred world.

The Sixth Circuit Court of Appeals has temporarily stayed the rule nationwide, forcing the EPA and Army Corps to continue to rely on the guidance they developed before the Supreme Court decisions.

Whether my colleagues are willing to accept it or not, the reality is that the Clean Water Rule is an important regulation. It will clear up years of uncertainty about protecting water resources. It has broad support from businesses and sportsmen alike, and it should have the support of my colleagues on the subcommittee. Attacks on this rule have been often based more on Government conspiracy theories than on the actual rule itself.

For the record, let me emphasize first that the rule has substantive legal support, which was well documented by EPA and the Army Corps. The agencies included an entire chapter in their response to public comments on the legal grounding of the rule and published a technical support document entitled Statute, Regulations, and Case Law Legal Issues.

Second, EPA and the Army Corps did not develop this rule in some secret lair in the base of a volcano. In promulgating the rule, the Corps and EPA compiled over 1,200 peer-reviewed scientific publications, held over 400 public meetings with stakeholders around the country, and considered over 1 million public comments, nearly 90 percent of which were in support of the rule.

Third, and most important for this hearing, the rule does not represent an expansive power grab by the Federal Government, nor does it eliminate exemptions under the Clean Water Act. It simply aims to restore what was protected before Supreme Court decisions in 2001 and 2006.

All previous exemptions and exclusions were maintained, and the rule went so far as to explicitly label some specific waters as nonjurisdictional for the first time. The rule actually reduces coverage of total waters protected by the Clean Water Act, and according to

the Corps and EPA, would only lead to around 3 to 5 percent more assertions of jurisdiction over U.S. waters as compared to before the rule.

And for those of us downstream, we like, Mr. Chairman, this protection. Thank you.

Senator SULLIVAN. Thank you, Senator Whitehouse.

I do want to comment on our hearing from last week. I agree fully with you, I think there is a lot of opportunity for bipartisan support to move forward on the issue of ocean debris, and I look forward to working with you on that.

I will also mention, with regard to broad support, there are 34 States that have now sued to stop the Waters of the U.S., so in my view there is not that much broad support.

But what I want to do right now is turn to the witnesses. Each witness will have 5 minutes for their opening statements, and we will provide any other additional written material for the record as you wish.

We will begin with Mr. Don Parrish, the Senior Director of Regulatory Relations for the American Farm Bureau Federation.

Mr. Parrish, you are recognized for 5 minutes.

STATEMENT OF DON PARRISH, SENIOR DIRECTOR, REGULATORY RELATIONS, AMERICAN FARM BUREAU FEDERATION, ACCOMPANIED BY: JODY GALLAWAY

Mr. PARRISH. Thank you, Mr. Chairman. Thank you, Ranking Member.

My name is Don Parrish, and I appreciate the opportunity to share with you what our members are already experiencing with the regulation of low spots and ephemeral drains. What I will describe are real on-the-ground experiences for farmers who are facing the consequences of this regulation. We are going to draw from information provided by a Farm Bureau member, a farmer, a biologist, a senior consultant in Northern California, Ms. Jody Gallaway. Ms. Gallaway is sitting behind me here today. Her experiences are provided for the committee in more detail in the attachment to my testimony.

But I want to be clear. This regulation is a growing disaster for farmers and ranchers. Farm Bureau and others have testified before this committee and other committees regarding what we believe is the real scope of the WOTUS rule. The reality, despite testimony from top Corps and EPA officials, contrary to what they are saying, normal farming exemptions will not protect commonplace farming and ranching practices from burdensome Federal regulation.

Before the rule was finalized, and despite a nationwide stay by the Sixth Circuit Court of Appeals, we began hearing from our members that California Corps districts were already implementing some of the rule's most controversial provisions, such as asserting jurisdiction based on features that are not visible to the human eye. The Corps is making jurisdictional determinations and tracking farming activities based solely on imagery that is not publicly available, such as classified or proprietary aerial photography and LIDAR imagery.

The Corps has used historical aerial photographs dating back to unknown periods of time to determine historical landscape conditions and evaluate changes in agricultural activities and farming practices. For example, two farmers invested tens of thousands of dollars to proactively map their private property to ensure that their farming activities would avoid WOTUS and any impacts to WOTUS only to have the Corps threaten enforcement proceedings for activities related to road building and the construction of stock ponds, both—both—exempt activities conducted years before these landowners actually owned the property.

EPA Administrator McCarthy assured Congress that farmers would not be impacted because of the agricultural exemptions. Farm Bureau has been telling Congress that is not true. In practice, the Corps routinely narrows the farming exemptions and interprets the recapture provision too broadly. For example, in California, any plowing—any plowing, no matter how shallow—in or near a WOTUS draws threats or permit requirements. The Corps routinely sends threatening letters to farmers if they plow their fields, if they change from growing alfalfa hay to cattle grazing and then back to alfalfa hay growing. The California districts routinely require wetland delineations to include puddles in dirt roads, puddles in tire racks, and depressions, depressions in parking lots, gravel parking lots, claiming they provide habitat for endangered species.

The new rule allows the Corps to broadly assert jurisdiction based on indicators, not actual ordinary high water mark. Ms. Gallaway, who sits behind me, has seen the Corps regulators make ordinary high water mark determinations that differ by as much as 50 feet. That has huge implications for on-the-ground projects.

I will conclude with this example. A farmer requested an official jurisdictional determination, but the Corps ignored it, ignored it. After the farmer expressed frustration, the Corps assigned a new regulator. He promptly rejected Ms. Gallaway's delineation and requested more information.

Ms. Gallaway completed an ordinary high water mark datasheet at significant cost to the landowner. The regulator, without collecting any field data—any field data—rejected the field data; instead, identified the ordinary high water mark based on an interpretation of an aerial photograph. When Ms. Gallaway asked to see the aerial photograph, she was denied. The Corps district said it was proprietary information.

Based on what we see in California, red tape, the use of secret information, and delays are going to be enormous problems for farmers and ranchers, and they are only going to get worse. Importantly, normal farming exemptions are going to be further narrowed, and we are going to see more and more permit requirements for normal farming practices. Congress has to step in.

I will be happy to answer any questions.

[The prepared statement of Mr. Parrish follows:]

Statement of the American Farm Bureau Federation

TO THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE

"EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL – IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES"

MAY 24, 2016

Presented By:
Don Parrish
On behalf of the American Farm Bureau Federation

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600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024 | p. 202.406.3600 | f. 202.406.3605 | www.fb.org

Thank you, Mr. Chairman and Ranking Member. My name is Don Parrish and I appreciate the opportunity to share with you what our members have already experienced with the regulation of isolated low spots and ephemeral drainage areas on farmland as "waters of the U.S." (WOTUS). These experiences demonstrate that the so-called normal farming exemption does not protect farmers and ranchers from permit requirements for ordinary agricultural practices, such as plowing. My educational background is in agronomy and I have almost 30 years of Clean Water Act regulatory experience with Farm Bureau. What I will describe to you today are real, on-the-ground experiences from a broad range of our members who are facing the consequences of this regulation. In order to give specific focus, I am going to draw in particular from information provided by a Farm Bureau member, farmer, biologist and senior consultant in northern California, Jody Gallaway. Her experiences are provided to the Committee in more detail in the attachment to my written testimony. But I want to be clear, many of our members are being challenged by this regulation. Ms. Gallaway is being drawn on because of the breadth of her knowledge and to give some specificity.

Since the WOTUS rule was first proposed, Farm Bureau and others have testified before this Committee and others regarding what we believe is the real scope of the WOTUS rule, the impact on agricultural producers and the reality that despite testimony from top Corps and EPA officials to the contrary, the normal farming exemptions will not protect commonplace farming and ranching practices from burdensome federal regulation. Ms. Gallaway's attached testimony brings to light these key facts based on her clients' experiences that are occurring on the ground, now, on some of the nation's most productive and valuable farmland.

Before the rule was finalized in August of 2015 and even now, despite a nationwide stay by the 6th Circuit Court of Appeals, we have heard from our members that the Sacramento Corps District was already implementing some of the rule's most controversial provisions, such as asserting jurisdiction based on features that are not visible to the human eye, presumably established using desktop tools and remote sensing technologies—and it continues to do so. The Corps is making jurisdictional determinations and tracking farming activities based solely on imagery that is not publicly available, such as classified aerial photographs and LIDAR imagery. The Corps also uses historical USDA aerial photographs dating back to unknown periods of time

to determine historical jurisdictional waters and evaluate changes in agricultural activities and farming practices. The Corps does not appear to rely on field data, resulting in clear errors that only trigger the ire of Corps staff, and more delays, when errors are noted by a consultant or landowner.

The relationship between farmers, their consultants and the Corps used to be one of mutual respect and professionalism. Now, the Corps takes farmers' desire for collaboration and cooperation as an opportunity to investigate all activities on the farm, turning this into an adversarial relationship. For example:

- One farmer invested tens of thousands of dollars to map his private property to ensure his farming activity would **avoid WOTUS and any impacts to WOTUS,** only to have the Corps threaten enforcement proceedings for activities related to road building and construction of stock ponds years before the farmer owned the property.

EPA Administrator McCarthy assured Congress that farmers would not need permits for farming activities in and around WOTUS because of the agricultural exemptions. We have been telling Congress that is not true because the Corps' reading of the normal farming exemption is too narrow, and its interpretation of the recapture provision is too broad. Here are just a few examples from our members demonstrating that the agricultural exemptions, as interpreted by the Corps, do not protect farmers from burdensome Section 404 permitting requirements for even for the most routine agricultural practices.

- In the Corps' Sacramento district, *any plowing*, no matter how shallow, in a WOTUS such as a vernal pool or ephemeral drain requires a permit. The Corps issues threatening letters if farmers plow a fire break, change from alfalfa hay farming to cattle grazing and back to alfalfa hay farming or when the agency "thinks" the farmer was plowing too deep or changing land use. The Corps selectively enforces this interpretation and the result is that the Corps now exerts the power to tell farmers where they can and cannot farm, and what they can grow. The case of California farmer John Duarte is just one of many examples.

- The 5-year drought has forced many farmers to temporarily fallow land or change crops based on alterations in irrigation practices and market forces. When there are WOTUS on the farm, the Corps is impeding these changes, requiring permits for ordinary plowing necessary to prepare the ground to change crops.

The Corps' Sacramento District still regulates isolated waters such as puddles, even after the Supreme Court's SWANCC decision. The EPA Administrator mocked Farm Bureau's concerns about regulating puddles, but the Corps still regulates puddles.

- The Sacramento Corps District requires wetlands delineations to include *puddles in dirt roads*, *tire ruts* and *depressions in gravel parking lots*, claiming they provide habitat for endangered species. Consultants know this is illegal, yet any objections result in serious delays in processing permits and jurisdictional determinations. Despite the exemption for "puddles" in the new WOTUS rule, these low lying areas on roads and in farm fields can still be characterized as historical wetlands or even ephemeral pools.

The ordinary high water mark (OHWM) has always been an inconsistent and problematic indicator of flow, and the rule's provision allowing the Corps to assert jurisdiction based merely on indicators of an OHWM (and bed and bank and a minimal hydrological connection) will only make things worse. Ms. Gallaway tells us that she has seen Corps regulators on the same project make OHWM determinations that differed by more than 50 feet. This discrepancy has huge project implications.

Permit red tape and delays are an enormous problem and getting worse. Permits are supposed to be completed in a short period of time. The problem is that the Corps' requests for information by multiple (and often changing) staff never end, delaying final approval for years. The Corps has told Congress that it has a very low permit denial rate. The denial rate is low because many applicants give up and withdraw their applications.

I will conclude with this example. A farmer requested an official jurisdiction determination and the Corps just sat on the request. After the farmer expressed frustration, a new regulator was

assigned, but he promptly rejected the delineation prepared by the farmer's consultant and asked for more information. The staff requested that the farmer have his consultant complete an OHWM data sheet, at significant cost. The staff eventually, **without collecting ANY field data**, summarily rejected the data collected by the consultant in the field—instead identifying the OHWM at a different elevation on the map **based on interpretation of an aerial photograph**. When the farmer and his consultant asked to review the photograph, the Corps told them that the photograph was **classified and proprietary information** (LIDAR) and they were not allowed to view it. In the end, the farmer and his consultant were required to delineate the feature at whatever elevation the Corps wanted.

Based on what we see in California, it is clear that the expansions in jurisdiction over land and water features on the farm are already happening. And importantly, the normal farming exemption has been interpreted in such a way that the most ordinary farming activities conducted in jurisdictional features will require permits if and when the Corps chooses to demand them. And when they demand permits, delays and costs will mount until most farmers simply give up. Congress needs to step in and give farmers some real certainty so they can plan their farming operations and protect the environment at the same time.

Don R. Parrish

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Don Parrish is the Senior Director, Regulatory Relations, for the American Farm Bureau Federation's Public Policy team in Washington, D.C.

His primary area of responsibility at the American Farm Bureau is the Clean Water Act, which encompasses a wide range of issues affecting farmers and ranchers. These include federal authority over waters of the U.S., wetlands, concentrated animal feeding operations (CAFOs), water quality standards, and conservation issues related to the farm bill (such as swampbuster). Don supports state Farm Bureaus in their legislative and regulatory efforts and works with numerous agricultural organizations, as well as a diverse group of industry and trade associations in Washington D.C.

His expertise on these issues has placed him in leadership roles. He currently chairs the Waters Advocacy Coalition (WAC), whose purpose is to prevent the expansion of the regulatory definition of "waters of the United States." The WAC is made up of diverse organizations representing virtually every aspect of the nation's economy. Don also chairs the Agricultural Nutrient Policy council. ANPC is made up of agricultural organizations that want to strengthen their ability to work effectively on nutrient related policy and regulatory issues important to the agricultural community.

Before joining the AFBF staff, Don was an economist at Auburn University. Prior to his working at Auburn, he was employed by the Farm Credit System as a Research Analyst.

Don received a Bachelor of Science Degree in Agronomy from Auburn University and a Master of Science Degree in Agricultural Economics from Auburn University.

Originally from a farm in Alabama, Don now resides in the Washington, D.C. area with his wife, Dee Dee. His daughter Leslie Anne is working on a MBA at Vanderbilt and his son Austin is a rising senior majoring in business at the University of Alabama.

TESTIMONY SUBMITTED FOR THE RECORD

TO THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE

"EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL – IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES"

MAY 24, 2016

Prepared By:
Jody Gallaway
California Farm Bureau Member and
President and Senior Regulatory Biologist
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INTRODUCTION

I appreciate the opportunity to provide testimony for the record about the problems my clients are facing with agency interpretations of farming exemptions and how the final Clean Water Rule (WOTUS) will exacerbate a serious challenge facing farmers. I am Jody Gallaway, President and Senior Regulatory Biologist at Gallaway Enterprises, an environmental consulting firm I founded in 1998 to navigate the Clean Water Act (CWA) permitting process for private citizens, farmers, builders, and local, federal, and state agencies throughout California. I am here as a California Farm Bureau member. I was raised on an olive and hay ranch in northern California and raise a commodity myself, which is a unique background among environmental consultants who provide CWA services. Our company's guiding philosophy is to let science make decisions and not allow ourselves to be advocates for our clients. We take very seriously our obligation to base environmental analysis on science, effectively balancing both environmental ethics with practical development solutions. I work directly with the U.S. Army Corps of Engineers (Corps) on CWA permits and have taken a serious interest in both Corps' and the Environmental Protection Agency's (EPA) proposed final Clean Water Rule, also known as the waters of the United States rule (WOTUS).

I will explain how the CWA is being abused by regulators to thwart, interrupt, and challenge existing farming operations. I will share my expert opinion on how the new WOTUS rule could be used to further these assaults. I will offer suggestions to alleviate the attack on agriculture.

It was a difficult decision for me to provide testimony to this committee. I hesitated to put my name, company, and twelve employees at risk because our work depends on maintaining a professional relationship with California-based Corps staff in the Sacramento, Redding, and San Francisco offices. I am concerned that my decision to provide testimony could result in retribution from Corps regulators resulting in even greater delays on our permitting and delineation review projects.

However, the encouragement of my employees and clients empowered me to provide this testimony today. Our collective frustration, concern, and the challenges we face are at the highest I can remember at any time over the last 15 years.

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While the WOTUS rule was created by two agencies, I believe the EPA is completely disconnected from the Corps' implementation on-the-ground. EPA claims that the rule helps agriculture by creating certainty, improving the permitting process. It also claims the regulations do not create an economic burden but the practical implications are that the new rule gives both EPA and the Corps broad latitude and seemingly limitless discretion to regulate. In many cases, Corps regulators are literally a law unto themselves with no accountability. As I will discuss further, many have varying, arbitrary interpretations of the congressionally authorized "normal farming exemptions." These exemptions include plowing, changing from one crop type to another, what constitutes a ditch and a puddle, and "indirect" flows to a tributary. Perhaps most frustrating is the regulators' unbounded discretion to regulate based on their interpretation of the term the ordinary high water mark.

The EPA requires farmers to obtain a CWA permit when farming practices fail to meet the narrowly defined exemptions. From my firsthand experience, the complexity and high cost make

it nearly impossible for a farm to secure a CWA permit in California.

For all permits, the applicant needs to conduct a formal delineation of WOTUS... Using the draft delineation, the applicant would determine the level of impact associated with the agricultural project. From here, the applicant must seek a jurisdictional determination (JD) or apply for a permit. The level of impact dictates the type of permit for which the farmer may apply. I will explain this process in more detail later in this testimony.

Historically, when I and other consultants had a different interpretation of a regulator's site specific WOTUS jurisdictional determination, we worked out differences in a professional, respectful manner to arrive at science-based solutions. Over the last few years, the atmosphere of professionalism, collaboration, and compromise has deteriorated. I have great appreciation for the Corps' role and there are many great, passionate regulators working for the Corps. However, individual personalities can sometime make it extremely difficult to maintain professional working relationships when individual regulator interpretations lead to disagreement over implementation of agency guidance and protocol. Such disagreements often result in substantial and very costly project delays.

Early last year, it became apparent that regulators in our area were jumping the gun and implementing the proposed WOTUS rule before it became final in August 2015. One of the first impacts was a significant expansion of jurisdiction. I saw it when the Corps started automatically regulating additional features not historically hydrologically connected. Specifically, for the first time, Corps regulators expanded jurisdiction to features that could not be seen on the ground with the human eye. Our clients, who were in various planning stages of agricultural, development, and infrastructure projects, were concerned, confused, and deeply frustrated. In one case a regulator required that we indicate hydrological connections by drawing arrows on a delineation map and indicating that sheet flow connected waters. The Corps does not regulate sheet flow or subsurface flow. When we refused the result was two months delay and eventually the applicant withdrew his JD request.

My clients typically experience a delay of 3-4 months before a Corps regulator will even acknowledge receipt of a permit application or request for a jurisdictional determination (JD). It is common practice for a JD request to take more than twelve months to complete. More often than not, our clients are so discouraged by the Corps' lack of progress and inconsistencies that they withdraw their JD requests.

Recently, many of our projects were delayed because Corps staff said they were waiting on implementation guidance from the EPA and others told us it was "too dry" and that our project should wait until it rained again. Needless to say, some of our projects are still delayed.

Regarding projects that were moving forward, jurisdictional interpretations were inconsistent. We have seen individual regulators on the same project make ordinary high water mark determinations that vary by more than 50 feet which can significantly impact a project.[1] As a professional wetland delineator with over 15 years' experience it is challenging, if not down-right scary, to give my clients advice on the nature, location, and extent of jurisdictional features, given the wide disparity of individual regulator interpretations of CWA jurisdiction.

The evolving, inconsistent, and unreasonable positions Corps regulators take on many issues has drastically reduced collaboration and coordination. Several years ago, the Corps would be consulted on projects, methodology, and process. Now, many consultants, professionals, agencies, farmers, and developers view the Corps with a sense of fear and are unwilling to discuss projects with them or seek clarification or advice since it's common for Corps staff to launch investigations into applicants, especially farmers, when they approach the Corps for assistance.

The Corps uses classified aerial photography, LIDAR images, and other resources that are not publicly available to track farming activities and interpret the potential for Waters to occur. In one recent situation, we needed to have aerial photos de-classified in order to understand what the Corps was claiming to be Waters. The WOTUS rule allows regulators broad authority to

[1] Inconsistent ordinary high water mark findings by regulators is nothing new. See "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO Report, February 2004, available at: http://www.gao.gov/new.items/d04297.pdf.

make Waters determinations based on aerial photo interpretation rather than with field data. On one recent project a Corps regulator insisted that we map a large feature as a wetland because, based on her interpretation of an aerial photo, the feature looked like a wetland. It was in fact exposed lava rock, we refused, resulting in additional field reviews and delays.

On two projects in 2015, applicants spent tens of thousands of dollars to identify and map waters of the U.S. for the express purpose of developing an agriculture project to avoid any impacts. Both applicants submitted the delineation to the Corps seeking a jurisdictional determination. They stated their intent to develop portions of their properties into agricultural operations in such a manner as to completely avoid waters of the U.S. In both cases, the Corps threatened to pursue violations for activities that occurred on their farms related to road building and construction of stock ponds, even when those activities took place years before the farmer owned the property.

The new WOTUS rule will be worse. It provides the Corps with the ability to use historical aerial photographs dating back to an undetermined period of time to determine jurisdictional waters and evaluate agricultural activities and farming practices. This is happening now during the murky pre-rule phase even as 6th Circuit Court of Appeals has a stay on the rule. Regardless, the final WOTUS rule legitimizes this approach. The WOTUS rule uses previously undefined terminology, adds malleable terms like "floodplain", and lays out methods for individual regulators to determine jurisdiction over features that can't be seen on the ground or that may have existed in a historic context. The WOTUS rule contains significant internal inconsistencies with regards to Corps jurisdiction of subsurface flows, on page 37090 it claims that subsurface flows are not WOTUS and on page 37081 subsurface flows can be used to assert jurisdiction. The following is an excerpt taken from the WOTUS rule that demonstrates the lack of clarity, and provides amble opportunities for vast interpretation.

> *"When determining the outer distance threshold for an "adjacent water" the line is drawn perpendicular to the ordinary highwater mark or hightide line of the traditional navigable water, interstate water, territorial seas, impoundment, or cover tributary and extended landward from that point. If there are breaks in the ordinary highwater mark, the line should be extrapolated from the point where the ordinary high water mark is observed on the downstream side to the point where the ordinary*

> *high water mark is lost on the upstream side. Therefore, waters may meet the definition of neighboring even where, for example, a tributary temporarily flows underground." [37081]*

Given the incredible variation and interpretation of existing protocol, manuals, and guidance documents, I can only imagine how landowners, consultants, and regulators will map these invisible points on the landscape and where they will draw the lines that define jurisdictional features.

EXEMPTIONS AND EXCEPTIONS TO NORMAL FARMING PRACTICES

A Corps district office Clean Water Act Exemptions page[2] shows the very confusing "exceptions to the exemptions," which outlines some of the exceptions to the normal farming exemption. Some of these exceptions are extremely difficult to understand for the layman.

With vague definitions of, for example, what triggers the recapture provision, coupled with the uncertainty of what is an exempt farming practice; it is difficult even for me as a scientist to provide advice to landowners. My answer may be correct today but wrong tomorrow depending on which regulator is reviewing the information.

The Sacramento District handout offers the following disclaimer:

> *"A permit would NOT be required under Section 404 of the Clean Water Act if the activity would NOT result in the discharge of fill material into waters of the US. Please contact your local district office for a determination on whether your activity is exempt under Section 404(f) of the Clean Water Act."*

[2] http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx

The disclaimer above is both hilarious and terrifying. The Corps suggests that landowners and farmers contact the Corps so that they can determine if their farming activities are exempt, that the activities meet their definition of "normal and on-going". However, most regulators have no experience in evaluating farm practices, activities, and crop rotation decisions based on market conditions. The Corps has developed so many exceptions to the exemptions that it is difficult to determine what individual regulators consider discharge or what activities are exempt. I will review some of those here:

Plowing

Corps regulations provide that "plowing" (defined as "all forms of primary tillage . . . for the breaking up, cutting, turning over, or stirring of the soil to prepare it for the planting of crops") "will never involve a discharge of dredged or fill material." (33 C.F.R. 323.4 (a).)

Yet, notwithstanding the regulations stating otherwise, senior wetland specialists at the Sacramento and Redding District have informed our staff that all plowing, even disking for the purpose of creating firebreaks, results in a discharge into waters of the U.S. and that the Corps selectively enforces this interpretation.

The Corps selectively enforces this interpretation but with varying enforcement mechanisms. In one case, the Corps ordered a farmer to cease and desist farming property. In another case, the Corps issued the landowner a Letter of Inquiry. Here the Corps suspected that the landowner's activities violated the CWA. The letter informed the landowner that the Corps has initiated an investigation into their activities and demands that the landowner answer a variety of questions within 30 days or face legal proceedings.

I have another client that plowed his fields in the same manner as he had over the last fifteen years and planted a cover crop to improve range forage for cattle. He received a letter from the Corps informing him that the Corps had issued an investigation into his activities. I had another client who plowed and planted a wheat crop. The physical manipulation to the land was identical on both farms. Both properties contained vernal pools, swales, and seasonal wetlands and both

were plowed and planted with a crop. In the ongoing case, the Corps took the position that plowing and planting a wheat crop resulted in a discharge into waters of the U.S. In the other example the Corps determined:

> *"The discharges of dredged or fill material were associated with disking and replanting pasture grasses and are part of an established and on-going normal ranching operation conducted in acceptance with Conservation Practice standard number 512. As such, in accordance the March 25, 2014 Interpretive Rule, the discharges do not require a permit under Section 404 of the Clean Water Act (CWA), provided they do not convert an area of waters of the US to a new use and impair the flow or circulation of waters of the US or reduce the reach of the waters of the US. As recently explained in the Interpretive Rule, activities that are planned, designed, and constructed in accordance with one or more of the 56 specific Natural Resource Conservation Service (NRCS) national conservation practice standards are considered exempt under CWA section 404(f)(1)(A) and a section 404 permit is not required." (August 27, 2014, SPK-2014-00183)*

It's interesting to note that in one instance, the Corps viewed plowing and planting as a discharge into waters of the U.S., but determined the same activity was exempt in another. This is despite the plain language in the CWA regulations that state "plowing" "will never involve a discharge of dredged or fill material" (33 C.F.R. 323.4 (a)), many regulators in the Sacramento and Redding office act otherwise.

Puddles

Across much of northern California, the Corps still asserts jurisdiction over isolated waters. Regulators in our region have required delineators to map puddles in dirt roads, tire ruts, and depressions in gravel parking lots as waters of the U.S., claiming they provide habitat for endangered species. Any objections based on protocol and regulations results in serious delays in

processing permits and jurisdictional determinations. There is nothing in the final WOTUS rule that limits regulators from continuing to take jurisdiction of small impressions occurring in roads, fields, and parking areas if they can demonstrate that they might have historically been present at some undetermined time in the past, are hydrologically linked, or in northern California are "vernal pools." This is despite the EPA's claims that puddles are now exempt. Without a definition of a puddle, which the final rule fails to adequately define, the Corps will continue to take this rigid interpretation of what is and what is not jurisdictional under the CWA.

Changes in Crop Types

There was a time not long ago when the Corps did not view changing crop types as changes in "land use." Additionally, the agency recognized that fallowing fields for various time intervals was considered a normal farming practice. However, that is no longer the case. My office has recently experienced the Sacramento and Redding Districts eroding the longstanding normal farming exemption, leading to legitimate concern among members of the agricultural community that exemptions as clearly written in CWA § 404(f) are no longer applicable in our region.

During the now five-year long Western drought, farmers have needed to use their land to change from one commodity to another. As farmers seek guidance from the Corps, I have had experiences where the Sacramento District senior staff have informed us and our clients that when a crop is changed from alfalfa hay farming to cattle grazing and back to alfalfa hay farming, this change constitutes a change in "land use" therefore, the landowner should seek a permit from the Corps for any activities that constitute a discharge of fill into wetlands that may have formed during the cattle grazing operation or for any wetlands that may have been present before the original alfalfa operation. In another case, we have a client who changed from rice farming to walnut orchards and was issued a letter by the Corps informing him that the Corps had opened an investigation into his activities to determine if his farming operation required CWA § 404 authorization.

Most landowners possess detailed historical records indicating participation in U.S. Department of Agriculture (USDA) benefit programs, historic Natural Resource Conservation Service (NRCS) wheat allotments, and wetland determinations performed by NRCS staff. My

experience is the Corps demands CWA permits when the farmer switches crops. Unbeknownst to landowners, the Corps views a change from one crop type (such as an irrigated row crop, rice, wheat field, or grazing, etc.) to an orchard as a "land use" change going from temporary to permanent crops. Our reality is the Corps now demands permits for exempt actions. Through their regulatory authority Corps regulators can tell farmers which crops can be grown and where. California's current drought conditions, advaneements in irrigation techniques, and market conditions have led many landowners to change from one agriculture crop type to another.

Sadly, landowners who trust their government to work for them often proceed with normal agricultural practices with guidance and advice from USDA, only to find themselves under investigation by the Corps for activities that the Corps feels may have violated the CWA. Often these landowners are completely unaware and thought that they had completed due diligence by seeking advice and guidance from another federal agency. They often seek our services to assist them with demonstrating that their activities did not result in unauthorized fills in order to prevent incurring significant fees and delays in farming operations. In some cases, landowners have lost the ability to utilize their land because the Corps merely suspects that a violation has occurred. This comes at great financial and even emotional cost to landowners.

With the final rule, the only thing certain is how uncertain it is.

COMPLEX PERMITTING AND DELINEATION

Many landowners in California are spending significant resources to try to determine the extent of waters of the U.S. on their land and are very concerned about the ability to continue farming and ranching activities. In these cases, as mentioned previously, we are retained to perform a delineation of waters of the U.S.

There are two types of jurisdictional determinations: approved and preliminary. The Corps should attempt to process a JD request in 60 days[3]. In reality, it often takes 12 months or longer

[3] US Army Corps of Engineers, Regulatory Guidance Letter, No. 08-02, June 26, 2008: Jurisdictional Determinations

for the Corps to process a JD request and may take more than 18 months if the applicant requests an approved JD. In many situations, we perform delineations in spring months and submit it to the Corps. After receipt of the delineation, the delineation typically sits at the Corps office for months waiting to be assigned to a regulator. Frequently the Corps staff informs us that they want to wait for the rainy season before they go out into the field to verify a delineation, which typically results in a year-long process to receive a JD. It is routine for Corps staff to request clarification or have questions, but depending on the staff regulator assigned to the project, it could be minor remapping or unreasonable requests for remapping based on no field data, just a regulator's interpretation of an aerial photograph.

While the focus of the hearing is on the new WOTUS rule, it is important to highlight how the Corps has evolved over recent years, even during pre-rule times, as it can provide a strong indication of where things are headed under the current rule.

In one case, we submitted a delineation of Waters of the US to the Corps in 2013 and requested a JD. The regulator acknowledged receipt of the delineation and then proceeded to do nothing on the project for two years. When we expressed frustration, the regulator was reassigned. A new regulator informed us that he could not accept our delineation because we did not include an ordinary high water mark (OHWM) data sheet. There is no requirement to supply this data when requesting a JD. The Chief of the Sacramento office acknowledged that acceptance of delineation is not predicated on receipt of ordinary high water mark data sheets, but even this acknowledgment was not able to move the regulator. Individual regulators are given the ability and authority to request almost anything they want and landowners have no recourse. At significant cost we went back to the project site and collected the ordinary high water mark data and submitted it to the Corps. The Corps regulator, without having collected any field data, summarily informed us that we were wrong and he wanted the OHWM reflected at a different elevation on the map based on his interpretation of an aerial photograph. When we asked to review the photograph he was using to make this determination we were told that the photograph was classified/proprietary information and we were not able to view it, but were required to map the feature at whatever elevation he wanted or risk significant processing delays. The following week the regulator was reassigned and a new regulator wanted additional data. We finally

resolved all issues on this thirteen acre site, but it took more than 2 years at a $18,000 additional cost to the project (cost includes consulting fees and additional mitigation).

Unfortunately, this is all-too common. Most applicants cannot wait 12 months or 2 years for the Corps to give their blessing on delineation so they conduct the studies and file the report hoping that the conclusions of their consultant are correct. Unfortunately, given the Corps' inconsistent application of the CWA and protocols, their authority to demand almost anything, and make findings that are incompatible with field data – it's almost a forgone conclusion that delineations will be considered wrong in some way. Again this is very unsettling for landowners who are trying to comply with the plethora of rules that affect their ability to conduct traditionally lawful farming activities on their land.

PERMIT OPTIONS

If a landowner needs a Corps permit for an agricultural project or any activity there are several types of permits and/or permitting processes that may apply. The type of permit needed largely depends on the amount of discharge or fill material anticipated by the activity. Here is where the new WOTUS rule's expansion of federal jurisdiction affects landowners and will cause a significant financial burden. Slight increases in the amount of waters of the US at the project level can trigger the need for a general permit or a very rigorous individual permit, which can cost hundreds of thousands of dollars and effectively stop an agricultural project. To illustrate the difficulty to secure a permit, I offer the process below:

There are 3 types of permits applicable for agricultural projects. For all permits the applicant needs to conduct a formal delineation or JD of waters of the U.S. pursuant to Corps criteria. The applicant must then determine the level of impact or the size of the waters of the US associated with the agricultural project. The amount of waters of the US impacted dictates what type of permit the applicant can apply for. In all permitting scenarios the applicant must include a mitigation proposal demonstrating where and how mitigation will occur. Mitigation involves the use of an agency approved mitigation bank or applicant sponsored mitigation project, or use of an in-lieu fund. Mitigation costs depending on the type of resource impacted varies widely. If a

project site is not serviced by a mitigation bank then the applicant must propose an applicant sponsored mitigation project or participate in an in-lieu program. Mitigation ratios when participating in these types of mitigation projects are increased and can be anywhere from two to five acres for each acre[4] affected by the proposed project. The permittee must comply with all other federal laws before they can be issued a permit. In most instances, those laws are Section 106 of the National Historic Preservation Act (NHPA) and Section 7 of the federal Endangered Species Act (ESA).

For ESA compliance, the applicant needs to submit with their CWA application biological reports or an evaluation that discusses the presence or absence of species listed under the federal ESA. If species are present and will be directly or indirectly impacted then the applicant is required to submit a Biological Assessment for the purposes of assisting the Corps with ESA Section 7 consultation. The applicant must determine how and where they will mitigate for all impacts to federal listed species or critical habitat.

The applicant also needs to submit a NHPA Section 106 compliant Cultural and Historic Properties Report to demonstrate that no cultural or historic properties would be impacted by the agricultural project. Part of this process involves consultation with Native American tribes. A concern for agricultural projects is that buildings, bridges, and water conveyance structures over 50 years old can often become eligible for listing as a historical resource. Areas or structures within a project site that are listed or are eligible for listing must be avoided or mitigated.

The Corps Chief in the Sacramento Regulatory office informed us that for an agricultural project that involves conversion of land for agricultural operations that require a Corps permit and compliance with CWA § 404(b)(1), the range of potential off-site alternatives could include anywhere in the State that the crop grows. Therefore, if someone was purchasing land to expand their agricultural operations the EPA/Corps could require that the applicant evaluate all possible lands that are currently under cultivation or range lands suitable for the proposed agricultural operation across the entire State of California. The applicant must demonstrate that the proposed project is the Least Environmentally Damaging Practicable Alternative (LEDPA) by answering

[4] Mitigation ratios can be much higher in other parts of the nation.

the following question, "Is, or was there, an alternative site that could be acquired to accommodate the project and achieve the basic project purpose that would result in fewer impacts to waters of the US? When the entire State is the back-drop for an off-site alternatives analysis, the answer, by design, is almost always yes. Given this almost insurmountable hurdle for an agricultural project, to my knowledge, there have been no individual permits issued for an agricultural project in California, (excluding those affecting two acres or less, issued under RGL 95-01[5]).

For quick reference the following table includes a summary of the permit thresholds for an agricultural permit process and the associated average cost for each.

Type of Permit	Impact Threshold		404(b)(1) Alternatives Analysis Required	Costs (national average based on Sunding 2011, not including mitigation, project designs, entitlement)
	Acres	Linear		
Nationwide (NWP 40)	½ or less	300 feet or less		$35,940
Letter of Permission (LOP)	1 or less	500 or less	yes	$337,577
Individual Permit (IP) under RGL 95-01	2 or less		yes	Only applies when building a barn, home, or agricultural building, $150,000
IP	1.1 or more	501 or more	yes	$337,577

In our field work, we have applied the WOTUS rule definitions and found that the new definition will increase the number and extent of jurisdictional waters on most projects. The increase in

[5] U.S. Army Corps of Engineers, Regulatory Guidance Letter 95-01, Guidance on Individual Permit Flexibility for Small Landowners, March 31, 1995.

jurisdictional waters generally comes from the inclusion of tributaries, as well as those features not hydrologically connected. Small changes in the amount of jurisdictional features at the project level do and will have significant implications on cost and processing timelines. In my view, this is the primary disconnect between government regulators and the regulated public. Many EPA and Corps officials agree that federal jurisdiction will increase, but both fail to honestly acknowledge the impacts that this increase will have in the ability of property owners to remain compliant. In 2011[6] dollars, the nationwide average to prepare a nationwide permit application was $35,940. The nationwide permit, as demonstrated in the graph above, only applies to very small projects. For individual permits that are large enough to accommodate even small farms, the cost average is $337,577. Costs would remain the same for an LOP IP as the only difference is that the federal noticing process is eliminated, which does not affeet costs.

Though times have changed, even back in 2002, the Corps asserted that it takes 127 days for a decision on an individual permit and 16 days to receive a decision on a nationwide permit. When recording permit decision times, the Corps only counts the time from the date that it deems an application complete. For a nationwide permit the majority of time is spent responding to the Corps' requests for additional information regarding the impacts assessment, delineation, and making changes to the delineation map. For an individual permit, Corps regulators have broad authority to request redesigns of the project, the site plans, demand the additional review of on-site and off-site alternatives, require additional technical studies, and require additional cost evaluations; almost anything they feel might assist them with a permit decision. As a result, Sunding and Zilberman in 2002[7] determined that nationwide permits took an average of 313 days to obtain. Individual permits took an average of 788 days of which 405 days elapsed after the application was submitted to the Corps office. It's my experience that in California the cost and timeframes are much longer.

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[6] Sunding, David. July 26, 2011. Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction. Exhibit 11. Comments submitted by Waters Advocacy Coalition, et. al in Response to

[7] Sunding, D. and Zilberman D., "The Economics of the Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," Natural Resources Journal, vol. 42, Winter 202, pp. 59-74.

Depending on the type of project, costs of delay can be significant. Sunding and Zilberman (2011) estimated that, assuming a 20 percent discount rate, delays lasting 6 months could result in a loss of $47,000 per acre and a delay of a year could result in loss of over $90,000 per acre.

CLOSING STATEMENT

I have shared several examples of how the Corps is severely limiting farming and ranching in California. I could have shared many more. Most of my clients wish to remain unnamed because there is an overriding fear of the Corps. A few have come out publicly, facing the risk that the Corps could end their business, simply because they have sensed the injustice and don't want others to suffer a similar fate. Similarly, I have put my name and company on the line, which I hope will not affect my day-to-day work with regulators.

I work with landowners on a daily basis to help them remain compliant with the CWA. As I have described, the permitting process is expensive, lengthy, and lacks predictability. Nationwide Permit number 40 (NWP 40) is established for agricultural activities; however the impact thresholds are too narrow to provide much utilitarian function for farmers[8].The nationwide permits are currently being reissued and I urge Congress to allow NWP 40 to increase allowable discharge to 5 acres and have no linear threshold for impacts to drainages, ditches, and ephemeral streams (similar to the threshold standards giving to linear transportation projects, NWP 14). Removing the linear threshold would provide significant relief to farmers especially given the vague and confusing language in the WOTUS rule regarding the potential jurisdiction of features that no longer exist, man-made ditches, and ditches that convey water for meniscal amounts of time.

The EPA's claim that the new rule will not create an economic burden and will streamline the permitting process is not true. There is no question that the permitting process for agricultural projects should be streamlined. It seems logically contrary to expand federal jurisdiction of

[8] NWP 40 discharge and fill limitations: The discharge must not cause the loss of greater than ½ acre of non-tidal waters of the US, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse impacts.

waters of the U.S., as I have demonstrated this rule does, while maintaining or continuing to erode narrow permit thresholds and then have the EPA claim that *"it will not add an economic burden on agriculture."* It's my experience that the EPA can make such a claim because they are disconnected from how things actually work on the ground at the project and individual regulator level.

Additionally, the EPA's claim that the new rule brings certainty is blatantly false. There is extreme uncertainty in the new definitions. And unfortunately, there is no fallback position because the previous definitions were unclear and, as demonstrated, interpreted in vastly different ways by different regulators within the same regulatory agency.

The agencies and the courts have so far tried and failed to bring certainty to America's farmers and ranchers. What needs to happen is for the Congress to step in and help create that certainty. There should be clearer definitions, an easier permitting process, minimal cost to the farmer, and better interagency communication between EPA, Corps, and USDA. Farmers and ranchers shouldn't feel that the U.S. Army has militarized farming and ranching, treating them as an enemy of the United States. I hope for a day when the agency can be trusted again and work in good faith with farmers and ranchers who produce the food and fiber upon which our nation and the globe depends.

I hope I have shed some light on this issue. I appreciate the opportunity to testify and look forward to your questions.

***

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Hopper, Reed M and Miller, Mark. 2015. "Waters of the United States: A Case Study in Government Abuse." The James Madison Institute: Backgrounder. No. 76/August 2015.

Sunding, D. and Zilberman D., "The Economics of the Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," Natural Resources Journal, vol. 42, Winter 202, pp. 59-74.

Sunding, David. July 26, 2011. Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction. Exhibit 11. Comments submitted by Waters Advocacy Coalition, et. al in Response to the Environmental Protection Agency's and US Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act EPA-HQ-OW-2011-0409.

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U.S. Army Corps of Engineers, South Pacific Division. 2001. Final summary report: Guidelines for jurisdictional determinations for water of the United States in the arid Southwest. San Francisco, CA: U.S. Army Corps of Engineers, South Pacific Division. (http://www.spl.usace.army.mil/regulatory/lad.htm).

Senate Environment and Public Works Committee
Subcommittee on Fisheries, Water, and Wildlife
hearing entitled, "Erosion of Exemptions and Expansion of Federal Control – Implementation of the Definition of Waters of the United States"
Tuesday, May 24, 2016
Responses for the Record
Mr. Don Parrish

Don R Parrish
American Farm Bureau Federation

I have attached the information requested by the committee and Senator Whitehouse specifically regarding communications and documentation related to the U.S. Army Corps of Engineers routinely regulating "puddles" (puddles are defined here as small wet-spots and tire ruts that hold rainwater on the surface of land and that do not meet the U.S. Army Corps wetland criteria). I have also attached supporting documentation that shows the U.S. Army Corps of Engineers routinely engaging in regulatory over-reach by requiring CWA permits when farmers change one type of crop to another or one type of farming activity to another type of farming activity. This documentation is summarized and provided by Ms. Jody Gallaway, President of Gallaway Enterprises. These examples reflect her firsthand knowledge and her on-the-ground experiences with the U.S. Army Corps of Engineers.

The American Farm Bureau would welcome an opportunity to work in a bipartisan manner to craft a legislative solution that would ensure that the U.S. Army Corps of Engineers does not improperly limit or narrow the exemptions authorized by Congress in Section 404 f of the Clean Water Act to protect normal farming operations.

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 1 and Supporting Documents

Case Study 1

1. Project Summary:
   SPK#2004-00896
   The total project area is approximately 221 acres in size.

2. Issue:
   a. Corps determined that puddles in the middle of a dirt road, filled after rain events and created from vehicular disturbance (tire ruts), are WOTUS.
   b. Corps required placement of puddles on a delineation map that are not wetlands and required data sheets to support false assertion of federal jurisdiction by the Corps, or risk not obtaining a jurisdictional determination.

3. Supporting Information:
   Exhibit A – 2007 Wetland Delineation (verified[i])
   Exhibit B – Corps Field Inspection Record obtained from FOIA request
   Exhibit C – 2014 Wetland Delineation (unverified)

4. Details:
   a. In 2007, a delineation of WOTUS (Exhibit A) was performed for the project area. Of the total 0.214 acres of *Seasonal Wetlands*, 25% of "wetland" features were human created tire ruts in the dirt roads. The consultants argued that the puddles in the dirt roads were not jurisdictional because they did not meet the Corps' wetland criteria. Specifically, there was an absence of hydric soils and hydrophytic vegetation. Nonetheless, the Corps asserted jurisdiction and required a permit to fill the puddles. Refer to Exhibit B "Field Inspection Form" for the Corps regulator's reasoning and justification for determining jurisdiction, which includes statements of "little to no veg" and "appears to be formed due to off-road activity."

   b. In 2014, following the reissuance of the 2012 Nationwide Permits and construction of Phase I of the project, another wetland delineation was completed for Phase II. Based on the direction of the Corps regional representative's insistence on asserting jurisdiction over puddles in roads, additional puddles were delineated (Exhibit C). The additional puddles were a product of vehicular use in the area.

c. Corps Regulator conducted a site visit after an intense rain event and used photos of ponded water to assert jurisdiction. This is not an acceptable method under the 1987 or 2008 Regional Supplement to the Corps of Engineers Wetland Delineation Manual.

S. Status: Pending.

[ii] Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area.

Exhibit A

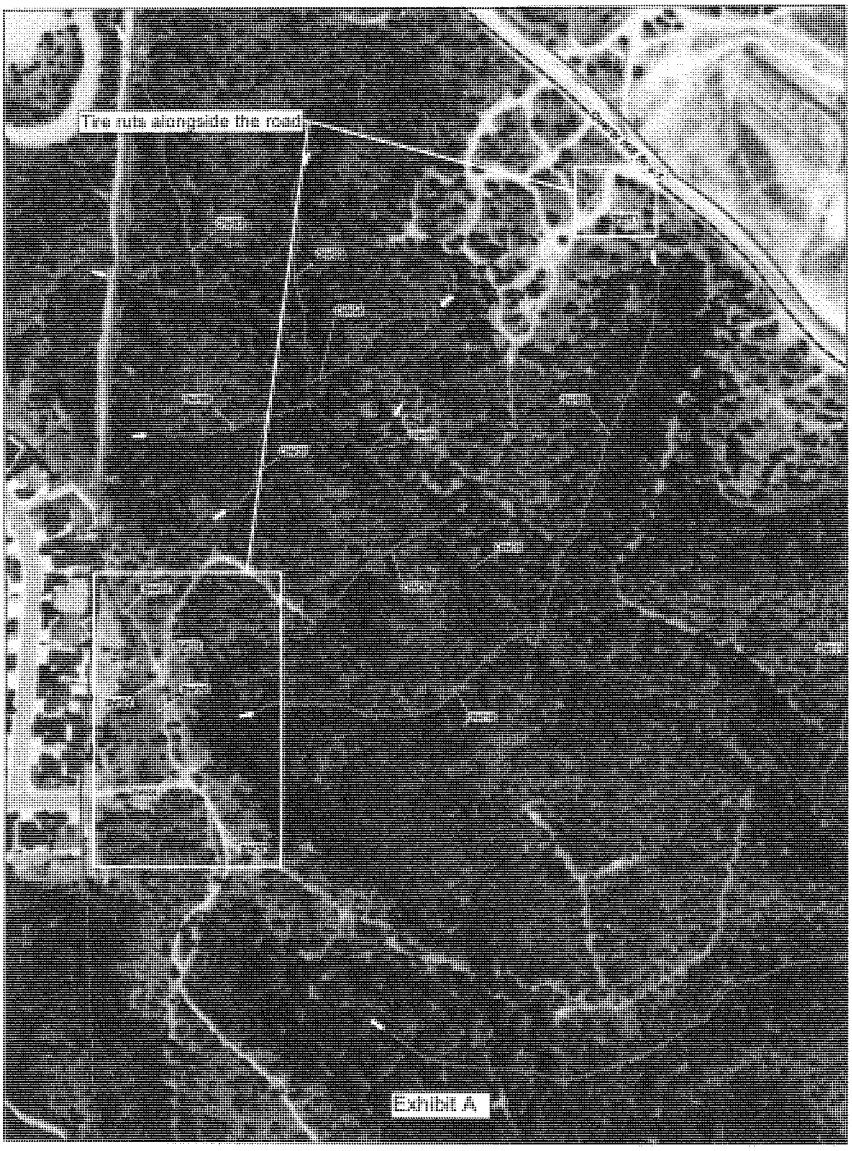

Tire ruts alongside the road
Exhibit A

Exhibit B

FIELD INSPECTION RECORD

1. Name *(Inspector)* Kelly		2. DATE 3-1-05
3. PERMIT NUMBER 2004CO896	3. E-NUMBER	5. SUSPENSE NUMBER

INSTRUCTIONS: Place an "X" in the appropriate box or annotate the required information

_ SECTION 10	_ PRE-CONSTRUCTION INSPECTION	_ PROPOSED	7. BANK: RIGHT / LEFT
X SECTION 404	_ COMPLIANCE INSPECTION	_ EXISTING	
_ SECTION 13	_ VIOLATION INSPECTION		8. RIVER MILE
_ OTHER *(Specify)* _____		FLIGHT NUMBER _____	

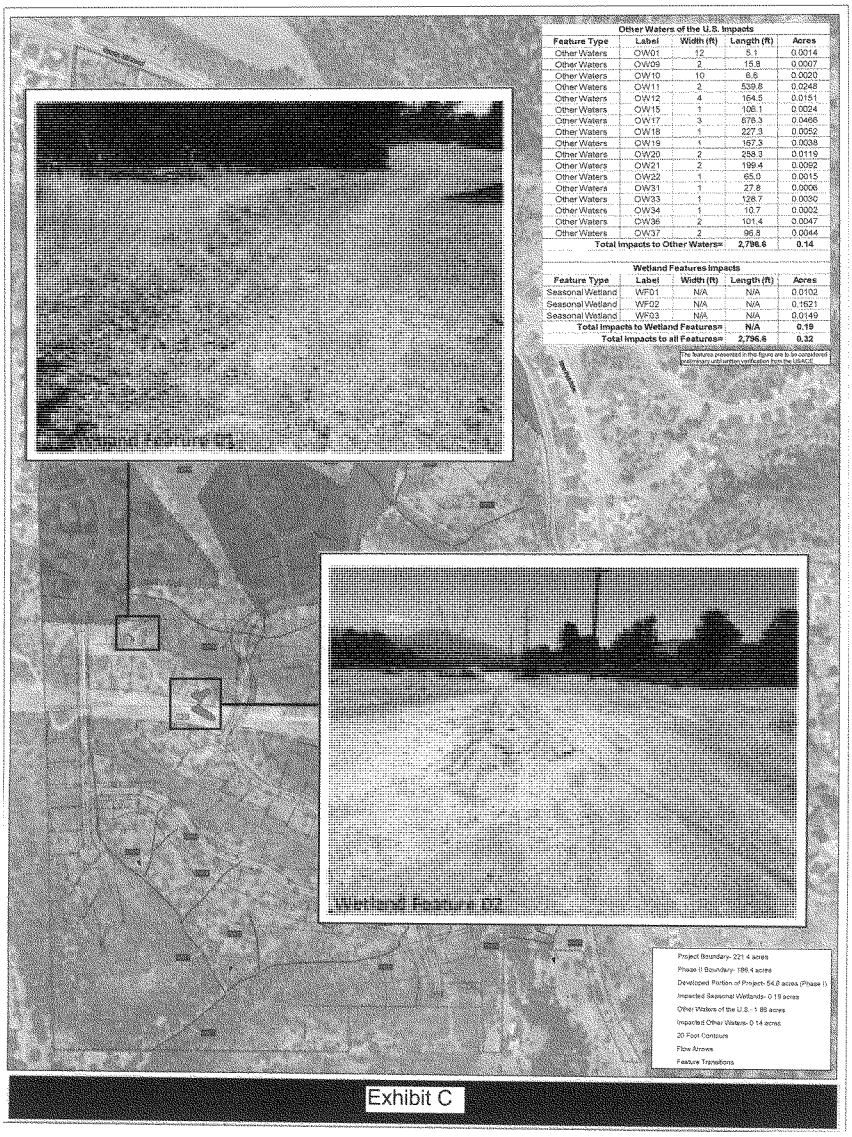
9. NAME OF WATERWAY	10. COUNTY	11. PARCEL NUMBER
12. TRIBUTARY	13. SUBDIVISION Bay	14. LOT NUMBER
15. WIDTH OF WATERWAY	16. LOCATION (nearest town or city)	
17. NAME (property owner)		18. TELEPHONE NUMBER
19. ADDRESS		
20. NAME (lessee)		21. TELEPHONE NUMBER
22. NAME (person contacted)		23. TELEPHONE NUMBER
24. NAME (agent)		25. TELEPHONE NUMBER

26. FIELD SKETCH

- Observed pools along west side fire Rd. little to no veg. appear to be formed due to off-road activity. Definitely receiving H2O from pools previously considered potential habitat. ✓ w/ FWS if should be added.
- Walked down OW 16 (Gallery map) Gallery listed as open. Definite ground water input. on OW16. OW 18, 19, & 20 - Tribs to OW16 Definite ground water input, water observed seeping out of hill and rodent holes into streams. Needs to be mapped as intermit as NSR map indicated.

"little to no veg."
"appear to be formed due to off-road activity"

Exhibit C



Other Waters of the U.S. Impacts

Feature Type	Label	Width (ft)	Length (ft)	Acres
Other Waters	OW01	12	5.1	0.0014
Other Waters	OW09	2	15.8	0.0007
Other Waters	OW10	10	8.6	0.0020
Other Waters	OW11	2	539.8	0.0248
Other Waters	OW12	4	164.5	0.0151
Other Waters	OW15	1	106.1	0.0024
Other Waters	OW17	3	676.3	0.0466
Other Waters	OW18	1	227.3	0.0052
Other Waters	OW19	1	167.3	0.0038
Other Waters	OW20	2	258.3	0.0119
Other Waters	OW21	2	199.4	0.0092
Other Waters	OW22	1	65.0	0.0015
Other Waters	OW31	1	27.8	0.0006
Other Waters	OW33	1	128.7	0.0030
Other Waters	OW34	1	10.7	0.0002
Other Waters	OW36	2	101.4	0.0047
Other Waters	OW37	2	96.8	0.0044
Total Impacts to Other Waters=			**2,796.6**	**0.14**

Wetland Features Impacts

Feature Type	Label	Width (ft)	Length (ft)	Acres
Seasonal Wetland	WF01	N/A	N/A	0.0102
Seasonal Wetland	WF02	N/A	N/A	0.1521
Seasonal Wetland	WF03	N/A	N/A	0.0149
Total Impacts to Wetland Features=			**N/A**	**0.19**
Total Impacts to all Features=			**2,796.6**	**0.32**

The features presented in the figure are to be considered jurisdictional unless specifically excluded.

Exhibit C

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 2 and Supporting Documents

Case Study 2

1. Project Summary
   SPK#2002-00641
   The total project area is approximately 50.9 acres is size.

2. Issue:
   a. Corps required the inclusion of puddles that form after rain events in a gravel parking lot in the wetland delineation report.
   b. Corps required data sheets to support a false assertion by the Corps, or risk not obtaining a jurisdictional determination.

3. Supporting Information:
   Exhibit A – Portion of original delineation of WOTUS
   Exhibit B – Case Study Area
   Exhibit C – 2007 Final Delineation WOTUS (small focus area is depicted demonstrating the Corps jurisdiction of puddles in parking lot) (verified[1])
   Exhibit D – Site photos including chronological photos of WF 21

4. Details – The original wetland delineation was revised under the direction of the Corps to include wetland feature 21, a manmade puddle in a gravel parking lot. This revision resulted in an additional 0.079 acres of Seasonal Wetland being labeled as jurisdictional. As observed in Exhibit A, the delineator did not map the puddle in the parking lot as WOTUS. Supporting evidence was provided that the puddle was not jurisdictional. In Exhibit D the delineator provided a series of historical photos that show no connection (isolated) or ponding in the parking lot. However, the Corps later instructed the delineator to map the puddles as WOTUS and suggested language for a data sheet. .Despite arguments from the delineator that the feature is not WOTUS, the Corps asserted jurisdiction and would not verify the delineation map without including the feature. The final map (Exhibit C) shows the puddle in the parking lot. The data sheet (Exhibit E) indicates that no vegetation is present therefore it does not meet the criteria as a wetland. The Corps required Ms. Gallaway to change the data contained in her data sheet and map a feature that did not meet the wetland criteria as a wetland feature as a condition of obtaining a permit. The Corps frequently takes jurisdiction over similar features therefore this situation repeats frequently throughout the region.

5. Status: Project completed

[1] Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area.

Exhibit A

Exhibit A

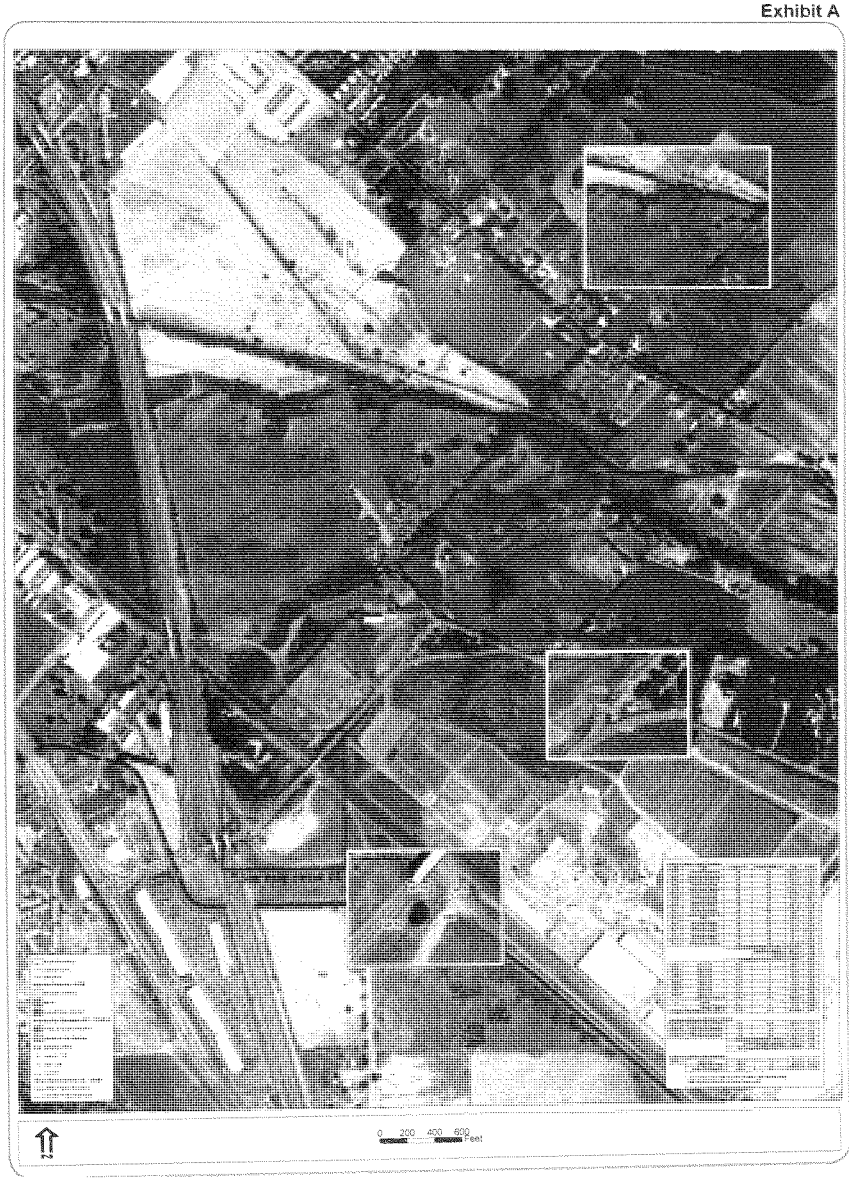
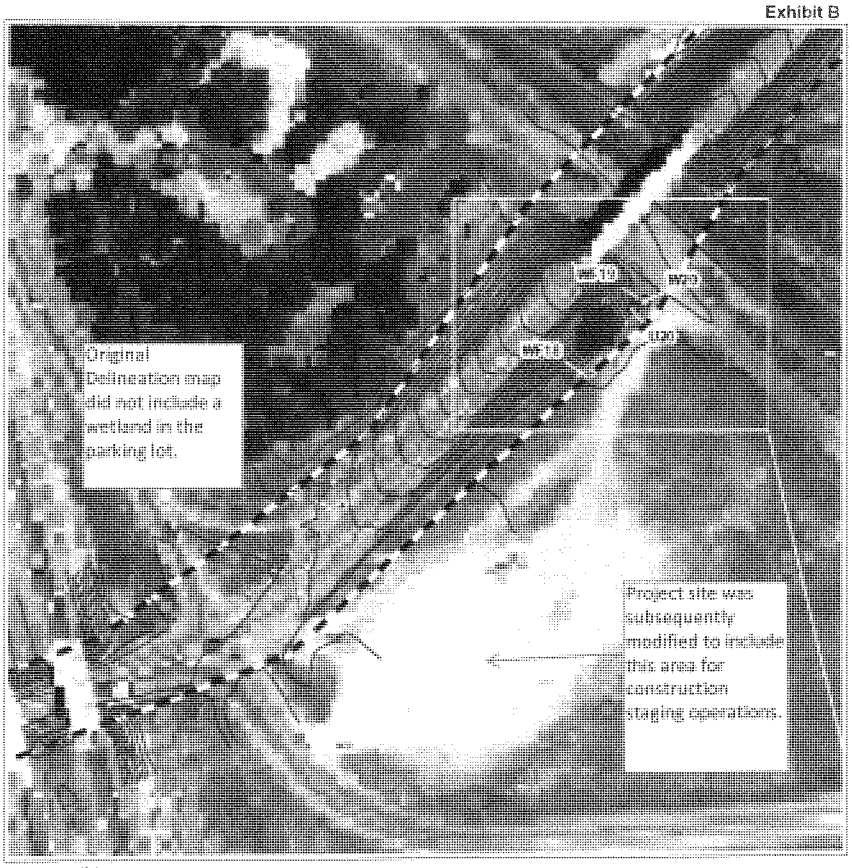


Exhibit B

Exhibit B



Map Detail 01.

Exhibit C

Exhibit C

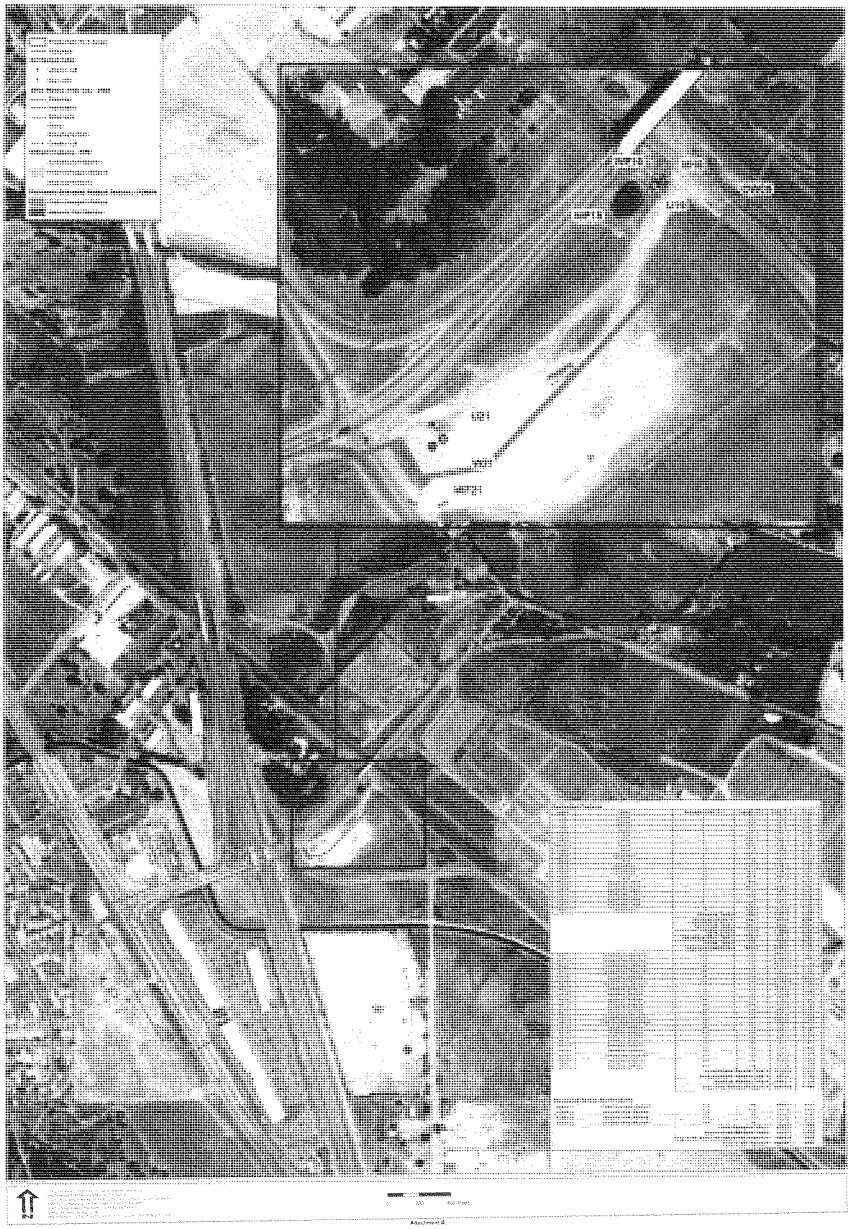
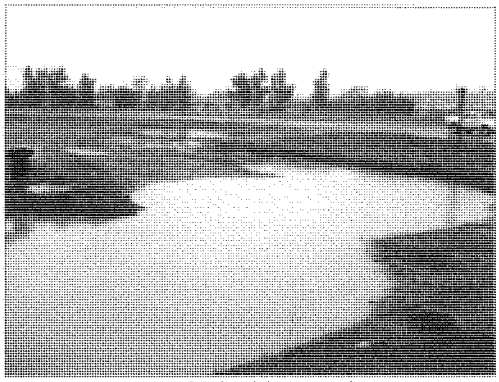
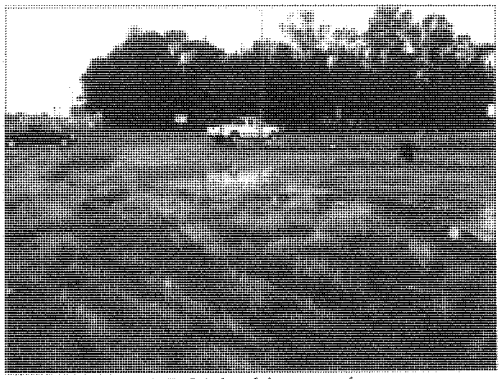


Exhibit D

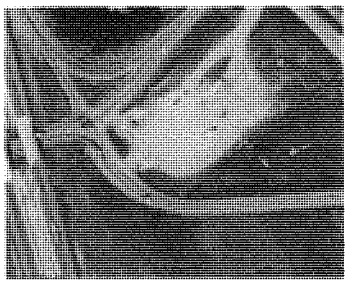
Wetland Feature 21 Pictures



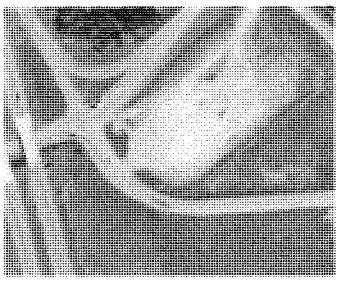
WF 21 looking south



WF 21 looking north

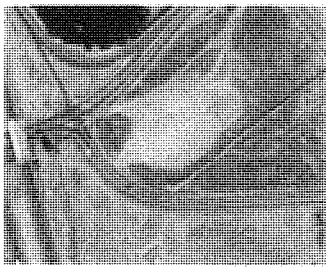


5/1/2006



4/1/2004

6/30/2005



9/10/98

* Aerial imagery showing the absence of wetland feature 21

Exhibit E

DATA FORM
ROUTINE WETLAND DETERMINATION
(1987 COE Wetlands Delineation Manual)

Project/Site:	Anderson Sewer			Date:	11/18/04
Application/Owner:	Sandy Sanderson			County:	Shasta
Investigator:	B. Taylor and S. Innecken			State:	CA
Do Normal Circumstances exist on the site?		yes		Community ID:	Seasonal Wetland
Is the site significantly disturbed (Atypical Situation)?		yes		Transect ID:	WF 21
Is the area a potential Problem Area?			no	Plot ID:	W21

VEGETATION

	Dominant Plant Species	Stratum	Indicator		Dominant Plant Species	Stratum	Indicator
1.	No vegetation present			9.			
2.				10.			
3.				11.			
4.				12.			
5.				13.			
6.				14.			
7.				15.			
8.				16.			

Percent of Dominant Species that are OBL, FACW or FAC (excluding FAC -). n/a

Remarks: Feature is highly disturbed due to off-road vehicle traffic. No vegetation was present.

HYDROLOGY

x Recorded Data (Describe in Remarks):
Stream, Lake or Tide Gauge
x Aerial Photographs
Other (Soil Survey)
No Recorded Data Available

Field Observations:
Depth of Water Surface: __ (in.)
Depth of Free Water in Pit: ___ (in.)
Depth to Saturated Soil: _5__ (in.)

Wetland Hydrology Indicators:
Primary Indicators:
____ Inundated (nearby)
__X__ Saturated in Upper 12 inches
____ Water Marks
____ Drift Lines
____ Sediment Deposits
____ Drainage Patterns in Wetlands
Secondary Indicators (2 or more required):
X Oxidized Root Channels in Upper 12 inches
____ Water-Stained Leaves
____ Local Soil Survey Data
____ FAC-Neutral Test
____ Other (Explain in Remarks)

Remarks: none

SOILS

Map Unit Name
(Series and Phase): Perkins Gravelly Loam, 0-3% slopes

Drainage class: well-drained and moderately well-drained

Taxonomy (Subgroup): Mollic Haploxeralfs

Field Observations

Confirm Mapped Type x Yes __ No

Profile Description:

Depth (inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance/Contrast	Texture, Concretions Structures, etc.
0-9 "	A1	10YR 3/3	10YR 6/8	many/small/prominent	Sandy loam
9-18"	A2	10YR 4/3	7.5YR 4/4	few/small/prominent	Sandy loam

Hydric Soil Indicators:

__ Histosol
__ Histic Epipedon
__ Sulfidic Odor
__ Aquic Moisture Regime
_X_ Reducing Conditions
__ Gleyed or Low-Chroma Colors
_X_ Concretions
__ High Organic Content in Surface layer in Sandy Soils
__ Organic Streaking in Sandy Soils
_X_ Listed on Local Hydric Soils List
_X_ Listed on National Hydric Soils List
__ Other (Explain in Remarks)

Remarks:

Wetland Determination

Hydrophytic Vegetation Present	x Yes	No			
Wetland Hydrology Present	x Yes	No	Is this Sampling Point Within a Wetland?	x Yes	No
Hydric Soils Present	x Yes	No			

Remarks: Wetland devoid of vegetation due to vehicle disturbance.

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 3 and Supporting Documents

Case Study 3

1. Project Summary:
   SPK#2013-00513
   The total project area is approximately 20 acres in size.

2. Issue:
   a. Corps requires the inclusion of puddles that form after rain events created by and resulting from vehicular disturbance in the middle of a dirt road.
   b. No data was supplied for the non-jurisdictional feature, but it was considered jurisdictional and verified.

3. Supporting Information:
   Exhibit A – 2013 Delineation of WOTUS map (verified[1])
   Exhibit B – Technical memo to Corps regarding Non-jurisdictional Feature 1
   Exhibit C – Photo of Non-jurisdictional Feature 1
   Exhibit D – Delineation of WOTUS Jurisdictional Determination Letter from Corps

4. Details: The original delineation map (Exhibit A) indicated a non-jurisdictional feature with supporting data to confirm non-jurisdiction. Additional technical memos and data were supplied to the Corps describing the non-jurisdictional status of the man-made depression in a dirt road (Exhibit B). The language in Exhibit B was accepted by the Corps, however in the jurisdictional determination letter (Exhibit D), the Corps asserts jurisdiction over this feature resulting in an additional 0.002 acres Seasonal Wetland with no supporting data.

5. Status: No progress

[1] Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area.

Exhibit A

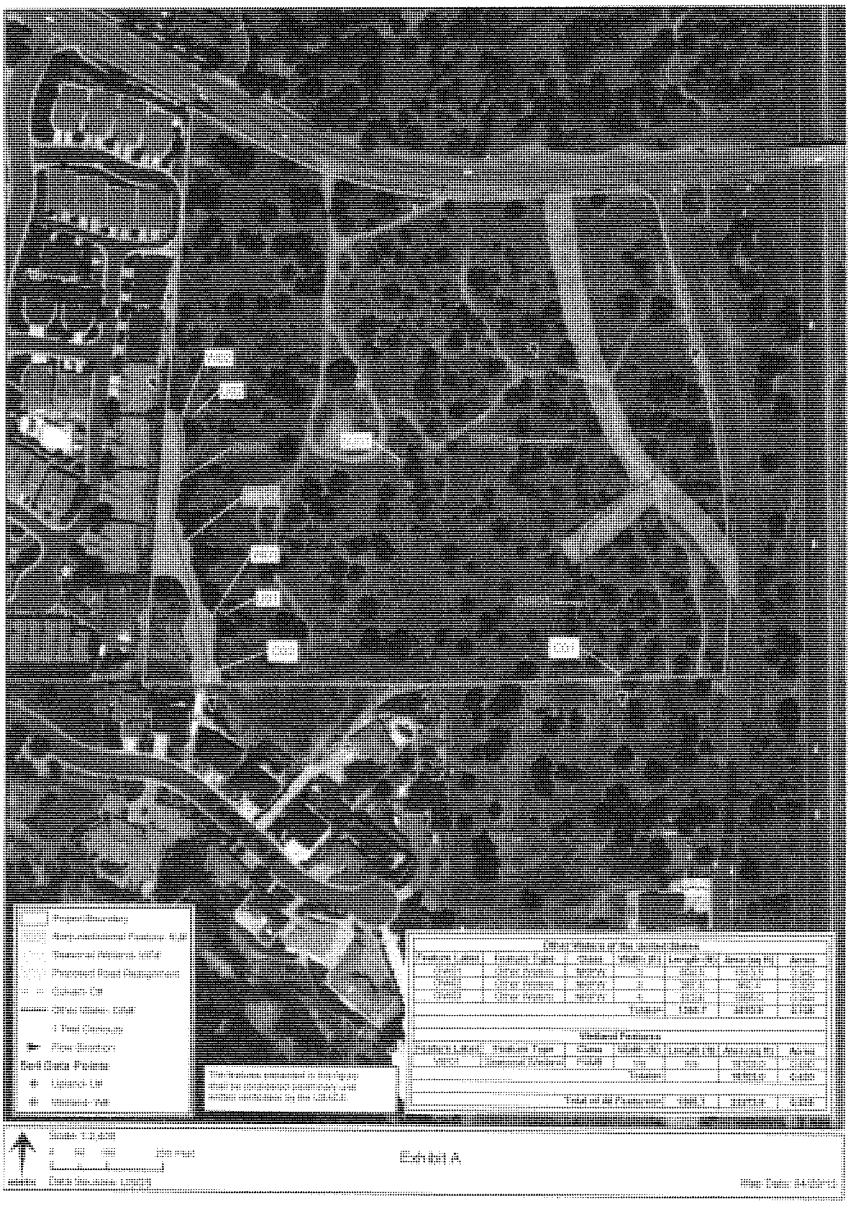


Exhibit A

Exhibit B

gallaway
ENTERPRISES
117 MEYERS STREET SUITE 120
CHICO, CA 95928 530·332·9909

U.S. Army Corps of Engineers
Regulatory Division, Sacramento District
1325 J Street, Suite 1350
Sacramento, California 95814-2922
Attn: Zac Fancher

September 16, 2013

RE: Technical Memorandum for the Draft Delineation of Waters of the U.S Hilltop Drive Development Project (SPK-2013-00513)

Dear Mr. Fancher,

Gallaway Enterprises has made corrections and additions to the Draft Delineation of Waters of the U.S Hilltop Drive Development Project (WD) (SPK-2013-00513). Corrections and additional information added to the WD was made to clarify the size and classification of a non-jurisdictional feature within the project limits. The following excerpt is where corrections and additions to the WD were made.

The following paragraph can be found in the **Results** section under **Potential Non-jurisdictional** on Page
6.

Potential Non-jurisdictional

One potentially non-jurisdictional seasonal wetland was delineated on the site. This feature was created by ~~an off-road vehicles getting stuck in the mud and subsequent efforts to retrieve the vehicle~~. off road vehicles which subsequently left deep tire ruts in the soil. The indentations left by off road vehicles now hold enough water to support hydrophytic vegetation. Because of disturbance from vehicles, vegetation was greatly reduced, but enough was present to complete the determination. The seasonal wetland appears to be isolated, as it is fed mostly by heavy rains and some on-site runoff but appears to have no direct connection to either of the streams. This feature does not contribute to the function or ecology of the ~~contribute any significant manner to the ecology or function of other~~ jurisdictional features on site. It does not abut nor is it adjacent and has no significant nexus. There are ~~0.1096~~ 0.002 acres of non-jurisdictional isolated wetland within the project area.

gallaway
ENTERPRISES
117 MEYERS STREET SUITE 120
CHICO, CA 95928 530·332·9909

Should you have any questions, please do not hesitate to contact me at (530) 332-9909 or christine@gallawayenterprises.com.

Sincerely,

Christine Schukraft, Biologist
Gallaway Enterprises

Exhibit C

Exhibit D

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO CA 95814-2922

REPLY TO
ATTENTION OF

January 17, 2014

Regulatory Division (SPK-2013-00513)

Mr. Ron Giddings
MD Development
4255 Alta Camp Drive
Redding, California 96002-2468

Dear Mr. Giddings:

We are responding to your May 30, 2013, request for a preliminary jurisdictional determination (JD), in accordance with our Regulatory Guidance Letter (RGL) 08-02, for the Hilltop Drive Development Project site. The approximately 20-acre site is located on or near Sacramento River, Section 30, Township 32 North, Range 4 West, Mount Diablo Meridian, Latitude 40.5939°, Longitude -122.3630°, Shasta County, California.

Based on available information, **we concur with the amount and location of wetlands and/or other water bodies on the site as depicted on the enclosed April 29, 2013 *Hilltop Drive Development Project Draft Wetland Delineation – Attachment A* map prepared by Gallaway Enterprises.** The feature labeled "NJ01" on the above referenced map does not have an acreage figure indicated. Gallaway Enterprises has estimated this feature to be 0.002-acre in size. The Corps concurs with the estimate and has included "NJ01" in this Preliminary Jurisdictional Determination. The approximately 0.538-acre of wetlands and/or other water bodies present within the survey area are potential waters of the United States regulated under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

We have enclosed a copy of the *Preliminary Jurisdictional Determination Form* for this site. Please sign and return a copy of the completed form to this office. Once we receive a copy of the form with your signature, we can accept and process a Pre-Construction Notification or permit application for your proposed project.

You should not start any work in potentially jurisdictional waters of the United States unless you have Department of the Army permit authorization for the activity. You may request an approved JD for this site at any time prior to starting work within waters. In certain circumstances, as described in RGL 08-02, an approved JD may later be necessary.

You should provide a copy of this letter and notice to all other affected parties, including any individual who has an identifiable and substantial legal interest in the property.

This preliminary determination has been conducted to identify the potential limits of wetlands and other water bodies, which may be subject to Corps of Engineers' jurisdiction for the particular site identified in this request. A Notification of Appeal Process and Request for Appeal form is enclosed to notify you of your options with this determination. This determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985. If you or your tenant are U.S. Department of Agriculture (USDA) program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service, prior to starting work.

We appreciate your feedback. At your earliest convenience, please tell us how we are doing by completing the customer survey on our website under *Customer Service Survey*.

Please refer to identification number SPK-2013-00513 in any correspondence concerning this project. If you have any questions, please contact Mr. Zachary Fancher at our Sacramento Regulatory Office, 1325 J Street, Suite 1350, Sacramento, California 95814-2922, by email at *Zachary.J.Fancher@usace.army.mil*, or telephone at 916-557-6643. For more information regarding our program, please visit our website at *www.spk.usace.army.mil/Missions/Regulatory.aspx*.

Sincerely,

Nancy Arcady Haley
Chief, California North Branch

Enclosures

cc: (w/o encls)

Ms. Jody Gallaway, Gallaway Enterprises, 117 Meyers Street, Suite 120, Chico, California 95928-6592
Mr. Matthew Kelley, U.S. Army Corps of Engineers, Regulatory Division, Redding Field Office, 310 Hemsted Drive, Suite 310, Redding, California 96002-0935

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 4 and Supporting Documents

Case Study 4

1. Project Summary:
   SPK#2013-01091
   The total project area is approximately 10 acres in size

2. Issue:
   a. Corps requires the inclusion of a geotechnical test pit to assess soil percolation as a jurisdictional wetland feature
   b. Delineator refused to supply data sheets for features that were not jurisdictional. Corps verified the delineation without data sheets for features they required add to the delineation map (WF04, WF05 and WF 06).

3. Supporting Information
   Exhibit A – 2013 1st Submitted Draft Delineation map
   Exhibit B – 2014 Revised Delineation map (verified[1])
   Exhibit C – Photos of features the Corps required to be added to the original delineation map.

4. Details: Following the original submission of the draft delineation (Exhibit A), a site visit with consultant and Corps regulator was conducted, resulting in the Corps asserting jurisdiction of additional features (Exhibit B). The revised map includes an area labeled as a seasonal swale and two additional man-made features (WF04, WF05 and WF06). The seasonal swale (WF06) contained wetland indicator plants dominated by rye grass, but the same prevalence of rye grass was found in the upland areas, which means that the swale shouldn't be considered a wetland based on rye grass as a dominant plant. However the Corps claimed that the area was subject to sheet flow when there were significant rain events. The Corps regulator brought photos of the site and surrounding area taken during significant rain events and asserted jurisdiction based on the photos he had taken. The regulator indicated that they wanted the three additional features on the map because the site is known to flood during high precipitation events. The man-made feature (WF04) was a percolation test pit that was created as a result of geotechnical investigations. All three features that the Corps required to be mapped as wetlands did not meet the criteria as wetlands and the regulator did not supply any data.

5. Status: Proposed actions on the site are stalled due to project costs associated with the presence of wetlands, mitigation costs, and the inability to avoid through construction techniques.

[i] Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area. PJD issued.

Exhibit A

Project Boundary
Culvert Dir
Contours
Direction of Flow
Soil Data Points
Test Pit TP9
Wetland Features WF3
Wetland Boundary
Wetland Vegetation
Exhibit A

Exhibit B

Field Boundary
Culvert
Culverts
Direction of Flow
Soil Data Points
Test Pit TP4
Wetland Feature- WF4
Seasonal Beds
Seasonal Beds
The features presented in this figure are to be considered preliminary and require verification on the ground.
Wetland Features
Type
Designation
Area (m²)
Length (m)
Wetland Features Total
Detail B

Exhibit C

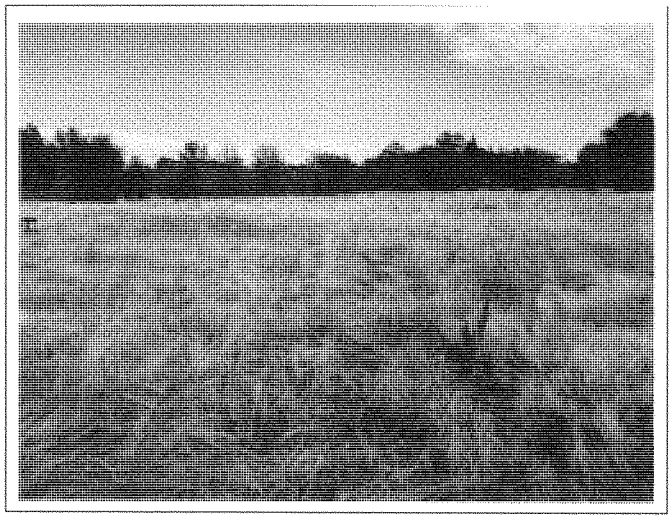
Site Photos

Test Pit Location Number 1.

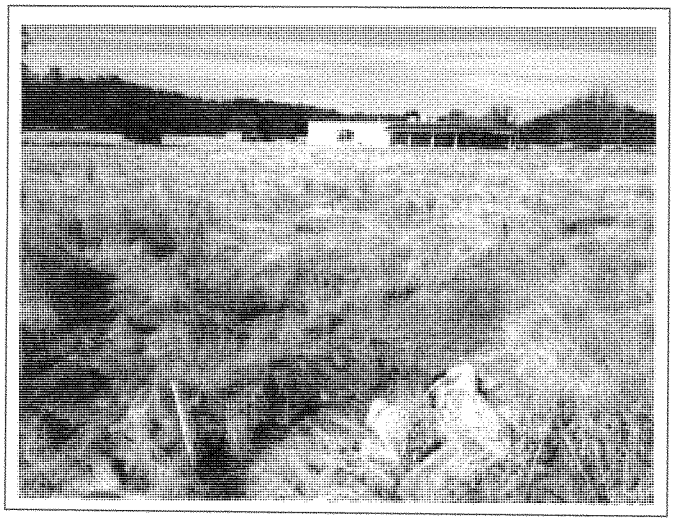
Test Pit Location Number 2.

Wetland Feature 01.

Wetland Feature 04.



Wetland Feature 02.



Wetland Feature 03.

Wetland Feature 05.

WFD6

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 5 and Supporting Documents

Case Study 5

1. Project Summary
   SPK#2014-01031
   The total project area is approximately 3,000 acres in size
   Due diligence efforts to determine agricultural operations to avoid WOTUS

2. Issue:
   a. Corps requires the inclusion of puddles resulting from vehicular disturbance that form after rain events in the middle of a dirt road used for farming practices.
   b. Corps requires the inclusion of erosional areas within existing agricultural roads as well as erosional areas that developed at the roads edge as a result of vehicle tires.

3. Supporting Information:
   Exhibit A – Aerial photograph showing dirt ranch roads used to access gas wells and cattle feeding stations.
   Exhibit B – Photos of representative puddles and erosional features in dirt roads that Corps asserted jurisdiction on.
   Exhibit C – Delineator's notes from site visit with regulator contained within an email

4. Details: Following the submission of the delineation of WOTUS on the entire 3000 acre ranch, a site visit with consultant and Corps regulator was conducted, resulting in the Corps attempting to take jurisdiction of additional features, including over 50 small depressions within dirt and gravel roads, as well as erosional features that developed at the roads edge. Notice water bottle in Exhibit B, picture A for scale. Additional pictures are features that the Corps requested be mapped as WOTUS. Despite, the lack of **any hydrological connection** and considering that many of the so called "wetlands" created in the roads were not present before the roads were established the Corps advised to include the features on the delineation map and label them as jurisdictional. There are over 6 miles of dirt and gravel roads on this ranch. Exhibit A is a focused area depicting representative examples wherein the Corps required the mapping of isolated WOTUS in dirt roads. The applicant disagreed with Corps and withdrew his delineation and request for jurisdictional determination. Exhibit C describes the delineator's notes from a site visit with the Corps regulator. Notable excerpts from these notes are the requirement to map farming roads as wetlands.

5. The agricultural project is suspended indefinitely.

Exhibit A

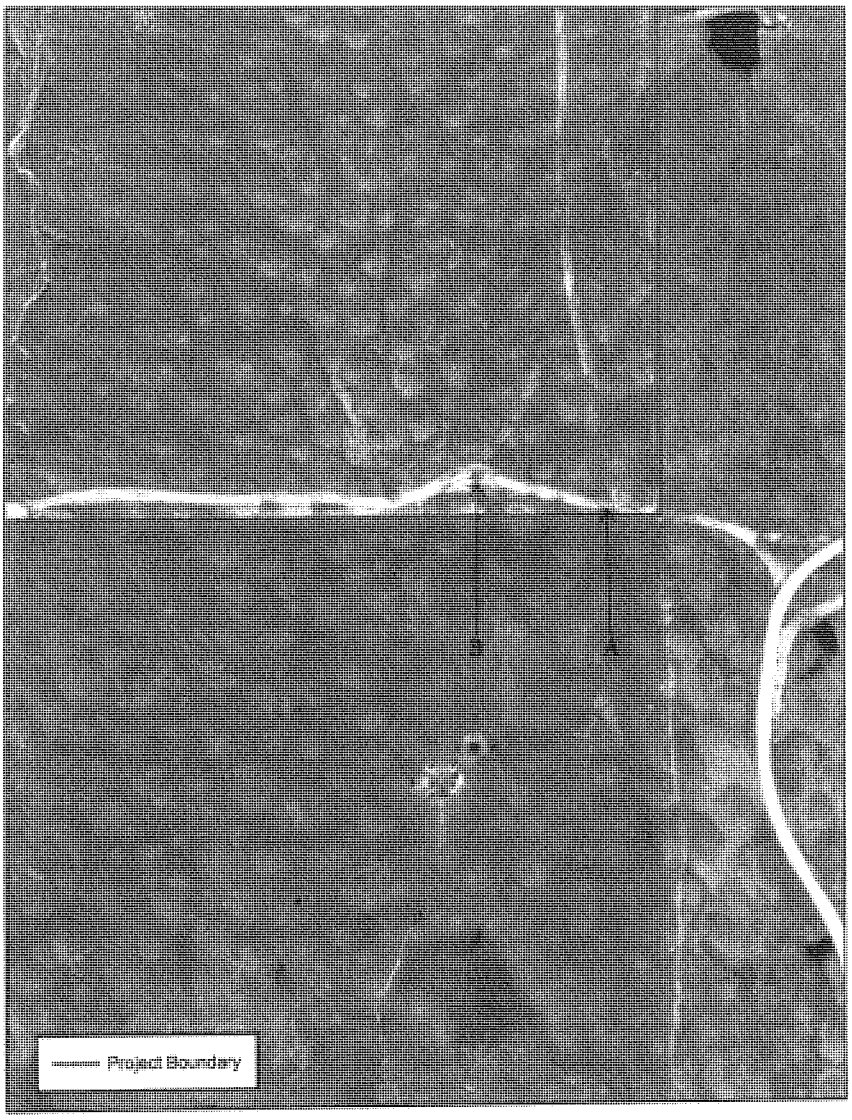
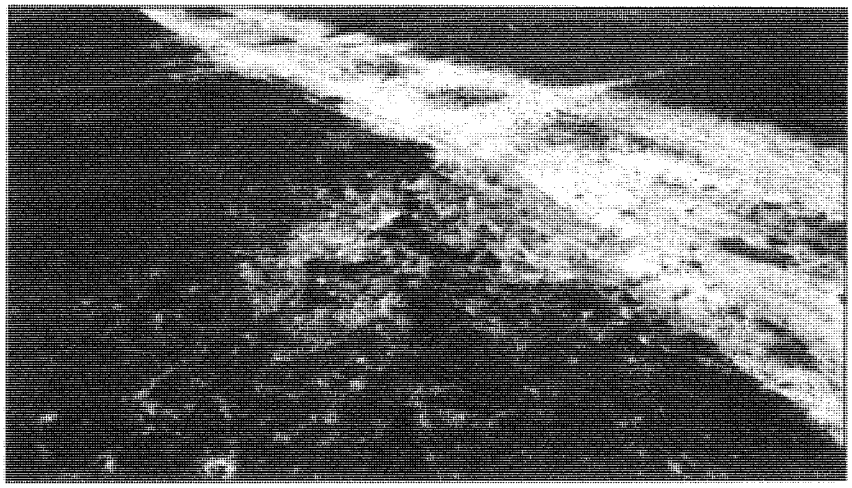
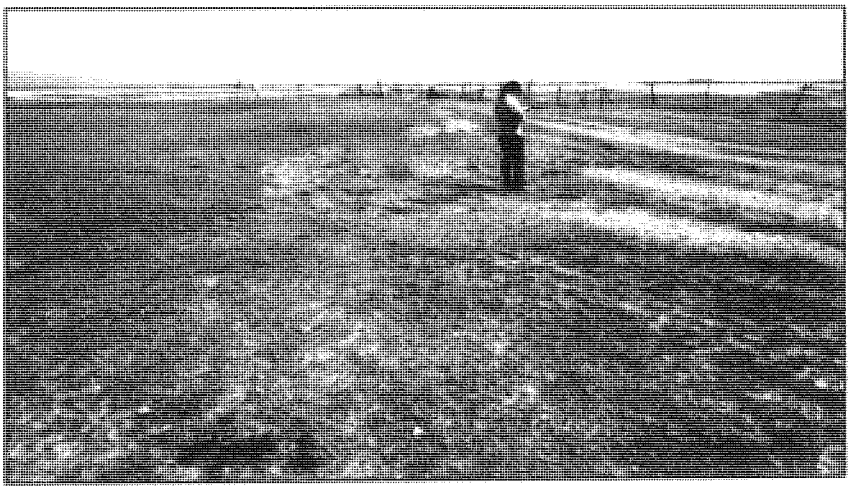


Exhibit A

Exhibit B



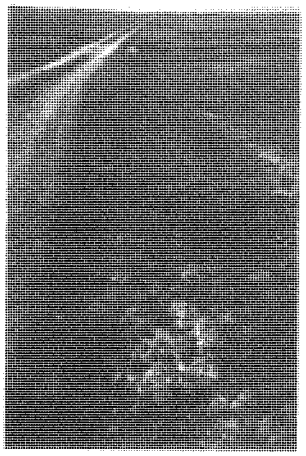
A.



B.

Exhibit B

Corps attempted to assert jurisdiction on most of the road side drainages that formed via erosion or were created to construct the road.



The Corps asserted jurisdiction claiming that sheet-flow was being conveyed in road-side swales even when they lacked bed, bank (ordinary high water mark) or maintained any hydrophytic vegetation (Case study 5).

Exhibit C

From: Jody Gallaway
To: Melissa Murphy
Cc: Kevin Sevier; Sam Rossi
Subject: RE: Brasil Corps Visit 4/15/2015
Date: Monday, April 20, 2015 3:25:56 PM

Thanks Melissa,
We are not going to map wetlands that can't be substantiated with data or reflect Matt's interpretation of OHWM. So when you map the new wetlands make sure that they can or could be substantiated with real data and not a magical wand. Also, when we make changes to the OHWM or extent of OW boundaries I want an explanation for **each** change.

Thanks,
Jody

From: Melissa Murphy
Sent: Monday, April 20, 2015 2:57 PM
To: Jody Gallaway
Cc: Kevin Sevier
Subject: Brasil Corps Visit 4/15/2015

Jody,

Here are the issues Matt Kelly has with the areas I visited with him:

- OHWM: He claims we are mapping the low flow channel instead of the "active floodplain." He says within the active floodplain, last year's erodium and other upland plants will be swept away therefore all the upland plants you see in these areas will be new growth from this year. He suggested we use a laser level and the "rack lines" from storm events to determine the OHWM. One drainage we mapped the width at 6 ft and he wants it to be 35 ft wide.
- Seeps: He claims there are jurisdictional seeps located on many of the hillslopes that need to be mapped and "are obvious in aerial photos." We visited two of these seeps, although hydric soils were present, one lacked hydrophytic vegetation and the other I did not recognize the plants (Elena might remember what the specific plants were better than me).
- OW and Swales Combined: He suggested we include OW polylines through the vernal swales we have already mapped that run downhill into larger drainages. Although the example swale he showed me (a feature we had already mapped as a vernal swale) had no indication of an OHWM, bed or bank (which is why it was mapped as a swale).
- Wetlands on Roads: On several occasions we mapped wetlands on either side of a dirt road, but did not include the road within the wetland. He wants the dirt roads mapped as wetlands as well, arguing that the only reason wetland vegetation is not present is because of the constant disturbance from vehicle traffic. He claimed he's had this debate with you many times before and low lying dirt roads between wetlands should always be mapped.
- Ridge Tops: At the time of the site visit, plants on the ridge tops were already desiccated and difficult to identify. Matt claims the vegetation found in some of the ridge top depressions is desiccated immature Psilocarphus and should be mapped as wetlands. Matt did not key out

questionalbe plants to determine their species, he simply relied on pictures to figure out what it was. As Elena pointed out, you can't positively identify unknown plants down to species without keying them out.

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016
Request for Additional Information: Case Study 6 and Supporting Documents

Case Study 6

1. Project Summary
   5 acre Delineation of WOTUS in an urban setting

2. Delineation of Waters of the US
   Exhibit A – 2015 Final Delineation map submitted to Corps (entire map provided) (verified[i])

   Exhibit B- Photos of representative wetlands on the site. WF 02 is created entirely by vehicle tire ruts, other wetlands are made larger by off-road activity. WF 04 is a small wetland in the middle of a dirt road. Test pit data is collected to demonstrate that features do not meet the criteria for jurisdiction. The Corps can and does assert jurisdiction despite data to the contrary, especially with issuing a PJD.

3. Jurisdictional Issues – Corps asserts jurisdiction of puddles in dirt roads and within wetlands entirely created by tire ruts. Despite the consultants claim of non-jurisdictional status. Applicant was forced to assume federal jurisdiction or withdraw application.
4. In process.

[i] Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area. PJD issued.

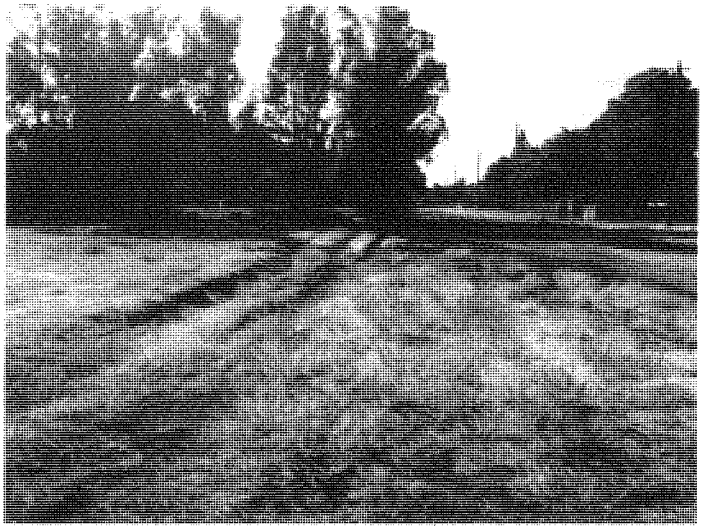
Exhibit A

Exhibit B

Site Photos

Vernal Pool (WF01)

Seasonal Wetland (WF02)



Vernal Pool (WF03)

Vernal Pool (WF04)

Test Pit 01

Test Pit 03

Test Pit 04

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 7 and Supporting Documents

Case Study 7

1. Project Summary:
   SPK#2015-000526
   The total project area is approximately 2,700 acres

2. Issue:
   a. Request for an Approved Jurisdictional Determination (AJD) was retracted due to delays by the Corps in reviewing the submittal and a Preliminary Jurisdictional Determination (PJD) was subsequently requested in order to pursue expedited processing.
   b. Multiple regulators were assigned to the review of the draft delineation resulting in a wide variety of interpretations of the Clean Water Act.
   c. Corps requested data points in actively farmed alfalfa fields in an attempt to take jurisdiction of low areas within the field and areas where irrigation water over ran the field
   d. Corps threatened to pursue a violation for activities that the Corps perceived to result in discharge to wetlands related to the land use change.
   e. Landowner hired a consultant to formally delineate all waters of the US so that he could plan agricultural operations of avoid all WOTUS thus eliminating a need for a permit. Original request was in May 2015.

3. Supporting Information:
   Exhibit A –Portion of the original delineation map points that the Corps wanted additional evaluation and mapping

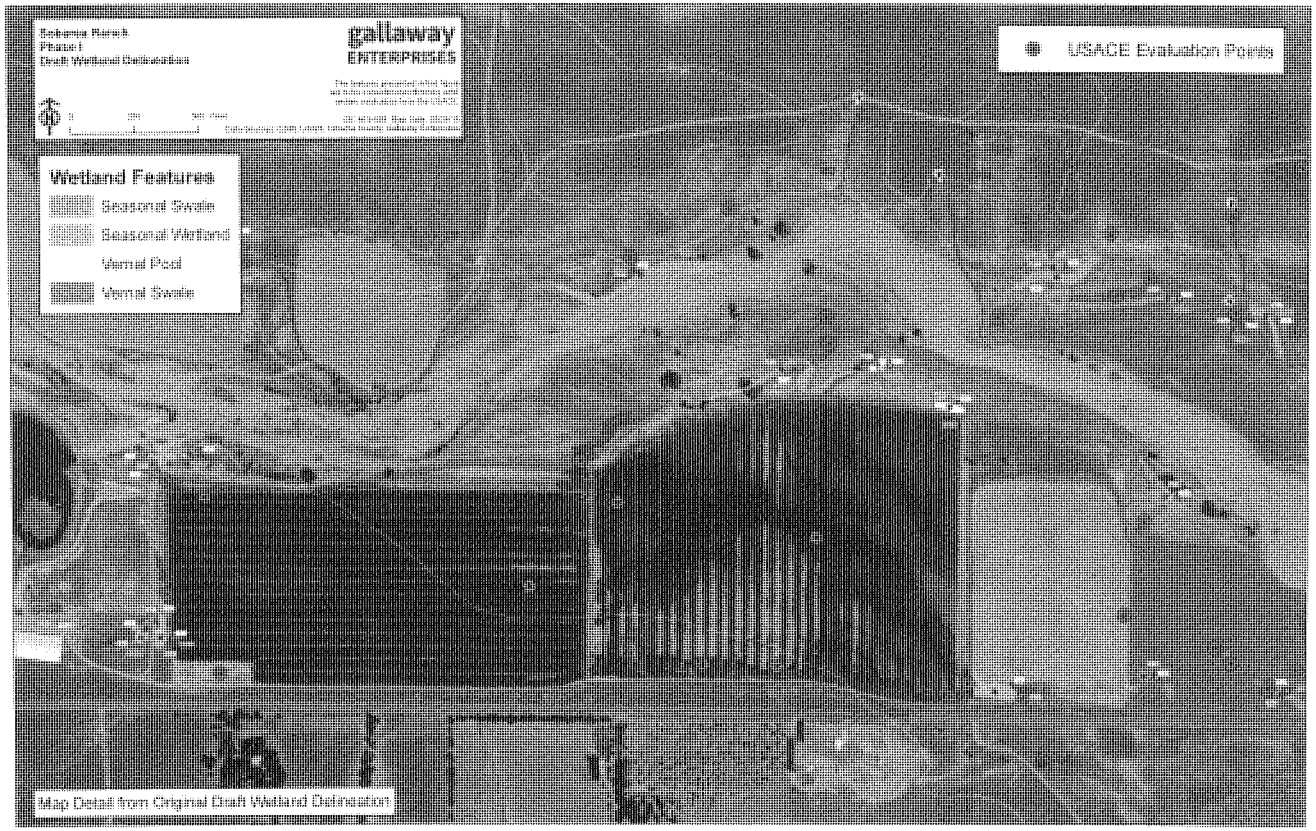
4. Landowner originally requested an approved jurisdictional determination but due to delays with the Corps response changed the request to a preliminary jurisdictional determination in August 2015 in hopes of facilitating a Corps decision.

   Following submission of the original delineation the Corps started the initial process of issuing a violation for the construction of stock ponds on the ranch. These stock ponds were designed, funded, and construction supervised by the Natural Resource Conservation Service. The regulator was removed from the project and a new regulator was assigned in February 2016. The new regulator initially requested over 350 new data points within areas that exhibited "wetland" signatures on an aerial photo. This new request delayed the delineation review even further. By almost any standard the Corps data request was unreasonable, as the original delineation included over 600 data points that adequately covered the site and all represented wetlands and other waters.

The Corps requested additional data points in actively farmed alfalfa fields (Exhibit A) in an attempt to take jurisdiction of low areas within the field and areas where irrigation water over ran the field. The Corps also instructed the delineator to take additional data points in low areas within fields that are dry land farmed. The landowner decided to remove these fields from the delineation study boundary and move ahead with an agricultural project that involved planting an orchard in the alfalfa and fields historically used for dry land farming without a Corps verified delineation in these fields. This move would have essentially operating at risk. The Corp regulator informed the landowner and our staff that changing from alfalfa to orchards would constitute a land use change and that Corps regulators could pursue a violation for activities that the Corps perceived to result in discharge to wetlands related to the land use change. The Corps regulator informed the landowner that despite an extensive farming history, orchards were never planted on the ranch so they might not be considered a normal farming activity.

5. Status: Preliminary jurisdictional determination is still pending.

Exhibit A



Case Study 7 Exhibit A

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 8 and Supporting Documents

Case Study 8

1. Project Summary:
   SPK#2014-00183 (revised 2013-00958)
   The total project area is approximately 175 acres

2. Issue:
   a. Corps claims that routine disking of land within wetlands is considered a discharge into WOTUS and in the absence of a permit represents an unauthorized discharge and violation of the Clean Water Act.

3. Supporting Information:
   Exhibit A –Corps letter concerning potential unauthorized activities in waters of the US. May 6, 2014

   Exhibit B-Consultant response letter

   Exhibit C- Corps resolution letter, August 27, 2014

4. Details: May 6, 2014, Landowner receives an investigation letter from the Corps notifying him that farming activities related to disking performed by a tenant farmer may have resulted in unauthorized discharge into WOTUS. The site has been historically used for high intensity cattle grazing during winter months. Tenant farmer has disked the site periodically over the last 15 years to improve forage for cattle. Since 2013, when the Sacramento Corps enforcement division opened, the Corps has aggressively pursued landowners and farmers who disk their property. Corps wetland specialists have informed our office that all disking for any purpose and at any depth within any "potential WOTUS" is a discharge into WOTUS and in the absence of a permit represents an unauthorized discharge and violation of the Clean Water Act. The property owners were shocked and felt that this was a new interpretation of the Clean Water Act and farming exemptions because they had been periodically disked their fields for more than 15 years and never received any notification from the Corps.

   At the time of the investigation, the EPA and Corps had released the proposed Interpretive Rule which established 56 specific Natural Resources Conservation Service conservation practice standards that are considered exempt under CWA section 404(f)(1)(A). The Corps ruled that the farming activity was part of an established on-going normal ranching operation conducted in accordance with conservation practice standard 512 thus was exempt from CWA. However, an important part of the Corps ruling was that they determined that the disking did create a discharge. EPA and Corps regulations state that "plowing...will never involve a discharge" unless it changes a water to a "dry land". The Corps routinely disregard and reinterpret their own

regulations[i] regarding plowing[ii] and claim that all plowing does in fact create a discharge and requires a permit.

The Interpretive Rule has been withdrawn leaving the farmer to speculate about getting a notice of violation if he continues agricultural operations. The Corps stated that the disking created a discharge into WOTUS, but would his activities still be exempt? Would he need a permit to continue his farming activities, would be need a permit every time he disks and plants his field, would he be required to mitigate for disking his field and planting a crop to improve forage conditions? Farming at risk was not an option for this landowner.

5. Landowner sold the property and has discontinued farming.

[ii] The regulations define plowing as: "all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, disking, harrowing and similar physical means utilized on farm, forest, or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. 33 C.F.R. §323.4(a)(1)(iii)(D)

Exhibit A

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO CA 95814-2922

CERTIFIED MAIL RETURN RECEIPT REQUESTED

May 6, 2014

Regulatory Division (SPK-2014-00183)

Mr. Robert Kelly Brown
Mr. Melvin Niels Leen
460 West East Avenue, Suite 110
Chico, California 95926

Dear Mr. Brown and Mr. Leen:

This letter is a request for information concerning potential unauthorized activities in waters of the United States. The activities are located on an unnamed tributary to Hamlin Slough, in unsectioned portions of the Rancho Esquon Mexican Land Grant, in Township 21 North, Range 2 East, Mount Diablo Meridian, Latitude 38.6404°, Longitude -121.7197°, Butte County, California (Enclosure 1).

We have received a report, which alleges that you have discharged dredged or fill material into waters of the United States. Section 404 of the Clean Water Act requires that a permit be obtained from the Corps prior to the discharge of dredged or fill material into waters of the United States, including wetlands (Enclosure 2).

We have opened an investigation in accordance with 33 CFR 326. We would appreciate your cooperation in this investigation. To ensure that all pertinent information is available for our evaluation and included in the public record, you are invited to provide any information which you feel should be considered. Thank you for your email of March 26, 2014, which describes activities on the property by another party which included disking and planting pasture grass. The answers to the following specific questions would be most helpful in determining if a violation has occurred.

a. Please confirm that Pentz Property Partnership is the owner of the property shown in Enclosure 1 and the above description.

b. What is the history of use on the property prior to the disking and planting to pasture grass as described in your March 26, 2014 email? Was this property used as pasture or rangeland regularly prior to the disking and planting? You indicated in your

time- line in the March 26, 2014, email that Mr. Mel Weir grazed cattle last year and the year before; can you tell me in the last 10 years (2005-2014) which years cattle were grazed on the property?

c. Prior to the disking and planting conducted by Mr. Weir, had the property been disked or plowed or planted? If so, how frequently (e.g., which years in the last ten)?

d. Was a wetland delineation and determination performed? Were wetlands and other waters mapped for the subject areas? Did another federal agency such as the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) verify this delineation? Please send a copy of any delineation reports and verification letters.

e. Please describe the work associated with disturbance or manipulation of the soils. What types of equipment were used? How deep was the soil manipulated? If different treatments were used in different portions of the subject area, please indicate where each treatment was used. Was this work performed in accordance with a NRCS Conservation Practice (http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/cp/ncps/ for more information)? If so, which ones?

f. Did this work result in a discharge to waters of the U.S.? If so, please indicate the extent both in terms of volume of material discharged and the areal extent of waters affected.

g. Were permits from any other federal, state or local agency obtained for work in the subject area?

h. Please provide the names and addresses of all individuals and companies that conducted work in the subject area as well as the nature and timing of that work.

i. Have you or any companies you represent worked in any other areas that may have resulted in discharges to wetlands or other waters of the United States?

Additionally, would you please grant permission to USDA to discuss this case with us? USDA may have information that is pertinent to this case that, under some circumstances, they may not be able to share without your permission.

Since the information provided will become a part of the public record, it may be presented in any enforcement action that could result from this investigation and will be retained in our files. Any information you wish to provide should reach this office no later than 30 days from the receipt of this letter. We appreciate your cooperation and timely action on this matter.

Please refer to identification number SPK-2013-00958 in any correspondence concerning this project. If you have any questions, please contact me by email James.T.Robb@usace.army.mil or telephone 916-557-7610. For more information regarding our program, please visit our website at *www.spk.usace.army.mil/regulatory.html*.

Sincerely,

James T. Robb
Senior Project Manager, Enforcement Unit
Regulatory Division

Enclosures

cc (w/o encls)

Mr. Scott Zaitz, Central Valley Regional Water Quality Control Board, szaitz@waterboards.ca.gov
Mr. Ken Sanchez, U.S. Fish and Wildlife Service, Kenneth_Sanchez@fws.gov
Ms. Tina Bartlett, California Department of Fish and Game, Tina.Bartlett@wildlife.ca.gov
Ms. Jennifer Cavanaugh, Natural Resource Conservation Service, jennifer.cavanaugh@ca.usda.gov
Mr. David Wampler, U.S. Environmental Protection Agency, Region 9, Wampler.David@epa.gov

Exhibit B

gallaway
ENTERPRISES

117 Meyers Street • Suite 120 • Chico CA 95928 • 530-332-9909

July 14, 2014

US Army Corps of Engineers
James Robb, Senior Project Manager, Enforcement Unit
1325 J Street
Sacramento CA 95814-2922

RE: SPK-2013-00958

Dear Mr. Robb;

On behalf of the property owners Gallaway Enterprises has prepared a response to your May 6, 2014 letter wherein you requested information regarding recent farming activities. As previously discussed, the farming activities were conducted by a neighboring farmer without the notification or approval of the landowner(s). As the landowners did not engage in any of the recent activities that have resulted in the current investigation, specific knowledge of the activities is limited.

We have provided a response to your request for additional information in the same order as requested in your May 6th letter.

a) Yes, the Pentz Property Partnership is the owner of the property shown in Enclosure 1 and as described in your May 6th letter.
b) The land use history of the property prior to the disking and planting to pasture grass included cattle grazing and occasional disking to improve range conditions. Cattle have grazed the property every year over the last 10 years.
c) The site was last disked in 2011 to improve range conditions.
d) A wetland evaluation was performed for the entire site by Gallaway in 2004 but was never submitted to the COE for verification or determination. Some of the Waters were mapped as part of the Highway 99/149/70 Interchange Project (SPK 199700165). The Highway 99/149/70 Interchange Project Delineation of Waters of the United States was verified by the COE.
e) The disturbance occurred between January 15 and March 2, 2014 and consisted of shallow disking of the entire site including wetlands and drainages and using a cultipacker to prepare the site for planting. The purpose of the disking was to plant a mix of annual plants including oats, rye, and alfalfa to improve forage for cattle. The activity that occurred on the property is consistent with NRCS Conservation Practice 512: Forage and Biomass Planting (attached). The entire site was disked using a field harrow with two rows of 14 inch disk blades pulled by a tractor with steel tracks. The site was disked repeatedly in some localized portions, and about 85% of the site was disked only once and in one direction. Disking depth across the entire site

f) was about 6 inches. The site was prepared for seed using a cultipacker. The entire site was seeded with a seed mixture for the purpose of improving range feed for cattle.
g) The work resulted in no obvious permanent fill of waters of the US.
h) No permits from any local, state or federal agency were obtained to disk and plant the site for the purpose of improving range conditions.
i) Mel Weir
   2281 Highway 45
   Glenn, CA 95943
   Subject disking activities occurred between January 15 –March 2, 2014.
j) To our knowledge no other companies or individuals have worked on this site; therefore no discharges to wetlands or other water of the United Sates have occurred.

We grant permission for you to speak to the USDA and NRCS about the farming activities that have occurred on this site. Should you have additional questions, please do not hesitate to contact me at (530) 332-9909 or jody@gallawayenterprises.com.

Sincerely,

Jody Gallaway, Senior Biologist
Gallaway Enterprises, Inc.

CC: Nels Leen
Kelly Brown

NATURAL RESOURCES CONSERVATION SERVICE

CONSERVATION PRACTICE STANDARD

FORAGE AND BIOMASS PLANTING

(Ac.)

CODE 512

DEFINITION

Establishing adapted and/or compatible species, varieties, or cultivars of herbaceous species suitable for pasture, hay, or biomass production.

PURPOSE

- Improve or maintain livestock nutrition and/or health.
- Provide or increase forage supply during periods of low forage production.
- Reduce soil erosion.
- Improve soil and water quality.
- Produce feedstock for biofuel or energy production

CONDITIONS WHERE PRACTICE APPLIES

This practice applies all lands suitable to the establishment of annual, biennial or perennial species for forage or biomass production. This practice does not apply to the establishment of annually planted and harvested food, fiber, or oilseed crops.

CRITERIA

General Criteria Applicable to All Purposes

Select plant species and their cultivars based on:

- Climatic conditions, such as annual precipitation and its distribution, growing season length, temperature extremes and the USDA Plant Hardiness Zone.
- Soil condition and landscape position attributes such as; pH, available water holding capacity, aspect, slope, drainage class, fertility level, salinity, depth, flooding and ponding, and levels of phytotoxic elements that may be present.
- Resistance to disease and insects common to the site or location.

Follow recommendations for planting rates, methods and dates obtained from the plant materials program, land grant and research institutions, extension agencies, or agency field trials.

Seeding rates will be calculated on a pure live seed (PLS) basis.

Plant at a depth appropriate for the seed size or plant material, while assuring uniform contact with soil.

Prepare the site to provide a medium that does not restrict plant emergence.

Plant when soil moisture is adequate for germination and establishment.

All seed and planting materials will meet state quality standards.

Do not plant federal, state, or local noxious species.

Apply all plant nutrients and/or soil amendments for establishment purposes according to a current soil test. Application rates, methods and dates are obtained from the plant materials program, land grant and research institutions, extension agencies, or agency field trials.

When planting legumes, use pre-inoculated seed or inoculate with the proper viable strain of Rhizobia immediately before planting.

Conservation practice standards are reviewed periodically and updated if needed. To obtain the current version of this standard, contact your Natural Resources Conservation Service State Office or visit the Field Office Technical Guide.

Exclude livestock until the plants are well established.

Select forage species based on the intended use, level of management, realistic yield estimates, maturity stage, and compatibility with other species. Verify plant adaptation to the area prior to planting.

Additional Criteria for Improving or Maintaining Livestock Nutrition and/or Health

Use forage species that will meet the desired level of nutrition (quantity and quality) for the kind and class of the livestock to be fed.

Forage species planted as mixtures will exhibit similar palatability to avoid selective grazing.

Additional Criteria for Providing or Increasing Forage Supply During Periods of Low Forage Production

Select plants that will help meet livestock forage demand during times that normal farm/ranch forage production are not adequate.

Additional Criteria for Reducing Erosion and Improving Water Quality.

Ground cover and root mass need to be sufficient to protect the soil from wind and water erosion.

Additional Criteria for Producing Feedstocks for Biofuel or Energy Production

Select plants that provide adequate kinds and amount of plant materials needed.

CONSIDERATIONS

In areas where animals congregate consider establishing persistent species that can tolerate close grazing and trampling.

Where wildlife and pollinator concerns exist, consider plant selection by using an approved habitat evaluation procedure.

Where air quality concerns exist consider using site preparation and planting techniques that will minimize airborne particulate matter generation and transport.

Where carbon sequestration is a goal, select deep-rooted perennial species that will increase underground carbon storage.

During and upon stand establishment planning and application of the following conservation practices should be considered as applicable; Forage and Biomass Harvest (511), Herbaceous Weed Control (315), Nutrient Management (590), and Prescribed Grazing (528).

PLANS AND SPECIFICATIONS

Prepare plans and specifications for the establishment planting for each site or management unit according to the Criteria, Considerations, and Operations and Maintenance described in this standard. Record them on a site specific job sheet or in the narrative of a conservation plan.

The following elements will be addressed in the plan to meet the intended purpose:

- Site Preparation
- Fertilizer Application (if applicable)
- Seedbed/Planting Bed Preparation
- Methods of Seeding/Planting
- Time of Seeding/Planting
- Selection of Species
- Type of legume inoculant used (if applicable)
- Seed/Plant Source
- Seed Analysis
- Rates of Seeding/Planting
- Supplemental Water for Plant Establishment (if applicable)
- Protection of Plantings (if applicable)

OPERATION AND MAINTENANCE

Inspect and calibrate equipment prior to use. Continually monitor during planting to insure proper rate, distribution and depth of planting material is maintained.

Monitor new plantings for water stress. Depending on the severity of drought, water stress may require reducing weeds, early

harvest of any companion crops, irrigating when possible, or replanting failed stands.

REFERENCES

Ball, D.M., C.S. Hoveland, and G.D.Lacefield, 2007. Southern Forages,4th Ed. International Plant Nutrition Institute, Norcross, GA.

Barnes, R.F., D.A. Miller, and C.J. Nelson. 1995. Forages, The Science of Grassland Agriculture, 5th Ed. Iowa State University Press, Ames

United States Department of Agriculture, Natural Resources Conservation Service. 1997. National Range and Pasture handbook. Washington, DC.

USDA, NRCS. 2008. The PLANTS Database (http://plants.usda.gov, 08October 2008). National Plant Data Center, Baton Rouge, LA 70874-4490 USA.

USDA, NRCS. 2009. Technical Note 3. Planting and Managing Switchgrass as a Biomass Energy Crop.

Exhibit C

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO CA 95814-2922

REPLY TO
ATTENTION OF

August 27, 2014

Regulatory Division SPK-2014-00183

Ms. Jody Gallaway
Gallaway Enterprises
117 Meyers Street Suite 120
Chico, California 95928

Dear Ms. Gallaway:

I am responding to your letter dated July 14, 2004, on behalf of your clients Mr. Robert Brown and Mr. Melvin Leen, in regards to activities involving discharges of dredged or fill material into wetlands and an unnamed tributary to Hamlin Slough, in unsectioned portions of the Rancho Esquon Mexican Land Grant, in Township 21 North, Range 2 East, Mount Diablo Meridian, Latitude 39.6404°, Longitude -121.7197°, Butte County, California.

Relying on the information you provided, we have determined the discharges of dredged or fill material were associated with disking and replanting pasture grasses and are part of an established on-going normal ranching operation conducted in accordance with Conservation Practice Standard number 512. As such, in accordance with the March 25, 2014, Interpretive Rule, the discharges do not require a permit under Section 404 of the Clean Water Act (CWA), provided they do not convert an area of waters of the U.S. to a new use and impair the flow or circulation of waters of the U.S. or reduce the reach of waters of the U.S.

As recently explained in the Interpretive Rule, activities that are planned, designed, and constructed in accordance with one or more of the 56 specific Natural Resources Conservation Service (NRCS) national conservation practice standards are considered exempt under CWA section 404(f)(1)(A) and a section 404 permit is not required.

You may find the 56 specifically exempted conservation practice standards at: *http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm*. Information regarding NRCS's conservation practices in general may be found at: *http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/home/?cid=nrcs143_026849*. If technical assistance is needed to better understand a conservation practice, you should contact your local NRCS office by using the site locator at: *http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/contact/local/*. Of course, information requests or questions about CWA jurisdiction under section 404 should be addressed to our project manager.

Please note that this notification does not eliminate the need for you to obtain any other applicable Federal, state, or local authorizations required by law. If additional work or discharge of dredged and/or fill material is proposed in waters of the United States that is not covered by one of the 56 specific exemptions, you may be required to obtain an authorization under section 404 of the CWA.

The Corps' Regulatory Project Manager for this matter is James Robb, and can be reached via telephone at 916-557-7610.

Sincerely,

Michael S. Jewell
Chief, Regulatory Division

Mr. Robert Brown, Owner, kellybrownrealty@sbcglobal.net
Mr. Nels Leen, Owner, us4leens@aol.com
Mr. Scott Zaitz, Central Valley Regional Water Quality Control Board, szaitz@waterboards.ca.gov
Mr. Ken Sanchez, U.S. Fish and Wildlife Service, Kenneth_Sanchez@fws.gov
Ms. Tina Bartlett, California Department of Fish and Game, Tina.Bartlett@wildlife.ca.gov
Ms. Jennifer Cavanaugh, Natural Resource Conservation Service, jennifer.cavanaugh@ca.usda.gov
Mr. David Wampler, U.S. Environmental Protection Agency, Region 9, Wampler.David@epa.gov

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 9 and Supporting Documents

Case Study 9

1. Project Summary:
   SPK-2014-01076
   The total project area is approximately 1,100

2. Issue:
   a. Request for an Approved Jurisdictional Determination (AJD) was discouraged and a Preliminary Jurisdictional Determination (PJD) was encouraged.
   b. Corps required flow arrows on maps to falsely justify hydrologic connectivity based on sheet flow
   c. Corps required data sheets to support a false assertion by the Corps
   d. Corps demanded that the ordinary high water mark extent be mapped at almost to the 100 years flood limits

3. Supporting Information:
   Exhibit A – Landowner request for approved jurisdictional determination, original delineation map, and Corps correspondence.

   Exhibit B-Corps site visit emails, Corps GPS data from their field visit and instructions to map features.

   Exhibit C- Updated delineation per Corps instructions (as applicable), Corps response letter, and consultant response letter and AJD withdrawal.

4. Details: Landowner hired a consultant to formally delineate all waters of the US so that he could plan agricultural operations to avoid all WOTUS thus eliminating a need for a permit. The landowner requested an approved jurisdictional determination (Exhibit A).

   Corps discouraged an approved jurisdictional determination (AJD) and asked if they can perform a preliminary jurisdictional determination with a no permit letter or a plain jurisdictional determination because it is quicker (Exhibit A). However in reality, with a preliminary jurisdictional determination (PJD) the Corps ends up taking jurisdiction of anything that is a potential jurisdictional wetland even without any supporting data. The identification of "potential wetlands" defeats the purpose of trying to develop an agricultural project to avoid WOTUS and a CWA permit. In order to properly avoid WOTUS, the applicant needs to know what is and what is not a WOTUS, not what could possibly be a WOTUS. This argument has been repeated on numerous agricultural projects wherein the Corps delays, delays, delays, and then claims that a preliminary jurisdiction determination would be quicker. Eventually the landowner either withdraws the AJD request or capitulates and settles with a PJD. Without an approved jurisdictional determination, the landowner risks that the Corps won't change its mind later.

In this case the consultant would only map features that could be substantiated with actual data rather than mapping features that might be a wetland based on the Corps aerial photo interpretation and demands. The consultant with over 20 years' experience delineating and mapping WOTUS spent 16 days on the property collecting data on over 1000 potential WOTUS features and only mapped features that met the criteria for jurisdiction. The Corps supplied no data to the contrary, instead suppling inaccurate GPS data with incomprehensible notes taken during a one-day 6-hour site visit and demanded to map features that looked like WOTUS from an aerial photo (Exhibit B).

Corps demanded that the delineation map show wetlands as jurisdictional waters with no supporting data.(Exhibit C).

Corps demanded that the ordinary high water mark extent be mapped at almost to the 100 years flood limits (significantly farther than the 2-10 year flood event that is supposed to mark the boundary of Corps jurisdiction) Exhibit C.

The Corps do not follow their own regulatory guidance[i] with regards to processing times for PJD and AJD requests and staff provided inconsistent guidance to the regulated public regarding the benefits of an AJD. Corps staff routinely informs the public that the processing time for a PJD is shorter than an AJD. However, in Corps educational classes they tell people that the consultation process only takes 20 days for a AJD and there is no different in processing times between an AJD and PJD. Reality tells a completely different story. Processing times measured from when the AJD request was made until the Corps sends the AJD letter to the client takes between 18-24 months.

The Corps refused to process the AJD request if the features were not mapped according to their interpretation.

5. Landowner withdrew the AJD and discontinued planned farming operations.

[i] US Army Corps of Engineers, Regulatory Guidance Letter 08-02, June 26, 2008. Jurisdictional Determinations. Available at: http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf

Exhibit A

gallaway
ENTERPRISES

117 Meyers Street • Suite 120 • Chico CA 95928 • 530-332-9909

November 12, 2014

US Army Corps of Engineers
Leah Fisher, Senior Project Manager
1325 J Street
Sacramento, Ca 95814-2922

RE: Draft Delineation of Waters of the United States-Nance Canyon Agricultural Project, Butte County, Ca

Dear Ms. Fisher,

On behalf of the property owners, Nance Canyon Partners, we are requesting a review and ***approved jurisdictional determination*** of the enclosed Draft Delineation of the United States: Nance Canyon Agricultural Project. Enclosed is a hardcopy of the delineation, including maps which meet the 2012 mapping standards and a copy on CD in PDF file format with GIS shapefiles. The applicant is proposing to utilize the site for agricultural purposes. Proposed development is planned for the upland areas and the applicant wants to avoid the need for permits from the Army Corps of Engineers (COE) thus the property owners will use the COE approved jurisdictional determination of the attached delineation as a guideline for complete avoidance of Waters of the United States.

Should you have any questions, please do not hesitate to contact me at (530) 332-9909 or email jody@gallawayenterprises.com

Regards,

Jody Gallaway
President and Senior Biologist

CC Don Swartz, Nance Canyon Partners, L.P.

Jody Gallaway

From: Fisher, Leah M SPK <Leah.M.Fisher@usace.army.mil>
Sent: Monday, January 26, 2015 1:17 PM
To: Jody Gallaway
Subject: RE: Nance Canyon AJD request (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Hi Jody,
Looks like this landed on Kathy Norton's desk. Her number is 916-557-5260.
Thank you for your kind words.
At least we will get to work with each other until Whisper Ridge is complete. :) v/r, Leah

-----Original Message-----
From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Monday, January 19, 2015 3:24 PM
To: Fisher, Leah M SPK
Cc: Haley, Nancy A SPK; Elena Gregg
Subject: [EXTERNAL] Nance Canyon AJD request

Leah;

So sad that you will be leaving our region. You have been so professional and responsive, we really appreciate it.

The landowner for the Nance Canyon project has proposed to plant an agricultural crop and wanted to put this crop in the ground in the next couple of months. Could you let me know when this project has been re-assigned so I can get some idea on if the landowners will be able to meet their planting goals. Worse case scenario they may start planting in the obvious upland areas. Rightfully so, the landowners are concerned about perception as the project is located right on highway 99. They want to use the AJD to develop a planting plan to completely avoid Waters. I have copied Nancy is case this decision is already made.

I wish you all the best.

Thanks,

Jody Gallaway

President and Senior Biologist

Gallaway Enterprises, Inc.

117 Meyers Street, Suite 120

Chico, CA 95928

(530) 332-9909 office

(530) 332-9905 fax

www.gallawayenterprises.com <x-msg://55/www.gallawayenterprises.com>

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Classification: UNCLASSIFIED
Caveats: NONE

Sent: Thursday, February 26, 2015 12:40 PM
To: Finan, Michael C SPK; Norton, Kathy M SPK
Subject: [EXTERNAL] Nance Canyon Ag Project

Mike;

I spoke to my client about a PJD with No-permit letter as an option. He had his legal staff review and has decided to continue with an AJD request for this project. Please let me know when you would like to visit the property and I can go with you or I can come out and open the gates and let you have at it.

Thanks,

Jody Gallaway

President and Senior Biologist

Gallaway Enterprises, Inc.

117 Meyers Street, Suite 120

Chico, CA 95928

(530) 332-9909 office

(530) 332-9905 fax

www.gallawayenterprises.com <x-msg://55/www.gallawayenterprises.com>

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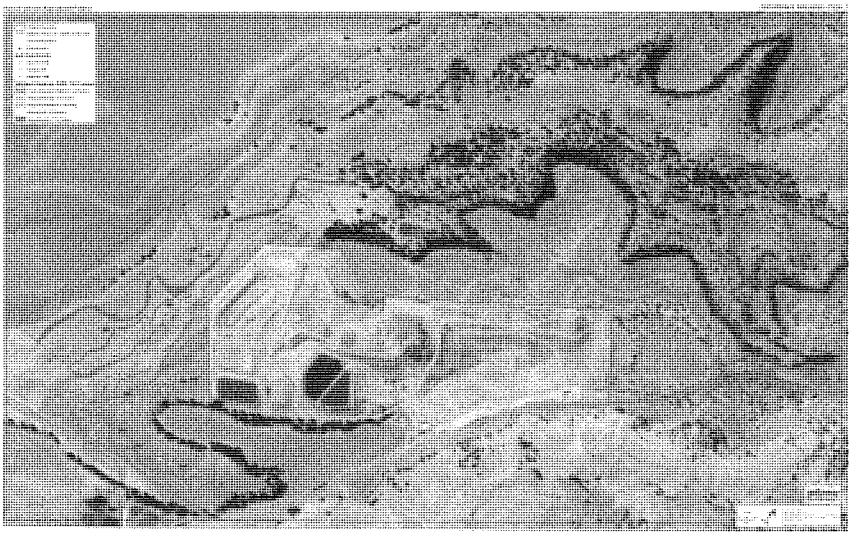

Exhibit B

Jody Gallaway

From: Norton, Kathy M SPK <Kathy.Norton@usace.army.mil>
Sent: Wednesday, March 11, 2015 1:30 PM
To: Jody Gallaway
Subject: RE: Nance Canyon Ag Project

Hello Jody--

I am guessing you have heard by now that Mike is no longer with our office. I have been asked to take the lead on this wetland delineation, but in order to do this because it is a large site with a lot of features--I am going to need help from my co-workers that can use the GPS unit. The people most likely to help with this GPS are in training/meetings until the 23rd of March. I will send them an email asking for their help--but I'm not sure when they will respond to my request. I will try to setup an April field visit to the site, but that will depend on everyone's schedule and the completeness of the current wetland delineation submittal.

I understand that you want to proceed with an approved jurisdictional determination for this project.

Thank you--

Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
Customer Service Hours: 09:00 am-3:00 pm - Tuesday -Friday
kathy.norton@usace.army.mil
(We do not have "out-of-office" e-mail return notes. So--e-mails not returned in a reasonable amount of time means I'm not in the office, and haven't received your message.) Web page/surveys/information
http://www.spk.usace.army.mil/Missions/Regulatory.aspx
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----
From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Thursday, February 26, 2015 5:26 PM
To: Finan, Michael C SPK; Norton, Kathy M SPK
Subject: [EXTERNAL] RE: Nance Canyon Ag Project

Mike,
We have not mapped anything as non-jurisdictional or isolated. We have considered all features on the Nance site as jurisdictional. I am meeting with my clients and their legal counsel in April to discuss further. In the meantime they directed me to ask the Corps to proceed with their original request. They also quote RGL08-02 specifically the section wherein in says that there should be no time difference between a AJD and PJD. In my experience as you have eluded also, there is a very large time and processing difference between an AJD and PJD. So large in fact perhaps RGL 08-02 should be modified or amended with a new RGL that explains the processing differences better.

Keep in mind that the project is adjacent to Highway 99 so they (property owners) expect accusations and complaints; therefore they are asking for the most rigorous evaluation of the delineation and want EPA's concurrence as well. The thought is that an AJD gives them more protection and certainty. I am not sure about protection but with regards to the certainty aspect I agree. I mainly agree because I have had various regulators provide varying opinions about the certainty a PJD gives. I have even had a case where there was a PJD provided by a regulator, that regulator left and the new regulator disagreed with the PJD and extent of wetlands. I completely understand that there are nuances between regulators but given such a large discrepancy between how regulators interpret the protections and certainty between a AJD and PJD I can understand why the regulated public would opt for something they perceive gives them a greater level of protection, especially when they are designing projects to avoid jurisdictional waters. If they were asking for a permit than a PJD would suffice. I think (and I am just guessing) that generally there is so such distrust, that even people who are designing projects to completely avoid Waters, which is consistent with the Clean Water Act, are fearful of government agencies changing their minds or public perception pushing governmental agencies into some action that they can't even foresee. They are looking for predictability, protection and certainty. They feel that a AJD allows them to use the delineation map as a base to design projects to avoid Waters, whereas a PJD can be reinterpreted over time, thus does not provide certainty. My client understands the 5 year expiration and plans to complete this very large agricultural project within 1 year of receiving the AJD.
Mike, thanks for your time and I hope my comments have been helpful. If there is anything else I can provide to you or to my client that helps move this project forward please let me know.
Regards,

Jody

-----Original Message-----
From: Finan, Michael C SPK [mailto:Michael.C.Finan@usace.army.mil]
Sent: Thursday, February 26, 2015 4:51 PM
To: Jody Gallaway; Norton, Kathy M SPK
Subject: RE: Nance Canyon Ag Project

Hi Jody, Are there isolated or other potentially non-jurisdictional waters on the site? If not, an AJD will generate considerably more work on everyone's part for a JD which will expire in 5 years. I am curious as to reasoning. In any event, I will check with Kathy on site visit schedule and get back to you. Thanks, Mike

Michael Finan, Wetland Specialist
U.S. Army Corps of Engineers
Sacramento District, Regulatory Division
1325 J Street, Room 1350, Sacramento, CA 95814-2922
PH: (916) 557-5324 (9am-3pm); FAX: -7803 michael.c.finan@usace.army.mil

* We want your feedback! Take the survey:
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

* Need information on the Regulatory Program? Visit our website:
www.spk.usace.army.mil/Missions/Regulatory.aspx

* Sign up to receive our Public Notices. Email:
cespk-regulatory-info@usace.army.mil

BUILDING STRONG(r) And Taking Care of People

-----Original Message-----
From: Jody Gallaway [mailto:jody@gallawayenterprises.com]

USACE, Regulatory Division
California North Branch,

1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
Customer Service Hours: 09:00 am-3:00 pm - Tuesday -Friday
kathy.norton@usace.army.mil
(We do not have "out-of-office" e-mail return notes. So--e-mails

not returned in a reasonable amount of time means I'm not in the office,

and haven't received your message.)

Web page/surveys/information

http://www.spk.usace.army.mil/Missions/Regulatory.aspx

http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Wednesday, March 25, 2015 4:46 PM
To: Norton, Kathy M SPK
Subject: [EXTERNAL] Nance Canyon

Hello Kathy;

I hope things have stabilized following Mike's passing and a schedule for completing the approved JD for the Nance Canyon project has been determined. I will be meeting with my clients on Friday and they would like an update. This is a very large agricultural project and they run the risk of losing their farming tenant if this gets extended too much further. I believe we submitted the request on November 12, 2014 and have sent the shapefiles and hardcopies of all data sheets.

Thanks,

Jody Gallaway

President and Senior Biologist

Gallaway Enterprises, Inc.

117 Meyers Street, Suite 120

Chico, CA 95928

(530) 332-9909 office

(530) 332-9905 fax

www.gallawayenterprises.com <x-msg://55/www.gallawayenterprises.com>

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-----Original Message-----
From: Norton, Kathy M SPK [mailto:Kathy.Norton@usace.army.mil]
Sent: Friday, March 27, 2015 1:26 PM
To: Jody Gallaway
Subject: RE: Nance Canyon

Hi Jody--

Also--if you could hold the 21st of April open for a field visit just in case the 16th doesn't work out....or we need another day--please.

Thanks much--

Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
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http://www.spk.usace.army.mil/Missions/Regulatory.aspx
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----
From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Thursday, March 26, 2015 1:07 PM
To: Norton, Kathy M SPK
Cc: Elena Gregg
Subject: [EXTERNAL] RE: Nance Canyon

Kathy,
This day will work fine for us. As the day gets closer, we will contact you to confirm.

Thanks!
Jody

-----Original Message-----
From: Norton, Kathy M SPK [mailto:Kathy.Norton@usace.army.mil]
Sent: Thursday, March 26, 2015 1:05 PM
To: Jody Gallaway
Subject: RE: Nance Canyon

Hi Jody--

I believe the 16th of April works for us to come look at Nance Canyon. Please let me know if that day works for you. Depending on how that day goes--as to how much we get done--we may need another field day after that.....Thank you--

Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
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http://www.spk.usace.army.mil/Missions/Regulatory.aspx
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----
From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Wednesday, March 25, 2015 4:55 PM
To: Norton, Kathy M SPK
Subject: [EXTERNAL] RE: Nance Canyon

I am so sorry, I can only imagine how difficult things are.

My meeting is at 9 am this Friday the 27th.

-jody

From: Norton, Kathy M SPK [mailto:Kathy.Norton@usace.army.mil]
Sent: Wednesday, March 25, 2015 4:53 PM
To: Jody Gallaway
Subject: RE: Nance Canyon

Hi Jody-- Things are still not stabilized with Mike's passing.but we are trying....

I have been asking the gps people to help with Nance Canyon and trying to get a handle on their schedule-and will get back to you as soon as I can. When is your meeting on Friday with the landowner....please.

Kathy Norton
Ecologist/Sr. Project Manager

Jody Gallaway

From: Norton, Kathy M SPK <Kathy.Norton@usace.army.mil>
Sent: Wednesday, June 10, 2015 8:47 AM
To: Jody Gallaway
Subject: [PossibleSpam] RE: Nance Canyon

Hi Jody-- It is in review--I'm checking to see if all of the spots we asked your folks to go check--were checked and data taken/wetland areas added. Thanks--

Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
Customer Service Hours: 09:00 am-3:00 pm - Tuesday -Friday
kathy.norton@usace.army.mil
(We do not have "out-of-office" e-mail return notes. So--e-mails not returned in a reasonable amount of time means I'm not in the office, and haven't received your message.) Web page/surveys/information
http://www.spk.usace.army.mil/Missions/Regulatory.aspx
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----
From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Tuesday, June 09, 2015 11:50 AM
To: Norton, Kathy M SPK
Subject: [EXTERNAL] RE: Nance Canyon

Good afternoon Kathy,

How are we progressing on the AJD for this project?
Thanks,

Jody Gallaway
President and Senior Biologist
Gallaway Enterprises, Inc.
117 Meyers Street, Suite 120
Chico, CA 95928
(530) 332-9909 office
(530) 332-9905 fax
www.gallawayenterprises.com
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Proposed Draft Wetland Delineation
Map Detail 1
Proposed Draft Wetland Delineation and USACE GIS Data
USACE Preliminary GIS Data

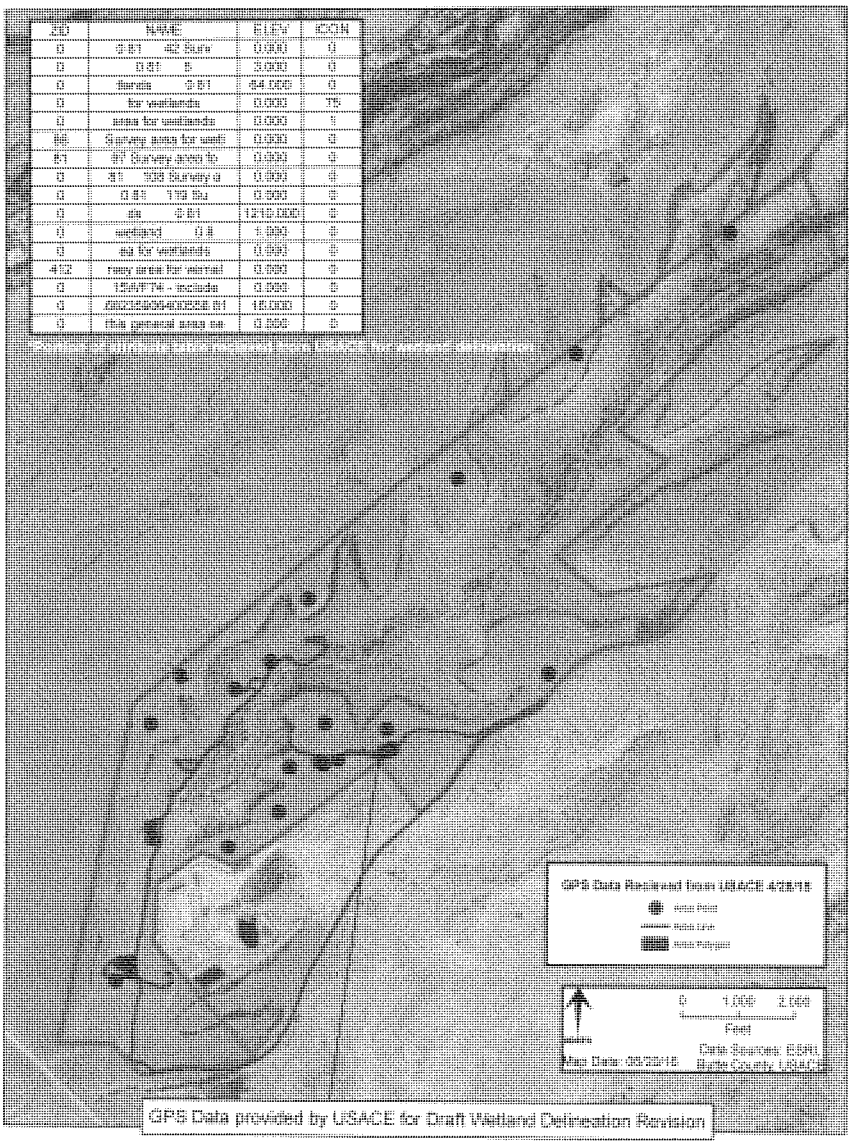
GPS Data Received from USACE 4/28/18
0 1,000 2,000
Feet
Map Date: 08/20/18
Data Sources: ESRI
Butte County, USACE
GPS Data provided by USACE for Draft Wetland Delineation Revision

Exhibit C

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

REPLY TO
ATTENTION OF

July 29, 2015

Regulatory Division SPK-2014-01076

Mr. Don Swartz
Nance Canyon Partners, L.P.
2038 Daladier Drive
Rancho Palos Verdes, California 90275

Dear Mr. Swartz:

We are responding to your consultant's November 12, 2014, draft wetland delineation report, and May 12, 2015, revised wetland delineation requests for an approved jurisdictional determination for the approximately 1,349-acre Nance Canyon Property. This property is located in Sections 1-2, 10-12,14-15, and 22, Township 21 North, Range 2 East, MDB&M, Butte County, California. Based on our review of the information that has been submitted, we are unable to verify this delineation of wetlands and other waters of the United States at this time

Staff from Gallaway Enterprises (Gallaway) and the Corps of Engineers (Corps) conducted a field visit on April 16, 2015 of this property. During this visit it was determined that potential waters of the United States (WOUS) were not identified on the delineation map. A revised wetland delineation report dated May 12, 2015 was later received by our office from Gallaway for review. After reviewing this document we have determined that additional potential WOUS are still not appropriately identified on the wetland delineation map.

Boundaries of other waters of the United States like rivers and creeks can be identified by debris lines and other features that show the ordinary boundaries of the streams' active floodway. The Corps gave guidance to Gallaway out in the field on how to map the entire creek areas. This mapping was not completely expanded as required in the revised wetland delineation report. Please expand the map creek areas to appropriately reflect the guidance that was given out in the field, and that can also be seen in years of aerial photographs of the site. In addition, the Corps has issued Regulatory Guidance Letter (RGL) 05-05, *Ordinary High Water Mark Identification* and the August 2008 *Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States* (2008 OHWM Delineation Manual), to assist in identification of the OHWM of the streams

Also, during the April 16, 2015 site visit, Gallaway was directed by the Corps to map all of the vernal pools on the upper terraces of both sides of Nance Canyon. Directions were given on how to locate these features based on wetland evidence in the landscape. Although Gallaway's May report did improve on the mapping of the area, additional aquatic features are still not mapped and need to be appropriately mapped in the delineation report. Gallaway's May report states that the vernal pool terrace areas have a "[b]iotic crusts like those described in the Arid West manual as asphalt-like crusts were observed. They are not indicators of wetland hydrology." The Corps has identified that these areas are ponding-remnant biotic crust features that do show evidence of hydrology, algal matting, and need to be mapped.

Additionally, the delineations sent by Gallaway references the 1989 Federal Manual for Identifying and Delineating Wetlands. In 1992 the Corps was prohibited from using 1989 Interagency Delineation Manual. Currently, the only documents that may be used to identify wetlands on the project site are the 1987 Wetland Delineation Manual and the September 2008 *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region.* The use of, or reference to, the 1989 Manual is not appropriate.

The Corps is committed to completing this approved JD as expeditiously as possible. Following the April 16th field visit progress was made in that Gallaway identified and mapped additional aquatic features and appropriately expanded jurisdictional features as identified by evidence in the field. However, because the correct policies, procedures, and regulations were not completely followed in the delineation, we are unable to complete the requested jurisdictional determination at this time until every aquatic feature is mapped appropriately as directed.

In order to complete the approved jurisdictional determination, following our review of any additional information provided to our office, we will complete any required coordination with the U.S. Environmental Protection Agency and Corps' Headquarters as appropriate. An itemized list of minimal information we need to process your request is enclosed. Once we receive complete information we will continue to evaluate your delineation, including a site visit if necessary.

Please refer to identification number SPK-2014-01076 in any correspondence concerning this project. If you have any questions, please contact Ms. Kathy Norton at the letterhead address, Room 1350, by email at Kathy.Norton@*usace.army.mil*, or telephone at 916-557-5260. For more information regarding our Regulatory Program, please visit our website located at *www.spk.usace.army.mil/Missions/Regulatory.aspx*.

Sincerely,

Nancy A. Haley

Nancy A. Haley
Chief, California North Branch

Enclosure

cc: (w/o encl)

Mr. Scott Zaitz, Regional Water Quality Control Board, 364 Knollcrest Drive, Suite #205, Redding, California 96002-0175
Mr. Jason Brush, US Environmental Protection Agency, 75 Hawthorne Street, (WTR-8), San Francisco, California 94105-3941
Ms. Jody Gallaway, Gallaway Enterprises, 117 Meyers Street, Suite 120, Chico, California 95928-6592

MINIMUM STANDARDS FOR ACCEPTANCE OF PRELIMINARY WETLANDS DELINEATIONS
Page 1

November 30, 2001

The Regulatory Branch of the Sacramento District, U.S. Army Corps of Engineers (Corps) receives numerous requests to perform wetland delineations for potential applicants for permits under Section 404 of the Clean Water Act. Due to limited staff and resources, the response time can be several months or longer. To expedite this process, the Corps encourages applicants to use consultants to conduct preliminary wetlands delineations, especially for large and/or complex areas. Preliminary delineations may then be submitted to the Corps for review and verification.

While accurate delineations by qualified individuals have resulted in a quicker review and response from the Corps, substandard or inaccurate delineations have resulted in unnecessary time delays for applicants. These delays are due to insufficient, incomplete, or conflicting data, which prevent the Corps from verifying the proposed wetland boundaries. Such delineations must be returned by the Corps to the applicant or consultant for revision

To improve the quality of and consistency of delineations, the Corps has developed **minimum standards necessary for accepting a delineation for verification of the jurisdictional boundaries**. Any submittal that does not meet these requirements will be returned to the applicant or consultant. All deficiencies must be corrected by the applicant or a consultant prior to re-submittal.

MINIMUM REQUIREMENTS

The preliminary wetlands delineation report shall include

___ A statement that the delineation has been conducted in accordance with the 1987 "Corps of Engineers Wetlands Delineation Manual"

___ A narrative describing the wetlands.

___ Justification for the wetlands boundaries.

___ The total acreage of the project site.

___ Existing field conditions such as season and flood/drought conditions.

___ A discussion of the hydrology source (subsurface or surface, including potential irrigation influence) and drainage gradients.

___ A site location map, preferably outlined on a 7.5 minute USGS quadrangle, along with any other pertinent maps of the site. The map must provide the name of the USGS quadrangle, Section, Township, Range, and UTM or latitude and longitude.

___ Directions to the site.

___ Contact information for the applicant(s) and property owner(s).

___ A discussion of plant communities and habitat types present on the site and a list of the scientific name, common name(s), and indicator status of all plants.

___ Soil descriptions, soil map(s), and a list of hydric soils or soils with hydric inclusions on the site.

✓ Any observed and/or documented examples of an interstate or foreign commerce connection. Examples include, but are not limited to:

- Recreational or other use by interstate or foreign travelers.
- Sale of fish or shellfish in interstate or foreign commerce.
- Use by industries, including agriculture, operating in interstate or foreign commerce.

MINIMUM STANDARDS FOR ACCEPTANCE OF PRELIMINARY WETLANDS DELINEATIONS
Page 2

___ A delineation map at an appropriate scale (for most projects, a scale of one inch to 100 or 200 feet). The map should not exceed one inch to 400 feet unless there are extenuating circumstances. Note: map scales must be accurate and in round numbers, any maps using a photographic base must be corrected for distortions, and any overlays must be of identical scale7. The map must include:

- ___ The boundary of the entire project area.
- ✓ All features which meet the criteria for wetlands or other waters of the United States.
- ___ Color or thatched coding of the different wetlands coding of different wetland types present.
- ___ Topography.
- ___ Clearly and accurately identified data point locations and the location and identification number of surveyed or GPS established flags, stakes, or wetland boundaries.
- ✓ All waters of the U.S., including but not limited to, in state waters, tributaries, wetlands, and all other waters such as intrastate lakes, rivers, streams, and mudflats as described in 33 CFR 328.3, must be shown on the delineation map. Those features which meet wetlands criteria or are potential waters of the U.S., but may be isolated and lacking an interstate or foreign commerce connection or are non-jurisdictional for other reasons must still be shown on the map. Any justification for the Corps to make a non-jurisdictional determination should be provided in the report.
- ___ Standard mapping conventions (e.g. north arrow, location map, etc.) and other identifying features which facilitate the correlation of map locations with ground features (e.g., buildings, fence lines, roads, right-of-ways, trees, streams, topographic features, etc.)
- ___ A reference block which identifies the project, the delineators, surveyors, date of initial preparation and date(s) of any revision.
- ___ Individual numbers or other designations for each water feature identified.
- ___ A table displaying the respective size (in acres) of each water and cumulative acreage of each type of water.

___ Data sheets completely and appropriately filled out. Data forms may be modified from the Corps' standard version, but they must present all essential information necessary to make a wetlands/nonwetlands determination.

✓ At least one set of paired points documented for each feature or complex. Additional data forms may be necessary depending on various factors including the size and shape of the wetlands on the site, difficulty in identifying a precise wetlands/uplands boundary, and the width of any transition zones.

___ Additionally, before the Corps can complete its verification of the delineation, wetland boundaries must be marked with flags or stakes. Flags or stakes must be individually numbered and surveyed by traditional methods or by GPS equipment accurate to less than one meter. The survey data must specify the geographic coordinate system used in referencing the data, including projection and datum (e.g., Latitude-Longitude: NAD27 or UTM – Zone 10; NAD83). Data should be provided in a digital geographic information system (GIS) format to expedite review, with ESRI Shape files being the preferred format. The Corps also strongly recommends that property boundaries be flagged or staked and surveyed.

___ Additional information often can be expedite a wetland verification. Particularly helpful data includes topographic maps, aerial and ground photographs, and related reports. Expanded narrative reports may also clarify the investigation. However, the Corps emphasizes that these reports should be succinct with only the relevant information presented. Irrelevant, verbose, or perfunctory information will only delay the Corps' evaluation.

✓ Acreage totals for all wetland and other waters of the United States features mapped within the project boundary must be identified in the legend of the map.

✓ Identify date in which photographs were taken within the wetland delineation report

gallaway
ENTERPRISES

117 Meyers Street • Suite 120 • Chico CA 95928 • 530-332-9909

August 17, 2015

US Army Corps of Engineers
Kathy Norton
1325 J Street, Room 1350
Sacramento CA 95814-2922

RE: Nance Canyon Partners, L.P. (SPK 2014-01076)

Dear Ms. Norton,

We are responding to your July 29, 2015 letter in which you provided comments on the revised May 12, 2015 delineation report prepared by Gallaway Enterprises. The revised report thoroughly addressed the comments provided by Ms. Norton in the field and responded to all requests for changes to the delineation map based on the GIS data supplied to our office. In fact, Gallaway actually mapped the extent of the OHWM at a greater distance than requested by Ms. Norton and as identified on the Corps GIS data collected on the April 26 field visit. Expanding the extents of creeks further into upper terrace areas and presenting that information on a delineation map would be contrary to the guidance provided in the field by the Corps and RGL 05-05. Gallaway made an additional field visit on April 26, 2015 to confirm the mapping of the OHWM following the Corps guidance. Transects were established along Nance Creek, each transect evaluating the width of the creek and associated floodway based on the OHWM boundary which was identified using the regulations, policies, and procedures outlined in RGL 05-05. The data was used along with the data provided by the Corps to augment the delineation map accordingly. OW01 and OW02 collectively represent Nance Creek as depicted on the May 12, 2015 revised map and reflect an average width of 45 feet for the entire creek. The average transect width was determined to be 42 feet which correlates well with the average creek width currently represented on the delineation map.

After reviewing the extent of the active floodplain on several aerial photographs from differing years, it is apparent that the extent of the active floodplain boundary has not deviated beyond what was mapped in the May 12, 2015 revision. The extents presented in the May 12, 2015 map are a reflection of the site conditions, data gathered in the field and information integrated from the Corps field visit.

In paragraph 4 of the July 29, 2015 letter from the USACE, it says that Gallaway mapped additional wetland features in the upper terraces of Nance Canyon following the Corps site visit but that still more additional features were not mapped. In many cases, the Corps has actually requested that we map rock outcroppings as wetlands due to the "signature" given during review of aerial photography. The letter also makes reference to the indicator of these features being "ponding remnant biotic crust features that do show evidence of hydrology, algal matting, and need to be mapped." Gallaway maintains that the areas in question examined during the site visit do not contain biotic crusts that are indicators of ponded water and did not provide all three wetland parameters and, therefore, are not jurisdictional wetland features.

Biotic crusts are typically a composition of multiple organisms that occur together on the soil surface. Not all biotic crusts are indicators of hydrology. As the Arid West Manual describes, "Certain types of biotic crusts such as rough-surfaced or pedicellate crusts and asphalt-like crusts, do not develop or are destroyed in areas that become inundated. They are not indicators of wetland hydrology." Further studies, conducted in part by William N. Brostoff, have identified and distinguished between "upland" crusts and "aquatic remnant" crusts and suggested that these biotic crust types can help in identifying the boundaries of playas in the arid west. In a paper published in 2005, Brostoff et al. describes the "upland" crusts as being dominated by cyanobacterium and several other species including lichens and mosses and the "aquatic remnant" crust as being dominated by either algae or bacteria. Within the Nance Canyon Property, the biotic crusts observed on the terraces were dominated by cyanobacterium, bryophytes, and some lichens. These crusts are not typical of crusts found in seasonally ponded features since the physical structure of these crusts can be destroyed when submerged in water (Lichvar et al. 2006). In addition to the presence of "upland" crusts in the terrace area on the Property, the vegetation that is present, though sparse, did not meet the dominance test or the prevalence index. As such, these areas lacked hydric vegetation as well as hydrologic indicators. The soils in these areas in question generally demonstrated a very small percentage of redox features, however, the upland areas also demonstrated similar soils. Wetland features that were added to the delineation are all positioned on pockets of deeper soil, which allowed water to pond for enough duration to meet the three wetland parameters. The areas where the biotic crust was located that are being requested to be added as wetland features are positioned on particularly thin soils, frequently where bedrock was partially exposed, and were not added due to the lack of the three wetland parameters and the composition of the biotic crust being one typical of uplands.

All vernal pools in the upper terraces were mapped and included in the May 12, 2015 revision. Directions were provided to Gallaway by the Corps to investigate areas identified on an aerial photo that may contain vernal pool features. The investigation concluded that there were a few vernal pools in the areas that the Corps identified with the aerial photo. This investigation and the results are supported by scientific evidence. The presence or absence of jurisdictional features must rely on scientific information and not opinions, guesses or, speculation. The Corps representatives at the site exposed their misunderstanding of the basic information and methods necessary to complete a WOTUS delineation such as the use of test pit data. The same Corps representative requested that Gallaway remove a wetland feature from the map based on the absence of *Ranunculus muricatus*, when the reality was that the wetland feature met all of the parameters to be classified as a jurisdictional feature. Gallaway staff encouraged the Corps to visit the upper terrace areas to evaluate the areas in question using the standard scientific methods for determining jurisdictional features, but Corps staff refused, instead relying on their opinion based on a misinterpretation of an aerial photo.

All jurisdictional wetlands have a paired dataset. Upland data sheets for features 120-122 are not missing rather these features are located in a complex therefore data is extrapolated. The extrapolation of data is consistent with the *1987 Wetland Delineation Manual* when features are part of a complex and are similarly situated. In addition, the acreage totals for all wetland and other waters of the United States features mapped within the project are identified in the legend on the May 12, 2015 revised map,

consistent with the *2012 Final Map and Drawing Standards for the Pacific Division Regulatory Program*. We also included a separate table that provides the area and linear distance, as applicable for each feature. The project site is large and contained too many features to include the area calculations for each feature in the legend, therefore we summarized which is consistent with *2012 Final Map and Drawing Standards for the Pacific Division Regulatory Program*.

Though the upper terraces in the Property appear to be composed of vernal pool/swale complexes due to the aerial signature, the majority of the signatures are located on slopes as conveyed on the revised May 12, 2015 delineation map. As water tends to run downhill, the potential for ponding to an extent that would create jurisdictional wetlands is very low. Very similar lands surround the Property that contain similar landforms and aerial signatures. One such area located to the south of the Property was recently delineated and verified by the USACE (SPK 2013-01078, Old Durham Wood site). This delineation verified that the vast majority of the areas on the property that exhibited aerial signatures similar to those vernal pool/swale complexes were in fact not jurisdictional wetlands due to the thin soils, rock outcroppings, slope, landscape position, and lack of the three wetland parameters. If you have any question about this delineation, please reference the SPK number provided above.

We referenced the 1989 manual but did not use it to determine wetland indicator status, which was clearly described in the report and most importantly in the manner of data collection which reflects the *September 2008 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region*. We have referenced this manual in over 200 delineations submitted to the Sacramento office and recently referenced this manual in 6 delineations submitted to the San Francisco office with not one previous objection. This change in the review of our delineations is consistent with the Corps recent re-interpretation of other guidance documents. While referencing the manual may be inappropriate based on recent internal Corps guidance it does not invalidate the data used to make jurisdictional boundary determinations. In the future we will refrain from referencing this document.

Inconsistency in guidance interpretation and reliance on aerial photographs without incorporation of field data leads to an unpredictable and lengthy process. By any reasonable measure of response time this approved JD process has not been expeditious. We sought the guidance from the Corps regarding the best course of action for this client and were advised that seeking an approved jurisdictional determination would provide the greatest amount of security to the applicant. This was poor guidance and significant delays resulted in the termination of the project. On behalf of the applicant we are formally withdrawing the request for an approved jurisdictional determination for the Nance Canyon project.

Sincerely,

Jody Gallaway, President
Gallaway Enterprises, Inc.

References:

Lichvar et al. 2006. SURFICIAL FEATURES ASSOCIATED WITH PONDED WATER ON PLAYAS OF THE ARID SOUTHWESTERN UNITED STATES: INDICATORS FOR DELINEATING REGULATED AREAS UNDER THE CLEAN WATER ACT. WETLANDS, Volume 26, No. 2. The Society of Wetland Scientists.

Brostoff et al. 2005. Photosynthesis of cryptobiotic soil crusts in a seasonally inundated system of pans and dunes in the western Mojave Desert, CA: Field studies. Flora 200 (2005) 592–600. (letterhead)

CC: Don Swartz, Nance Canyon Partners, L.P., 2038 Daladier Drive, Ranchos Palos Verdes, CA 90275

Jody Gallaway

From: Jody Gallaway
Sent: Monday, August 03, 2015 3:12 PM
To: Norton, Kathy M SPK (Kathy.Norton@usace.army.mil)
Subject: Nance Canyon 2014-01076

Kathy;
We received your July 29, 2015 letter today regarding the Nance project. Could you provide the source, photograph date(s) for the "years of aerial photographs" that were reviewed by your office to determine the location of the OHWM. The OHWM determined by your office is clearly NOT determined by reviewing on the ground physical indicators such as debris lines, changes in vegetation patterns, extent of normal erosion from frequent flow associated with a normal flood interval event (2-10 years). My staff does not recall the collection, review, or verification of actual field data or a discussion of site specific indicators of the OHWM during your one day site visit, therefore I presume you must be making this determination based solely on a review of aerial photography. We have a tendency to collect actual field data in conjunction with a review of aerial photography as part of the decision making process for determining the OHWM as discussed in the *2008 Field Guide to the Identification of the Ordinary High Water Mark*. I believe our reliance on actual field data from having spent over 16 days on this site, including the collection of transects to determine the OHWM versus the Corps OHWM review solely from aerial photographs continues to create a disconnect between what is and what it should be based on a change in Corps policy. At your soonest convenience please provide the source, photograph date(s) for the "years of aerial photographs" that were reviewed by your office to determine the location of the OHWM so that we can better understand the disconnect between field and office.

Jody Gallaway
President and Senior Biologist
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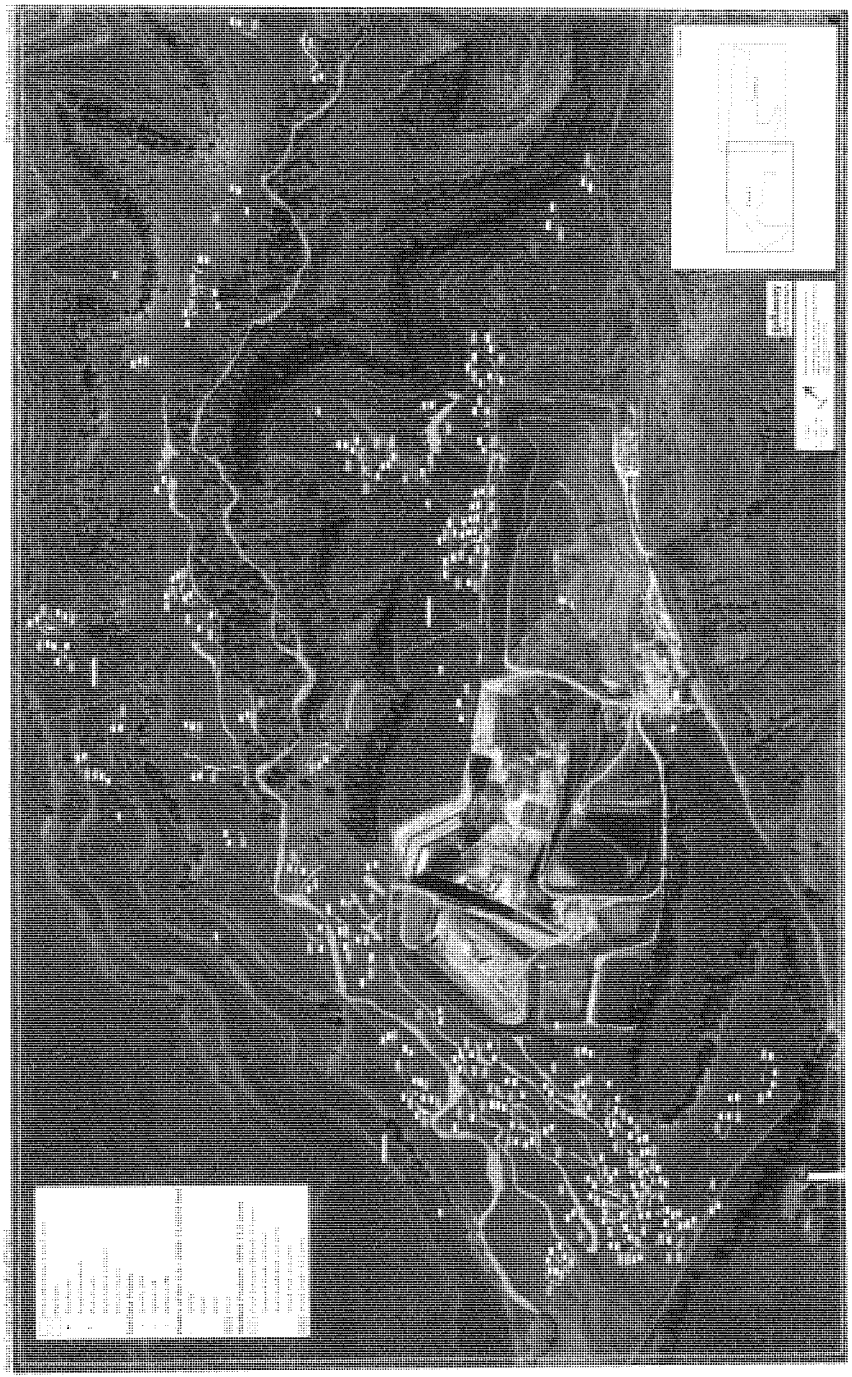

CASE STUDY #10

CHANGE IN USE:

Change in crop type

Note information contained on the Sacramento District's website, http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx which eviscerates the section 404(f) exemption by stating:

"if a property has been used for cattle grazing, the exemption does not apply if future activities would involve planting crops for food; similarly, if the current use of a property is for growing corn, the exemption does not apply if future activities would involve conversion to an orchard or vineyards."

At the same website, the Sacramento District takes it upon itself to determine how long a field may lay fallow to be subject to the exemption:

"An operation is not[sic] longer established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations."

Unfortunately for farmers, according to the Corps, as demonstrated in the Duarte case, described below, plowing is a change to the hydrologic regime necessary to resume operations, the need to plow takes away the exemption, giving the Corps control over what crops can be grown when, and where.

JOHN DUARTE and Duarte Nursey

California farmer John Duarte owns and operates a farm near Sacramento. In 2012 he purchased a 450-acre parcel of land. After John plowed the land to plant wheat, in February 2013, the Army Corps sent him a letter instructing him to "cease and desist" his operation. The letter instructed him to stop his wheat operation because his plowing had resulted in the discharge of pollutants to WOTUS found on the parcel in violation of the Clean Water Act. What followed was an enforcement action brought by the Corps against not only John's company, but him personally. The federal district court recently ruled against John and this litigation is expected to play out in federal courts for years.

Aside from the precedent this litigation will make, this litigation is important because the briefs filed by the Department of Justice reveal just how narrow the government (here the Corps) interprets the so-called "normal farming" exemptions from 404 permit requirements. Just as important is the 173-page (without attachments) expert report prepared by the government, explaining how plowing that disturbs the soil and hydrology is not the kind of "plowing" the government intends to allow, and how the waters and soils in land are so interconnected that any

disturbance of land and water in a field, not matter how small, will impair the flow or reach of a WOTUS and trigger the statutory recapture provision. The result is that few, if any, plowing and farming activities will ever qualify for the regulatory permit exemptions for so-called "normal" farming operations.

The Corps interprets its own regulation narrowly, establishing that the permit exemption for "established and on-going" operations is limited only to "land already under active cultivation." None of the permit exemptions, whether for plowing or planting in a WOTUS, will ever apply to land that a farmers decides to not cultivate for a time and for any reason, including adverse market conditions, or new land brought into cultivation. For John, his land's history of agricultural production (grazing) and tillage (wheat) failed the government's test of an "established and on-going" operation because the wheat production was fallowed for many years, and plowing was necessary to reestablish cultivation. How many years land can lay fallow is up to the discretion of the Corps, as is whether the plowing caused enough alteration in the soils and hydrology to trigger the recapture provision.

Senator SULLIVAN. Thank you, Mr. Parrish.

The next witness is Mr. Damien Schiff, the principal attorney for the Pacific Legal Foundation.

Mr. Schiff, you are recognized for 5 minutes.

STATEMENT OF DAMIEN M. SCHIFF, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION

Mr. SCHIFF. Thank you, Mr. Chairman, and thank you also to the Ranking Member, Senator Whitehouse, for the opportunity to talk today about this critically important issue of the scope of the Clean Water Act.

The Clean Water Act is a law that has been controversial for many decades. The Foundation and its attorneys have participated in many cases concerning the scope of the Clean Water Act, including the Supreme Court's two most recent cases addressing that statute, Rapanos v. United States and Sackett v. EPA.

The recent controversy has focused, of course, on the scope of the WOTUS rule, but in my testimony this afternoon I would like to draw the committee's attention to issues that are not directly raised by the WOTUS rule but nevertheless, in my view, represent the extravagance with which the EPA and the Corps view their authority under the Clean Water Act.

And I would like to begin with a case that, Mr. Chairman, you mentioned in your opening remarks, concerning the Schok family in Alaska. The Schoks own a pipe fabrication business, and they want to expand their business and acquire a new location for that purpose. But the Corps has intervened and asserted jurisdiction over approximately 200 acres of that property, calling it permafrost that is subject to the Clean Water Act.

Now, no one disputes that determining whether a site contains wetlands can be exceptionally difficult. And to provide some measure of predictability, Congress in 1992 mandated that the Corps use its 1987 wetlands manual for delineating wetlands until a final manual would be adopted.

Now, under the manual it is clear that permafrost does not qualify as a wetland. But to get around that obstacle, the Army Corps, in 2007, promulgated a so-called Alaska supplement. This supplement changes a key criterion for wetlands delineation which allows the agency to regulate permafrost. Again, that is a result that could not be reached under the congressionally mandated, nationally applicable 1987 wetlands manual.

Now, although permafrost is not that common in the lower 48, the principal raised by the Schok family's case pertains throughout the country. Should a Federal agency be allowed to deviate from its published, nationally applicable rules just to expand its power? The answer clearly is no.

Another example of agency excess under the Clean Water Act comes out of Andy Johnson's battle with EPA over his stock pond. Johnson owns an 8-acre parcel in Fort Bridger, Wyoming. The rural property contains both his home as well as some surrounding land which he uses to raise various farm animals, including horses and cattle. Johnson obtained a permit from the State of Wyoming to construct a stock pond in order to improve the water quality on his property.

Unfortunately, EPA didn't care for that, and in January 2014 issued a compliance order against Mr. Johnson, saying that his construction of the stock pond violated the Clean Water Act, this notwithstanding the fact that the Clean Water Act, since the late 1970s, has clearly exempted the construction and maintenance of farm and stock ponds from Clean Water Act regulation.

Nevertheless, the EPA said that the Clean Water Act applied to Mr. Johnson's stock pond because he did not construct it simply for the use of his livestock but also for the aesthetic pleasure that it might give himself and his family; and therefore, because his intent was not limited to simply providing water for his livestock, the exemption did not apply. And the compliance order that was issued against Mr. Johnson not only told him that he had to undo everything that he had done, but also threatened tens of thousands of dollars per day in civil penalties if he did not immediately respond to the compliance order.

Now, thankfully, following a lawsuit brought by Pacific Legal Foundation attorneys, EPA agreed to a reasonable settlement with Mr. Johnson, allowing him to keep his stock pond without having to obtain a permit. But there is no reason to think that the Agency will not continue to enforce its very narrow interpretation of the stock pond exemption to farmers and landowners throughout the country.

So, in closing, I would just like to emphasize that regardless of the WOTUS rule's fate, the history of the enforcement of the Clean Water Act by the Army Corps of Engineers as well as the EPA demonstrates that, frankly, all too often these agencies allow a misguided zeal for protecting the environment to override key constitutional and statutory protections for the Nation's farmers and landowners throughout the country.

I thank you again for the opportunity, Mr. Chairman, and I look forward to answering any questions the committee may have.

[The prepared statement of Mr. Schiff follows:]

May 24, 2016

Hearing on *Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States*

Senate Committee on Environment and Public Works

Subcommittee on Fisheries, Water, and Wildlife

Statement by:

Damien Schiff

Principal Attorney

Pacific Legal Foundation

Sacramento, California

Introduction

The Clean Water Act[1] is one of the most powerful and far-reaching federal environmental laws. The statute, jointly administered by the United States Environmental Protection Agency and United States Army Corps of Engineers, generally prohibits the unpermitted discharge of pollutants into the "waters of the United States."[2] Whether those waters include some, or most, or all streams, creeks, ponds, and wetlands in the nation is a question that for decades has fueled controversy among property owners, the agencies, and the courts. The controversy has intensified over the last decade, following *Rapanos v. United States*,[3] the United States Supreme Court's latest (and fractured) decision interpreting the Act's scope. Recently, attention has centered on the agencies' new rule-making, which purports to construe "waters of the United States" in light of *Rapanos*.[4]

In this testimony, rather than focusing on the so-called WOTUS rule, I would like to draw attention instead to a few post-*Rapanos* decisions, as well as several ongoing cases. These litigation examples demonstrate the extravagance with which the EPA and the Corps view their authority. They also reveal that the agencies' fondness for such power extends well beyond the particular issues raised in their WOTUS rule-making.[5]

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[1] 33 U.S.C. §§ 1251-1388. The Act's formal title is the Federal Water Pollution Control Act Amendments of 1972. *See* Pub. L. No. 92-500, § 1, 86 Stat. 816, 816 (Oct. 18, 1972).
[2] *See* 33 U.S.C. § 1311(a).
[3] 547 U.S. 715 (2006).
[4] *See* 80 Fed. Reg. 37,054 (June 29, 2015).
[5] In each of these cases, Pacific Legal Foundation attorneys served as counsel of record for the property owners.

Is Frozen Ground among the "Waters of the United States"?

Permafrost covers a vast expanse of Alaska's territory.[6] By definition, this land is permanently frozen. Nevertheless, the Corps believes that it can regulate permafrost as "waters of the United States." A recently filed lawsuit challenges that doubtful proposition.

The Schok family runs a small business in North Pole, Alaska. The company specializes in pipe fabrication, insulation, and related services for companies developing the North Slope oil fields. It has outgrown its current location, and wants to expand to a neighboring location which the firm has acquired. The Corps, however, has asserted jurisdiction over the property's approximately 200 acres of permafrost.

For several decades, the Corps has interpreted the Clean Water Act to reach at least some "wetlands."[7] The agency defines wetlands to include "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."[8] Determining whether a site contains wetlands can be very difficult. For that reason, the Corps in 1987 published a manual to assist the public and local Corps officials in making wetland delineations.[9] Shortly thereafter, the Corps and other federal agencies published another manual that—not surprisingly—dramatically expanded the definition of wetlands.

The ensuing controversy moved Congress to rein in the Corps. In the Energy and Water Development Appropriations Act of 1993, Congress mandated that the agency use the 1987 manual exclusively for wetlands delineations until "a final wetland delineation manual is adopted."[10] Since then, the Corps has chosen not to follow Congress' direction. Instead, it has issued regional "supplements" to the 1987 manual. These supplements—which by themselves are not "final wetland delineation manual[s]"—provide region-specific criteria for wetland delineation that purportedly supersede anything to the contrary in the 1987 manual.

Consistent with this practice, the Corps promulgated in 2007 an Alaska Supplement to the 1987 manual.[11] The Alaska Supplement uses a relaxed standard to determine the dates of the "growing season," an important factor in identifying wetlands. According to the Alaska Supplement, the growing season is determined with reference to "vegetation green-up,

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[6] Permafrost comprises about 80% of the state. Torre Jorgenson, *et al.*, Permafrost Characteristics of Alaska, *available at* http://permafrost.gi.alaska.edu/sites/default/files/AlaskaPermafrostMap_Front_Dec2008_Jorgenson_etal_2008.pdf (last visited May 20, 2016).

[7] *See* 33 C.F.R. § 328.3(a)(6) (2015); *id.* § 328.3(a)(7) (2014).

[8] *Id.* § 328.3(c)(4) (2015); *id.* § 328.3(b) (2014).

[9] Corps of Eng'rs, Wetlands Delineation Manual (1987), *available at* http://el.erdc.usace.army.mil/elpubs/ pdf/wlman87.pdf (last visited May 20, 2016).

[10] Pub. L. No. 102-377, 106 Stat. 1315, 1324 (Oct. 2, 1992).

[11] U.S. Army Corps of Eng'rs, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (Sept. 2007), *available at* http://www.usace.army.mil/Portals/2/docs/ civilworks/regulatory/reg_supp/erdc-el_tr-07-24.pdf (last visited May 20, 2016).

growth, and maintenance as an indicator of biological activity occurring both above and below ground."[12] In contrast, the 1987 manual defines the growing season to be that "portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5°C)."[13]

The critical reason for the Alaska Supplement's divergence from the 1987 manual is to enable federal regulation of permafrost. Under the 1987 manual, permafrost would never qualify as a wetland because permafrost never reaches the required above-freezing soil temperature. In contrast, under the Alaska Supplement's easy standard for the growing season, permafrost can be considered a wetland.

After the Corps asserted jurisdiction over their property, the Schok family filed suit in federal district court. In *Tin Cup, LLC v. United States Army Corps of Engineers*,[14] they argue that the Corps has no jurisdiction over their property's permafrost because it does not qualify as a wetland under the Corps' 1987 wetlands manual.

The family's dispute with the Corps is not just academic. Whether permafrost can be regulated under the Clean Water Act is an issue of keen importance to all Alaskans, as it will affect the extent to which the Corps and EPA can use the Act as a federal land-use ordinance. These agencies have long sought that improper end, a fact recognized by the late Supreme Court Justice Antonin Scalia. In his plurality opinion in *Rapanos*,[15] Justice Scalia criticized the agencies' claimed power to regulate "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years."[16] He justly called this "an immense expansion of federal regulation of land use" that "would befit a local zoning board."[17]

Not only is federal regulation of permafrost legally untenable, it is scientifically questionable. EPA and the Corps seek to regulate wetlands in part because they can filter pollutants, regulate storm flows, and provide other water quality benefits. But permafrost can do little of this; because it is frozen, it functions largely like dry land.

Beyond permafrost, the Schok family's case raises an important issue of democratic governance. Should a federal agency be allowed to deviate from its published, nationally applicable rules just to expand its power? Does it make any sense that a piece of turf may qualify as a wetland in Mississippi but not in California? To preserve individual liberty, it is essential that the government play by the rules consistently. Allowing federal agencies to make regional "exceptions" to their regulations raises a dangerous, freedom-threatening precedent.

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[12] *Id.* at 48.
[13] 1987 Wetlands Manual at A5.
[14] No. 4:16-cv-00016-TMB (D. Alaska compl. filed May 2, 2016).
[15] 547 U.S. 715 (2006).
[16] *Id.* at 722 (plurality op.).
[17] *Id.* at 738.

Are Normal Farming Practices Exempt from the Clean Water Act?

The Clean Water Act provides important jurisdictional exemptions for some discharges of dredged and fill material.[18] Included among them is the exemption for "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."[19] The purpose of this exemption is to ensure that everyday farming activities do not come within the Clean Water Act's onerous reach.

Unfortunately, the Corps has not taken Congress' lead but instead has treated the normal farming exemption extremely narrowly. A case in point is *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*.[20] In 2012, Duarte Nursery purchased approximately 2,000 acres of farmland in Tehama County, California. Shortly thereafter, it sold about 1,500 acres, retaining about 450 acres. The land traditionally has been farmed and grazed, and is zoned for agricultural use. After purchasing the property, Duarte Nursery directed that the land be planted with a winter wheat crop. To that end, the property was chisel-plowed to a shallow depth (most areas substantially less than 12 inches). Nevertheless, the Corps issued Duarte Nursey a cease and desist order, contending that its plowing constituted an illegal discharge of pollutants. The agency has persisted in that view, notwithstanding the failure of a ten-day, extensive, onsite examination to reveal any wetland that was destroyed as a result of the plowing. Indeed, after Duarte Nursery filed suit to challenge the Corps' cease and desist order, the agency filed its own counterclaim seeking civil penalties and other relief against Duarte Nursery.

The Corps' allegation that Duarte Nursery violated the Clean Water Act requires the agency to adhere to a number of legally shaky conclusions. First, that a plow can be considered a "point source" for pollutants. Second, that soil on farmland can be considered a "pollutant." Third, that simply moving around soil within a wetland on farmland constitutes the "addition" of a pollutant. And fourth, that tillage of farmland is not a normal farming practice. In short, if what Duarte Nursery has done qualifies as a discharge of pollutants, then no farmer in this country is safe from the threat of Clean Water Act liability.

Improving the Environment, but Incurring the Wrath of EPA

Another important Clean Water Act exemption applies to discharges connected with the construction of farm and stock ponds.[21] Not surprisingly, the agencies have taken an exceedingly narrow view of the exemption's scope. And, just as in *Duarte Nursery*, the agencies are prepared to impose that narrow view backed by the full enforcement power of the federal government.

A case in point is Andy Johnson's battle with EPA to maintain a stock pond. Johnson owns an eight-acre parcel in Fort Bridger, Wyoming. The property contains both his home and

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[18] *See* 33 U.S.C. § 1344(f)(1)(A)-(F).
[19] *Id.* § 1344(f)(1)(A).
[20] No. 2:13-cv-02095-KJM-DAD (E.D. Cal. compl. filed Oct. 10, 2013).
[21] *See* 33 U.S.C. § 1344(f)(1)(C).

surrounding land which he uses to raise various farm animals, including horses and cattle. The property is located in a rural area primarily made up of farm and ranch land. A small stream—Six Mile Creek—crosses the property. The water that runs through this stream is return flow from agricultural runoff. Prior to Johnson's work on the property, the area along this stream contained no wetlands, riparian vegetation, or any significant wildlife or fisheries habitat. Six Mile Creek ultimately empties into a controlled irrigation canal and reservoir, and the water is diverted for agricultural use. Historically, the stretch of the creek that crosses Johnson's property has been used to water livestock, both his and prior owners'. However, the stream did not provide a sufficiently reliable and safe source of water. In particular, the steep incline down to the water during winter and periods of low flow created a risk of injury for the animals.

In order to provide more reliable and safe access to drinking water for these animals, Johnson applied for a stock pond permit from the State of Wyoming. During the permit application process, Johnson consulted with state officials regarding how best to construct the stock pond. Together they came up with ways both to minimize any of the pond's incidental impacts on the environment, and to maximize the pond's incidental benefits. After having obtained the permit, Johnson constructed the stock pond.

In September, 2012, the Corps contacted Johnson to investigate whether his stock pond violates the Clean Water Act. Johnson explained that he built his pond intending it to be environmentally beneficial, including as habitat for fish. Nevertheless, in January, 2014, EPA issued a compliance order against Johnson, asserting that Johnson violated the Clean Water Act by constructing the pond.[22] The compliance order required Johnson to conduct restoration and mitigation activities and hire a stream or wetland restoration expert to prepare a plan to do so. It gave authority to EPA, the Corps, and the U.S. Fish and Wildlife Service, and any of their contractors, to access Johnson's private property to inspect and monitor it. The order also threatened substantial civil penalties should Johnson not comply.[23]

The agencies pursued this severe course of enforcement notwithstanding clear evidence that the stock pond's construction produced many environmental benefits. These include the creation of wetlands, riparian vegetation areas, and habitat for migratory birds, fish, and wildlife. The pond also allows sediment and other suspended particles to settle before the now-cleaner water continues flowing downstream.

EPA ignored all of this and argued that Johnson's actions fell outside the stock pond exception. The reason? Because Johnson was allegedly motivated by a desire to create a mere ornamental "fixture" for the aesthetic pleasure of himself and his family. Of course, that conclusion entirely ignored not just the valuable environmental benefits that the pond produces, but also the fact that the pond provides a high-quality water sources for Johnson's livestock and horses.

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[22] The Clean Water Act authorizes EPA to issue a compliance order "[w]henever on the basis of any information available," the agency has determined that an individual has violated the Act. 33 U.S.C. § 1319(a)(3).

[23] Currently, EPA may assess civil penalties of up to $37,500 per day for compliance order violations. Sackett v. EPA, 132 S. Ct. 1367, 1370 n.1 (2012).

Johnson sued EPA to challenge the agency's compliance order.[24] Thankfully, the agency agreed to a reasonable settlement.[25] Under that settlement, Johnson will pay no fine and will need no federal permit to maintain the pond. But EPA has not definitively abandoned its miserly interpretation of the stock pond exemption. And farmers can be sure that the agency will seek to impose that interpretation on hapless landowners.

A Dry Arroyo Is Among the "Water of the United States"?

The last time the Supreme Court addressed the scope of the Clean Water Act was *Rapanos*. In that case, a divided court struck down the "hydrological connection" theory, by which EPA and the Corps would regulate any wet area in the nation so long as a drop of water could flow from that spot to a downstream navigable water. Justice Scalia, writing for a plurality, chided the agencies for such an extravagant interpretation, which would lead to the regulation of "washes and arroyos" located "in the middle of a desert."[26] Notwithstanding this strong rebuke, the Corps proceeded to assert de facto the same broad interpretation of its regulatory power. One of the Corps' victims was the Smith family of Santa Fe, New Mexico.

Peter and Frankie Smith own an approximately 20-acre parcel in Santa Fe. They purchased the property for their retirement, investing their life savings to build their dream home. A dry creek bed, or arroyo, runs across the property. Water only flows in the arroyo during and immediately after major storms (which occur only about three times per year). Within a half hour after these storms, the water in the arroyo either evaporates or is absorbed into the porous ground. The nearest navigable water is the Rio Grande, which is located approximately 25 miles away.

Before the Smiths purchased the property, prior owners or unknown persons had used the arroyo as a place to dump trash. Also, many trees on the property and in the arroyo had died from a pine beetle infestation and posed a fire hazard. To remove the trash and dead trees, the Smiths smoothed out the ground in the bottom of the arroyo so they could safely use a truck and tractor. During their clean-up, they did not introduce any new fill material or dirt into the arroyo.

In May, 2011, Corps officials visited and inspected the property without the Smiths' knowledge or permission. Following that visit, the Corps issued the Smiths a "Notice of Violation," contending that they had violated the Clean Water Act. The Notice explained that the Smiths' efforts to clean out their arroyo resulted in the discharge of pollutants into navigable waters. Jurisdiction over the arroyo existed, the Notice alleged, because sediment and fertilizer collected in stormwater *could* flow through the arroyo into the Rio Grande.

In December, 2012, the Smiths sued the Corps, alleging that the agency lacked jurisdiction over their arroyo.[27] The lawsuit explained that the basis for the Corps' jurisdiction—pollutants could end up in the Rio Grande—was just a reformulated version of the "hydrological connection"

[24] Johnson v. U.S. EPA, No. 2:15-cv-00147-SW5 (D. Wyo. compl. filed Aug. 27, 2015).
[25] Consent Decree (filed May 9, 2016).
[26] Rapanos v. United States, 547 U.S. 715, 727 (2006) (plurality op.).
[27] Smith v. U.S. Army Corps of Eng'rs, No. 2:12-cv-01282 (D.N.M. compl. filed Dec. 11, 2012).

theory that the Supreme Court in *Rapanos* had rejected. Just three months later, the Corps changed its position to conclude that the Smiths' arroyo was not jurisdictional.[28] The Corps' shift in position remedied the Smiths' injuries, but other property owners may not be so lucky.

An Intent Component to the Prior Converted Croplands Exception?

In an effort to harmonize its wetland practice with those of other federal agencies, the Corps in 1993 amended its regulations to provide that "prior converted cropland" was exempt from Clean Water Act regulation.[29] Such cropland are formerly wetland areas that, on account of farming activities occurring prior to 1986, no longer satisfy the Corps' wetlands definition.[30] However, beginning in the 2000s, the Corps issued and utilized a series of policy changes without the benefit of notice-and-comments and without following proper rule-making requirements.[31] According to these pronouncements, prior converted cropland would cease to enjoy the exemption if the use of that cropland shifted to non-agricultural activities.[32] This was a substantial shift from the Corps' prior view that a prior converted cropland determination "is made regardless of the types of impacts of the activities that may occur in those areas."[33] In 2010, a federal district court in Florida ruled that the Corps could not enforce this shift in interpretation without new rule-making, accompanied by notice to the public and an opportunity for interested parties to comment on the proposed policy change.[34] Yet, despite this ruling, the Corps continues to enforce this "underground" rule in other parts of the country.

Those other parts include Louisiana. The Belle Company owns a parcel of land in Assumption Parish, Louisiana, which has been used for agriculture since at least the 1960s. In 1991, the Corps informed Belle that its property was exempt prior converted croplands.[35] In 2009, the company sought a permit to convert its property into a solid waste landfill. The Corps then asserted Clean Water Act jurisdiction, relying on the agency's new interpretation of the prior converted croplands exception.[36] The company filed suit, but lost on procedural grounds in the lower courts.[37] A request for review in the United States Supreme Court is pending.[38]

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[28] *See* Notice of Dismissal Without Prejudice (filed Mar. 8, 2013).

[29] 58 Fed. Reg. 45,008, 45,031-32 (Aug. 25, 1993). *See* 33 C.F.R. § 328.3(b)(2) (2015); *id.* § 328.3(a)(8) (2014).

[30] The exemption makes the Corps' and EPA's practice consistent with that of the Department of Agriculture's "Swampbuster" program. Under that program, eligibility for government contract payments, insurance premiums, and loans will be revoked if farming practices result in the conversion of a wetland. *See* 16 U.S.C. § 3821. An area is not considered a wetland if the conversion occurred prior to December 23, 1985. *See id.* § 3822(b).

[31] *See* New Hope Power Co. v. U.S. Army Corps of Eng'rs, 746 F. Supp. 2d 1272, 1276 (S.D. Fla. 2010).

[32] *See id.* at 1282 ("[B]efore the Stockton Rules, prior converted cropland that was shifted to non-agricultural use was treated as exempt. Following the Stockton Rules, the opposite was true.").

[33] 58 Fed. Reg. at 45,034.

[34] *Id.* at 1284.

[35] Belle Co., LLC v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 386 (5th Cir. 2014).

[36] *Id.* at 387.

[37] *See id.* at 397.

The *Belle* case is a troubling example of the Corps' unfairly narrow interpretation of exemptions to Clean Water Act jurisdiction. What is worse, it reflects the Corps' disdain for fundamental administrative protections like notice-and-comment.

A Modest Home-Building Project Threatens the Environment?

In 2004, Mike and Chantell Sackett purchased an approximately half-acre lot in a built-out subdivision near Priest Lake, Idaho. The Sacketts bought the property to build their family home. The site is bounded to the east and west by developed lots, and to the north and south by county roads. Between the site and Priest Lake is a row of developed lots.

In May, 2007, the Sacketts prepared for building by removing unsuitable material and placing sand and gravel on the site to create a stable grade. Shortly thereafter, officers of the EPA came to the site and announced their opinion that the property contained wetlands that were subject to regulation under the Clean Water Act. These officials directed the Sacketts' work crew to cease work until a Corps permit for the work was produced. The Sacketts had never been advised to seek such a permit, but they did obtain all of the necessary Bonner County permits to build their home. For months, the Sacketts sought an explanation from the Corps and EPA as to the factual basis on which the agencies claimed that the Act covered the property. Despite assurances from EPA and Corps staff that this explanation would be provided, it never came.

Instead, what did arrive, in November, 2007, was a compliance order from EPA. The order found that the property contains wetlands subject to federal regulation under the Act, and threatened the Sacketts with fines of up to tens of thousands of dollars per day unless they restored the site, fenced it off for three years, and built their home elsewhere. The Sacketts sued EPA in April, 2008.[39] Remarkably, as the Sacketts later learned when EPA produced the administrative record, neither the Corps nor EPA had performed a jurisdictional determination prior to issuing the November, 2007, order. Moreover, neither agency had ever requested the Sacketts' permission in writing to perform one on the property, requested in writing that the Sacketts perform one, sought an administrative warrant that would have allowed EPA to perform a jurisdictional determination on the property, or provided a written statement of the basis for its jurisdiction under the Act, despite repeated requests from the Sacketts. In short, EPA's compliance order was supported by no data sheets, no methodology for observing the site or collecting data, no sample collections, and no analysis of any data whatsoever. Nevertheless, EPA still maintains, after over eight years of litigation (and counting), that it has adequate evidence to conclude that the Sacketts' property contains wetlands.

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[38] Kent Recycling Servs., LLC v. U.S. Army Corps of Eng'rs, No. 14-493.

[39] Sackett v. U.S. EPA, No. 2:08-cv-00185-EJL (D. Idaho filed April 28, 2008).

Conclusion

The controversy over the WOTUS rule underscores that the Clean Water Act is a potent law the strength of which stirs its advocates and foes alike.[40] But regardless of that rule's fate,[41] EPA's and the Corps' administration of the Clean Water Act will continue to raise serious issues of agency overreach. The preceding cases unfortunately reveal these agencies' too frequent practice of allowing a misguided zeal for the environment to override commonsense enforcement principles, as well as statutory and regulatory backstops designed to prevent agency aggression. Understanding that these problems are not exclusive to the WOTUS rule should help policy makers in their effort to strike an appropriate balance between environmental protection and the rights of landowners and citizens.

[40] *See* Michael Campbell, *Waters Protected by the Clean Water Act: Cutting through the Rhetoric on the Proposed Rule*, 44 Envtl. L. Rep. News & Analysis 10,559 (July 2014).
[41] *See In re EPA*, 803 F.3d 804 (6th Cir. 2015) (staying enforcement of the rule).

PACIFIC LEGAL FOUNDATION

June 17, 2016

Ms. Elizabeth Olsen
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Via Email: Elizabeth_Olsen@epw.senate.gov

Dear Ms. Olsen:

In accordance with the June 10, 2016, letter from Chairman Inhofe and Ranking Member Boxer, please find below my responses to the questions for the record.

Questions from Senator Inhofe:

1. *Senators Cardin and Markey implied there was a relationship between expanded federal jurisdiction over land and water and basic water quality protection, invoking the Cuyahoga River. They suggested that absent broad Clean Water Act jurisdiction, that river and others would burn. Would you respond to that allegation?*

Federal water quality regulation may have accelerated the clean-up of the nation's waters. But it is not true that broad federal command-and-control regulation was the only way to improve the environmental health of the country's waters.[1] Nor is it correct that such federal intervention was essential to remedy the pollution problems of the Cuyahoga or other rivers.[2]

[1] Richard A. Epstein, *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 Harv. J.L. & Pub. Pol'y 23, 25 (2014) ("The appropriate response [to pollution like that with the Cuyahoga River] is not to pass some new huge, unwieldy, and overambitious law [but rather] to ramp up effective state enforcement, conferring, if necessary, standing on private individuals who use the rivers to coerce public bodies to take steps to clean up the river."); Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253, 263 (2013) ("While the federal government has a role to play in environmental protection, the virtues of federal intervention have been oversold."). *See also* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 160 (2005) ("[T]he bulk of federal environmental regulations on the books concern matters that do not directly address interstate spillovers or benefit from the sort of economies of scale that would justify federal regulation.").

[2] Adler, *Conservative Principles*, *supra* n.1, at 265 ("While there were plenty of serious environmental problems in the 1960s, it is wrong to suggest everything was getting inexorably worse until the federal government got involved."); Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 Case W. Res. L. Rev. 705, 730 (2008) ("But, because the common law evolves slowly, it sometimes lags behind more rapid changes in public preferences.

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"Much of the Cuyahoga story . . . is mythology . . . ."[3] In fact, the "conventional narratives, of a river abandoned by its local community, of water pollution at its zenith, of conventional legal doctrines impotent in the face of environmental harms, and of a beneficent federal government rushing in to save the day, is misleading in many respects."[4] To be sure, rivers that catch fire because of pollutants on their surface present a grave water quality issue. But "it appears [that] the tide [against such events] was turning well before Congress enacted the 1972 Clean Water Act."[5] For example, by 1966, "every state had enacted water pollution legislation of some sort delegating responsibility to one or more state agencies."[6] Similarly, EPA's 1973 National Water Quality Inventory showed that "there had been significant improvements in most major waterways over the preceding decade, at least in regard to organic wastes and bacteria."[7]

In contrast, federal involvement prior to the 1972 Clean Water Act actually may have retarded state and local efforts to improve water quality. "In 1966, 237 federal installations continued to discharge insufficiently treated waste into domestic waters."[8] It is also "important to remember that prior to 1972 the federal government had potentially powerful tools"[9]—like the 1899 Rivers and Harbors Act[10]—"to address at least some aspects of the nation's water pollution problems."[11] Indeed, "enforcing the longstanding federal prohibition on dumping refuse into navigable waters could well have prevented the 1969 Cuyahoga fire, if not any of

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Arguably, this timing problem is what allowed national politicians to exploit the perceived need for federal intervention in the early 1970s. Even if it is true that the common law could not keep up with rapid changes in public preferences in the 1960s, it does not follow that the common law could not have caught up over time.").

[3] Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 Fordham Envtl. L.J. 89, 93 (2002). For example, the famous *Time Magazine* cover of the Cuyahoga River burning was *not* an image of the 1969 fire but rather an archive photo of a 1952 blaze. *Id.* at 98.

[4] *Id.* at 93. *See Adler, Conservative Principles, supra* n.1, at 266 ("[C]ontrary to the standard fable, federal environmental regulation was not always necessary or an improvement over the available alternatives.").

[5] Adler, *Fables of the Cuyahoga, supra* n.3, at 95. *See id.* at 106 ("Yet contrary to popular perception, Cleveland officials began river cleanup *before* the 1969 fire.").

[6] *Id.* at 111. "[T]here is reason to believe that state and local efforts produced measurable, if modest, improvement in water quality in many areas." *Id.*

[7] *Id.* at 111-12 (citation omitted).

[8] *Id.* at 132.

[9] *Id.* at 138.

[10] 33 U.S.C. § 407.

[11] Adler, *Fables of the Cuyahoga, supra* n.3, at 138.

the earlier fires as well."[12] Thus, "it makes no more sense to blame state and local governments for the gross pollution of [the pre-Clean Water Act] period than it makes sense to blame the federal government or any other institutional force."[13] Moreover, recent scholarship demonstrates the relative superiority of state, local, and private/common-law efforts to control pollution over ill-fitting, excessively centralized, and frequently counterproductive federal regulation.[14]

2. *The Pacific Legal Foundation just won a significant Supreme Court victory in the* Hawkes *case. However, the Administration is suggesting they may change a MOU between the Corps and EPA so that Corps jurisdictional determinations are not binding on EPA. Does this issue require a legislative fix?*

Chief Justice Roberts' majority opinion in *United States Army Corps of Engineers v. Hawkes Co.*[15] states that an approved jurisdictional determination is binding on the government generally, not just on the Corps or the EPA.[16] Although the Chief Justice's opinion cites the MOU between

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[12] *Id.* at 135.

[13] *Id.* at 143-44.

[14] Jonathan H. Adler & Andrew P. Morriss, *Introduction*, 58 Case W. Res. L. Rev. 575, 576 (2008) ("Today there is widespread dissatisfaction with many aspects of federal environmental law."); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L. Rev. 923, 925 (1999) ("[M]ost federal pollution control efforts are fundamentally misguided. The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly, which directed most environmental policy for the last part of this century. America's move down the track of central environmental planning is incompatible with . . . environmental protection itself."); Adler, *Conservative Principles*, *supra* n.1, at 278-80 (contending that "environmental protection efforts would benefit from greater decentralization" because (i) "most environmental problems are local or regional in nature," (ii) it "creates the opportunity for greater innovation in environmental policy," and (iii) the federal government could then focus on "those environmental concerns where a federal role is easiest to justify, such as in supporting scientific research and addressing interstate spillovers"); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1556 (2007) ("The common law system's independence and private incentives to challenge the status quo are particularly valuable antidotes to complacency and ineffective regulation."), *quoted in* Adler & Morriss, *supra* n.14, at 577 n.15.

[15] 136 S. Ct. 1807 (2016).

[16] *Id.* at 1814 (noting that an approved JD "will also be 'binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination'") (quoting Memorandum of Agreement: Exemptions Under Section 404(f) of the Clean Water Act §§ IV–C–2, VI–A (1989)).

the Corps and EPA, the decision was not dependent on the MOU.[17] Justice Kagan, in a concurring opinion, stated that the MOU "is central to the disposition of this case" because it clearly shows that jurisdictional determinations are "binding on the Government."[18] In counterpoint to Justice Kagan's take on the case, Justice Ginsburg wrote in her separate concurring opinion that the Court need not rely on the MOU at all because jurisdictional determinations are "definitive."[19] Therefore, they are final as to jurisdiction and are subject to review under the Administrative Procedure Act.[20] Importantly, Justices Kennedy, Alito, and Thomas sided with Justice Ginsburg on this point. Their concurring opinion states that even if the MOU is not enough to establish final agency action, "the Court is right to construe a [jurisdictional determination] as binding in light of the fact that in many instances it will have a significant bearing on whether the Clean Water Act comports with due process."[21] In other words, altering the MOU to make jurisdictional determinations non-binding would raise a constitutional issue. If the Corps and EPA were to revise the MOU, it would certainly be for the purpose of exploiting any ambiguity in the *Hawkes* decision to argue that the decision no longer applies to the EPA. To avoid such an outcome, it would be both prudent and desirable for Congress to provide a legislative "fix."

3. *Can the Corps respond to the Hawkes case by refusing to provide jurisdictional determinations in the absence of a completed permit application? If so, could that undermine the protections the Supreme Court provided and would this issue require a legislative fix?*

The Corps' current regulations provide for standalone jurisdictional determinations along with a right of appeal identical to that for permit decisions.[22] Under these regulations, the project proponent is entitled to a jurisdictional determination.[23] If the Corps were to refuse to provide a jurisdictional determination, a project proponent could challenge the Corps' failure to act

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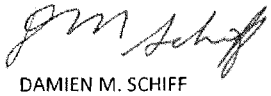
[17] For example, as discussed in the Chief Justice's opinion, the Corps' own regulations bind the agency to the outcome of the JD process, regardless of the MOU. *See Hawkes Co.*, 136 S. Ct. at 1814.
[18] *Id.* at 1817 (Kagan, J., concurring).
[19] *Id.* at 1817 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967)).
[20] *Hawkes Co.*, 136 S. Ct. at 1817-18 (Ginsburg, J., concurring in part and concurring in the judgment).
[21] *Id.* at 1817 (Kennedy, J., concurring).
[22] *See* 33 C.F.R. §§ 320.1(a)(2), 331.2. The Corps will issue a jurisdictional determination as part of its permitting process.
[23] *See id.* § 320.1(a)(6) ("The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities.").

under the Administrative Procedure Act.[24] Therefore, the Corps may legally refuse to provide a jurisdictional determination only if the agency rescinds its current regulations. As suggested above, because of the breadth and uncertain reach of the Clean Water Act,[25] the government's failure to provide a definitive and binding jurisdictional determination would raise a serious due process issue. Justice Kennedy, speaking for himself and Justices Thomas and Alito, observed in his *Hawkes* concurrence that the "Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[26] Unfortunately, these due process concerns may not be enough to deter the Corps from refusing to provide standalone jurisdictional determinations.[27] To avoid this outcome, it would be both prudent and desirable for Congress to provide a legislative "fix."

Respectfully submitted,



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Principal Attorney

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[24] *See* 5 U.S.C. § 706(1).

[25] *See Hawkes Co.*, 136 S. Ct. at 1816 ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern."); *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) ("The reach of the Clean Water Act is notoriously unclear.") (Alito, J., concurring).

[26] *Hawkes Co.*, 136 S. Ct. at 1817 (Kennedy, J., concurring).

[27] *See* Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 Cato Sup. Ct. Rev. 139, 163 ("[T]here remains a due process deficit in environmental law, and in the federal regulation of wetlands in particular.").

Senator SULLIVAN. Thank you, Mr. Schiff.

Our next witness is Ms. Valerie Wilkinson. She is the Chief Financial Officer of the ESG Companies, on behalf of the National Association of Homebuilders.

Ms. Wilkinson, you have 5 minutes. Thank you.

STATEMENT OF VALERIE L. WILKINSON, CHIEF FINANCIAL OFFICER, ESG COMPANIES

Ms. WILKINSON. Thank you, Chairman Sullivan, members of the committee. I appreciate the opportunity to testify. My name is Valerie Wilkinson. I am a CPA and the Vice President and Chief Financial Officer of the ESG Companies, a small business based in Virginia Beach, Virginia.

Homebuilders have become frustrated with the expansion of Federal authority over private property and believe the current permitting process is broken. For almost three decades we have been held hostage by the EPA and the Corps, who have continually altered the Clean Water Act 404 permit requirements. This is perplexing, as irrelevant sections of the Act have not changed since 1972.

Our nightmare began when our company proposed plans for a multiuse community to address local housing demand. While we were clearing our land in 1989, the Corps asserted that our property contained jurisdictional wetlands and that a wetland delineation was required. This surprised us, as we had developed land with identical characteristics for years. Clearly, the rules had changed.

We hired environmental experts to survey the land; however, the Corps dismissed their assessments. The delineation took years to complete because Corps officials disagreed on the criteria for determining wetlands. The regulatory environment changed again in 1999, when Virginia adopted the Federal 404 regulations to create an expedited one-stop permitting system and required a permit to excavate the land. We hired more experts to complete another wetland delineation for the Virginia DEQ wetland permit.

DEQ staff confirmed our expert's delineation, and we submitted our State permit request. We agreed to revise our plan to further avoid and minimize impacts, and provided mitigation so that for every one acre impacted, two acres of wetlands would be restored and another acre placed in preservation, resulting in no net loss of wetland acreage or functions. The DEQ applauded the fact of our exceeding the typical protective measures and issued a 15-year permit.

Since the State and Federal requirements are the same, we were stunned when the Corps disregarded DEQ's delineation and added 36.7 acres of impacted wetlands to the project. The basis of their decision for this 25 percent increase was vague and unsubstantiated. And although we strongly disagreed, we tried to move the permit forward by offering a number of amendments to our proposal that further lessened the environmental impact and provided an extensive alternatives analysis which proved the other options unfeasible.

Five years after we received the State permit, the Corps, utilizing the same regulations, denied our request. The Corps wrongly claimed that we had not adequately addressed information re-

quests even though we had replied to every one, provided offsite analysis, as well as 17 onsite alternatives, and addressed every public comment to multiple public notices.

Frustrated, we modified our project again in an effort to stay out of court and salvage some of our extensive investment. The significantly reduced plan decreased wetland impacts by 84 percent and the Corps accepted this as a modification to our original application. However, the Corps adopted a new regional supplement which expanded the definition of a wetland, and we were forced to start over again with a new set of rules.

It has been 11 years since filing our Federal application. We have responded to countless requests for information, studies, and data, only to be met with more delays and requests to update and revise the information. We have hired consultants and experts for an additional delineation, and although many requests appeared to be stalling mechanisms, we have complied again and again. We have been prevented from developing any of our 428 acres for 27 years, and our 15-year State permit will expire in 2018. Our efforts are reflected in the files on these boards.

We fear that the worst is yet to come. The EPA and Corps have finalized a rule further expanding their authority under the Clean Water Act. This rule will lead to increased litigation and delays. Small businesses will not survive under these rules, as most do not have the time and resources to fight. We have spent over $4.5 million in the process and over $40 million in our investment and still are not close to a permit. If constructed, our project will create jobs, increase property tax revenue, and provide affordable housing.

Thank you for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Ms. Wilkinson follows:]

Testimony of Valerie Wilkinson,
Vice President and Chief Financial Officer,
The ESG Companies

Before the Senate Subcommittee on Fisheries, Water and Wildlife

Hearing on "Erosion of Exemptions and Expansion of Federal Control- Implementation of the Definition of "Waters of the United States""

May 24, 2016

Chairman Sullivan, Ranking Member Whitehouse, members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders, I appreciate the opportunity to testify today. My name is Valerie Wilkinson, and I am a Vice President and the Chief Financial Officer of The ESG Companies. The ESG Companies is a group of family owned development, building, management and entrepreneurial companies based in Virginia Beach, Virginia. Our companies evolved from a small electrical contracting company started by our founder, Edward Garcia, after returning from serving in the Navy in the Pacific during World War II, and we have been providing strong, sustainable communities ever since.

I commend the subcommittee's desire to highlight the pitfalls of the current regulatory regime, and I appreciate the opportunity to tell our story. Our quest to obtain a federal wetland permit for our building project has spanned over 25 years. Throughout every step of the process, the rules have changed and new requirements have been added. Unfortunately, the land we acquired almost three decades ago still lays undeveloped and we continue to be held hostage by the federal government. After spending thirty years and over $4.5 million dollars in pursuit of the required permit, we still are not even close to obtaining a federal 404 CWA permit for our project.

Recognizing and supporting the need for a clean environment and the benefits that it brings to our nation's communities, home builders and land developers have a vested interest in preserving and protecting our nation's water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and improving the quality of our lives. Our nation's home builders build neighborhoods, create jobs, strengthen economic growth, and help create thriving communities while maintaining, protecting, and enhancing our natural resources, including our lakes, rivers, ponds, and streams. We foster the American dream of home ownership. Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetland permits to complete their projects. What is most important to these compliance efforts is a regulatory scheme and permitting process that is consistent, predictable, timely, and focused on protecting true aquatic resources.

The home building community knows all too well the frustration of a broken permitting process. Over the years, the federal government has expanded the scope of their regulatory authority and have frequently changed the requirements needed to obtain a federal wetland permit. These changes have made the permitting process virtually impossible to navigate and have caused many land use projects to come to a grinding halt, putting more people on the unemployment rolls. It is impossible for home builders and developers to support the needs of our community under an ever-changing regulatory system. With property rights being jeopardized by federal regulatory overreach, it is increasingly more difficult to attract new companies into our industry. Unfortunately, our company has fallen victim to this broken system.

Our story begins in the mid-1980's when The ESG Companies began to acquire parcels of land in order to develop a mixed-use community in Chesapeake, Virginia. Our mission was to address the anticipated population growth and housing demand after forecasters announced that 8,000 new jobs would be created in the Chesapeake area. The proposed project consisted of a multi-use community comprising retail, office, multi-family, single family and town homes with recreational amenities. Multiple parcels of land were consolidated into the Centerville Properties, a 428 acre development with a total investment in the project today, including land and carrying costs, of over $40 million.

In 1989, after obtaining required zoning approvals from the City of Chesapeake, The ESG Companies began clearing the land to develop Centerville Properties. Almost immediately, the U.S. Army Corps of Engineers (the Corps) asserted that jurisdictional wetlands, which were subject to CWA protections, appeared to be present on the property. They issued a Cease and Desist Order to halt "any and all filling activities on or adjacent to the waters and wetlands located on the property" until a wetland delineation could be completed. This action was surprising because prior to this time, we, along with many builders like us, had been developing properties like this all over the region, and the Corps had never asserted jurisdiction over similarly situated seasonally wet, non-tidal forested land. Even while the Corps put us through this rigorous regulatory obstacle course, adjacent properties with similar soils, hydrology and vegetation characteristics had been developed without permits.

The Corps asserted jurisdiction over our property by using their newly expanded jurisdictional authority to regulate wetlands as "waters of the United States." The landmark Supreme Court decision, *United States v. Riverside Bayview Homes, Inc.*[1] solidified the Corps' authority to regulate wetlands adjacent to navigable waters. The Court decided that wetlands which "actually abut on a navigable waterway" are "adjacent" and subject to CWA authority.[2] While our property does not directly "abut" a navigable water and is connected only by a historical drainage ditch, the Corps claimed that there was a subterranean connection to a jurisdictional water due to the fact that our soil was seasonally saturated to the surface.

While we did not agree with the decision that we were subject to federal jurisdiction, we clearly understood that the rules had dramatically changed. Therefore, we immediately hired highly

[1] 474 U.S. 121 (1985).
[2] *Riverside Bayview*, 474 U.S. at 135.

qualified and esteemed environmental consultants, Dr. Hilburn Hillstead, a biologist and environmental scientist with Law Environmental and a former official with U.S. Fish and Wildlife Service (USFWS), and Dr. Wayne Skaggs, a soil scientist and then professor at the University of North Carolina and member of the Soils Committee of the National Academy of Sciences to assist us with the wetland delineation and permitting process. From 1990 to 1995, our consultants attempted to work with local Corps officials to resolve any issues and clear a path that would allow our project to break ground. Surprisingly, Corp staff steadfastly refused to consider hydrology studies performed by Dr. Skaggs showing that the soil on site was not saturated to the surface by capillary fringe due to free standing water 12" below the surface. The Corp responded that it did not dispute Dr. Skaggs' findings, however its definition of surface is the "A" horizon within the root zone 12" below the top of the soil. Regrettably, the delineation took years to complete because at the time there was considerable confusion among Corps staff as to whether they should use the 1987 or the 1989 delineation manual to determine the existence of wetlands. Even though the 1989 delineation manual had been expressly disallowed by Congress in the Fiscal Year 1993 Appropriations bill,[3] Corps field officials still used it to complete their field assessments on our project.

Prior to 1998, mechanized land clearing and excavating in wetlands to prepare the land for development was prohibited by a Corps rule. However, the D.C. Circuit Court of Appeals overturned the rule prohibiting these actions in 1998.[4] In July 1999, after the Court ruling, Tri City Properties, LLC (Tri City), one of The ESG Companies, obtained an erosion and sediment control and water discharge permit and moved forward with clearing and excavating the land under the supervision of lawyer and environmental specialist, William Ellis.

As it has always been our intention to be in full compliance with federal regulation, we notified the Environmental Protection Agency (EPA) and Corps prior to initiating the action and took videotapes of the work as it was undertaken. These video tapes were then provided to the EPA. The ditching was accomplished by excavating and loading the material directly onto trucks and hauling it to an offsite location under the supervision of an engineer. At no point was dredged or fill material re-deposited on the land. Yet, in May 2000, the EPA issued an Administrative Order for compliance, one of over 20 they issued that day in our general area, stating that illegal discharges, "if any," must cease immediately and a new wetland delineation must be completed. No illegal activity took place on our property. However, later that year the Commonwealth of Virginia adopted a new regulation that required a permit to excavate in wetlands. Therefore, to comply with this new state regulation, we filed an application with the Virginia Department of Environmental Quality (VADEQ) to continue excavating the land. In addition, we retained the services of Environmental Specialty Group headed by Julie Steele, a former Corps Norfolk District regulatory branch Section Chief as well as Dr. W. Thomas Straw, a hydrogeologist and currently Professor Emeritus of Geosciences at Indiana University. These specialists have extensive expertise in environmental geology and wetlands hydrology and worked to develop a

[3] Energy and Water Development Appropriation Act of 1993, P.L. 102-377, 106 Stat. 1315, 1992

[4] *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

new wetland delineation as requested by EPA through their Administrative Order for compliance.

After obtaining yet another wetland delineation and 15 years since we had first started assembling the property for development, we were prepared to apply for our wetland permit. VADEQ and the Corps have joint permitting authority over the Commonwealth's wetlands. The expressed purpose of Virginia's statutory scheme was to provide a one-stop shop and prevent land owners from having to go through duplicative permit approvals. It is important to note that Virginia's wetlands regulations mirror the CWA section 404(b)(1) requirements. Since they use the same criteria and methodology, the state and the federal government should not differ in their regulatory assessments of our project. Unfortunately, coordination was not what we experienced, and our project only illustrates the disconnect between state and federal permitting partners.

In late 2000, we sent our new wetland delineation to the VADEQ to begin the permitting process. Our environmental consultant certified that the site contained 253.5 acres of palustrine, forested wetlands and 174.7 acres of upland. The VADEQ made multiple requests over an 8-month period that the Corps confirm the delineation; however, the Corps refused to participate, citing the outstanding Administrative Order. Therefore, Dr. Ellen Gilinsky, then VADEQ's Director of the Water Quality Programs Division who currently serves as a Senior Advisor to the EPA's Office of Water, and her colleague, Dave Davis, personally confirmed the wetland delineation we provided by performing their own field assessment of the property. Dr. Gilinsky and Mr. Davis invited Corps officials to accompany them on their field review so Corps staff could observe the wetland boundaries on the property. Corps staff attended but left without comment. The VADEQ confirmed the wetland delineation, showing 174.7 acres of uplands and 144.6 acres of wetland impacts, and the state permit process moved forward.

In late 2001, in an effort to find a mutually beneficial and expedient resolution to the outstanding Administrative Order, representatives from Tri City and their legal counsel, Robert Dreher, who now serves as the Associate Director of USFWS, met at EPA's Philadelphia offices with key EPA officials as well as a representative from the Environmental Defense Section of the U.S. Department of Justice (DOJ). Tri City proposed a settlement through a Consent Decree which included significant mitigation and preservation that the DOJ official believed it was in everyone's best interest, and EPA representatives agreed, with the caveat that they would need concurrence from the Corps to finalize the agreement. We were later notified that the Corps did not concur and would require a CWA404 permit for any development to proceed.

As required by Virginia state law, VADEQ opened a notice and comment period and held two public hearings on our project. During this time, we continued to communicate with VADEQ and interested parties to respond to any and all concerns regarding the impact of the project. In an effort to move the project ahead, we agreed to make a number of significant changes to our development plans to lessen the number of wetlands impacted. The revised project allowed us to avoid over 100 acres of wetlands and required us to offset our impacts by creating 290 acres of wetlands offsite by restoring wetland function on prior converted cropland. This amounts to two acres of restored wetlands for every one acre impacted. We also agreed to contribute 145 acres of wetlands on the adjoining property as a conservation buffer. As a result of these new

development, mitigation and preservation plans, VADEQ concluded that the project met the requirements of **no net loss** of wetland acreage and functions. In addition, Tri City agreed to install state-of-the-art stormwater ponds and filtration features such as wetlands benches, bioretention areas, and grassy swales in order to reduce erosion and improve water quality. At our final public hearing, VADEQ acknowledged that the permit contemplated more protective measures than typically required. Once again, VADEQ attempted to share our new project plans with the Corps, only to be rebuffed. At this point it had become painstakingly clear that the Corps did not want to participate in any review of our project.

On November 21, 2003, almost twenty years after obtaining the property, the Virginia State Water Control Board approved and VADEQ issued a Virginia Water Protection Permit, allowing Tri City to impact 144.6 acres of wetlands. The permit, which expires in 2018, included the negotiated wetland conservation requirements as well as numerous other conditions relating to wildlife preservation, erosion and sediment controls and construction procedures. Shortly after the issuance of the permit, VADEQ Director Bob Burnley praised our project, in an official VADEQ publication, as "an excellent example of the success of Virginia's wetland protection program" due to the extensive restoration, preservations and minimization requirements. Our project was being used as the prime example of how development can occur with sound environmental protections.

On two occasions, the Virginia judicial system defended our State permit against legal challenges. The Chesapeake Bay Foundation (CFB) opposed the issuance of the permit in *Chesapeake Bay Foundation v. Commonwealth of Virginia*. The Circuit Court of the City of Richmond ruled in our favor by upholding the permit.[5] The CBF appealed the decision only to lose again when the Virginia Court of Appeals issued a final ruling upholding the validity of the permit on April, 22, 2014.[6] Our state permit still remains in full force and effect, but only for another 30 months.

While we still needed formal CWA section 404 approval from the Corps, we felt we had overcome the most challenging obstacle of securing the wetland permit from the Commonwealth. After all, Virginia and the Corps have joint permitting authority, and the Virginia regulations enacted the CWA 404 regulations verbatim. The Corps issued the first public notice on the property based on the VADEQ confirmed impacts in 2005, and Tri City provided responses to all public comments including those made by the EPA, the U.S. Fish and Wildlife Service and the cities of Virginia Beach and Chesapeake, as well as various environmental groups and individual citizens. The Corps then requested a significant volume of new and updated information which we also provided; however, it took approximately 1 year to receive a response from the Corps related to our submissions.

The Corps subsequently concluded that the VADEQ-approved wetland delineation, which was the basis of our approved state permit, was not accurate. This is the same wetland delineation that the VADEQ asked the Corps to confirm three years earlier. With disregard to the VADEQ's

[5] Chesapeake Bay Found., Inc. v. Com., ex rel. Virginia State Water Control Bd., No. 1897-12-2, 2014 WL 1593323, at *4 (Va. Ct. App. Apr. 22, 2014).
[6] Id. at *16.

regulators and their expertise, the Corps performed a new wetland delineation in 2007 that added 36.7 acres of wetlands to the project for a new total of 181.3 acres impacted. Contrary to the well-documented delineation that was performed by our environmental consultants and VADEQ, the basis of the Corps delineation is rather vague and, in some instances, a stretch. For example, the Corps relied on observations of "ponding water and blackened leaves in designated areas" as primary indicators of hydrology during their site visit. Due to the increase in wetlands impact per their confirmation, the Corps required that the project go through a second public notice process. Tri City again provided responses to all public comments.

In response to the Corps' delineation, we quickly worked to amend our project proposal and offered a number of options to reduce our environmental impact. One of the proposals we offered reduced wetland impacts from 181 acres to 80 acres with onsite 1:1 mitigation. We also worked through the Corps' Least Environmentally Damaging Practicable Alternatives (LEDPA) analysis and considered the Corps impractical suggestion that we move our project to 90 acres of uplands on nearby Elbow Road. However, there were many complications with the Corps' LEDPA. First, the 90 acres is located along a narrow winding and dangerous section of road that could not support the main ingress and egress of a mixed-use development without millions of dollars of offsite infrastructure and road improvements that would have made the project financially infeasible. Second, the City of Chesapeake zoning laws prohibited us from moving the project to that area. In an attempt to overcome this obstacle, the Corps unsuccessfully tried to pressure city officials to waive current zoning restrictions and related proffers to allow the result it desired. Finally, as it is Congress' policy to "recognize, preserve and protect" the rights of the states to "plan the development and use…of land," the Corps has no authority to determine where a project should be built.[7] This action is an excellent example of the federal government's intrusion on local land use.

Three years after our permit request was filed with the Corps and 8 years after we had initiated the joint permitting process with the VADEQ, the Corps denied our request for a federal wetland permit. The Corps believed that we had failed to prove that the 90 acres of uplands on Elbow Road could not be developed and stated that we had not met the requirements of the LEDPA. The Corps also claimed that we did not adequately respond to requests for information even though we had filed all requested information, including offsite analysis of numerous sites, extensive analysis of 17 onsite alternatives, and detailed responses to two rounds of public comments.

In an effort to avoid litigation challenging the denied permit and to salvage at least part of our investment, we modified our project yet again. The significantly reduced plan allowed development on 61 acres, impacting 29.8 acres of wetlands. In 2009, the Corps accepted this proposal as a modification of the previously denied permit and reopened the 2005 application. The Corps issued their third public notice on our project with its modified scope and impact and Tri City again provided responses to all public comments.

[7] 33 U.S.C. § 1251(b).

As soon as we started to gain ground, the Corps issued a new regional supplement manual for field staff to use in making wetland delineations.[8] These changes expand the limits of wetlands into land that was formerly delineated by the Corps as uplands. This change specifically affected the Tri City property at Centerville. Two of the secondary indicators of hydrology were changed to primary indicators and used to expand the test for identifying wetlands. This change alone shifted very large areas from uplands to wetlands. The rules changed again in the midst of the process and the Corps applied these changes to our pending project application. In essence, we were forced to start over with new rules. We were now required to go through a public notice for a fourth time based on the increased impacts, moving us even farther away from securing our permit. In fact, just this past week, more than 60 days since the publication of our last notice, we received another 7-page request from the Corps for new and updated information on our project. It appears that we will be perpetually subject to vacillating circumstances.

Over the last eight years since the original permit denial, we have diligently continued to work with the Corps in an attempt to obtain a federal wetland permit. For us, these years have been spent responding to the Corps' constant requests for additional information, studies, and data. When we responded with the requested information and data, we were often met with follow-up requests to reformat the information in a painstakingly specific way. Indeed, the numerous reformatting requests appeared to be nothing other than an intentional stalling mechanism, as we swiftly complied with every request only to be faced with another. We had to hire additional environmental consultants to conduct more wetland delineations and wetland functional assessments, and even hired consultants suggested by the Corps. In addition, the Corps staff assigned to our project continually changed over the years and we struggled to keep them appropriately educated on our project. Over the years we have had dozens of field visits from Corps and EPA staff in order to survey and assess the land. We have complied every step of the way.

Since 1988, the Corps has successfully prevented Tri City from developing the land and in 2018, the 15 year permit that VADEQ approved will expire. The results of our 27-year effort to obtain required permits for the development of our property are contained in approximately 55 file boxes of records of submissions, correspondence, maps, scientific analysis and data collection related to this project and our pursuit of the required permits. In fact, if we laid the papers end to end, they would stretch over 30 miles, the distance from the U.S. Capitol to Dulles airport. It is hard to keep going when the continual requests and delays seem designed to further protract the process and frustrate our ability to ever reach a resolution and run out the clock on our state permit.

While we remain deflated by the status of our permit application, we are fearful that the worst is yet to come. The EPA and Corps are working to change the rules again with a regulation that would redefine the scope of waters protected under the CWA. They are trying to accomplish this by adding new terms, definitions, and interpretations of federal authority over private property that are more subjective and provide them with greater discretionary latitude. The Tri City

[8] "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)." U.S. Army Corps of Engineers. November 2010.

project serves as a perfect example of the frustration with the ongoing uncertainty over the scope of CWA jurisdiction. Unfortunately, the rule falls well short of providing the clarity and certainty sought by the regulated community. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. It is so convoluted that even professional wetland consultants with decades of experience will struggle to determine what is jurisdictional.

The EPA and Corps must stop expanding their authority over private property and improve the CWA's implementation by removing redundancy. They must also provide a practicable and transparent permitting system with the goal of improving compliance while protecting the aquatic environment. This rule completely fails to achieve any of these goals. Thankfully, the Sixth Circuit Court of Appeals has currently intervened and prevented this rule from being implemented. This rule will only serve as an additional obstacle that will prevent ours and many other projects from moving forward.

Our current project proposal totals 53.8 acres, a 233-acre reduction from the original development proposal. If constructed, the project will benefit the City and the public in the form of increased employment opportunities, increased property tax revenue estimated at well over $1.1 million per year, sales and use tax revenues, proffers for a school site, and increased public amenities. For over thirty years we have complied with every request, modified our building plans, and created an extremely aggressive conservation plan to combat environmental impacts. It is difficult to say what else we can do to move this project forward. Most businesses do not have the time, money and fortitude to engage in these lengthy fights and are forced to abandon such projects. We believe this is the Corps main objective. We are fortunate to have the means to stay in this fight, and our Chairman, Edward Garcia, now 90, is dismayed that the very liberties and fairness that he and his three brothers fought for during WWII are now being eroded by an overzealous regulatory bureaucracy. Eddie is not about to step away from this fight because he understands how important it is not only for our project but for all landowners. While the project remains at a standstill and we still have no clear end in sight, I hope that our story can be used to advance positive reforms to repair our broken regulatory system.

Senate Environment and Public Works Committee
Subcommittee on Fisheries, Water, and Wildlife
hearing entitled, "Erosion of Exemptions and Expansion of Federal Control – Implementation of the Definition of Waters of the United States"
Tuesday, May 24, 2016
Responses to Questions for the Record
Ms. Valerie L. Wilkinson

1. **Chairman Inhofe: Senator Rounds asked what recourse property owners have to prevent the Army Corps from devaluing their property to the point it practically becomes unsaleable? This was answered on behalf of farmers at the hearing, but as a developer, how would you address?**

Property owners essentially have no recourse. If the Corps determines that wetlands are present on a property and significant enough that the Corps will not permit a development, that would typically result in a significant loss of the property owner's use and value of the site.

In our case, we assembled hundreds of acres of land in the mid-eighties, before any assertions of jurisdiction in our region over seasonably wet, non-tidal forested land such as ours. In fact, properties with similar elevation, soils and hydrology were being routinely developed all across the area. Unfortunately, our land, which had all entitlements necessary for a valuable multi-use development, has been caught up in almost three decades of regulatory quagmire, depriving us of the use and value of the property. Currently, we have a valid state water protection permit to develop the property which expires in November 2018 and little hope, based on our years of experience, that we will be able to resolve the permit process with the Corps in a manner and timeframe that will allow us to develop the property for its intended purpose.

We effectively have had no recourse to the situation as the degree of deference afforded the federal agencies by the courts means that the lowest ranking person in the Corps/EPA is given precedence over that of any and all outside scientific experts, no matter how highly qualified or credentialed. This extreme deference gives a landowner no defense against arbitrary and capricious assertions or the uneven application of the regulations. In our case for example, significant development has taken place on similarly situated property surrounding ours during the permitting process, including the adjacent Woodbridge development (aerial map attached). This development was denied a state permit, (which we successfully obtained for our project), and was allowed to proceed without a federal 404 permit with the full knowledge of both the Corps and the EPA. The agencies have asserted that Woodbridge merely "fell through the cracks".

An even larger concern is that the Corps has recently been adopting Regional Supplements to the 1987 Wetlands Manual, with no oversite from Congress and no formal public comment process. Consequently, they have expanded what lands are now being considered wetlands with no recourse to property owners, intensifying this problem.

2. **Chairman Inhofe: Senator Sullivan asked Mr. Buzbee if the EPA can expand its own jurisdiction with broader definitions or is that something only Congress can do. Mr. Buzbee answered by saying the agency actions have to be based on statute, but the interpretation and regulation can change based on "best science" as it changes and develops. How would you answer this question?**

In our experience, the application of the regulations is much more subjective than scientific. In fact, the agencies' definition of "wetland" has proved malleable, depending on their interpretation of law and policy. This interpretation has continually changed over the years, moving farther and farther away from surface waters, up the hill towards drier and drier areas. The Corps' evolving view of what it regards to be a "wetland" is a one-way street, continually resulting in more areas that qualify as wetlands, not less.

We question if the Corps is applying science at all because in the absence of actually finding the three specific prerequisites for identifying a wetland, the Corps has ignored or disregarded any scientific studies prepared by our highly qualified experts and moved on to the arbitrary use of nonspecific indicators such as water stained (blackened) leaves to establish a finding of saturated soils, for which there is no factual, scientific basis. The use of such data by regulators to make the arbitrary assumption that wetland hydrology is present during the growing season, absent a positive finding of wetland hydrology, is based solely on supposition and conjecture. This supposition lacks a reasoned scientific basis of fact as to the period of time, duration and conditions under which the observed characteristics actually developed. For instance, wetland hydrology is supposed to be determined if the soils are inundated or saturated to the surface for 14 or more days during the growing season. It has been our experience that if Corps representatives don't find solid evidence in the field supporting their preconceived position, then they revert to the use of unreliable assumptions based on observance of certain indicators to allows them to make the call the way they want to make it. Once they've made the call, it's virtually impossible to dispute it.

According to the 1987 Manual, the Corps is to use "careful professional judgement" in making determinations where indicators of hydrology are unclear. They are supposed to be unbiased in their analysis, not a proponent or opponent; however, Corps and EPA representatives over the years have selectively relied on information regarding our property that supports their pre-determined opinion while continually disregarding the opinions of experts. Experts that specifically have been discounted during our permitting process include Dr. Ellen Gilinsky, then with VADEQ and now a Senior Policy Advisor to EPA's Office of Water; Robert Dreher, then legal counsel to the project and now Associate Director of USFWS; Dr. Hilburn Hillstead a biologist and environmental scientist with Law Environmental and a former official with USFWS; Dr. Wayne Skaggs, a soil scientist and then professor at the University of North Carolina and member of the Soils Committee of the National Academy of Sciences; Dr. Thomas Straw, a hydrogeologist and currently Professor Emeritus of Geosciences at Indiana University; and Julie Steele, a former Corps Norfolk District regulatory branch Section Chief. While these individuals have been highly regarded in key governmental and scientific positions, the Corps appears to believe they were all wrong in their positive evaluation of our property and our permit application.

Changing interpretations and constantly changing goal posts have made it nearly impossible for us to reach a resolution on our permit application. For example, the amount of wetland impacts on our currently proposed development have been increased twice during the process. First the Corps increased the impacts from the state's 2003 wetland delineation prepared by Dr. Ellen Gilinsky, and then they increased the impacts from their own earlier 2007 Jurisdictional determination. With regard the first change increase, Virginia appellate Judge McCullough opined in Chesapeake Bay Foundation et al. v Commonwealth of Virginia et al, 2014 case upholding the validity of our state permit: "The Corps' designation added 36.7 acres of wetlands to the DEQ-approved wetlands delineation. In contrast to the detailed data gleaned by ESG, on this record, the basis of the Corps' additional delineation is rather vague. The record shows only that the Corps noted 'ponding water and blackened leaves in designated upland areas' during a site visit with EPA."

The EPA and the Corps have recently expanded their jurisdiction with no input from the Congress. The proof of this is the adoption by these agencies of Regional Supplements to the 1987 Corps of Engineers Wetlands Delineation Manual. The supplement covering our area in Virginia contains more pages by an additional 50% than the 1987 Corps Manual, excluding appendices. Assumptions regarding the wetland hydrology, growing season, soils and vegetation have dramatically increased the amount of wetlands being confirmed on properties in the Coastal Plain of Virginia. The supplements make it much easier for the Corps to claim an area as a wetland. One of the easiest ways to see this is through the hydrologic indicators. The new supplement changed previous indicators from secondary to primary and added numerous new indicators in both categories. Many of these indicators are somewhat subjective and allow for much latitude in their interpretation. Additionally, several of the indicators, such as crayfish burrows and water-stained leaves, can be transient and may occur in areas that have received higher than normal precipitation regardless of the underlying hydrology.

The Corps required that we apply this new Regional Supplement to our ongoing permit application. Consequently, the Corps found that the same area we intended to develop went from having 24.6 acres of wetlands being impacted (based on a 2007 Corp JD) to 47.1 acres of wetlands being impacted. The entire 22.5-acre increase came as a result of the Corps applying the Regional Wetland Manual, as there were no physical changes in the land or our development plan. These Regional Supplements to the 1987 Wetlands Manual are not "clarifying procedures" but instead ones that expand jurisdiction.

3. **Senator Whitehouse: Please submit for the record any written documentation or other information from the U.S. Army Corps of Engineers supporting your statements that the U.S. Army Corps of Engineers treats a change in crops as requiring a permit under the Clean Water Act.**

I made no statement regarding the impact of a crop change at the hearing, and believe that was addressed by Mr. Parrish and Ms. Galloway. Our proposed permit is related to a multi-use

development, and I have no direct knowledge or information regarding the impact of the regulations as they relate to farming.

Senator SULLIVAN. Thank you, Ms. Wilkinson. That is very powerful testimony. I appreciate this.

Our next witness is Mr. William Buzbee, Professor of Law at Georgetown University Law Center.

Professor Buzbee, you have 5 minutes for your opening statement.

STATEMENT OF WILLIAM W. BUZBEE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

Mr. BUZBEE. Thank you, Chairman Sullivan, Ranking Member Whitehouse, and other committee members. I am William Buzbee, a professor at Georgetown University Law Center. I am pleased to testify today about both application of current Federal law under Clean Water Act and also briefly comment on the Waters of the United States rule, known as the Clean Water Rule.

I should also note that previously I have testified at congressional hearings in the House and the Senate on these questions and also represented a bipartisan brief of former EPA administrators in the Rapanos case, which was also aligned with the George W. Bush administration.

I think it is important to remember this has been an area of bipartisan support in the past, and I hope it will be again, too.

Rather than covering the remarks I submitted in writing, I want to focus on two main issues. One is given the claims of regulatory overreach, I will address some of those claims and make a few suggestions. And then I will turn to issues of the Clean Water Rule and ways in which I believe it would be a beneficial and good turn in the law.

So, first, on this issue of regulatory overreach, I think first, and most importantly, Federal policy should never be based on a story, but an assessment of how a regulatory program works overall. And I note today, as in many past hearings, and really since the SWANCC case, up until today, critics of Clean Water Act jurisdiction focus on wetlands and section 404. It is important to recall that the Waters of the United States issue and jurisdiction is the linchpin for all jurisdiction under the Clean Water Act, including industrial pollution discharges.

Second, it is important to look at where the law stands today compared to where it stood prior to the SWANCC case. The Clean Water Act, as measured now, protects less water or fewer waters than it did during the Administration of President Ronald Reagan.

Then, as I read the witness statements for today, a few things jumped out at me. First, as is not to be a surprise to any of us, you see unavoidable interaction of Federal, State, and local regulators, and it is important to remember that States' actions here, although sometimes disliked, are protected under the Clean Water Act; they are never forced to accept a project merely because at times it will be federally protected; they are subject to a strong savings clause.

Second, thinking about the Army Corps' work and EPA's work, for a country as large as the United States, there is a formidable task in trying to provide regulatory consistency and also show sensitivity to local differences; and there is probably no area more than the Clean Water Act where the jurisdictional determinations

call for this balance of rule-like clarity and sensitivity to local circumstances.

Part of this is a result of the Rapanos case. Several of the groups here today on this panel and past witnesses in similar hearings were ardent advocates in the Supreme Court, that the Supreme Court should embrace the so-called significant nexus rule, which required in many circumstances close attention to individual waters and their characteristics.

Justice Kennedy's now authoritative opinion in Rapanos embraced that, and for good or bad, unless the Clean Water Rule is allowed to take effect, it requires substantial case-specific judgment by regulators about how lands and waters function, including for things like filtering of pollutants and reducing flooding. So this sort of individual discretionary judgments is unfortunately, right now, in part the result of the significant nexus test embraces in Rapanos.

If this is disliked, the Clean Water Rule would bring greater clarity. Also, the earlier Clean Water Restoration Act that was proposed would also bring greater clarity. And you can't have it both ways; you either need rule-like clarity with more law or you need to have discretionary judgments, and right now the law requires quite a bit of regulatory individual judgments.

Looking at the overall data—I was looking it up in response to testimony today—it is important to understand that skirmishes and permit denials are not the norm here. The recent Army Corps data says that there were 79,000 permit activities this past fiscal year; that the Army Corps authorized 57,000 permits, completed 49,000 jurisdictional determinations, and 95 percent were authorized. The remainder received individual permits, and only 1 to 3 percent are subject to denials.

Now, with my last few seconds I would suggest that the Clean Water rule is well grounded in law and science. I notice in statements there are some arguments that EPA and the Army Corps did not have power to act here. It is important to note that six Supreme Court justices in Rapanos called for action by regulation to bring clarity to the law.

Second, as mentioned by Senator Whitehouse, the Clean Water Rule solidifies exemptions and carve-outs, and actually proposes to eliminate completely the longstanding Commerce clause sweep-up provision that allowed regulators to act based on the existence of commerce and industrial linkages. My sense is that the Clean Water Rule is well founded in science and the connectivity report and should be embraced.

Thank you very much.

[The prepared statement of Mr. Buzbee follows:]

Testimony of William W. Buzbee
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Before the United States Senate
Subcommittee on Fisheries, Water, and Wildlife
Of the
Committee on Environment and Public Works
Hearing on "Erosion of Expectations and Expansion of Federal Control—
Implementation of the Definition of Waters of the United States"
May 24, 2016, 2:30 p.m.
Room 406, Dirksen Senate Office Building

My name is William Buzbee. I am a Professor of Law at Georgetown University Law Center. I am also a member-scholar of the not-for-profit regulatory policy think-tank the Center for Progressive Reform.

I am pleased to accept this Committee's invitation to testify regarding your hearing subject, entitled "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States." I will focus in my testimony on the finalized "waters of the United States" regulations (hereinafter the "Clean Water Rule") published in the Federal Register by the Army Corps of Engineers (the Army Corps) and the United States Environmental Protection Agency (EPA) in the Federal Register on June 29, 2015, at 80 Federal Register 37,054.

As a professor asked to testify due to my expertise, not as a partisan or representative of any organization, I will seek to provide context leading to these regulations, comment on the choices made by EPA and the Army Corps, and assess the legality and logic of the Rule. Given the hearing's title and my review of some recent related past hearings and claims about the legality and substance of this rule, I will especially focus upon claims of regulatory overreach and expansion. As I state below in more detail, I believe that these claims are legally and factually erroneous, misunderstanding the regulatory background and Supreme Court decisions, omitting key elements of the actual Clean Water Rule, and mistakenly claiming limitless regulatory overreach under a statute and regulation that actually now protects less and provides more clarity than under the law as it stood during the term of President Ronald Reagan.

My background and past involvement with the "waters of the United States" question:

This is not my first involvement with the question of what are protected as "waters of the United States" under the CWA. I have been involved in past related Supreme Court litigation and legislative hearings.

As a result of my work on environmental law and federalism, I served as co-counsel for an unusual bipartisan amicus brief filed in the *Rapanos* case. This brief was filed on behalf of a bipartisan group of four former Administrators of the United States Environmental Protection

Agency (EPA). Those former US EPA Administrators had served under Presidents Nixon, Ford, Carter, the first President Bush, and President Clinton. Despite their different party backgrounds and years of service, all four agreed on the importance of retaining longstanding regulations protecting America's waters. This bipartisan EPA Administrators' brief was also aligned in *Rapanos* with the George W. Bush Administration's arguments before the Supreme Court, several dozen states, many local governments, and an array of environmental groups as well as hunting and fishing interests.

This substantial, bipartisan coalition, including the Bush Administration, all asked the Supreme Court to uphold longstanding regulatory and statutory interpretations regarding what is protected as "waters of the United States," emphasizing the centrality of the "waters" determination to all of the Clean Water Act. After all, although this question of what are protected "waters" is often discussed with a focus on wetlands and tributaries and especially dredging and filling restrictions long set by Section 404 of the Clean Water Act, the "waters" issue is the key jurisdictional hook for virtually all of the Clean Water Act. This includes, among other things, direct pollution industrial discharges under Section 402 of the Clean Water Act and its National Pollutant Discharge Elimination System (NPDES) program, as well as oil spill and water quality components of the Act.

Since the Court's splintered and confusing ruling in *Rapanos,* I testified in House and Senate hearings on implications, potential fixes, and regulatory responses in 2006, 2007, 2008, 2014 and 2015. I have continued to follow developments regarding this rule and body of law.

Earlier in my legal career, I counseled industry, municipalities, governmental authorities, states and environmental groups about environmental law, pollution control, and land use issues under all of the major federal environmental laws, as well as state and local laws. As a scholar, I have written extensively about related issues, with a special focus in recent years on regulatory federalism, especially environmental laws and their frequent reliance on overlapping federal, state and local environmental roles. I have published books with Cornell and Cambridge University Presses, and Wolters Kluwer/Aspen. My publications have appeared in *Stanford Law Review, Cornell Law Review, NYU Law Review, Michigan Law Review, University of Pennsylvania Law Review, Harvard Environmental Law Review,* and in an array of other journals and books. In addition to teaching at Georgetown, I previously taught at Emory

University and have been a visiting professor at Columbia, Cornell, Georgetown and Illinois Law Schools and taught and lectured in Europe and Asia.

My testimony, in brief:

The Clean Water Rule and the massive accompanying science report referenced and summarized in the Federal Register and now generally known as the "Connectivity Report" are an attempt to reduce uncertainties created by three Supreme Court decisions bearing on what sorts of "waters" can be federally protected under the Clean Water Act. Furthermore, the Clean Water Rule and Connectivity Report are directly responsive to the pleas and rulings of a majority of US Supreme Court justices. Far from being illegal, they are directly responsive to Supreme Court law and well grounded in peer-reviewed science and the long enduring Clean Water Act.

I will make six main points in this testimony:

First, I will explain very briefly how the question of what "waters" are protected matters not just for wetlands and tributary protections, but for industrial discharges of pollution. Furthermore, the various types of waters protected perform many functions of importance to businesses and governments at all levels. Business, health, recreational, and environmental interests are all at stake. And America's fisheries—a focus of this Committee---are hugely dependent on protection of rivers, tributaries, wetlands, and the sorts of waters and related ecological and economic functions addressed by the final Clean Water Rule. Business interests are undoubtedly on both sides of this issue, but hunting, fishing, boating, recreation, and tourism-linked businesses are especially dependent on protection of America's waters. And because pollution and filling of America's waters threaten low cost but high value wetlands functions and waters used for agricultural purposes and for drinking water, and also water quality in drought prone areas, the despoiling or filling of America's waters would be immensely costly in terms of resulting harms. In addition, state and local governments are also on both sides of this issue. Degraded water quality can lead to costly obligations for state and local governments.

Of great importance, legislators and other critics make both a scientific and legal error when they assume that periodically dry areas cannot be worth protecting as a water of the United States. No majority of the Supreme Court has ever so held, and the science contradicts this view. After all, much of the United States is often dry if not suffering from drought; when waters do flow, those

channeling and connecting geographic features are of critical importance and require protection against pollutant discharges that will degrade precious and scarce water.

Second, I will show how the regulatory choices reflected in the Clean Water Rule are responsive to Supreme Court law and also the views of a majority of the Supreme Court that regulations on this issue are needed and appropriate. EPA and the Army Corps provided lengthy and well-grounded legal explanations for the Clean Water Rule at every stage of the regulatory process.

Third, the Clean Water Rule and massive regulatory preamble in the Federal Register and accompanying documentation reveal that EPA and Army Corps engaged in extensive outreach and responded to criticisms of supposed limitless claims of federal power by retaining and solidifying exemptions.

Fourth, in attacks on the Clean Water Rule, critics seem consistently to fail to note and credit a major change that removes the most expansive and least water-linked historic grounds for federal claims of jurisdiction. The Clean Water Rule deleted longstanding federal power to regulate "other waters" based on showing that the harming activity or uses of the waters were linked to industry or commerce. This was, in effect, a commerce-linked sweep up provision. Instead, the Clean Water Rule, as now amended, links Clean Water Act jurisdiction to what the best peer-reviewed science indicates deserves protection. This science-based effort should be applauded, even in a time of partisan acrimony.

Fifth, the Clean Water Rule is directly linked to and tailored in light of the Connectivity Report, a massive survey of peer-reviewed science regarding waters' functions. This approach answers criticism that the federal government is going too far and protecting areas of no value relevant to the Clean Water Act. If critics had found flaws in the science or proposed regulatory categories, they surely were required to participate in the notice and comment process and support their contrary views with hard science and firm data, not conclusory tales.

Sixth, past hearings and public comments about this rule at times reveal a fundamental confusion. For liability and permit obligations to arise under CWA in connection with farming and other typical land and water uses, a discharge of pollutants must be involved. Basically, neither ordinary farming activities nor basic uses of lands, wetlands, and other covered waters are prohibited. It is the act of discharging pollutants subject to Section 402 or Section 404

permits that typically creates permitting obligations. (Oil spill prevention obligations are subject to their own separate measures that are not relevant here.) Hence, many activities are non-events under the CWA, and most actions that are covered are subject to permits that typically constrain but allow activities. To be subject to liability, there generally must be a discharge of pollutants into or filling of a protected water without a required permit or in violation of a permit.

Point I : *The extent of federally protected waters matters to far more than just wetlands regulation and explains the longstanding protective federal bipartisan consensus*

The question of what "waters" are federally protected is not a matter that only concerns allegedly marginal waters that, as often presented by critics of the longstanding protective consensus, look more like land or involve the outermost reaches of wetlands protection. The question of what are protected "waters of the United States" concerns the very linchpin of federal Clean Water Act jurisdiction. It does indeed supply the hook for Section 404 "dredge and fill" coverage that, in accordance with the Clean Water Act, protects wetlands. It also provides the jurisdictional prerequisite for Section 402's requirement of permits for industrial pollution discharges under the National Pollution Discharge Elimination System (or NPDES). These provisions support efforts to protect water quality, protect drinking water, provide habitat, and buffer against storm surges and flooding. Furthermore, since the 1970s and still today on the Supreme Court, the longstanding consensus has been that the Clean Water Act protects far more than just waters used in the literal sense for shipping-linked navigation. That is simply not the law.

It is critical to remember that the Clean Water Act has been one of America's great success stories, helping to restore many of America's rivers from highly polluted conditions to water that often now is clean enough for fishing, recreation, and even drinking water. The Act also greatly reduced the pre-Clean Water Act tendency to see wetlands as worthless and appropriate for filling.

Many of the countries we compete with for talent and business vitality suffer from a hugely degraded environment. Our cleaner environment is a major comparative advantage in the increasingly globalized economy. After-the-fact efforts to clean polluted waters are costly, and harms to health, business, governmental, and recreation interests when a water is polluted can be vast. Especially in states and regions with a fisheries industry and large hunting and fishing

constituencies and linked businesses, the rivers, tributaries, and wetlands that are at the heart of the protections of the Clean Water Rule provide vast value.

Despite the great progress in improving United States water quality, many parts of the country still suffer from degraded water quality, and threats to wetlands and tributaries still arise. Everyone shares a common interest in protecting water quality and wetlands' hugely valuable functioning. Nevertheless, individuals may see business advantage in being able to pollute with impunity or convert for private gain a tributary or wetland into land for development or other commercial use, even if others downstream are economic losers. Hence, despite a broad consensus that America's rivers, tributaries and wetlands should be protected, clashes over particular applications of the law are a near constant. All environmental protection laws, by their very nature, ask for a degree of restraint, forbearance, and attention to shared interests and resources. Congress, and under the Clean Water Act EPA and the Army Corps, play a critical role in protecting our critically important and shared water resources. That the Clean Water Act is one of America's great success stories, and a success with bipartisan roots, should not be forgotten.

Point II: *The new "waters of the United States" regulation is an appropriate response to the Supreme Court's recent cases*

Protecting jurisdictional waters was an area of bipartisan consensus and regulatory consistency right through the recent Bush Administration. Until the 2001 Supreme Court *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) *(SWANCC)* decision, the law and underlying regulations reflected a stable bipartisan consensus of almost thirty years that protection of America's waters was good policy. A unanimous Court deferred to agency line-drawing about what sorts of waters deserved protection in *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985). However, *SWANCC* and then *United States v. Rapanos,* 547 U.S.715 (2006) (*Rapanos)* unsettled that longstanding bipartisan consensus, breeding legal uncertainty that the new Army Corps and EPA regulations seek to address.

Greater regulatory clarity and explicit reference to the relevant best science together reduce regulatory uncertainty, both protecting waters that matter and reducing regulatory uncertainty and costs that benefit no one.

That EPA and the Army Corps could or should issue new clarifying regulations on "waters" was explicitly embraced by a majority of Supreme Court justices in *Rapanos* and is consistent with forty years of CWA understandings. The act of rulemaking is in no way illegitimate. A six justice majority in *Rapanos* embraced the role of expert regulation to clarify the appropriate line between land and water. This included Chief Justice Roberts, who bemoaned the lack of responsive clarifying regulations post-*SWANCC*, and Justice Kennedy, who penned a swing vote opinion that is widely viewed as the most authoritative *Rapanos* opinion. Justice Kennedy fleshed out how a "significant nexus" needs to be shown to federally protect some waters whose linkages to navigable waters and functioning makes them of possibly marginal importance; "alone or in combination," the relationship with navigable waters must be more than "speculative or insubstantial." *Rapanos,* 547 U.S. at 780. Justice Kennedy explicitly recognized that many questions about what sorts of waters deserve protection could be addressed via categories set forth by regulation. The four dissenters, all of whom joined an opinion by Justice Stevens, would have affirmed the regulators' judgments attacked in *Rapanos;* they emphasized the importance of judicial deference to expert regulatory judgments about what waters should be protected. They also agreed that both the sorts of waters that would be protected under Justice Kennedy's opinion and under Justice Scalia's plurality opinion fall within the reach of the Clean Water Act.

Thus, six justices embraced an ongoing role for regulation to bring clarity to the law. In addition, an earlier unanimous Supreme Court in *Riverside Bayview Homes* embraced deference to regulatory judgments about where to draw the line between land and water. There undoubtedly remains legitimate room for regulations to bring greater clarity to this body of law.

The *SWANCC* decision did not constitutionally toss away the heart of the Clean Water Act. It merely addressed a regulatory interpretation that it viewed as outside the permissible bounds of the statute, stating that protection of isolated waters due to their use by migratory birds went beyond the bounds of statute's language. It explicitly did not state some new constitutional boundary, but read the statute to avoid having to engage such a question.

The Clean Water Rule responds directly and reasonably to these Supreme Court calls. It protects some waters by category, basing that judgment on a comprehensive review of peer-reviewed science about the linkages, value and functions of such categories of waters. Some other types of

waters are identified as possibly falling under federal jurisdiction, but the jurisdictional determination has to follow a water site-specific review to see if a "significant nexus" exists adequate to justify federal protection. The Rule and the Federal Register preamble discussion offer additional guidance about what "significant nexus" analysis should consider, building on Justice Kennedy's *Rapanos* language and providing additional guidance for what regulators and those seeking a jurisdictional determination should consider.

Hence, by protecting some waters by category and others on a case-by-case basis if satisfying "significant nexus" analysis, and by linking the rule's approach to the Connectivity Report, a comprehensive survey of peer-reviewed science, the Army Corps and EPA respected Supreme Court edicts and signals. Furthermore, the Clean Water Rule is consistent with the Clean Water Act's explicit textually stated goal of protecting the "chemical, physical, and biological integrity" of America's waters by reducing pollution discharges and requiring permits before discharging any pollutants into such waters, whether in the form of industrial pollution or fill.

When reviewing recent hearings and statement about the Waters Rule, I noted occasional claims that EPA and the Army Corps somehow failed to provide legal analysis to explain their understanding of the law and legal basis for the rule. I don't know the source of this erroneous view, but ever since the Supreme Court in the 1980s embraced what is known as judicial "hard look review" of high stakes regulations, agencies have been careful to provide in-depth legal explanations for their actions and also responses to salient criticisms. If anything, when proposing and then finalizing the Clean Water Rule, EPA and the Army Corps provided unusually lengthy and numerous legal analyses to justify their actions. When the agencies proposed the rule, the proposal published in the Federal Register contained a lengthy appendix entitled "Legal Analysis."[1] Similarly, when they finalized the rule, the agencies published an enormous response to comment document. In addition to responding to legal claims throughout that document, there is an entire chapter dedicated to Legal Analysis.[2] Moreover, the Technical Support Document published with the final rule has a large section entitled "Statute, Regulations

[1] See analysis starting at p. 22,252 of https://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf.
[2] See https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

and Caselaw: Legal Issues." This provides yet more lengthy and detailed legal analysis.[3] Whatever one's views about the Clean Water Rule, it did not emerge out of nowhere and the ageneies certainly provided a massive body of explanatory legal material.

Point III: *The Clean Water Rule makes newly explicit several categories of activities or waters not subject to federal jurisdiction*

A persistent refrain regarding the Clean Water Rule and in litigation over the Clean Water Act is that federal jurisdiction being claimed borders on the limitless. Based on this Senate hearing's title, I expect that the Committee will again state or hear similar concerns. I believe that claims that the Clean Water Rule expands on federal jurisdiction are incorrect. Based on my review of the Rule and preceding law, it protects fewer water than provided under the law as it stood during the Reagan Administration. The Rule partly restores to protection some waters that were in regulatory limbo since the *SWANCC* decision, mainly due to regulatory forbearance and avoidance of litigation over disputed jurisdictional determinations. This claim of limitless federal power is most evidently erroneous in light of the Rule's creation of categorically protected waters, others that must be assessed on a case-by-case basis, and explicit distance-based exclusions from federal jurisdiction.

However, the error of claims of limitless jurisdiction and overreach is also readily apparent when we examine new regulatory sections and definitions that, as now amended, make explicit that several types of otherwise potentially debatable waters are not "waters of the United States." These include (with additional more precise language not quoted in full here): wastewater structures of several types; prior converted cropland; several sorts of ditches that are upland or do not contribute flow to otherwise regulated waters; and several types of "features" such as artificially irrigated areas that would revert to upland without irrigation water, artificial lakes, ponds, pools and ornamental waters, puddles, construction-linked water-filled depressions, groundwater, and gullies, rills and non-wetland swales. Several of these exemptions appear to be in direct answer to criticisms in court briefs and congressional testimony that federal

[3] See https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf.

jurisdiction has bordered on the limitless. Of huge importance, elimination of the commerce-based sweep up grounds for jurisdiction shifts federal power from a potential focus just on the presence of commercial activity to a focus on peer-reviewed science about the functions of America's waters. I turn to that provision now.

Point IV: The Army Corps and EPA in the Clean Water Rule deleted the longstanding "other waters" commerce-linked sweep-up provision, instead basing federal jurisdiction on science and thereby limiting federal power

Critics of the Clean Water Rule have virtually ignored a vast legal change that I would have expected to garner applause from critics of broad federal jurisdiction. EPA and the Army Corps deleted the longstanding additional commerce-based sweep-up grounds for federal jurisdiction. This provision, the former Section 328.3(a)(3) "other waters" paragraphs, provided federal jurisdiction to protect over a dozen sorts of waters upon a showing that their "use, degradation or destruction . . . could affect interstate or foreign commerce" or be used by "interstate or foreign travelers" for "recreational or other purposes," for fishing-linked commerce, or for "industrial purposes by industries in interstate commerce." This provision basically identified types of waters but made them protectable based just on their commerce-linked uses or values. This regulation was consistent with longstanding understandings of the 1972 Clean Water Act amendments and the congressionally intended reach of federal power. It was clearly crafted to mesh Clean Water Act jurisdiction with the reach of federal power under the Commerce Clause of the U.S. Constitution. However, both the *SWANCC* and *Rapanos* decisions raised questions about whether Clean Water Act jurisdiction could focus on a water's commercial or industrial uses or the impacts of a water's degradation without regard to the water's functions or links to navigable waters. In the Clean Water Rule, EPA and the Army Corps opted to avoid dispute, deleting this longstanding grounds for jurisdiction and relying instead on peer-reviewed science about how and why waters should be protected.

I will not here opine on whether this section's deletion was legally necessary or prudent. I will, however, note that the Corps and EPA answered critics and eliminated uncertainty by deleting this section in favor of linking jurisdictional "waters of the United States" determinations to what the science shows, as applied to the particular sites and activities at issue. Since most pollution and filling activity is undoubtedly commercial and industrial in nature, and little today is not

linked to interstate commerce, this regulatory deletion is a significant concession and reduction in federal power. Again, the final Clean Water Rule instead links federal jurisdiction to peer-reviewed science, cutting back on a provision in place for decades that provided the broadest possible grounds for jurisdiction.

Point V. The Clean Water Rule links to a massive survey of peer-reviewed science about waters' connectivity, values and function and thereby responds to the most prevalent criticism of "waters" federal jurisdiction and puts all on notice

Over the past decade, a common claim of critics of federal jurisdiction has been that waters—or sometimes lands—can and are claimed to be protected for no reason relevant to the Clean Water Act's purposes. And on this issue and in other battles over regulation, critics in Congress, in the courts, and in the academy have called for "sound science" and "peer-reviewed" science to underpin regulatory judgments. The Army Corps and EPA took this to heart, for the first time pulling together a massive survey of peer-reviewed publications about the connectivity, values, and functions of various types of waters. This report was released in draft form, reviewed by the Science Advisory Board, and made public for review and comment. On January 15, 2015, EPA announced in the Federal Register release of a final version of this report. In addition, the Corps and EPA in the Clean Water Rule Federal Register preamble explain how they interpret this report and the science in deciding what types of waters are categorically protected, subject to case-by-case "significant nexus" analysis, or not protected.

This sort of notice and comment process and public vetting of the accompanying science report, with the overt linkages to the "waters of the United States" rule, provided an exemplary science-based, open, transparent, and judicially challengeable process. I'm unaware of any powerful criticisms against the Connectivity Report; considering its massive survey of all peer-reviewed science, criticism would certainly be difficult.

Point VI: *Because an unpermitted discharge of a pollutant is a central prerequisite for Clean Water Act liability, not ordinary uses of lands and waters, surprise liability should be rare*

Both in past legislative hearings and in many statements about this rule, critics have asserted that virtually everything farmers and others do in lands near waters and around or in supposed waters

will now create indeterminate liability or trigger legal prohibitions. These claims seem to be rooted in a misunderstanding of the CWA. Apart from some provisions applicable to oil spill planning that require preventive planning, permitting obligations and linked liabilities under the CWA only arise when a person will be discharging pollutants from a point source into a jurisdictional water. Section 402 industrial discharges and Section 404 "dredge and fill" permits are most relevant here.

Most ordinary agricultural activities and other uses of lands and waters simply do not constitute covered discharges. First, as mentioned above, there are explicit statutory as well as regulatory carveouts, especially for categories of agricultural activity. In addition, assorted "nationwide" or "general" permits create presumptive permission for many categories of activities often undertaken around waters. And not everything is a point source; many sorts of pollutant flows, especially connected to agriculture or flowing across lands or roads, are nonpoint sources and not reached by the CWA. It is when someone decides to dump pollutants or destroy a water, yet without a permit, that legal liability arises. (Again, oil spill prevention is subject to different additional obligations.) But often such discharges will be subject to permitting and hence escape liability.

Thus, it is important to keep in mind that it is the *unpermitted discharge of pollutants from a point source into a jurisdictional water* that gives rise to concerns. Furthermore, it is extraordinarily rare that unintentional or even clearly illegal intended conduct gives rise to liability; citizens seeking to enforce the law have to give notice so there is an opportunity for cure, and government enforcers also typically try to head off trouble by telling potential law violators of their concerns. When a question arises about whether a water is jurisdictional, the Army Corps has long had a non-mandatory process for providing regulatory guidance, further reducing risks of surprise regulatory liability. Basically, liability does not come out of the blue, but requires several stages of intentional conduct and often something approaching willful disregard of the law.

Conclusion

The legal uncertainty of recent years about what are protected federal waters has benefitted no one. For those concerned about protection of America's waters, regulatory uncertainty has led to regulatory forbearance, problematic or erroneous regulatory and judicial decisions, and increased regulatory costs. By now linking the "waters of the United States" question to peer-reviewed science and clarifying which waters are subject to categorical or case-by-case protection and revealing the reasons for such judgments, the Corps and EPA have moved the law in the direction of certainty and clarity. This is an area calling for difficult, expert regulatory judgments. There was a reason for the thirty years of bipartisan consensus in favor of broadly protecting America's waters. The new Clean Water Rule should bring clarity and stability to the law, while also respecting Supreme Court precedent and the protective mandates of the Clean Water Act. Little is bipartisan these days, but protection of America's waters is surely valued on both sides of the aisle and embraced broadly at the federal, state, and local level. Businesses and citizens depend on protection of America's waters. Our abundant and protected waters, especially high quality waters, offer a major economic advantage for the United States; many of our international competitors are despoiling their air and waters or suffer from chronic water shortages exacerbated by pollution. I hope that this Committee and others will avoid criticisms rooted in misunderstandings about the law and content of the new Clean Water Rule. It deserves support and will bring new clarity to the law.

Senator SULLIVAN. Thank you, Professor Buzbee.

Our final witness today is Mr. Scott Kovarovics. He is the Executive Director of the Izaak Walton League of America.

Scott, you have 5 minutes for your opening statement. Thank you.

STATEMENT OF SCOTT KOVAROVICS, EXECUTIVE DIRECTOR, IZAAK WALTON LEAGUE OF AMERICA

Mr. KOVAROVICS. Thank you, Chairman Sullivan and Senator Whitehouse, members of the subcommittee. I appreciate the opportunity to testify today on the Clean Water Rule. I am Scott Kovarovics, the Executive Director of the Izaak Walton League of America, and I am pleased to be here on behalf of not only the League, but the much broader community of Americans who enjoy hunting and angling and outdoor recreation.

The League's 43,000 members nationwide are leading efforts locally to conserve and restore habitat and improve and monitor water quality. Our members enjoy hunting, angling, recreational shooting sports, and a myriad of other outdoor recreation. And our members and sportsmen nationwide understand that healthy natural resources provide the foundation for the outdoor traditions that tens of millions of Americans enjoy every year.

Ensuring our Nation's streams, wetlands, and other waters are healthy is vitally important to Americans who hunt and fish for communities nationwide and for the outdoor recreation economy.

Wetlands and streams provide essential habitat for fish, ducks, and other wildlife. Prairie potholes throughout the northern plains and southern Canada support 50 percent of the North American duck population in an average year. Ducks that grow to adulthood and hatch in those wetlands are harvested throughout the United States every fall. Headwaters and other small streams provide vital habitat for coldwater fish, provide essential spawning habitat for trout, salmon, and other fish, and support those fish throughout their lifecycles.

Each year, nearly 50 million Americans go into the field to hunt or fish. The money that sportsmen and sportswomen spend benefits major manufacturing industries and small businesses in communities all across this country. These expenditures directly and indirectly support more than 1.5 million American jobs and ripple through the economy to the tune of $200 billion annually.

And many other forms of outdoor recreation depend on clean water and a healthy environment. According to the Outdoor Industry Association, boating, including canoeing and kayaking, had a total economic impact of $206 billion in 2012, supporting 1.5 million additional jobs in this country.

The Clean Water Rule is science-based, limited, and more specifically defines waters that are and are not covered by the Clean Water Act. The final rule narrows the historic scope of Clean Water Act jurisdiction. It clearly defines and limits tributaries through physical features and distinguishes tributaries from dry land ditches and erosional features, and it preserves and enhances existing exemptions for farming, ranching, and other land uses.

Hunting, angling, and conservation groups, including the League, strongly support the final rule. It is also supported by businesses

and industries that depend on clean water and a healthy environment. I will give you two quotes that offer examples.

"The Clean Water Rule is good for our business, which depends on clean fishable water. Improving the quality of fishing in America translates directly to our bottom line, to the numbers of employees we hire right here in America, and to the health of our brick and mortar stores all over the country." That is from Dave Perkins, the Executive Vice Chairman of the Orvis Company that has some 80 retail operations across the country and employs 1,700 people.

Next, "EPA's rule gives the business community more confidence that clean water sources, including streams and wetlands, are protected and removes uncertainty surrounding the Agency's authority to protect our waterways. This is good for the economy and vital for businesses that rely on clean water for their success." That is from Richard Eidlin, the Vice President of Policy and Campaigns at the American Sustainable Business Council, which represents 250,000 businesses across the country.

The exemptions from the Clean Water Act are maintained and enhanced in the Clean Water Rule. As mentioned, since 1977, the Clean Water Act has included a number of exemptions from the 404 permit process for discharges associated with farming, construction, mining, and other activities. Moreover, in an effort to provide even more clarity and certainty about the types of waters covered by the Clean Water Act, the final rule maintains existing regulatory exemptions and for the first time in regulation explicitly excludes specific waters and features from the definition of waters of the United States.

The following summarizes some of those exemptions: prior converted cropland; many drainage ditches; artificially irrigated areas; artificial reflecting pools or swimming pools; small ornamental waters; erosional features, including gullies and rills; puddles; groundwater, including groundwater drained through subsurface drainage systems.

Conserving and protecting streams, wetlands, and other waters is essential to Americans who hunt and fish and enjoy a wide array of other outdoor recreation. These activities depend on clean water and healthy habitat, including abundant wetlands. And these activities fuel the outdoor recreation economy, which totals hundreds of billions of dollars annually and supports millions of American jobs.

The Clean Water Rule is vitally important to safeguarding our Nation's water resources, hunting and angling traditions, and the outdoor recreation economy. The final rule provides more clarity about the waters that are and are not covered by the Clean Water Act. It is based on overwhelming science and common sense, and it responds to common calls from Supreme Court justices, industry, and landowners to clarify agency regulations.

I appreciate the opportunity to testify and happy to answer any questions. Thank you.

[The prepared statement of Mr. Kovarovics follows:]

THE IZAAK WALTON LEAGUE OF AMERICA

Testimony of Scott Kovarovics
Executive Director, Izaak Walton League of America

Subcommittee on Fisheries, Water and Wildlife
Committee on Environment and Public Works
United States Senate

May 24, 2016

Chairman Sullivan, Senator Whitehouse, and members of the Subcommittee, I greatly appreciate the opportunity to testify today concerning the Clean Water Rule issued by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency (EPA).

I serve as Executive Director of the Izaak Walton League of America. I am honored to be here to share the perspective of the League and the much broader community of Americans who enjoy hunting, angling and outdoor recreation. The Izaak Walton League was founded more than 90 years ago by anglers, hunters and others who were concerned about the negative impacts of water pollution and unlimited development on outdoor recreation – especially fishing – and the health of fish, wildlife and other natural resources. The founders of our organization understood that clean water and healthy wetlands are essential to robust populations of fish, ducks and other wildlife and successful days in the field.

Today, the League's 43,000 members are leading efforts locally to conserve and restore habitat and monitor and improve water quality. These members also enjoy hunting, angling, recreational shooting sports, boating and myriad other outdoor recreation activities. And like League members before them, they understand that healthy natural resources, including water and wetlands, provide the foundation for the outdoor traditions they and tens of millions of other Americans enjoy every year.

Healthy Streams and Wetlands Are Vital to Hunting and Angling, Communities and the Outdoor Recreation Economy

Ensuring the nation's streams, wetlands and other waters are healthy is vitally important to Americans who hunt and fish, for communities nationwide and for the outdoor recreation economy.

Wetlands and streams provide vital habitat for fish, ducks and other wildlife. For example, the prairie pothole wetlands throughout the northern plains and southern Canada support 50 percent of the North American duck population in an average year and as much as 70 percent when water and prairie grasses are abundant. A wide array of duck species depend on these wetlands for breeding, nesting and rearing young. Ducks that hatch and grow to adulthood in these wetlands are harvested throughout the United States every fall. In addition, headwaters and other small streams are vital to cold water fish. These waters provide essential spawning habitat for

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trout, salmon and other fish and are then essential to supporting these fish throughout their lifecycles.

However, following two confusing U.S. Supreme Court decisions (*SWANCC* in 2001 and *Rapanos* in 2006) and subsequent agency guidance, many streams and wetlands are increasingly at risk of being polluted or drained and filled. According to EPA, the types of streams that flow to public drinking water supplies for more than 117 million Americans are at increased risk of pollution. Wetlands are not only at greater risk, the nation is losing natural wetlands at a growing rate. In the most current *Status and Trends of Wetlands* report, the U.S. Fish and Wildlife Service concludes the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions – compared with the previous assessment period (1998-2004). This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago.

Each year, nearly 47 million Americans head into the field to hunt or fish. These are not simply traditions or hobbies – they are fundamental components of our nation's economy. The money sportsmen and women spend benefits major manufacturing industries and small businesses in communities across the country. These expenditures directly and indirectly support more than 1.5 million American jobs and ripple through the economy to the tune of more than $200 billion per year. Many other forms of outdoor recreation also depend on clean water and a healthy environment. According to the Outdoor Industry Association, boating – including canoeing and kayaking – had a total economic impact of $206 billion in 2012, supporting 1.5 million additional jobs in this country.

In addition to providing critical habitat for fish and wildlife and directly supporting hunting and angling, wetlands also provide a host of other benefits to people and communities across the country. Natural wetlands are arguably the most cost-effective protection against flooding for communities large and small. According to the National Weather Service, the 30-year average for flood damage is $8.2 billion annually. Conserving wetlands is a fiscally prudent alternative to building higher levees and concrete storm walls and armoring every stream bank with rip-rap.

The Clean Water Rule is Balanced, Science-based and Limited in Scope

The Clean Water Rule adopted by the Army Corps and EPA in 2015 is science-based, limited and more specifically identifies waters that are – and are not – covered by the Clean Water Act. The final rule represents a scientifically and legally sound definition of covered waters that:

- **Narrows the historic scope of the Clean Water Act jurisdiction**, excluding protections for some wetlands and other waters that were protected under the Act before 2001.

- **Clearly defines the limits of tributaries** through physical features, including bed, bank and ordinary high water mark, and distinguishes tributaries from dryland ditches and erosional features.

- **Draws bright line physical and measureable boundaries on covering adjacent and nearby waters.**

- **Preserves and enhances existing exemptions for farming, ranching, forestry and other land uses.**

Hunting, angling and conservation groups, including the League, strongly support the final rule. It is also supported by businesses and industries that depend on clean water and a healthy environment. The following quotations highlight some of that support:

> "The clean water rule is good for our business, which depends on clean, fishable water. Improving the quality of fishing in America translates directly to our bottom line, to the numbers of employees we hire right here in America, and to the health of our brick-and-mortar stores all over the country."
> *— Dave Perkins, executive vice chairman of The Orvis Company, America's longest continually-operating fly fishing business, with 66 retail stores and 10 outlets in the United States and approximately 1,700 employees*

> "This important final rule provides clarity on protections for the lifeblood of many of our country's prized fisheries. The health of these headwaters sets the tone for all waters downstream and creates the backbone of our nation's water resources. If we as a nation fail to protect our headwater streams and wetlands, we could jeopardize the economy of the hunting and fishing industry and put millions of people out of work."
> *— Benjamin Bulis, president of the American Fly Fishing Trade Association, the sole trade organization for the fly fishing industry*

> "Our brewery and our communities depend on clean water. Beer is, after all, over 90 percent water, and if something happens to our source water, the negative effect on our business is almost unthinkable . . . .We all rely on responsible regulations that limit pollution and protect water at its source. Over the past 23 years, we've learned that when smart regulation and clean water exist for all, business thrives."
> *— Andrew Lemley, government affairs representative, New Belgium Brewing*

> "The EPA's rule gives the business community more confidence that clean water sources, including streams and wetlands, are protected, and removes uncertainty surrounding the agency's authority to protect our waterways. This is good for the economy, and vital for businesses that rely on clean water for their success."
> *— Richard Eidlin, vice president of policy and campaigns, American Sustainable Business Council, which represents 250,000 businesses and 325,000 entrepreneurs, executives, managers, and investors*

Exemptions from the Clean Water Act are Maintained and Enhanced by the Clean Water Rule

Since 1977, the Clean Water Act has included a number of exemptions from the section 404 dredge and fill permit process for discharges associated with farming, construction, mining and other activities. For example, the discharge of dredge or fill material "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" (section 404(f)(1)(A)) is generally exempt from permitting. Other provisions exempt "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches" (section 404(f)(1)(C)); "construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters" (section 404(f)(1)(D)); and "construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment . . ." (Section 404(f)(1)(E)). These exemptions do not apply to activities that would bring waters of the United States into

uses for which they had not previously been used or where the flow or circulation of such waters would be reduced.

Under the plain language of the Clean Water Act, discharges associated with a broad range of activities are already exempt – and have been for nearly 30 years. These statutory exemptions can only be modified by Congress; federal agencies cannot alter them and are bound by law to follow them. The final rule in no way limits or alters these exemptions.

Moreover, in an effort to provide even more clarity and certainty about the types of waters covered by the Clean Water Act, the final rule maintains existing regulatory exemptions and – for the first time in regulation – explicitly excludes specific types of waters from the definition of "waters of the United States." **The following are among the types of waters that are excluded from the regulatory definition:**

- Waste treatment systems.
- Prior converted cropland.
- Many drainage ditches provided they are not excavated in a tributary.
- Artificially irrigated areas that would revert to dry land if irrigation ceased.
- Artificial, constructed lakes and ponds created in dry land, including farm and stock ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds or cooling ponds.
- Artificial reflecting pools or swimming pools created in dry land.
- Small ornamental waters.
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining sand or gravel that may fill with water.
- Erosional features, including gullies, rills and other ephemeral features.
- Puddles.
- Groundwater, including groundwater drained through subsurface drainage systems.

When considered in context with the existing statutory exemptions for certain discharges, the final rule more clearly defines the waters **not covered** by the Clean Water Act and incorporates exemptions that had previously not been in regulation. For instance, the rule – in response to comments – adopts an exclusion for certain storm water control features such as green infrastructure installations constructed in dry land.

Conserving and protecting streams, wetlands and other waters is essential to Americans who hunt, fish and enjoy a wide array of other outdoor recreation. These activities depend on clean water and healthy habitat, including wetlands. And these activities are more than traditions or hobbies – they fuel the outdoor recreation economy, which totals hundreds of billions of dollars annually and supports millions of American jobs.

The Clean Water Rule is vitally important to safeguarding our nation's water resources, hunting and angling traditions, and the outdoor recreation economy. The final rule provides more clarity about the waters that are – and are not – covered by the Clean Water Act. The rule is based on overwhelming science and common-sense. And it responds to common calls from Supreme Court justices, industry and land owners to clarify agency regulations.

I appreciate the opportunity to testify and would be happy to answer any questions.

Senator SULLIVAN. Well, thank you.

I want to thank all the witnesses. We have a very distinguished panel, a lot of different views, so I think we are going to have a good hearing this afternoon.

I do want to emphasize again that I don't think that any of us, certainly I can say from my experience on this committee, we are all very focused on clean water, clean air. But the issues that have been raised here about certainty, about the Federal agencies' statutory authority are very, very important from a perspective of oversight, and it is not just members of this committee who have concerns.

In the last 2 years, whether it is the WOTUS rule that has now had a Federal judge put a stay on that, whether it is the Clean Power Plan, which the Supreme Court, first time in its history, has put a stay on that before a district court has even ruled on it; several other cases, or even EPA Administrator McCarthy's statement on the eve of the EPA v. Michigan case, where, when asked if she thought she was going to win, she said, yes, but then she said, "Even if we don't, we promulgated this rule 3 years ago. Most companies and everybody else are already in compliance. Investments have been made. We'll catch up." Essentially, even if we lose, we win, and that is not how the law works.

So there is a lot of concern.

And I do want to mention, again, Ms. Wilkinson, your point about uncertainty in changing the rules, how that impacts our economy, is also very, very powerful.

So let me start with a question that relates to your case, and this is for Mr. Schiff or Ms. Wilkinson. My understanding is the Corps told Ms. Wilkinson's company that they can regulate land even if there is no surface connection to navigable water.

First, I want to know did they actually say that. And can anyone explain to me how a high groundwater table creates Federal jurisdiction, particularly if the groundwater never reaches the surface? Wouldn't all of the State of Florida, for example, be subject to the EPA's jurisdiction if that is actually their legal view of their jurisdiction?

Mr. Schiff, why don't you take a shot at that?

Mr. SCHIFF. Thank you, Mr. Chairman. For a long time the Corps has used the idea of what they call shallow subsurface connection to justify the basis of Federal jurisdiction, and at bottom it is really an attempt to regulate groundwater and to expand surface jurisdiction without a congressionally appropriate change in the legislation.

So, under the WOTUS rule, this is carried forward under the idea of adjacency jurisdiction, that if there is that shallow subsurface connection, then the Corps will consider your property to be adjacent to, and therefore subject to regulation under the Clean Water Act, adjacent to whatever the nearest navigable water may be where that shallow subsurface flow ends up.

Senator SULLIVAN. So doesn't that greatly expand the jurisdictional reach?

Mr. SCHIFF. It is hard to imagine, really, any area that otherwise would at least be, prima facie, subject to jurisdiction, because to

some extent you are going to have that shallow groundwater flow in almost any part of the country.

Senator SULLIVAN. Let me ask you another question. In a hearing last year I asked EPA Administrator Gina McCarthy if permafrost itself was jurisdictional under the proposed WOTUS rule. And if so, what is the significant nexus between permafrost, which, again, is frozen water and a navigable water, interstate water, or territorial sea. Her response was that permafrost specifically refers to permanently frozen soil. And while permafrost may underlie wetlands or open waters, it is not, in and of itself, a water of the U.S. subject to the rule and the jurisdiction of the rule.

If that is her response, this is the head of the EPA, do the Corps and Alaska agree, in particular with regard to the Schok case that you are working on or more broadly in terms of their guidance?

Mr. SCHIFF. No. And it is surprising that the administrator would take that position. But the Corps is certainly not reconcilable, its position is not reconcilable with what Administrator McCarthy said. The position of the Corps is that permafrost can qualify not just as a wetland, but much more importantly, as a water of the United States.

Senator SULLIVAN. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Just to follow up on that, it is not your position that because something is permafrost it could not be regulable under the Clean Water Act; i.e., something that is permafrost could, for other reasons, in addition to it being permafrost, make itself properly regulable under the Clean Water Act, correct?

Mr. SCHIFF. Senator Whitehouse, certainly under existing law it can't be regulated.

Senator WHITEHOUSE. It can't be regulated as permafrost, per se, but one can have an area that is permafrost that is also a wetland, that is also an area through which a stream runs and so forth. So the fact that there is permafrost underneath a wetland feature doesn't disqualify the wetland feature from being regulable.

Mr. SCHIFF. I think perhaps, Senator Whitehouse, there may be a semantic issue, because the Corps would say that we are not talking about permafrost underlying a wetland; we are talking about essentially just permafrost.

Senator WHITEHOUSE. And that, I think, is the difference here, and that is what I want to make sure. But your position is not that something just because it is permafrost can't be regulated under the Clean Water Act no matter what other conditions it may be exhibit. Your point is that just because it is permafrost shouldn't be enough to trigger Clean Water Act regulation.

Mr. SCHIFF. At the very least, yes, that is correct.

Senator WHITEHOUSE. OK.

And then to go to Mr. Parrish, you have indicated that the Army Corps, to quote you, "still regulates puddles, including puddles in dirt roads, tire ruts, and depressions in gravel parking lots." Could I ask, as a question for the record, that you send me any and all information that you have, any and all paperwork from the Army Corps that substantiates that statement? That is worth, I think, pursuing. It doesn't have to be right now, but we can take that as a question for the record.

Mr. PARRISH. I can do that, but I can also bring forth a technical witness that can support that.

Senator WHITEHOUSE. The other question that I had had to do with arroyos. In your testimony, Mr. Schiff, I believe you said because sediment and fertilizer collected in stormwater could flow through the arroyo into the Rio Grande, the arroyo was regulated under the Clean Water Act. If you are a downstream water user, and somebody upstream is dumping pesticides, manure, waste, anything else into an arroyo that they know, you know, everybody knows is a couple times a year going to just flood and wash all that stuff down into the waterway, isn't that something that the EPA should be able to consider in protecting the downstream waterway?

Mr. SCHIFF. Senator Whitehouse, I would say, first of all, it is hard to imagine any State in the Nation where that sort of activity would also be legal. So I think that it is a clear example of even in that extreme——

Senator WHITEHOUSE. Well, if it is outright illegal, then it certainly shouldn't be a great burden for the EPA to come in and say, look, we are regulating that, too.

Mr. SCHIFF. Well, then you have a question of duplication of effort. And wouldn't it be much better if EPA could focus its authorities and limited budget on those issues that truly raise a Federal question?

Senator WHITEHOUSE. Perhaps. But your question was jurisdictional. You are not suggesting that an arroyo, because it is sometimes dry, is always beyond EPA's jurisdiction, no matter what the polluting effects to that arroyo on the downstream waters when it floods?

Mr. SCHIFF. Well, it is not so much, Senator Whitehouse, what I am suggesting.

Senator WHITEHOUSE. But it is your testimony, so I am trying to clarify it. So it is exactly what you are suggesting.

Mr. SCHIFF. Well, what I meant to say, Senator Whitehouse, is that it is not my position so much as it is Justice Kennedy's position in the Rapanos case, where he said that there are some tributaries that, because of the quality or quantity of their flow is so small, that it is not in the appropriate——

Senator WHITEHOUSE. Correct. But one can have an arroyo that is on both sides of the Kennedy test. One could have one where there is a significant enough nexus that even though it is dry sometimes, it could still properly be regulated. Or is it your testimony today that no streambed that ever runs dry should be regulable under the Clean Water Act?

Mr. SCHIFF. No, that is not certainly my testimony. But I would say that ultimately even the Corps, in the case that you mentioned from my written testimony, the Corps itself realized that this was an arroyo that fell on the other side of the line, so to speak, even under Justice Kennedy's test.

Senator WHITEHOUSE. Good. OK. I agree with you, they could be regulable or not, depending on local conditions and what the actual factual circumstances there on the ground are.

Let me make a concluding point in my last 30 seconds. One is that people who are downstream of manure lagoons or heavily pesticide-laden farmland, or extensive use of fertilizer very often expe-

rience really significant effects when that runs off and hits the waterways that they love; whether they want to protect the insects that the fish feed on or whether they just want to have a clean stream going by their children's backyard, I do think that they have an interest in that we should protect.

And the second point is that I think that there is a difference we should reflect between, particularly in a large organization, bad bureaucracy that creates a problem by not being helpful and responsive to individual applicants versus an underlying bad statute. And I think that is an important distinction for us to bear in mind.

Ms. Wilkinson, I am sorry that you had a horrible experience, and I gather it continues.

Senator SULLIVAN. Chairman Inhofe.

Senator INHOFE. Thank you, Mr. Chairman. I want to put a statement in the record that I didn't want to give in the beginning.

Senator SULLIVAN. Without objection.

[The prepared statement of Senator Inhofe follows:]

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

I want to thank Senator Sullivan for holding this very important hearing. This committee has conducted extensive oversight of both the development and the implications of the new Waters of the United States—or WOTUS—rule. On behalf of Oklahomans and farmers and property owners across the United States, I was very relieved when the 6th Circuit Court of Appeals issued a stay on October 9, 2015, that prevented this rule from going into effect.

However, I have heard concerns that the Corps and EPA are continuing to expand Federal control over land and water without any change in the statute or regulations.

This hearing validates those concerns with concrete examples of how the Corps and EPA are already implementing the expanded Federal control that they are trying to codify in the WOTUS rule. The examples presented by these witnesses are not hypothetical. They are based on the experiences of farmers, developers, and wetlands experts.

The WOTUS rule allows use of remote sensing and aerial photographs to assert Federal control over dry land. The testimony presented today demonstrates that the Corps is already regulating land based on information from these tools, even when there is no on-the-ground evidence of a wetland or water.

The WOTUS rule allows use of water that is below the surface of the land to assert Federal control. The testimony presented today demonstrates that the Corps is already claiming that groundwater and even water in soil creates Federal jurisdiction.

The WOTUS rule erodes ordinary farming exemptions with its broad definition of tributary. The testimony presented today demonstrates that Federal officials are claiming authority over farming activities even on land that has no streams and no wetlands. As far as EPA and the Corps are concerned all plowing is regulated, and the farming exemptions no longer exist.

This testimony is tremendously important because EPA has tried to convince Members of Congress that its new rule does not expand Federal jurisdiction, and exemptions for farmers will remain.

In fact, as our witnesses today explain, EPA's and the Corps' claim of Federal control over land and water has expanded significantly over the last several years, and the WOTUS rule would codify that expansion.

I don't know which is more shocking:

- Ms. Wilkinson's testimony about how the buildable acres of her company's property have shrunk from 144.6 acres down to 6—with no change in the law,
- Mr. Parrish's testimony that the Corps is regulating farmland based on light sensing radar and aerial photographs and then refusing to share these documents with the landowner, claiming that they are classified, or
- Mr. Schiff's testimony about how Corps districts are issuing Regional Supplements to change the definition of a wetland without going through notice and comment rulemaking.

I will do everything within my power to expose these abuses so my colleagues—including the seven Senators who wrote a letter to EPA instead of voting for S. 1140—are no longer fooled by EPA's assurances. Working together, we can stop this Federal overreach.

Senator INHOFE. Mr. Parrish, do you know Tom Buchanan from Oklahoma, who is the Farm Bureau President there?

Mr. PARRISH. Yes, sir.

Senator INHOFE. He testified before this committee just a few weeks ago, sitting in the same chair where you are now. He was really quite outspoken. He had contended for a long period of time that of all the problems that farmers and ranchers in the State of Oklahoma, and he contended outside also, was nothing that is really found in the agriculture bill, but was overregulation by the EPA and specifically the WOTUS bill. Do you agree with Tom Buchanan?

Mr. PARRISH. I do, sir.

Senator INHOFE. He was really quite emotional about it, and it is one that we are all concerned about. The last time Secretary Darcy testified before this committee I specifically asked her why she was ignoring the language in the energy and water appropriation bills that says the Corps cannot require a permit for ordinary farming activity, and she claimed that they were not doing that now.

Do you think they are doing that now? Do you have an example?

Mr. PARRISH. Yes. We believe that they are doing that now.

Senator INHOFE. Well, you know, one of the things that they say, I am not sure how formal this is, but I have heard the Corps and the EPA claim jurisdiction if a farmer wants to change just from grazing to growing hay, or from rice farming or to walnuts or something else. Have you heard that?

Mr. PARRISH. I have, sir, and I keep hearing that from my members. If the Chairman would like even more information, Ms. Gallaway here has actually seen on-the-ground results of that.

Senator INHOFE. Mr. Chairman, I would like to ask permission for her to join, without objection, to respond to that question.

Senator SULLIVAN. Without objection, Ms. Gallaway, you are welcome to join the panelists for additional expertise and information that you want to provide.

Ms. GALLAWAY. Thank you. Yes, it is my experience on the ground. I am a senior regulatory biologist, work mainly in northern California, and my main role is to help farmers, a variety of clients, public works, cities and States, navigate the Clean Water Act process.

Lately, it has been my experience that the Army Corps of Engineers has considered changing from one crop to another a land use change, and when you incur a land use change, that change becomes under their jurisdiction. For example, a rice farmer going from rice to walnuts, the Corps considers that a land use change and has submitted letters of inquiry notifying my clients that they are under investigation for potential violations to the Clean Water Act. These land use changes they consider from temporary to permanent crops now fall under their jurisdiction, and they are requesting farmers to go consult with them before they change crops.

Senator INHOFE. OK, now, that is interesting. You are saying they actually have a written communication to that effect?

Ms. GALLAWAY. Several.

Senator INHOFE. All right. I would like to ask if you would give this committee some of the copies of that, where they are actually making that statement. Would you do that for us?

Ms. GALLAWAY. I would be happy to.

Senator INHOFE. All right.

Last, Mr. Schiff, you referred to this, so I direct this to either Ms. Gallaway or Mr. Parrish or Ms. Wilkinson, that the WOTUS rule has been stayed by the Second Circuit Court of Appeals. So that means that we are still operating under the law; nothing has changed. Now, despite this, are you seeing a Federal expansion of Federal jurisdiction in on-the-ground activities of the EPA and the Corps of Engineers?

Mr. Schiff, you already mentioned that, but how about you, Ms. Wilkinson?

Ms. WILKINSON. Thank you, Senator Inhofe. It has been our experience that each time the rules are further modified or clarified, that this results on on-the-ground increase in jurisdictional impacts. We have had it happen several times now on our property, since this has been going on for so long. I would also say that these changing regulations just make it so difficult for a small business to play for the future or to run their business when the interpretations are constantly changing and expanding.

Senator INHOFE. Any comment on that?

Ms. GALLAWAY. I would like to echo Ms. Wilkinson. That is what I see on a daily basis interacting with the Corps, is each regulator has a different interpretation of what is and what isn't waters of the United States, and that creates a lot of confusion on the ground.

Senator INHOFE. Well, let me just, in my final few seconds here, remind this panel up here that they tried to do this through legislation 6 years ago. That was an effort. In fact, it was Senators Feingold and Oberstar. And not only did they lose their legislation, they lost their careers, too, at the same time. So this is an issue that has been there for a long time. It is very typical of things that are not being able to be done through legislation are now trying to be done through regulation, and that, I believe, is what we are experiencing now.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Chairman Inhofe.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Mr. Parrish, in your testimony you have identified numerous examples of the Army Corps implementing the waters of the U.S. rule despite the nationwide stay. Because of this implementation, farmers are losing the ability to manage their land and utilize it in the best way possible. Can you explain the impact of this early implementation of the WOTUS rule and what it could have in terms of an impact on ag production in the United States?

Mr. PARRISH. From a global perspective, we saw a shift in the EPA and the Corps exerting jurisdiction back about 3 years. What we are seeing is not just them having an impact on the practices

that farmers use; we are seeing an actual impact on the way farmers can use their land and actually prohibitions on the way that they propose to use their land. They do everything possible, in a lot of cases, to try to avoid WOTUS or any impacts to WOTUS. And what we are seeing here are things that are going to have ripple effects throughout the agricultural economy, not only impacting farmers and ranchers, but impacting the quality and the abundance of our food supply.

Senator ROUNDS. Mr. Schiff, today we have heard multiple examples of the Army Corps implementing the WOTUS rule, nearly to the point where the property that is subject to the permitting loses its value. When ag land is subject to burdensome and unreasonable permitting requirements based on incomplete information or the illegal implementation of regulations, landowners use the ability to cultivate and properly manage their land, which essentially prohibits farmers and ranchers from using the land which they rightfully own.

Would you consider this illegal implementation of the WOTUS rule a regulatory taking by the Army Corps of Engineers? And, if so, what recourse do the property owners have to prevent the Army Corps from devaluing their property to the point that it becomes practically unsaleable?

Mr. SCHIFF. Thank you, Senator Rounds, for that question. I do believe that in many of these instances there would be a regulatory taking. The idea is that the Constitution says that the Government cannot take your property for public use without just compensation. And the Supreme Court has made clear that includes in cases where, through environmental or other regulation, you can no longer do anything with your property, and therefore no longer have any value left. And oftentimes, with respect to the implementation of the Clean Water Act, that is the result.

One big obstacle that property owners have, though, to vindicating their property rights when they are told they can't use it and they seek compensation is the general rule that one cannot seek compensation until one has first applied for a permit. Unfortunately, Federal agencies, including the Army Corps, oftentimes know this and will drag out the permitting process in order to prevent a claim from being ripened, or what they may do, they may very well recognize that just the permitting process itself can oftentimes cost more than the value of the property in question, so essentially it gives a landowner no effective remedy.

Senator ROUNDS. Mr. Parrish or Ms. Gallaway, would you like to comment on that?

Ms. GALLAWAY. Yes, I agree. I mean, just the cost of getting a permit, a nationwide 40 permit in California is close to $40,000, and that is just with a half-acre or 300 linear feet of fill. So, if you exceed that, you are at an individual permit. The cost of that in California is $350,000. Those costs do not include mitigation, which can also be $300,000, $400,000 an acre.

Senator ROUNDS. I think the Ranking Member has brought up something which I think is important, and that is what we have to begin with is a statute, and I don't think any of us disagree with the statute itself. I think the challenge for us is whether or not the implementation of the statute within either the existing language

of rules prior to the implementation of WOTUS are appropriate or if they are so ambiguous that we literally need to upgrade them, or if the WOTUS would have been a better alternative, which I don't think it was; I think they went way beyond that.

But I do think that we have to get back to, as the Ranking Member suggested, a more clear and definitive definition and understanding of what the statute really implied in the first place. And if we want to change it to the point where it looks something like what WOTUS did, I think they have to come back to Congress to actually request permission to expand it over and above what the statute provided for in the first place.

With that, Mr. Chairman, thank you.

Senator SULLIVAN. Thank you, Senator Rounds.

Senator Markey.

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

The Clean Water Act is an American success story. We don't talk about the Cuyahoga River being on fire anymore. We don't talk about the Charles River as dirty water up in Boston; it is a big success story. Summertime in the Bay State is now filled with students sailing on the Charles and beach days at Revere Beach, which is the first public beach in America. These are success stories of the Clean Water Act.

But the next chapter in protecting our Nation's waterways is still not complete. There is still work to be done. When the Environmental Protection Agency and the Army Corps of Engineers finalized the recent Clean Water Rule, they did so to clarify longstanding regulatory uncertainty. In fact, many groups on both sides of the aisle asked for clarification. And the foundation of the rule was based on the latest scientific developments.

Over 1,200 scientific studies were reviewed. The conclusion was that upstream wetlands and small streams are vital to health of rivers and lakes downstream. The outreach from EPA and the Army Corps was tremendous and demonstrated they understood seriousness and importance that had to attach to this rule. More than 400 stakeholder group meetings were held across the country. More than 1 million public comments were reviewed after an extended comment period.

The uncertainty about the Clean Water Rule is not good for business, not good for our communities, not good for our environment. We have a choice in our story's next chapter. We can acknowledge the interconnectedness of our Nation's waterways and the importance of ensuring clean water or allow regulatory uncertainty to endanger our Nation's waterways and the drinking water for one-third of Americans.

I prefer the chapter with clarity, with clean water, and with a healthy future.

Mr. Buzbee, there have been questions at the start of this hearing about dry areas being regulated. Perhaps you can talk legally about how a seemingly dry area can be important to protect under the Clean Water Rule.

Mr. BUZBEE. Thank you, Senator. In the Rapanos case, Justice Scalia wrote a plurality opinion were wanted and called for permanent surface flows and connections but never received a majority vote in support of that. Justice Kennedy's significant nexus opinion,

which is now viewed as the governing one, explicitly calls for attention to a waters functioning. And if you look at the science, and especially the science in the connectivity report, areas like arroyos and other seemingly dry features can—during seasonal rains, especially heavy flows—can be critically important to carrying pollutants downstream and impairing water uses that are of great importance; also helping to control, sometimes, flooding. So what seems to be dry can in fact be very important water for much of this country.

Senator MARKEY. Do you feel, Mr. Buzbee, that the regulatory certainty in the definition of waters of the United States would help to resolve some of the jurisdictional confusions we have heard about today?

Mr. BUZBEE. Yes, I think it would help a great deal. The regulation, as written, ties its lines and strengthens its exclusions, but with lots of reference to the connectivity report and peer-reviewed science.

Senator MARKEY. OK. So given the contradictory, conflicting court decisions, why is this recent Clean Water Rule an appropriate response to those court cases?

Mr. BUZBEE. That is a good question. And basically it is if you look at the three major Supreme Court cases, one case unanimously said there was room for rulemaking under the Clean Water Act and defining what is water of the United States. The next case, the SWANCC case, avoided a constitutional question and also didn't question that possibility, and then six justices in the Rapanos case either applauded regulation or called for regulation to bring greater clarity.

Senator MARKEY. So they are begging for clarification.

Mr. BUZBEE. Yes.

Senator MARKEY. Please help us. Please don't leave this so confusing. And that is in fact what has been happening.

Mr. Kovarovics, in your written testimony you discuss exclusions. Why do you feel the EPA and the Army Corps specifically listed exclusions in the new Clean Water Rule?

Mr. KOVAROVICS. I think, again, as Professor Buzbee alluded to, this was designed to provide more clarity, and as you were suggesting, more clarity about what is in and what is out, and I would defer to the professor about the legality of that, but I think, you know, what we have heard about so long in this process is some more clarity, some more bright lines, and that is what I believe the agencies attempted to do.

Senator MARKEY. Thank you.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Markey.

I am going to ask Ms. Gallaway if you can just take your seat again in the audience, and if there are other questions, and I might have one, we will have you come up again. So thank you very much for doing that.

Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman.

As we look into the Waters of the U.S. rule, I can tell you in Nebraska, Nebraskans from across the State understand that these are rules that are providing an agency with so much overreach that

every Nebraskan's life is affected. It is not just what I call the usual suspects, people in agriculture; it is every taxpayer who has to pay more because of these rules in order to construct or to maintain a road; it is homebuilders who continue to see regulations increased on the cost of a new home, which is an American dream that is not out of reach for most of us. So when we talk about waters of the U.S., we need to realize the negative impact it has on all citizens across this country.

Mr. Parrish, I would ask you, in your testimony you discuss the Corps' use of classified aerial photographs to evaluate changes in agricultural activities in relation to historical jurisdictional waters. What does that mean, and why are these photographs classified?

Mr. PARRISH. Thank you, Senator, for that question. Classified and proprietary. It is pretty amazing to me that the Government, our Government, a Government that is supposed to provide clarity, can use information that the public has no access to it. And it is more than just having access to. We are talking about, from a clarity standpoint, Professor Buzbee, allowing our Federal Government to declare something jurisdictional the naked eye cannot identify. That is a problem.

Senator FISCHER. That doesn't really help with certainty, does it?

Mr. PARRISH. Absolutely not.

Senator FISCHER. Thank you.

I would ask Ms. Gallaway, if I could, Mr. Chairman, has she requested access to those photographs.

Senator WHITEHOUSE. Mr. Chairman, we have an order in this committee, and we have witnesses who are identified in advance. This was not a witness who was identified in advance. I think we have given the majority an enormous amount of leeway with a person who has been sort of plucked spontaneously from the audience, and I think that should probably run its course about now.

Senator FISCHER. I was just following other members, I would answer to the Ranking Member.

Senator WHITEHOUSE. I appreciate it, but I think we have been out of order for quite a while on this subject.

Senator SULLIVAN. The Chairman would ask unanimous consent to allow Ms. Gallaway.

Senator WHITEHOUSE. To answer his questions, which she did, not to refer a witness for all purposes——

Senator SULLIVAN. And if Senator Fischer wants to do the same——

Senator WHITEHOUSE. Then I will object.

Senator SULLIVAN. OK.

Senator FISCHER. Thank you.

As a follow up, Mr. Parrish, if the Corps can selectively enforce section 404 permits based on that historical ordinary high water marks in California, can they do it in Nebraska?

Mr. PARRISH. Senator Fischer, we are very afraid that, based on the way we have changed our landscape, if the EPA and the Corps can look back into some kind of ethos out in whatever and determine that we have made mistakes as a society, and go back and start fining individual landowners with criminal and civil penalties, that is a problem. It is a problem because it is not only going to be a problem in California; we are already seeing problems in

Louisiana and in Georgia, here in Virginia. We are seeing that all across the country. So, yes, whether you are talking shallow groundwater connections, whether you are talking invisible, secret science or secret data and maps, it is going to be a problem in Nebraska, yes, ma'am.

Senator FISCHER. I would agree.

On this committee, and especially in this subcommittee, we focus on the impacts of these overreaching regulations, and it is my understanding that even though the courts have ordered a stay on WOTUS, Federal agencies are still implementing that rule. If the EPA and the Corps succeed in this regulation, what do you think the impacts are going to be on our rural economies in this country and on our Nation's food supply?

Mr. PARRISH. Senator Fischer, when we look at what the impacts are, the regulatory footprint of this regulation and what it means, I mean, technically you are talking about trying to regulate navigable waters. EPA says they are providing clarity. We think we see 4-, 5-, 10-fold increase in the jurisdiction as a result of this regulation into things that the public has no real understanding of. We all support clean water. And most of the support for this regulation comes from people that clicked on the I Support Clean Water icon, and they never read a word of this proposal.

Senator FISCHER. Well, we all support clean water.

Mr. PARRISH. Absolutely.

Senator FISCHER. We support the Clean Water Act. We make that clear in this committee and on the floor and in our States all the time.

I would ask Ms. Wilkinson to follow up. In March 2015 I chaired an EPW Committee hearing in Nebraska on the possible impacts at that time on waters of the U.S., and at the hearing we did have that local homebuilder who spoke about what I thought was a very startling statistic, and that was that 25 percent of the cost of a new home is now due to regulations. Would you agree that regulations are going to continue to go up as a direct result of the rules and regulations under Waters of the U.S.? And what impact is that going to have?

Ms. WILKINSON. Yes, Senator, I would. And it creates such extensive costs that become a hidden burden. Most homeowners don't realize what they are spending their money on when they purchase a home or are unable to purchase a home due to that. So our costs have certainly been tremendous because we have just been in this changing environment and with an increased assertion of jurisdiction.

Senator FISCHER. Thank you very much.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Fischer.

Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman. I want to thank all of the witnesses. I was here at the beginning of the hearing, and I listened to the Chairman and the Ranking Member both talk about the importance of clean water, and I thought I just really wanted to make a couple points, and I would be glad to get response.

It is one thing to be for clean water. It is another thing to recognize where we were before we had the Clean Water Act, when rivers caught fire, when bodies of water were not safe to be near. I was involved in the development of the Chesapeake Bay Partnership Program. It started in Maryland under Governor Hughes when I was in the State legislature. We got the surrounding States to join us.

It was never a partisan issue; we always had Democrats and Republicans working together. We not only had governmental partners; we had private sector partners. We had partners from States that did not border the Chesapeake Bay; Pennsylvania, New York. The headwaters, the waters that come into the Chesapeake Bay come through those areas; and yes, the watershed areas, the wetlands are all critically important to the Chesapeake Bay.

So I know what it took to get everyone together and dealing with it, and what Senator Whitehouse said is absolutely accurate. Before the two Supreme Court decisions, I don't think the enforcement of the Clean Water Act was controversial. I didn't hear from stakeholders that they thought there was a real problem the way that the Clean Water Act was being enforced. But then we had two Supreme Court decisions, and those two Supreme Court decisions basically brought uncertainty as to what is going to be regulated and what is not going to be regulated, and we have been dealing with that for a long time.

The Supreme Court decisions was really a challenge to Congress to clarify, to make sure that we had it moving forward, and I can tell you, I tried. I remember introducing legislation and working on legislation and trying to get Democrats and Republicans, as we did with the Clean Water Act, to come together, and the premise was simple: let's just get us back to where we were before the Supreme Court decisions, because that is where most stakeholders said they were comfortable. And we couldn't get congressional action.

And now you have the Obama administration with a rule that tries to take us to where we were before the Supreme Court decisions, where a lot of things are said about it that just aren't true, and we are trying to get predictability. And one thing I hear from my stakeholders: let us know what the rules are. Let us have predictability. We will deal with it. As long as it is rational, we can deal with the rules. What we can't deal with is the uncertainty as to whether something is regulated or not.

So I am somewhat perplexed, I really mean this, as to why there isn't more cooperation to try to give direction to what is regulated and what is not. We have exemptions that have been in law. The farming activities, regular farming activities are protected. That is not what is aimed at the Clean Water Act. Standing bodies of water that do not affect the clean water issues are not regulated.

So why isn't there more of a sense to get something done? Why is it always we are going to be opposed to this? I haven't really heard of an effort to try to get where we were before the Supreme Court cases, where I thought most stakeholders thought we should be.

So what am I saying that doesn't make sense? Nothing. I liked your answer.

Mr. Chairman, I will just yield back the balance of my time. I think I made my point. And I am going to continue to fight on behalf of the people of Maryland and the people of this country who recognize the importance of clean water, the number of people whose drinking water comes from these water supplies in this country and my State, the people who depend upon clean water for their commercial businesses, the people who depend upon clean water for recreation, the people who depend upon clean water for public health. They want me to fight to make sure that we don't return to the days we had before the Clean Water Act, and I am going to do everything I can to make sure that we protect America's public health.

Senator SULLIVAN. Thank you, Senator Cardin.

I think the Ranking Member and I are going to wrap up with a few additional questions, so I appreciate the witnesses here.

I wanted to go back to Mr. Parrish, Mr. Schiff. In your experience, back to farming activities, do the EPA and the Corps now claim that ordinary farming activities like plowing constitute a discharge or a pollutant?

Mr. PARRISH. Yes, sir. We are seeing the Corps explicitly regulate activities now that 3 or 4 years ago they would not. And again, we think the statute is clear. We think the congressionally authorized exemptions are clear.

But what you have now is not only is the Corps parsing what a farm exemption is, they are parsing what a ranching exemption is, what a farm exemption is. They are trying to parse out specifically any changes in use. That is tantamount to land use and the control of land use at the local level.

We see big problems in that because, just for instance, in California alone there has been a drought. Farmers sometimes need to shift from crops that use a lot of water to crops that don't use so much water. If they can't make those kinds of decisions without seeking a permit that takes 2 or more years to complete, there are some real problems.

Senator SULLIVAN. And how long have you been farming?

Mr. PARRISH. Sir, I grew up in a farm, and I started my agricultural career back in the 1980s.

Senator SULLIVAN. And so that has not always been the case, that kind of requirement for Federal permits when you are shifting crops or shifting activities on your farmland?

Mr. PARRISH. That is correct.

Senator SULLIVAN. So you said you have started to see that kick in about 3 years ago?

Mr. PARRISH. Actually, we saw a more intense focus on agriculture after the economy had the big downturn in 2008 and 2009. My friends over here in the homebuilding industry ultimately stopped; they were in a depression. They stopped building. And we have seen the Corps turn their attention to agricultural uses, agricultural land, and we have seen more focus on agriculture and land use activities since that time.

Senator SULLIVAN. And let me ask you to follow up. Another question that you talked about is that in the WOTUS rule there is an assertion that the Corps can identify a stream complete, bed, bank, ordinary high water mark from an aerial photograph and

that the Corps does not need to do a site visit to confirm where the actual water is present on the property.

Now, in contrast, current Corps guidance requires a site visit, it is mandatory. So are you seeing them implement that aspect of the WOTUS rule, where they are just using aerial photography to make that determination, which, remember, that rule has been stayed. Without that rule, they would have no authority to do that. Are you seeing them do that right now?

Mr. PARRISH. Senator Sullivan, I will refer you to Ms. Gallaway's testimony, and in her testimony she explicitly says that she has collected on-the-ground data and presented that to the Corps and had it rejected based on information that the Corps had, aerial photos, imagery that they would not even share with the permittee.

Senator SULLIVAN. Let me turn to the legal issues that I think are very important, very vexing. To Senator Cardin's statement, we did pass out of this Committee S. 1140, which would have provided very much detail, very much certainty on the WOTUS rule, and when we brought it to the Senate floor it was filibustered on the ability to proceed. So just to be clear, this committee, the Senate, we have tried to clarify this rule, and it has been stymied. So I think that that needs to be stated.

Let me just ask Ms. Wilkinson and Mr. Schiff, can you help us understand how a so-called regional supplement can actually change the definition of what a wetland is either in Virginia or even Alaska, and how that, again, raises the issue of uncertainty that you have focused on in your testimony?

Ms. WILKINSON. Yes. Thank you, Senator. Specifically, the supplement that applies to our area, I first want you to understand is very extensive. The supplement itself is one and a half times the 1987 manual. So these are extensive changes that are in the supplement.

Some of the key changes is it changed the wetland hydrology criteria to reduce the time the water must be within 12 inches of the surface, which is what the Corps calls the surface, not where you place your foot, from 30 to 14 days. And it also redefined the growing season from starting at March 15th to essentially year-round based on indicators such as bud break. And it expanded, this is very important, the list of primary and secondary indicators that can be used in certain circumstances to identify a wetland.

Very specifically, on our property, we had a Corps-confirmed delineation on our reduced development in 2007, before the implementation of the regional supplement, and they confirmed 30 acres of wetland impacts. They have done a new confirmation of the wetland delineation since the regional supplement and said we had 47 acres of wetland impact. That is a 57 percent increase. So that is the specific effect of the regional supplement on our property.

Senator SULLIVAN. Thank you.

Professor Buzbee, I wanted to ask just a few legal questions, very basic. If the EPA is looking at its jurisdictional reach of the Clean Water Act, can it expand its own jurisdiction? Can it say, well, we know that we have, say, 20,000 square miles of wetlands; we are going to expand it with a broader definition? Or is that something that only the Congress can do in terms of expansion of its jurisdictional reach?

Mr. BUZBEE. The statute would govern what the agencies can do, the Army Corps and EPA, but the Army Corps and EPA need to look at the best science and respond to that. So as science changes and develops, whether it is Chesapeake hydrology or understanding of Alaska, the agencies have an obligation to look again at that best information, and that may lead to adjustments one way or the other.

Senator SULLIVAN. So one thing, and Senator Whitehouse mentioned at the outset, he mentioned that even under the new rule the EPA has admitted that it is going to expand its jurisdiction under the Clean Water Act by up to 5 percent, which doesn't sound like a lot. We were running the numbers. Five percent of the clean water jurisdiction in Alaska would be expansion of 15,000 square miles. That is 10 times the size of Rhode Island.

Senator WHITEHOUSE. Thanks so much for pointing that out, by the way.

[Laughter.]

Senator SULLIVAN. Sorry. We have a lot of fun with that issue.

[Laughter.]

Senator SULLIVAN. It is a serious point, though. An even 5 percent expansion of its own jurisdiction, its self-declared expansion in certain States can be an enormous expansion. Don't they need the legal authority to undertake that? I mean, the EPA can't expand its own jurisdictional reach, can they?

Mr. BUZBEE. Two things. One is the legal standard is the same, but it is important to understand that science and hydrological science has improved vastly in recent years, and if you actually look at litigation under the Clean Water Act, people will rely on the best science all the time; and this committee and other committees in the past in the Senate have called for agencies to rely on the best peer-reviewed science. That can lead to changes in what an agency can justify. So that is not legally grabbing power; that is following what the science leads to.

But also, importantly, my understanding is slightly different, that if you go to SWANCC and the pre-SWANCC period, that the level—the amount of water protected was substantially more than now. Then it dropped back as far as actual assertions of jurisdiction dropped back during the uncertain period. The Waters of the United States would restore I thought it was 3 to 5 percent of the jurisdiction, but that it would still be less than it stood during the Reagan administration.

Senator SULLIVAN. Senator Barrasso.

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

Mr. Parrish, EPA spent an enormous amount of time and resources defending their Waters of the U.S. proposal. Most, if not all, of the resources were focused on communications outside of the Federal Register and outside the formal rulemaking process to the point that they used social media to do more than just educate the public; they did what the GAO called "covert propaganda." Covert propaganda. So do you think the EPA had an open mind, or even fairly evaluated public comments in the rulemaking process? And how do you think that this agency's social media campaign added confusion to the process?

Mr. PARRISH. Senator Barrasso, that is a great question. What we experienced during this rulemaking was unlike anything in my 30 years of regulatory effort that I have ever witnessed. From day one, the Agency campaigned to enact this rule. We think they used very, very carefully worded talking points that were true but misleading. They mislead the public, they mislead our members, they confused the members of the Farm Bureau as to the exact reach of this regulatory proposal.

And not only did they do that; they used social media to do outreach to the public, and they did it during the rulemaking process, when they are supposed to be open minded and listen to what the stakeholders had to say about their proposal. Now only did they do it during the rulemaking process; they did it after the rulemaking process closed. And the only reason they would do that, the only reason they would do that is because your legislation, S. 1140, was before this Congress, and they were doing it to try to influence the public and to lobby the public, to lobby against your legislation.

Senator BARRASSO. So following up on that, both Mr. Parrish and Mr. Schiff, you take a look at your written testimony, it clearly documents the EPA and the Corps clearly attempted to expand what is a water of the United States, despite the current court stay says about the rule. I think it is important because, as you know, I introduced the legislation you just referred to; it was bipartisan, the so-called Federal Water Quality Protection Act. It was to repeal the rule and have the EPA go back and draft a new more tailored rule that basically protects families and farmers and small business owners.

But rather than vote for the bill, we had 11 Senators who had expressed concerns with the Waters of the U.S. rule. They chose to write this letter rather than to vote against the legislation, and instead they wrote about their concerns to the EPA and the Corps. The letter stated, "We call on the EPA and the Army Corps of Engineers to provide clear and concise implementation guidance to ensure that the rule is effectively and consistently interpreted."

They went on to say, "Farmers, ranchers, water utilities, local governments and contractors deserve this clarity and certainty." They said, "Should the EPA not provide this clarity or enforce this rule in a way that erodes traditional exemptions, then we reserve the right to support efforts in the future to revise the rule."

So, in your opinion, both of you, has the Corps and the EPA been eroding traditional exemptions since this rule has been issued? And how clear and consistent has the Corps and the EPA been in their decisionmaking since the rule has been issued?

Mr. PARRISH. Senator Barrasso, what we have seen is the agencies eroding the exemptions. We have seen them intrusively trying to not only influence the activities that farmers conduct on their land; they try to influence the way the farmers use their land, flat out. With regard to guidance, it is pure speculation on my part, but I would probably take a bet that EPA and the Corps will not do implementation guidance. They do not plan to; they have stated such. So we don't expect implementation guidance.

No. 2, this rule, the specifics of this rule and what expands it, allowing the agencies to use tools that the human eye can't see as affirmative evidence that they can regulate a bed bank and ordi-

nary high water mark, that cannot be changed by guidance. That is an expansion, it is a significant expansion, and the agencies have not been transparent about that. Thank you.

Senator BARRASSO. Mr. Schiff, would you like to weigh in on this?

Mr. SCHIFF. I would just add that it shouldn't be surprising that we are seeing such a dramatic expansion under the WOTUS rule, in part because you look at the exceptions. Why would there be a need to call out an exception for the regulation of puddles or ornamental fixtures? The only reason for those exceptions is because, otherwise, legitimately, the scope of the rule would cover things like that. So it is not surprising, unfortunately, that the agencies have continued through the WOTUS rule to expand their authority.

Senator BARRASSO. Thank you.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Barrasso, and thank you for your leadership on this issue. I just wish that your bill would have been able actually to have a vote on the bill because that is what we were trying to do, is bring certainty to this issue.

Again, it was a bipartisan bill, and yet we couldn't get over a filibuster threshold by some of the members of this body, even though it was voted out of this committee. Some of the members of this committee voted for the bill, I believe. So the Senate has been trying to bring clarity to this issue because we are hearing you, we are hearing you, and we are hearing from the States.

One final quick question. Professor Buzbee, Mr. Schiff, anyone else, why do you think 34 States have sued to stop the WOTUS rule? That is a pretty big number of U.S. States. I think it is also bipartisan.

Mr. SCHIFF. I think, Mr. Chairman, one reason is an issue that we haven't touched upon a great deal this afternoon, and that is the federalism implications of the Clean Water Act as interpreted by EPA and the Army Corps. Nobody is against clean water, but the problem is that the agencies have converted the Clean Water Act, through the WOTUS rule, into a de facto land use ordinance for Federal agencies; and that has traditionally been an area that the States and local governments have been sovereign in, as opposed to the Federal Government. And I think that is what is motivating so many of the States to challenge the rule as a direct threat to their sovereignty.

Senator SULLIVAN. Professor Buzbee.

Mr. BUZBEE. Yes. I am not sure that the number should be taken for all that it appears to be. What started happening now both in Supreme Court litigation and in regulatory matters is different leading actors in States are taking positions in different cases. So you can have environmental regulators taking one position and the State attorney general is taking another, and then Governors taking yet another. So my guess is, if you look at the number of who filed supportive comments and who criticized, the numbers are far more mixed than the number you provided would indicate.

Senator SULLIVAN. Just for the record, I want to mention a lot of statements about the support for this rule, a million comments. Actually, the head of the Corps testified that only 2 percent of those were substantive comments; 98 percent were form letters or

e-mails that weren't substantive and may have been part of what Senator Barrasso was talking about, the EPA's social media attempt to get support for their own rule, which was deemed out of line by the GAO.

Senator Whitehouse, I know you want to finish with some questions.

Senator WHITEHOUSE. Thank you. I just wanted to wrap up with a couple of things.

First, Mr. Parrish, same question for the record. Any documents you have that support the proposition that a mere crop change is a regulable activity, I would love to see an example of that, or two if you have two examples of it.

Mr. PARRISH. We can do that. But you also need to understand, Senator, that the way in which the Corps enforces the Clean Water Act, they scare the dickens out of farmers. They threaten their ability to be an ongoing concern going forward. And we are not talking about big farmers; we are talking about farmers that farm 100 acres or less. And if you are talking hundreds of thousands of dollars to challenge the Agency, they pretty much have to give up the use of their property or the proposed use of their property and back away from it.

But we will supply that.

Senator WHITEHOUSE. Let's start with just supplying me where a crop change was seen as a regulable event by itself.

Also, you are not suggesting that LIDAR is not a credible means for mapping? We use LIDAR all the time for coastal mapping, for storm mapping, for FEMA mapping, for all sorts of things. You are comfortable that LIDAR is a legitimate technology, aren't you?

Mr. PARRISH. I am comfortable that the Government has access to it; the landowners don't. And the way in which the Government is using it——

Senator WHITEHOUSE. So your issue isn't with the LIDAR.

Mr. PARRISH [continuing]. Is they are using it in ways——

Senator WHITEHOUSE. Your issue isn't with the use of the LIDAR issue——

Mr. PARRISH. They are identifying the——

Senator WHITEHOUSE. Let me just ask my question, if you don't mind. Your issue is not with the use of the LIDAR; your issue is with the fact that the landowner doesn't have access to the information that the Government has generated through LIDAR.

Mr. PARRISH. I am taking issue with the fact that they are using it to identify features that you and I could not walk onto the landscape and identify with the naked eye.

Senator WHITEHOUSE. Like altitude?

Mr. PARRISH. That is a problem. That is a problem.

Senator WHITEHOUSE. Well, maybe we need to follow up on this.

Mr. PARRISH. If they are affirmatively defining, affirmatively using as evidence that information to regulate when the human eye cannot understand or detect it. That is a problem.

Senator WHITEHOUSE. But LIDAR measures altitude.

Mr. PARRISH. It is, I believe, you know, and these guys are the——

Senator WHITEHOUSE. LIDAR measures the distance.

Mr. PARRISH. I believe it is unconstitutionally vague.

Senator WHITEHOUSE. LIDAR, you think, on its own, is unconstitutionally vague?

Mr. PARRISH. Using that to define features that are regulated under the Clean Water Act, bring and carry criminal and civil penalties.

Senator WHITEHOUSE. So it would be OK under the FEMA, for coastal protection, but somehow not under the Clean Water Act?

Mr. PARRISH. Are you going to find people criminally and civilly liable as a result of that information? That would be the question. And we think that is outside of bounds.

Senator WHITEHOUSE. There are a whole variety of——

Mr. PARRISH. We think that is outside of the bounds of a clear regulatory program. There is nothing clear about that, Senator.

Senator WHITEHOUSE. So the Farm Bureau is opposed categorically to the use of LIDAR in Clean Water Act determinations.

Mr. PARRISH. We do not have policy on that, but there is a big problem.

Senator WHITEHOUSE. But that is your testimony. Got it. OK.

Just last, throw the ball to Mr. Buzbee. There have been tons of questions to the agricultural interest and deregulatory interest witnesses and not so many to you, so if you would like to sort of clean up with, I will give you my last minute and 45 seconds.

Mr. BUZBEE. Thank you, Senator. I guess the only thing I would say, several people made statements either in questions or witness statements stating that the Army Corps and EPA were effectively enforcing the Waters of the United States rule, the Clean Water rule, despite it being stayed, and I don't think there is any evidence of that, and I think it is based on a misunderstanding of how rules work.

So I would just make one quick point about that, which is if an agency promulgates a final regulation, and it is put in the Code of Federal Regulations, that becomes binding on everyone; it becomes binding on the courts, it becomes binding on the regulator. And those who are regulated can rely on it to their benefit or to their detriment, but it becomes the binding law. And that is well established in decades and decades of Supreme Court law.

In the absence of that rule, the agencies still need to undertake regulatory actions. You still have the Clean Water Act, you still have all of the existing regulations which now have not been amended, and you still have these three Supreme Court cases, and you still have the connectivity report, which is what it is, it is a report on science.

So the regulators have been basing actions on all of the existing law and science, as they must do. There is nothing illegitimate about it; indeed, it is their obligation. And if they didn't do so, they would deserve sound criticism.

Senator WHITEHOUSE. And be sued.

Mr. BUZBEE. Yes. And the only other point I would say is I don't think anyone would argue in favor of agencies hiding the basis on which they act. If that is going on, then they deserve criticism. But that is different than the issue whether the Clean Water Act itself is misguided. And I don't know enough about the particular actions that are being claimed here, but that is a totally different problem.

Senator WHITEHOUSE. Understood.

Thank you, Chairman.

Senator SULLIVAN. Thank you.

I want to thank the members again. I do want to ask unanimous consent that a letter from the National Association of Realtors and testimony from Mr. Merlin Martin of Martin Firms also be included in the record.

Senator WHITEHOUSE. Without objection.

[The referenced testimony follows:]

Testimony for the Record
Mr. Merlin Martin
Martin Farms
for the
The Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife
Hearing on
Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States
Tuesday, May 24, 2016

Mr. Merlin Martin appreciates the opportunity to present this testimony about his farm's experience with the U.S. Army Corps of Engineers regarding dredge and fill permitting under Clean Water Act Section 404. Although Mr. Martin has worked cooperatively with the agency on several matters where the agency has asserted jurisdiction over farm maintenance and development activities, those were protracted and expensive processes. Recently the agency has sought to expand its enforcement authority to areas of Martin Farms by using historical aerial photography (Google Earth images) as the main source of evidence of alleged violations. Mr. Martin hopes this testimony will educate the Committee about the Corps' activities with respect to farm development, generally, and specifically educate the Committee on the Corps' use of inconclusive Google Earth images and speculative assertions of significant nexus to reach far upstream from traditionally navigable waters to control farmers' development of their property.

Overview

Mr. Merlin Martin owns and operates Martin Farms in and near Clayton, Hendricks County, Indiana. Mr. Martin grows corn, wheat, and soy on his property and has been in business since 1964. Martin Farms currently employs eleven people and is among the five largest farms in the state.

Since 2009, Martin Farms has been involved in several enforcement actions with the Corps regarding farm activities. In two instances, Martin Farms did not contest the agency's assertion of jurisdiction over farm ditches and wetlands. Martin Farms cooperated with the agency and has obtained after the fact (ATF) permits for those encapsulation and tree-clearing activities. These agency interactions and permitting activities have come at considerable costs. For example, the off-site mitigation for the alleged disturbance of approximately 1 acre of wetland and 1,374 linear feet stream cost approximately $500,000.

In 2014, the Corps again contacted Martin Farms as a result of what the agency characterized as an anonymous tip that Martin Farms had cleared trees on farm property. Although Martin Farms continued to cooperate with the agency, allowing access and exchanging information, Martin Farms did not believe there had been any water, much less jurisdictional waters, on the identified parcel. At most, there had been a wash on the northernmost part of the parcel, which was tiled to provide outlet drainage for the eastern-adjacent farmland. There was no evidence of current or previous existence of ordinary high water mark, bed and banks or any other feature of a relatively permanent waterway on the parcel identified by the Corps. (The Corps did not allege

existence of any wetlands on the property.) The nearest relatively permanent waterway, a ditch called Mud Creek, was 1.5 river miles away from the site, and the nearest traditionally navigable water was over 100 river miles away.

Nevertheless, the Corps asserted that Martin Farms had encapsulated and graded approximately 2,660 linear feet of jurisdictional tributaries when it cleared trees and developed this parcel for farming. Although Martin Farms asked for more proof of jurisdiction, the Corps took the position that it was Martin Farms' responsibility to prove there had *not* been jurisdictional waters, not the agency's burden to prove conclusively that there *had* been.

Upon request, the Corps provided its approved jurisdictional determination (JD) to Martin Farms. The JD was based on a soil survey and several historic aerial photos (Google Earth) of the area before the trees were cleared. These documents are provided as Attachment 1. The JD's significant nexus analysis of how the alleged relatively permanent waterways impacted a traditionally navigable water was purely speculative. The JD is provided in Attachment 2.

In response, Martin Farms provided the affidavit of the contractor who had performed the work on the identified parcel. The contractor attested that tiling work on the northern part of the property was primarily done in 2007, more than 7 years before the 2015 allegation, and only a small amount of tiling work was done in 2013 when the trees were cleared in the northern portion of the parcel. The tree-clearing work was done on the southern end of the parcel in 2014. The contractor attested that in 2007 he tiled along an erosional feature (wash) in the northern part of the property, using an excavator among the trees, and in 2013 he cleared trees in the northern area of the parcel and finished tiling approximately 230 feet. The tree-clearing work was done in the southern area of the parcel in 2014; no tiles were installed. The contractor attested that he did not encounter any water on the parcel during the times he worked, and that there was no stream-like feature of any kind on the southern area of the parcel. The affidavit is provided in Attachment 3.

The Corps responded that the affidavit was incompatible with the existing evidence (i.e. the Google Earth photographs and soil survey). The agency did not explain why the affidavit did not refute existence of a stream in the southern part of the property. Regarding the northern part of the property, the Corps concluded that the description in the affidavit of an erosional feature (wash), in addition to the Google Earth images, actually supported the agency's assertion that an ephemeral stream had existed there. This is in apparent contradiction to Corps guidance that states that "swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent and short duration flow" are not typically jurisdictional[1]. The Corps response to the affidavit is provided in Attachment 4.

The letter from the district engineer rejecting the affidavit also indicated that the district engineer was giving Martin Farms an opportunity to appeal the JD without having to go through the ATF permitting application process. *See* Attachment 4. Martin Farms filed a request for appeal of the JD, but the division engineer's office would not accept the jurisdictional determination appeal without the ATF application. Martin Farms supplied this application in May 2016.

[1] May 30, 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook at 16.

Martin Farms is in a Catch-22. It has been required to apply for a permit for farm development work it doesn't believe requires permitting, on land where the enforcing agency has provided no conclusive proof of jurisdiction. The agency has continued to press enforcement despite an affidavit regarding the state of the land at the time the work was done and only inconclusive Google Earth images to support the agency's position. This regulatory authority has been asserted under the existing definition of "waters of the United States". Martin Farms brings this to the Committee's attention in order to provide an example of what it believes is Corps over-reach into non-jurisdictional farm activities.

A more detailed timeline of the interactions between Martin Farms and the Corps follows. Mr. Martin would be happy to provide further information or answer questions as requested.

Detailed Timeline of Interactions between Martin Farms and the Corps of Engineers

2009-2012: Mr. Martin's first encounter with the U.S. Army Corps of Engineers came in November 2009, when a neighbor reported activity on Mr. Martin's property. The reported activity consisted of approximately 500 linear feet of pipe added to an agricultural drainage ditch. The Corps performed a site visit and asked Mr. Martin to disclose all other encapsulation activity he had done on his farm in the past five years, which he did. Mr. Martin had encapsulated several portions of existing agricultural ditches. The encapsulation was necessary to provide field access, help alleviate flooding issues, and help prevent the continued loss of farmable land due to water erosion. After Mr. Martin made this disclosure, the agency alleged that much of the encapsulation activity Mr. Martin disclosed was performed on jurisdictional waters of the United States without required permitting. Mr. Martin cooperated with the Corps and the Indiana Department of Environmental Management (IDEM) to obtain an after-the-fact (ATF) permit for encapsulating a total of 1,410 linear feet of what were deemed by the Corps to be jurisdictional tributaries. Mr. Martin submitted the application for this ATF permit in February 2011.

As part of the permit application, Mr. Martin originally offered to install a native grass buffer on a total of 5,250 linear feet of stream on his property as mitigation for real or perceived impacts. This was a 3.7:1 ratio of mitigation to the alleged impact. The Corps did not accept this plan; instead, they required a forested buffer of at least 50 feet on each side of the stream in order for this proposal to be considered mitigation. This forested buffer would have been inconsistent with farm operations. A compromise proposal regarding the size of the forested buffer could not be reached, despite Martin Farms' efforts to propose a reasonable compromise that would allow the mitigation to take place on Martin Farms property. Ultimately, the Corps approved a mitigation plan where Martin Farms contracted with a local wetland development company to create 0.61 acre of forested wetlands. Approximate costs of mitigation were $50,000, not including permitting and regulatory assistance.

2012-2014: The enforcement process that began in 2009 was drawing to a close in 2012 when an anonymous report to the agency was made, this time regarding tree-clearing activity on another area of Martin Farms. Martin Farms employees were instructed to cease and desist the tree-clearing activity, which they did. The Corps alleged that Martin Farms had mechanically

cleared and graded 0.939 acres of jurisdictional forested wetland and 1,374 linear feet of jurisdictional tributary. The Corps indicated they would not issue the pending permit for the encapsulation activity until the new alleged violation was resolved. Mr. Martin again worked with the agency to obtain an ATF permit for this work. When some issues regarding the scope of the jurisdictional determination of the area could not be worked out between the Corps and Martin Farms consultants, the matter was referred to EPA for enforcement. EPA issued a lengthy information request, which Mr. Martin answered in detail and at significant cost of preparation. A site visit with EPA, the Corps and IDEM personnel was conducted in June 2013. Ultimately, EPA determined not to pursue formal enforcement outside the ATF permitting process, but IDEM levied a fine. Mr. Martin entered an agreed order with IDEM, paid his fine, and completed the ATF permit application in May 2015.

As mitigation for this alleged impact, Martin Farms has contracted with the same local wetland development company to mitigate 1,789 linear feet of channel and to construct 3.76 acres of new forested wetland. The cost of this mitigation is approximately $500,000.

2014-Present: In October 2014, the Corps contacted Mr. Martin about another anonymous tip that he had cleared trees on his property. This allegation is still ongoing with the agency. In short, the Corps is basing its assertion of jurisdiction on inconclusive historic aerial (Google Earth) photography and speculation about how the alleged waters, if they existed, may have influenced the transport of farm chemicals to the nearest traditionally navigable water, which is alleged to be over 100 river miles away.

1. October 2014 - The Site Visit: A site visit with personnel from the Corps, IDEM and American Structurepoint (Martin Farms' wetland consultant) was held in October 2014. The parties had trouble finding the area of allegation, as there was no sign of any disturbance of waters. They ultimately found the parcel, which had been cleared of trees.

2. March 2015 – The Cease and Desist Letter: In March 2015, the Corps issued a cease and-desist letter alleging Mr. Martin had encapsulated and graded approximately 2,669 linear feet of jurisdictional tributaries, without appropriate permitting. The Corps provided a 2014 Google Earth image of the property showing that clearing had taken place in the northern section of the property (the image was taken before the southern portion of the property was cleared). The Corps also provided a topographic map with the alleged tributaries drawn on. The topographic map did show some blue line tributaries in the area, but these were at least a mile from the alleged tributaries and were not connected to them.

3. April – September 2015 – Communications about Proof: Martin Farms provided responsive information to the cease-and-desist letter detailing that: (1) there was no jurisdictional waterway on the property; (2) the tiling (encapsulation) work was only done on the northern part of the property, and the majority of the tiling work was done in 2007, before the tree clearing and cultivation of the parcel and more than six years prior to the allegation. Therefore, this prior work was not subject to enforcement per the administrative procedures act statute of limitations; (3) at most, 230 feet of tiling work was done in 2013; and (4) the southern portion of the property did not contain any water, either, and no bed, banks or ordinary high

water mark (OHWM) features, and this area was not tiled before the trees were cleared and has not been tiled at all.

Martin Farms requested the Corps provide additional information regarding the basis for its jurisdictional determination. At that point, the only proof the Corps had produced of any jurisdictional features was the topo and a 2014 Google Earth aerial photograph of the parcel showing the northern portion having been cleared and pictures from the October 2014 site visit showing adjacent property.

The Corps responded that it believed the alleged tributaries had existed and were jurisdictional, and Martin Farms' information did not substantiate that jurisdictional tributaries had been absent. The Corps stated that without further information from Martin Farms substantiating that there were no jurisdictional tributaries, the agency would require ATF permitting or restoration of the property to its former state. Martin Farms responded by asserting that it was the Corps' burden to prove jurisdiction, and requesting to see the agency's jurisdictional determination.

4. September 2015 – the Jurisdictional Determination: The Corps responded with a jurisdictional determination (JD) that there had been relatively permanent waters (RPW) that flowed directly or indirectly into traditionally navigable waters (TNW) and there were also non-RPWs that flowed directly or indirectly into TNWs. The JD noted that the alleged "project waters" were 118.5 river miles from a TNW and 1.5 river miles from an RPW – Mud Creek, a blue line perennial RPW. The Corps must determine that there is a significant nexus between non-RPWs and a TNW when alleging Clean Water Act jurisdiction. The JD's significant nexus discussion was purely speculative, stating that the alleged intermittent tributaries would have had the capacity to carry pollutants from the adjacent crop fields 1.5 miles to the nearest relatively permanent waterway, and along the remaining 117 miles to impact the nearest traditionally navigable water. The significant nexus determination also speculated that before the area was cleared, its riparian zone would have filtered agricultural pollutants from entering the alleged tributaries which would have prevented these pollutants from entering the downstream waterway. The JD is provided as Attachment 2.

The Corps included several other historic aerial photographs with their JD, including a March 30, 2005 Google Earth image that the agency asserted demonstrated bed and banks features on the property. These images were the basis of the Corps' claim that there had been jurisdictional waterways prior to Martin Farms' work. These documents are provided as Attachment 1.

5. September 2015 - the Affidavit: In response to the Corps' information, Martin Farms provided an affidavit from Mr. Reuben Scott, the contractor hired to perform the work. *See* Attachment 3. This affidavit attests that at most there was an ephemeral erosional feature (a wash) *without* an ordinary high water mark where the JD alleges an intermittent tributary existed in the northern part of the property. The affidavit attests that there was no drainage feature at all in the southern area of the property, where the ephemeral tributaries were alleged to have existed. Furthermore, Mr. Scott attests that selective logging was done in the area in the early 2000's, and that log skidder tracks from the previous logging work were in evidence during the time he performed the agricultural improvements. Given this information, the aerial photographs of the areas allegedly containing the ephemeral tributaries are particularly suspect. Not only are

the Google Earth images difficult to decipher on their face, but also the evidence that logging skids were visible to Mr. Scott casts further doubt on the Google Earth images' demonstration of OHWM for the alleged ephemeral streams.

6. November 2015 – May 2016: The opportunity to appeal the JD: The District office of the Corps offered Mr. Martin the opportunity to appeal the approved JD via a November 19, 2015 letter. *See* Attachment 4. This letter presented the opportunity to appeal the JD as an alternative to submitting an ATF permit application. It provided separate timeframes for these actions, and discussed the required tolling agreement for the JD appeal without mentioning that an ATF permit must also be accepted before a JD can be appealed in an enforcement matter. Based on the language in the November 19, 2015 letter and upon review of the regulatory requirements for appealing a JD associated with an alleged unauthorized activity, Mr. Martin concluded the opportunity to appeal the JD was being offered under the "justice and fairness" exception in 33 C.F.R. § 331.11. Under this regulation, the district engineer may accept an appeal of the approved JD without an ATF permit application "if the district engineer determines that the interest of justice, fairness, and administrative efficiency would be served."

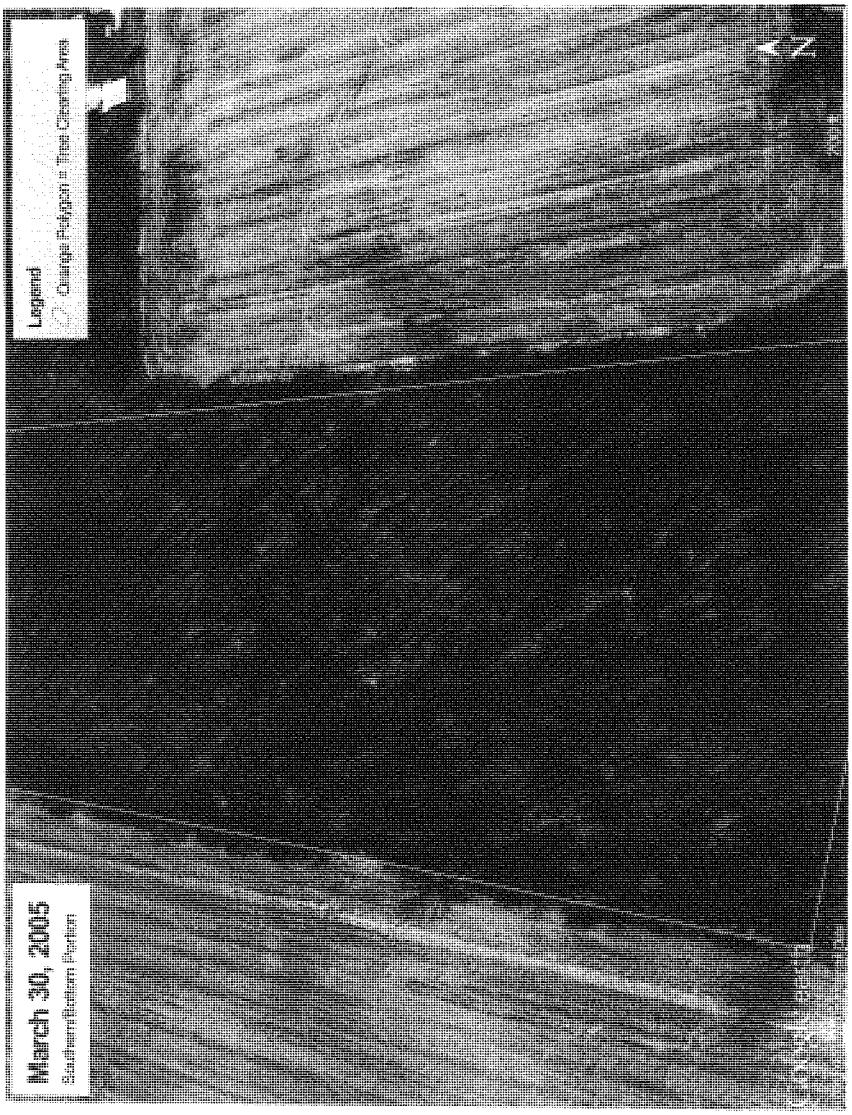
In reliance on the November 19 letter, Mr. Martin did not begin putting together an ATF permit application. Instead, based on his belief that there were no jurisdictional waters at issue, he pursued the offered request for appeal (RFA) with the understanding that he would not be required to compile an ATF permit application while the merits of the JD that served as the basis for the ATF requirement were being reviewed.

Upon receipt of the RFA, Division Engineer's office contacted Martin Farms to relate that in fact an ATF permit application was required before the JD appeal could be processed. The representative from the Division Engineer's office noted that although the published regulation in 33. C.F.R. § 331.11 stated that the discretion was with the *district* engineer to make this decision, in fact the *division* engineer was the entity with that discretion and the District Engineer's November letter could not permit a JD appeal absent an ATF permit. In a February 2016 letter, Martin Farms requested the *Division* Engineer exercise its claimed discretion to accept the JD appeal absent an ATF permit, but the Division Engineer ultimately declined. By an April letter, the Division Engineer noted the JD appeal could not proceed without an ATF permit application. Martin Farms provided an ATF permit application within the provided 30-day timeframe, and the JD appeal is now ripe for review.

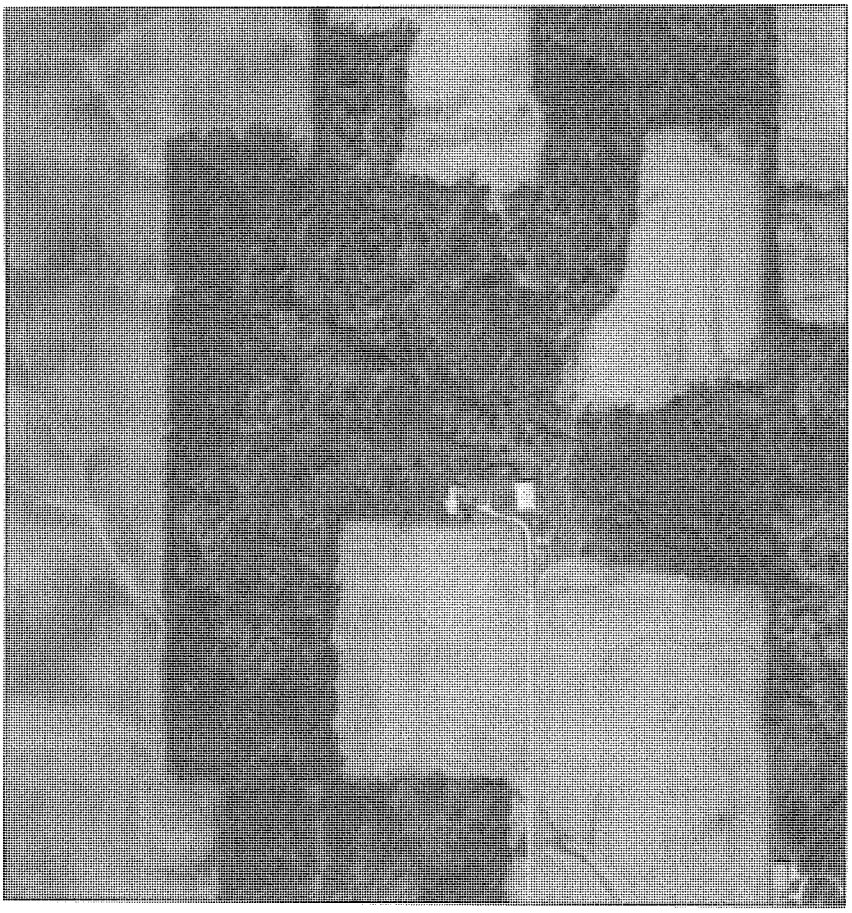
Conclusion

As this testimony reveals, Martin Farms has been through a regulatory saga over the past seven years relating to farm maintenance and development activities. Although Martin Farms has not contested Corps jurisdiction in previous encounters for encapsulation of farm ditches and tree-clearing for farm development, in the current situation it believes the Corps has improperly alleged jurisdiction over tree-clearing and farm cultivation work without sufficient evidence. Inconclusive Google Earth images and speculation about potential impacts to traditionally navigable waters that are over 100 river miles away cannot and should not support regulatory enforcement actions by the agency over a farmer's development on his land.

March 30, 2005
Northern Rim Portion
Legend
Orange Polygon = Tree Clearing Area
N


March 30, 2005
Southern/Bottom Portion
Legend
Orange Polygon = Tree Clearing Area
N

Martin #3 Orthos 2011



June 16, 2015

1:4,000

State Boundary

0 0.0325 0.065 0.13 mi

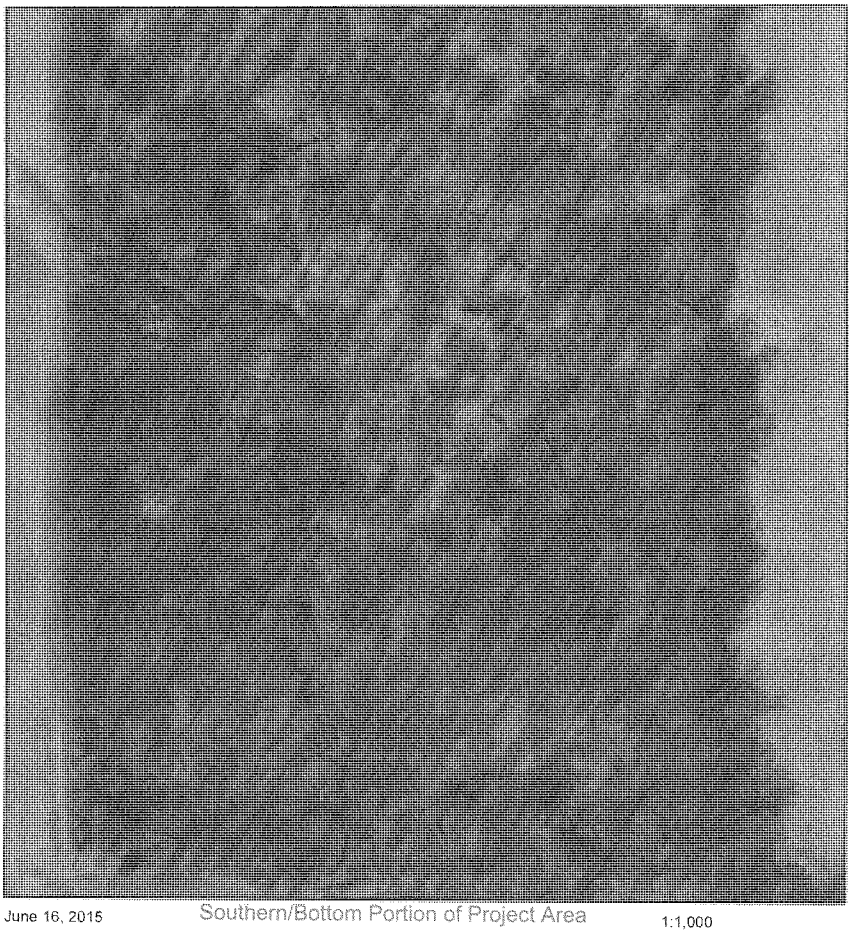
0 0.05 0.1 0.2 km

Indiana Spatial Data Portal, UITS, ESRI
Indiana Department of Transportation (INDOT), U.S. Census Bureau (USCB), Indiana Geographic Information Council (IGIC), UITS, Indiana Spatial Data Portal

Leslie Estill

Orthos 2011

Martin #3



June 16, 2015

Southern/Bottom Portion of Project Area

1:1,000

0 0.0075 0.015 0.03 mi

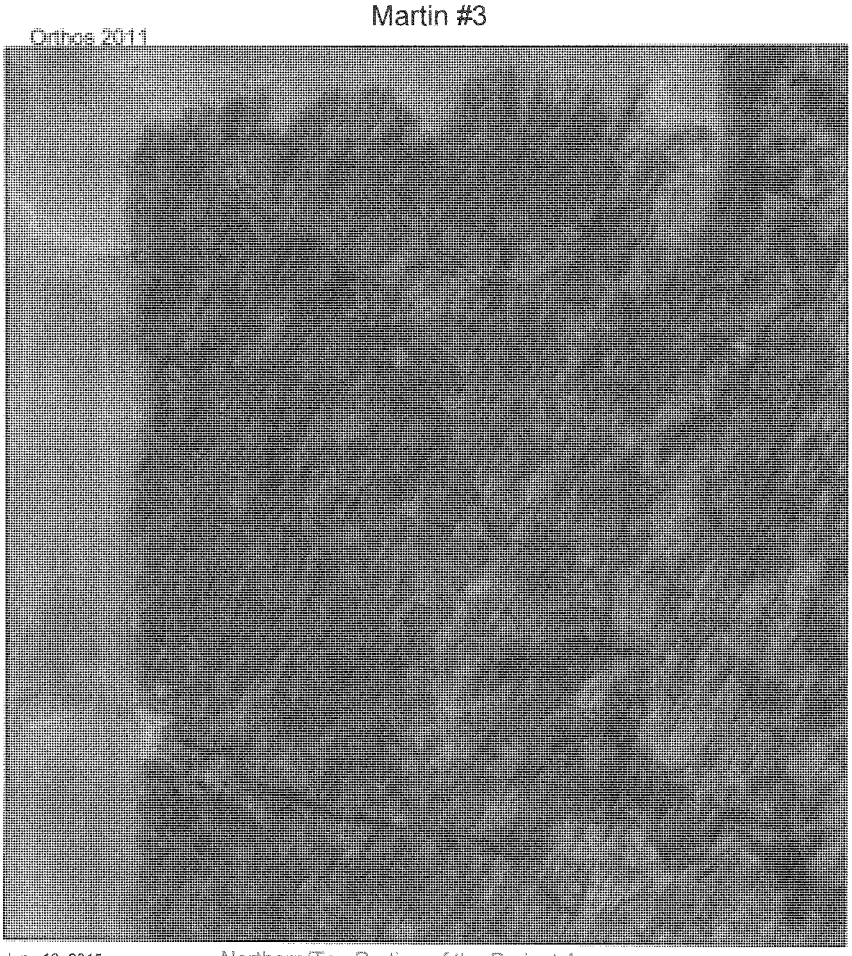
0 0.0125 0.025 0.05 km

State Boundary

Indiana Spatial Data Portal, UITS, ESRI
Indiana Department of Transportation (INDOT), U.S. Census Bureau (USCB), Indiana Geographic Information Council (IGIC), UITS, Indiana Spatial Data Portal

Leslie Estill

Martin #3



June 16, 2015

Northern/Top Portion of the Project Area

1:1,000

State Boundary

0 0.0075 0.015 0.03 mi

0 0.0125 0.025 0.05 km

Indiana Spatial Data Portal, UITS, ESRI
Indiana Department of Transportation (INDOT), U.S. Census Bureau (USCB), Indiana Geographic Information Council (IGIC), UITS, Indiana Spatial Data Portal

Leslie Eshill

1974 USDA Soil Survey of Hendricks County, Indiana

Mr. Martins 3rd Violation (LRL-2014-921-lac)

RuB2
CrB
CrB
CrB

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): August 3, 2015

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CELRL-OPF-N, Martin Farms #3 Violation, LRL-2014-921-lae

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: Indiana County/parish/borough: Hendricks County City: near Stilesville
Center coordinates of site (lat/long in degree decimal format): Lat. 39.60711 °, Long. -86.61427 °
Universal Transverse Mercator: NAD 83
Name of nearest waterbody: Mud Creek
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: White River
Name of watershed or Hydrologic Unit Code (HUC): 05120203 - Eel

☑ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc…) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

☑ Office (Desk) Determination. Date: October 28, 2014

☑ Field Determination. Date: October 27, 2014

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There are no "*navigable waters of the U.S.*" within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area.

☐ Waters subject to the ebb and flow of the tide.

☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There are "*waters of the U.S.*" within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area.

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply): [1]

☐ TNWs, including territorial seas

☐ Wetlands adjacent to TNWs

☑ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs

☑ Non-RPWs that flow directly or indirectly into TNWs

☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

☐ Impoundments of jurisdictional waters

☐ Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:
Non-wetland waters: 2,669 linear feet: 1 width (ft) and/or 0.06 acres.
Wetlands: 0 acres.

c. Limits (boundaries) of jurisdiction based on: Established by OHWM

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):[3]

☐ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain:

---

[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.
[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).
[3] Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. **TNW**
   Identify TNW:
   Summarize rationale supporting determination:

2. **Wetland adjacent to TNW**
   Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. **Characteristics of non-TNWs that flow directly or indirectly into TNW**

   (i) **General Area Conditions:**
   Watershed size: 14 digit HUC is 6,948 acres
   Drainage area: Trib A has approximately 53 acres of drainage area, and Trib B has approximately 30 acres of drainage area.

   (ii) **Physical Characteristics:**
   (a) Relationship with TNW:
   ☐ Tributary flows directly into TNW.
   ☑ Tributaries flow through 3 tributaries before entering TNW.

   Project waters are 118.5 river miles from a TNW (Located at the beginning of the White River's designation as a TNW, 66.2 miles above its mouth to the Wabash River.)
   Project waters are 1.5 river miles from RPW. (For this analysis we used the tribs connections to Mud Creek, a blue line perennial RPW.)
   Project waters are 75 aerial (straight) miles from TNW.
   Project waters are 1.5 aerial (straight) miles from RPW. (For this analysis we used the tribs connections to Mud Creek, a blue line perennial RPW.)
   Project waters cross or serve as state boundaries. Explain: N/A
   Identify flow route to TNW[5]: Tribs A and B flow to (1)Mud Creek, (2) Mill Creek, (3) Eel River, and into the (4) White River, a TNW. The White River then flows into the Wabash River, another TNW.
   Tributary stream order, if known: First Order

   (b) General Tributary Characteristics (check all that apply):
   Tributary is: ☑ Natural
   ☐ Artificial (man-made). Explain:
   ☑ Manipulated (man-altered). Explain: These streams were natural until the violation occurred in 2011 and 2012. The violation involved the clearing, grading, and encapsulation of these stream channels.

[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.
[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

Tributary properties with respect to top of bank (estimate):
Average width: 1 feet
Average depth: .5 feet
Average side slopes: 3:1

Primary tributary substrate composition (check all that apply):

- [x] Silts
- [ ] Sands
- [ ] Concrete
- [x] Cobbles
- [ ] Gravel
- [ ] Muck
- [ ] Bedrock
- [x] Vegetation. Type/% cover: 100% cover before tree clearing occurred.
- [ ] Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: Probably stable with sediment deposits from the adjacent crop fields.
Presence of run/riffle/pool complexes. Explain: None. These streams have ephemeral and intermittent flow.
Tributary geometry: Meandering
Tributary gradient (approximate average slope): 2%

(c) Flow:
Tributary provides for: ephemeral and intermittent flow
Estimate average number of flow events in review area/year: 20 (or greater)
Describe flow regime: 24 hours after a rain event for the ephemeral tributaries, and approximately 3 months out of the year with a ground water influence for the intermittent tributary.
Other information on duration and volume: N/A
Surface flow is: Discrete and Confined Characteristics: Water was present within Intermittent Stream A during the field investigation on October 27, 2014, and the surface flow within the ephemeral streams is evident by the OHWM visible in aerial photography from 2005 and 2011 when leaf cover is down within this previously forested area.
Subsurface flow: Yes Explain findings: Intermittent Stream A has ground water influenced flow. There was water within this stream channel at the time of the field investigation on October 27, 2014, and the most recent rainfall within this area was 6 days prior to the investigation. In addition, this intermittent stream was encapsulated during the violation activity. However, the entrance and exit of the pipe was observed during the field investigation.

- [ ] Dye (or other) test performed:

Tributary has (check all that apply):

- [x] Bed and banks
- [x] OHWM[6] (check all indicators that apply):
  - [x] clear, natural line impressed on the bank
  - [ ] the presence of litter and debris
  - [ ] changes in the character of soil
  - [ ] destruction of terrestrial vegetation
  - [ ] shelving
  - [ ] the presence of wrack line
  - [x] vegetation matted down, bent, or absent
  - [ ] sediment sorting
  - [ ] leaf litter disturbed or washed away
  - [ ] scour
  - [ ] sediment deposition
  - [ ] multiple observed or predicted flow events
  - [ ] water staining
  - [ ] abrupt change in plant community
  - [x] other (list): OHWM is visible in aerial photography when leaf cover is off the surrounding trees.
- [ ] Discontinuous OHWM.[7] Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

- [ ] High Tide Line indicated by:
  - [ ] oil or scum line along shore objects
  - [ ] fine shell or debris deposits (foreshore)
  - [ ] physical markings/characteristics
  - [ ] tidal gauges
  - [ ] other (list):
- [ ] Mean High Water Mark indicated by:
  - [ ] survey to available datum;
  - [ ] physical markings;
  - [ ] vegetation lines/changes in vegetation types.

(iii) Chemical Characteristics:
Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).
Explain: The observable water within Intermittent Stream A was clear during the field investigation on October 27, 2014.

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[6] A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.
[7] Ibid.

Identify specific pollutants, if known: Pollutants are washed from the adjacent crop fields into these stream channels. These pollutants include sediment, pesticides, and fertilizer (nitrogen and phosphorus).

(iv) Biological Characteristics. Channel supports (check all that apply):

- [x] Riparian corridor. Characteristics (type, average width): A forested riparian zone on all the identified stream channels was present before the violation activity occurred. The riparian zone on average was over a 100 feet wide on each side of the stream channels.
- [ ] Wetland fringe. Characteristics:
- [x] Habitat for:
  - [x] Federally Listed species. Explain findings: The forested riparian corridor previously surrounding the intermittent stream channel may have provided habitat for the endangered Indiana bat (*Myotis sodalis*) and the threatened northern long-eared bat (*Myotis septentrionalis*). Bother protected bat species find habitat within riparian corridors near RPWs.
  - [ ] Fish/spawn areas. Explain findings:
  - [ ] Other environmentally-sensitive species. Explain findings:
  - [ ] Aquatic/wildlife diversity. Explain findings:

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW N/A

(i) Physical Characteristics:

(a) General Wetland Characteristics:
Properties:
Wetland size:
Wetland type. Explain:
Wetland quality. Explain:
Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:
Flow is : Explain:
Surface flow is:
Characteristics:
Subsurface flow: Yes Explain findings:
- [ ] Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:
- [ ] Directly abutting
- [ ] Not directly abutting
  - [ ] Discrete wetland hydrologic connection. Explain:
  - [ ] Ecological connection. Explain:
  - [ ] Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW
Project wetlands are river miles from TNW.
Project waters are aerial (straight) miles from TNW.
Flow is from:
Estimate approximate location of wetland as within the floodplain.

(ii) Chemical Characteristics:
Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain:
Identify specific pollutants, if known:

(iii) Biological Characteristics. Wetland supports (check all that apply):
- [ ] Riparian buffer. Characteristics (type, average width):
- [ ] Vegetation type/percent cover. Explain:
- [ ] Habitat for:
  - [ ] Federally Listed species. Explain findings:
  - [ ] Fish/spawn areas. Explain findings:
  - [ ] Other environmentally-sensitive species. Explain findings:
  - [ ] Aquatic/wildlife diversity. Explain findings:

3. Characteristics of all wetlands adjacent to the tributary (if any) N/A
All wetland(s) being considered in the cumulative analysis:
Approximately () acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)

Summarize overall biological, chemical and physical functions being performed:

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. 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). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
   Tributaries A and B have the capacity to carry pollutants from the adjacent crop fields such as sediment, pesticides, and fertilizer into the White River, a TNW, which then flows into the Wabash River, a TNW. Before this area was mechanically cleared of trees, the forested riparian zone would have filtered some of these pollutants out before entering these tributaries and prevented these pollutants from entering downstream tributaries. In addition, the forested riparian zone would have likely retained some local flood waters. The physical, chemical, and biological integrity of these tributaries influence the integrity of the downstream TNWs because these tributaries convey pollutants and nutrients downstream. Before the tributaries were cleared of their forested riparian zone, less pollutants and more beneficial nutrients were transported to downstream tributaries and TNWs.
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
   [ ] TNWs: linear feet width (ft). Or, acres.
   [ ] Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**
   [ ] Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: .
   [✓] Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B.
   Provide rationale indicating that tributary flows seasonally: Intermittent Stream A has ground water influenced flow. There was water within this stream channel at the time of the field investigation on October 27, 2014, and the most recent rainfall within this area was 6 days prior to the investigation.

   Provide estimates for jurisdictional waters in the review area (check all that apply):
   [✓] Tributary waters: 547 linear feet, 1 width (ft).
   [ ] Other non-wetland waters: acres.
   Identify type(s) of waters:

3. **Non-RPWs[8] that flow directly or indirectly into TNWs.**
   [✓] Waterbody that is not a TNW or a RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

   Provide estimates for jurisdictional waters within the review area (check all that apply):
   [✓] Tributary waters: 2,122 linear feet, 1 width (ft).
   [ ] Other non-wetland waters: acres.
   Identify type(s) of waters:

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**
   [ ] Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
   [ ] Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:
   [ ] Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

   Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**
   [ ] Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisidictional. Data supporting this conclusion is provided at Section III.C.

   Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**
   [ ] Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

   Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.[9]**
   As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.
   [ ] Demonstrate that impoundment was created from "waters of the U.S.," or
   [ ] Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
   [ ] Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]

[ ] which are or could be used by interstate or foreign travelers for recreational or other purposes.
[ ] from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
[ ] which are or could be used for industrial purposes by industries in interstate commerce.
[ ] Interstate isolated waters. Explain:
[ ] Other factors. Explain:

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):
[ ] Tributary waters: linear feet width (ft).
[ ] Other non-wetland waters: acres.
Identify type(s) of waters:
[ ] Wetlands: acres.

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[8] See Footnote # 3.
[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.
[10] Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.*

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- ☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- ☐ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
  - ☐ Prior to the Jan 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- ☐ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:
- ☐ Other: (explain, if not covered above):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): # linear feet # width (ft).
- ☐ Lakes/ponds: # acres.
- ☐ Other non-wetland waters: # acres. List type of aquatic resource: .
- ☐ Wetlands: # acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): # linear feet # width (ft).
- ☐ Lakes/ponds: # acres.
- ☐ Other non-wetland waters: # acres. List type of aquatic resource: .
- ☐ Wetlands: # acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- ☐ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- ☐ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
  - ☐ Office concurs with data sheets/delineation report.
  - ☐ Office does not concur with data sheets/delineation report.
- ☑ Data sheets prepared by the Corps: See AJD – Fig 1 and 2 in pdf
- ☐ Corps navigable waters' study:
- ☐ U.S. Geological Survey Hydrologic Atlas:
  - ☐ USGS NHD data.
  - ☐ USGS 8 and 12 digit HUC maps.
- ☑ U.S. Geological Survey map(s). Cite scale & quad name: Hall, Indiana 1:24K Quad
- ☐ USDA Natural Resources Conservation Service Soil Survey. Citation:
- ☐ National wetlands inventory map(s). Cite name:
- ☐ State/Local wetland inventory map(s):
- ☐ FEMA/FIRM maps:
- ☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
- ☑ Photographs: ☐ Aerial (Name & Date):
  - or ☑ Other (Name & Date): Field Investigation 10/27/2014 Photo Log
- ☐ Previous determination(s). File no. and date of response letter:
- ☐ Applicable/supporting case law:
- ☐ Applicable/supporting scientific literature:
- ☑ Other information (please specify):
  - Corps Documentation of Field Investigation "MFR #3 Martin Violation Investigation October 27, 2014
  - Corps Documents titled "additional documents 6-15-2015" displaying aerial photography from 1998 – 2014 and a soil survey from 1974.

B. ADDITIONAL COMMENTS TO SUPPORT JD: This approved JD is associated with a violation that discharged fill material within 2,669 linear feet of stream channels in order to expand adjacent crop fields. The Corps C&D letter sent out to the violator, Mr. Merlin Martin, is dated March 12, 2015.

Estill/OPF-N
McKay/OPF-N

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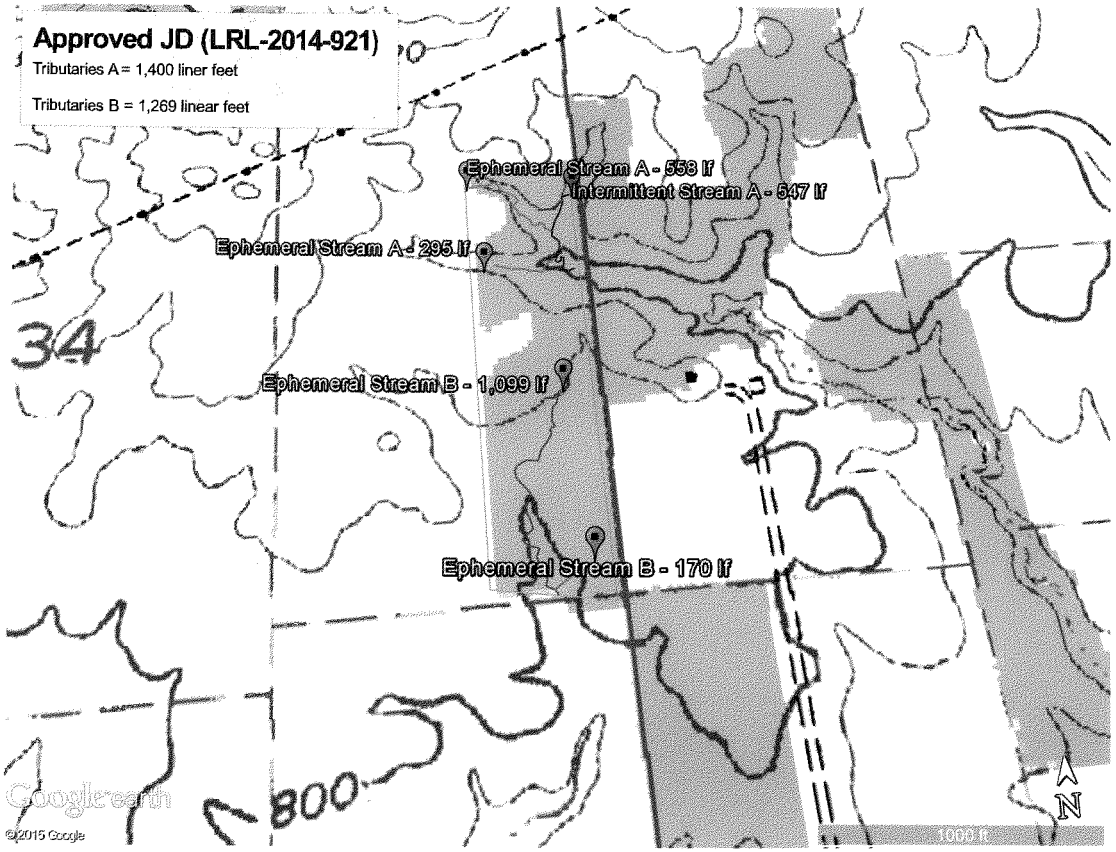

Approved JD (LRL-2014-921)
Tributaries A = 1,400 liner feet
Tributaries B = 1,269 linear feet
Ephemeral Stream A - 553 lf
Intermittent Stream A - 547 lf
Ephemeral Stream A - 295 lf
34
Ephemeral Stream B - 1,099 lf
Ephemeral Stream B - 170 lf
800
Google earth
©2015 Google
1000 ft
N

Approved JD (LRL-2014-821)
Tributary A = 1,400 linear feet
Tributary B = 1,200 linear feet
Aerial 8/28/2012
Tributary A
Tributary B
Tributary A
Tributary B
Tributary A
Tributary B

STATE OF INDIANA)
) ss:
COUNTY OF _____)

AFFIDAVIT OF REUBEN SCOTT

I, Reuben Scott, being over the age of 18 and having been first duly sworn upon my oath, do hereby swear and affirm that the following statements are correct and accurate to the best of my knowledge:

1. This affidavit is based on my personal knowledge of the following information.

2. Mr. Merlin Martin hired me to perform work on a parcel of his land that is near Anglin Road. I have been informed that this land is now subject to an investigation by the United States Army Corps of Engineers.

3. I did work in the northern part of the property, in the area that the Army Corps has identified as containing "Tributary A," in the summertime about seven or eight years ago (about 2007 or 2008).

4. I used an excavator in this area to install tile outlet for the fields to the west of this parcel and install 12" tile in the northern part of the property. This work took me a few days to complete.

5. I laid out the tiles following an erosional feature from the western property line to the eastern property line. The tile was laid at a depth of about 2 1/2 feet on the western edge to about 3 feet on the eastern end. The feature I followed to lay out the tile was shallow in places and more cut out in others. There were weeds on the ground and growing within the erosional feature.

6. At the time I was doing this work, the ground was dry. The erosional feature did not have any water in it. It appeared to be the type of feature that only had water in it when it rained.

7. The property had been logged a few years before I did this work. Small and medium-sized trees were left after the logging, and these trees were generally tall and thin. The log skidder tracks ran throughout the area. By the time I came in to do the tiling work, there were tall weeds on the ground and saplings had grown up. I only had to do minor tree removal to install the tile.

8. In the summer of 2013, I was hired to do some more work in the area identified by the Army Corps as containing "Tributary A". I used an excavator and a dozer to clear trees. I also installed about 230 feet of 12" tile along the eastern property line. I started this tile at the outlet pipe for the tile I'd installed in 2007-08 timeframe, but

installed a new outlet pipe for the new tile. The tile I laid in 2013 was put in about 3 feet deep.

9. At the time I did this work, the ground was dry. I did not observe any standing water on the ground or any flowing water. The erosional feature looked about the same as it did the last time I was there. It did not look like it carried water on a regular basis.

10. This work took me about a month to complete. I worked on it as I had time.

11. In 2014, I did more work for Mr. Martin on that parcel of land. This work was done in the southern part of the property, in the area identified by the Army Corps as containing "Tributary B." I worked on this project for about 3 months, from late summertime into the fall, as I had time.

12. For this work, I used an excavator and a dozer to take out stumps from the early 2000's logging operation and also take out shrubs and bushes. As with the other area, the logging company left small to medium-sized trees standing within this area, and these trees were generally tall and thin.

13. The ground was dry during the timeframe when I did this work. I did not observe any identifiable erosional feature or stream or any feature that looked like it would have water flowing through it. There were deer trails and log skidder tracks from previous logging activities. I also saw old clay tiles in the ground.

This concludes my affidavit.

Reuben Scott

Reuben Scott

Subscribed and sworn to before me this ___ day of September, 2015 by Reuben Scott.

Witness my hand and official seal.

[S E A L]

Julie K. Peters

Notary Public

My Commission Expires: November 18, 2016

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, LOUISVILLE
CORPS OF ENGINEERS
P.O. BOX 59
LOUISVILLE KY 40201-0059
FAX; (502) 315-6677
http://www.lrl.usace.army.mil/

Received
NOV 24 2015
Faegre Baker Daniels

Operations Division
Regulatory Branch (North)
ID No. LRL-2014-921-lae

NOV 19 2015

Ms. Olivia Lucas
Faegre Baker Daniels LLP
3200 Wells Fargo Center
1700 Lincoln Street
Denver, Colorado 80203-4532

Dear Ms. Lucas:

This letter is in response to your email of September 28, 2015. We have carefully reviewed and considered all available information including your response and the affidavit of Mr. Ruben Scott. We affirm our prior determination that the affected waters on Mr. Martin's property are jurisdictional and the actions taken by or on behalf of Mr. Martin constitute violations of the Clean Water Act. Some of the information in the affidavit seems to be incompatible with the existing evidence and other information is fully compatible with the Corps' determination.

The drainage patterns Mr. Ruben Scott describes as erosional features in his affidavit do not contradict, but rather match the previously provided soil survey and the attached USGS National Hydrography Dataset, which both support our Jurisdictional Determination. The stream channels within the project area were determined to have ephemeral and intermittent hydrologic flow. Ephemeral streams only have flow in them during and for a short duration after rain events. Intermittent streams have flow in them seasonally and are influenced by groundwater. Typically, ephemeral and intermittent streams are jurisdictional "waters of the U.S.," as the Corps has determined in this instance. The flow regimes of both stream types are consistent with Mr. Scott's description of the project area being dry during the work he performed in the summers of 2007 or 2008 and 2013.

If field tiles were installed with an excavator by Mr. Scott in 2007 or 2008, they did not serve to eliminate the hydrology of the stream channels enough to change their jurisdictional status. The meandering stream channels can be seen in the previously provided 2005 and 2011 aerials. In addition, available aerial imagery does not provide evidence of excavator work or of mechanized tree clearing within the project area between 1998 and 2011. Therefore, it seems that if any tree clearing occurred within the project area before 2011, it was selective tree clearing.

Under Corps regulation, approved Jurisdictional Determinations associated with unauthorized activities are generally not appealable. However, if Mr. Martin wishes to pursue an appeal of our Jurisdictional Determination within the agency, in this instance the Corps will consider a Request for Appeal (RFA). Enclosed with this letter you will find a Notice of Appeal Process (NAP) fact sheet and RFA form.
If he requests to appeal this Jurisdictional Determination, he must submit a completed RFA form to the Lakes and Rivers Division Office at the following address.

U.S. Army Engineer Division,
ATTN: Appeal Review Officer CELRD-PD-REG
550 Main Street - Room 10524
Cincinnati, Ohio 45202-3222

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 CFR Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. In addition, please be advised that the Corps cannot consider an RFA in this instance unless and until the enclosed Tolling Agreement is signed and returned to this office. The enclosed Tolling Agreement is specific to a possible RFA concerning the Jurisdictional Determination.

If Mr. Martin declines the option to go through the appeals process or does not file an acceptable RFA for the Jurisdictional Determination, then he must complete either option "a" or "b" below within 75 days from the date of this letter to resolve this violation:

a. Submit a restoration plan to this office for review and approval. The plan must include a time frame and monitoring plan.

b. Submit an after-the-fact Department of the Army (DA) permit application, with proposed compensatory mitigation, to this office to authorize the work performed in Tributaries A and B. However, before we can accept an application for a DA permit, Mr. Martin must sign the previously provided Tolling Agreement and return it to this office.

Upon receipt of a complete application including acceptable plans, we will begin the permit processing procedures. Normally, this will require issuance of a Public Notice allowing interested parties an opportunity to register objections or comments on the project.

Please be advised that this violation cannot be considered resolved until the work is authorized under an after-the-fact permit or the unauthorized fill is removed and the necessary restoration of the worksite accomplished. If Mr. Martin fails to choose either option "a" or "b," USACE will make a determination as to the appropriate enforcement action to be taken in this matter.

If you have any question regarding the above directives, please coordinate with Ms. Leslie Estill by writing to the above address, sending an email to Leslie.A.Estill@usace.army.mil, or scheduling a time for a conference call by calling (502)315-6711. Any correspondence on this matter should refer to our ID No. LRL-2014-921-lae.

A copy of this letter is being furnished to the property owner and to Indiana Department of Environmental Management (see enclosure for addresses).

Sincerely,

for Lee Anne Devine
Chief, Regulatory Branch
Operations Division

Enclosures

ADDRESS FOR PROPERTY OWNER

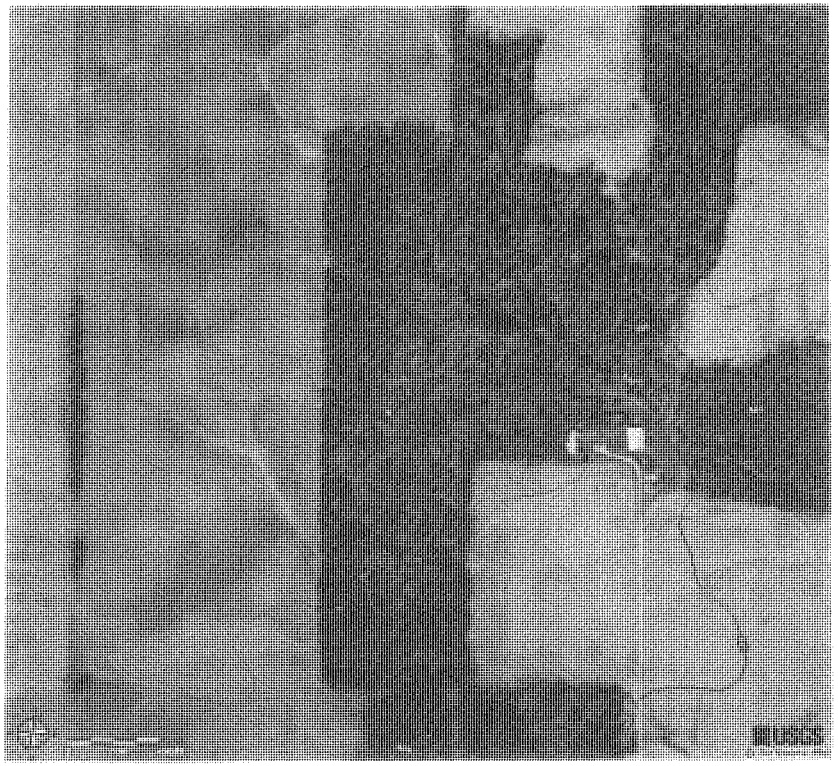
Mr. Merlin Martin
2408 Tudor Road
Clayton, Indiana 46118

ADDRESS FOR COORDINATING AGENCY

Ms. Samantha Groce
Indiana Dept. of Environmental Management
Office of Water Quality
100 North Senate Avenue
Indianapolis, Indiana 46204-2251

USGS - The National Map Viewer

NOTES: Imagery Topo with Hydro - NHD



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9/18/19 12:28 PM

Senator SULLIVAN. And the record will be open for 2 weeks to this hearing, so if there is any additional information that you think that this committee needs to see, please make sure you get it in.

I want to thank the witnesses for their testimony.

Mr. Parrish, I want to respond to your comments about Federal agencies that can scare the dickens out of farmers. I know that some of you continue to deal with the EPA and the Corps on a regular basis. My view is that the vast, vast majority of our Federal Government officials do their job honorably.

But as your testimony indicated, some of you may be concerned about retribution for speaking out. You still have permits, unfortunately decades long in terms of the wait, and if you feel that a Federal employee has in any way treated you, any of the witnesses here, differently because you had the courage to bring your concerns to this subcommittee and share them with the U.S. Senate, first of all, that would be unconscionable, it would be illegal. We would certainly want you to inform me or my office if you feel that any Federal official is retaliating against you for providing this very important information to Congress at this hearing today.

Again, I want to thank all the witnesses. This was a very informative hearing for all of us.

This hearing is adjourned.

[Whereupon, at 4:12 p.m. the subcommittee was adjourned.]