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HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT HOLDS A
HEARING ON THE CLEAN WATER ACT JURISDICTIONAL RULE, PANEL 1

JUNE 11, 2014

SPEAKERS: REP. BOB GIBBS, R-OHIO CHAIRMAN REP. DON YOUNG, R-ALASKA REP. GARY G. MILLER, R-CALIF. REP. SHELLEY MOORE CAPITO, R-W.VA. REP. CANDICE S. MILLER, R-MICH. REP. DUNCAN HUNTER, R-CALIF. REP. ANDY HARRIS, R-MD. REP. RICK CRAWFORD, R-ARK. REP. JEFF DENHAM, R-CALIF. REP. REID RIBBLE, R-WIS. REP. RICHARD HANNA, R-N.Y. REP. THOMAS MASSIE, R-KY. REP. TOM RICE, R-S.C. REP. DANIEL WEBSTER, R-FLA. REP. STEVE DAINES, R-MONT. REP. RODNEY DAVIS, R-ILL. REP. MARK MEADOWS, R-N.C. REP. MARKWAYNE MULLIN, R-OKLA. REP. MARK SANFORD, R-S.C. REP. BILL SHUSTER, R-PA. EX OFFICIO

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REP. DAVID JOLLY, R-FLA.

WITNESSES: ROBERT W. PERCIASEPE, DEPUTY ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

JO-ELLEN DARCY, ASSISTANT SECRETARY OF THE ARMY, FOR CIVIL WORKS

[*] GIBBS: The Committee on Water Resources and Environment, the Subcommittee of the Transportation and Infrastructure will come to order. Today, having a hearing on the impacts of the proposed rule by the USCPA, the Army Corps of Engineers of the Waters of the United States.

A couple of housekeeping issues here first. We've received numerous requests for written testimony to be submitted to the record. I ask for

unanimous consent that all written testimony be included in the hearing record, be kept open for 30 days after this hearing in order to accept these and other submissions on written testimony.

Any objection? Hearing none, so ordered.

Welcome to the first -- our first panel -- after we do our couple of opening statements, we have the USCPA Deputy Administrator and Secretary of the Army Corps of Engineers, Secretary Darcy.

Then we'll have a panel two after the first panel, six individuals representing various government entities and associations in the challenges that they see with the proposed rule and impacts. I yield myself here for my opening statement.

First of all, again, I would like to welcome everybody to the hearing today of the potential impacts of the proposed changes to the Clean Water Act Jurisdictional Rule which aims to redefine the term "Waters of the United States."

On April 21st of this year, the EPA and Army Corps of Engineers published a proposed rule in the Federal Register that, according to the agencies would clarify the scope of federal jurisdiction under the Clean Water Act. After reviewing the proposed rule, I have serious concerns about the rule and the process the agencies are following to develop it.

Since 1972, the Clean Water Act has been instrumental in dramatically improving the quality of our nation's waters. Fundamentally to that progress has been the federal-state partnership, which recognizes that not all waters need to be subject to federal jurisdiction, and that the states should have the primary responsibility of regulating waters within their individual boundaries.

However, I am concerned that this rule will undermine the federal-state partnership and erode state authority by granting sweeping new federal jurisdiction to waters never intended for regulation under the Clean Water Act, including ditches, man-made ponds, flood plains, riparian (ph) areas and seasonally-wet areas.

In promoting this rule, the agencies are implying to the public that massive amounts of wetlands and stream miles are not being protected by the states and that this rule, which will essentially federalize all waters, is needed to save them. However, nothing is further from the truth. States care about and protect our waters.

I also am concerned how the proposed rule misconstrues and manipulates their legal standards announcing their SWANCC and Rapanos Supreme Court cases, effectively turning those cases that placed limits in Clean Water Act jurisdiction into a federal justification for the agencies to expand their assertion of federal authority over all waters nationally.

The agencies had an opportunity to develop clear and reasonable bright line rules on what is jurisdictional versus not. But they instead chose to write many of the provisions in the proposed rule vaguely in order to give federal regulators substantial discretion to claim federal jurisdiction over most any water or wet area. This is dangerous because this vagueness will leave the regulated community without any clarity and certainty as to their regulatory status and will leave them exposed to citizen's lawsuits. In addition, since many of these jurisdictional decisions will be made on a case-by-case basis, as they have stated, and this will give the federal regulators free rein to find jurisdiction.

This rule, in essence, will establish a presumption that all waters are jurisdictional and will shift to property owners and others in the regulated community the burden of proving otherwise. This rule set a very high bar for the regulated community to overcome. Nevertheless, the agencies continue to claim that no new waters would be covered by the rulemaking.

The agencies cannot, through guidance or a rule, change the scope and meaning of the Clean Water Act, as they are trying to do here. I also am troubled that the sequence and timing of the actions of the agencies have been taking to develop this rule are undermining the credibility of the rule and the process to develop it.

First, instead of initiating a rulemaking process by soliciting input from, and developing consensus with, the general public, scientific communities, and federal and state resource agencies on how to identify the appropriate scope of jurisdiction, the agencies rushed ahead on their own and developed a draft guidance that would be, the agencies' own admission, increases significantly the scope of the Clean Water Act's jurisdiction over more waters and more provisions of the Act.

Then after facing substantial bipartisan opposition to the expansive new guidance, the agencies proceeded ahead again on their own with a rulemaking that is simply based on that expansive guidance.

And to hide the inaccuracies of the rulemaking process that the agencies have embarked on, EPA decided to develop a so-called scientific study that is

supposed to provide a basis for determining the reach of federal jurisdiction under the Clean Water Act.

It is disturbing that the EPA intentionally precluded from the study a review and discussion of scientific concepts that are highly relevant to determining which waters should be subject to Clean Water Act coverage.

The interconnectedness of the science and policy issues here warrants rigorous scientific peer review prior to the ruling's crafting. However, instead of waiting until the science study was completed, the agencies who wrote the rule long before the study's report has peer reviewed and finalized.

The agencies also took steps to hide the regulatory impacts of the rulemaking by preparing a flawed economic analysis that did not comprehensively access all the costs and benefits.

This is very troubling because this rule, if not carefully crafted, will have sweeping economic and regulatory implications for the entire nation, by adversely impacting nearly all sectors of the economy, threatening jobs, increasing compliance costs, restricting the rights of landowners, inviting costly litigation and undermining the ability of states and local governments to make decisions about their lands and waters.

Regulations of the nation's waters can and must be done in a matter that responsibly protects the environment without unnecessary and costly expansion of the federal government. Finally, I am pleased to hear that the agencies have just announced a 91-day extension of the public comment period for the proposed rule.

However, the agencies should extend the comment period on the proposed rule until after the EPA Science Advisory Board has completed its review of the science study and the study's report is thoroughly vetted to ensure that any final rule is based on the final, peer-reviewed report.

I look forward to that testimony from our witnessing today. And I would recognize Chairman Shuster of the Transportation and Infrastructure Committee for any statement he may have.

SHUSTER: Thank you, Mr. Chairman.

The President's published proposed rule, which of course, Mr. Gibbs did a great job of going through it, it will dramatically extend the reach of the federal government when it comes to regulating ponds, ditches, and wet areas.

And I don't believe anybody's going to dispute that. I mean, we may attempt to hear that today, but that's what's going to happen. But this is another example of this administration seeks to use executive action and brute force, bypassing Congress, ignoring Supreme Court rulings of the past, unilaterally broadening the scope of the Clean Water Act and the federal government's reach in everyday lives will adversely affect the nation's economy, threaten jobs, invite costly litigation, and restrict the rights of landowners, states, and local governments to make decisions about their own lands.

This massive federal jurisdictional grab was the subject of failed legislation in the 110th and 111th Congress. And I know my colleagues over there -- we were the majority at the time, and I hope we can join together to fight back on this because, once again, this is going to be Congress ceding power to the Executive Branch.

And if we do that, if we allow this go forward, we will never get that back. I don't care if it's a Republican president or a Democrat president. We give it up and they will never give it back to us. So this is a fight we need to have, we need -- and we need to win.

The 110th and the 111th Congresses, it was strong bipartisan support to prevent those bills from moving forward, and I said the administration now is doing in and around Congress to try to see that, try at least to gain that federal power expansion through this rulemaking.

The rule supposedly ends up clarifying water bodies subject to federal jurisdiction under the Clean Water Act. But, as I said, I'm concerned that there are serious flaws in this rule, and the Executive Branch will take power away from the Congress.

Twice, the Supreme Court has told the agencies there are limits to federal jurisdiction under the Clean Water Act, and they had gone too far in asserting their authority. Now the Administration appears to be cherry-picking those Supreme Court rulings, taking out language and attempt to gain its expanded authority, rather than heeding the directive of the Court.

It's the responsibility of Congress, and not the administration, to define the scope of jurisdiction under the Clean Water Act. This rule will have sweeping economic and regulatory implications for the entire nation. I believe that the agencies will be better off correcting the deficiencies in this rulemaking and develop a rule that is credible, reasonable, and consistent with the law.

Regulation of the nation's waters must be done in a manner that protects the environment without unnecessary and costly expansion of the federal government. We can continue to protect our waters without unreasonable and burdensome regulations on our businesses, farmers, and families.

So again, I have tremendous concern. This is something that I know that those of us in our side of the committee are going to fight to make sure this doesn't move forward. And that we, as Congress -- and I, again, encourage my Democrat colleagues to look at this as a -- this is fight between the Executive Branch and the Legislative Branch.

This is our constitutional duty, and they're going to take it away from us. And I said to you, if that would -- if this were a Republican administration, I'd be saying the same thing and fighting it just as hard. So I encourage you all to keep an open mind as we go through this, and let's fight to keep Congress relevant in this process.

I yield back.

GIBBS: At this time, I recognize the Ranking Member of the Full Transportation and Infrastructure Committee, Mr. Rahall.

RAHALL: Thank you very much, Mr. Gibbs. I appreciate you as Chairman holding this hearing, and I appreciate very much our witnesses being with us today on both panels.

This is an excellent opportunity to examine and question the regulations that are pouring out of the Environmental Protection Agency. We are told that this latest regulation defining "Waters of United States" is an attempt to address the muddled mess of what waters are subject to the permitting process in the Clean Water Act.

Certainly, the most recent Supreme Court decisions on the matter have only left the question increasingly murky; opened a legal void that is begging to be addressed. Unfortunately, from all that I have seen and heard to date, this latest proposed rule has only further muddied the waters.

I've heard many times from proponents of this rule that the intention in crafting it was to provide certainty so that businesses and individuals, before setting off on some undertaking, would know whether or not they needed to go through the lengthy and expensive permitting process.

On that score, I have to give credit where credit is due. This proposal certainly does provide certainty, the certainty that if you want to undertake

an activity, whatsoever, that may involve so much as a puddle, you must seek a permit.

So I confess, I'm terribly frustrated. I represent a state that has been brutally beaten up by the barrage of regulations gushing out of the EPA. We feel we are under siege from an agency so power hungry that it is gobbling up jurisdiction and taking power away from our states, away from other federal agencies, and ultimately, away from the people. And any serious person looking at this agency will have to question if it has bitten off more than it can chew already.

The EPA likes to cultivate the impression that science and pragmatism govern the day, and that it is not swayed by ideology. But I see it differently. I see an agency that is so hard over against coal, that it will gloss over the science in doing so; and if doing so, helps to stop the construction of coal-fired power plants.

I see an agency that is so blinded by an anti-coal philosophy that it will stonewall efforts to provide coal-fueled residents with modern sewer systems and safer water. It is an agency that is willing to block construction of a major national highway, add huge savings to the American taxpayers if it would involve the mining of a little coal.

This committee is right to view this new proposal with skepticism. We must look candidly and matter-of-factly at the cost of the latest EPA proposal on the Waters of the United States and its effects on our jobs, on our economy, and on the course of our nation.

So I thank the Chairman for allowing me one of these opening comments, and thank him again for having this hearing today.

GIBBS: Thank you. This time I recognize my Ranking Member Mr. Bishop for any comments he may have.

Bishop: Thank you very much, Mr. Chairman, and thank you for holding today's hearing.

Let me take a moment to frame out the context of today's hearing and try to highlight some of the factors that brought us to where we are today.

The starting point of all of these was Congress' passages of the Clean Water Act in 1972, which was approved by a veto override by a 10-1 margin over President Nixon's veto. In that law, the Congress broadly defined the scope of the Act as "the navigable waters," meaning the Waters of the United

States in the territorial seas and directed the agencies before us today to fill in the details.

For almost 30 years, the agencies' regulatory definition of those terms were the law of the land. And since the enactment of the Clean Water Act, we have seen dramatic improvement in the number of water bodies that are safe for fishing and swimming; up from one-third of the nation's waters in 1972 to approximately two-thirds of the nation's waters today.

I hope we can all agree that's a good thing. And I hope we can also all agree that that improvement would not have happened were it not for the Clean Water Act.

Then in 2001, a stakeholder challenge on the Act's application with respect to an Illinois landfill, resulted in the Supreme Court questioning the application of these definitions. Later in 2006, the Supreme Court again questioned the application of these rules to two wetlands in the state of Michigan.

In the latter case, the Rapanos case, Chief Justice Roberts wrote that the Corps and the EPA needed to do a better job in defining the scope of the Clean Water Act. So this is, in fact, a conflict between branches of government (inaudible) the conflict is between the judicial branch and the Executive Branch.

This is something that has been attempted by the last two administrations -- the administration of President George W. Bush and the current administration.

In 2003, the Bush Administration initiated a public rulemaking to define the term "Waters of the United States" consistent with the rulings of the Supreme Court, as well as took public comment on whether other regulatory definitions on the scope of the Clean Water Act jurisdiction also needed clarification.

In response, several outside stakeholders, including some of the groups represented here this morning, recommended that the agency use the rulemaking process as a means of providing increased clarity to the, quote, "hodgepodge of ad hoc and inconsistent jurisdictional theories," closed quote -- as well as to define other terms in the regulations, including such terms as "tributary and adjacent." The 2003 rulemaking attempt by the agencies never reached its conclusion.

Following in the footsteps of the Rapanos decision, the federal agencies released two interpretive guidance documents, one in 2007 and a second in 2008 -- the latter of which remains enforced today.

Now, let's fast-forward to 2014. The list of stakeholders publicly recommending that agencies carry out a rulemaking has expanded and now includes groups ranging from the National Wildlife Federation to the Water Advocacy Coalition.

In response earlier this year, the administration initiated its own rulemaking to do just that -- to clarify the scope of the Clean Water Act consistent with the parameters laid down with us by the Supreme Court over the years.

Now, I'm not naive enough to expect that the various groups following this proposed rule would agree on how to clarify the scope of the Clean Water Act or where the bright lines of jurisdiction should lie.

However, I do believe it is reasonable for the agencies to be allowed to continue this open process in providing the clarity that these stakeholders have demanded over the years. If the stakeholders have concerns or recommendations or changes to the proposed rule, that is what the public comment period was created for.

And I strongly encourage all interested parties to utilize this open process to make their views known. However, I do not support throwing out the entire rulemaking process simply because there is disagreement with the initial draft.

Going back to the legislative play, in the past 30 years, the Supreme Court has issued three rulings that directly addressed the scope of the Clean Water Act, the Bayview Homes case, the SWANCC case, and the Rapanos case. Each of these decisions outlined a piece of the puzzle of defining the scope with the Clean Water Act.

In the Bayview Homes case, the justices unanimously agreed that certain wetlands fell within the protections of the Clean Water Act. In the SWANCC decision, the 5-4 majority of the Court ruled that the presence of migratory birds on a water of the United States could not be the sole basis for determining jurisdiction.

Finally, in Rapanos, the Court issued a 4-1-4 decision where four justices led by Justice Scalia outlined a relatively permanent waters test for determining jurisdiction; while Justice Kennedy established a complementary test, the so-called Significant Nexus Test, for determining jurisdiction.

And the remaining four justices agreed with the agencies' current authorities. These three decisions outlined the four corners of the Supreme Court's interpretation of the scope for the Clean Water Act.

So in my view, the question becomes how does the 2000 -- April 2014 proposed rule compare with tests on the Clean Water Act's scope as outlined by the Supreme Court. This will be the area of questioning that I will focus in on today as this hearing progresses. If the stakeholders today suggest a different approach, I welcome their input as well.

Mr. Chairman, I hope that all involved with today's hearing will use this hearing as a learning experience about what this rulemaking does, and as important, what it does not do. I welcome the witnesses here this morning. I look forward to your testimony.

I yield back.

GIBBS: If any other members have opening statements, they can submit their written testimony for the record.

This time, we'll recognize our panel one. We have the Honorable Robert Perciasepe. He is the Deputy Administrator of the United States of Environmental Protection Agency. And we also have the Honorable Jo-Ellen Darcy, who is the Assistant Secretary Of The Army Civil Works. Mr. Perciasepe, I will recognize you first. The floor is yours. Welcome.

PERCIASEPE: Thank you, Mr. Chairman and members, Ranking Member. Thank you so much for inviting us today.

GIBBS: Can you pull your mike up a little bit closer? Maybe...

PERCIASEPE: I apologize.

I think we all agree, and I've heard this already that we want clean and safe waters for ourselves, our economy, our environment, our children, our future. I also want to express my appreciation to my colleague and friend, the Assistant Secretary of the Army, Jo-Ellen Darcy for her leadership and commitment to protecting the nation's water.

We are undertaking a process to clarify the geographic scope of the Clean Water Act to improve a regulation that has been in place for nearly 30 years. The proposed rule will help provide families, manufacturers, farmers, ports, energy producers, and the American people with the clean water they depend on.

The written testimony that I've submitted will provide more details about the proposed rule, including the agency's goal to respond over the request from stakeholders across the country to make a process of identifying waters protecting -- protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

We believe this rulemaking will minimize delays, costs and improve predictability, clarity, consistency for everyone who may or may not need a Clean Water Act permit.

I'll focus my opening remarks this morning on some of the misinformation that exist regarding the potential effects of this rule. And I'm concerned that incorrect information may have the effect of distracting the attention from the legal policy and scientific underpinnings of the proposed rule.

The agencies are meeting with Americans across the country, including farmers, energy companies, small business, state and local governments, ports and developers, and many others to solicit their comments, because remember, this is a proposal -- and to answer their questions about it.

We are hearing from the public directly and personally about how to improve the rule and how to make it most fair, flexible, and effective for everyone. In addition to providing valuable insights to our discussions, are also revealing an unfortunate pattern of misinformation.

For example, I've heard in my discussions with stakeholders that this regulation will require farmers to get permits for their cows to cross the stream, that this regulation will make dry washes that carry water only once in a thousand years protected under the Clean Water Act, that this rule will make entire flood plains subject to the Clean Water Act jurisdiction. I can tell the committee that, categorically, none of these are correct statements.

In contrast, here are some of the examples about what the proposed rule does and does not do. In adherence with the Supreme Court, it would reduce the scope of waters protected under the Clean Water Act compared to the existing regulations on the book.

It would not assert jurisdiction over any type of waters not previously protected over the past 40 years. The rule does not apply to lands, whole flood plains, backyards, wet spots, or puddles. It will increase transparency, consistency, and predictability in making jurisdictional determinations that reduce existing cost, confusion, and delays.

It represents the best peer-reviewed science about functions and values of the nation's waters. The agencies will not finalize this rule until the Science Advisory Board completes its review, which you've mentioned, Mr. Chairman.

It would reduce Clean Water Act's jurisdiction over ditches compared to the previous 2008 guidance. The rule will maintain all existing Clean Water Act exemptions and exclusions. In addition, the agencies have also identified agricultural conservation practices conducted in waters that do not require a 404 permit. We want to encourage conservation work on agricultural land.

We have published a proposed rule, not a final rule. We are currently taking public comment, and we have extended the comment period as you've already heard. We expect a tremendous amount of public response from a broad range of interest, and we're actively working to meet with a wide range of stakeholders.

This outreach has already been tremendously helpful to us in understanding the concerns and discussing effective solutions. We're going to continue to work hard and listen more effectively, and learn more, and better understand.

Let me just conclude by emphasizing my strong belief that what's good for the environment and clean water is also good for farmers, ranchers, foresters, manufacturers, homebuilders, small businesses, communities, energy producers, and all Americans.

We look forward to working with all stakeholders to reflect this important goal in the final rule, and to (inaudible) geographic rule of the Clean Water Act. And I thank you and I look forward to your questions.

GIBBS: Secretary Darcy, welcome. The floor is yours.

DARCY: Thank you. Good morning, Chairman Gibbs, Ranking Member Bishop, and all members of the committee.

Thank you for this opportunity today to discuss the proposed rule clarifying the definition of Waters of the United States under the Clean Water Act. Once implemented, this rule will enable the Army Corps of Engineers to more effectively and efficiently protect our nation's aquatic resources while enabling appropriate development proposals to move forward.

The Clean Water Act jurisdiction applies to navigable waters, defined in the statute as Waters of the United States including the territorial seas.

Our 1986 regulations defined Waters of the United States as traditional navigable waters, interstate waters, all other waters that could affect the interstate or foreign commerce, impoundments of Waters of the United States, tributaries, the territorial seas, and adjacent wetlands.

The U.S. Supreme Court has addressed the scope of waters regulated under the Clean Water Act in three occasions, specifically the Riverside Bayview Homes' case of 1985, the SWANCC decision in 2001, and the Rapanos decision in 2006.

The Court's decision significantly altered the regulatory landscape. And although the Corps and the Environmental Protection Agency have done a fine job adjusting their regulatory activities in response, a critical need exists for this rulemaking.

We received many comments from Congress, from organizations, from stakeholders, from the public urging the agencies to pursue notice and comment rulemaking, including Chief Justice Roberts himself in the Rapanos decision strongly recommended that the agencies initiate a rulemaking.

We've been working for several years now to develop a science- based rule that will provide the clarity needed, the transparency as well as the efficiency.

Under the proposed rule, the process of identifying Waters of the United States will become less complicated and more efficient as to which waters are and which waters are not jurisdictional.

Our proposal does not assert jurisdiction over any new category of waters. However, we do expect that there will be a small increase in jurisdiction over the existing 2008 guidance, but the extent of jurisdiction is less inclusive than the 1986 regulation.

Our decisions to propose to regulate by rule, all tributaries and adjacent waters and wetlands is scientifically based and is consistent with our understanding that these waters alone or in combination with similarly situated waters in the watershed have a significant nexus to jurisdictional waters.

Other waters may be determined jurisdictional only upon a case- specific determination that a significant nexus exist between the jurisdictional water. This is consistent with our current practice.

The proposed rule will also exclude certain waters and erosional features. Waste treatment systems and prior converted croplands remain excluded. We anticipate receiving meaningful comments on the proposed rule. And as you know, the comment period has just been extended until October of 20th of this year.

Mr. Chairman and members of the committee, I'm happy to answer your questions, and look forward to this hearing. Thank you.

GIBBS: This time, Mr. Chairman of the committee, Bill Shuster, do you have...?

(OFF-MIKE)

GIBBS: OK. He yields to the former chairman, Mr. Young from Alaska.

YOUNG: Thank you, Mr. Chairman.

I want to thank you the witnesses. I have a personal feeling about the EPA. I want you to know what you've done in Alaska, to me, is a disgrace. Without any input from the state of Alaska, any cooperation from the state of Alaska, any understanding the effect of upon individuals from the state of Alaska, preempting a state-owned property without consulting, totally arrogance on the part of another agency.

(Inaudible), Mr. Perciasepe is the influence you have, Ms. Darcy, on your agency where we just now have a Corps request of the new way to allow family mining to take place and I have information. I was submitted by the Corps for permitting because of the EPA. That's not right.

You are a separate agency. You should have the ability to make decisions based upon other than I call a policy of an EPA that doesn't understand that there is economics, there's a human life that it involves and that's the last of my statement.

But I'd like to just ask the question to the EPA. In this bill, have you indicated a cost were underestimated? Are you doing anything about that? Are you looking at the cost of this legislation upon the economy and upon the individual states?

PERCIASEPE: Thank you for the question. We have a draft of the economic analysis that accompanies the proposal. Our draft of the economical analysis does identify the costs, and it does identify the benefits that we anticipated.

YOUNG: But is it true you underestimated the cost of this proposal?

PERCIASEPE: We do not believe we've underestimated the cost.

YOUNG: So you're not doing anything about it?

PERCIASEPE: Well, it's a proposal, so we're taking comments on the economic analysis. And if do get comments that demonstrates any modification or improvement that we can make on, that we will obviously take that into account... YOUNG: Did you consult with any of the states involved or any of the states of the United States on this proposal?

PERCIASEPE: We've had discussions, ongoing discussions with the states, and we continued...

YOUNG: Have you found one state that supported this proposal?

PERCIASEPE: I don't have a polling of it.

YOUNG: So you really didn't consult, because I don't believe there's one of the 50 states that support this proposal.

PERCIASEPE: I couldn't say that one way or the other.

YOUNG: Well, you're the agency. You should know that if you were consulting. There should be somebody, one state, saying this is a grand idea. And if you don't know, that means you didn't consult with them.

PERCIASEPE: We did consult with them.

YOUNG: Well, no, because you didn't do it well enough. You didn't write it so the states could accept it. You've got 50 states that say they don't like this program -- 50 states, mister, and you represent 50 states, supposedly, as an agency.

PERCIASEPE: I don't believe 50 states have said that.

YOUNG: Well, do you believe they said -- in one state, give me a name of one state.

PERCIASEPE: The way we...

YOUNG: One state.

PERCIASEPE: I'm sure there...

YOUNG: You have not one state.

PERCIASEPE: I don't have one state.

YOUNG: You have not one state that supports this proposal.

PERCIASEPE: Well, let me answer some...

YOUNG: No. I'm asking you a question and you can't do it.

PERCIASEPE: You have to stop talking...

(CROSSTALK)

YOUNG: You can't do it, and that's what bothers me. Now, if I have a private piece of property, under the constitution, it is mine.

PERCIASEPE: That's correct. YOUNG: And I have water on it. Can you, under this rule and go, and then tell me I cannot make a difference in the waters on my water? I cannot drain my pond, under this rule?

PERCIASEPE: If those waters are jurisdictional under the Clean Water Act, you would need to have permit.

YOUNG: The question is very simple. I have a pond of water. It is on my private land. It is my water. Is that not true it's my water?

PERCIASEPE: It is on your land.

YOUNG: Is it my water?

PERCIASEPE: That varies from state to state on water rights.

YOUNG: I asked you as federal, the state has not proposed this. It is my water. It's on my property, and I want to drain it. Can I do that without your permission?

PERCIASEPE: The United States Congress has enacted a law that requires a permit to do work in waters that are jurisdictional under the Clean Water Act. So if it is, and I have no idea whether it is or not because I don't know which water you're talking about, it would require a permit.

YOUNG: It's my property. This is my ranch.

PERCIASEPE: It would require a permit if it is jurisdictional. If it isn't jurisdictional, you won't need a permit.

YOUNG: Mr. Chairman, if I say so, and the committee, this is an example. Under the constitution, you have a right on your property to protect your property. If I want to drain it because I've got, I call -- what do you call these fish that walk across the water, on the land and get in the other area - and I want to kill those beasts , and I can do it by draining it.

And now, I had to get a permit from you and your agency says, you know, you can't do it because we have not given you a permit. You're taking from my right to run my land. That's unconstitutional. And you both have sworn up to uphold the constitution.

PERCIASEPE: That's correct.

YOUNG: And you're not doing it if I can't run my land and my water. Mr. Chairman, that's...

(OFF-MIKE)

YOUNG: We have a government today, Mr. Chairman, running individuals (inaudible).

(OFF-MIKE)

YOUNG: (Inaudible) to stand up and say no more, that's enough.

(OFF-MIKE)

GIBBS: Thank you.

Mr. Rahall?

RAHALL: Thank you, Mr. Chairman. I'll try to be a little tamer.

Mr. Administrator, as we all know, the coal industry, the coal mining job is crucial, vital to my home state. It's our livelihood. It literally -- coal literally keeps the lights on. And when we have downturn for a variety of factors or variety of reasons that contributed to those downturns in the industry, as we're in now through layoffs.

Layoffs of law-enforcement personnel by County Commissioners who cannot find the funding to keep our officers on the street, or even keep the lights on in our courthouses or keep staff employed.

So there's a lot of families watching these proposals in my district, as I did recent proposals announced last week. And they're worried about their jobs. They're receiving warning notices as we speak.

Again, there's a variety of factors for this downturn, I recognize that. Everybody recognizes that. But in these downturns in the past, we've always felt the government is trying to help us get out of these downturns in the coal industry. That's not the feeling now; a matter of fact, just the opposite.

I think our government is trying to keep us in the downturn and trying to finish us off during this current down cycle. So, you know, as I said, everybody is worried about everything that comes out of EPA in the district I'm honored to represent.

Several years ago, the agencies went through an extended exercise to align various definitions of fuel material that has a lot of industry concern. My question to you would be, is the EPA planning now to revisit that and redefine what is fuel material?

PERCIASEPE: Congressman, we have no, absolutely no plans to revisit that.

RAHALL: OK. Let me ask you another question on the issue of properly permitted ditches on mine sites that are in place to address storm water runoff. Is the rule expected to capture these onsite draining systems?

PERCIASEPE: The way -- looking specifically, for instance, at a permitted coalmining site, we would expect that the waste treatment exclusion in the rule, that we are continuing in the same way it's always been there will continue, which covers many of those.

Any storm water ditches or ponds that were constructed to convey or deal with storm water control on mining sites would not be covered. And we are not changing the water treatment or the waste treatment system exclusion rule -- composing of the rule.

So, with those clarifying points which are reinforcing the fact that the answer is no, that would not have jurisdiction over those treatment facilities that are on a permitted mine site.

RAHALL: So the industry will continue to rely upon your longstanding and the agency interpretations.

PERCIASEPE: Exactly.

RAHALL: Regarding these uses?

PERCIASEPE: Yes.

RAHALL: Madam Secretary?

DARCY: Yes. The exclusions will stay in place under this proposal.

RAHALL: OK. Thank you. I yield back.

GIBBS: I've got some questions. First of all, you're absolutely right. We need to make sure we have the certainty -- to our businesses and our farmers and everybody out there, but there's so much vagueness.

When I read through your testimony, and I've actually read the testimony of the next panel, I hope you're able to stay around and hear the next panel since you're the regulators and see what their concerns are. So I really, really would appreciate if you're able to stay around to hear their testimony because they're really concerned about that, too, and they've got a little different take on that.

First of all, when some of the things you've -- Mr. Perciasepe said -- I hope that you can put that in writing, because sometimes just saying things -- we'd like to sit down in writing and waiting for the official record.

But Ms. Darcy, we're talking about vagueness. In your testimony, it says, "The agencies proposed that waters outside the riparian, in flood plain areas would be jurisdictional only if they are confined to surface, a shallow sub surface connection to the traditional navigable waters and so on."

Would you please explain to me what you mean by the connectivity or the surface or a shallow sub surface connection? Because you say you're not expanding the scope of your jurisdiction, I don't know what that means.

DARCY: Congressman, what it means is that if there's a connection between that and the flood plain, and if the flood plain is a navigable water, then that significant nexus determination would need to be made.

GIBBS: Any connection or significant connection? I don't want to miss anything, but. DARCY: No, the significant connection, and we define significant nexus in the rule as to what - how significant that would be, it has to be able to impact navigable water.

GIBBS: OK, would you explain to me how you define significant?

DARCY: Pardon me?

GIBBS: Would you explain to me how you define significant?

DARCY: I will read you the definition if that will help, I have it here, I know I do. Give me my glasses. Significant nexus means that a water, including a wetland, either alone or in combination with other similarly situated waters in the region, in that watershed significantly affects the chemical, physical, or biological integrity of a water identified as a jurisdictional water.

GIBBS: So, for example out west, I've been out west, I've seen areas where they might get water flowing through an area during once in a year rain event, and you know, as dry beds, would that be significant?

DARCY: That again would be an individual case by case determination depending on the circumstances in that area. For example, some of those kinds of waters, if they are determined to be a tributary which is defined as a water body that has a bed, a bank, and ordinary high water mark and...

GIBBS: So, you could - so, let's say I had a - in my farm here last month, I had a washout, and I went out there and I fixed it. I had - it was probably 200 feet long, it washed out, it was close to two feet deep, two feet wide, and then, you know, I had to fill that in and I planted grass and tried to do the right thing to fix that.

Now, if you came out there, if the Corps came out, would they say that was a, you know, a bed - water bed or would I be able to fix that without getting a permit?

DARCY: Congressman, what you have described would be an erosional feature that would not be subject to a jurisdictional determination.

GIBBS: OK. There's questions (inaudible) to the testimony of the next panel, there's a lot of concern that the states haven't been consulted, the local governments haven't been consulted, so I just want to make you aware of that, Mr. Perciasepe that there's concern about that.

Also, a huge concern of local governments, road ditches, because you talked about - yes, I think, it was significant, the bed. So, I think you could define that as a ditch now under the new definition as a tributary, does that mean when they're doing a dredge or clean up the ditch, that they're going to have to get a permit? I think...

DARCY: Congressman, for this, for the first time, we are excluding in this rule ditches, and if you'd like, I can give you the two examples of what kinds of ditches -- the ditch.

GIBBS: Let's see. Well, I guess that's - there is some controversy if you really are or not. And I think the, you know, the trust factor here, we've seen some of the things the EPA has done in the past with the revocation of permits and VO permits and preemption of permits that I think there's a high level of distrust out there, and there's really concern about how we move forward on that area.

OK. I just borrowed our time, I think I'll turn it over to Mr. Bishop.

BISHOP: Thank you Mr. Chairman. Secretary Darcy, first of, thank you for reading the definition of Significant Nexus. Am I correct in understanding that the language in the Significant Nexus Definition as included in the proposed rule is lifted almost verbatim from Justice Kennedy's ruling in the Rapanos Case?

DARCY: I believe - oh, excuse me. I believe that to be the case.

BISHOP: OK.

DARCY: And also, and I just like to reiterate that the definitions are also part of what's being proposed in this rule as being open for public comment.

BISHOP: OK. But you are staying wholly within the confines of Justice Kennedy's definition of Significant Nexus in this proposed rule, is that correct?

DARCY: That's correct.

BISHOP: And is it also correct that Justice Scalia in his definition of relatively permanent connection to traditionally navigable waters suggested a hydrological connection in his ruling and is it not the case that your proposed definition adheres to Justice Scalia definition, am I right about that?

DARCY: That's correct.

BISHOP: Thank you. Now, let me ask you this, there are all these two rules or true tests, the relatively Significant Nexus Test and the Traditional - pardon me, Relatively Permanent Connection Test. Is there any way in which any aspect of your proposed rule extends jurisdiction beyond the four corners of those two definitions?

DARCY: No.

BISHOP: Mr. Perciasepe, do you agree with that?

PERCIASEPE: I do. And in fact I would just augment slightly that in addition to the definition that colloquially just discussed here on the discussion on the words in the Supreme Court Justice, we actually are using this rule making to by rule exclude certain things. So, even with that test, some notwithstanding if they would pass that test or not, they are excluded. Things like as to go back the Chair's question, ditches that are excavated wholly in uplands that drain only in uplands and have less than perennial flow which is virtually most of the highway drainage ditches in the country.

You know, they're not draining a wetland, they're not draining a stream, they're just draining dry land when it rains, those are excluded in the definition of the rule. So, I just wanted to add that to Secretary Darcy.

BISHOP: But just to be clear, this has been described as a power grab, it's has been described in other ways, somewhat even more pejorative than that. Your definitions are definitions that hue (ph) precisely to the definitions suggested by the two Supreme Court rulings.

DARCY: That's correct.

BISHOP: Thank you.

Let me move to another area. The operative guidance that we have right now is 2008 Guidance. The 2008 Guidance asserts a jurisdiction over dry land ditches that flow less than year round. Yet, the proposed limits of jurisdiction - the proposal, your proposal limits jurisdiction by requiring water year round.

Am I correct therefore in determining that jurisdiction over fewer ditches would be asserted under your ruling than is currently the case today?

DARCY: That's correct.

BISHOP: OK. So, it limits rather than expands the scope of the Clean Water Act in that particular case, am I right about that?

DARCY: That's correct.

BISHOP: Let me just ask one more question. Are there any other examples where the proposed rule expands the definition of jurisdictional waters that is currently the case under the oath of 2008 Guidance?

DARCY: No.

BISHOP: Mr. Perciasepe, do you agree with that?

PERCIASEPE: I do, there's no expansion.

BISHOP: And does it in fact limit some of the jurisdiction?

PERCIASEPE: It does. And in fact, some of those limitations as I mentioned have to be done through rule making.

BISHOP: OK. So, those who are proposing that we prohibit the use of Federal funds to allow this rule making to go forward or to enforce that rule, this might be falling under the heading of "Be careful what you hope" for because the '08 Guidance is more restrictive than what this rule is proposing, is that a correct interpretation?

DARCY: In some instances, that's correct.

BISHOP: OK. Mr. Perciasepe, do you agree with that?

PERCIASEPE: I do.

BISHOP: OK, thank you very much.

I'll yield back.

YOUNG: Mr. Shuster.

SHUSTER: Thank you Mr. Chairman. You know, some words have been used here, like flexibility. Flexibility is a great thing when you're able to do both sides of the - both party, you get to use flexibility.

My concern is that when you talk about flexibility, the stakeholders seem to never get the flexibility to come under a rule and be able to mitigate the problem themselves in a way that it will work. What typically happens that I

see is when you talk about flexibility, it allows the EPA and the core, the flexibility in different districts, in different regional offices across the country to interpret these things differently.

And we see that in Pennsylvania, in Marcello's (ph) gas play where the Corps office in Baltimore is treating Pennsylvanian wherever else the other places that it has a jurisdiction differently than what happens in Arkansas and other places in this country because the local office is interpreting these rules and regulations in a different way.

For instance, also the word significant. Significant, what it means to me, what it means to you is different. I'm not a scientist, I'm a geologist, you don't have specifics in there as to really what significant is, it requires a measurement of some sort, then I can understand it, or a measurement that a farmer or a developer can understand.

So, you've got all these nice terms in here, but when you look at how you've made these definitions, tributary, adjacent flood plain, neighboring waters, they're very vague to my understanding. And to when we talked to the stakeholders today and I have been talking to them, they're very vague to them.

So, can you tell us now what waters would definitely no longer be regulated by the federal government under this proposed rule?

DARCY: We have a series of exclusions that are defined here and if you'd like, I can read those to you. It's under section B1 of the definition of the rule.

It's waters that are not going to be considered are waste water treatment, prior converted cropland, ditches that are excavated wholly in uplands, ditches that do not contribute flow either directly or through other waters to a water, and artificially irrigated areas that would revert to uplands' artificial lakes, there's a whole list, do you want me to continue?

SHUSTER: But, so, if the water somehow seeps into a body of water that's flowing that it - because of a flood or something occurring, some extreme weather event occurs, would that enable the regulators to change the definition of that ditch or that pond to fall under the federal jurisdiction?

DARCY: Congressman, if the water body contributes to the flow of a tributary, then that would be considered jurisdictional.

SHUSTER: So, we get a 100-year storm, and the floods - there was a typically irrigated field and a diverging ditch in a farm which never really - it never flowed into a river that's close by, if that event occurred, then would that come under Fed regulation?

DARCY: Congressman, that sounds as though you're describing a flood event and the runoff from that flood event, and that kind of runoff would not be considered a jurisdictional water in the United States.

SHUSTER: When you talk about waste treatment - yes, sir.

PERCIASEPE: Just to add in because I think it gets some of the -- some of the potential need for continued dialogue. We're using the term flood plain to try to get at the issue of adjacency which has been in a number of the Supreme Court cases.

But just because it's a flood plain doesn't mean it's jurisdictional, it still would have to be a water in the wide plain, you know, standing water or a wet land with the hydric (ph) soils and the vegetation or a natural running stream through a flood plain area.

So, but the flood plain is an area that can help identify, and that's what we're proposing to take comment on that it's adjacent to the other traditional waters. So, I want to be really clear that the entire flood plain which may flood is not jurisdictional, and in fact, I want to remind that agriculture is exempt from having to get permits in that area regardless of whether it's got a wetland in part of it.

So, I wanted to - just to add to the Assistant Secretary's comments on that.

SHUSTER: And my - a great concern that makes of seeing it happen first in Pennsylvania where well, I just talked about the Corps.

We have, I believe it's an EPA field office up in State College of Pennsylvania, that staffed with what sued to be staffed with I don't know who's there today presently, with people that are extreme environmentalists, and they will interpret the law differently than the folks in Washington.

And I said to the Corps, what's happening in Baltimore versus what they do in Arkansas or other places in the country doesn't conform to what the rule is necessarily, it's interpretation. And if that happens, I think I'm willing to bet that everybody in this room has faced that before where the local office,

whether it's the regional or the district office is looking at things differently. And so, how can you protect the stakeholders against that occurring?

PERCIASEPE: Well, I'll let Assistant Secretary Darcy answer for the Corps but the we both have regional structures as you point out, and it is important for us to develop consistency and predictability there, that is a high priority for both of us, and we view the work we're doing in this rule, and when we get it finalized to help us provide that consistency.

SHUSTER: Have you experienced that in your - in the EPA where you've seen regional directors look at something very, very differently?

PERCIASEPE: Well, to the extent that we, that we can practically - I mean, there's always difference of opinions in any organization. Our objective...

SHUSTER: That's the point.

MALE: ...is always to try to reconcile.

SHUSTER: That's my point. What you're trying to do is we're trying to do as we've always try to do in Washington is a one size fits all, and then, what you have is you've got differences of opinion, and that's - and that causes tremendous problems for people out there trying to earn a living and farm around and run their businesses.

PERCIASEPE: You've hit the nail on the head of that, we have to find a way to have enough predictability and consistency so that there isn't a vague use of different opinions all over the country, but at the same time, we can't be so constrained, you know, in a one size fits all well. So, what we're trying to do is get that right. So, we have definitions here and practice that will be established that can deal with the different situations in the country.

SHUSTER: Well, and just I know I've extended my time but just a final point because I think Chairman Young made a very good point when he asked a rigid question he asked you is, is there one state out there that had said this is really good, we embrace it, and I'll let you finish answering the question.

PERCIASEPE: I am sorry about that before, I really apologize. But let me just say draining upon is not - does not require a permit. Just - just if I could have answered. But the - filling it would require a permit under the Federal Law.

The state organizations have been very supportive, you know, the environmental counsel, the states, some of the water organizations that

represent state water, they've been supportive as we've been building this, but we have yet to get any specific comments on the rule from the states. So, I can do a polling of them, but I haven't done that polling yet because we plan to do significant continued outreach with them between now and when the comment period is over. And I want to point out that we treat states differently than normal contract - normal commenters because they are co regulators with EPA.

So, we're going to be working with them differently, although they will be submitting comments.

SHUSTER: Again, our DEP in Pennsylvania, over the past couple of years, hasn't seen eye to eye with the Corps or EPA, and back when there was a different administration, they saw eye to eye.

So again, this is the problem that we're going to face is this rule is going to go into place with all these - there's a lot of vague terms in there, and what's going to happen is the stakeholders and we're going to have them next year talk about the damage it's going to cause them.

And again, to your point about not to - not being against - you don't have to get a permit to drain a pond, can you put that in the rule to make sure we were clear on that? So, when Chairman Young tries to drain his pond, he doesn't have to come and get a permit.

DARCY: I think we can make that more clear.

SHUSTER: I yield back. Thank you, Mr. Chairman.

GIBBS: Just, Ms. Darcy, I'd like to make a comment.

Well, we're here from the state EPAs, they're concerned because they haven't been consulted from the proposed rules so (inaudible) the information. But Mr. Nolan (ph) here, do you have questions?

NOLAN: Thank you Mr. Chairman, and thank you to the panel.

First of all, I'd like to respond to my good friend of over 40 years, Dan Young who's so shy and restless (ph) about expressing an opinion. Yes, I too have a farm and we have a little pond on it that my wife and I created, it's quite beautiful, right alongside the house.

I suspect that that would not be covered by jurisdiction, and the courts have ruled that we don't have unlimited control over those waters that are

navigable and have -- so, we have a river that flows through my farm as well. And the courts have ruled that we have no right to dump toxic substances and other things into that river that would be harmful to people down the stream.

So, with all due respect to my good friend, there are some constitutional restrictions and limitations. As to the proposed rule, I will reserve a final judgment until I've heard all the facts, but I do want to applaud you to the extent that you do try to give us some predictability and some consistency here.

That would be very, very helpful to hear from any parties. I have a couple of quick questions, I'll try to be quick with them and please, be quick with your answers so I can get as many in as possible.

First of all is I have a company that's talking about investing \$3 billion in my congressional district, and my question of you is how do you think that the jurisdiction that's proposed in this rule combine, you know, combined with EPA's retroactive and preemptive 401 - 404 authority and action, how do you think that impacts a company looking at making a rather substantial investment?

PERCIASEPE: Well, I don't know if that -- if what they're proposing will have -- is going to impact water or not.

HAHN: Hard to do anything in Minnesota without impacting water.

PERCIASEPE: So I -- I'm just going to say at a high level. I think the Army Corps of Engineers to the permitting process have authorized over 2 million permits and activities under this section law and 13 have been involved with the so-called veto, which is essentially EPA designating a section of water that can't have a discharge of the fill to it.

So it is an extremely rare occurrence that that gets used and there's a significant amount of work and process that goes on for it, so I would think in the normal realm of activities, you're talking about projects that go through the permitting process. They get permitted. They may have to do mitigation that is some of what our economic analysis has shown that there may be some of that, but generally speaking, I don't see that as a deterrent to business.

HAHN: Well, as someone spend the last 33 years of my life in business, I can tell you the prospect of that has a very chilling dampening effect on anyone considering any kind of substantial investment, with regard to the

Constitution this whole -- raises the whole question of due process for a company in that kind of a situation.

My next question is with regard to the trail systems, snowmobilers, cross-country skiers, snowshoers, on frozen waterways and wetlands that provides some -- multi-use recreational opportunities for individuals. How would this - these regulations impact them?

DARCY: I don't believe the proposed rule would change the current status on what would be required under the current law (inaudible).

HAHN: Is that your understanding as well? Farmers continue to ask who is ultimately in charge of enforcement. The EPA, Army Corps, who's going to do the enforcement here?

DARCY: If someone has a Department of the Army permit for an action and is in violation of that permit, it would be the Army Corps of Engineers' responsibility to either ensure that that permit is being to -- undertaken as agreed to, so it would be our responsibility. HAHN: Well, what if the EPA determines it's part of their jurisdiction, or I mean, who does the enforcement then?

PERCIASEPE: Right. Obviously, things get very case-specific. We have somewhere in the vicinity of 30 cases a year -- 30 to 40 cases or so a year that we end up getting involved with -- as well.

HAHN: Well, what do you in those cases where, you know, the Army Corps has one definition and the Natural Resource Conservation Service has a different, different definition and you are compliant with one and non-complaint with another, I mean, what kind of methodologies or matters for resolving this, do you have in place?

DARCY: Can I just explain about the interpretive rule that accompanies this proposed rule that deals with the Natural Conservation Service regulations and practices. We are exempting about 56 of those practices from any kind of Clean Water Act permitting requirement in the interpretive rule that we've put out at the same time as the proposed rule.

So it would be the Natural Resource Conservation Service and those local agents who would be responsible for assuring that the practices undertaken by that farmer or (inaudible) or rancher were being complied with.

HAHN: OK. And lastly, what kind of outreach do you have planned to help get the word out of what, in fact, all this is and isn't?

DARCY: We've conducted a number of conference calls, webinars, I think over 64 to date, since the issuing of the proposed rule and continue -- will plan to continue to do that throughout now. Now that its comment period has been extended we may try to increase those outreach efforts between now and then.

HAHN: And then my last question -- we heard a lot of questions here about the states, what do you think these actions -- or how they will impact the ability of state and local government to exercise their authority with respect to land-use management and planning?

DARCY: These jurisdictional determinations will still -- they don't impact their local authorities other than their -- if they are looking to do any kind of development in the Waters of the United State. They would need to look to see whether that water is jurisdictional and what sort of permit would be needed by them (inaudible).

HAHN: Will they supersede state plans in any manner (inaudible)?

DARCY: Not land planning. No.

HAHN: OK.

DARCY: (inaudible) that's local planning and zoning.

HAHN: OK. Thank you, Mr. Chairman. I yield the balance of my time. GIBBS: Mr. Crawford?

CRAWFORD: Thank you, Mr. Chairman.

Secretary Darcy, you stated earlier in the course of answering one of the questions that my colleague -- one my colleagues ask in the proposal we define and you've also used personal possessive pronoun. I'm a little confused, whose proposal is this?

DARCY: It's the administration's proposal.

CRAWFORD: The administration.

DARCY: Yes.

CRAWFORD: So have you been working with the administration to develop the proposed rule?

DARCY: Yes, EPA and the Corps of Engineers have developed this rule together.

CRAWFORD: OK. But this is ultimately just an EPA proposed rule, correct?

DARCY: No, it's the administration's rule.

CRAWFORD: That's it. It's the administration proposal now.

DARCY: Yes.

CRAWFORD: OK. But you've been collaborating with the -- with the Corps -- I mean, with the EPA rather?

DARCY: Yes, Sir.

CRAWFORD: OK. We're in currently in the public comment period, correct?

DARCY: Yes.

CRAWFORD: Have you submitted public comment?

DARCY: No.

CRAWFORD: OK. Do you intend to submit a public comment?

DARCY: No, we intend to review the public comment with the EPA.

CRAWFORD: Collaboratively?

DARCY: Yes.

CRAWFORD: OK. I was just a little confused by that. Administrator -- can you define a ditch -- I just want to get the clarity. And I apologize on my repeating myself, but could you give me some clarity on what a ditch is?
PERCIASEPE: Well, I mean, what we have tried to do in our proposal is make it clear of, that ditches that are just -- that are built on land that is normally drive -- somebody puts a ditch through it to drain it from rain or some other -- some other wet event and it's got water in it sometime. That these are not covered no matter what -- no matter what.

CRAWFORD: OK. So there's -- here's the problem I have with that.

PERCIASEPE: OK.

CRAWFORD: Ultimately, that ditch is designed to drain water, got to drain into something. At some point it drains into a body of water that is regulated and then therefore becomes regulated. Isn't that correct?

PERCIASEPE: So the reason we are doing the rulemaking (inaudible) ...

CRAWFORD: I've only got five minutes, is that (inaudible) ...

PERCIASEPE: I understand. But let me answer please. The -- if you just look at the definition of significant nexus, you might start getting into those kinds of thoughts, but so what we did in the rulemaking is we specifically by rule are excluding those, no matter whether they meet a test or not. And I think that's a key important factor.

CRAWFORD: We had -- in the last 2, 3 days in my hometown. We've had about 14 inches of rain. Got a neighbor. Got a swimming pool -- swimming pool overflows. Can't handle too much, water flows into a ditch. Ditch flows into a regular (inaudible) -- regulated water -- body of water. How far back - does that swimming pool become a regulated waterway?

PERCIASEPE: It does not. It is not a wet land nor it's (inaudible) ...

CRAWFORD: You don't think that's much of stretch though, do you?

PERCIASEPE: No.

CRAWFORD: (inaudible) you think that ...

PERCIASEPE: I don't -- I think it is a stretch (inaudible).

CRAWFORD: Do you really? Because I (inaudible) ...

PERCIASEPE: (inaudible).

CRAWFORD: The ambiguity that I'm hearing from all this is so great that I don't think that's a stretch at all.

PERCIASEPE: Artificial lakes, ponds, swimming pools, they're specifically excluded. We're writing (inaudible) ... CRAWFORD: Up to the point that they overflow into a ditch that drains into a regulated body of water at which point they become connected, correct?

PERCIASEPE: (inaudible) -- go ahead.

DARCY: I would say that's not a significant nexus.

CRAWFORD: OK. Well, I'm not sold on that, but at any rate, so what about flooded rice fields?

PERCIASEPE: Flooded (inaudible) ...

CRAWFORD: At some point in time, they're going to drain into a ...

PERCIASEPE: Flooded ...

CRAWFORD: Flooded rice fields.

PERCIASEPE: Rice fields are not included.

CRAWFORD: Well, I think what's going on here is an effort to create such ambiguity that you're given ultimate regulatory authority on a whim and that there's really no recourse for those folks that are affected and defining that's going to come through in farmers and other businesses, the cash flow that it's going to impact and there's not been any economic analysis to address that. And let me ask you one more thing about public comment. Will you be entertaining public comments from other federal agencies?

DARCY: Yes.

CRAWFORD: You will. And do you think that's appropriate? DARCY: Yes. Most of them are making (inaudible) ...

CRAWFORD: Are they more heavily weighted in public comment from say, some of the relevant stakeholders in the private sector?

DARCY: No, Sir.

CRAWFORD: Are the -- our friends at Farm Bureau, for example, National Association of Counties, will they be given equal weight in their public comments?

DARCY: Yes, they will.

CRAWFORD: I think you'll find when you hear their public comments and I would also echo the sentiments of the Chairman encourage you to stay around and hear their comments and find that they probably agree with me that there is significant ambiguity in this to cause great concern, not just in the agriculture industry but to homeowners, to business owners and anybody that has even a view of water from where they are standing, so with that I yield back. GIBBS: I'm going to take 14 of your seconds. I'll just

-- for a clarification, you know, just talk about the vagueness and ambiguity, you know, that's what you're saying (inaudible) but doesn't it just open up for (inaudible) lawsuits if they don't think that -- how they interpret the rule and litigation?

PERCIASEPE: I, we -- here is where we can work together. We've tried to list these things specifically in the rule. Rice growing is specifically listed as excluded. Normal agricultural activities are excluded.

GIBBS: Now, we'll get into that later. I (inaudible) ...

PERCIASEPE: So if we could -- if we could -- yes, we expect to hear from the stakeholders during this proposal and comment period of time, if we've not done that enough here and then we can sit down and talk to them.

GIBBS: OK.

PERCIASEPE: But our intention is to get it in here so that (inaudible) ...

GIBBS: Well, talk later about this -- the rest of the Clean Water Act effects with other 404 permitting.

Ms. Edwards?

EDWARDS: Thank you very much, Mr. Chairman. And thank you very much to our witnesses today and especially for your honorable public service, I think there are many of us in the public who really appreciate both the work of the EPA and the Army Corps in protecting our water and making sure that it's clean, so thank you.

I just want to clarify the notice of the proposed rule was issued on April 1st. My understanding is that because you heard from agricultural groups and other stakeholders that there wasn't enough time to respond adequately to the rule that that's, the response time for comments has been extended to October 10th, is that correct?

DARCY: Actually, it's been extended in additional 90 days until October 20th, actually 91 days because the 90 day falls on a Sunday (inaudible).

EDWARDS: Thank you. So hearing from the stakeholders, you took that into consideration and you've extended the rule?

DARCY: Yes.

EDWARDS: The comment period. Thank you. And then -- so is it a surprise to you that you've not yet heard formally from states whether they support or oppose the rule because they haven't -- there hasn't been a chance yet and that it's probably preliminary to qualify, quantify or to characterize a support or opposition to the proposed rule at this stage?

DARCY: I think that's correct.

EDWARDS: Thank you. And then -- Mr. Chairman, I have three letters to this committee urging us -- urging the Congress to enable the EPA and the Army Corps to go through the process of the rulemaking rather than create legislation that is unnecessary to respond to what has been, you know, a very, you know, an environment in which people have been quite uncertain about what it is that their responsibilities are for permitting.

And I'd like to enter those into the record. It's a letter from Clean Water Action, from Trout Unlimited and from 15 sportsmen and conservation groups supporting the process and saying themselves that they probably plan to submit comments.

GIBBS: So ordered.

EDWARDS: Thank you.

I have a question, Mr. Perciasepe; can you describe the exemption that exist in the act and in your proposed rule for discharges associated with agricultural activities? And in the event that certain agricultural activities don't qualify for an exemption, am I correct that the Army Corps has a fast track nationwide permit that authorizes an assortment of discharges associated with agricultural activities that cause the loss of less than half an acre of water bodies?

DARCY: Yes, we currently -- that's our nationwide permit program and that's correct.

PERCIASEPE: Yes, and I -- just as a general matter, the normal agricultural activities of -- I mean, essentially it's for me, I could say if you can -- if you own a piece of land and you can plow it, plant it, and harvest it, you -- under -- now, you can do it under this rule. There is nothing in here that's going to change that.

EDWARDS: Thank you very much. We recently enacted -- in fact, the President just signed yesterday our Water Resources Reform and Development Act, and we included for the first time provisions that I've been

quite a champion of using innovative green and low impact technologies. We may hear testimony later that suggests that somehow those green infrastructure activities would then fall under the purview of this rule. Do you have a sense of that?

PERCIASEPE: We don't believe that that will happen. It is not our intent and, of course, we're going to be interested in comment on that, but most green infrastructure that I'm familiar with in an urban setting is going to be built in a place that is normally dry and you're moving drainage to it.

There are going to -- there may be instances where somebody wants to utilize an existing stream or a lake as part of that and then we would have to look to see whether that's part of the waste treatment exemption or whether or not that would be,, but again you don't have to worry about this unless you are discharging fill or pollution into that water. If you're not discharging pollution into the water you're you know, you're not going to or still you're not going to have to get a permit or be under this jurisdiction, so we would think and it was certainly, is our intent that drainage in an urban area for -- and how it's altered to have green infrastructure and low impact development would not become jurisdictional and would not be jurisdictional, just as we were talking about ditches earlier, so ...

EDWARDS: And so, obviously those kinds of activities are actually designed to filter the water, not to contribute to the pollution?

PERCIASEPE: We absolutely want to encourage conservation work on agricultural land and we want to encourage low impact development in urbanized areas including green infrastructure, absolutely want to do that.

EDWARDS: Thank you. And then lastly, I understand the rule if it's finalized would protect roughly 3 percent more waters than are protected today, but almost 5 percent fewer waters than were protected prior to the Supreme Court's 2001 decision, is that correct? And does that sound like an unprecedented radical expansion to you?

DARCY: Those numbers are correct and in my view it is not a radical expansion.

EDWARDS: Thank you.

GIBBS: Mr. Denham?

DENHAM: Like the gentleman from Minnesota, I'm also a farmer, but unlike him, I cannot hope and wait to see what you guys are going to come up

with. I can't take hope to the bank, and so I'm very concerned about this. It affects of livelihood of our community, of our state, the largest ag state in the nation that is feeling some of this pain already due to Army Corps and some of the challenges that they already put on some of the fallowed fields that are now having some water on those fields.

And I'm concerned that this year, because of government when water get shut off to the central valley, a million acres of farm land could be lost. Now it might next year, and we may have, the fallowed fields may have some puddles that -- or ponds that -- or even some streams that end up going through a million acres of lost productivity -- of lost jobs.

So, yes, I've got a lot of questions about this. Let me -- I'll start with you, Ms. Darcy, because the ambiguity of this rule, do you think it's going to encourage third-party lawsuits?

DARCY: I'm -- actually think that this proposed rule would bring additional clarity to the jurisdictional determinations that are necessary under the Clean Water Act, so I think with additional clarity, there will be fewer lawsuits.

DENHAM: So you think that this new rulemaking will create less lawsuits?

DARCY: I do.

DENHAM: And greater clarity?

DARCY: I do.

DENHAM: Now, the permits that are going to be required, how long do you think it'll take to issue a permit?

DARCY: Congressman, it depends on what's the permit is being asked for, you know, and you know, how much information we have up front for that particular permit. It does vary -- it varies from region to region. We try to do our permits whether it's -- we have individual permits. We have nationwide permits. Nationwide permits are usually, go more quickly than individual permits, because individual permits usually require more data and more information.

DENHAM: If it's a -- area of farmland has been historically farmed, but may have sat fallow for a year or two and now it's required to do a permit, how long do you think it would take to do a permit?

DARCY: Congressman, what you've described would be prior converted crop land that is exempt from the Clean Water Act.

DENHAM: Well, I will -- I will circle back around with you, because I've got a number of constituents that have these very same concerns today, but they're unable to farm. They're losing a season of planting. They can't go back through and farm that property and again seeing that job loss in our community.

Let me ask about the Clean Water Act. In '74, when this was originally done, it was done with navigable waters with ebbs and flows -- ebbs and flows of the tide. Now, we're seeing ebbs and flows on our riverbanks because of discharges from government -- forcing discharges. What we see in the central valley are these pulse flows. The pulse flows not only go down the river, but they overflow into the farmland that is adjacent to it. Sometimes losing the crop, but sometimes forming a pond or a puddle or a mudhole that now could be under this very same thing.

So my question is both on navigable waters as well as intrastate waters where now EPA and the core would have jurisdiction over.

DARCY: Under currently, we have jurisdiction over navigable waters.

DENHAM: Intrastate waters?

DARCY: Yes.

DENHAM: What about groundwater?

DARCY: No.

DENHAM: Mr. Perciasepe, you talked about pollution. Is fertilizer a pollution?

PERCIASEPE: Properly applied, no.

DENHAM: Probably -- what about pesticides?

PERCIASEPE: Pesticides require -- have to be applied according to label and they would form (ph) under a general permit if they apply it on water.

DENHAM: So, again...

PERCIASEPE: But not in -- not when a field is flooded if I can think where you're going. That would not be...

DENHAM: That's exactly where I'm going. That's a concern that a number of our farmers have.

PERCIASEPE: It would not -- it would not change the -- it would not -- that would not change because a flooded field is not -- is not jurisdictional.

DENHAM: Yes. But if you follow a field and you're unable to plant for a year or two years or four years and a pond or a small something that is already covered under your own definition now gets pesticides or herbicides or fertilizer in it, that would be a pollutant would it not?

PERCIASEPE: Boy (ph), the general permit for pesticide application under the Clean Water Act requires the avoidance of spraying directly on waters. If there is a crop and you spray on the crop it does not need a permit or it does not fall under that.

DENHAM: So, what falls under that if you were spraying your crop and it went into that water even though it's not into a river or a stream but it was considered an adjacent water on a farmer's field.

PERCIASEPE: Water on a farmer's field is not jurisdictional.

DENHAM: Not if it's flooding but if it is accumulated water it is under this definition would it not?

PERCIASEPE: I don't think so.

GIBBS (?): You know, why couldn't you answer Mr. Young's question about a pond. I mean, we're talking about farmland here.

PERCIASEPE: I would have answered Mr. Young's question but I didn't get a moment, that's all. I don't mean anything by that. He could drain his pond if he wants to. It doesn't require a permit from -- under the Clean Water Act.

DENHAM: Thank you, Mr. Chairman. I got a number of other questions but I'll wait for the next round.

GIBBS: Ms. Napolitano? NAPOLITANO: Thank you, Mr. Chairman. And I'm glad that we have such great agencies that help our communities especially in California where we really need you.

Mr. Perciasepe, it was indicated that the proposed ruling does not impact femoral (ph) waters that may exist only when the rainstorms occur especially like in Southern California. But the concern specifically is if the

water that may fall as rain and temporarily captured in ground water retention areas would that water be classified as jurisdictional.

And this is really an important issue because of the drought and the fact that we're trying every methodology to capture more water and infuse it back in the aquifer.

PERCIASEPE: Right. First of all, we explicitly make sure to mention that ground water is not included here. So, -- but second, there's no change from the existing law so those...

NAPOLITANO: Oh, that's for ground water.

PERCIASEPE: Yes.

NAPOLITANO: I'm talking about captured water for replenishment.

PERCIASEPE: Right. So, if this activity is currently going on whichever way it is, we're not -- we're not changing any existing jurisdiction in that regard so we want to encourage, you know, good capture and recharge.

NAPOLITANO: Well, there's little rainfall in Southern California. The episodes may be very few and far between.

PERCIASEPE: Yes. I think both of us are pretty familiar with the (inaudible).

NAPOLITANO: Thank you. And also does the waste water exemption -- pardon me -- clearly include water recycling projects is there -- should there be a clear exemption granted for water recycling projects especially in the western states where the drought is so critical.

PERCIASEPE: So, we don't think water recycling projects that are existing today are covered and we're not trying to change but so if it's not regulated today it won't be regulated under this rule. But if your folks have comments on this so that we can be clear about that we'd work on that.

NAPOLITANO: Well, we certainly would hope that we'd be able to clarify that because this is one of those issues that is not going to be ignored in Southern California or in California, you know, the western states.

The other area that I have a concern about is the storm water discharge regulations that are going to be imposed on communities by EPA.

PERCIASEPE: Storm water?

NAPOLITANO: Yes. The discharge going into the storm water and catch basins going down to the ocean.

PERCIASEPE: So, under another part of the Clean Water Act, areas that have storm water runoff are required to get a permit and under the -- under section 302 of the Clean Water Act and most of them have those permits then require either green infrastructure or some other maintenance activities to make sure that (inaudible) are minimized.

NAPOLITANO: Well, I think...

PERCIASEPE: There's no change to that in this rule.

NAPOLITANO: Okay. Well, I may want to clarify that later if I may...

PERCIASEPE: Okay. Just...

NAPOLITANO: ... because there's an issue that some of the cities have (inaudible) concern is an unfunded (ph) mandate for them to be able to ensure that nothing -- no contaminants go into these drain systems for some water release.

PERCIASEPE: Okay. I'm happy to follow-up with you on that but we're not trying to change the storm water rules in this regulation but if there are issues on storm water I would -- I would...

NAPOLITANO: If you wouldn't mind, yes, and I certainly want to thank Ms. Darcy. Your folks are tremendous in my area. They work with all my agencies and we've been able to clarify and work forward on many of the issues that have -- issues in my area (ph).

Thank you, Mr. Chair. I yield back.

GIBBS: Just some housekeeping, I ask you (inaudible) Mr. Duncan from Tennessee who is not on this subcommittee be included in today's hearing. Without any objection so ordered.

Mr. Mullin?

MULLIN: Thank you, Mr. Chairman.

Thank you, both for being here. I know we have met actually on separate occasions not always on the best terms but we're all fighting for the same thing hopefully this country and the right to still be entrepreneurs.

I think what the biggest fight is here though is that we've seen as business owners, as farmers, as I sit in front of you I'm farming the same land that is now is fourth generation. And it seems like every time we turn the corner what we're doing is we're asking more and more permission to just simply do the same job that we've always done.

I think you're going to find it very hard to find somebody that's got more interest in their water than the person who has owned that land since before statehood. But the way the definition is wrote with navigable (ph) waters I'm finding it very hard to understand maybe you can clear it up to me how a stream gets into that maybe just a simple- minded individual from Oklahoma that's been blessed enough to be able to be a congressman navigable (ph) waters would be at least something you could put a canoe on.

DARCY: Congressman, navigable since the inception of the Clean Water Act had a great deal of attention and litigation as well as court decisions.

MULLIN: I'm well aware of those but I'm just trying to figure out how this -- how you guys feel like you had to come out with a clarification when it's pretty clear itself and what we're doing is we're going farther out to streams and making the definition even more confusing and we're taking rights away from the states.

Sir, you had made a comment that you said that the state water board you felt like was onboard with you if I understood that because the question that the Chairman and Congressman Young had asked you was what states support you and you made a statement that the water boards of the states support you.

PERCIASEPE: I said that this -- some of the organizations that represents states their water associations have supported doing a rule. We don't have...

MULLIN: Because I've got our -- the gentleman from Oklahoma that's going to be testifying on the second panel and no one contacted them. So, who is it that you said are supportive of you because if we're -- if we're going to try really taking in the waters and having the best interest of the land owners the people who pay the tax to own that land, the people who live in that state would you think you would take the time to comment before you made this not requiring them to come out afterwards and make comments when I find it almost laughable when you guys are going to have these comments out which really isn't going to have that much impact.

You might add a thing or two but the rules are already out. You have already made your mind up what you're going to do otherwise you would have consulted them beforehand. Is it that not correct?

PERCIASEPE: We did talk to states. I can't say we talked to every -- well, here's a list of state associations who have asked us to do a rulemaking. They don't necessarily support this rulemaking yet because we don't know what their position is yet and we're going to work with them before we finalize.

MULLIN: Then you should have had that before you went out with it. That's what I'm trying to understand. Now, let's go back to the farming just for a second. The way I read this is you guys are going to accept existing permits. It's not going to change existing permits. Is that not correct, ma'am?

DARCY: That's correct. MULLIN: Okay. So, now what about that existing permit, what happens, does it stay with the land or does it stay with the holder of the permit? Say, my -- say, my father which I'm not hoping (inaudible) by any chance but say my father own the permit and he passed away and had to transferred to myself. Is that considered existing permits to you?

DARCY: If it's -- if it's applied to the land that it was permitted on but I'm...

MULLIN: But the land has essentially changed hands so, the permit will change hands, too.

DARCY: I believe it goes with the land.

MULLIN: You believe because it doesn't read that way.

DARCY: Well, it's clear (ph)...

MULLIN: It doesn't read that way at all. And there needs to be clarification on that because I can tell you I've read it. And the way I read it is that every time we lose a generation and a farm changes hands which you know farms are generational, we're going to lose farms as they happen -- as this happens.

DARCY: Congressman, most agricultural practices are exempt from the Clean Water Act.

MULLIN: Most. Ma'am, there's still permits because you had enough worry about it that you put in it that existing permits -- existing permits. You -- it

specifically says existing permits so we keep using this that most are exempt. Actually, what was first said was, sir, you said that all ag is exempt. Now, we're to most.

PERCIASEPE: All normal agricultural (inaudible).

MULLIN: Normal.

PERCIASEPE: Regular, you know, ploughing...

MULLIN: What is considered normal because what I think is considered normal...

PERCIASEPE: I think ploughing is (inaudible).

MULLIN: You guys already came into my land and said we couldn't spread chicken litter anymore. That was on my property. You guys came in on my property and said we couldn't spread chicken litter anymore effectively killing the chicken industry around for the small business owners.

So, I don't want to hear that anymore about normal. Normal is what, how many farms have you been on? How many times have either one of you guys worked on a farm?

PERCIASEPE: I went to -- I went to the (inaudible) College, sir. MULLIN: What is normal in Washington D.C.? There isn't one thing in Washington D.C. that is normal, not one.

PERCIASEPE: I'm not -- I'm not talking about (inaudible).

MULLIN: So, I don't want to hear the normal, what I want to know is how are we going to protect generational farms?

DARCY: Congressman, if there's ambiguity in the proposed rule about existing permits and how they will be transferred between either the current permit holder or the future of that land I think that's something we need to clarify.

MULLIN: Yes, we do. Please, if you could get with me on some clarification language on that. Thank you.

GIBBS: Mr. Garamendi?

GARAMENDI: It's interesting that we ended with chicken manure. Mr. Perciasepe and Secretary Darcy, I personally thank you for your efforts to clarify a longstanding controversial issue that has been with this country for well over 40 years now.

That is the application of the Clean Water Act. You've had a very, very difficult task because of the Supreme Court interpretations of the law you've been left with the necessity to provide clarification. And it's my understanding that this effort, this proposed rule is a result of the necessity to clarify the application of the Clean Water Act.

If I'm correct would -- am I correct and could you briefly describe -- very briefly describe how it is that we came to this proposed rule and its purpose.

DARCY: Congressman, the purpose of the proposed is to clarify the ambiguities many -- which resulted from the Supreme Court decisions and the Supreme Court directing us to develop a rulemaking for this purpose.

We coordinated between the agencies EPA and the Corps of Engineers to develop what we think is a proposal that will do just that to give people clarity hopefully more efficiency in this -- in this permitting program and the ability for people to know what's jurisdictional and what's not.

GARAMENDI: So, the purpose and the goal is to provide clarity.

DARCY: Yes, sir.

GARAMENDI: Apparently that has not yet been achieved at least among the members of this committee and a good portion of the public. How are you working now beyond explaining to this committee the process of achieving clarity? We're in the midst of a rulemaking, can you describe to all of us what you would expect the public to do if they believe there is uncertainty in your regulation. DARCY: Sir, the public comment period which now goes until October 20th we would anticipate that concerned citizens who have comments on this rule whether it's not clear enough or the definitions aren't what they believe to be representative of how we should be regulating Waters of the United States we anticipate that to come through either public comment via -- we have a website set up for the public comment.

We also are having webinars and conference calls with interested stakeholders and groups around the country to get their input and get their comments that way as well.

GARAMENDI: Mr. Perciasepe?

PERCIASEPE: What we're also doing more -- we're also doing additional specific outreach and I think one of the things we're developing now with the extended time period is additional more focused outreach as well.

We've met with a lot of people. We have a roundtable with small business with the small business administration coming up on June 24th. We're going to have a specific project process with our -- with our co-regulators at the states in terms of the implementation of the Clean Water Act because once you decide where it's jurisdictional all the implementation -- a lot of that implementation takes place at the state level as well. So, we expect to have quite a bit additional outreach throughout the summer.

GARAMENDI: Okay. Does your website provide specific opportunities for various locations in the country for people that are concerned about the lack of clarity in the rule to make comments?

DARCY: Yes.

GARAMENDI: Okay. Can you provide to the committee those specific sites and locations?

DARCY: Yes, we can.

GARAMENDI: And efforts that you are making to reach out to agriculture, chicken growers or whomever as well as waste water and drainage systems across the nation. Finally, I just -- it's important that we understand that we are in a rulemaking process. You have proposed a rule. Is it the final rule?

DARCY: No, sir.

GARAMENDI: Okay. You -- are you committed to listen carefully to the objections some of which you have heard here today others of which I suspect you'll hear in your process to take them into account and to modify where appropriate the ambiguities and to clarify, is that your commitment to do that?

DARCY: Yes.

GARAMENDI: Mr. Perciasepe? PERCIASEPE: Yes, sir.

GARAMENDI: Okay. And you're representing both the Corps of Engineers and the EPA, is that correct?

DARCY: Yes.

PERCIASEPE: I'm EPA, she's (inaudible).

GARAMENDI: I got it. Now, it's important for all of us to realize where we are in this process. You know, I've got a lot of folks in my district, I've got a large agricultural district. I've got plenty of water like 200 miles of the Sacramento River Valley including the river and a lot of questions. When my constituents come to you with -- asking for clarification will you listen to them and will you take that under advice and if appropriate make modifications?

DARCY: Yes.

GARAMENDI: Okay. Now finally, clarification is one thing. There is the law and there are certain thresholds that you will have to follow I suspect that then becomes a court (ph) question, is that correct, a question for the court to answer.

DARCY: As to whether the rule complies with the underlying law. Yes, ultimately.

GARAMENDI: Mr. Chairman, thank you very much.

GIBBS: Mr. Meadows?

MEADOWS: Thank you, Mr. Chairman.

Thank you, both. I do want, Ms. Darcy, to give you a chance to respond in terms of those permits that supposedly transfer, I assume you have counsel here. I would give you a chance to revise your statement because I can tell you from real experience I don't think that your testimony was accurate. If you got counsel in terms of if there's a transfer of land, transfer of permit, you know, perhaps you want to do that. Is that your counsel leaving?

All right. Well, you can get back to the committee. I've got limited time but it is not accurate and I would just encourage you to get together and perhaps change that. But let me -- let me go on (inaudible).

DARCY: That's what I responded to the Chairman -- I mean, to Congressman Mullin that, you know, if it's not clear we need to make it clear.

(UNKNOWN): And maybe I need to be clear (ph).

MEADOWS: And it's clear that it doesn't transfer and so and your counsel is nodding his head yes. So, I would just encourage you to revise your statement. The other part of that is we're implementing these rules for the health and safety of the American people, is that correct?

DARCY: Yes.

MEADOWS: So, Mr. Perciasepe, do you have adequate funding to make sure that the current rules and regulations that we have are implemented and carried out to provide for that health and safety current funding? Yes, sir? Do you have adequate funding for the current regulations?

PERCIASEPE: The current - the one on the book?

MEADOWS: Everything that's on the book without a change.

PERCIASEPE: Yes.

MEADOWS: So everybody should be safe today?

PERCIASEPE: I'm not exactly sure what - I mean we implement a lot of different laws that Congress had passed but...

MEADOWS: OK. Let me go on further, then with this rule, any rule that an agency makes is really for the sole purpose of carrying out the intent of the Congress' law, would you both agree to that?

DARCY: Yes.

MEADOWS: OK.

PERCIASEPE: Yes.

MEADOWS: So, since the administration came up with this at what point did someone in the administration realize that the intent of Congress under a previous law was not being carried out? Who may that decision that the original intent of Congress when they pass the Clean Water Act is not being carried out? Who made that decision?

DARCY: Well, within our agencies we - the purpose as I stated earlier for doing this rule is to provide clarity that we think as a result of the court decisions we needed to do.

MEADOWS: OK. So it is your agencies that decides the intent of what Congress originally pass this law?

PERCIASEPE: Let me just...

MEADOWS: Because I'm a body - I'm a part of a body of 435 people and everyday I'm confused as the intent of this body. So, it's amazing how somebody at your agency could figure out what the original intent of those who pass the law.

PERCIASEPE: I think what's - what we're responding to is decisions that were made in the past that went to the Supreme Court and the Supreme Court has a number of different positions or opinions that they've issued and what they have done looking at those opinions of the Supreme Court which have come out in the last decade that the existing regulations that we had on the books from the '70s need to be modified.

MEADOWS: So you're ignoring Justice Alito's concurring opinion in because he said that really Congress needs to clarify what the waters would be. And so, you're taking Justice Kennedy's sole opinion and ignoring the other four justices?

PERCIASEPE: Well...

MEADOWS: And so who's...

PERCIASEPE: Well, I believe - I believe the chief justice says as (INAUDIBLE) on the fact that the executive needs to do something about.

MEADOWS: And that Congress needs to weigh in as well.

PERCIASEPE: No, I think Justice Roberts said that the executive had an opportunity to do that.

(UNKNOWN): So you're taking Kennedy and Justice Roberts opinion?

PERCIASEPE: Well, yes.

MEADOWS: OK. I think my point is made and really the whole point is is that Congress should be the one that is fixing that not administrative law because I'm very concerned that you continue to make rule after rule after rule.

And arbitrarily decide what is good for the American people when there is 435 in this body elected officials to make that decision, would you not agree?

PERCIASEPE: I don't agree that it's arbitrary because I think we interpreted the law that Congress passed in 1972. We put out those rules back in 19 - in the 1970s. Those are the rules that the Congress - the Supreme Court never said they were unconstitutional or the law that the Congress passed was unconstitutional.

They just said...

MEADOWS: So you just passed these unclear rules and we're just clarifying is what you're saying.

PERCIASEPE: Well, people brought a case and went to the Supreme Court, the Supreme Court said we should not...

MEADOWS: Let me close because I'm out of time. A little over 30 days ago, I brought up with you, Mr. Perciasepe, an issue with contamination in my district. I've yet to hear from you.

Have you checked in to all of that? We've gotten no response from you and if you're really concerned about the health and well-being of the American people, I would have thought that a follow up phone call with egregious violations within the EPA would have been appropriate, wouldn't you?

PERCIASEPE: Yes, sir.

MEADOWS: OK. When can we expect a response from you and get that cleaned up?

PERCIASEPE: You'll get something from me before the end of the week.

MEADOWS: Thank you, sir. I yield back.

GIBBS: Mr. Jolly.

JOLLY: Thank you. Secretary Darcy, you mentioned that this is the administration's proposal, is that correct?

DARCY: Yes.

JOLLY: Who else within the administration has had input on this?

DARCY: Well, it was developed with EPA and the Army Corps of Engineers.

JOLLY: I understand that but you deferred to them to call the administration's proposal. Has somebody from the domestic policy council been involved in the creation of this proposed rule?

DARCY: No, but the Office of Management and Budget has reviewed the proposed rule.

JOLLY: From a policy perspective, has anybody from the White House been involved in this proposed rule. To refer to it as the administration's proposal is an interesting choice of word's, it's as though you deferred some of the responsibility of this to the administration collectively as opposed to just the EPA or the Corps?

DARCY: We are part of the administration, so I'm - and we have as I've stated this has been also reviewed by the Office of Management and Budget which is an arm of the president and an arm of the administration.

JOLLY: To the extent of your knowledge, was the domestic policy council involved at all in the proposed rule, yes or no?

DARCY: I don't believe so.

JOLLY: OK. Is that your understanding as well, Mr. Administrator?

PERCIASEPE: I can't know specifically but when we do rule making jointly or individually as agencies it goes through an inter-agency review under an executive order that's been in existence since many, many administrations ago.

And in that inter-agency review ran by the Office of Management and Budget, all the agencies get a chance to participate and comment on proposals before they go out as a proposal. So, I don't have the details on everybody who may have responded or put input into that but if opportunity was available to every agency and we actually did some work with the Department of Agriculture to try to clarify conservation practices that would be not - to declare that they are not falling - they would not be affected by this rule.

JOLLY: So in drafting the proposed rule was there any contribution of language from the White House?

PERCIASEPE: I don't have any specific information and, you know, inter-agency includes the Department of Energy, everyone else.

JOLLY: OK. So you also mentioned that this is a result of some confusion from the Supreme Court decision, is that correct?

DARCY: Yes.

JOLLY: OK. You seem to rely on Justice Kennedy's significant nexus definition though as having provide us some clarity. Why the need to expand on as definition, why not just take it as written if you're relying on it?

PERCIASEPE: Well, I think in our definition we did include significant language from Justice Kennedy but we also recognized and so we want to make it clear that some - in addition to that we wanted to make it clear that some activities and waters were not going to be included. We talked about the ditch already. So, we wanted to clarify that in the rule making that, you know, ditches that are in these, roadside ditches, types of ditches would not be included as an example or ground water or a number of other things that were not specified in his definition.

JOLLY: And the curiosity is because, Secretary Darcy in your written testimony today you refer to the confusion created by regional application and I find your written testimony interesting because it is though the Corps embrace regional decisions as being closest to the community best understanding the issues of the community following Swank (ph) and Rapano (ph).

And yet, now either the Corps or EPA or the administration broadly is stepping away from that regional application because in your written testimony it's now suggesting that what was the answer to use regional application actually created confusion and that's now why you're issuing this.

DARCY: Well, there will be regional distinctions between other waters but in order to have more clarity overall I think that the clarity that this rule will provide will give direction to each of our regions as well as our divisions and our districts about how to apply this one overall.

JOLLY: And the last question, part of the efficiency it says that you will be creating is by reducing documentation. Can you explain that? I think that's the heart of the concern of a lot of people who have concerns within their districts that now this will a less documented, less justified, less explained decision making authority coming from Washington and in fact the regional office will now have less ability to address specific regional concerns.

DARCY: An example of less documentation would be in the instance of the definition of tributaries, the people will now know that a tributary is a jurisdictional water of the United States. Previous to this rule, there are instances where we would have to go out and on the ground to make a determination as to whether a tributary was actually navigable water. So, in this instance now we define tributaries, so you an applicant or the Corps will not have to go out and look and say, OK, yes, it is a tributary. So, that's one piece of the documentation that won't be - will be alleviated by this rule.

JOLLY: And you're confident that streamlining is a better system?

DARCY: I do, I do.

JOLLY: All right. Thank you very much. I appreciate it.

GIBBS: Mr. Rice.

RICE: I want to thank you all for being here today. I've certainly learned a lot. I think the problem here is just the expansion of the - of the bureaucratic authority here and the stifling effect it has on our economy and our freedom. And I wasn't here in 1972 but I sure think we're regulating as Waters of the United States, things that would not have been considered in 1972 and everybody is very fearful that this new rule is an attempt further expansion and particularly with the administration's expansion of environmental protection in other areas currently.

I look at this list - I take it that the purpose of this rule is to more clearly define what the Waters of the United States are, correct? And then, I'm looking at the proposed definition here and there are six defined categories and then on a seventh that says on a case by case basis other waters including wetlands provided that those waters have a significant nexus to a water defined in paragraphs one through three of this section.

And then, as you said earlier, the word significant is defined and it says the term, you know, that's where the - that's where the play comes in, what does significant mean, the term significant - nexus means that are water including wet lands either on and in combination with other seemingly situated waters in the region significantly affects the chemical, physical or biological integrity of the water, is that correct?

DARCY: Yes.

RICE: All right, so you're defining significant as whatever is significant, right? You're saying that it has to have a significant connection, it has to have a significant effect.

DARCY: Yes. RICE: Well, how does that clarify the rule, I mean, at all? Who determines what a significant effect, chemical, physical or biological integrity, who makes that intervention?

DARCY: That would be a determination that would be made by a regulator.

RICE: OK. So either the EPA or the Army Corps, right?

DARCY: Or the Army Corps.

RICE: So what you're saying then is that a federal - federally controlled body of water is anything that we determine is significant and that's very clear with what this rule says. And even if you don't read it that way other people get involved in this, other groups get involved in this and they want this enforced to the ladder of the law, am I correct, these outside groups can bring lawsuits based on this proposed rule, right?

DARCY: Yes.

RICE: So if they determined that it has some significant effect, then they can hold up commerce, they can invade our freedom further, that's the way I see this. Here's what worries me, all of these expansion of authority absolutely affects commerce. The people making these decisions have no skin in this game, there's no cost to them.

And what I worry about is we make ourselves less and less competitive in the world with every one of these additional rules and I don't see these rule clarifying anything. I mean you're saying a water is federally controlled if it's significant and it's significant if we determine it significant. So, I don't see that clarifies anything, that goes right to the crux of the rule. So, here's my question to you, you all have kids?

DARCY: No.

RICE: OK. You got kids, you got grandkids?

PERCIASEPE: Not quite yet, my daughter is getting married next week.

RICE: Here's what I'm worried about because I got kids too, I'm worried that when these kids get out of college because we're telling them go to school

and get great education, your grand kids out of college and we're going to so stifle our economic freedom here that there's not going to be anything for them.

Otherwise, they're going to have less quality of life rather than better quality of life because of these rules. I think, you know, everybody certainly wants to protect our groundwater but I think we've gone so far in doing this that the marginal cost is so much greater than the marginal benefit.

And I would hope that when you actually - OK, I hear you say these aren't final rules, we're just putting this up for discussion. Well, my opinion is this doesn't clarify anything. I think my office could come up with a better draft than this.

PERCIASEPE: Can I just add a couple of points?

RICE: Sure.

PERCIASEPE: Because you're on to the issue we're trying to deal with and I just want to point out that earlier on in the definition section it says notwithstanding whether they meet the terms of the following paragraphs including number seven. These things are excluded and so it has a list that we've talked about a number of times already. We have some of the ditch issues.

RICE: OK. You specifically excluded a few things, I understand that.

PERCIASEPE: So then when you get into the rivers and the streams there's a definition in here that if it doesn't have a normal bank and these are defined in the science of hydrology, a bank or a stream bed or a high - ordinary high water mark, then it is not included. So, the - if it - so at some point, you know, whether - there has to be enough water occasionally in there, you know, even seasonally it's even - even, you know, all members of the Supreme Court pretty much agreed with there's a seasonal component to this.

So there are - and then, for it to be a wetland somebody was mentioning earlier about water flowing out of a pool and across the yard and into something else. Well, if it isn't a wetland, if it doesn't exhibit the hydric soils or the - there are other - but I'm just pointing out that there are other factors that are involved as to whether or not...

RICE: OK. And here's - just from a big picture perspective and I'm way over my time, I understand other factors and exclusions and all that, but here's

where we are, it takes 15 years to get permission to dredge the port of Miami which has dredged umpteen times before, it takes - it's going to take five years to get permission to dredge the port of Charleston which has been in a constant state of being dredged for the last 20 years. It takes ten years to get permission to build a road. We can sit here and dance on the head of a pin for days and that doesn't change the fact that our regulatory expansion is completely out of control and we need to be reining at the end rather than continuing abroad. Thank you very much.

GIBBS: Thank you. Mr. Webster.

WEBSTER: Thank you, Mr. Chairman, for having this hearing. I do have one question of EPA. How is EPA planning to distinguish between groundwater and shallow sub-surface connections?

PERCIASEPE: First of all...

WEBSTER: I'm asking that because Florida is kind of - it's a unique state in a lot of ways. I mean most of Florida is a wetland and the water is close to the surface - anyway, what do you think?

PERCIASEPE: We are trying to stay out of ground water with this rule, so if we're not achieving that that's - I hope we'll get some comment on that because we're trying to exclude groundwater from being considered. We're also trying to make sure that, you know, drainage is not included as well. So...

WEBSTER: But in staying out of it, don't you have to distinguish between the two?

PERCIASEPE: Well, one - you're talking a constructed underground system? I'm not...

WEBSTER: Well, just - there is shallow sub-surface connection and I assume that that's not the same as groundwater and what I'm asking is will there be some sort of distinction between the two?

PERCIASEPE: There obviously is. I'm just going to read from the definitions, excluded from this is groundwater including groundwater drain through sub-surface drainage systems, that's excluded.

WEBSTER: So would pollutants introduced into shallow sub-surface connection be in need of a permit in order to do those discharges?

PERCIASEPE: I don't know this. It would be improper for me to try to answer it, not knowing the issues. I mean, you can inject -- you can inject things into the ground for disposal but it does require a permit under the Safe Drinking Water Act if you're disposing pollutants or other things into the ground.

There are places that do this all over the country but they do require a permit under the Safe Drinking Water Act.

WEBSTER: OK, I yield back.

GIBBS: Mr. Massie?

MASSIE: Just want to start with a common sense question. I think it's common sense. This comes from my home builders.

But first let me ask, what's the cost of implementing this new rule? Just quickly give me a range.

PERCIASEPE: Our economic -- our draft economic analysis, which is out for public comment estimates between -- I can look up this -- I know it's somewhere between \$100 million and \$200 million.

MASSIE: A \$100 million to \$200 million. So my home builder is going to have to get more permits or fewer permits after this rule?

PERCIASEPE: This is -- this is based on...

MASSIE: Or the permits just get more expensive?

PERCIASEPE: This is based on the observation that Assistant Secretary Darcy said earlier that when we went back and looked at the jurisdictional, the determinations made under the 2008 guidance we saw that maybe about three percent would increase.

MASSIE: So you're going to increase the jurisdiction of the EPA and Army Corps of Engineers.

PERCIASEPE: No, this would be -- because of the...

MASSIE: And so, that's going to lead to more cost? Here is my common sense question, there is a whole industry that tries to deal with these regulations. And I know you spend a lot of your time and resources, and

money, which is taxpayer money trying to protect the environment and our waterways.

Wouldn't it be more effective just to set the guidelines for the home builders to follow and not require them to get permits? Wouldn't that be more cost effective to go back to the fundamental principle in this country that you're innocent until proven guilty? Why don't we assume that there are good actors until you find out otherwise? Why does everybody have to ask Mother may I to the EPA and the Army Corps of Engineers if they just want to build a home for somebody?

PERCIASEPE: Well, I would -- I would say that if -- well, first of all we don't want to expect the jurisdiction...

MASSIE: I'm done with that question.

PERCIASEPE: OK.

MASSIE: What about the idea for presenting the rules abide the rules...

PERCIASEPE: A permit -- a permit that they would need would be the authorization to discharge pollutants or fill into the water...

(CROSSTALK)

And they don't -- they don't...

MASSIE: The question here is if they don't discharge pollutants why do they need a permit?

PERCIASEPE: They don't.

MASSIE: OK. So why are my home builders waiting for permit?

PERCIASEPE: Because they want to -- they want to fill in -- I'm guessing, because they want to fill in...

MASSIE: But their fill is not going to cause pollution, otherwise you wouldn't give them a permit...

PERCIASEPE: Now the Clean Water Act defines fills as a...

(CROSSTALK)

MASSIE: OK, why if that fill is not harmful and you set up the guidelines and they abide by those guidelines why did they need a permit? I'm just -- what I'm testing here is the whole assumption that -- that you're -- that I think has been promulgated here is that these guys are bad actors and you need to rein them in and they've got to get your permission before they can do anything.

PERCIASEPE: We don't think they're bad actors, we think they do amazing things.

MASSIE: I don't think they are either, they are building homes but they can't do it in my district because they're waiting months for permits and some of this stuff is not even developable. ..

Look, I want to go to agriculture here. Why did you seek to narrow down to 56 the number of agricultural farming practices? Why can't we just assume the farmer knows how to farm?

DARCY: Congressman, in the interpretative rule that accompanied this proposed rule, we worked with the Department of Agriculture and the Conservation Service to lift 56 practices that are currently under...

MASSIE: So you worked with organizations in Washington D.C., that's great, but why don't we trust the farmers back home that they know what the practices are and assume there might be more than 56 things that you have to do to farm.

DARCY: Congressman those 56 things are ongoing conservation practices that we are saying are exempt from the Clean Water Act that we have said before. So these are additional new things that have come into being since the passage of the Clean Water Act...

MASSIE: Can you tell me what's not exempt now?

DARCY: What's not exempt?

MASSIE: Yes, what might the farmer do that is not exempt?

DARCY: I could not tell you right now what is not exempted because most of the agriculture practices are exempt.

MASSIE: Here is one thing that I am worried about, you know, I'm a farmer. I farm. I've got ditches. They've all got high -- I mean, I could find a bed, a high-water mark, a bank, these ditches, isn't that -- how is that compatible

with excluding ditches and then saying if it has these features, that it's under your jurisdiction?

DARCY: We have specific exemptions in the proposed rule for a district.

MASSIE: Do those exemptions extend to somebody who is spraying their fields and they've got a grassy ditch, for instance, that may flow only occasionally and they are using approved ag chemicals?

DARCY: That is exempt from the Clean Water Act because it's an ongoing agricultural practice.

MASSIE: That's comforting to hear that none of my farmers will have to get a permit -- and this is what you are saying, correct, to spray their fields for me, to the Corps of Engineers or the EPA.

DARCY: That's correct.

MASSIE: All right, thank you. My time is expired.

GIBBS: Mr. Davis?

DAVIS: Thank you, Mr. Chairman. Thanks, Secretary Darcy and Administrator Perciasepe.

I have a couple of questions. Number one, the administration has committed extreme (inaudible) in expediting permitting for major infrastructure projects, then moved energy. However, it seems that the EPA Waters of the U.S. rule will do just the opposite because it create new sub-categories of water that could be subject to federal jurisdiction.

Is there any way for the EPA, Mr. Administrator to guarantee that this rule will not further delay permitting for energy and infrastructure projects?

PERCIASEPE: Our view is that we're not expanding the jurisdiction. So under the -- and we're actually excluding some things that may be involved with some energy development projects. So I mean, I don't see how this will add to the burden.

DAVIS: OK.

I'm going to get to a few more questions that I think may get back to this. We're a little frustrated by what could be the regional approach to some of

the permitting issues and I'm going to give you a couple of examples in just a second.

But you also mentioned, Mr. Administrator, that in your testimony the EPA and the Corps then work with the U.S. Department of Agriculture to ensure that concerns raised by farmers in the Ag industry were addressed in the proposed rule. Did you also consult with the EPA Science Advisory Board, which now includes the (inaudible) farm bill and amendment that I introduced agriculture interest?

PERCIASEPE: Science Advisory Board did you say?

DAVIS: Yes.

PERCIASEPE: Yes, the Science Advisory Board will be looking at this proposed rule before it goes final but they haven't completed their review and we haven't set it. They are currently reviewing some of the science documents that go along with this as well.

And one of the reasons -- in addition to stakeholder request that we've extended the time period for public comment is that we wanted to complete the Science Advisory Board's review of some of the science documents so that that review is out there at the same time as the rule making docket that's still open.

DAVIS: OK, all right. Another quick question on the energy side that I forgot to ask. Secretary Darcy, can you give me any idea how other agencies and industries, you know, subjectively determine what might actually be covered by a Clean Water Act permit?

DARCY: Under the proposed rule? I mean, how...

DAVIS: Under the proposed rule.

DARCY: Under the proposed rule anyone who believes that they would be impacted by the proposed rule can comment to us...

DAVIS: So through the comment process they can come in because they might believe that they could be impacted, could be required to maybe self report, work with the regional office, et cetera, on an energy infrastructure project?

DARCY: Yes, and because then they would want to know if they would be subject to the rule, so, yes.

DAVIS: All right, in your proposed rule it mentions that waste treatment systems are not included in this -- in the definition of the proposed rule, the Clean Water Act of Waterways, right?

DARCY: Yes.

DAVIS: OK. Does that change the EPA's jurisdiction over above-ground septic discharge systems that many in my district actually have to utilize because of either soil type issues or rural living arrangements?

PERCIASEPE: I don't -- I turned it off when I thought I was turning it on. I don't believe EPA -- the EPA does not regulate septic tanks.

DAVIS: You may want to check with your -- you may want to check with your regional office that covers my state of Illinois because the septic discharge systems are being regulated by that regional office under an NPDES permit. And that's part of my frustration.

Maybe what you see and what you hear in Washington isn't getting to your regional offices because members of Ag interests in the state of Illinois and that with the USCPA (ph) just very recently. And it may have been yesterday or this morning, all and what are the requirements for -- above on a septic discharge permit. And it said it is the responsibility -- the EPA, your region said it is the responsibility of the potential discharger to determine whether or not his or her system might discharge into a water of the United States.

And it said even during this self determination -- this comes from the EPA's guidance, frequently asked questions on EPA's NPDES general permit for new and replacement surface discharging systems in Illinois, an FAQ sheet.

I'll go right to the point. It says, "if so, even though pollutants would not be carried to the Waters of the United States unless your area experienced an exceptionally wet season you are still required to obtain coverage under a permit. Only if you are sure that your system would not discharge pollutants to a water of the United States or a conveyance that leads to a water of the United States, should you forgo obtaining a permit for a surface discharging system. If you do not obtain a permit but actually discharge you may subject to an enforcement action under the Clean Water Act."

This gets to the point of the rule, sir. It specifically -- this is -- it specifically says waste water discharge systems will not be subject to the proposed rule and the change. But your regional office is basically saying self report, however, we may fine you if you're wrong because it may actually discharge

according to their own -- their own rule or their guidance, it may discharge into an (inaudible) waterway.

Can you see where we have some problems here when it comes to what you're talking to us about and then what goes back to the region, and then has a tremendous impact on the families that I represent, and that all of us represent here in this country?

PERCIASEPE: Well. I'm at a loss to determine whether or not -- I mean, first of all this is a proposed rule, so the regions are probably not dealing with it now anyway. But we think the waste treatment exclusion has been in existence before this rule. We're trying not to change it. So I can't answer you here and I will find out for you why something like that doesn't fall under the existing waste treatment exclusion.

I just don't know the answer to it.

DAVIS: Well, thank you and I do appreciate your willingness to do and I'm going to end by saying this because I'm out of time.

Many rural communities in Illinois, some of the poorest areas in Illinois have to rely upon an above-ground septic discharge system. And it is an issue where they can't be worried about the EPA determining whether or not there's going to be an enforcement action based on this NPDES permitting process that seems to be so vague and it seems to be in direct contradiction with the proposed rule.

So thank you for getting back to me.

Secretary Darcy, thank you for your time too and thank you to both of you for being here today.

GIBBS: And we're going to conclude this first panel. And I want to thank you for coming.

I just got to comment. It was really amazing to me and it was really appalling, I guess, that this proposed rule has been put out and the connectivity study hasn't been completed. And when you hear all the questions and everything, you know, what is the jurisdiction? What includes, you know, its tributaries, ditches, tributary ditches and all that and what lands.

And when the study and that's what -- it creates all of this ambiguity and vagueness here. And I think we really need to be concerned about that

really take note of the comments that are coming in and from this hearing. And otherwise we're just opening up a whole can of worms and I think it's a trial lawyer's dream come true, and a lot of lawsuits. And we don't have litigation to cost more problems.

PERCIASEPE: Our objective is to reduce that as the Assistant Secretary said. And I appreciate what you're saying about the study. I mean we had the draft study when we did this rule and that's one of the thing -- we promise we will not...

GIBBS: I don't believe it's peer reviewed, I don't think it's come to the final legislation.

PERCIASEPE: They had two prior peer reviews before it went to the SAB (ph). So we can get into that detail. I know you're out of time. But we won't finalize the rule without their final review.

GIBBS: And I know you've been here for a while and I hope you can stay and at least hear the testimony of the next ones, the next witnesses because I think they've got some really good comments and raise a lot of questions of where were we before and...

PERCIASEPE: We look forward to working with them over the next 90 days.

GIBBS: Thank you and we'll take a couple of minutes here to get set up for the next panel two.

END

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