EPA MISMANAGEMENT, PART II

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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EPA MISMANAGEMENT, PART II

Wednesday, July 29, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
WASHINGTON, D.C.

The committee met, pursuant to call, at 9:01 a.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Jordan, Walberg, Amash, Gosar, Gowdy, Lummis, Massie, Meadows, DeSantis, Buck, Walker, Hice, Carter, Grothman, Hurd, Palmer, Cummings, Maloney, Norton, Lynch, Connolly, Lawrence, Watson Coleman, Plaskett, DeSaulnier, and Welch.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come to order. Without objection, the chair is authorized to declare a recess at any time.

The title of today's hearing is about the EPA mismanagement. This is the second hearing we have had. We had one back in April. And once again we find ourselves at a hearing examining the management failures at the EPA.

Allegations before us today are disturbing and sound strikingly similar to a hearing this committee held just a few months ago. In April, we discussed Peter Jutro, the former EPA manager who had a history of serial harassment. Mr. Jutro harassed at least 16 women, with 13 of them filing formal complaints of misconduct to management. These reports, unfortunately, fell on deaf ears. In fact, EPA leadership continued to promote Mr. Jutro even though he continued to harass his female coworkers.

The EPA Office of Inspector General launched an investigation in August of 2014 into alleged acts of sexual harassment by Peter Jutro. During the course of its investigation, the EPA OIG corroborated the sexual harassment of a 21-year-old female intern at the Smithsonian and uncovered other allegations of Jutro's sexual harassment of female EPA employees throughout his 31-year career at the agency.

Senior officials at the EPA may have known about Mr. Jutro's misconduct prior to the intern incident, but it did not take necessary steps to corroborate that information while promoting him to the Acting Associate Administrator position in February of 2014. They failed to contact Mr. Jutro's direct supervisor, who knew of the allegations against Mr. Jutro, and verbally counseled him on multiple occasions for inappropriate behavior. When the EPA inspector general attempted to interview Mr. Jutro a second time, the

Agency allowed Mr. Jutro to retire, blocking the OIG from pursuing the investigation further.

The deep concern here is that—people are going to do stupid things. That is going to happen. We are a very forgiving society. But when you have somebody who repeats this behavior that is absolutely and totally unacceptable and does so time and time again, there needs to be consequences, not promotions. And it is of deep concern to this committee, to this Congress, on both sides of the aisle, that when these things are brought forward, that they are dealt with.

The situation that we are dealing with here today is another very unfortunate situation, to say the least, of a young woman who was harassed. And then it was compounded by the fact that the people who were trying to investigate it and hold people accountable were retaliated against.

So today we are discussing new allegations of sexual harassment along with employer retaliation in EPA's Region 5 Chicago office. Sadly, this incident is almost identical to the Jutro situation. Here a 24-year-old research fellow is the victim of a sexual harassment by a 62-year-old employee by the name of Paul Bertram. The victim in this case—and I would admonish our members here and the people that are on the panel today, we do not want to refer to this victim by name. She deserves our utmost respect. I do not want you to use her name. Call her the victim, Intern X, but we are not to use her name in this hearing here today. We are trying to protect her identity. She deserves better in her young career as she is starting forward.

But in her statement, when she put forward what she went through, the way she described it is this perpetrator, Mr. Paul Bertram, inappropriately hugged her, rubbed her back, grabbed her, rubbed her hands, touched her knees, kissed her, made suggestive comments, and engaged in unsolicited physical and verbal contact. This happened countless times over a period of years. The consequence? They moved the 62-year-old's cubicle. That was one of the consequences.

Unfortunately, he had a history of this. This was not just the first time. This was not just an isolated incident. What we are going to hear today is this had happened several times before. And when it happens, you have got to deal with it and protect, in this case, the young women in the office because it creates such a toxic environment.

The overwhelming majority of people at the EPA, the overwhelming majority of people that work in our Federal Government, they are good, honest, decent people. They do not do this. But it taints the whole atmosphere. In fact, one of the most toxic environments we have is at the EPA. How ironic. The mission of the EPA is to protect the environment, protect the people. The problem is the EPA does not protect its own employees.

And we have got good people here today who are in a position to do something about it. They did. They did their work. But then they were retaliated against. That only compounds it and makes it worse.

Our witnesses today believe the EPA management in Chicago retaliated against the employees who investigated the victims' accu-

sations of sexual harassment. Three of these employees are testifying today—three of them. This is not just one person saying: Oh, I was singled out. Three of them. And there are more. I applaud them for being brave enough to come before this committee today and to tell their story.

Other employees have submitted written testimony. And one passage from Ms. Deborah Lamberty—I hope I pronounced her name properly—is a perfect example of what these employees are facing, but it is so fundamentally wrong at every level. And I read from what she wrote: "Retaliation is not always loud and full of itself. It can be quiet and chilling, the soul-crushing kind, the kind that leaves you alone in your cubicle in tears in the middle of the day."

That is so wrong. We would be deficient in our jobs if we did not highlight this. We are here to help solve this. We are Oversight, but we are also Government Reform, and if we have to keep doing this, we are going to keep doing it. But if we do not shine the light on it, it is not going to get solved. Something is wrong when multiple employees come to Congress and attempt to get attention of the EPA management.

I would like to enter into the record, I ask unanimous consent to enter into the record a letter from the National Treasury Employees Union, somebody I do not always agree with. On July 1 of 2015, they wrote this letter to myself and Mr. Cummings, the ranking member.

I will read one sentence from it. "Our trust and confidence in the EPA leadership has sunk to an abysmal level, and we respectfully submit to you that more remains to be done in order to correct this unacceptable situation." I ask unanimous consent to enter this into the record. Without objection, it is so ordered. Thank you.

High-performing employees, people who are optimistic about their country, passionate about their work, concerned about their environment, trying to do a patriotic job, earn a living, and support their family, it is so discouraging when they see management rewarded for bad behavior and ignoring clear signs of misconduct.

Like I said, this is not common. It is not regular. But when it does happen, every red flashing light in the building better go off at every level in Washington, D.C., in Chicago, and other places, and there can never be the retaliation like we are about to hear today.

Again, I want to be careful about the treatment of this young woman. Please refrain from using her name. I look forward to having this hearing here today.

And I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I associate myself with your words. I must say, Mr. Chairman, as a husband and as the father of two beautiful daughters, as a brother with three sisters, and with a son, being a son of a beautiful mother, I want to thank you for holding this very important hearing today.

First, I want to welcome the whistleblowers who are testifying on our first panel. They have some very troubling, very troubling allegations. In short, they assert that an EPA official in Region 5 sexually harassed an intern and several other women, that managers in that region tried to cover up this activity, and that they were retaliated against after they tried to expose this wrongdoing. Those

are some very, very strong and painful and unfair and unfortunate allegations.

The three whistleblowers here today are the former heads of the Offices of Human Resources and Civil Rights in Region 5, as well as the Equal Opportunity Employment manager there, holding very responsible and significant positions. I want to thank each of them. I know how hard it is to come forward in this public forum and to testify before the United States Congress and put yourselves out there, not only to this committee, but I am sure to a C–SPAN audience.

Our committee respects whistleblowers, and I say that without hesitation. And I can tell you that on both sides of the aisle we have done everything we know how to protect whistleblowers, and we will continue to do everything in our power to ensure that all valid claims are thoroughly investigated and remedied.

Let me also welcome Ms. Kellen. She represents the employees union, and their core goal is to protect the rights and interests of hard-working and dedicated Federal employees across the Federal Government.

We welcome you, Ms. Kellen.

And I have been a strong advocate whenever Federal employees have been talked about in a negative way, I have been one who has constantly reminded all of us up here that we are also Federal employees.

Finally I welcome Administrator McCarthy, who will testify on our next panel. Although the activities at issue today happened before she became the EPA Administrator, we are happy Ms. McCarthy is going to be here, and we thank her for her service.

Sexual harassment is intolerable and has no place in the Federal workplace. Let me be clear on that. Sexual harassment is intolerable and has no place in the Federal workplace. That statement may seem obvious, but it is still worth saying.

In this case there seems to be an agreement that on March 2, 2011, a little more than 4 years ago, an intern reported that an environmental scientist in Region 5 had sexually harassed her in that office. Based on the limited information we have, it appears that managers acted quickly in response to this incident. The branch chief notified his supervisor, sought guidance from human resource officials, and informed them about a prior incident about 7 years earlier.

In turn, the human resource officials provided guidance, gave him a draft letter of reprimand, and urged him to move quickly. They met with the individual, who admitted that he: "crossed the line." They issued a Notice of Proposed Removal, and he left the Agency in June of that year.

Unfortunately, that was not the end of the story. Our witnesses here today also allege that officials in Region 5 retaliated against them for investigating this matter.

Allegations of whistleblower retaliation are very serious, and they deserve to be fully investigated, and substantiated if they are true, but that has not happened yet. Essentially, so far we have only one side of the story. Our committee has not interviewed many of the people involved in this case, we have not requested rel-

evant documents from the Agency, and the inspector general has not investigated these allegations.

Mr. Chairman, in order to respect the rights of all Federal employees, I recommend that this committee either initiate an investigation and a thorough investigation of these retaliation allegations or that we ask the inspector general to do so, and I would join you today in making that request. These whistleblowers deserve their claims to be taken seriously and to be investigated thoroughly.

Finally, I believe that Congress needs to enhance the laws against discrimination and abuse rather than watering them down. Let me say that again. Congress, we folks up here, need to enhance laws against discrimination and abuse, rather than watering them down.

For example, right now, current law does not prohibit sexual harassment or discrimination against unpaid interns or others who are not paid directly by an agency. Something's wrong with that picture. These are young people who come here trying to walk into their destiny, trying to get experience, working for free, sometimes from 9 to 5, 9 to 10, simply trying to be all that God meant for them to be. It appears that some of the victims in this case may have fallen into this category.

In order to close this loophole, yesterday I introduced H.R. 3231, the Federal Intern Protection Act. This legislation is one that our entire committee should be able to support, and I hope that all of my colleagues will join in cosponsoring the bill.

In addition, the House of Representatives recently took up my bill, H.R. 1557, the Federal Employees Antidiscrimination Act, which I introduced earlier this year. The House passed this legislation by a resounding, bipartisan, unanimous vote of 403 to 0. And I want to thank the chairman for joining me in cosponsoring that bill and supporting it. I hope we can work together again to press the Senate to act quickly on that bill.

What we should not do, however, is strip away existing Federal civil service protections, as some of my colleagues have proposed. That is going in the wrong direction. And I respect many of our witnesses today—I would suspect that they would strongly agree with me.

Again, Mr. Chairman, I want to thank you, and on behalf of all of those people who come to work for our Federal Government, who simply want to be the best that they can be, who simply want to be about the business of giving their blood, sweat, and tears to the public and making the public a better—place them in a better position, we say to you and to our whistleblowers, we will do every single thing in our power to protect you. And I say that, I am sure, for this entire committee.

And with that, Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I will hold the record open for 5 legislative days for any member who would like to submit any written statement.

We would now like to recognize our first panel of witnesses. And I want to say at the onset, we do appreciate these people being here. This is not common to come testify in front of Congress, as we have many people that come on a regular basis. These are peo-

ple that are serving on the front lines and doing the good work for this country, and we thank them for being here.

We are pleased to be joined by Ronald Harris, who works at the U.S. Environmental Protection Agency. He is served at the EPA for 26 years in such positions as property supply specialist, grant specialist, labor relations specialist, and EEO manager. Mr. Harris was reassigned to unclassified duties at the Employees Services Branch in the Health and Safety Office. We look forward to hearing his comments.

We appreciate, as I read your bio, your participation and your service in the United States military. We thank for that service as well.

We have Carolyn Bohlen.

Did I pronounce that properly?

Dr. Carolyn Bohlen is a distinguished manager and supervisor with more than 30 national and regional awards over her 28-year career at the EPA. Her awards range from Outstanding Achievement in Equal Employment Opportunity, presented by Susan Hedman, to the Federal Manager of the Year Award. She has quite a distinguished career, and we are honored that she is here with us today.

Mr. Ross Tuttle is also with us here. He began his career in the EPA in 2009 as a human capital officer, a senior manager position for Region 5. He currently works in Region 6 as a senior supervisor to the regional administrator.

We also, as I read your bio, I thank you for your service in the United States military as well.

Karen Kellen is joining us. She currently serves as the President of the American Federation of Government Employees and is an enforcement attorney for the EPA.

And we thank you again for being here with us today.

Pursuant to committee rules, all witnesses are to be sworn before they testify. So if you would please rise and raise your right hand.

Thank you.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth?

Thank you. You may be seated.

Let the record reflect that all witnesses answered in the affirmative.

In order to allow time for discussion and the fact that panel two will include the EPA Administrator, we would appreciate it if you would limit your verbal comments to 5 minutes. Your entire written statement will be entered into the record, and as we go through the hearing today, if there are additional comments, information that you would like to provide to the committee, we would obviously welcome that on a timely basis.

But if you could please limit your comments to 5 minutes. We will start with Mr. Harris and go down the line. And then after that we will go to the question section.

Mr. Harris, you are now recognized for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF RONALD HARRIS

Mr. HARRIS. Good morning, Chairman Chaffetz, Ranking Member Cummings, and other distinguished members of the committee. My name is Ronald Harris. I am an EEO employee and specifically an EEO specialist located in the Region 5 Chicago, Illinois office. Thank you for inviting me to submit a statement for the record with regard to sexual harassment, discrimination, and retaliation that took place in the Region 5 Chicago office by several EPA managers, the highest level managers within various divisions in the region.

I also would like to thank my attorney, Mr. Waite Stuhl, for his tireless efforts in representing me with regards to the issues I endured in this 4-year battle with the Agency.

I watched the EPA hearings titled "EPA Mismanagement" streamed on April 30 of 2015 before this same committee and was literally sickened to see the stories depicted were so similar to mine with regard to the following: Sexual harassment, the length of the harassment, and the regional coverup about these blatant and willful discriminatory activities by management officials. After viewing the hearing, I was more determined than ever to share my experiences as it related to the similar scenario within the EPA.

Ironically, I am here before you again, as I offered testimony before the 106th congressional committee nearly 15 years ago. The issues that were prevalent then are similar issues that I appear before you today to discuss.

During the opening statement of the 106th Congress by Chairman Sensenbrenner, he stated: "Retaliating against those who speak out against the Agency is not acceptable. Failing to enforce EPA disciplinary policies against those who are found to discriminate or harass is not acceptable. All of these actions send a message to EPA employees not to speak out, not to engage in public debate, and not to dissent against the Agency."

He further stated: "The EPA managers or officials that have been found to discriminate, harass, and intimidate other EPA employees or the public should be disciplined. This does not appear to happen."

I chose to highlight Chairman Sensenbrenner's prior quotes to use in this opening statement today because very little has changed within the EPA management culture, Region 5 office, despite the fact that these statements were made a decade and a half ago. This lack of change has a direct correlation to the absence of accountability. To expect change without accountability is wishful thinking at its best.

The regional office has chosen to offer the reward for going along to get along over accountability. In Region 5, this type of managerial mentality strengthened resistance and animosity toward change because the sentiments spoken by Chairman Sensenbrenner in the 106th Congressional were viewed as oppositional.

To further illustrate this point, the over 500 documented pieces of evidence I provided to this committee reveal that when I and Dr. Bohlen followed Agency protocol and reported allegations of sexual harassment activity towards female interns to the EPA Wash-

ington headquarters office, we discovered, through our investigation as EEO officers, had been going on for at least a decade and involved more than a dozen women. And we were immediately retaliated against by Mr. Bharat Mathur, assistant regional director, and removed from our positions in the Office of Civil Rights for following Agency protocol and contacting headquarters.

Despite the fact that Mr. Mathur had a legal obligation to prevent discriminatory activity within Region 5, he was rewarded with a $35,900 award approved by Washington headquarters to further supplement his $179,000 annual salary. This award given to Mr. Mathur was approved by the Region 5 administrator, Susan Hedman, and management officials within the EPA Washington headquarters as well had to make this approval.

Other Region 5 senior managers who were also named participants in these discriminatory coverups and retaliatory activities also received awards approved by both Regional Administrator Hedman and Assistant Regional Administrator Mathur. These monetary awards should have to be repaid to the government so that the earlier statements made by Chairman Sensenbrenner and further echoed by this honorable committee today will send a strong message: That discrimination and retaliation does not pay and there must be accountability.

Another claim that I mentioned in 2000 to the 106th congressional committee was that Region 5 and EPA lacked an Agency process for dealing with managers who retaliated and discriminated against regional employees. Three years later, in 2003, in a U.S. GAO report to Congress entitled "Environmental Protection Agency: Continued Improvement Needed in Assessing Equal Employment Opportunity," on page 15 stated that the "EPA had no formal process to discipline managers found for discrimination."

Further, on page 16 of this same report, the GAO concluded: "Accountability is the cornerstone of results-oriented management. Because EPA's management sets the conditions and terms of work, they must be accountable for providing fair and equitable workplaces, free of discrimination and reprisal."

By implementing the 2003 U.S. GAO report, this honorable committee can send another strong message: That the word "accountability" applies to these management officials too.

[Prepared statement of Mr. Harris follows:]

Witness Statement before the 114th Congress, the Government Reform Committee:

Witness: Ronald Harris, EPA, Region 5, EEO Specialist.

Date: July 29th

Introduction

Good-Morning, Chairman Chaffetz, Ranking member, Cummings and other distinguished members of the committee. My name is Ronald Harris, I am an EPA employee, and specifically an EEO Specialist located in the Region 5, Chicago, Illinois Office. Thank you for inviting me to submit a statement for the record with regard to sexual harassment, discrimination and retaliation that took place in the Region 5, Chicago office by several senior EPA managers, the highest level managers within various divisions in the region. I also would like to thank my attorney, Mr. Waite Stuhl, for his tireless efforts in representing me with regard to the issues I endured in this four year battle with the agency.

Mr. Chairman, I also respectfully request the committee's indulgence and ask prior to my testimony that Administrator McCarthy go on the record and state there will be no retaliation against any of the regional employees who submitted documents for this hearing and those that are appearing before you today and if retaliation that is currently ongoing be ceased immediately.

I watched the EPA hearings titled "EPA Mismanagement," streamed on April 30, 2015 before this same committee and was literally sickened to see that the stories depicted were so similar to mine with regard to the following: (1) sexual harassment, (2) the length of the harassment, and (3) the Regional cover up about these blatant and willful discriminatory activities by management officials. After viewing the hearing, I was more determined than ever to share my experiences as it related to this similar scenario within the EPA.

Ironically, I am here before you again, as I offered testimony before the 106th Congressional Committee nearly 15 years ago. The issues that were prevalent then, are similar issues that I appear before you today to discuss.

During the opening statement of the 106th Congress, by Chairman Sensenbrenner he stated:

> *"Retaliating against those who speak out against the agency is not acceptable. Failing to enforce EPA disciplinary policies against those who were found to discriminate or harass is not acceptable. All of these actions send a message to EPA employees not to speak out, not to engage in public debate, and not to dissent against the agency."*

He further stated:

> *"The EPA managers or officials that have been found to discriminate, harass, and intimidate other EPA employees or the Public should be disciplined. This does not appear to happen"*

I chose to highlight Chairman Sensenbrenner's prior quotes to use in this opening statement today because very little has changed within the EPA management culture, Region 5 office, despite the fact that these statements were made a decade and a half ago.

This lack of change has a direct correlation to the absence of accountability. To expect change without accountability is wishful thinking at its best. The regional office has chosen to offer the reward for "going-along-to- get-along" over accountability. In Region 5, this type of managerial mentality strengthened resistance and animosity towards change because the sentiments spoken by Chairman Sensenbrenner and the 106th Congressional were viewed as oppositional.

To further illustrate this point, the over five-hundred documented pieces of evidence I provided to this Committee revealed that when I and Dr. Carolyn Bohlen (Director, Office of Civil Rights) followed Agency protocol and reported allegations of sexual harassment activity towards female interns to the EPA Washington Headquarters office.

We discovered, through our investigation as EEO officers, had been going on for at least a decade and involved more than a dozen women, we were immediately retaliated against by Mr. Bharat Mathur (Assistant Regional Director) and removed

from our positions in the Office of Civil Rights for following agency protocol and contacting HQ. .

Despite the fact that Mr. Mathur had a legal obligation to prevent discriminatory activity within Region 5, he was rewarded with a $35,900 award approved by EPA Washington Headquarters to further supplement his $179,000 annual salary (2011). This award given to Mr. Mathur was approved by the Region 5 Administrator, Susan Hedman, and management officials within the EPA Washington Headquarters.

Other Region 5 senior managers who were also named participants in these discriminatory cover-ups and retaliatory activities also received awards approved again by both Regional Administrator Hedman and Assistant Regional Administrator Mathur. These monetary awards should have to be repaid to the government so that the earlier statements made by Chairman Sensenbrenner and further echoed by this honorable Committee today, will send a strong message that discrimination and retaliation does not pay and there must be accountability.

Another claim that I mentioned in 2000 to the 106th Congressional Committee, Was that Region 5 and EPA lacked an agency process for dealing with managers who retaliated and discriminated against regional employees. Three years (2003) later in a U.S. GAO report to Congress entitled "ENVIRONMENTAL PROTECTION AGENCY, Continued Improvement Needed in Assessing Equal Employment Opportunity," on page 15, stated that the *" EPA has no Formal Process to Discipline Managers for Discrimination." Further o*n page 16 of this same report, the GAO concluded that

> *"Accountability is the cornerstone of results-oriented management, Because EPA's management set the conditions and terms of work, they should be accountable for providing fair and equitable workplaces, free of discrimination and reprisal."*

By implementing the 2003 U.S. GAO report, this Honorable Committee can send another strong message that the word "Accountability" applies to these management officials too. I believe that this is the level of reform that the American People expect from such an Honorable Committee with the power to

address these matters and implement improvements when agency management fails to do so.

The submitted record will also reflect how agency senior management officials failed on many occasions to follow its own process, procedures, statutory authorities, Ethics, and EEOC Guidance within the EEO Process. These failures came from those same officials who had the utmost responsibility to prevent discrimination. Unfortunately, the group mostly affected by these failures were young female interns, new to EPA, and female employees in the Region's Great Lakes National Program Office.

Background

On March 17, 2011, in my capacity as the region's EEO Officer, I began a fact finding inquiry into the allegations of Sexual Harassment and Hostile Work environment in the Great Lakes National Program Office (GLNPO). The alleged perpetrator was a White male management official (with well over 30 years of federal service) who had a documented history of sexually harassing women.

Dr. Bohlen, the region's Civil Rights Director and my supervisor, sent Mr. Mathur an e-mail advising him of the complaint brought to our attention, he was not in the office at this time. However, he was made aware of the allegations of these particular women several weeks prior to us informing him.

In keeping with agency protocol and timeliness of complaints processing, upon learning the status, of these employees (young interns), the duration, and the severity of their claims I contacted Mr. Ronald Ballard for additional guidance Mr. Ballard was the EPA Associate Civil Rights Director located in the EPA HQ office.

After completing the fact finding, Dr. Bohlen and I provided this factual information to Mr. Mathur at a meeting we had with him on April 4, 2011. Angered at the findings, Mr. Mathur's temper exploded in which he immediately subjected us to intimidation, office bullying, humiliation, cursing, shouting, sticking his finger in our faces, requesting that documents be backdated, and referring to the EEO process as a four letter expletive." Mr. Mathur further stated that the harassment and hostile work environment allegations were my fault. In an assaultive manner, Mr.

Mathur repeatedly slammed his fist on his desk and yelled at me, "You did this...this is your fault. Why did you contact headquarters?"

Mr. Mathur was livid that Dr. Bohlen and I initiated an immediate inquiry and fact finding into the intern's allegations and that we had reported them to our Headquarters Office of Civil Rights as we were required to do so by EEOC Guidance and Agency Process.

I attempted to explain to Mr. Mathur, this is what we were instructed to do, when we had issues that were beyond the normal context of title VII issues. He referred to the recommendations we provided as *"Bull- (four letter expletives)!"* without even reading them.

Further, Dr. Bohlen and I discovered during the fact-finding that the sexual harassment endured by the interns included allegations of unwanted rubbing, touching on their backs, legs, arms, and shoulders. Lastly, the allegations also included uninvited sexual advances from attempts at kissing them and referring to the interns as "sexy, sweetheart, sweetie, and darling."

What was really alarming about this entire scenario, is once the report was provided to the two most senior managers in the region, neither one of them took any steps to discipline the management officials who enabled the harassers. Mr. Stuhl put it best when he stated "Even after finding out about the numerous harassment victims, the direct reporting manager continued to feed the harasser a steady diet of young women."

Reassignment

Within 90 days of seeking the collaborative advice and disclosing this information to Mr. Ballard in HQ, I was reassigned and constructively demoted from my position as the Regional EEO Officer to an EEO Specialist. On May 31, 2011, I was notified by Mr. Mathur with Karen Vasquez (newly appointed acting Director of the Office of Civil Rights) present that I was being removed from my position of record and reassigned to an unclassified set of duties in the Employees Services Branch, Health & Safety Office. This change was punitive and stripped me of 75% of my official duties and made me feel invisible from being banished from the region's EEO office on the 19th floor to a remote cubicle on the 12th floor.

Feeling humiliated, saddened, depressed, and bewildered after being notified of my reassignment from a position held for over a decade, I took Leave for a two week period. Upon returning to my desk, I found an envelope dated June 6, 2011 that reads as follows:

"Ron;
We wanted you to know we heard about your reassignment last week to the Health & Safety Office. We felt bad about this reassignment because we feel like we played a major role in it by bringing the sexual harassment issue to your attention. Had you not helped us perhaps you would still be in the OCR Office. We know you did not request or need our assistance, but we talked about what we could do to help you and some of us decided to let HQ know that this reassignment was unjust and unwarranted. Please keep your head high and know you have earned the respect of the women in the GLNPO".

Sincerely
The women in the GLNPO"

Additionally, after returning to my desk from Leave, every item related to EEO activity was removed from my computer to include; access to databases, statements, e-mails, notes, and updated statuses about EEO complaints filed. I later found out these items were removed by Ms. Vasquez , the employee Mr. Mathur chose to replace Dr. Bohlen when he removed her from the Office of Civil Rights and directed her transfer to a cubicle in another division with no duties to perform.

Despite her short tenure, Vasquez too would receive an award approved by the Regional Administrator Hedman and the Assistant Regional Administrator Mathur, Even thou shortly thereafter the EEOC found her to be a discriminating management official in a related EEO complaint indirectly related to this issue. The actions of these seniors managers has led to additional erosion of the Region 5 OCR office, an office they see as unnecessary and unwanted, this erosion continues to this very day.

Based on the evidence presented to this Honorable Committee, I submit that I was one of the victims retaliated against by management officials for providing precisely the kind of assistance required of EEO positions under the anti-discrimination statutes and the federal regulations, including those imposed upon federal agencies by the U.S. Equal Employment Opportunity Commission.

My crime, and that of my colleagues who are present before you today, was that, upon learning of possible longstanding and ongoing sexual harassment on the part of a male employee within the region against numerous women, we undertook immediate steps to investigate it; to inform headquarters of it and to stop it. For that we were punished. We had devoted our careers to the mission of the EPA. One might ask whether the harasser's manager in GLNPO to whom the victims had complained over the years to no avail was punished. He was not. To the contrary, his daughter was hired by Mr. Mathur. He has received awards. We alone were made to pay a price for our effort to address the harassment.

On July 28, 2013, with my attorney, Mr. Stuhl, we filed a complaint with the Office of Special Counsel alleging violations of 5 U.S.C 2302 (b) (8) and (b) (9) for retaliation for whistleblowing and engaging in a protected activity. The OSC has a reputation of only accepting cases that are creditable; this cases was accepted On October 1, 2013 for further investigation and prosecution. (May move to end)

On November 18, 2014, with my acknowledgement, Mr. Stuhl withdrew the OSC complaint and filed a Whistleblowers claim with the Merit Systems Protection Board where the case was assigned a judge. We reached settlement with the EPA on April 3, 2015.

Conclusion:

The actions of these senior managers has led to an erosion of the Region 5 OCR office, an office they see as unnecessary and unwanted. This erosion continues this very day with the elimination of the Civil Rights Director position through a planned reorganiation.

The intent of my testimony today is to offer recommendations and to act as a catalyst for this committee to work with the EEOC to hold management officials accountable to the EEO process, MD 110 , and statute 1614.

In conclusion, I appear before this committee today with four recommendations with hopes for bringing about a positive change to the EPA workplace, these recommendations I now make before this committee are similar to the recommendations I also made in 2000.

First and foremost, I recommend the committee examine the roles of the Agency General Counsels with regard to allegations of title VII violations and Counsel's premature involvement in EEO Complaints. Counsel's roles is to represent the best interest of Government, and not act as individual representation to senior managers or individuals. Presently the role of region 5 counsel in EEO complaints undermines the agency policies and the federal statutes enforced by EEOC regarding EEO complaint processing.

Secondly, I recommend the creation of an Ombudsman Office in every region. EPA already uses Ombudsman in matters dealing with the public for various programs. This Office should be independent in structure, staffing, function, budget and appearance to the highest degree possible within the organization. They should also be provided the upmost authority over personnel related issues as they relate to title VII violations. This authority should provide them direct access to the Administrator and Congress. This authority for access to the Administrator should not be delegated downward under any circumstances.

Thirdly, there is currently a hollowness in retaliation coverage for EEO employees across federal government, whose primary existence is to assist aggrieved employees in participating in thier protected rights as mandated by the Laws of congress and the United States. This lack of protection for the employees engaging in this type of work makes them easy targets for senior managers that do not share the values of diversity and equal treatment afforded by law, as demonstrated in the actions taken against Dr. Bohlen and I by senior managers in region 5.

I would respectfully urge the committee to ask EEOC to remedy this hollowness by providing well defined penalties to federal agency's who retaliate against individuals who interfere and create barriers to the agency's and EEOC's mission to eradicate title VII violations in the workplace.

And finally, I encourage this committee to hold the agency accountable for implementing the 2003 U.S. GAO report findings and initiating a process that holds all management officials (including the SES) accountable for their actions and/or managerial inaction when violations of title VII laws occur.

By adopting these recommendations the committee can send another strong message that the word "Accountability" applies to everyone, despite their titles or positions.

I believe that this is the level of reform that the American people expect from such an Honorable Committee with the power to address these matters and implement improvements when senior agency management officials fails to do so.

Once again, I thank-you for your indulgence and allowing me to testify.

Chairman CHAFFETZ. Thank you. We will put your entire statement into the record. Thank you.

Mr. HARRIS. Thank you, Chairman Chaffetz.

Chairman CHAFFETZ. We have questions, so we want to get to your questions. Thank you.

Mr. HARRIS. Thank you.

Chairman CHAFFETZ. Dr. Bohlen, you are now recognized for 5 minutes.

STATEMENT OF CAROLYN BOHLEN

Ms. BOHLEN. Good morning, Committee Chairman Chaffetz, Ranking Minority Member Cummings, and esteemed congressional committee members. I appreciate the invitation to speak before this illustrious committee this morning to discuss my experiences with regard to the violations of the Title VII Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973. Unfortunately, I was subjected to these violations at the behest of the EPA Region 5 administrator, Ms. Susan Hedman, and her former deputy administrator, Mr. Bharat Mathur, the two highest level managers in the region.

In God I trust that my testimony today, along with that of my colleagues present here this morning, will not result in further retaliation. We have the courage to speak before you, acknowledging that we have undergone 4 years of turmoil and consternation as a result of performing the requirements of our jobs. The actions waged against us were, indeed, an infringement of our civil rights and an embarrassment to the Agency at large.

I want to acknowledge and thank Mr. Waite Stuhl, my legal counsel, who is here with us today. My testimony is not intended to diminish or tarnish the meaningful work that many Region 5 employees, supervisors, and managers engage in on a daily basis to ensure that the air that we breathe, the water that we drink, and the land in which we live is safe for us all. I have devoted my career and efforts as a manager to the mission of the EPA. I will note that I am the recipient of the Regional Administrator's Award for Excellence, which was presented by Susan Hedman in June 2010, for outstanding achievement in EEO through redesigning the Region 5 Mentoring Program. I also received the national prestigious Manager of the Year Award from the Federal Managers Association in 2010 as well.

Nevertheless, I will speak about the office bullying, mismanagement, and retaliation that I was subjected to while serving as director of the Office of Civil Rights from September 12, 2010, to July 31, 2011. My life and professional career was disrupted to the point that I had to file a formal discrimination complaint against the Agency in September 2011. The complaint was based upon the overt discrimination practices that were perpetrated against me and my staff during that period.

On August 23, 2010, I was selected by Ms. Hedman and Mr. Mathur to provide my leadership and assistance in restructuring and redirecting Region 5's OCR. As my personnel records indicated, I was reassigned as the director of the Office of Civil Rights.

Mr. Mathur had been the second-in-line supervisor for the OCR for several years. The office had been grossly mismanaged, and Mr.

Mathur asked that I clean it up. He asked me what it would take for me to consider the job. I remarked that it would take a GS–15 for me to undertake the challenge. I explained to Mr. Mathur that I was a person with a disabling condition and with documented reasonable accommodations. Both Mr. Mathur and Ms. Hedman were eager for me to start the job, and they thanked me for accepting it.

Although my effective date was September 2010, I began working in August of 2010. I worked two jobs simultaneously. Mr. Ronald Harris was the EEO officer and the highest-performing employee in the OCR. We worked long, arduous hours developing overdue reports, preparing strategic 2- and 3-year plans, and I rewrote existing manuals, prepared Special Emphasis events, while reorganizing and restructuring each group.

The work was grueling. The office was understaffed and lacking resources. I repeatedly informed Mr. Mathur of the staff shortages. Mr. Mathur continued to give me assignments. Some were not related to OCR, like being made to prepare speeches for him and Susan Hedman, which is very odd, especially since they had two speechwriters dedicated to them.

The work was unrelenting, and with computer work and extensive writing, I made Mr. Mathur aware that I had begun to experience serious pain in my neck, shoulders, and back.

In January 2011, Ms. Cynthia Colquitt, a former employee of OCR, came to us on a detail. She did an excellent job. Ms. Colquitt went on to receive the Region 5 Administrator's Professional Award.

They staged a show to support OCR, but did not take the time to discuss the 2010 Regional Workforce Status and Analysis Report, which illustrated the participation rate of general schedule grades by race, ethnicity, and sex. It showed the full and part-time trends which demonstrated and impacted the racial makeup of the region as compared to EPA nationally and compared to the national civilian labor force.

Mr. Mathur and Ms. Hedman cancelled both meetings with the EEO Office on three different occasions. When Mr. Mathur was asked why we are postponing the meetings, he laughingly responded to Mr. Harris and I and said, "This meeting is cancelled indefinitely," and he walked away from us and closed the door.

It was apparent that these managers who set the tone for the region failed to embrace diversity and the principles of EEO in their leadership roles. The chances of addressing upward mobility initiatives and advancement of qualified minorities to higher graded positions was a moot point with them.

[Prepared statement of Ms. Bohlen follows:]

House Oversight Committee on Government Reform Testimony
Presented By Dr. Carolyn Bohlen

Introduction and Overview:

Good Morning, Committee Chairman Jason Chaffetz; Ranking Minority Member, Elijah Cummings; and esteemed Congressional Committee Members.

I appreciate the invitation to speak before this illustrious committee to discuss my experiences with regard to violations of the Title VII Civil Rights Act of 1964 (which prohibits employment discrimination based upon race, color, religion, sex and national origin); the Americans with Disabilities Act of 1990 (which prohibits discrimination based on disability); and section 501 of the Rehabilitation Act of 1973 (which prohibits discrimination on the basis of disability in programs conducted by federal agencies). Unfortunately, I was subjected to these violations at the behest of the EPA Region 5 Administrator, Ms. Susan Hedman and her former Deputy Administrator, Mr. Bharat Mathur; the two highest level managers in the Region.

In God I trust, that my testimony today, along with that of my colleagues (present here this morning) will not result in further retaliatory measures. We have the courage to speak before you, acknowledging that we have undergone four years of turmoil and consternation, as a result of performing the requirements of our jobs. The actions waged against us, were indeed an infringement of our civil rights and an embarrassment to the Agency at large. I want to acknowledge and thank Mr. Waite Stuhl, my legal counsel, who is here with us today.

My testimony is not intended to diminish or tarnish the meaningful work that many Region 5 employees, supervisors and managers engage in, on a daily basis, to ensure that: the air that we breathe; the water that we drink; and the land in which we live, is safe for us all.

I have devoted my career and efforts as a manager to the mission of the EPA. I will note that I am the recipient of the Regional Administrator's Award for Excellence, which was presented to me by Susan Hedman on June 29, 2010, for outstanding achievement in Equal Employment Opportunity (EEO) through re-designing the Region 5 Mentoring Program. I have also received the national prestigious "Manager of the Year Award" from the Federal Managers Association, in 2010, as well.

Nevertheless, I will speak about the office bullying, mismanagement and retaliation that I was subjected to while serving to direct the Office of Civil Rights (OCR) from September 12, 2010 – July 31, 2011. My life and professional career were disrupted to the point that I had to file a formal discrimination complaint against the Agency in September 2011. The complaint was based upon the overt discriminatory practices that Mr. Bharat Mathur perpetrated against me (and my staff) while under his supervision, during this period. My complaint was based upon my sex as a female; my race as an African-American; my physical disability (as proven by medical documentation and Agency sanction) and retaliation for engaging in a protected activity regarding issues of sexual harassment in the workplace.

Background:

On August 23, 2010, I was selected by Ms. Hedman and Mr. Mathur to provide my leadership and assistance in restructuring and directing the Region 5, OCR. I was reassigned from a nationally recognized area which I developed and supervised in the Superfund Division, since 1991. As my personnel records indicated, I was reassigned as the Director of Region 5's OCR. Mr. Mathur, had been the 2nd line supervisor for the OCR for several years. That Office had been grossly mismanagement and Mr. Mathur specified the need for me to "clean it up". I pointed out that if Mr. Mathur wanted the office to move forward, the problem performers would have to be replaced with high performing employees. He stated that I would have to work with them for now and in a few weeks, we would revisit the staffing issue.

After 16 years as a GS-14 and with a firm commitment to EEO, I accepted the OCR challenge, after having the understanding with Mr. Mathur, that I was to obtain a GS-15 while in that position. I explained to Mr. Mathur that I was a person with a disabling condition and with documented agency reasonable accommodations, since 2000. He remarked that he had back problem as well. Both he and Ms. Hedman were eager for me to start the job and thanked me for accepting it.

The effective date for the start of the OCR job as OCR Director was September 12, 2010, but due to the backlog of late reports and impending deadlines, Mr. Mathur started giving me assignments in August 2010 (I worked two jobs simultaneously). During the first Quarter of fiscal year (FY) 2011, I worked along with Mr. Ronald Harris, EEO Officer for long arduous hours, developing overdue papers; end of the year 2010 Minority Academic Institutions (MAI); and the MD-715 reports. In addition, I was developing new MD-715 reports and preparing strategic plans 2011 - 2013; re-writing existing manuals; preparing for Special Emphasis Program (SEP) events while reorganizing and restructuring each of the SEP groups.

During the first months on the job the work was grueling. The OCR was clearly understaffed and lacking resources. I had four employees (one on a detail) and two were out of the office for extended periods (due to sick leave, personal issues, use or lose, and holidays etc.). The bulk of the OCR work, at all levels, rested upon my shoulders and those of my EEO Officer, Ronald Harris. I informed Mr. Mathur of the staffing needs routinely, during face to face meetings and via weekly reports. I stated the need for additional resources and he repeatedly denied my requests. On October 20, 2010, I presented Mr. Mathur with a "Proposed Staffing Chart" that I had developed and used it as a visual aide to explain the urgent need for additional staffing. Finally, I asked for him to approve someone for a detail in the OCR, even for a short time, but to no avail.

Eventually, Mr. Mathur stated that I could post a full time GS-11 position; a GS-13 detail position; and to solicit for an Administrative Program Assistant. He later went back on his word and when asked for the reason for his decision, he vehemently stated "You are not getting any more staff. So work with what you have!" Please note that there was no hiring freeze at this time. Finally, I was allowed to post a GS-11 position.

Since Mr. Harris was the only high performing employee in the OCR, he and I, routinely dedicated 12 - 16 hour days, in efforts to resuscitate the failing office. I repeatedly asked Mr. Mathur for more and better qualified staff and resources. He repeatedly denied my requests. Yet, he continued to give me assignments, some related to the OCR and others, like writing speeches for him to deliver at the Dr. Martin Luther King Day Ceremony and for Susan Hedman to present at the Women's History Ceremony. Being made to prepare such speeches for them was very odd especially since they had two speech writers dedicated to them. I completed all of the tasks and restructured the office, but not without consequence. All of the arduous work physically harmed me. The work in the OCR was unrelenting and with unending hours of computer work and writing, I began to experience excessive pain in my neck, shoulders and back. I informed Mr. Mathur.

In January, 2011, the rapid pace of the office continued and the SEP's monthly and bi-monthly events were upon us. I appreciated that Ms. Cynthia Colquitt, an OCR employee on detail assignment to another Office, volunteered to assist the OCR from time to time. Thankfully, she returned to the OCR in January 2011 and did an excellent job providing attention to her duties as the EEO Assistant. In April 2011, Ms. Colquitt went on to receive the Region 5 Administrative Professionals Award.

Sadly, on three different occasions, from October 28, 2010 to January 20, 2011, the two highest level managers in the Region cancelled EEO meetings with the OCR staff because they were not interested in discussing EEO issues. These senior managers, staged a show of support publically for the OCR, but did not take the time to discuss the 2010 Regional Workforce Status and Analysis Report which illustrated the participation rate for General Schedule (GS) grades by race/ethnicity and sex. It also showed the full and part time employment trends, which demonstrated and impacted the racial make-up of the Region, as compared to EPA nationally, along with the national Civilian Labor Force.

On January 20, 2011, when Ms. Hedman canceled the third meeting with us, the ORC staff was outside of her office with a PowerPoint presentation and workforce analysis in hand. I asked Mr. Mathur when the meeting would be rescheduled. He laughingly responded to Mr. Harris and I saying, "This meeting is canceled indefinitely" as he walked away from us and closed the door. It was apparent that these managers, who set the tone for the Region, failed to embrace diversity and the principles of EEO in their leadership roles. The chances of addressing upward mobility initiatives and the advancement of qualified minorities to higher graded positions, was a moot point with them. I was appalled! But, the writing on the wall was clear, that the Region would not advance in these areas, under their leadership. While Mr. Mathur and Ms. Hedman gave "lip service" to the notion of an effective and meaningful EEO entity within the EPA's Region 5, their actions clearly demonstrated otherwise.

Sadly, in the past 28 years I have seen little in the way on minority advancement in the Region past the GS-12 level. To my knowledge, there have only been three African-Americans to have been promoted to the GS-15 level (outside of the Office of Regional Counsel) and even fewer of

the other ethnic groups. And, because of Mr. Mathur's antics, he did not keep his word with me and I did not receive a GS-15.

Sexual Harassment Allegations:

On March 17, 2011, three ladies reported sexual harassment allegations to the EEO Officer, Mr. Ronald Harris, regarding the Great Lakes National Program Office (GLNPO). I notified Mr. Mathur, Mr. Ross Tuttle, Human Capital Officer and his Deputy Ms. Juanita Smallwood of the claims. I visited Mr. Mathur's office to learn that he had just left for vacation. The sexual harassment complaint involved a female intern. An EPA scientist with many years of service, was named as the alleged perpetrator.

After engaging in fact finding, Mr. Harris found that multiple female employees had been involved and that such harassment by this scientist had been ongoing for the better part of a decade. Incredibly, the conduct was allowed to go on unabated with full knowledge of management. Mr. Harris and I addressed the alleged sexual harassment complaint, along with the Mr. Tuttle and the Office of Regional Counsel attorney, Ms. Debra Smith. Mr. Harris and I developed a 12 page fact finding summary and e-mailed it to Mr. Mathur, Mr. Tuttle and to Ms. Smith. The OCR asked for a meeting with Mr. Mathur to discuss the document.

When Mr. Mathur returned from vacation on April 4, 2011, he met with us and he was angry. He yelled, cursed at us and stated continuously, "Why did you notify Headquarters?" Mr. Harris stated that it is the OCR procedure to report to EPA Headquarters, when sexual harassment and discrimination is reported to a Regional Office. Mr. Mathur reviewed each recommendation on the document (and did not discuss the allegations provided). He referred to the recommendations as "bull expletive".

I then reaffirmed a few of the recommendations and reiterated that all Regional personnel are required to take Annual EEO Training. When I stated the need for Regional training on Sexual Harassment, Mr. Mathur emphatically stated, "I don't want 1200 people hearing that, "s... word expletive."

He stood up pounding on the table, leaning over his desk, pointed his finger in Mr. Harris' face and yelled, "This will not be the Ron and Carolyn show!" So, get somebody else to do the training." Ronald and I were both baffled and amazed at his offensive response. I felt intimidated by his unnecessary outburst.

Retaliation:

April 19, 2011, was my last one on one meeting with Mr. Mathur. I appraised him of my medical issues and my need to attend physical therapy. After having had a few medical tests and visits with my doctor, coupled with the excessive work in the office (with most week-ends working at home in the bed due to back pain), my doctor removed me from the workplace. Again, I asked Mr. Mathur for additional assistance and once again he said no!

I asked Mr. Mathur if I could work Medical Flexiplace in order to complete some of my portable assignments and on May 4, 2011, he denied my request and told me that he wanted me to use my personal leave. He refused to justify his reason for denying me this workplace benefit and privilege. However, I am aware that he had previously allowed a white male supervisor to work from home after suffering an injury.

I continued to keep Mr. Mathur apprised of my condition and of my doctor's visits while on sick leave. On May 31, 2011, Mr. Mathur forwarded an e-mail that I had sent to him, containing my medical information to Mr. Tuttle, Ms. Vasquez and others (without my consent). My medical privacy was invaded because these individuals did not have "a right to know." This fact is verified in affidavits given by Mr. Mathur, Mr. Tuttle and Ms. Vasquez.

In June 2011, I formally requested Episodic Flexiplace also and he denied my request. Mr. Mathur denied granting me the employee benefits and privileges and I was eligible to for both programs. He purposely told me that he wanted me to use my own sick leave.

I was harassed by Mr. Mathur's calling me at home while on sick leave and instructing others to do so as well, which resulted in over 90 calls during my illness. He did not provide me with an award for my accomplishments while in the OCR nor did he adequately recognize the accomplishments of Mr. Harris or Ms. Colquitt. Despite the numerous communications that he made with me during my illness, he did not confer with me on the issue of awards.

On July 7, 2011, I submitted a Leave Bank Application to Mr. Mathur. On July 8, 2011, he called me at home while I was still on sick leave, to inform me that, " since my back injury was worse than his, that he, Susan Hedman, and Rick Karl (the Superfund Director) had decided to move me back to Superfund." He provided no further explanation for his actions and referred me to Mr. Karl for an explanation.

As the Local Reasonable Accommodations Coordinator, Mr. Harris made an appointment to meet with Mr. Mathur to discuss my accommodations and his role according to the National Reasonable Accommodation Program (NRAP). Mr. Harris showed Mr. Mathur my request and the NRAP forms, he stated to Mr. Harris, "with all of these medical issues, I am sending Carolyn back to Superfund and I will let Doug Ballotti, Superfund Deputy Division to deal with this!"

Mr. Harris visited Mr. Ballotti, as instructed by Mr. Mathur. And on July 27, 2015, I sent an e-mail to him for answers to five questions, which related to his decision to reassign me. On August 4, 2011, he responded to my e-mail message and answered only one question. He reason changed and he stated that, "since stress caused my physical problems he decided to remove me." He deferred me to Mr. Ballotti to the other four question. But in the end, Mr. Ballotti could not provide me with that information. Mr. Mathur's decision to remove me from the OCR was not based on any medical information or recommendation from my doctors.

It is disturbing to know that same regional managers, who had assigned me to the OCR, Director's position, discriminated against me.

In addition, using sleight-of-hand to after-the-fact measures to change my permanent reassignment to the OCR to a "detail" in order to terminate my OCR work. And, then to ultimately, remove me from that office and punitively place me in a position, back in my former division, with "unclassified duties" and no supervisory responsibilities. The actions to which I was subjected, were indeed "adverse" actions and retaliatory to me for addressing and bringing to light an absolutely outrageous, longstanding pattern of sexual harassment in EPA's Region 5.

I served as director of the OCR from September 12, 2010 – July 31, 2011. I was removed from my position while still on sick leave. I was also removed from supervision and reassigned to unclassified duties in my previous Division. When I accepted the reassignment as OCR Director, I had been a manager in Superfund with an office and supervisory responsibility. I supervised a staff of 17 employees and contractors. When Mr. Mathur removed from the OCR, I was placed back in Superfund to work in a cubicle with no staff or supervisory responsibilities. Bear in mind that the year before, I received 5 awards and was named, as I've said, Federal Manager of the Year by the Federal Manager's Association.

I believe Mr. Mathur violated personnel regulations by ordering the back-dating and changing of my 2010 official personnel records from a permanent reassignment to the OCR Director's position to a detail assignment.

Intimidation and office bullying were major factors that I experienced while directing the Regional OCR. While I did not suffer a reduction in grade or salary in connection with my movement back to Superfund, it was done in such a manner as to be considered "adverse." While I was away on sick leave, my materials and personal property were boxed and shipped to my new cubicle in Superfund. As I expressed in my investigative affidavit, many of those things were damaged or were missing.

Because of my disability and for doing my job, I was tossed aside and treated like "damaged goods." After 25 years as a dynamic supervisor and manager, I was devastated that I had no supervisory duties anymore; which is something that the Committee may appreciate as not only prestigious, but also beneficial to one's career.

I submit, and expect that a reasonable person would find, that my displacement into this position was degrading and humiliating and amounted to a significant negative alteration of my work environment. I suffered a qualitative change in the terms and conditions of my employment.

To add insult to my misery, as my supervisor for 10 months out of the year, Mr. Mathur did not meet with me at the end of the year to conduct my evaluation, as required by the Performance Appraisal and Recognition System. He asked someone else to provide me with a "Fully Successful rating Interim rating Sheet for my work in the OCR. Once again, I was retaliated against, because my work in the OCR was outstanding and certainly commensurate to my ratings of Outstanding and/or Exceed Expectations that I have received for the past 27 years.

I might add, that Mr. Mathur received an award as a result of the work that my staff and I did in the OCR, as did Ms. Vasquez. They also used my "Proposed OCR Reorganization Structure" to gear up five more positions for Ms. Vasquez to reap the benefits of my work. The proposed staffing model that Mr. Mathur refused to grant to me, he allowed Ms. Vasquez. He did not amply reward Mr. Harris or Ms. Colquitt for the outstanding services that they performed in the OCR.

In addition, one of my OCR staff persons wrote a nomination for me for "Federal Supervisor of the Year in 2011." I asked her not to submit it for fear of retaliation to her.

Conclusion:

In conclusion, I express my disappointment with the Agency and the above mentioned Region 5 senior managers. They failed to keep their word on many occasions and failed to support the OCR Region 5. These senior managers staged a show of support for the OCR, yet impeded the overall progress of the Office by repeatedly canceling meetings that related to workforce status, analysis and trends which impacted the racial and ethnic make up of the region as compared to national EPA and civilian labor force. Ms. Hedman and Mr. Mathur repeatedly failed to address upward mobility initiatives, higher graded positions for people of color and other notable achievements that the OCR accomplished. Especially, because the OCR has a direct impact over the Regions awareness of workforce analysis and development.

It is deplorable, that out of a work force of approximately 1,230 employees in Region 5, there are so few qualified women and people of color afforded the opportunity to advance to higher level positions. It is through strong unbiased senior leadership, that such issues which plaque the Regional workforce, can and will be addressed.

As a result of our performing the duties of our jobs, Mr. Harris, Mr. Tuttle and I were taken to task. Attorney, Debra Smith, later served as the Agency's attorney defending my discrimination charges once they were before the EEOC. And, to my knowledge, the supervisor in GLNPO, who received the sexual harassment allegations, remains unfettered.

As I stated above, I accepted and successfully completed the challenges that these senior administrators asked of me and fulfilled my duties of refurbishing the failing OCR. I dedicated several months of my time, efforts, talents and skills to rectify that situation and to build a thriving well trained OCR. However, to my dismay, I became a victim of the very same dysfunctional system that I was to eradicate. And, all at the hands of the two highest ranking Region 5 managers.

Chairman CHAFFETZ. Dr. Bohlen, thank you. We have your full written statement, and we want to get to the questions.

Ms. BOHLEN. Okay.

Chairman CHAFFETZ. We are going to run short on that. So we are going to elect to err on the side of having more times for questions.

Mr. Tuttle, you are now recognized for 5 minutes. And remember, you can summarize this. We have got the full written statement.

Mr. Tuttle is now recognized for 5 minutes.

STATEMENT OF ROSS TUTTLE

Mr. TUTTLE. Good morning, Chairman Chaffetz, Ranking Member Cummings, distinguished members of the committee. Thank you for this opportunity to come and address you today.

My name is Ross Tuttle. Since January of 2014, I have been employed as senior advisor to the assistant regional administrator in EPA Region 6, Dallas, Texas. Prior to this reassignment, from September of 2009 to January of 2014, I was employed as the human capital officer at EPA Region 5 in Chicago.

I appreciate this opportunity to testify in front of you today, and I do so with a significant amount of trepidation, despite my belief that it is the right and proper thing to do. I can concur in what my colleagues have said with regard to the sexual harassment that took place of the interns. I investigated that case, as well, from the administrative side in human resources and found in my investigation that that went back with that perpetrator. And I stopped my investigation and stopped taking statements at the year 2000, and this was in 2011 that this was brought to my attention. So I can concur in that.

When I got stonewalled after the perpetrator was allowed to retire, and I decided I was going to pursue action against members of management that had concealed this for so many years, to use a phrase, EPA management circled the wagons and stonewalled me, and I was not able to pursue that at all. And I believe firmly that that did a significant amount of damage to my reputation in Region 5.

There were other incidents that I had to deal with in Region 5 that are included in my statement that I shared with the committee on other actions where I was not well received and was, in fact, treated with less than a cordial amount of professional respect for what I was doing. And that led me in April of 2013 to file a complaint against my division director at the time, Cheryl Newton, who was the assistant regional administrator in Region 5 in Chicago. That was settled, but then I was reassigned to Region 6 in Dallas, Texas, and the retaliation continued in Region 6 in Dallas.

My position as the senior advisor to the assistant regional administrator should be one of significance in that I am providing guidance and advice to the ARA in his job. From a human capital standpoint, I am responsible for providing him advice on differing issues that are important to him so that he knows what actions to pursue.

In actuality, in the time that I've been in Dallas, I've had only two assignments that would be considered respectful of my exper-

tise and my grade. One of those was to coordinate the early buyout program for Region 6 that was initiated in November of 2013. Based on the way that should work, that would have been a significant project. In actuality, the only thing I ended up doing there was coordinating applications, a list of applications that came in from people that were eligible, and I did the final wrap-up report that is provided to the Office of Personnel Management.

The other assignment that should have been significant as a follow on to the early buyout was a reorganization and restructuring of Region 6. And, again, the way that should have worked, that would have been a significant undertaking. I was assigned initially to chair a regional reorganization work group that was supposed to evaluate options and bring recommendations to senior management.

In actuality, the only thing I did there was sit on a work group as a panel member along with two of my colleagues from human resources who were not allowed to participate in those meetings. Management did what they wanted to do with those. And I ultimately ended up only looking over packages, the packages that were put together to submit to our headquarters. I just looked them over to make sure that the right forms were there and the signatures were there.

Since that is been completed in early April of this year, I've had no meaningful assignments at all. And as in my statement, I've told you how my ARA approached my midyear evaluation and what my plans are. Because I signed a modification agreement to protect myself and not have me go back to Region 5, to that environment I was in, that now essentially compels me to retire in December of this year, an action that was unpalatable then, as now.

Thank you for the opportunity.

[Prepared statement of Mr. Tuttle follows:]

The House Committee on Oversight and Government Reform
114th Congress
Witness Statement

Witness: Ross Tuttle, Senior Advisor to the Assistant Regional Administrator, U. S. EPA Region 6, Dallas, Texas and former Human Capital Officer, U. S. EPA Region 5, Chicago, IL.

Date: 29 July 2015

Introduction and Background

Good morning Chairman Chaffetz; Ranking Member (Congressman) Cummings; and distinguished members of the committee. My name is Ross Tuttle. Since January of 2014, I have been employed as Senior Advisor to the Assistant Regional Administrator in EPA Region 6, Dallas, TX. Prior to this reassignment, from September of 2009 to January of 2014, I was employed as the Human Capital Officer (Supervisory Human Resources Management Specialist) at EPA Region 5 in Chicago, IL. I appreciate the opportunity that has been extended to me to submit a statement for the record with regard to mismanagement, sexual harassment, discrimination, and retaliation, directed at myself and others, that took place in the Region 5, Chicago office by several senior EPA managers within various divisions in the region and that has followed me to Region 6 in Dallas. I do so today with a significant amount of trepidation despite my belief that it is the right and proper action to take.

Mr. Chairman, I respectfully request the committee's indulgence and ask, prior to my testimony, that my Agency Administrator, Ms. Gina McCarthy, go on the record and state there will be no retaliation against me or any of the regional employees who submitted documents for this hearing, including those of us that are appearing before you today.

I watched the EPA hearings titled "EPA Mismanagement," streamed on April 30, 2015 before this same committee. To say the least, it is disheartening and demoralizing to know, with certainty, that the situations that I was involved in, and privy to, in my former position as the Human Capital Officer were not only very similar to what I have experienced, but indeed seem endemic to the Agency. These situations included (but are not limited to) the following: (1) sexual harassment, (2) the length and scope of the harassment, and (3) the ongoing and protracted cover ups about these blatant and intentional discriminatory activities by management officials. After viewing the April 30th Committee proceedings, I am even more appreciative of this opportunity despite my fear and belief that there is even more retaliation to come after sharing my experiences with this Committee.

It is my understanding that these issues, and others, have been the subject of this committee and members of Congress for several years prior and subsequent to my hiring by the EPA in the Fall of 2009. If only 50 percent of what I have learned is true,

then what I have been subjected to would seem to have continued unabated for a significant period of time. It would further seem that very little has changed within the EPA management culture over this same period of time. Based on my own leadership experiences spanning some 35 years, I attribute this lack of change to a direct and corresponding lack of accountability. Accountability seems to be something that our "leadership" says they expect, but seem to rarely do themselves. To use my own words, management (at least in the two regions that I have been a part of), management does what it wants, when it wants, the way it wants, to whom it wants heedless of policies, regulations, laws, etc. To expect any change to the Agency culture given this attitude is absolute folly. The prevailing attitude seems to be "going-along-to-get-along" over personal and professional accountability. In Regions 5and 6, this thought/action process supported resistance and animosity to change because anyone (including myself and my colleagues) who advocated doing business the right way were viewed as oppositional and not being a "team player". Management's reaction to us was reflected in evaluations, annual performance awards, developmental and promotional opportunities, and our general treatment as "persona non grata" and attendant marginalization. We were made out to be "renegades" and "outliers".

Discussion 1: Sexual Harassment in the Great Lakes National Program Office
(this is also Discussion 4 supporting what happened to me)

As evidence of what I am saying here, and before I get to my own situations, I would bring to your attention two of my former colleagues in Region 5, Mr. Ronald Harris (former Region 5 EEO Specialist) and Dr. Carolyn Bohlen (experienced manager (FMA Manager of the Year in 2010) and Acting Director of the Region 5 Office of Civil Rights). When these two esteemed colleagues had followed Agency protocol and reported allegations of sexual harassment activity towards female interns in the Great Lakes National Program Office to the EPA Washington Headquarters office, they were subjected (both jointly and severally) to office bullying and retaliation by Mr. Bharat Mathur (Deputy Regional Administrator) and were removed from their positions in the Office of Civil Rights.

As the Deputy Regional Administrator for Region 5 and a senior executive, Mr. Mathur had a legal obligation to prevent discriminatory activity. Not only did he continually fail to uphold his professional obligations in this regard, his lack of leadership was rewarded with a Presidential Rank Award and the accompanying performance bonus of approximately $35,900 approved by EPA Washington Headquarters to further supplement his $179,000 annual salary. The recommendation for this award given to Mr. Mathur was made by the Regional Administrator, Dr. Susan Hedman, and sanctioned by senior management within EPA Headquarters. Other Region 5 senior managers who were also named participants in these discriminatory cover-ups and retaliatory activities received awards approved by both Regional Administrator Hedman and Deputy Regional Administrator Mathur. In my humble opinion, these monetary awards should have to be repaid to the government so that a strong message will be sent that discrimination and retaliation will not be tolerated or rewarded and that personal and professional accountability is viewed in a much stronger light and context.

Although I believe that EPA has a process for dealing with discrimination, retaliation, and reprisals there is a demonstrated unwillingness to effectively deal with supervisors and managers who retaliate or discriminate and an affirmative tolerance for those subordinate supervisors who do engage in these behaviors.

This Committee can send another strong message that the word "Accountability" applies to these management officials too. I believe that this is the level of reform that the American People expect from their Government and from this Committee which has the power and latitude to address these matters and implement improvements when agency management fails to do so. This record will also reflect how agency senior management officials failed on numerous occasions to follow our own processes, procedures, statutory authorities, ethics, and EEOC Guidance within the EEO Process for addressing sexual harassment and retaliation.

These failures came from those same officials who were entrusted with the utmost responsibility to prevent discrimination. Unfortunately, the employees, and people most affected by these failures, were young female interns; new to EPA, and female employees in the Region's Great Lakes National Program Office in addition to myself and my colleagues here today.

On Thursday afternoon, 17 March 2011, I was made aware of a sexual harassment complaint in the Great Lakes National Program Office (GLNPO). After speaking with two female employees and the female intern that was the subject of the unwanted behaviors, I began a fact finding inquiry into the allegations of Sexual Harassment and Hostile Working Environment complaint brought to my attention by three white females in the EPA Region 5 Great Lakes National Program Office (GLNPO) in the Monitoring Indicators & Reporting Branch (MIRB) brought against a white male employee that had "agreed" to work with them during their internship with EPA Region 5.

From the conversation that I had with the intern who was being harassed, I obtained the names of more than a dozen other female interns that had worked in this same organization going back to the year 2000. I obtained email addresses for each of them and sent them an email asking if they would be willing to provide me a written statement of what had happened to them and how it had been dealt with. Most responded in the affirmative and sent me their statements (I shared these statements with both Dr. Carolyn Bohlen and Ron Harris in the Office of Civil Rights) as well as David Cowgill and Wendy Carney who are mentioned in the ensuing paragraph). From their statements, I learned that not only had this employee been systematically sexually harassing female interns (going back to at least the year 2000), but an email I received from a current employee and male colleague of the perpetrator stated that the perpetrator had been "disciplined" by his university for this same kind of behavior during his Ph.D. program. Most of the statements I received not only spoke about the behaviors of the alleged harasser, but also stated that the intern had contacted the Branch Chief in MIRB (a GS-15 manager (with well over 30 years of federal service) and that nothing had been done by management to address the harassment. One former intern stated that because of this she changed her mind about not only working for EPA

but also for working in the federal sector at all and even went so far as to obtain employment in an unrelated profession.

After I had obtained the written statements, I contacted David Cowgill, the Acting GLNPO Division Director (a Branch Chief in another part of GLNPO) and Ms. Wendy Carney, his Deputy (new to the Division and NOT a part of the complaint) and stated that I needed to meet with them. When we met later that day in my office, I informed them of what I had found out, told them I had obtained statements from current as well as former female interns and employees stating they had been sexually harassed. I went on to say that I was going to recommend that the perpetrator be processed for removal from federal service (as an administrative as opposed to a criminal action) and that after I had finished with this action, I was going to pursue disciplinary actions for the management officials that were knowledgeable about the ongoing harassment by the perpetrator, but had done nothing to stop it or report it to senior leadership. Even after finding out about the numerous harassment victims, the direct reporting manager continued to feed the harasser a steady diet of young women. I found this to be particularly reprehensible considering that one of the management officials in GLNPO that knew of this situation was a woman who had stood by and let other young professional women become victims of this employee for more than 10 years prior to her retirement in December 2010.

Further, I discovered during the fact-finding that the sexual harassment endured by the interns included allegations of unwanted rubbing, touching on their backs, legs, arms, and shoulders. It further included uninvited sexual advances from attempts at kissing them and referring to them as "sexy, sweetheart, sweetie, and darling." This whole sordid affair is made more egregious considering that once the report was provided to the two most senior managers in the region, neither one of them took any steps to discipline the management officials who enabled the harassers.

When I informed my Division Director (who was the Assistant Regional Administrator for Resources Management) about the situation and what I was planning to do, his reaction was significantly less than supporting. after my staff and I had met with Mr. Mathur on 3 separate occasions (along with Dr. Bohlen and Mr. Harris) to discuss the facts, circumstances, and recommendations for the harassment, my office was largely excluded from the administrative processing of the perpetrator. The perpetrator's attorney negotiated with Mr. Mathur to let the perpetrator retire (as he had sufficient service for regular retirement) which we strongly opposed due to the nature of his conduct. (Note: Our goal was not to keep him from retirement; we could not prevent that in an administrative action; but we knew it would take him longer to get his retirement if he was removed.

Essentially, this employee got a "free pass" to retire after years of this behavior.) Subsequent to the "retirement" of this employee, I met with a labor attorney in the Office of Regional Counsel to begin disciplinary proceedings on the management officials that had condoned and tolerated this behavior. At this point, senior management must have come together and decided that this was not going to happen and I was stonewalled and stymied in my attempts to hold management responsible.

To date, NO ACTION has been taken against either of the two remaining managers who knew about the harassment and did nothing to stop it, one of which was the manager of the perpetrator.

Discussion 2: Reassignment of Ronald Harris and Carolyn Bohlen

In the middle of May 2011, due to his investigative involvement in the GLNPO Sexual Harassment Scandal from the Office of Civil Rights side of the Region and within some 3 months of reaching out to our HQ in Washington, DC seeking advice and disclosing this information to a senior management official in HQ, Mr. Harris was reassigned and constructively demoted from his position as the Regional EEO Officer to a position in the Employee Services Branch in Resources Management Division (RMD). This action was taken by Mr. Mathur based on a meeting that I was asked to attend along with my Associate Director, Cynthia Colantoni. Mr. Mathur did not speak to me (as the HCO) or ask my opinion on anything; he directed his conversation to Ms. Colantoni. He stated that he did not "like the way that Ron Harris was handling things" and that Mr. Mathur felt that Mr. Harris had been "too cozy with the Union", so he wanted to reassign him and asked Ms. Colantoni what her recommendation was. Ms. Colantoni suggested that he could be reassigned to RMD to handle Reasonable Accommodation (he was already the Local Reasonable Accommodation Coordinator) and help with facilities management issues. Thus, on 31 May 2011, Mr. Harris was notified by Mr. Mathur with Karen Vasquez (newly appointed acting Director of the Office of Civil Rights) present that he was being removed from his position of record and reassigned to "Unclassified Duties" in the Employees Services Branch, Health & Safety Office. I firmly believe that this change was punitive; essentially stripping him of 75% of his official duties and banished him from the 19th floor to the 12th floor.

I am certain that this action caused him personal and professional embarrassment and humiliation. Karen Vasquez, who had been assigned as the Acting Director of the Office of Civil Rights after the removal of Dr. Bohlen (also by Mr. Mathur)(while on Medical leave for conditions exacerbated by working many long hours to fix the Office of Civil Rights after the firing of the previous Director in early 2010) had NO previous EEO experience and was uniquely unqualified for that position. She conspired with Cyndy Colantoni and others to remove Mr. Harris' access to access to databases, statements, e-mails, notes, and updated statuses of EEO complaints filed while he was on annual leave following his involuntary reassignment.

Her lack of relevant experience and competence in Civil Rights notwithstanding, Karen Vasquez, would also receive a significant cash award approved by the Regional Administrator (Hedman) and the Deputy Regional Administrator (Mathur) despite the fact that the EEOC found her to be a discriminating management official in another EEO complaint indirectly related to this issue. The actions of these seniors managers has led to additional erosion of the Region 5 OCR office, an office they see as unnecessary and unwanted, in essence a "thorn in their side".

****What follows is an indication of the retaliation that I have been subjected to for doing my job.****

Discussion 3: Recruitment Irregularity (EEO Violation) in Superfund Program
In the Spring of 2010, Mr. Harris brought to my attention a recruitment violation (EEO) in Region 5 Superfund Division. The Division was recruiting a Community Involvement Coordinator (CIC) to work with the Hispanic communities in West Chicago. The solicitation was put on USAJobs, a list of eligibles was prepared from the responses to the advertisement, and an experienced cross-divisional interview panel from Superfund reviewed the resumes and prepared a list of candidates for interview. Based on the interviews, the panel selected the best qualified person which was an older Hispanic man that had extensive community outreach experience in the private sector. The panel certified their choice to the hiring manager (Jeff Kelly who is currently the Director of the Office of External Affairs). Mr. Kelly overrode the panel's recommendation and instead chose to hire a young white female whose only qualification seemed to be that she had taken Spanish in college. My reaction was that his action had placed the Region in a precarious position that I felt could not be defended if other candidates were to file a discrimination complaint.

I immediately informed my Division Director (who was also the Assistant regional Administrator for Resources Management). I briefed him on the problem and the potential impact. I then called the Cincinnati Shared Services Center and spoke with the HR Specialist that was responsible for the pending action. I asked if she had extended an employment offer to this young woman yet. The specialist stated that she had done so two (2) weeks prior, it had been accepted, and that the prospective employee was in transit to Chicago from South Carolina. The specialist asked if there was a problem. I replied that there was as this was not the person deemed best qualified by the panel. (Note: The HR Specialist was not aware of this issue at any time prior to speaking with me). Subsequent to this discussion, I called and e-mailed the selecting official (Kelly) and stated that he had put the Region in a bad position and that I hoped he had room to hire 2 CIC's since he should have hired the "Best Qualified". He never responded to my email or voicemail, but Superfund did come up with another position to hire the man deemed "Best Qualified".

Evidently, there was some kind of discussion between the Superfund Division Director and my Division Director about my intercession as my DD was very terse in dealing with me for about 2 weeks following this action.

Discussion 4: Sexual Harassment in the Great Lakes National Program Office(from my perspective as the Human Capital Officer)

On Thursday afternoon, 17 March 2011, I was made aware of a sexual harassment complaint in the Great Lakes National Program Office (GLNPO). After speaking with two female employees and the female intern that was the subject of the unwanted

behaviors, I began a fact finding inquiry into the allegations of Sexual Harassment and Hostile Working Environment complaint brought to my attention by three white females in the EPA Region 5 Great Lakes National Program Office (GLNPO) in the Monitoring Indicators & Reporting Branch (MIRB) brought against a white male employee that had "agreed" to work with them during their internship with EPA Region 5.

From the conversation that I had with the intern who was being harassed, I obtained the names of more than a dozen other female interns that had worked in this same organization going back to the year 2000. I obtained email addresses for each of them and sent them an email asking if they would be willing to provide me a written statement of what had happened to them and how it had been dealt with. Most responded in the affirmative and sent me their statements (I shared these statements with both Dr. Carolyn Bohlen and Ron Harris in the Office of Civil Rights) as well as David Cowgill and Wendy Carney who are mentioned in the ensuing paragraph). From their statements, I learned that not only had this employee been systematically sexually harassing female interns (going back to at least the year 2000), but an email I received from a current employee and male colleague of the perpetrator stated that the perpetrator had been "disciplined" by his university for this same kind of behavior during his Ph.D. program. Most of the statements I received not only spoke about the behaviors of the alleged harasser, but also stated that the intern had contacted the Branch Chief in MIRB (a GS-15 manager (with well over 30 years of federal service) and that nothing had been done by management to address the harassment. One former intern stated that because of this she changed her mind about not only working for EPA but also for working in the federal sector at all and even went so far as to obtain employment in an unrelated profession.

After I had obtained the written statements, I contacted David Cowgill, the Acting GLNPO Division Director (a Branch Chief in another part of GLNPO) and Ms. Wendy Carney, his Deputy (new to the Division and NOT a part of the complaint) and stated that I needed to meet with them. When we met later that day in my office, I informed them of what I had found out, told them I had obtained statements from current as well as former female interns and employees stating they had been sexually harassed. I went on to say that I was going to recommend that the perpetrator be processed for removal from federal service (as an administrative as opposed to a criminal action) and that after I had finished with this action, I was going to pursue disciplinary actions for the management officials that were knowledgeable about the ongoing harassment by the perpetrator, but had done nothing to stop it or report it to senior leadership. Even after finding out about the numerous harassment victims, the direct reporting manager continued to feed the harasser a steady diet of young women. I found this to be particularly reprehensible considering that one of the management officials in GLNPO that knew of this situation was a woman who had stood by and let other young professional women become victims of this employee for more than 10 years prior to her retirement in December 2010.

Further, I discovered during the fact-finding that the sexual harassment endured by the interns included allegations of unwanted rubbing, touching on their backs, legs, arms, and shoulders. It further included uninvited sexual advances from attempts at kissing

them and referring to them as "sexy, sweetheart, sweetie, and darling." This whole sordid affair is made more egregious considering that once the report was provided to the two most senior managers in the region, neither one of them took any steps to discipline the management officials who enabled the harassers.

When I informed my Division Director (who was the Assistant Regional Administrator for Resources Management) about the situation and what I was planning to do, his reaction was significantly less than supporting. after my staff and I had met with Mr. Mathur on 3 separate occasions (along with Dr. Bohlen and Mr. Harris) to discuss the facts, circumstances, and recommendations for the harassment, my office was largely excluded from the administrative processing of the perpetrator. The perpetrator's attorney negotiated with Mr. Mathur to let the perpetrator retire (as he had sufficient service for regular retirement) which we strongly opposed due to the nature of his conduct. (Note: Our goal was not to keep him from retirement; we could not prevent that in an administrative action; but we knew it would take him longer to get his retirement if he was removed.

Essentially, this employee got a "free pass" to retire after years of this behavior.) Subsequent to the "retirement" of this employee, I met with a labor attorney in the Office of Regional Counsel to begin disciplinary proceedings on the management officials that had condoned and tolerated this behavior. At this point, senior management must have come together and decided that this was not going to happen and I was stonewalled and stymied in my attempts to hold management responsible. To date, NO ACTION has been taken against either of the two remaining managers who knew about the harassment and did nothing to stop it, one of which was the manager of the perpetrator.

However, following this issue and because I would not knuckle under to the "get along, go along" management "good old boy" system, I started getting systematically by-passed by Walt Kovalick (my Division Director/ARA) as well as senior leadership on any further inclusion on issues that I should rightly have been a part of as the HCO. I was not included in meetings, discussions, or asked for my advice or recommendations on any matters of significance including the reorganization in the Office of the Regional Administrator in late 2001 to mid-2012. When I was contacted by HQ Office of Civil Rights on an EEO complaint filed on the Regional Acting Director of Civil Rights (Ms. Karen Vasquez) and contacted her to demand documents requested by HQ, she contacted my Division Director and I was directed by him to "stand down". When I explained to him that I am required to assist in any investigation, he again told me to "stand down". I informed him at that time that he had directed me to violate the law by so doing. My response seemed to make him angry and he said that I was being borderline insubordinate (words to that effect). This same situation recurred in late summer of 2012 when I was again contacted by a HQ EEO Investigator and told that she needed documents. I drafted another email to Karen Vasquez, but this time, I decided to clear it with my new Division Director, Cheryl Newton. Cheryl responded that she did not like the tone of my email and thought I was being too formal. When I explained to her the reason for my formality, she got angry and told me to "stand down" just like her predecessor. I contacted the investigator by phone and email and

told her what I had been directed to do. She said that she was "appalled" by the direction I had been given, but responded to me and stated she would contact Vasquez directly. (Note: The Region lost this EEO case and was compelled to hire another GS-13 EEO Manager as a result and still nothing was done to Vasquez for what her actions had caused the Region and the Agency)

Discussion 5: The Reorganization in the Office of the Regional Administrator (ORA)

In late 2011/early 2012, the Human Capital Office was approached by Elissa Speizman, (Senior Policy Advisor to the Regional Administrator) for recommendations on a reorganization that they wanted to do. As part of the Agency's efforts to centralize web content and appearance, she had received approval from Susan Hedman (Regional Administrator) to create an "Office of External Communication" which would contain the existing Office of Public Affairs (OPA) and would also create a new Office of Web Communication (to standardize web content and appearance). I assigned this project to Mr. Gil Colston, Section Chief for Labor and Employee Relations. He brought our Position Manager with him to meet with Elissa to begin determining how best to help them with this effort. After several meetings with Elissa over a period of three weeks, we were clear that what she wanted to do was just create this new organization without getting approval from HQ and to hand pick the employees that she wanted to have in the new section. When we tried to explain that she could not do it that way, she got upset and told Mr. Colston that I said it could be done that way. When Mr. Colston called me to the meeting and she was asked to repeat what she said, she got visibly upset and stormed out of the room. Subsequent to those meetings, she tried to bypass my office and send recruitment actions directly to the Shared Services Center (SSC). When the SSC noted that the actions did not have Human Capital approval on them, they returned them to Elissa who was even more furious than before. Unknown to me and my staff, she then "conspired" with Cyndy Colantoni (my Associate Director) and Ms. Nancy Ciccarello, Operations Branch Chief at the Cincy SSC, to create "details so that Elissa could get who she wanted and thus disenfranchising every other regional employee who had been doing web work from having an opportunity to participate and perhaps get promoted.

After the details were put into place, Elissa began preparing the required reorganization package for submission to EPA HQ. This was done with no input or consultation with the Human Capital Branch and none of us (including me) knew this was in the works. I did not know what was being done until about May of 2012. When I went to a Human Capital Branch meeting with my ARA (Cheryl Newton and the Associate Director, Cyndy Colantoni on a Wednesday afternoon, Cyndy handed me a package as I walked into Cheryl's office. She told me to get it to HQ. I looked at the cover page and saw that it was a reorganization package for the Office of the Regional Administrator. I handed it directly to Mr. Colston and directed him to make sure it got to "where it needed to go". A few days later, I got a call from the reorganization section of HQ. The Acting Section Chief, Veronica Smith, told me that she had just received the package and it did not

contain my signature (as the HCO). She asked why and I said that I had not looked at it because we (Human Capital Office) was not included or consulted about the content. I asked her to send me an electronic copy which she did. On review, I immediately notice clear evidence of pre-selection in the proposed new section. This constituted an illegal action in and of itself. Further review of the proposal showed that other employees in the region were not taken into consideration when discussing impact on promotion and career development. For those reasons, I called Veronica and said that, in my opinion, the proposal was illegal and I would not sign it. I stated that my signature as the HCO constitutes an approval of the proposal and I did not approve.

She reviewed the package again and concurred with my assessment. She stated that processing would be terminated and the package would be returned and she was going to send me an email to that effect. I asked her to include Cheryl Newton, Cyndy Colantoni, Elissa, Mr. Mathur (DRA), Susan Hedman (RA) and Regional Counsel on the email, which she did. When Cheryl got the email she was furious. She sent a response to HQ stating that they (HQ) were not going to hold up the processing. She then called me and demanded an explanation from me. I calmly explained what was wrong with the package and stated that, had we not been bypassed in an attempt to do what they wanted to do INSTEAD of what was right, this would not have happened. Minutes later, I received an email scheduling a face-to-face meeting with me the following morning at 9:00 AM. Cyndy Colantoni was copied and was asked to attend. This was followed by another email stating that "in preparation for our meeting tomorrow, I want a written explanation of what you believe is illegal....." I provided her a written explanation about 2 hours later. I have provided a copy of my response to the Committee.

When I showed up at her office for the meeting the following morning, I was surprised to see that Mr. Eric Cohen, Supervisory Attorney-Advisor (and the manager of the Labor Relations Attorneys in Regional Counsel) was sitting in the office. I said that I did not know that Eric was invited to the meeting as he was not on the invite that I received from Cheryl the previous day. That seemed to take Cheryl by surprise but she said "I just wanted Eric here for his legal perspective." I honestly felt that Cheryl intended to use that meeting to initiate an adverse action on me, but I took my seat and explained my position. When I finished, I turned to Eric Cohen and asked "Did I say anything that was not true, Counselor?" He shook his head "No" but did not say anything. Cheryl asked what needed to be changed so that I would sign the package. I told her that all evidence of pre-selection must be removed. I further stated "I know what you all are going to do anyway, but don't wave it in my face". I also stated that the impact on ALL regional employees doing web work needed to be addressed, not just the employees in the Office of Public Affairs.

Discussion 6: Fallout

The fallout from this latest incident seemed to be the proverbial "last straw" and it has had long term impact on me. By opposing the reorganization as it was written I

angered quite a few people. For my annual performance appraisal in October of 2012, I received an adjective grade of "Fully Successful" after two consecutive years of "Exceeds Expectations". In July of 2012, when performance awards were handed out, each of the six Branch Chiefs in RMD received "Time Off" awards in lieu of cash. I was okay with that part; however (of the six of us) 3 of my peers received 36 hours; 2 (including a brand new supervisor) received 27 hours; and I received 16. I had no reason to view these actions as anything other than punishment. As the Fall of 2012 came and went, the micro-management got worse. When I agreed to mentor two employees in different divisions, I was required, by Cheryl, to submit my mentoring plans to her. This was not required of ANY OTHER MENTOR or ANY OTHER SUPERVISOR. However, this was part of ongoing efforts to marginalize and minimize employees who stand up for what is right and call out management when abuses are taking p-place. Further, in all of the years that I have been a mentor to other employees, I have NEVER seen this done. This was a form of retaliation by Cheryl because I would not be "part of the team". Along with my Deputy (Juanita Smallwood) and my Labor and Employee Relations Supervisor (Gil Colston), we shared a commitment to do business the right (legal) way. We saw ourselves as "gatekeepers" responsible for telling people what they needed to KNOW instead of what they wanted to HEAR.

When I returned to Chicago after Christmas vacation on 31 December 2012, I was told (by Gil Colston) that an attorney in Regional Counsel had told him that Susan Hedman had directed Mr. Mathur and Ms. Newton to "get rid of me" because of the problems "I created" stemming from the bungled ORA reorganization. While this was hearsay, it had sufficient credibility with me that I contacted my counterpart in Region 6 in Dallas to ask if his ARA would be willing to let me come for a 120 day detail. As my wife and I had been dealing with some serious medical issues for her, I felt that this would serve two purposes; one to allow me to help her, and two to give me a break from the retaliation and micro-management in Region 5 for a period. The Acting ARA in Region 6, Ronnie Crossland, stated it was fine with him if it was okay with Region 5. I approached Cheryl Newton in January of 2013 and asked if she would consider allowing to go on a 120 day detail to Region 6. Her immediate response was "have you considered an IPA?" As IPA's were generally 1 to 3 years in length, that was not my thought, but I thought it was strange that she leaped right to that extreme when all I had asked for was 120 days. I stated that I thought 120 days would be sufficient and she stated that she would need approval from Mr. Mathur, but she would support it. I left Region 5 for the 120 day detail in Region 6 on 6 February 2013.

In mid-May 2013, Cheryl again summoned me back to Chicago for my mid-year performance review. I found that more than a little disconcerting since EPA policy on Performance Evaluations states that my mid-year should have been performed by my supervisor in Dallas which, at the time, was Ray Rodriguez (Region 6 HRO). Adding to my angst was that she wanted me back in Chicago even after HQ had directed all activities to limit unnecessary travel in light of budget issues. I raised those concerns

and that I believed that her wanting me to return was because she was considering an adverse action on me. She denied this was true and stated that the sole purpose was to have a face-to-face review. In response to my question, she "guaranteed" that it would be just the two of us in the room.

On 9 May 2013, I had my mid-year with Cheryl Newton. I have provided the Committee with a copy of Ms. Newton's Summary and my responses to same. I found the general tone to be adversarial and non-productive. She was somewhat taken aback when I told her at the end of the conversation that I knew that there was a plan to get rid of me. She did not know where I would have gotten that information. I told her that I did not need to be micro-managed and that I had been a supervisor, manager or executive longer than she had. I asked if the Region would consider extending my detail until the end of the fiscal year, 30 September. She said that she would need to get Mr. Mathur's approval but she did not foresee a problem and she would also call James McDonald. I went on to say that if I returned in October (2013), that I was inclined to ask for reassignment in the Region since I did not trust her or any other leader.

Cheryl and I negotiated a settlement to my EEO complaint in late May 2013. I have provided a copy of that settlement to the Committee. In that agreement, I was permitted to remain on detail in Region 6 through 30 September 2013. During that time, I would be reassigned to "Unclassified Duties" and would negotiate a new position before I returned to Chicago. However, I was never moved to "Unclassified Duties". My position was advertised (with me still encumbering it) in August 2013 and was filled by Ms. Amy Sanders effective early October 2013 (after the shutdown). Ms. Sanders and I DOUBLE ENCUMBERED the position (not legal) until 11 January 2014 when I was permanently reassigned to Region 6.

Discussion 7: The Retaliation Continues in Region 6

I started my detail in Region 6 on Monday 11 February 2013. Ronnie Crossland was the Acting Assistant Regional Administrator for Management when I reported for duty. Early in the month of April 2013, I filed an EEO complaint against my Division Director, Cheryl Newton (the first time in more than 40 years of work including 26 years in military service) for retaliation. Also in mid-April, I was summoned back to Chicago to be deposed in an EEO case for Dr. Carolyn Bohlen. My testimony in that deposition was not favorable to Region 5 or to Mr. Mathur which further exacerbated an already untenable situation for me.

Region 6 got their new, permanent ARA, James McDonald, in April of 2013. I had not previously known, or met, James McDonald prior to his arrival in Dallas. I had my first meeting with him on 27 June 2013 at 3:30 PM in his office. His first words to me were "I don't know how you got here or why you are here. I would not have agreed to this; I would have done something different, but I was not consulted." (To that effect) I told him that I had been approved for the detail to help me deal with some family issues. He asked me what I was working on and I shared that I was helping HR with some

programs and issues that had previously been agreed to by Ronnie Crossland incident to my request for a detail. The overall tone of the meeting was negative and Mr. McDonald made it clear that I was not welcome here as far as he was concerned. It was at this point that I suspected that he had spoken with Cheryl Newton prior to our meeting to find out about me from her.

In another meeting that I had with Mr. McDonald in September or October of 2013, Mr. McDonald asked me when I was eligible for retirement. Suspicious of his motives, I responded that I was eligible in December of 2015. My suspicions were confirmed in mid-November of 2013 when I was handed a Modification of Settlement Agreement by James McDonald which stated, in part, that "**in exchange for being permanently reassigned to Region 6, under this Agreement Modification, Mr. Tuttle agrees to retire from employment with the EPA no later than January 2, 2016....." Incident to this reassignment, I was downgraded from GS-15 to GS-14, removed from supervisory status, and told that I would "never see GS-15 or supervisor status again".** This was pure retaliation on the part of James McDonald. There was no valid business reason for the downgrade, removal from supervision or the other comments made to me. This was further punishment that started in Region 5 and continued in Region 6 under James McDonald. He is acting as the instrument of Region 5's drive to run me out of the Agency and federal employment. I only signed the modification in November of 2013 because my only options were to a) sign and hope he would reconsider; b) return to Region 5 and the untenable situation there; or c) resign from federal service. Choices b and c were not viable options then or now, so I did what I had to do for the benefit of my family and me.

As a result of these actions, I filed a Breach of Settlement with the Office of Civil Rights in EPA HQ. James McDonald had no legal right to insert himself into my settlement with Cheryl Newton and Region 5. He was not a party to the original complaint and should not have made himself a signatory party to the settlement. The letter was received by EPA on 01 June, but to date, there has been no response to my allegations. This is vintage EPA; dragging their feet until the complainant gives up or is hounded into submission.

Further, during my tenure in Region 6, I have had exactly 2 "major" assignments. I coordinated an Early Out/Buy Out (VERA/VSIP) program for Region 6. Instead of doing the process as it should have been done, I simply put together a proposal package based on the input I got from senior leadership and when the approval came back, I coordinated keeping track of who applied and who received approval. Following the VERA/VSIP, I was originally tasked to guide the Region through a reorganization/restructuring/realignment. In reality, all I did was check divisional packages to make sure that the required forms were included and that required signatures were obtained. Only one of Region 6's Program Divisions included me in their process. I was not even included in my own Division's deliberations. Since early April 2015, when our divisional reorganization packages were submitted to HQ for approval, I have essentially been idled. I am not assigned any work by my supervisor.

As the Senior Advisor to the Assistant Regional Administ6ratior, I should have a lot of meaningful work to do. Instead, I have little to none.

In my mid-year performance review on 30 April 2015; James thanked me for my work on the reorganization and asked where I saw myself fitting with the reorganization process going forward. My response was that I have no involvement going forward. My part is done. He then asked if I had given any thought to what projects I wanted to work on "**for the remainder of my time here (in Region 6)**". (At this point, I fully confirmed that I had "outlived my usefulness" to James McDonald. I worked on the two projects because no one else had the knowledge or expertise to do so, and even then I really was not allowed to do them as they should have been done.) I told him that I had not given it any thought, but I would do so. He wanted to know what I was currently working on and I told him that I was assisting the HRO in putting together some Standard Operating Procedures to help him manage the HR function and staff (he asked me to be his mentor when he was accepted into the Leadership Development Program). He concluded by asking if I needed anything from him. I said: "To clarify this conversation; are you disinclined to reconsider my settlement agreement?" (Note: I have asked three separate times for him to reconsider my settlement modification for "forced retirement". Two of those times, he said that he would "revisit" the agreement as we get closer to the end. I am now at the 11th hour with nowhere to go.) He quickly responded: "I am. Sam wants to flatten the organization. He says we have too many people." These statements fly in the face of region 6 taking on at least 1 person from HQ permanently and another that is supposed to be on an IPA in the Rio Grande valley that Region 6 either already has, or will at the end of the IPA, take on permanently from HUD. This also does not mesh with the current aggressive recruiting effort taking place. Immediately following this meeting, I filed an EEO Complaint against James McDonald for ongoing retaliation in a separate action from the Breach of Settlement mentioned earlier. It is currently in the informal stage.

In an ongoing effort to help myself, I have been applying for other opportunities; however, I have received no offers to date. On the few interviews where I was told references would be checked, I did not receive an offer either. I am loathe to suspect a "less than stellar" recommendation, but cannot prove it.

Although I was, in mid-November 2014, tasked to take over the Reasonable Accommodation process for Region 6, there is not a lot of work involved with that.

Conclusion:

Based on the evidence submitted to this Committee, I am, without doubt, one of the victims retaliated against by senior management officials for providing precisely the recommendations and advice that was required of me as the Human Capital Officer and for my protected actions in Title VII matters that I was a part of or were brought to me as the HCO.

At this point, I am fighting for my professional life. I do not want to have to retire at the end of this year. If that happens, I will not be able to support my family and will be

compelled to rely on public assistance. I am 62 years of age. If I were to be involuntarily unemployed, it is highly unlikely that I would be able to find other meaningful employment at my current level of experience and compensation. I have much left to contribute and cannot afford to absorb that serious a reduction in income. I should not have to pay this kind of price for doing what I was hired to do and for calling out fraud, waste, and abuse. Unless I am able to correct this injustice, I will be "forced out" and "the system" (EPA) will have prevailed again. The actions of these senior managers has led to an erosion of the Region 5 Human Capital Office whose reputation and dependability I had worked hard to restore, an office they view as unnecessary, unwanted, and an impediment to how they want to operate. I strongly suspect this erosion continues unabated. I can only hope that my story, as presented to this Committee, will cause change in how management conducts itself. I know that we have many good supervisors and managers because I have met a lot of them; however I implore this Committee to act as the catalyst for change and end the unlawful and egregious Agency conduct that my colleagues here today, my other colleagues that are not here but are dedicated to our mission, and I, have been, and are, subjected to on a daily basis.

Among any recommendations that I might make for your consideration are:

1. First and foremost, I recommend the committee examine the roles of the Agency General Counsels with regard to allegations of Title VII violations and their premature involvement in the EEO Complaints process. Government attorneys must be held to a higher standard of accountability in enforcing the laws afforded to every government employee. If agency officials stopped getting free legal service from their agencies due to their titles, then there should be a significant reduction in the number of Title VII violations.

2. We need to do a much better job selecting supervisors and managers. There are some that should never be permitted to be in a superior position to any employee; they are not suited for management. This is especially important in the Senior Executive Service.

3. We should require a mobility agreement for every supervisor so that the good and effective managers can spread their expertise throughout an organization in addition to expanding their own knowledge and skill base.

4. We should also require supervisors to sign a "Statement of Understanding" that clearly says if a person does not perform well as a supervisor or manager, they are removed immediately and reassigned at their previous grade and series.

5. Lastly, I encourage this committee to hold the agency accountable for initiating a process that holds all management officials (including the SES) accountable for their actions and/or managerial inaction, especially when violations of Title VII laws occur. This process should also include issues when settlements are made with regard to agency officials. By adopting these recommendations the committee can send another strong message that the word "Accountability" applies to everyone, irrespective of their

title or position. I believe that this is the level of reform that the American people expect from such an Honorable Committee with the power to address these matters and implement improvements when senior agency management officials fail to do so.

In closing, I am reminded of a quote from a late 1980's movie that said **"Whenever you have a group of individuals, who are beyond any investigation, who can manipulate the press, judges, Members of our Congress; you're always going to have, within our government, those who are above the law."**

I would like to extend a final "Thank You" to all the members of the Committee for affording me this rare opportunity to be heard.

Chairman CHAFFETZ. Thank you.

Ms. Kellen, you are now recognized for 5 minutes.

STATEMENT OF KAREN KELLEN

Ms. KELLEN. Chairman Chaffetz, Ranking Member Cummings, thank you for inviting me to testify today. I have worked at the EPA for 28 years, the last 2 as the president of AFGE Council 238. Council 238 is the largest union at the EPA. We represent about 8,500 employees.

EPA is an agency of proud and dedicated civil servants with a strong work ethic. However, bad management practices have become routine, causing everyday duties to become stressful and difficult. This hinders the Agency's ability to function effectively and efficiently.

There is a double standard in which the rank-and-file employees accused of lesser offenses are often treated harshly, while managers who bully and harass their employees are rewarded with promotions and large bonuses. Allow me to present some examples.

First, I will speak to the aftermath of the testimony before this body on the misconduct of Peter Jutro, who was accused of sexually harassing multiple female EPA employees. After that testimony, EPA held an all-hands meeting with his staff to discuss the testimony. Staff were encouraged to speak freely, but as information was shared, it became clear that EPA senior management did not want to hear about the extent of the harassment. They attempted to limit the input by stating that Peter was not here to defend himself. Management chose to defend the indefensible rather than addressing the serious allegations of misconduct.

Another incident involves a former employee who had a stellar work record and an international reputation in the scientific community. Upon her division director's retirement, her new manager was appointed using Title 42 authority. Title 42 positions are intended for short-term consultants with specific expertise. EPA has been using this authority to hire managers.

Soon after his arrival, the new manager began to harass and bully the employee. He cancelled previously approved speaking engagements at scientific conferences, even though it was part of her job and there was no cost to the agency, while allowing the men in the office to continue to pursue these endeavors.

After months of this behavior, she filed an EEO gender claim. The manager was not deterred, but was emboldened to try to find a way to have her removed from Federal service. EPA searched her desk and her email in an effort to manufacture ethical violations relating to conference travel and planning activities. EPA then fabricated charges and proposed to remove her from service. Despite the lack of any threat on her behalf, they escorted her out of the building with a specially hired armed guard. The employee was forced to hire an attorney to defend herself.

The Agency ultimately reduced the termination to a 2-month suspension. When she returned to the office, the harassment intensified. This employee ultimately found new employment as a full professor with an endowed tenured seat at a major U.S. university.

Her EEO case went to trial in June of this year. After a 5-day trial, the 12-person jury took less than 2 hours to return a verdict

in her favor. They found that the Agency had retaliated against her and awarded her back pay and substantial compensatory damages.

It is not easy to fight the full force of the Federal Government. This woman had to refinance her home and tap into her retirement account to pay for the legal costs. While she prevailed in court, EPA lost a valuable employee, and those responsible for this reprehensible behavior have never been held accountable.

These are not isolated instances, just specific accounts of systematic breakdown. The Agency has too many managers at senior levels who regularly bully and harass employees.

Today, I ask Administrator McCarthy to stand with the good, hard-working employees of the EPA and work with the unions to address the harassment, bullying, and retaliatory behaviors within EPA.

Finally, I ask the members of this committee to distinguish between the very public problems that you are hearing about and the vast majority of EPA employees, both staff and managers, who want nothing more than do a good job for the American people.

When the rhetoric about Federal workers as lazy, unproductive, or unresponsive to the public is tossed about without consideration to the men and women who labor for the government, it demeans and demoralizes employees. Please do not paint all Federal workers with the brush of a few problem employees. Federal employees deserve the respect of the Nation, not its scorn. They are what keeps this country working, day in and day out.

Thank you.

[Prepared statement of Ms. Kellen follows:]

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TESTIMONY OF
KAREN S. KELLEN
PRESIDENT OF AFGE COUNCIL 238
BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

JULY 29, 2015

Written Submission for the Record

Chairmen Chaffetz, Ranking Member Cummings, thank you for inviting me to testify. I have worked for the EPA for 28 years, and I have been involved in some capacity with the union for 18 years. I am currently the President of AFGE Council 238 which represents approximately 8500 bargaining unit employees at the EPA. There are 14 locals that are part of Council 238. We have a presence in every Region of the EPA as well as the offices in Washington, DC, Research Triangle Park, NC, Ann Arbor, MI and Ada, OK.

I began working for EPA in 1987 as a staff attorney in the Region 3 office located in Philadelphia. I subsequently transferred to the Region 8 office in Denver, which is my current home base. I have devoted my career to this Agency, whose mission is to protect human health and the environment. EPA is an Agency of proud and dedicated civil servants with a strong work ethic. However, over time I have seen these same dedicated civil servants become disenfranchised, making the performance of every day duties stressful and difficult. Bad management practices have become a cancer within the Agency. A cancer that grows unchecked and unmonitored; choking out the hundreds of healthy cells which make the organization unable to function effectively and efficiently.

Life from the Union's Perspective

I did not set out in my career to be a union leader: a rabble rouser to some, a trouble-maker to others, and a savior to a few. I wanted to save the earth. But over time I learned about injustices and I saw how managers banded together when pressed about certain issues and refused to ever admit that one of their own had done anything wrong. Our local union was not very effective when I joined it. It had one brave soul running it. A few of us got more involved and we grew an organization that was responsive to both employees and managers. I know that some claim that unions are bad because they stand up for the troublemakers. It is true that we represent employees in trouble; that is our obligation under the law. However, we distinguish between when an employee is having difficulty because of their own behavior and when they are having trouble because of their supervisor's behavior, and when it is a bit of both. Our greatest tool is not the grievance, but the ability to speak frankly and with credibility to both employees and management. We defend the process, not the behavior. Even employees who make mistakes and run afoul of the rules deserve due process. If it is not a criminal matter, then the mere process of holding them accountable sends a message to both the offender and to the organization as a whole. However, I have not seen the same process implemented with management, because there is a serious lack of accountability or transparency at EPA when a manager is the problem.

Working as a union steward one sees the dirty underbelly of an organization. The steward sees the malingering employee and the badgered and beaten employee. We see the great managers who truly lead their employees and allow them to grow and excel at their work. We also see the managers who move from organization to organization leaving a trail of broken careers and stifled potential in

their wake. Over the years, I have watched as the bad managers became entrenched in the organization. Treating employees badly has become accepted - and rewarded - behavior.

When one hears about the abuses that have occurred, it is easy to think that there are more problem employees than good employees. But that is not the case. The vast overwhelming majority of EPA employees are dedicated public servants, committed to providing high quality work, and good value to the tax payers. Unfortunately, problems within the management ranks have not been addressed, allowing rampant abuses by many managers. Senior management's unwillingness to hold fellow managers accountable has sent a clear message that this type of inappropriate behavior is acceptable at the EPA.

In my time as a union representative, I have come to know three types of problem employees: 1) untruthful or corrupt employees who are just trying to game the system (the porn watcher), 2) those unable or unwilling to do their job at an acceptable level of performance (includes people with disabilities who need reasonable accommodations), and 3) bullies. Every organization has some of these types of employees and deals with them with varying amounts of success. From the rank and file perspective, we work with the employees who are challenged on one of the above. With regard to bullies, staff level employees tend to be the bullied rather than the bully.

I set down this path because of the inequities of the system, as implemented at the EPA. Rank and file employees are held accountable for bad behavior, but senior managers exhibiting the same behavior are rewarded by promotions, awards, and sometimes expensive training courses that do not address the management failing.

Hold Everyone Accountable; Don't Waste Limited Agency Resources and Punish Everyone for the Failings of a Few

Since John Beale, the high level EPA official who claimed to work for the CIA, the Unions have seen a change in how the Agency manages its workforce. For example, management has definitely stepped up its enforcement of time and attendance issues for staff level employees. I have seen more instances where long time underperforming employees are being held accountable. However, we also see some managers using this new focus as another way of harassing their employees. Significant time and resources are now spent on time and attendance.

Meanwhile, we have not seen the same level of attention placed upon the behavior and activities of senior leadership. I, and my colleagues in the Union have observed inappropriate behavior in management tolerated and rewarded for those of a certain grade level or those with the proper status within the Agency. I am not talking about minor infractions of the many rules of the Agency. I am talking about managers who are corrupt and taking advantage of the system. Managers who are incapable or unwilling to do their jobs of managing employees and probably the worst of the problems, bully managers, who harass and undermine their employees without ever facing any consequences. I have examples of these types of situations that have gone on for years, which we have brought to the attention of senior management, and not been addressed. It's frankly not true to say the Agency lacks tools to address mismanagement issues, the tools and procedures exist, for whatever reason, they are not used.

Management Issues

Title 42 Appointments: Title 42 of the United States Code (USC) Section 209 (f) – (h) gives statutory authority to the Public Health Service and the Surgeon General to hire consultants, scientists, and engineers at much higher pay than allowed under Title 5.

In a single sentence under an administrative provision of Public Law 109-54 the Environmental Protection Agency's Office of Research and Development (ORD) was first granted the authority to make up to 5 appointments per year using 42 USC Sec 209, even though this statute does not cover EPA. Funding for this provision was extended through fiscal year 2015 when the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010 (H.R. 2996) was passed by the House.

ORD has used this authority, intended to lure the best and brightest scientists and engineers as short-term consultants, to hire managers. By using this authority, EPA bypasses the usual pay levels for managers and can pay these managers between $200,000 and $300,000 per year. AFGE has been pointing out this misuse of the Title 42 program since 2009, without success. The number of Title 42 appointments within the EPA now stands at about 20, with authority for up to 50 and plans to use this authority to hire additional laboratory managers.

Recently Congressman Michael C. Burgess, M.D, proposed, and the House passed, an amendment to the 2016 Interior appropriations bill that would bar the EPA from hiring and compensating employees under the Title 42 special pay designation.

Lack of Management Accountability; My union colleagues and I know of problem managers throughout the Agency. These are not unknown or hidden problems. These problems have been aired but continue to be ignored. I present a few of those examples here today, there are many more that could be provided given the widespread management issues at EPA.

First there is the manager who was the subject of letters to the Inspector General, and to members of Congress, pointing out examples of the misuse of funds, utilizing staff to perform maintenance work on his house and tutor his children, and a long pattern of storing and using alcohol in his government office (with evidence of such provided in photographs). Out of fear of reprisal, which was a common management practice by this person, the accusations were made anonymously. Of all the charges, only the alcohol violations were substantiated by the IG. Did he lose his position? No. He was sent off to a much smaller EPA office, where he retained his Senior Executive Service (SES) salary while only managing a skeleton staff. Where is he now? Working in the Office of the Administrator.

When the IG investigates the same person repeatedly, and no one but their management chain can see the results, ultimately, employees refuse to speak with the IG because doing so does not help address the issues. Employees are also afraid to speak to the IG due to an extreme fear and bullying. Too often when employees voice concerns about a manager, the end result is moving the manager to another location until the issue gets stale and then moving them back into senior leadership the first chance they get.

Then there is the high ranking SES official who was found to be selling diet pills out of her office, hiring her family members, and rewarding those same family members with large bonuses. The union has obtained information indicating that she is currently on extended paid administrative leave while she challenges her termination. When rank and file employees are terminated, their paychecks stop.

Worse, there is a double standard in which employees accused of lessor offenses are treated. Employees who are single mothers suffer adverse consequences for being 5 to 10 minutes late. Employees with documented mental or physical conditions are subjected to harassment by their supervisors over their use of leave, sometimes being driven out of the Agency, even though they may have a reasonable accommodation in place. Managers so obsessed with what they term "excess use of the bathroom" that they sit in glass walled conference rooms all day counting how many times that employee uses the restroom.

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These issues do not only affect EPA employees. Similar issues exist in other federal agencies and employees are not willing to blow the whistle on bad behavior and practices out of fear of reprisal. Therefore, I bring to your attention the importance of permanent federal employees' due process rights. Under current law, federal employees are entitled to 30 days advance written notice, notice of specific instances of unacceptable performance, seven days to respond orally and in writing to furnish affidavits and other evidence, and a right to a review of termination by the Merit Systems Protection Board (MSBP). Employees must feel that they will be protected against reprisal if they bring attention to unethical issues within federal agencies. The tools afforded them through the current system of federal employee due process must be retained or whistleblowers will be silenced.

EPA's Biggest Problem is Bullying -- What is Bullying in the Workplace

By far, the biggest problem within the EPA is how it handles bullies and bullying behavior. I am not talking about a demanding manager, a bully is much more damaging to the workplace and individuals.

Bullying is characterized by its intensity, repetition, duration and a power disparity.[1] It has also been defined as "repeated, health-harming, mistreatment of one or more persons (the targets) by one or more perpetrators that takes one or more of the following forms; verbal abuse; offensive conduct/behaviors (including nonverbal) which are threatening, humiliating or intimidating; work interference – sabotage- which prevents work from getting done."[2]

More than a third of all Americans will become the target of a bully during their career. Approximately 1 in 10 people are being bullied at any one time. Nearly half of all employees experience bullying either by becoming a target or observing the bullying behavior in the workplace. What is almost more disturbing is that 80% of that bullying is legal.[3] Because of the power differential in the workplace, about 72% of bullies outrank their targets. And because of the insecurities that often drive the bully, it is often "the least skilled that attack the best and the brightest workers because of perceived threat."[4] Bullying has a negative impact on the work environment, not just for the target, but for those observing the behavior and on the general work environment.

Targets of bullying behavior suffer a variety of negative physical and emotional symptoms. They report chronic stress and a decrease in self-esteem and mental performance, and emotional strength. They report more depression, alcohol and drug abuse, posttraumatic stress and even suicide. They often suffer from high blood pressure and increased risk of coronary heart disease. Witnesses and bystanders also suffer from increased stress and are more likely to quit their jobs than employees not exposed to this behavior.[5]

The top 10 tactics adopted by workplace bullies (as reported by bullied targets):

1. Falsely accused someone of "errors" not actually made (71%)
2. Stared, glared, was nonverbally intimidating and was clearly showing hostility (68%)

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[1] *Adult Bullying; A Nasty Piece of Work: Translating a Decade of Research on Non-Sexual Harassment, Psychological Terror, Mobbing, and Emotional Abuse on the Job,* Pamela Lutgen-Sandvik, PhD, 2013 (hereinafter PLS).

[2] Workplace Bullying Institute, information cited available at: http://www.workplacebullying.org/ (hereinafter WBI).

[3] WBI.

[4] WBI.

[5] PLS.

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3. Discounted the person's thoughts or feelings ("oh, that's silly") in meetings (64%)
4. Used the "silent treatment" to "ice out" & separate from others (64%)
5. Exhibited presumably uncontrollable mood swings in front of the group (61%)
6. Made up own rules on the fly that even she/he did not follow (61%)
7. Disregarded satisfactory or exemplary quality of completed work despite evidence (58%)
8. Harshly and constantly criticized having a different 'standard' for the Target (57%)
9. Started, or failed to stop, destructive rumors or gossip about the person (56%)
10. Encouraged people to turn against the person being tormented (55%).[6]

Targets also suffer from not being taken seriously when they make complaints. Especially in the early stages of bullying, the target is often labeled as a trouble maker or overly sensitive or the problem is just dismissed as an interpersonal dispute. "Bullying terrorizes, humiliates, dehumanizes, and isolates targets. It draws attention and energy away from, and interfere with task completion."[7]

Because the employer establishes working conditions, including hiring, rewarding, assigning work, etc., the agency is ultimately responsible for creating a "bullying-prone" environment. There are various ways in which this environment is created, but it is sustained by management's response to bullying. "If positive consequences follow bullying, the bullies are emboldened. Promotions and rewards are positive. But it is also positive if they are not punished. Bullies who bully others with impunity become convinced they can get away with it forever. They will continue until stopped."[8]

The EPA management bullies and the senior managers responsible for their behavior, create a truly toxic and demoralizing situation for many employees; a work environment where bullies and stealth harassers get to overpower and threaten employees daily, impacting productivity, morale, and the health and welfare of employees.

Examples of EPA's Management Bullies and existing Tools to Address Them.

I spoke with an employee who was targeted by her management for discipline and removal despite her stellar work record and impeccable reputation in the scientific community. When her previous long-time Division Director in this office retired, EPA's Office of Research and Development decided to fill that position with a Title 42 position, rather than using the regular hiring and promotion process. Although Title 42 positions are intended for short term consultants with specific expertise, the person hired actually had no prior experience as a Division Director and had little experience in managerial roles. He immediately began bullying an internationally recognized and respected PhD scientist, who was the only GS-15 female scientist at her laboratory. After months of this behavior and repeated attempts to remedy the situation, the employee filed an EEO gender claim against this manager. This did not deter this manager, as he enlisted his subordinate manager and instead intensified the harassment by searching through her desk and emails in an effort to find a basis in which to remove her from federal service.

After EPA completed its "investigation", the Agency issued a proposed notice of removal and escorted her out of the building with an armed guard hired specifically for this purpose, thus sending a strong message to other employees in the laboratory. The charges consisted of a variety of manufactured ethical violations, mostly relating to scientific conference travel and her work in planning scientific conferences (an action required in her performance agreement with the Agency). She and

[6] From the WBI 2003 Abusive Workplaces Survey.
[7] PLS, p. 88.
[8] WBI, How Bullying Happens.

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others in the office had been conducting business in this manner for years, with no indication that there were any ethical issues. She was never informed about a problem prior to the effort to remove her from her position. She was placed and remained on paid administrative leave for 6 months. The employee was forced to hire an attorney to defend herself in the action. The Agency ultimately reduced the termination to a two month suspension, which she served.

When she returned to the office, the harassment intensified. Within a week of returning, the Title 42 Division Director cancelled her research project, and redirected funds from that project. This despite the fact that the project in question was a high priority for the Agency, had been in process for several years, and had several clients, contracts and grants that were dependent upon its completion. Despite reassurances that she would be able to complete her research by the end of the fiscal year, the manager refused to approve any of the employee's publications necessary to complete the projects. Management also scheduled bi-weekly "progress" meetings, normally done for employees who have performance issues. None of the charges against her related to her performance.

All attempts to settle her EEO claim were rebuffed by EPA management, including efforts to allow her to work under different managers. This employee ultimately found new employment as a Full Professor with an endowed, tenured seat at a major university. But she continued her EEO action against the Agency which now included a charge of retaliation. She finally went to trial in June of this year, more than 3 years after she filed her EEO claim. After a 5 day trial, the 12 person jury came back with a verdict in her favor for retaliation in less than 2 hours of being charged. They found that the Agency had retaliated against her and awarded her back pay and substantial compensatory damages. The judgement in her favor also allows her to seek the payment of nearly $350,000 in legal fees and expenses. The Agency is currently contemplating an appeal of this decision.

It is not easy to fight the full force of the federal government. She had to refinance her home and tap into her retirement account to pay the legal costs that she has had to pay to pursue this action. For many people at the lower grade levels, that is not an option. In this case the employee prevailed against the Agency. However, EPA had already lost a good employee to another entity and the managers responsible for this reprehensible incident have not been held accountable for their behavior.

In other examples the AFGE local is **cautiously optimistic** that senior agency leadership will resolve instances of agency mismanagement. This involves a SES level manager with erratic and abusive behavior for more than 20 years while reassigned to multiple EPA locations. He routinely uses bully tactics against numerous staff to undermine the highest performing in the office, which has forced many staff out of the office over the years. While management has worked with the local to resolve this issue, and has acknowledged the problem with the manager, the solutions proposed to date are ineffective and unlikely to succeed. However, the local remains committed to working with EPA management to try to resolve this situation.

Another local president recently identified 29 instances of bullying within their location during the last year. Most of these involve supervisors bullying employees. In only one instance was the supervisor removed from their position.

Additionally, the Union has observed that EPA prefers to move their problem managers to a new location, rather than addressing (or even documenting) the problems arising from their behavior. Providing a bully with more employees to target is clearly not a resolution to the unacceptable behavior. As shown in the situation above, the Union has observed situations where employees raise management bully issues to the Union and/or to senior management, and instead of addressing the bully, senior management **closes ranks** around the bully, protecting him or her. This elevates employees' fear of

retaliation via more bullying, or even worse, physical violence against the target by the bullying manager.

I have worked with some employees, who struggle with some basic components of their jobs. Often this goes on far too long before management addresses the issue. And when an employee who has been doing the same job for 10 years is told that his work in inadequate, it is not treated as a performance problem, but as a conduct problem. This approach ignores management's failure to take the appropriate corrective action involving the employee's performance, and inappropriately makes the issue one that is incorrectly categorized as willful misconduct. Again, management's failures are laid at the feet of the employee. Should that employee be held accountable? Yes, but someone has to tell him he has performance issues and try to correct his behavior before it turns into a conduct issue.

Contrast the situation with the Union's experience with problem managers. Managers for many years that are either incapable or unable to manage without harassing and undermining his or her employees. When senior management finally tries to address the problem do they treat it as a conduct issue? No, it is a performance problem and the solutions include: (1) transfer the bully to another geographic location; (2) promote the bully to a more senior position; (3) send the bully to an expensive unrelated training course (often costing the agency $5,000 to $20,000); (4) pay the bully SES bonuses of thousands of dollars each year; (5) provide opportunities for travel out of the office to bullies; (6) "fix" the management problem by targeting the employee by moving or forcing employees out of the office; and (7) appoint known bullies to new candidate selection panels. EPA managers are held to a lower standard of behavior than the employees.

When the Union pushes management on these issues they indicate that they don't have enough information to remove SES employees. This despite the fact that SES rules dictate that an SES employee can be removed from his/her position for even one unsatisfactory rating. And contrary to standard practice, SES ratings can be held more than once per year[9], and supervisors of bullies should do just that when they have a bully, the targets of bullies and the dysfunctional office unit should not have to wait a year or more for resolution. However, it is hard to call someone unsatisfactory when the agency continues to award significant bonuses in the thousands of dollars to bullies, despite the upheaval in an office. Evaluation of a SES manager must follow OPM's requirements, which include five critical elements and performance requirements.[10] The use of bully tactics by a SES manager is clearly not consistent with the criteria in the critical element "Leading People", which requires SES managers "[p]rovides an inclusive workplace that fosters the development of others to their full potential; allows for full participation by all employees; facilitates collaboration, cooperation, and teamwork, and supports constructive resolution of conflicts" and "[e]nsures ... that employees receive constructive feedback." Given the bully culture in EPA, those criteria are not applied to SES managers. It is also difficult to attack the problem of bullying, which by its nature occurs over a long period of time, when management fails to document earlier problems and the SES rules on performance systems only allows consideration of actions during the previous year. 5 U.S.C. § 4303(c). Finally, OPM requires that each agency establish a Performance Review Board that is to make written recommendations on annual summary ratings to the appointing authority on the performance of senior executives. So, the system already has a group of peer individuals to police its own, but EPA's Board does nothing about their

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[9] The minimum period of performance that must be completed before a performance rating can be given in 90 days.

[10] OPM SES Appraisal System (available at: https://www.opm.gov/policy-data-oversight/senior-executive-service/basic-appraisal-system/).

fellow bullies. What we lack is not a system that allows for accountability, but an unwillingness, at the highest levels of the Agency to hold their colleagues accountable for their behavior.

EPA has a variety of policies in place that address workplace behavior (e.g., Workplace Violence Policy) and AFGE is currently negotiating a new Anti-Harassment Policy with EPA. While these policies set out standards and procedures to address bullying, none of them will achieve the desired results until all senior level managers are held to these standards. It is also very difficult to get targets to speak up about their experience because they fear retribution or being forced out of jobs they love, as others have before them. And when one learns that only a small percentage of employees' efforts to push back on bullies is successful, it becomes clear why the behavior is so entrenched.

At EPA, we have had so many high level managers who have bullied employees for so many years without ever suffering any adverse consequences (based upon their steady career rise and other rewards), that it is no wonder that the behavior is taking hold at lower levels in the agency.

The Process for Disciplining and Firing Employees is Not Broken

Under current law and regulations, management has the tools to hold employees accountable, up to and including removal from federal service. If you looked at the numbers in an organization one would surmise that it is easier to remove someone from a staff level position than from a management position. However, the process is not that different. Employees need to be notified of the proposed decision and have 30 days to respond to the notice. Once the final decision is made, employees have recourse to the MSPB for review of such decision

When rank and file employees go through this process, they may be allowed to continue to work, or they may be put on administrative leave during the 30 day time frame, if there are reasons they cannot be allowed to work during the process. However, once the final decision is rendered, employees must bankroll their own defense, while no longer receiving a pay check.

AFGE is demanding that the good managers of EPA, of which there are many, step up and hold these other managers accountable for their behavior. We challenge the Agency to take stock of its career leadership. Some will need to be removed from their positions because of long-term damage to the organization. Some, may be candidates for training or coaching to be better managers (just as some employees need more training and/or coaching to be the best they can be). Some people who have moved into management for the pay grade, but are unable or unwilling to take on the very difficult job of managing people, may need to move back to a staff level position, where they often thrived. Finally, like some employees who elected to leave the agency rather than be fired, some managers may make the same choice. There are rules and procedures in place now the agency can follow to correct the mismanagement and bullying culture.

Employee Viewpoint Survey: Employee Engagement and Identifying Ways to Repair EPA

OPM has been conducting the Employee Viewpoint Survey for many years. It is time for us to look realistically at this data and use it to fix our ailing organization.

Let's first look to the 5 highest percent positive items.

- When needed I am willing to put in the extra effort to get the job done. 96%
- In the last 6 months, my supervisor has talked with me about my performance. 77%
- I am constantly looking for ways to do my job better. 90%
- The work that I do is important. 90%
- How would you rate the overall quality of work done by your work unit. 82%

9

From the way federal workers have been treated in the press lately, one would think that all federal workers are slackers, who don't care about their work. But in reality most federal employees are proud of the work they perform. They are always looking for better ways to get work done. However, with fewer people and shrinking budgets, but an increasing workload, it gets harder and harder to keep those high performing employees at the Agency. Next time you hear about a problem or a mistake in the federal government, please keep in mind that for every mistake, federal workers complete millions of tasks correctly, including all the mundane and important tasks that keep our country functioning as a mostly orderly society.

Lately, OPM has focused a lot of attention on what they call the employee engagement elements of the Employee Viewpoint Survey (EVS). The factors used in the EVS employee engagement index are similar (maybe modeled after) to the principles laid out in *First Break All the Rules (FBAR)*. [11] A book that surveyed over 80,000 managers and over 400 companies to understand what great managers do differently.

FBAR's Gallop survey of employees focused on 12 questions to measure employee satisfaction and related it to productivity. The author's following statement rings true to me: "Perhaps the best thing any leader can do to drive the whole company towards greatness is, first, to hold each manager accountable for what his employees say to these twelve questions, and second, to help each manager know what actions to take to deserve "Strongly Agree" responses from his employees. [12]

FBAR specifically focused on 6 items that are the strongest links to the most business outcomes.

1. Do I know what is expected of me at work?
2. Do I have the materials and equipment I need to do my work right?
3. At work, do I have the opportunity to do what I do best every day?
4. In the last seven days, have I received recognition or praise for doing good work?
5. Does my supervisor, or someone at work, seem to care about me as a person?
6. Is there someone at work who encourages my development?

There are clearly resources readably available to senior EPA management to address the mismanagement issues.

Solutions

How do we fix the problems within the EPA, and are likely present in many other organizations within the federal government? First, I must note that this is not a Democrat or Republican problem. This problem started long before the current administration and will continue into the next, unless we find a way to hold the senior career staff accountable for managing managers.

One place to start would be to order GAO to conduct a study of bullying in the federal sector. I believe that the EPA is not the only government entity with a bullying problem. The federal sector is often criticized for instances of rude or bullying behavior reported by the public. While I believe that these instances are the exception rather than the rule, we cannot discount these reported incidents. When bullying behavior is accepted and tolerated within the management structure of an organization, one might expect that some employee would adopt that "acceptable" behavior in their approach to the public. If we want a more civil federal government, then we need to start treating all of our federal

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[11] *First, Break All the Rules, What the World's Greatest Managers Do Differently,* Marcus Buckingham & Curt Coffman, 1999.
[12] FBAR p. 36.

workers with respect and dignity. Such a study should focus not only on agencies like ours with a bullying culture, but agencies that do not tolerate bullies, so that we all can learn from them.

I am asking you today to assist AFGE in holding EPA management accountable for their behavior. First, we are asking for an independent review and investigation of all information gathered by the Inspector General, and/or internal EPA investigations of allegations of illegal and improper activities by EPA Senior Executive Service officials and all other levels of management. We further request that, as a matter of transparency and full disclosure, the results of this investigation be released to the public. Based upon the findings, the Agency should be required to address areas of impropriety, bullying, and violations of civil service law.

But there is more that can be done immediately, within the EPA and other federal agencies. It is simple, but it is not easy. It starts by having the people at the top, pay attention to the concerns of the people they supervise. Managers need to listen for the rumblings of a workforce. People talk. Workplaces talk. One just has to listen and sift through the grumbles and the difficult people, to hear when a manager is causing a stir in the workforce. Frequent departures of employees from a particular unit is a good sign that there is a problem with a manager. The union can be a great asset within an organization, because we hear the rank and file employee's concerns first hand.

AFGE has listened to employees concerns and communicated these entrenched problems up to senior leaders. The higher one goes up in the chain of command the harder it is to hear the concerns of the workers. At a certain level, one only hears the voices of their inner circles. And sometimes, the inner circle may only be telling them what they think they want to hear. EPA's unions want to truly partner with Agency management to improve the workplace for all employees.

Another way to learn what is happening in an organization is to put a feedback loop in place that allows staff level employees to anonymously voice their opinions on how managers are performing their job of managing employees. The Agency periodically conducts 360 degree management reviews, but frequently allow the manager to select who they want to rate them. Senior management cannot effectively manage other managers if they do not receive input from the staff who work for that manager.

I believe the first step to solving our problems is to address the **senior** management level issues. People at high levels within the organization who have acted in an inappropriate manner for far too long without consequences. All employees, at all levels of the organization, need to see that there are consequences, whether it is because you cannot perform your work or if you bully other people in the office. Until senior leaders are held accountable, the EPA will not be able to lay out a new framework for efficient and effective operations. The Agency likes to issue rules of behavior and conduct and Anti-harassment policies. But when they are only applied against the rank and file workers, it does not send the right message. The double standard of accountability cannot continue at the EPA. Moreover, the time and resources wasted in the dysfunctional work units managed by bully managers, and abuse and impacts to employee's health and well being (including significant medical costs) is a culture that EPA must end. We see each EPA Administrator find and allocate significant time for her/his "priority" policy projects, while neglecting to ensure employees are treated with respect.

EPA needs to recreate its culture of respect for all employees. Holding employees of all rank and status accountable for their behavior, but remembering that we are all human. As such, people work differently and personal problems can impede even the best performer's work at times. The Federal government likes to call itself the "model employer". I believe that EPA can meet and exceed that standard.

11

A recent article in the Government Executive discussed the role of HR in the federal government. The author notes that "industry also has learned –in a supportive, healthy work environment people look forward to their workday and the sense of achievement when their contributions are acknowledged and valued."[13]

This is even more important during these times of brutal budget cuts, and increased scrutiny of employee behavior. I ask the Members of this Committee to distinguish between the horror stories that you hear about those few problem employees and the vast majority who want nothing more than to be able to do a good job for a decent wage. The employees of the EPA do not make policy. They are regular American's doing their jobs and caring for their families. When the rhetoric about federal workers as lazy, unproductive or unresponsive to the public is tossed about without consideration to the men and women who labor for the government, it demeans and demoralizes employees. Please do not paint all federal workers with the brush of a few problem employees. Federal employees deserve the respect of this nation, not its scorn. They are what keeps this country working day in and day out.

[13] *Let's Demolish HR and Start Over*, Howard Risher, Government Executive.

Chairman CHAFFETZ. Thank you.

I now recognize myself for 5 minutes.

What I would like to do is talk specifically about the case with Intern X, as we are referring to her. Please, I admonish members, the people on the panel today, do not use this person's name.

Paul Bertram was accused of harassing several women over the course of time, and specifically I want you to give me your first-hand account of what she went through. What do you know specifically about this case involving Paul Bertram? What was his history, and what happened specifically to this intern? What was your findings, your personal involvement in that?

And we'll start with Mr. Harris.

Mr. HARRIS. My personal involvement is that I was contacted, I believe, right around sometime in May—I am sorry, March. She had spoken with another young lady, Ms. Deborah Lamberty, whose statement you read, and told her get in touch with me, because she did not feel like anything was happening. When she got in touch with me, I made several appointments to see her, took her the necessary documents. We discussed what was to take place, what had taken place. I recorded everything. I then contacted my director, Carolyn Bohlen, and then we proceeded from there.

Emotionally, mentally, Intern X was a wreck. It bothered her. She was strong. She did prevail. She kept saying to me: I just want it to stop. How do I get it to stop?

She contacted an individual who was the lead person, or who was supposed to have been addressing the issue, and she did not hear back from them for 3 weeks. And during this 3-week period, other incidents still occurred. She also continued to let the supervisor know, who also took no action.

At that point my advice to her: You might have to file something in order to get them to do the right thing.

Chairman CHAFFETZ. And what happened? What ultimately happened?

Mr. HARRIS. I spoke with her about what it would take to file something. She said she just simply couldn't afford it. Her and her husband—I believe that was her husband at that time—were just getting their lives together. They both were in graduate school. They just did not have the money to pursue anything.

Chairman CHAFFETZ. Why couldn't she do anything internally in the office, I mean, make a complaint?

Mr. HARRIS. She did make an informal complaint.

Chairman CHAFFETZ. But what happened? They just moved the cubicle, that is all they did?

Mr. HARRIS. Yes. They moved her cubicle first. When we got involved in the OCR office, we said: Wait a minute. That is not the way you do this. You move the aggressor, not the intern.

Chairman CHAFFETZ. When you say moved the cubicle, like how far?

Mr. HARRIS. Originally they moved, I believe, it was four cubicles down.

Chairman CHAFFETZ. So that was going to solve the problem, move it four cubicles down?

Mr. HARRIS. Yes. And we insisted: No, move him to another floor.

Chairman CHAFFETZ. Dr. Bohlen, what was Paul Bertram doing to this intern?

Ms. BOHLEN. To my knowledge, he was touching, groping her, kissing her, and she was feeling very uncomfortable by his advances. She had asked him to stop, and he continued to do it. And Dr. Bertram's advances were well known by management, and they had just been going on for years.

The intern, along with two other ladies, came to my office, along with Mr. Harris, to report the situation. They were very upset, all of them. What they finally did was to give a number of testimonies to us. Mr. Harris and I prepared a 12-page summary document and prepared it for the human capital officer, the Office of Regional Counsel, as well as Mr. Mathur. And we gave the allegations, the persons who were involved, the comments that were given, and we gave recommendations.

Chairman CHAFFETZ. And what happened?

Ms. BOHLEN. Mr. Mathur was irate with Mr. Harris and myself for writing up the 12-page summary. He questioned us and shouted and yelled at us, intimidated us, and said: Why did you report this to headquarters? Mr. Harris stated to him that it is the procedure to report sexual harassment and discrimination claims to headquarters. Mr. Mathur banged on his desk, pointed his finger, and said he was not interested in hearing the EEO, and he used and expletive when he referred to it.

Chairman CHAFFETZ. What is Mr. Mathur doing now?

Ms. BOHLEN. He has retired.

Chairman CHAFFETZ. What happened to Paul Bertram?

Ms. BOHLEN. Paul Bertram, to my understanding, retired. But he was seen in the building several times for several months after that at meetings, at various meetings. So I can't tell you exactly why he was there, but it looked suspicious.

Mr. HARRIS. Mr. Chaffetz, may I make a comment on what Dr. Bohlen said?

Chairman CHAFFETZ. Yes.

Mr. HARRIS. The Agency, especially direct level supervisor, Mr. Paul Horvatin, they were going to issue a reprimand again to the same guy, despite the fact they had known all these years and had all these accusations against him. Once we stepped in and met with Mr. Mathur, myself and Dr. Bohlen, said you can't do this, you have got to do the right thing and elevate this to more than a reprimand, only then did they move to remove him.

Chairman CHAFFETZ. How many previous reprimands had Dr. Bertram had?

Mr. HARRIS. According to the witness statements that I remember and observed, there were three to four.

Chairman CHAFFETZ. Thank you.

I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

As I've listened to this testimony, it is, indeed, very alarming. But having practiced discrimination law when I first came out of law school back in 1976, it does not surprise me.

To all of you, to Mr. Harris, to Ms. Bohlen, to Mr. Tuttle, first of all, I want to thank you for standing up for what you believe to be right. My favorite theologian says that it is what you do when

you are unseen, unnoticed, unappreciated, and unapplauded that matters the most. And I am sure that you all have stood up in many instances where you were not applauded, as a matter of fact, you got slapped for doing the right thing.

Mr. Tuttle, the idea that you have been basically forced out of the Federal Government, I mean, is that a fair statement?

Mr. TUTTLE. Yes, that is essentially correct. I was handed, as part of what could have been and should have been a routine reassignment to Region 6, I was handed a modification to my original EEO settlement agreement that stated in part, and as I said in the record, stated in part, in exchange basically for being permanently reassigned to Region 6, I agreed to voluntarily retire no later than December 31 of 2015, and that EPA is authorized to initiate the documentation to indicate that.

Mr. CUMMINGS. Let me say this, that as I listened to the testimony, one of the things that is being said that is not being said is that when you all are being retaliated against, that means that you cannot do the job that we are paying you to do. Come on now.

Mr. HARRIS. That is correct.

Mr. CUMMINGS. You can't do the job that we are paying you to do. Your effectiveness and efficiency is diminished. So that is a double whammy. Not only do you suffer, but the taxpayers can't get what we are paying for. And so that is why I am so appreciative of what you have tried to do.

And one of the things that is just bearing into the DNA of every cell in my brain is the idea, Mr. Harris, that back in 2000 you were making the same types of statements, I guess.

Mr. HARRIS. That is correct.

Mr. CUMMINGS. In 2000. Which means that over the course of 15 years, over and over and over again, obviously there have been folks who have been damaging people, harming them, and then moving on, or being promoted. Is that right? Is that a fair statement?

Mr. HARRIS. Yes.

Mr. CUMMINGS. Now, back to you Ms. Kellen. I am glad you said what you said the way you said it, that we have a way up here of maligning Federal employees over and over and over again. But the fact is that we have some folk who are not doing the right thing. But you said something that is very powerful. You said the management gets rewarded. Am I right?

Ms. KELLEN. Correct.

Mr. CUMMINGS. But on the other hand, the rank and file, the folks getting up at 6 o'clock in the morning, giving their blood, their sweat and their tears, they get messed over. Am I right?

Ms. KELLEN. Absolutely.

Mr. CUMMINGS. We are better than that. We are.

Now, Dr. Harris, Ms. Bohlen, Mr. Tuttle, I am very concerned about the allegations you raise, especially your claims that you were retaliated against for investigating this activity. Now, I understand that we have not investigated your claims yet, we haven't talked to your managers to get their responses, and we haven't requested any documents that would shed light on your claims. I hope we will do that soon. As I said to the chairman, I think we

need to have the IG to look in this because this stuff is culture. I mean, you got to dig deep.

In Baltimore, we had a situation where we had some concerns about our Police Department, and I asked for a patterns or practice examination. You know why? Because I knew that in order to deal with the culture, we had to dig deep. I mean, you cannot just leave this on the surface, because what will happen, Mr. Harris, is that you will be here, God willing, 15 years from now making the same allegations with more victims having fallen by the wayside.

Mr. HARRIS. That is correct.

Mr. CUMMINGS. What a waste of taxpayer dollars. But more importantly, what harm comes to people who are simply trying to walk into their destiny? And it is sad. We are better than that. And I thank you for what you are doing.

But let me go on just 1 more minute. I want to ask you about the recommendations you made in your testimony and some legislative proposals that Congress is considering. Mr. Harris, you urged the committee to require EPA to develop a process to hold managers accountable for discrimination and retaliation. Is that right?

Mr. HARRIS. Yes, I did.

Mr. CUMMINGS. I have a bill called the Federal Employee Antidiscrimination Act that does just that. It says: "Accountability in the enforcement of Federal employee rights is furthered when Federal agencies take appropriate disciplinary action against fellow employees who have been found to have committed discriminatory or retaliatory acts."

Mr. Tuttle, do you agree with that statement?

Mr. TUTTLE. I absolutely do.

Mr. CUMMINGS. And, further, my bill would require agencies to track every single complaint alleging discrimination from inception through resolution, which is not required now under Federal law. My bill would also require agencies to notify the EEOC when violations occur, and it would require agencies to report on their Web sites whether a finding of discrimination or retaliation was made.

Dr. Bohlen, I realize these steps are not a silver bullet, but do you think they could help bring some additional level of accountability to the process?

Ms. BOHLEN. I do. I do think that this is exactly what is needed.

Mr. CUMMINGS. Well, I've run out of time, but let me say this. I have seen so many people over the years, over my being in the practice of law, I mean, people who have gone through difficulties, and then they were looked upon like you, Mr. Tuttle. They tried to do the right thing, and then they filed suit or whatever, and while waiting for the suit, they died.

Mr. TUTTLE. Yeah.

Mr. CUMMINGS. They died. I've see that over and over and over again. And I am so glad you all are coming before us. Hopefully we can get to the bottom of this so that 15 years we won't be going through the same thing, Mr. Harris.

Thank you, Mr. Chairman.

Mr. HARRIS. Congressman Cummings, may I make one comment on the bill that you are going to introduce?

Mr. CUMMINGS. Please.

Mr. HARRIS. We need to include the language in settlements, because, as your bill might indicate, those who are found guilty, but when issues are settled, there's a clause——

Mr. CUMMINGS. There is a nondisclosure clause. We addressed that in the bill also. By the way, I did not get a chance to ask you about that. Because what happens, you are right, when they settle, they put a nondisclosure clause in there. And so therefore the very acts that brought about the settlement, they can't talk about them. So therefore they go on and on and on.

Thank you, Mr. Chairman.

Mr. GOWDY. [Presiding.] The gentleman from Maryland yields back.

The chair will now recognize the gentleman from Michigan, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman.

Ms. Kellen, thank you for being here from your position as president of the Council 238. Could you just summarize the basics, the general approach, as to how EPA leadership handle cases of misconduct or harassment by management?

Ms. KELLEN. Frankly, it varies from location to location. We do have some locations in which management has been responsive in listening to us and starting to address the problems, although I have to admit that the solutions that they come up with tend to be feckless, frankly.

Mr. WALBERG. What does the responsiveness look like, just briefly?

Ms. KELLEN. Responsiveness looks like an acknowledgement that the bullying behavior is happening and that there is a problem.

The response, however, is to send the bully, whose been doing this for 20 years, off for training for 3 weeks with master's credit. I actually asked if I could be sent off for 3 weeks of training with master's credits.

In other instances, there is complete denial of what is going on. Frequently what happens is, when you raise the issue with one level of management, they join forces. Managers stand together as one, and the manager is always right, the manager is the one who is telling the truth, and the employee is the problem.

Mr. WALBERG. Does that promote, in the culture of EPA, an effective, productive workplace?

Ms. KELLEN. Oh, no. It undermines the work people are trying to do. These people just want to do their job. And if we'd just get out of their way, they would give great service to the American public. But, instead, you get this whole culture of—everything starts to revolve around the problems, and it just undermines everything we do.

Mr. WALBERG. In your testimony, Ms. Kellen, you say that the managers are not held to the same standard as their employees. Elaborate on that a little bit more. Explain it to us.

Ms. KELLEN. Okay. So what we see after the John Beale situation, which I am sure you are all aware was the CIA impersonator——

Mr. WALBERG. Right.

Ms. KELLEN. —the Agency came down very hard on employees on time and attendance issues, to the extent where there are times

when single mothers have gotten in trouble for being 5 minutes late once in a while. We had an employee who was severely ill who forgot to request his leave to take his doctor's appointment 1 out of, like, 40 visits. Despite the fact that he was working again later in the afternoon, he was put on AWOL for that period of time because he did not ask ahead of time.

Yet the managers pretty much walk free. They do as they like, and they are not held accountable.

Mr. WALBERG. I guess this is a crucial question for me to hear from you, because you have talked with your membership, other employees. What steps do you think leadership at EPA should be taking to address these management problems?

Ms. KELLEN. Well, I think the first place to start would be developing a feedback loop.

One of the issues I see is that, when you have a bullying situation going on, the bullies tend to be very good at managing upwards, so the senior leaders never see that behavior. And they need to listen to the staff, they need to listen to the employees.

And when you are managing, you learn that there are some gripers, and then—but when the problem expands beyond those few people who are always griping to a larger group of people, you have to listen to the employees.

So we need to develop a feedback loop to make sure that senior leadership gets feedback about how managers are doing within this process.

Mr. WALBERG. And ultimately they listen to it.

Ms. KELLEN. Well, that is the next step, that they actually have to act upon what they hear.

Mr. WALBERG. Okay.

Mr. Chair, I yield back.

Mr. GOWDY. The gentleman from Michigan yields back.

The chair will now recognize the gentlelady from New Jersey, Mrs. Watson Coleman.

Mrs. WATSON COLEMAN. Thank you, Mr. Chairman.

And thank you very much to the panel being here and sharing this very painful information. I spent much of my career working in EEO/affirmative action, and so I understand the, sort of, frustration when the system just does not do what it is supposed to do.

I am not quite sure I completely understand your system, but I think we are dealing with two issues here. We are dealing with what does this agency do when it has a discrimination complaint, what is the process, what do you do—like the sexual harassment complaint. And then the other process is what happens to individuals who try to stand up and make the system work right, the whistleblowing.

So let me go to the first piece. The first piece involves a sexual harassment, a discrimination complaint that you all investigated. This is a very toxic environment that you have described, as it relates to sexual harassment, with regard to this one individual. But is there a culture there that there is discrimination because of race and gender assignments also?

Ms. BOHLEN. Yes.

Mrs. WATSON COLEMAN. Is this—and I do not know who can best answer that.

Dr. Bohlen?

Ms. BOHLEN. Yes. There is definitely the culture.

Mrs. WATSON COLEMAN. So have you all been called upon in that region to investigate discrimination complaints based on race, creed, color, all that other stuff?

Ms. BOHLEN. Yes, we have.

Mrs. WATSON COLEMAN. And do you have the same reaction and response from the higher-ups with regard to those cases as you did with this case involving sexual harassment and this doctor?

Ms. BOHLEN. Actually, I think that the higher-ups are not concerned with those types of cases.

And, by the way, I might add that I was removed from the Office of Civil Rights as a result of my doing my job. Mr. Harris and I worked diligently with employees and with managers to make sure that they understood the policies of EEO and affirmative action. And I think that the attitude comes from the top. And if——

Mrs. WATSON COLEMAN. So, when you say "the top," are you referring to the top of your regional office, or are you talking about headquarters?

Ms. BOHLEN. Well, it is the top of our regional office. And, of course, that should come from headquarters. I think it is a trickle-down effect.

Mrs. WATSON COLEMAN. So let me ask you a question. You investigate cases of discrimination, sexual harassment, whatever. You have a responsibility not only to report that to your regional office, but you have a responsibility to report it to headquarters also?

Ms. BOHLEN. That is correct.

Mrs. WATSON COLEMAN. And in doing so, you were then harassed—allegedly harassed on your regional level, right?

Ms. BOHLEN. Yes, we were.

Mrs. WATSON COLEMAN. Is there a policy in place in the Department as it relates to whistleblowing, harassment of whistleblowers?

Ms. BOHLEN. Yes.

Mrs. WATSON COLEMAN. And what is that policy?

Ms. BOHLEN. I will defer to Mr. Harris.

Mrs. WATSON COLEMAN. Mr. Harris?

Mr. HARRIS. They have a policy, but it is more or less a statement. There is no official step one, step two, step three. But they send out a policy statement every year. So if you are asking me are there steps involved, no. And this is what one of my recommendations is. There should be.

Mrs. WATSON COLEMAN. Uh-huh.

Mr. HARRIS. I want to respond back, if I may, to another part of the question or remark that you just made.

One of the biggest issues that I've seen in doing this over a 10- to 15-year period, it is our own regional counsel's office. The moment a discrimination complaint comes in informally or even are mentioned, the attorneys are digging in with the managers. This is not the way the EEO—the OCR process is supposed into work.

Mrs. WATSON COLEMAN. Okay. Then let me ask you a question about that. Has the Department established any kind of, sort of, training and accountability on a routine basis?

Mr. HARRIS. Yes, they have. Matter of fact, as I indicated in my statement, in 2004 and 2008, the same managers that withheld

doing anything with regards to the sexual harassment, they attended the training. I submitted that as part of the evidence.

The attorney, again, who defended the Agency during an informal process, documents were sent out by then Karen Higginbotham, who was a director, stating they should not be involved, prior to that, 1998, stated they should not be involved.

Mrs. WATSON COLEMAN. Let me ask you a really quick question. Anybody can answer it.

Is it better as a result of your being here today, as a result of the, sort of, prominence associated with the issue? Is the culture better? Is there more accountability? Are there any steps moving in the right direction being done by the administrative branch?

Mr. HARRIS. I can only speak on what I know. And, right now, just recently, there was another issue. I brought it to the DRA's attention, who is new, and he addressed it right away.

Mrs. WATSON COLEMAN. Okay.

Mr. HARRIS. This is what is needed.

Now, how long he'll be able to do that with that institutionalized culture, that is the question mark.

Mrs. WATSON COLEMAN. Okay.

Ms. KELLEN. And, if I could, as a lawyer, I would have to say: It depends. Because it is very dependent on the senior career leaders in each location. And I have found that some locations, the political leadership is stepping in and really trying to make a difference.

Mrs. WATSON COLEMAN. So consistency, or the lack thereof, is a big issue here?

Ms. KELLEN. That is correct.

Ms. BOHLEN. Yes. Absolutely.

Mrs. WATSON COLEMAN. Mr. Chairman, may I just ask one final short question?

Mr. GOWDY. Yes, ma'am.

Mrs. WATSON COLEMAN. And this is to Mr. Tuttle, because he explained that he had investigated cases against Dr. Bertram——

Mr. TUTTLE. Yes, ma'am.

Mrs. WATSON COLEMAN. —as far back as 2000, and then you stopped.

Mr. TUTTLE. Yes.

Mrs. WATSON COLEMAN. Can you tell me why you stopped and what happened with the findings of your investigation?

Thank you, Mr. Chairman.

Mr. GOWDY. Yes, ma'am.

Mr. TUTTLE. Thank you for asking.

I stopped at the year 2000 because I had—in my part of this investigation, I was doing it from the administrative side of the house as opposed to the civil rights side. And I would have gotten the names of previous interns who had been through the same thing, and I stopped at 2000 because that was the last point that any of the—either the employees that I had talked with or the interns could give me any information or contact information on who to reach out to.

And I would have like to add, for the benefit—one of the things that was among the most disturbing things that I saw in those statements, one intern specifically stated that, because of what had

happened to her and what had not been done, it not only changed her mind about a career with EPA, it turned her off from government service completely, and she ended up getting a job in a completely unrelated profession.

Mrs. WATSON COLEMAN. Thank you, Mr. Tuttle.

Thank you, Mr. Chairman.

Mr. GOWDY. The gentlelady yields back.

The chair will now recognize the gentleman from Wisconsin, Mr. Grothman.

Mr. GROTHMAN. Thank you.

Thank you all for your testimony.

For most of us, or at least for me, when I think of the Environmental Protection Agency, I think of, you know, touring local farms, factories, that sort of thing and what they feel are, first of all, rules that are lacking in common sense, causing huge cost of money, perhaps chasing jobs out of America.

Now, you guys are not psychologists, but I will ask you maybe to comment. I wonder, do you think the same apparent psychological problems with the management at EPA—the bullying, okay, the getting revenge on people, not dealing with legitimate questions but just walking away—is that psychological problem that you are experiencing, do you think those same psychological flaws in the EPA management is what is causing, you know, problems for American business or American landowners?

Ms. KELLEN. If I could respond, I believe that when you allow a bullying culture to exist with managers that those employees who have those tendencies will also act that way towards the public.

I also think that is more rare. I think you hear about the worst ones, but on the day-to-day operations, unfortunately what I've seen is that some of our employees in the field have been harassed and threatened by the public because of the environment towards us.

But I think, if there are instances of that out there, that the bullying culture definitely lends itself to that.

Mr. GROTHMAN. Well, what I am saying is I am extending even to the people who write the regulations that American business, that American farms have to live under. Okay?

Now, a normal human being, in writing these regulations, would have to realize that, when you write them, it is going to be very costly, it is going to result in a lot of ambiguity in the regulations, you are going to create a situation in which individual employees can make subjective decisions that, quite frankly, ruin businesses and ruin people's lives.

Do you feel, if this is the culture in the management of the EPA, that these personality flaws are perhaps one of the reasons why we have such onerous regulations coming out of the EPA?

Mr. HARRIS. If I may respond?

Mr. GROTHMAN. Yeah.

Mr. HARRIS. Yes, I do. You have a culture of arrogance, beyond the shadow of a doubt that you could ever see—the arrogance. And when you have that level of arrogance and unaccountability, there's an untouchable feel about this individual now. So, yes, I know it transfers over to the public.

Mr. GROTHMAN. Okay.

Ms. KELLEN. And if I could, as well, address that, I think part of the problem with that is just—I grew up in a town of 400 people, so I know what it is like in rural America. And the rules you come up with in Washington, D.C., just do not always make sense when you get down on the farm. And I think that is a challenge in general.

And I think one of the things I would caution you on is that, currently, the Federal Government itself is so loaded down with regulations that control us and tell us how we can and cannot do things that it is impossible to operate effectively or efficiently.

Mr. GROTHMAN. Do you think it is possible—and, obviously, you know, we are not going to get rid of the entire EPA—but do you think it is possible, given the huge culture of arrogance at the top, apparently covering so many employees, is it possible for the EPA to reform itself and work with the American people rather than right now, where it is perceived as, you know, I mean, really a problem agency that seems like its sole goal is to harass people and come up with regulations that lack common sense?

Are there enough good people left in the EPA that it can even reform itself?

Mr. HARRIS. Did——

Mr. GROTHMAN. Sure, Mr. Harris.

Mr. HARRIS. I believe EPA can be reformed but not without accountability. There's no way you are going to have change and reform without accountability. Until you initiate accountability, do not expect change.

Mr. GROTHMAN. Just one more question. Do you think it would be better, given the huge problems you have, to take at least some of the responsibilities the EPA has and give them back to the various departments of natural resources around the country?

Mr. HARRIS. They have what—in working in the HR issues, they have what they call the delegation of authority. If EPA cannot perform in a satisfactory manner and eliminate that culture of arrogance, that delegation of authority should be in place to take that authority away and give it to somebody else. This is how you hold an agency accountable.

Mr. GROTHMAN. Thank you very much, Mr. Harris. We will see if we can do that.

Chairman CHAFFETZ. [Presiding.] Thank you. I thank the gentleman.

We will now recognize the gentlewoman from Michigan, Mrs. Lawrence, for 5 minutes.

Mrs. LAWRENCE. Thank you.

I just want everyone to know here today that sexual harassment in the workplace and allegations of management coverup are something I take very seriously. As a matter of fact, during my tenure with the Federal Government, I served as an EEO investigator. So these are things that I am—the process and the sensitivity to this I take very seriously.

So one of the protections in place throughout our executive branch is the Office of Inspectors General. And this committee has worked to strengthen the role of the IG because of the critical importance of an independent investigation when allegations such as this arise.

So my question to you today, to the members of this panel: Mr. Harris, did you contact the IG, or did you consider doing so?

Mr. HARRIS. No, we did not contact the OIG. My reasons for not contacting, or the individual contacting them, in Region 5, OIG is seen as an extension of management, and many employees are intimidated to contact them.

The reason for this, because when certain managers with the bullying tactics, the first thing they do, they contact OIG and sic them on the employees. So the persona of the OIG regional office is not the persona that it should be, because they are used as extensions of management to attack employees. So no one wants to talk with them.

Mrs. LAWRENCE. So would you say for the record that you feel that the IG, as we call them, actually are part of the conspiracy of what happened in this case?

Mr. HARRIS. No, I do not. I think OIG, themselves, independently, will and can do a good job. But the perception of the employees toward OIG.

And, no, I do not think there's a conspiracy. I think OIG would investigate the facts as they are. But the perception.

Mrs. LAWRENCE. But they were not given the opportunity.

Mr. HARRIS. That is correct.

Ms. BOHLEN. And I might add that there is a certain clique of managers that seem to follow the same pattern. It is not all supervisors and managers that have this opinion or that operate in this manner.

But there is a certain faction within EPA that seems to have the attitude that Mr. Harris just—the arrogance and the entitlement and that idea of being above the law. And those are the managers that taint the region, that cause low employee morale. And those are the ones that need to be isolated and dealt with and held accountable.

Mrs. LAWRENCE. Mr. Tuttle, could you respond to that question pertaining to the IG?

Mr. TUTTLE. Well, I was going to ask just to weigh in on this.

I knew personally two people that worked in the Office of the IG in Region 5 that were investigators. I had met them independently when they came down to my office to seek information about other issues. And while I was completely comfortable that if it was left to them that it would be investigated, I, too, was not—I am like Mr. Harris. I was of the impression that the IG's office has the persona of being an extension of management.

Contacting the IG would've normally been one of the things I would've recommended, but I wasn't comfortable doing that.

Mrs. LAWRENCE. Ms. Kellen?

Ms. KELLEN. Yes. Just to let you know, I have reached out to the IG. And, unfortunately, our meeting was cancelled last week because of various reasons. But my intention is to work with the IG to try to find a way to address these issues and to try to reopen those lines of communication so that employees do feel comfortable reporting that. So that is an ongoing effort that we are making right now.

Mrs. LAWRENCE. Again, I want to reiterate that part of the investigation of allegations such as what we have heard, and the whis-

tleblower and that, we must exercise the process that we have. And we can't hold our government responsible if we are not using the investigative tools that are allotted to us.

It seems to me that the allegations that I have heard here today, which are disturbing to me, are exactly the type of allegations that we need a third party to investigate.

Mr. HARRIS. That is correct.

Ms. KELLEN. Absolutely.

Mrs. LAWRENCE. And perceptions are hard to validate when you are not even given the opportunity or reporting for that. When management fails to investigate themselves, the IG can step in as an independent party to carry out that investigation.

Mr. Chair, I yield back my time.

Chairman CHAFFETZ. Thank you.

I now recognize the gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Harris, I made a note, the ranking member in his opening remarks said that sexual harassment was intolerable and had no place in the Federal workplace. And if you heard him today and hear the passion with which he speaks on this issue, you will know that if he were in charge it would be not tolerated and have no place in the workplace.

Mr. HARRIS. That is correct.

Mr. GOWDY. But he is not in charge. And it appears to me that it is tolerated, prevalent. And, really, the only consequences are consequences for the victims, not the perpetrators.

Mr. HARRIS. Yes.

Mr. TUTTLE. That is right.

Mr. GOWDY. The chairman, whom I laud for calling this hearing, began to get into some of the specifics with you, and that is precisely what I am going to do.

No names, no identifying characteristics at all, but I want to know, how many victims and witnesses to the harassing conduct were there?

Mr. HARRIS. From the top of my head, right now I remember there were at least 10. I do not remember specifics, but I do have it documented in the evidence that I submitted. But I do remember there were at least—we took 10 statements.

Mr. GOWDY. All right. So there are 10 victims of sexual harassment.

When did the conduct begin?

Mr. HARRIS. I was informed—as I said, we worked together. I was informed that the conduct started right around 2002.

Mr. GOWDY. All right.

Now, we use the word "conduct" because it has such a benign-sounding name to it. I want you to describe for our fellow citizens what that conduct was. What did these victims have to endure?

Mr. HARRIS. According to the statement submitted by one of the victims, she endured the very same thing—the touching, the attempts at rubbing, touching her back, arms, legs, shoulders. This, if I remember correctly, according to the statements, happened to at least four of these women.

They reported this, again, going back to 2002, and nothing took place for this long, limited period. The manager involved was more

hellbent on saving the reputation of Dr. Bertram than he was in dealing with the issue. He himself stated to one of the victims, "If I do something, it will ruin his reputation."

Mr. GOWDY. Well, I think he had already done that.

And, to the extent that he had not, we are going to keep going. I read hugs, kisses, placing his hand on the knees of several women. Is that correct?

Mr. HARRIS. That is correct.

Mr. GOWDY. Rubbing their arms, upper and lower backs. Is that correct?

Mr. HARRIS. That is correct.

Mr. GOWDY. And, again, this is going on since 2002?

Mr. HARRIS. Yes. We were made aware this had been taking place since 2002. We predict it might have lasted longer than that, but——

Mr. GOWDY. Well, let's just go with the most—let's just go with what we know we can prove.

Mr. HARRIS. Okay.

Mr. GOWDY. 2002. We have a combination of victims and witnesses who were forced to watch this, whom I also consider to be victims, numbering 10.

Mr. HARRIS. Uh-huh.

Mr. GOWDY. Gestures, remarks, and other sexual innuendos. What were some of the remarks and innuendos that these victims were forced to endure?

Mr. HARRIS. I remember, in one conversation with one of the young ladies, they were at a meeting, and one of the innuendos were—there was a couple of males who were bantering back and forth. And they were supposed to be on a ship, the Guardian, which is the EPA vessel. And they kept making references as to who they were going to "poke."

Mr. GOWDY. So you have conduct dating back to 2002. You have double-digit victims. You have conduct that is by any definition sexual harassment.

Mr. HARRIS. Correct.

Mr. GOWDY. Now, I want you to tell my fellow citizens all the consequences that the perpetrators suffered.

Mr. HARRIS. The perpetrator—or, initially, there was an issue for a—they were going to go ahead and give him a reprimand.

Mr. GOWDY. A reprimand.

Mr. HARRIS. For about the third—a written reprimand for about the third or fourth time. When we stepped in and said, wait a minute, you gotta do more than that, that is when——

Mr. GOWDY. How would you get a reprimand for this conduct? Is there any ambiguity as to whether or not it is acceptable? Is there any ambiguity as to whether or not it is illegal?

Mr. HARRIS. It is not acceptable and should not be. If you look at the Agency's——

Mr. GOWDY. It is actually a crime——

Mr. HARRIS. I would have agree.

Mr. GOWDY. —to touch someone when the touching is unwanted. It is actually a crime.

Mr. HARRIS. Yeah.

Mr. GOWDY. Well, I hope it gets remedied. This workplace environment is criminal.

Mr. HARRIS. Yeah. It is toxic.

Mr. GOWDY. And whatever consequences befall this perpetrator would be insufficient, in my judgment.

I yield back to the chairman.

Chairman CHAFFETZ. I thank the gentleman.

I now recognize the gentleman from Virginia, Mr. Connolly, for 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

And thank you all for being here.

I think all of us ought to stipulate that sexual harassment in any form is wrong. In some cases, as my friend from South Carolina just said, it is against the law. Unwanted advances simply cannot be tolerable in the workplace. And it is the obligation of every agency manager within the Federal Government to protect the workforce from such unwanted advances.

But I think it is important for all of you to also keep in mind that in this Congress, unfortunately, there is a clear agenda against the mission of EPA that does not want EPA protecting the public through regulatory process. And it is very important that, as we excise out wrongdoers with respect to sexual harassment, that we keep in mind there is another agenda sometimes at work here, too. Of course, none of my colleagues here.

And I do not know how many times—over 100—we have voted on the floor of the House to de-fang EPA. Whether it be water regulation, air regulation, particulate matter, you know, we do not like it, collectively, this Congress. And I just—a word of caution, in terms of what is—some might see another agenda going at work here.

Now, let me ask Ms. Kellen—so, listening to this and certainly listening to the formidable statements against the evil of sexual harassment—so sexual harassment is a pervasive part of the EPA culture; is that right?

Ms. KELLEN. I would not say it is a pervasive part. It happens in locations, and it is not appropriately addressed.

Mr. CONNOLLY. Right.

Ms. KELLEN. Bullying is more pervasive.

Mr. CONNOLLY. Bullying.

Ms. KELLEN. Bullying, which is as detrimental, almost as detrimental, as sexual harassment.

Mr. CONNOLLY. Why do you think, when it does occur, although it is not pervasive, it is not handled instantly, I mean, you know, efficiently and rapidly, so we make a clear statement to others who might think that is okay and, frankly, to deal with the situation so the victim is not lingering, you know, without an unresolved case? Why do you think that is?

Ms. KELLEN. I think, most of the time, most of the managers—EPA employees tend to hang around a long time, and most of the managers have come up through the ranks together, and they just cannot imagine that Joe over here, Manager Joe, who is the nicest guy in the world to them, could possibly be treating their employees that badly.

They are not listening to the employees. And I think there's a lot of pressure on senior leaders. And there are plenty of really good managers at EPA, but I do not think they have the support to stand up to other managers and do what needs to be done.

Mr. CONNOLLY. You know, H.L. Mencken once said that, for every human problem, there is a solution that is simple, neat, and wrong.

One of the solutions being proposed floating around here is actually to take away civil service protections from Federal employees, virtually making Federal employees at-will employees so that protections go away.

Do you think that would be helpful in terms of trying to make sure we are excising sexual harassment from the Federal workplace?

Ms. KELLEN. I think that would be a disaster. None of the people to my right would still be working for the Agency if that were the case. They would have got them out of the Agency so fast none of us would have known what happened.

Mr. CONNOLLY. Mr. Tuttle, you are shaking your head "yes." You agree with Ms. Kellen on that, that it would be counterproductive?

Mr. TUTTLE. Yes, I do. I do not want to broad-brush anything. I think that appropriate action needs to be taken on situations like this and others, and frequently it is not, whether it is the culture of get along, go along.

In my words that clearly belong to me, my attitude and viewpoint has been that management will do whatever it wants, when it wants, to who it wants, any way they want, anytime they want, with impunity. And my colleagues to my right——

Mr. CONNOLLY. You mean without civil service protection?

Mr. TUTTLE. So I do not think—yeah. So I do not want to broad-brush anything——

Mr. CONNOLLY. Yeah.

Mr. TUTTLE. —but I do agree with Ms. Kellen, that if the protections were removed, I can pretty much assure you that you and I would not be having this conversation.

Mr. CONNOLLY. Dr. Bohlen and Mr. Harris, I have very little time left. Did you want to comment on this question of the removal of civil service protections?

Ms. BOHLEN. I agree with my colleagues to my left. This is a very serious situation for us——

Mr. CONNOLLY. Could you speak up, Dr. Bohlen? I am sorry.

Ms. BOHLEN. I am sorry. I agree with my colleagues on the left. It is a very serious situation for us to deal with, and if we were not to have that protection, none of us would—neither of the three of us would be here today. So——

Mr. CONNOLLY. Thank you.

Ms. BOHLEN. —that is my response.

Mr. CONNOLLY. Very important testimony.

I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I now recognize the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

Ms. Kellen, you mentioned earlier that many people, employees at the EPA just wanted to do their job, and if the managers could get out of their way, they would be able to do so.

And just to counter a bit the gentleman from Virginia, we are not talking about an agenda against clean air or safety or that type of thing, but there are many businessowners out there, quite frankly, who feel the same way about the EPA as the people who are working there. They just want to get the EPA off their back and allow them to do their business without being bullied by the culture that is within the EPA.

But I do want to go specifically to some of the issues you brought up regarding retaliation. There has been quite a bit mentioned in that regard here today.

In your opinion, what kind of retaliation is there? We have mentioned bullying, perhaps changing of positions. But, specifically, what type of retaliation is there against people who report these types of thing?

Ms. KELLEN. Well, in the instance that I mentioned in my testimony, once the employee had filed her EEO claim, they decided to go on a fishing expedition and search through her email and try to—and go through her desk and try to find something that they could go after her for. And so that that is one way.

And, really, when you look at the nature of the Agency——

Mr. HICE. And what would they use that information, whatever they found? Would it be used in a blackmail kind of way? Or how would they use it?

Ms. KELLEN. It was used to try to remove her from Federal service.

Mr. HICE. Okay. All right. So it was an attempt to find something in order to fire her.

Ms. KELLEN. Exactly.

Mr. HICE. All right.

I am sorry. Continue, please.

Ms. KELLEN. In other instances—I think the issue with the Federal Government, it is very easy, because of the amount of—after the Beale situation, the time and attendance rules are very tight, and we are spending an extraordinary amount of money trying to enforce that against the rank-and-file employees. And so it is very easy to find a technical violation when someone is still doing their job.

So the other forms of retaliation is not assigning the good work. People really are excited about their job. They want to do good work. And you can take away the high-profile cases, you can take away the good work and give them the, kind of, dredge of the work.

And so there's severe and there's more subtle types of——

Mr. HICE. But there's multiple types of retaliation.

Dr. Bohlen, real——

Ms. BOHLEN. May I comment?

Mr. HICE. —quickly, please.

Ms. BOHLEN. Yes. The denial of workplace benefits and privileges is one way of retaliating. Harassment. Then you have the removal, the backdating of personnel actions to change the situation so that it appears to be what management wants it to be.

Mr. HICE. You mentioned earlier specifically intimidation.

Ms. BOHLEN. Yes.

Mr. HICE. So there's quite a bit of about. All right.

How prevalent is retaliation in the culture?

Mr. HARRIS. Mr. Hice, may I address also that issue and that question, if you do not——

Mr. HICE. Yeah, but do so quickly. My time is running out.

Mr. HARRIS. The higher up you go, the more the retaliation. You have a go-along-to-get-along mentality. You file one complaint, say something is wrong, there's now 25, 30 people you now have to watch.

Mr. HICE. Okay.

All right. How prevalent is this?

Mr. HARRIS. It is very prevalent.

Ms. BOHLEN. Very prevalent.

Mr. HARRIS. The higher up you go, the more prevalent.

Mr. HICE. All right. So this is not—these are not out of the ordinary, these are not exceptions. The entire culture is a culture of you fall in line, you do as you are told, or you will suffer consequences.

Mr. HARRIS. That is correct.

Ms. BOHLEN. Absolutely.

Mr. HICE. All right.

All of you would agree with that?

Mr. TUTTLE. Yes.

Mr. HARRIS. Yes.

Ms. KELLEN. I actually might disagree a little bit, because there are some managers there who really do support their employees and allow them to do their work.

Mr. HICE. That would be the exception.

Mr. HARRIS. Well, we are talking different regions, too.

Mr. HICE. No, not necessarily.

Ms. KELLEN. Not necessarily.

Mr. HICE. All right. But it is not uncommon? Is it safe to say it is not an uncommon——

Ms. KELLEN. Right. And maybe I just come from a location that has better managers than——

Mr. HICE. Sure.

Ms. KELLEN. —they have in Chicago.

Mr. HICE. Okay.

What are the options that a person has? If they want to identify harassment or they've seen something that they want to report, what are the legitimate options, given the fact that there is a culture of retaliation if they go forward?

Mr. HARRIS. Your options are diminished. But, again, we have talked about OIG, the perception or persona. And I think OIG would do an excellent job, but the persona.

OCR, if you look at the new OCR policies that the Agency just came out with, they just changed them. Now, you do not even contact the OIG's office.

Mr. HICE. What about the person whose there, though? I mean, do they feel like there are options, or do they feel like they just have to be silenced?

Mr. HARRIS. They feel like they have to be silent. Their options are——

Mr. HICE. All right. So they do not feel comfortable.
Mr. HARRIS. No, they do not.
Ms. BOHLEN. No.
Mr. HICE. Okay.
Thank you, Mr. Chairman.
Chairman CHAFFETZ. I thank the gentleman.
We will now recognize the gentleman from Alabama, Mr. Palmer, for 5 minutes.
Mr. PALMER. Thank you, Mr. Chairman.
Ms. Kellen, you mentioned that if the EPA leadership fails to act on management complaints that were investigated by the Office of the Inspector General, then that could undermine the IG reporting system.
This committee takes that very seriously. We have had a couple of hearings in which Arthur Elkins, the inspector general for the EPA, has testified and talked about the impediments that they've faced in investigations, I think some specifically to what is being discussed here today.
Can you elaborate on this concern from your perspective?
Ms. KELLEN. Absolutely.
In one situation that I actually mention in my written testimony, the IG did an investigation of an employee. He was moved off into a small office. And then he was brought back up to the administrator's office.
I have asked to see the copy of the IG report. I've talked to the former chief of staff to try to get an idea of what really happened here. And I was told he was exonerated except for the alcohol charge, but I am not allowed to see the report.
And so I am not allowed to know whether he was actually exonerated from all these charges or whether the employees were just too afraid to talk to them. And there's a big difference there.
And so, by having these reports not shared or not more open, we have no way and the employees who anonymously reported this have no way to know that anything was actually done on it.
Mr. PALMER. Are there other examples that you might cite?
Ms. KELLEN. Not offhand, but I am sure it has happened in other situations. But, in general, we do not get to see the IG reports on these matters.
Mr. PALMER. One other thing that troubles me about the culture at the EPA involves the title 42 appointments by EPA. And they allow the EPA to pay well above the normal title 5 levels, with salaries reaching $200,000, $300,000. That is supposed to be used to hire temporary consultants.
Why does the EPA use this authority to hire managers when it is intended to attract top-quality scientists and engineers?
Ms. KELLEN. In one instance, I was told that they use the authority because it takes so long to get an SESer in place and that this was a fast, easy way to get a manager in there.
But I also think that there is, at least in some places, a culture of, frankly, nepotism-like behavior, whether they have people that they know of, buddies from before, that they want to get into some sweet position that they can just kind of slip them in and let them do their thing.
Mr. PALMER. And those people are protected?

Ms. KELLEN. They are not protected, really. They are protected by management, but they shouldn't be protected, because they are term appointments. So it should be very easy to remove them, yet they do not.

Mr. PALMER. Okay.

Thank you, Mr. Chairman.

Chairman CHAFFETZ. Thank you.

I will now recognize myself. Mr. Cummings and I have just a couple followup questions, and then we'll get to the Administrator.

I need to understand the involvement of Susan Hedman. Have you any personal experience with any sort of retaliation from Susan Hedman herself?

Mr. Harris, go ahead.

Mr. HARRIS. I do, personally—I did not have contact with her directly. However, personally, yes, I believe she was definitely made aware of what was taking place. There's no doubt about it. If you read what Mr. Mather stated in his affidavit and in the depositions, he clearly stated he'd consulted with her. And once she was made aware of this, her statement in her own affidavit, "I told him to handle it," or, "I just want this to go away."

The question with regards to my reassignment and the depositions that my attorney, Mr. Stuhl, took over—I am sorry, I am sorry, Carolyn Bohlen's depositions—again, the elusiveness, the "I just wanted it done with and over."

And she signed those documents, but yet in the deposition she stated she did not have anything to do with this. It was like she was above this. As the CEO of that region, how can you be above something of this nature?

Chairman CHAFFETZ. Dr. Bohlen?

Ms. BOHLEN. Mr. Mather stated on several occasions that he had consulted with Ms. Hedman and that they had agreed on certain negative aspects of what happened to me in the retaliation, like the removal from the OCR, like not allowing me to have the temporary medical flexiplace, episodic flexiplace, I was denied the workplace privileges and benefits, and also involved in backdating personnel documents, which I think is a serious issue.

I see that her name was on those documents, signed those documents. So there was some involvement, yes.

Chairman CHAFFETZ. Thank you.

Mr. Tuttle?

Mr. TUTTLE. As I indicated in the statement I submitted to the committee, in December of 2012 when I returned from Christmas leave, my colleague and my labor relations supervisor told me that he had been informed by an attorney from the Office of Regional Counsel that Ms. Hedman had told Mr. Mather and Ms. Newton to get rid of me—and I use the term "get rid of me" colloquially—largely because of the sexual harassment case and my involvement in that and how hard I was pursuing to see that management was held accountable for their responsibilities in that, as well as some other incidents that occurred that I alluded to in my statement where I took a stand and said, no, this is not going to happen this way, and I became an impediment.

So that is what I understand that she was involved in. As I indicated in my statement, that is hearsay on my part, but it was credible at the time, given the circumstances.

Chairman CHAFFETZ. And, Mr. Tuttle, I haven't heard from you directly verbally here about the Intern X. What did you find? What did you hear? And were there other incidents that this Paul Bertram was involved with? What was your finding?

Mr. TUTTLE. My findings were that, in the statements that I had gotten, the written statements I had gotten from not only Intern X but the other interns that I was put in contact with that submitted statements, a majority, not all, but a significant majority of those statements all indicated that the same type of behavior—the touching, the inappropriate contact, the sexual innuendos, the words—all of that the same.

All of the statements that expressed that indicated that that intern had reached out to management, in particular the manager that was responsible, because they were all in the same branch within that division. And they had reached out to this manager to get it to stop. And one of them made the statement that Mr. Harris brought up that said, when she wanted something done about it, this manager, Paul Horvatin, said to her, "Well, you know, if I do this, it will ruin his career."

And, as I indicated to Ms. Lawrence, to Congresswoman Lawrence, one of the other things that was said was that these women all asked for something to be done, and nothing had been done.

And to piggyback on what my colleagues have said here, all of this was made much worse than just being in the office, because all of these interns went out on our research vessel, the Lake Guardian, onto Lake Michigan, because that is a normal part of what Region 5 does because that is the national program for the Great Lakes. And sometimes they are out for days at a time. And so to be confined on this small research vessel while this is going on was a concern for the ones that I had gotten statements from.

Chairman CHAFFETZ. How many people, and how far back did it go in the record?

Mr. TUTTLE. My records went—I got statements that went back to approximately the year 2000. That would have encompassed about 10 statements, like Mr. Harris said. And probably all but—best I can remember right now, all but two had this same kind of statement made to them.

Chairman CHAFFETZ. In your professional opinion, how would you categorize Mr. Bertram? Was he a predator? Was he a serial—I do not want to put words in your mouth.

Mr. TUTTLE. Based on what was documented, that could conceivably constitute a serial predator. And, you know, as I heard someone else make the statement, and I can't remember where I heard it, but, you know, this predator was being fed a steady diet of young interns over an extended period of time.

And to also go along with my involvement—because, again, as I indicated to the committee in my statement, I pursued this from the administrative side, and I was pursuing, actively pursuing, removal. And when Dr. Bertram was served notice, I guess, of his proposed removal, he retained an attorney. And from what I was given to understand through my labor relations supervisor, Mr. Gil

Colston, once his attorney—because we provided support documentation as part of the due process—once his attorney saw what evidence we had that we were using to justify the removal, the attorney supposedly came back to Mr. Mather and asked if Mr. Mather would let him retire in lieu of removal.

Now, Dr. Bertram had sufficient service for regular retirement at the time that removal was proposed. I was not proposing to do him out of retirement, because that wasn't within my purview. But, by removing him, I could have added a few extra months and steps into him getting his retirement. Instead, in my professional opinion, when Mr. Mather agreed to let him retire, he gave him a free pass out with no blemish. So he had done all these things and essentially walked free.

Chairman CHAFFETZ. Was there any discussion about a criminal referral? Because, in my opinion, in Mr. Gowdy's opinion, what he did was illegal.

Mr. TUTTLE. What he did was absolutely illegal. I do not know if discussion was held between Mr. Mather once the matter was brought to his attention and the regional counsel, Mr. Kaplan, who is now the Deputy Regional Administrator since Mr. Mather retired. I do not know if discussion was held on that or not. I can't testify to that.

Chairman CHAFFETZ. Dr. Bohlen, it seemed like you wanted to add something.

Ms. BOHLEN. Yes, I just wanted to interject something.

It seemed as though Susan Hedman made herself involved in the GLNPO program, the Great Lakes national program, as a result, I think, of an enormous grant that was given. And Dr. Bertram was a scientist that was very, very important in completing the projects involved in that GLNPO grant. And I think that they were trying to hold onto him for that reason specifically until some of the work was, you know, either transferred to someone else or that he was able to at least get involved with cleaning up some of the project.

Chairman CHAFFETZ. So what you are saying is it was more important to the EPA to get the grant money and to get the grant done than it was to hold him accountable for——

Ms. BOHLEN. Yes, it was. At the hands of Ms. Hedman.

Chairman CHAFFETZ. It is disgusting. Absolutely disgusting.

I now recognize the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I just have a few questions real quick.

Let me say this. I assume this is being streamed to EPA, probably. And all of you out there in EPA land, let me tell you something. We have had these courageous people to come before us today, and I promise you that if you try to retaliate against any of them I will do everything in my power to come after you. And I really mean that. I do not want anything to happen to these folks or any other people who are bravely coming forward, trying to simply do their job.

Ms. BOHLEN. Uh-huh.

Mr. CUMMINGS. Just doing their job.

Mr. Tuttle, if it were not for all of this, do you think you'd stay in service? In other words, you have been kind of forced out, but would you have rather to stay in service?

Mr. TUTTLE. Well, to answer the question directly, yes. I like what I am doing. I believe—I've always been in customer service positions. I like what I do. I enjoy helping people and helping the mission get done.

And because of all of the things I've done, I've not only been—I am not only facing a force-out in December, I've been reduced in grade from a GS–15, which is what I was in Chicago, to a GS–14; I've been removed from supervision; I am not allowed anywhere near anything to do with what I formerly did, at least certainly anything where I can contribute at the level I have expertise in.

Mr. CUMMINGS. Have any of you all ever talked to Administrator McCarthy, any of you, directly?

Mr. HARRIS. No.

Ms. BOHLEN. I have not.

Mr. TUTTLE. No.

Mr. CUMMINGS. She is going to be sitting where you are sitting in about 5 minutes. What would you, if you—since you are not going to be asking questions, what would you want us to say to her? And how do you think that she can help you do your job? Because you are not—we are going to have that opportunity. You won't. This is your shot. I am listening.

Mr. Harris?

Mr. HARRIS. Well, I would like to see, the very first thing, who are you going to hold accountable. And I do not just mean accountable with a slap on the wrist or another reassignment and then you get promoted a year from now and get a big, fat award. Who are you actually going to remove from Federal service as to what occurred to us?

Mr. CUMMINGS. By the way, she is probably watching this right now. But go ahead.

Mr. HARRIS. That is my question with her watching. Who are going to remove from Federal service?

Mr. CUMMINGS. All right.

Dr. Bohlen?

Ms. BOHLEN. Yes, I think that disciplinary action is necessary for those who are violators of Federal policies, rules, and regulations. And I think that accountability, as Mr. Harris said, is very, very important. There should be some type of stringent action coming from the top down to reinforce the fact that retaliation, sexual harassment, discrimination, and the like will not be tolerated here. And I think that will be done through example.

Mr. CUMMINGS. Mr. Tuttle?

Mr. TUTTLE. I agree with my colleagues. I think accountability that is held firmly to is the only answer. I think that retaliation in any form, regardless of who it is, whether it is me, any of my colleagues, or anybody else, is abhorrent and has no place in any organization.

So if I were going to say—I were going to ask a question, it is, are you going to take a stand to make sure that me, my colleagues, and people like me can speak out on issues that need to be brought into the light of day and we are not going to have to worry about

whether we are going to end up out on the street or castigated or marginalized or shamed any more than we have already been?

Mr. CUMMINGS. Ms. Kellen?

Ms. KELLEN. I want the Administrator to do what the head of VA recently did and go to us, the unions, and work with us so that we can identify the problems. Because we know where they lie, and we will be very careful about not identifying people who are not the problem. We will identify the problems, and they need to address them.

Mr. CUMMINGS. Now, one thing that Ms. McCarthy may say is that EPA issued a notice of proposed removal of Dr. Bertram within 2 months of the March 2011 incident. Is that accurate?

Mr. HARRIS. That is accurate, but only after we got involved and completed a factfinding investigation. Initially, they were going to give another reprimand. When we met with Mr. Mather and told him, you can't do another reprimand——

Mr. CUMMINGS. I am running out of time, unfortunately.

Mr. HARRIS. —that is what it changed.

Mr. CUMMINGS. But let me just say this as I close. I want to thank you for what you have said.

And I've got to tell you, my chairman here is a lot younger than me, but as I get older, I realize, Mr. Harris, that 15 years from now I may be dead. And what you are doing today, it is not just about this moment——

Mr. HARRIS. Yeah.

Mr. CUMMINGS. —and it is just not about the people there right now. It is about generations yet unborn.

Mr. HARRIS. That is right.

Mr. CUMMINGS. It is about people who are in high school right now——

Ms. BOHLEN. Right.

Mr. CUMMINGS. —little kids in the sixth grade——

Ms. BOHLEN. Yes.

Mr. CUMMINGS. —who simply want to give.

Ms. BOHLEN. Uh-huh.

Mr. CUMMINGS. They do not want to make a lot of money. They just want to make things better for all members of our country.

And so what you are doing, what you have done, it goes beyond—hopefully it goes beyond the grave. And so I want you to keep pushing forward.

Mr. Tuttle, I am so sorry that you are being forced out of government, because you all are the kind of people that we need.

Ms. BOHLEN. Yes, he is.

Mr. CUMMINGS. You are the ones that we need.

Ms. BOHLEN. Uh-huh.

Mr. CUMMINGS. But, yet and still, you are forced out, simply trying to do the right thing.

Ms. BOHLEN. Yes.

Mr. CUMMINGS. We are better than that.

Thank you, Mr. Chairman.

Chairman CHAFFETZ. I want to thank you all for being brave enough to come here and testify. It will make a difference. We do listen to what you have. We do want to continue to follow up with you.

And I concur with our ranking member here. The passion that he puts into this and the caring that he has we all appreciate. And you keep us up to speed, and we got your back.

We are going to stand in recess for approximately 5 minutes while we reset, and then we will start our second panel with the Administrator.

[Recess.]

Chairman CHAFFETZ. The committee will come to order.

We are pleased to welcome the Honorable Gina McCarthy, Administrator for the Environmental Protection Agency.

And, Administrator, we appreciate you being here. You have regularly testified before Congress. You have made yourself available, and to that we are very appreciative, as I know other committees are.

It is not always an easy thing to come and testify before Congress, but I do believe it is one of the unique things and great things about the United States of America, the way we operate. We have these discussions with candor. We ask tough and difficult questions. It is part of the checks and balances. And your personal involvement and participation is very much appreciated. And we recognize that, and we thank you.

As you know, pursuant to committee rules, witnesses are to all be sworn before they testify. So if you would please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the whole truth, the truth, and nothing but the truth?

Thank you.

Let the record reflect that the witness answered in the affirmative.

We would appreciate it if you would limit your verbal comments to 5 minutes, but we will be very generous with that. And, of course, your entire written statement will be entered into the record.

Administrator McCarthy, you are now recognized for 5 minutes.

STATEMENT OF THE HON. GINA MCCARTHY, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. MCCARTHY. Thank you, Mr. Chairman, Ranking Member Cummings, and members of the committee, for the opportunity to testify today.

It really is an honor to serve as Administrator of the U.S. Environmental Protection Agency. EPA's mission to protect public health and the environment is important to every one of us and our families, and I understand and appreciate the committee's keen interest in EPA's work.

In order to best achieve our mission, one of the priorities for my tenure as Administrator has been embracing EPA as a high-performing organization. That means using our limited resources effectively, supporting our incredibly talented and dedicated workforce, so that EPA employees have the tools that they need to do the important work that we all ask of them every day, as well as ensuring that the Agency continues to rely on a faithful application of the law and science.

The overwhelming majority of the approximately 15,000 EPA employees are dedicated. They are hardworking, they are professional public servants. I personally remain very proud of the EPA's achievement in protecting public health and the environment on behalf of the American people and of the EPA employees who work hard every day to make those achievements possible.

But I also know that, over the last few years, there have been examples of a few EPA employees who have engaged in serious misconduct. While I firmly believe these employees are isolated examples, I believe we always can and must do better. To that end, we have made a number of changes to Agency management processes and procedures, and we will continue to strive for continuous improvement in this area.

While not the subject of today's hearing, with the committee's encouragement, we have been working closely with our inspector general to enable the Agency to expeditiously take administrative action with regard to certain types of employee misconduct. The Agency and the OIG have now biweekly meetings to discuss the status of those investigations into employee misconduct, and we have agreed upon a set of procedures and timelines for information-sharing in certain categories of cases.

These meetings and procedures have helped us facilitate the Agency's ability to take action more quickly upon completion of the OIG investigations. The Agency and the OIG sent a joint letter to the committee outlining this progress earlier this year.

As I understand it, today's hearing is focused primarily on the events surrounding a misconduct situation which occurred in 2011 at our Region 5 office in Chicago.

While the misconduct that is at the root of this case occurred before my tenure as Administrator, it is my understanding that, in this particular case, a Region 5 supervisor took action upon learning of the alleged misconduct of the individual and that the individual was subsequently held accountable and no longer works for the Agency.

While there were some difficulties and likely some miscommunications among the offices in the region which may have created confusion among those involved, through the efforts of all involved, disciplinary actions were taken that resulted in the subject employee no longer being a Federal employee.

I expect all managers to take appropriate and corrective disciplinary actions when they learn of potential misconduct by one of their employees, regardless of that employee's position at the Agency. Harassment of any kind in EPA workplaces is intolerable.

In December 2014, I reaffirmed the Agency's commitment to prohibit harassment in the workplace through an email to the entire Agency. In January, I sent a second Agency-wide email reminding everyone of the OIG's important role in routing out waste, fraud, and abuse at the Agency, ensuring employees were aware of their ability to contact the OIG Hotline about a matter.

The Agency also recognized the need to provide managers with clear guidance on what to do if they become aware of a matter—an alleged matter of harassment. Earlier this year, the first-ever comprehensive set of procedures evaluating allegations of harass-

ment were developed and sent to the Agency's five units for bargaining.

When those discussions are concluded, we will finalize the order that formalizes the Agency's very first procedure for addressing allegations of workplace harassment. The order will provide for uniformity and transparency about expectations related to processing complaints of harassment, procedures for reporting and responding to those complaints, and guidance for engaging in related fact-finding and decisionmaking.

We hope to conclude this process in the very near term. Having formal procedures to implement the Agency's anti-harassment policy will provide the clarity we need for managers and employees in preventing and stopping harassment of any kind.

In closing, I am honored to serve this agency and the people of the United States. I am proud of the great work accomplished every day by all of the employees at EPA, and I am excited about the progress we are making as an agency.

With that, I look forward to taking questions.

[Prepared statement of Ms. McCarthy follows:]

Opening Statement of Gina McCarthy
Administrator
U.S. Environmental Protection Agency

Committee on Oversight and Government Reform
U.S. House of Representatives
July 29, 2015

Chairman Chaffetz, Ranking Member Cummings, and members of the Committee, thank you for the opportunity to testify today. It is an honor to serve as Administrator of the United States Environmental Protection Agency (EPA). The EPA's mission, to protect human health and the environment, is important to every one of us, and our families, and I understand and appreciate this Committee's keen interest in the EPA's work.

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meetings to discuss the status of OIG's investigations into employee misconduct and have agreed upon a set of procedures and timelines for information sharing in certain categories of cases. These meetings and procedures have helped to facilitate the agency's ability to take action more quickly upon completion of the OIG investigations. The Agency and the OIG sent a joint letter to the Committee outlining this progress earlier this year.

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taken that resulted in the subject employee no longer being a federal employee. I expect all managers to take appropriate corrective and disciplinary actions when they learn of potential misconduct by one of their employees, regardless of that employee's position at the agency.

Harassment of any kind in EPA workplaces is intolerable. In December 2014, I reaffirmed the agency's commitment to prohibit harassment in the workplace through an email to the entire agency. In January, I sent a second agency-wide email reminding everyone of the OIG's important role in rooting out waste, fraud, and abuse, at the agency, ensuring employees were aware of their ability to contact the OIG Hotline about a matter.

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first procedures for addressing allegations of workplace harassment. The order will provide for uniformity and transparency about expectations related to processing complaints of harassment; procedures for reporting and responding to complaints; and guidance for engaging in related fact-finding and decision making. We hope to conclude this process in the upcoming months. Having formal procedures to implement the agency's anti-harassment policy will provide additional clarity for managers and employees in preventing and stopping harassment of any kind.

In closing, I am honored to serve the agency and the people of the United States. I am proud of the work accomplished every day by the employees of EPA and excited about the progress we are making as an agency. With that, I look forward to any questions you may have.

Chairman CHAFFETZ. Thank you.

I now recognize myself for 5 minutes.

Do you believe the three witnesses that were here prior, do you believe they wereretaliated against?

Ms. MCCARTHY. No, I do not.

Chairman CHAFFETZ. Not in any way, shape, or form?

Ms. MCCARTHY. You know, I think that—Mr. Chairman, I want to just confirm that harassment of any kind is not tolerated. You know, as a 61-year-old woman who started in a man's field——

Chairman CHAFFETZ. No, no, no. This is not the question I asked you. I do not want to know about your background. I want to know if you think that they were retaliated against.

Ms. MCCARTHY. No, sir.

Chairman CHAFFETZ. We heard nearly 2 hours of testimony, and you believe that their statements are false.

Ms. MCCARTHY. No, I did not indicate that.

Chairman CHAFFETZ. Well, they said that they were each retaliated against, and you said that is not the case.

Ms. MCCARTHY. I indicated that what I look at is the entire facts around the case. And, clearly, we had confusion in how we investigated it, but they were part of a large team that actually recommended removal of that employee, and they are no longer in Federal employ.

Chairman CHAFFETZ. And part of the criticism——

Ms. MCCARTHY. There was nothing to retaliate, and retaliation will not be tolerated.

Chairman CHAFFETZ. Mr. Tuttle has a lower grade, less responsibility. You do not think that that was a result of some of his complaints against management?

Ms. MCCARTHY. There were issues long before the issue of sexual harassment that arose——

Chairman CHAFFETZ. What is——

Ms. MCCARTHY. —about Mr. Tuttle's performance that is well-documented, and he still is a productive and valued member of EPA's——

Chairman CHAFFETZ. What is your definition of "sexual harassment"?

Ms. MCCARTHY. It is the same as in the law, sir. And any harassment or bullying is not tolerated at EPA. This is not a——

Chairman CHAFFETZ. When you say "not tolerated," they have documented multiple cases, up to 10 times, of sexual harassment against this intern. Did you ever do——

Ms. MCCARTHY. I think, sir, if you look at the——

Chairman CHAFFETZ. Hold on. Hold on.

Ms. MCCARTHY. —entire record, you'll see that these are regular performance issues that we have resolved separately. It is not a retaliation.

Chairman CHAFFETZ. Was there any criminal referral?

Ms. MCCARTHY. Was there any criminal referral? In this particular case——

Chairman CHAFFETZ. The answer is no. And I want to——

Ms. MCCARTHY. —I do not believe so.

Chairman CHAFFETZ. You said that the definition of "sexual harassment," you agree, is what is in law. So if there is—if it is illegal,

the kissing, the touching, the inappropriate behavior is against the law, why did not you refer that for criminal prosecution?

Ms. MCCARTHY. It was properly referred to the correct agencies within the——

Chairman CHAFFETZ. Which agencies?

Ms. MCCARTHY. The Office of Human Resources in that region.

Chairman CHAFFETZ. That is within your own agency.

Ms. MCCARTHY. Well, that is——

Chairman CHAFFETZ. It is against the law. It is against your own policies and procedures. What these people testified to is they had to step up, go to the mat, and say—offering a reprimand is not sufficient. I want to know why somebody——

Ms. MCCARTHY. The employee was removed, sir, not reprimanded. He was removed from service.

Chairman CHAFFETZ. Not the—the problem is they had 10 victims to get to that point.

Now, I grant it, you were not the Administrator the entire time. I understand that. But this predator, the quote we heard, this was a predator who was fed a steady diet of interns. The first time it happened he should've been fired, and he should've probably been referred to the authorities for criminal prosecution. It happened 10 times, and you never did that.

Ms. MCCARTHY. I am aware——

Chairman CHAFFETZ. You still haven't done that on this person.

Ms. MCCARTHY. I am aware that 11 years ago there was an issue raised. And it was handled appropriately, is my understanding——

Chairman CHAFFETZ. Appropriately? He got a promotion. He——

Ms. MCCARTHY. No. He was——

Chairman CHAFFETZ. —continued to work there.

Ms. MCCARTHY. He was carefully watched. The very minute——

Chairman CHAFFETZ. Watched?

Ms. MCCARTHY. —we had any indication——

Chairman CHAFFETZ. Who was watching him?

Ms. MCCARTHY. The very minute we had any indication of impropriety, which was the recent issue, we took prompt action. And in less than 2 months, that man——

Chairman CHAFFETZ. You moved his cubicle four spaces away. You think that is appropriate?

What do you say to the mother and father who sent their 24-year-old to the EPA, she is starting her career, and she is harassed? Look at her statement. And you did the appropriate thing by moving her four cubicles away?

Ms. MCCARTHY. We are doing everything we can to reenforce the policy in the law. We are developing procedures so there's never a question about this. And we are doing everything——

Chairman CHAFFETZ. That is not good enough.

Ms. MCCARTHY. —we can to protect every employee——

Chairman CHAFFETZ. When somebody is sexually harassed, you send them to the authorities. You fire them.

Ms. MCCARTHY. I did send them to the correct authorities.

Chairman CHAFFETZ. You sent them to Human Resources, who wanted to reprimand him. You never did send him to the criminal referral.

Ms. MCCARTHY. Human Resources recommended the same thing as every manager, which was to actually proceed to removal. The man is no longer in Federal——

Chairman CHAFFETZ. That is not what initially happened. It was in his record that they had had 10 complaints, 10 sexual harassment complaints, against this gentleman, and he was allowed to continue to be there. And, as we heard testimony, a predator who was fed a steady diet of interns.

Ms. MCCARTHY. I am aware of one complaint 11 years ago and the complaint that was just processed under my watch, which resulted in his removal from public service within 5 or 6 weeks.

Chairman CHAFFETZ. Did you fire him, or was he allowed to retire?

Ms. MCCARTHY. He was allowed to retire because that is his right.

Chairman CHAFFETZ. Yeah.

Ms. MCCARTHY. Even if he were fired, he was allowed to retire.

Chairman CHAFFETZ. Do you believe this intern who said that there was sexual harassment? Do you believe that her statement is true?

Ms. MCCARTHY. Oh, I absolutely do, and that was——

Chairman CHAFFETZ. Then why did not you refer it for a criminal referral? Why did not you give it as a criminal referral? If you believe that her statement is true and it was sexual harassment and that is a violation of the law and you allowed him to just retire, why did not you send that to the proper authorities?

Ms. MCCARTHY. We took the appropriate action.

Chairman CHAFFETZ. Do you think it is appropriate—do you think it is against the law to sexually harass somebody at work?

Ms. MCCARTHY. I think it is not only against the law, but it is also against our policies. And we acted under the policies and the law when we—when it led to the removal of him from public office.

Chairman CHAFFETZ. Did you let any of the law enforcement officers know?

Ms. MCCARTHY. Mr. Chaffetz, I have two young daughters just about this woman's age.

Chairman CHAFFETZ. I've got two young daughters, too——

Ms. MCCARTHY. I appreciate the fact that——

Chairman CHAFFETZ. —and I would never send them to the EPA. it is the most toxic place to work I've ever heard of.

This person, this 24-year-old girl, she is starting her career; she is harassed over a 3-year period. And you admit that that is a violation of the law. Why did not you do the criminal referral?

Ms. MCCARTHY. There was absolutely no information that I was aware of or that the people investigating this when this intern spoke up that there was any consistent harassment until the day she spoke up.

I am not blaming her. She is in a very difficult situation that none of us want her to be in.

Chairman CHAFFETZ. When she did speak up.

Ms. MCCARTHY. But we can't know——

Chairman CHAFFETZ. When she did speak up.

Ms. MCCARTHY. —things that have never been—when things aren't spoken up.

Chairman CHAFFETZ. Looking at the record now, are you going to do a criminal referral?

You have got to ask somebody? You are the Administrator.

Ms. MCCARTHY. Well, I am happy to move forward in whatever——

Chairman CHAFFETZ. You are happy. I do not want you to be happy. I want you to do the right thing. He should have been fired, and, at the very least, you should do a criminal referral.

How many times does this happen and you do not do a criminal referral? I mean, we had the case where we had to bring you up and talk about Mr. Jutro. So why is there such a toxic environment?

I want to know why there's no criminal referral. You did not do it then, and you are not willing to do it now. Why?

Ms. MCCARTHY. The individual could have. We responded appropriately under our policies in the law. If additional work is necessary or referrals, we are happy to do that.

I did not make a decision that this shouldn't move there. I operated under the policies in the law to move forward. And, in fact, we expedited this in a way that Mr. Cummings has been asking us to do for a long time, which is quickly and decisively.

Chairman CHAFFETZ. Do you believe you have an obligation under the law if you know of sexual harassment——

Ms. MCCARTHY. No.

Chairman CHAFFETZ. —to report that to the legal authorities?

Ms. MCCARTHY. I am not aware of that obligation, no. I am aware that we have to follow it up and appropriately take steps that are appropriate for the circumstances, which is exactly what we did.

Chairman CHAFFETZ. Your appropriate steps were to move him four cubicles away. Do you think that was appropriate?

Ms. MCCARTHY. No, my step and the step that led to his removal is what I am referring to. I do not know what you are referring to in terms of four cubicles——

Chairman CHAFFETZ. I've given you probably a dozen chances to say—and I will give you one more time before I recognize Mr. Cummings. If you have knowledge of criminal activity, do you believe you have an obligation to report that to law enforcement?

Ms. MCCARTHY. I did not treat this as a criminal activity as opposed to an appropriate anti-harassment issue. That is how it is worked. That is how it is done.

Chairman CHAFFETZ. And that is the crying shame, because you know what? Sexual harassment, it is a crime. And you need to take it more seriously. And it needs to go to the legal authorities. And that is the failing on your watch, on what you are doing.

Ms. MCCARTHY. Well, part of the challenge, Mr. Chair, is—I am happy to talk to the woman involved, but part of the decision is that that woman chose a number of different paths she could take. It is always open to her. Frankly, I am not comfortable making decisions for a young woman who probably wants to move on, when I have already taken all of the actions I can do under my own authority.

Chairman CHAFFETZ. You did not separate——

Ms. MCCARTHY. And I am not sure you——

Chairman CHAFFETZ. —him. You did not move him away.

Ms. MCCARTHY. —should make that decision on her behalf either.

Chairman CHAFFETZ. Anybody who looks at this case, you fell far short of that.

I now recognize the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much.

Ms. McCarthy, I just want to see if we can't—you know, I do not know how much of the testimony you heard earlier, but you had three whistleblowers. Two of—well, all three of them are still in the room. And they were very, very—first of all, they were very courageous. They are people who came before us—they did not have to do it, but they did—and they talked about problems that the chairman had just alluded to.

And I want us to be very careful that we are not so busy being defensive——

Ms. MCCARTHY. Yes.

Mr. CUMMINGS. —that we do not address the problem.

I am always—I tell my staff that I am about the business of being effective and efficient, period. Life is short. And so I am trying to figure out how do we address these issues effectively and efficiently so that we are not in the situation that Mr. Harris found himself, some 15 years ago talking about these same things, and now he is back again today talking generally about these same things.

Mr. Harris, the former EEO manager in the Office of Civil Rights, Region 5, testified about his experiences with what he believed to be retaliatory conduct by management. Specifically, Mr. Harris alleges that in 2011, as a result of investigating claims of sexual harassment, among other things, he was reassigned to his current position as EEO specialist.

As a result of his experiences, he offered four recommendations for bringing about positive change to EPA's work environment.

And, again, these are dedicated employees——

Ms. MCCARTHY. Absolutely.

Mr. CUMMINGS. —simply trying to do their job. These are the kind of employees that ought to be up for awards and, you know, commendations.

And I would like to get your take on each of his recommendations.

Mr. Harris contends that the EPA counsel currently act as personal counsel for senior officials. He said this: "undermines Agency policies and Federal statutes enforced by EEOC." He recommends that this committee, "examine the roles of the Agency general counsels with regard to allegations of Title VII violations and counsel's premature involvement in EEO complaints."

Madam Administrator, how do you respond to that recommendation?

Ms. MCCARTHY. Mr. Cummings, any recommendation that a dedicated employee of EPA wants to make I am going to look at, period. But I will explain a couple of things.

In our counsel office, we have a dedicated independent unit that specifically is there to support OCR and EEO complaints. They are

independent of all of the other lawyers in the office and act that way.

We also have an Office of the Inspector General, who I think this committee, above all others, will know is extremely independent. We do not always agree, but they do their jobs well, and they push us to get better all the time. And we need to respect that they are available.

There's also an Office of Special Counsel that is available external to the Agency specifically as an independent body to support these issues.

So there are layers of opportunities here that folks have, and I am happy to explain that to them. And if that is inadequate, I will listen to what else they might recommend that we do.

Mr. CUMMINGS. Well, I am going to go to Mr. Harris' other recommendations, but, you know, one of the things that I said to the chairman is that I really wanted the IG to look at all of this. Because I think——

Ms. MCCARTHY. Yeah.

Mr. CUMMINGS. —perhaps, and you may not see it, but it sounds like there's a culture problem. At least in some of the regions, there's a culture problem. And that culture problem probably has developed long before you even got here. And sometimes that culture can be so thick and so—I mean, it is so deep that you almost have to dig it up to really effectively deal with it. And so I am hoping that we will have the IG look at this.

Mr. Harris recommends—I am going to his second recommendation—that we have an ombudsman's office which should have, "the utmost authority over personnel-related issues as they relate to Title VII violations."

Administrator, what is your view on the need for a regional ombudsman's office with regard to overseeing Title VII claims?

Ms. MCCARTHY. I certainly will take a look at it. I can't say that I am familiar enough with the role of an ombudsman and how that interacts with other legal statutes and requirements. But I am happy to take it back, and we'll come back to you.

Mr. CUMMINGS. I would ask that—how soon can you get back to us on your thoughts with regard to that?

Ms. MCCARTHY. If possible, maybe I could have our staff work together and develop a reasonable schedule that you'd think was appropriate.

Mr. CUMMINGS. Very well.

Next, Mr. Harris suggested the Federal EEO employees currently do not have sufficient retaliation protection. So he proposes that the EEO devise, "well-defined penalties for managers who retaliate against those who work to uphold an agency's EEO mission."

I believe that you will not tolerate retaliation. There is no Member of this body that would go along with people being retaliated against. As a matter of fact, all of us have worked very hard on both sides of the aisle to protect whistleblowers and those who might come before us from the agencies.

But I just wanted to know your view on that.

Ms. MCCARTHY. Well, certainly, we want to move forward to make sure our anti-harassment procedures are in place so that it

avoids confusion. Because I think part of that really led really good individuals, as well as two managers, into a difficult situation. So we'll get those done, and that will help.

But the idea that we would provide, sort of, uniform measures really negates our ability to look at each case on its own merits and give each employee, whether they are a manager or not, their due process, which is just as important to me, to make sure that we do thorough investigations and do this with due process.

Mr. CUMMINGS. Well, you'll never get me to argue against you with regard to due process. I think the problem is that, when people feel that they are walking up against brick walls when they try to get the word out and try to complain about situations—and, by the way, and trying to do their job that they are sworn to do—then, I mean, they wonder about any process.

Ms. MCCARTHY. I think part of the issue that I am hearing is the sense that there's a double standard——

Mr. CUMMINGS. Yes.

Ms. MCCARTHY. —in the Agency.

Mr. CUMMINGS. I am glad you said that.

Ms. MCCARTHY. And, you know, I——

Mr. CUMMINGS. I am glad you said that.

Ms. MCCARTHY. I am working hard to make sure that that is not the case. And that is what these policies and procedures are about.

But, honestly, this has not been raised as an issue to me. And I am really surprised that people do not find that the OIG is independent and effective in looking at these issues.

Mr. CUMMINGS. Well——

Ms. MCCARTHY. You know, I would welcome that.

Mr. CUMMINGS. Well, it goes back—now, Ms. Kellen—I do not know if she is still here. Ms. Kellen was telling me that she does have a relationship where she is able to talk to you.

Ms. MCCARTHY. Yeah.

Mr. CUMMINGS. And one of the things that she said in her testimony—and I think it kind of summarized this whole hearing. She said the rank and file basically get screwed, and the management, some of the management folk—and she admitted that there are a lot of good management people now——

Ms. MCCARTHY. Good.

Mr. CUMMINGS. —but that there are some that, even when they do the wrong thing, they get the bonuses, they get promoted. And there's something wrong with that picture. I mean, it seems like that would smack morale in the face big time. Would you agree?

Ms. MCCARTHY. Absolutely.

Mr. CUMMINGS. So I want you to do me a favor. I want you to—I mean, I know you want to come before us—and I am almost finished, Mr. Chairman.

I know you want to come before us, and I know you want to make sure you defend your agency. I got that. But I want you to also put some binoculars on or at least look through a high-powered microscope and say to yourself, why would somebody who has been——

Ms. MCCARTHY. Yeah.

Mr. CUMMINGS. —these employees, who have been here many years, given their blood, sweat, and tears, why would they even

risk coming here if they did not have something legitimate, or at least they believed legitimate, to say?

They are putting themselves on the line. And I am telling you, I could not be in your shoes and just disregard folks who put themselves in that position.

Ms. MCCARTHY. Well, Ranking Member, the issue in Region 5 that the chairman was referencing involves what I consider to be very valued and successful members of this agency. I am not disputing their value or my willingness to work with them as continued wonderful employees at the Agency.

There was clearly a problem. The question I was asked was whether it was directly retaliatory, and my concern is that this committee needs to see the entire record.

Mr. CUMMINGS. I do want to see the entire—that is why I want to see the IG. That is why I want the IG to look at it.

Ms. MCCARTHY. Yeah. So I think it is just important, and not because I am disputing how they feel——

Mr. CUMMINGS. Right.

Ms. MCCARTHY. —but just what the facts are on the ground.

And I will continue to work with these employees and others. Now that I know that there's a concern here, there will be no stopping our ability to work together. The unions are our partners. We are going to make sure that happens.

Mr. CUMMINGS. Now, either you can refer to the IG or we can refer to the IG, but——

Ms. MCCARTHY. I am happy to request it. I am happy to, sir.

Mr. CUMMINGS. Will you do that?

Ms. MCCARTHY. Yes.

Mr. CUMMINGS. And, Administrator, please hear me out.

Ms. MCCARTHY. Yes.

Mr. CUMMINGS. Administrator, I do not know how long you are going to be in this position, but what we are trying to do is create a situation where we try to cure some of this——

Ms. MCCARTHY. Absolutely.

Mr. CUMMINGS. —so that people coming behind us will not have to go through the same thing. I mean, it makes no sense.

Ms. MCCARTHY. I agree. And I am certainly not trying to be defensive of the Agency, just defending due process for everybody involved. And I will work hard on this, Mr.——

Mr. CUMMINGS. And I want to make it clear, Mr. Chairman, we—and I know the chairman agrees with me—that we know that the vast majority of EPA employees are great people giving everything they've got. We've got that. But we do not want to ruin their spirit; we do not want to take away from them. We do not want to be forcing somebody out, like Mr. Tuttle, who—almost in tears when I talked to him after the hearing. He does not want to leave, but he is being forced out. And you know what he said to me?

And I hope you do not mind me sharing this, Mr. Tuttle.

He said, "You know, I am 63 years old. Everywhere I go, I am pretty much blackballed. I can't get a job." Why? Because he simply was trying to do his job. We are better than that. We are so much better.

Thank you, Mr. Chairman, for your indulgence.

Chairman CHAFFETZ. Thank you.

I now recognize the gentleman from Arizona, Mr. Gosar.

Mr. GOSAR. Thank you, Mr. Chairman.

We are going to switch it up a little bit, since I haven't had a chance to evaluate some of the things.

Administrator McCarthy, there's a memorandum prepared by senior Army Corps of Engineers employees detailing serious legal and scientific deficiencies with the waters of the United States rule were reported in the news this week.

Are you aware of those memos?

Ms. MCCARTHY. I have been reading about them, yes.

Mr. GOSAR. Okay. Are you aware of the legal and scientific deficiencies raised by the Corps in those memos?

Ms. MCCARTHY. Just from what I've read. I have not seen the memo myself.

Mr. GOSAR. Mr. Chairman, I would like to submit the memos and the attachments into the record and share some of those concerns with you right now.

Chairman CHAFFETZ. Hearing no concerns, without objection, so ordered.

Mr. GOSAR. An April 27, 2015, memo from Major General John Peabody, Deputy Commanding General for the Corps' Civil and Emergency Operations, states: "The rule's contradictions with legal principles, general multiple legal and technical consequences that, in the view of the Corps, would be fatal to the rule in its current form." As is, the rule will be legally: "vulnerable, difficult to defend in court, difficult for the court to explain or to justify, and challenging for the court to implement." The rule has abandoned principles of sound science, quote, and introduced indefensible provisions into the rule.

A May 15, 2015, memo states: EPA's analysis underlying the rule is, quote, flawed in multiple respects. And the Corps' review could not find a justifiable basis to the analysis for many of the document's conclusions.

Now, question. This rule was jointly issued by the EPA and Army Corps. Is that correct?

Ms. MCCARTHY. That is correct.

Mr. GOSAR. Assistant Secretary of the Army Jo-Ellen Darcy testified before the House Transportation Committee in June that the Army Corps, quote, took these concerns and walked through them with the EPA before finalizing the rule.

Is that your understanding?

Ms. MCCARTHY. That is my understanding, yes.

Mr. GOSAR. Can you confirm that the EPA knew about these concerns before finalizing the rule?

Ms. MCCARTHY. Since I am not privy to the exact language in the memo, I can't speak directly. But I can tell you that, in working with Jo-Ellen Darcy on this rule, she indicated that all of the concerns of the Army Corps had been satisfied. In moving forward with the final, I individually had conversations with her about the changes that the Army Corps was interested in making as the proposal moved through the interagency process, and I understood that everything had been fully satisfied.

Mr. GOSAR. Really? Huh.

The EPA has publicly stated that it worked closely and carefully with the Army Corps to make sure, just as you said, sure that all concerns were addressed before finalization.

In its April 27, 2015 memo, the Corps asserts that, to date, the fixes have not been adopted, so the flaw remains.

Did the EPA adopt the Corps' recommended changes to the final version of the rule published on June 29, 2015?

Ms. MCCARTHY. I wasn't privy to the exact interagency discussion within the Army Corps. I was privy with—I had a close working relationship, as did our staff, and that is what produced the final rule. And they understood that all concerns were satisfied.

Mr. GOSAR. Well, that is why these two documents come out here showing quite the contradiction, because they are saying they weren't met.

Once again, I see the EPA saying that they are above the law, not only in rulemaking—and you are aware that there are numerous Supreme Court rulings that defy you actually going into this waters of the U.S. Application. You got serious comments in regards to the Army Corps of Engineers that you are supposed to team up with, and yet you sit here and tell me that we have made sure that it is all taken care of, but yet it is not.

What am I supposed to believe when I hear just the testimony that you gave in front of the chairman and now I am looking at waters of the U.S.? It is just a blatant disregard for the rule of law.

Do you have any comments in regards to that?

Ms. MCCARTHY. I disagree with that, sir. I think it follows——

Mr. GOSAR. Oh, you can disagree all you want, but the facts are the facts, are they not, ma'am?

Ms. MCCARTHY. They certainly are.

Mr. GOSAR. And so there's huge deficiencies with this rule, but yet you did not take the time to do it properly. What you did is you forced it down, just like everybody else does within this agency. And so, who cares about the rules?

You know, I come from Arizona, where water is for fighting over, whiskey is for drinking. So these are very, very important to us, particularly, in the West.

Ms. MCCARTHY. They are.

Mr. GOSAR. And they are overreaching beyond that.

So I find it very defiant to have you sitting here and, in light of these two documents, stating that you actually worked with the Army Corps of Engineers, that it is ingrained within the rule. But it is not ingrained in the rule. And you perpetuated a bad rule that has legal consequences and has ramifications for States and water use throughout this country. Shame on you.

I yield back, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentleman.

I now recognize the gentlewoman from Michigan, Mrs. Lawrence, for 5 minutes.

Mrs. LAWRENCE. Ms. McCarthy, Administrator, I am here today to talk about your responsibility as the Administrator of this department.

You have been in this position 2 years, correct?

Ms. MCCARTHY. That is right.

Mrs. LAWRENCE. And the incidents we are referring to happened before your position took over this department.

Ms. MCCARTHY. That is my understanding.

Mrs. LAWRENCE. So my question to you is—and I know that you understand this, because when you take on a position of a department head, you have a responsibility for ensuring that your employees are safe, that they work without discrimination. Title VII clearly outlines what that discrimination is.

And one of the ways that you hold employees accountable is that you train them; that when you come into a department, that you have documented training that explains to all of your management staff that violation—that these are the laws, and you are held responsible for that.

Can you explain to me how you, in these 2 years, have documented that your managers have this training and the accountability that happens as a result of that?

Ms. MCCARTHY. I certainly can, and I am happy to provide a more complete report after the hearing.

But we have had anti-harassment policy in place. People are trained in accordance with all of the policies. When an issue arises, one of the first things we look at is ensuring that they have been properly trained and that there will be no repeat of any violating behavior.

You know, we take these issues incredibly seriously. And one of the things that is happened under my tenure is a continued increase in our training budget, not just for managers but for other employees, so that people can know what their rights are, know what the appropriate recourse is if they feel like they have had issues that arise that they are uncomfortable with or they do not understand.

And I think we are going to keep trying to do the best we can to both document training but to increase training availability. It is been very difficult at the Agency to adjust to budget cuts, but the last thing I am going to do is disinvest in the employees of this agency.

Mrs. LAWRENCE. Now, the training goes two ways. So you train your managers, but you also train the employees.

Ms. MCCARTHY. Right.

Mrs. LAWRENCE. I was disheartened to hear the testimony of the previous panel, where they felt they did not have anywhere to go. To me, what came to mind, if there had been proper training—you are required to post information. If you feel like you have been discriminated, there's a confidential number that you can call that is beyond your manager if you do not feel—are all those things in place?

Ms. MCCARTHY. I believe they are, but I will go back and double check. I think I am distressed by the same issue. It seems as if they knew the Office of the Inspector General was available but did not feel comfortable or that they would be independent. You know, we are—and I will talk about that and figure out what else we do.

But there is training. People know who to call. One of the things we are working on on anti-harassment is, while we have had a good policy, I think we haven't had the procedures in place to im-

plement that consistently and effectively, which is why we just did that.

I just asked that that policy be developed. What happened is the five unions wanted to bargain on the implementation of that policy. And that is where we are today. My hope is that that will provide added clarity, and we'll integrate that into a more rigorous training program, as well.

Mrs. LAWRENCE. I want to be really clear. The question that was just asked by my colleague is about efficiencies in programs and procedures within EPA. I am the ranking member on Interior. EPA is extremely important to our government, to our environment, something I am very committed to.

This whole hearing is about distractions, about waste of time and demoralizing employees that we need energized and committed to actually doing the job we hired them to do. It is unacceptable that we have 11 complaints put forth on the same issue about sexual harassment, about bullying. And, to your credit, 2 years in—but you must have a fierce commitment to policies, to making sure that any employee, if they feel like they've been discriminated against, that they know where they can go; that the IG—you do not wait for the employee to call the IG. You energize the IG to advise you.

You need to do something above and beyond. You need to be creative, as the Administrator, how you are going to change this. Because I am holding EPA accountable to do what we hired them to do. It is a critical time in our country, with our environment and these questions on water, for us to be so distracted.

This, to me, is so disappointing, that we have to spend this much time when we have valued—30 years' experience in EPA is something that we should be valuing. That employee should be so energized and integrated into the success of this country and doing the work for EPA.

And, with that, I yield back my time.

Chairman CHAFFETZ. Thank you.

We'll now recognize the gentlewoman from Wyoming, Mrs. Lummis, for 5 minutes.

Mrs. LUMMIS. Thank you, Mr. Chairman.

And I certainly admonish you to listen to the chairman and the ranking member and the other members of this committee who have brought to your attention how serious this committee believes this issue is.

With that, I, too, am going to switch gears. I want to talk to you about a couple of substantive issues related to the President's Climate Action Plan.

Now, under his plan, the EPA has proposed two major rules on existing power plants and on new power plants. These rules affect listed species.

Now, let's go to the Endangered Species Act, where any Federal agency that carries out a discretionary action that may affect a listed species or critical habitat must consult with either the Fish and Wildlife Service or NOAA Fisheries. The threshold is really low. It is any possible effect, including insignificant or beneficial effects. That is what triggers the consultation requirement in the Endangered Species Act.

Now, let's turn back to the existing-source rule. The EPA just summarily concluded that the rule would have no effect on any listed species. In the new-source rule, the EPA did not even address compliance with the Endangered Species Act.

My question is this: Will EPA consider whether its proposed new-source rule may affect any listed species or critical habitat?

Ms. MCCARTHY. Well, Congresswoman, first of all, I am glad of the commitment to endangered species, and I share it. We will make sure that the final rules actually meet our obligation under the Endangered Species Act.

Mrs. LUMMIS. Well, I hope that obligation includes a consultation. Because, with regard to the existing-source rule, every model EPA has released projects that multiple coal-fired power units will close if the rule is implemented. Now, among those are Big Bend Power Station and Crystal River Power Plant in Florida.

Now, according to the Fish and Wildlife Service's Florida manatee recovery plan and a USGS study, the warm water that is provided by these plants is crucial to the existence of the Florida manatee. The plan states that about two-thirds of the manatees in Florida rely on these warm-water discharges for protection from the cold. The plan states that alterations to power plants will significantly affect the manatees' ability to survive cold temperatures.

Many of the power plants in Florida even have manatee protection plans imbedded in their Federal Clean Water Act permits for water discharges. Now, that includes, like, Big Bend and others. The operator of Big Bend Power Station, Tampa Electric Company, has advised the Public Service Commission in Florida that your existing-source rule will force the company to shut down Big Bend.

How did the EPA conclude that its existing-source rule will have no effect on endangered species if the EPA's own modeling and the Tampa Electric Company have both concluded that the rule will shut down generating units at this plant and eliminate the warm-water refuge for manatees?

Ms. MCCARTHY. Well, Congresswoman, as you know, this issue has arisen during the proposal period for 111(d). We will certainly take a look at this comment, and we will abide by the law as we finalize the rule.

Mrs. LUMMIS. Have you ever contacted the Fish and Wildlife Service with regard to the possible effects of the two power plant rules on endangered——

Ms. MCCARTHY. I can only speak to my own knowledge, which I personally have not.

Mrs. LUMMIS. Do you know if anyone else in the Agency has?

Ms. MCCARTHY. I do not know the process that has been established by the Agency and the staff so far.

Mrs. LUMMIS. Would you please provide to this committee information on whether and who, if anyone, contacted the Fish and Wildlife Service with regard to the possible effects of the two power plant rules on endangered and threatened species?

Ms. MCCARTHY. Well, I know, Congresswoman, that when the rule comes out in final form, you will see this as a comment in response, and it will be fully responsive to your request.

Mrs. LUMMIS. We will go now to the existing-source rule. What is the basis for finding no effect on the manatee under the existing-source rule? The overwhelming evidence is to the contrary.

Ms. MCCARTHY. I can't answer that specific question any more directly than I just did, which is the folks are aware of the concern that is been raised, and they will address that concern, and we will make sure that when the final rule comes out it is consistent with our requirements under the Endangered Species Act.

Mrs. LUMMIS. Would you provide to this committee also the basis for a decision?

Ms. MCCARTHY. That will also, I am sure, be thoroughly discussed, but I will make sure that is the case as we look at the response to comment in the rule.

Mrs. LUMMIS. Thank you, Ms. McCarthy.

Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentlewoman.

I now recognize the gentlewoman from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you very much, Mr. Chairman. And I want to thank you especially for today's hearing. I think it is a very important hearing.

And I want to thank Ms. McCarthy for coming and for the progress the Agency has made.

Ms. McCarthy, when I became chair of the Equal Employment Opportunity Commission, sexual harassment was not even defined as sexual discrimination. We issued guidelines defining the words "sex discrimination" in the statute to include sexual harassment, and the Supreme Court later backed us up.

The courts have not done the same with respect to unpaid interns. I was flabbergasted but understanding, how some courts interpreted law, to find that some courts have already found that unpaid interns are not covered by the word "employees" in Title VII of the 1964 Civil Rights Act. That means that the people, the whistleblowers who testified here today could not receive relief in the courts the way an employee of the Agency could under the statute.

Mr. Cummings, our ranking member, has introduced a bill to correct this flaw in Title VII. He calls it the Federal Intern Protection Act. I hope that some of the Republicans on this committee who have expressed I think appropriate outrage at the harassment that went on here will join us as cosponsors to this bill.

And I would like to ask you if you would support a bill to add or define interns as employees under Title VII of the 1964 Civil Rights Act.

Ms. MCCARTHY. While I can't speak directly to a legislative proposal, I can indicate to you that EPA strives to protect all of our employees from discrimination, and we hold our employees and our managers accountable for their actions.

Ms. NORTON. Now, let me ask the question more directly. Would you have your counsel look at the—since there has been repeated harassment of interns—and, by the way, this House and the Senate now, like most large employers across the United States, are replete with interns. This has widespread implications.

Would you have your counsel look at the recently introduced Federal Intern Protection Act and indicate to this committee, to the

chairman and the ranking member, whether you would support that act to prevent the harassment of interns in the future? Would you give us that in writing?

Ms. MCCARTHY. I am happy to provide technical assistance on this. And I think, as you know, I personally and the Agency would support any effort to ensure that our employees are not——

Ms. NORTON. I appreciate that, Ms. McCarthy, because I can see that you want to get rid of this issue and are right do so.

I wasn't here to hear from the first panel, but I've read their testimony, and I was particularly interested in the testimony of the whistleblowers and of Ms. Kellen of AFGE Council 238. In my own experience at EEOC, I've found that employees on the ground can be very helpful. That particularly, seems to me, might be the case here, where we are talking about managers.

Ms. McCarthy, I can think of no one in the life of an employee, not even you, the head of the Agency, that has more power and authority over an employee than the direct supervisor or manager. That is why listening to these employees is, it seems to me, particularly important. And, of course, she describes what she calls a serious lack of accountability and transparency, she says, at EPA in particular.

When a manager has a problem—you know, imagine having to file a Title VII complaint against your manager. I mean, that really takes a lot, even if the law covered interns. That takes a lot of gall. That is why proactive action would be most beneficial.

She does state, Ms. Kellen, that there are tools and procedures currently to address management issues. So I would like to look at the existing tools and procedures to address management issues, since that is so far out of reach of the average employee.

You have made some progress, and I am looking at these management issues for even further improvement. And employees are among those who will always offer suggestions. She says that it would be helpful to have the GAO conduct a study of what she calls bullying in the Federal sector. And she does not even list EPA alone.

Now, understand that the word "bullying" here has real connotations. I mean, it may be if you bully a Federal employee that is about all you have to do in order to get your point across, and there's nothing she can do, even if it is a form of harassment.

So I wonder if you would support the idea of a GAO study of bullying in the Federal sector by management employees?

Ms. MCCARTHY. I would be happy to support an independent look at this. And, in fact, Congresswoman, I think we still have work to do within EPA. I mean, every agency has to continue to be diligent, but one of the things we have put on the table is much more concise and well-spelled-out procedures that managers need to follow and that employees can count on when these complaints come forward. We need to get that over the finish line, complete the review of the union, because we welcome their input on it. But we all have to keep struggling on this issue.

And I am not claiming that EPA is above where any other agency is. Bullying happens at all levels whenever there is a power difference between one employee and another. And we have to constantly be as diligent as——

Ms. NORTON. And it is really that power difference I am talking about. The Agency employee may rarely see you but will see her supervisor, or SES, far more often.

I wonder, because there was testimony that action by managers has not been fully investigated. Now, Ms. Kellen suggests something called a feedback loop, where employees could anonymously offer their opinions of how managers are performing their duties.

Now, of course, that anonymous feedback could be of any kind, and I am not suggesting it is enough to get some kind of action taken against an employee. But this person who was guilty, it would appear, of repeated instances of sexual harassment, if employees could have anonymously reported that and if the head of the Agency knew that—others have gone on for much longer than I've gone on, including, you Mr. Chairman. If I could just get an answer.

Chairman CHAFFETZ. Well, with all due respect, we are almost 3 minutes over. I am just—I just tapped.

Ms. NORTON. Could I just get an answer to this question then?

Chairman CHAFFETZ. Sure.

Ms. NORTON. Thank you, Mr. Chairman.

Ms. MCCARTHY. I will be as brief as possible.

We do have an OIG Hotline, which is the most direct way for anybody to raise an issue.

Ms. NORTON. And that is anonymous?

Ms. MCCARTHY. It is, yes.

But more to your point, I am happy to talk to Ms. Kellen about any suggestion she has for how we can proactively address this issue and not wait until it has to go to a hotline.

Ms. NORTON. Thank you for your indulgence, Mr. Chairman.

Chairman CHAFFETZ. Thanks.

We'll now recognize the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

I would like to begin by going back to the topic from my colleague from Wyoming. The U.S. Geological Survey, I am sure you are aware, has the manatee on the endangered list. And they rely on power plants as a source of warm water during the wintertime.

And you had mentioned a moment ago that, to your knowledge, the EPA never contacted the U.S. Fish and Wildlife Service or National Marine Fisheries Service. Is that correct?

Ms. MCCARTHY. No, sir, that is not what I indicated. I said that I have not personally had those conversations.

Mr. HICE. So who has had those conversations?

Ms. MCCARTHY. Well, the obligation of the development of the rule in addressing those issues falls to—I guess our Assistant Administrator at the Office of Air and Radiation would be the next one to look at this issue.

Mr. HICE. You "guess." So you do not know who is responsible?

Ms. MCCARTHY. You know, I do not run the day-to-day work of the rule. As you know, we have received lots of comments on this rule. This is certainly on the radar screen, and I am confident that we will put out the rule in a way that addresses this——

Mr. HICE. Well, it needs to be on the radar screen; this is the law.

Ms. MCCARTHY. Absolutely.

Mr. HICE. The law requires you to contact them, and you do not have any idea if they were contacted or not.

Ms. MCCARTHY. I just said I did not participate in conversations myself. That is all I am——

Mr. HICE. And you are also indicating that you do not know if anyone else did either, because you are saying you guess it might have been one department or another. So you do not know.

Ms. MCCARTHY. All I know is that my staff and I are well aware that we have an obligation to meet the rules under the Endangered Species Act, and we will do that.

Mr. HICE. Okay. But you do not know if those agencies were contacted.

Ms. MCCARTHY. I honestly do not recall whether I've had that direct conversation. I may have, but it is——

Mr. HICE. I am not talking about you. I am talking about the EPA in general. Did the EPA abide by the law——

Ms. MCCARTHY. The EPA has to abide by the law on the final rule, and we will.

Mr. HICE. Did the EPA abide by the law and consult with the U.S. Fish and Wildlife Service or National Marine Fisheries?

Ms. MCCARTHY. I am happy to get back to you, as I indicated——

Mr. HICE. So you do not know, is the answer.

Ms. MCCARTHY. There are many comments that we receive that I do not follow directly up on. But I am——

Mr. HICE. So are you saying yes or no or you do not know?

Ms. MCCARTHY. I do not know.

Mr. HICE. Okay. That is what I was trying to get to. All right. So you do not know if the law was upheld or not.

Ms. MCCARTHY. I know that the law has to be upheld, and I know that happens when we issue the final rule, which has not happened yet.

Mr. HICE. All right.

Well, you realize that the EPA's proposed rule ultimately is going to shut down a number of coal-generated power plants.

Ms. MCCARTHY. I remember in the Regulatory Impact Analysis there was an estimate of potential closings as a result of decisions the States might make as a result of that rule.

Mr. HICE. There have been a number of those. One of them is in my own district.

Ms. MCCARTHY. Okay.

Mr. HICE. Plant Branch was closed down because of EPA regulations and so forth. And this——

Ms. MCCARTHY. Which plant did you say, sir? I am sorry.

Mr. HICE. Plant Branch in Milledgeville, Georgia, shut down because of the EPA regulations, and hundreds of jobs have been lost because of that. And the manatee, of course, not in my district but relies in other areas on the warm water generated here. And it just sounds to me, again, that the EPA is not abiding by the law.

What would happen if a business decided that they were just not going to abide by regulations from the EPA? Would you ignore that?

Ms. MCCARTHY. Not if it was called to my attention. And, certainly, EPA won't ignore the law either.

Mr. HICE. Well, EPA has been ignoring the law, and it is not—do you believe that all coal plants should be shut down?

Ms. MCCARTHY. I do not have—it is not—there's no belief system I have about coal at all, sir. All I do is enforce the law.

Mr. HICE. You do not have a belief system?

Ms. MCCARTHY. No.

Mr. HICE. Do you believe that coal generates power?

Ms. MCCARTHY. Yes, I—that is a factual issue.

Mr. HICE. It is a factual issue. Do you believe that they should be shut down because they are coal-generated?

Ms. MCCARTHY. I think they offer tremendous value to energy——

Mr. HICE. That was not my question. I know they offer——

Ms. MCCARTHY. No, I do not have any——

Mr. HICE. —value because the offer energy.

Ms. MCCARTHY. —belief as to whether they should be shut down or not shut down. I do not—that is not a belief system for me, sir. I appreciate the value that coal brings to our energy supply system and how valuable it is——

Mr. HICE. You are having a difficult time understanding my question. I am asking, do you believe that coal plants should be shut down?

Ms. MCCARTHY. I have no such belief that they should be shut down.

Mr. HICE. Okay.

Ms. MCCARTHY. I have no belief——

Mr. HICE. Are you aware that EPA policies and regulations are skyrocketing the ability for coal-generated power plants to exist?

Ms. MCCARTHY. I believe there are two things happening. One is there is a transition in the energy world, and coal is becoming less competitive because of inexpensive natural gas. And I believe that we are putting rules out that are related to pollution from those——

Mr. HICE. Coal is becoming expensive because of the upgrades that are required by plants to uphold the regulations put upon them by the EPA.

Ms. MCCARTHY. There are——

Mr. HICE. My time has expired. I thank you, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentleman.

We will now recognize the gentleman from Alabama, Mr. Palmer.

Mr. PALMER. Thank you, Mr. Chairman.

Ms. McCarthy, Arthur A. Elkins, the inspector general for the EPA, testified a number of times about their frustration with cooperation from the EPA. As a matter of fact, he talked about how the EPA had inappropriately blocked his office from conducting some investigations that involved employee misconduct. He testified to this in September 2014 and, in that testimony, advised the committee that the EPA had asserted that there was a category of activity defined as intelligence, to which the OIG may have access only subject to the EPA's granting permission. He further stated that, in some cases, the EPA's obstruction had interfered with and, in some cases, fouled the investigations.

There's other testimony by Patrick Sullivan from the OIG's office where he talked about other inappropriate activity taking place at

the EPA in which the EPA employees in the Office of Homeland Security had been interviewing EPA employees and telling them not to tell the OIG, pulling EPA employees' emails and phone records, and searching information on employees' computers, among other things. And he said those, in fact, are investigations, and that is what they are doing. And the point is that the Office of Homeland Security does not have investigative authority.

Now, this has gone on now for some time. In April, Mr. Elkins testified again and pointed out that the EPA confirmed to the Office of Inspector General that it would share the information that they had been seeking, both with regard to previous matters and on an ongoing basis, and that the Agency had not yet shared that information.

Then, in June, apparently—and I do want to cite one other thing. There was a memorandum of understanding that the EPA entered into unilaterally with the FBI without informing the OIG that further impeded the OIG's ability to do their job.

And then, earlier, in June, you finally agreed to turn over the information. And you also informed the OIG's office that you had rescinded the memorandum of understanding.

Now, my question to you is, have you turned over all of the information from the investigations from the Office of Homeland Security?

Ms. MCCARTHY. My understanding is that we have made tremendous progress into——

Mr. PALMER. No, ma'am. This is a yes or no answer.

Ms. MCCARTHY. I am trying to answer your question, sir.

I do not believe that we were withholding information or that MOU indicated that we would be. However, I've addressed every one of Art's concerns, including rescinding that MOU, having——

Mr. PALMER. You have rescinded the MOU?

Ms. MCCARTHY. —direct contact with the staff, reaching an agreement with the FBI on how to integrate the OIG into all of the efforts that they are concerned about at our Office of Homeland Security so that Homeland Security can perform their programmatic functions and never ever be viewed by the IG or anyone as above the law, in terms of allowing the IG access to information they need to do their job.

We have made great progress in that venue.

Mr. PALMER. Well, you keep talking about not impeding the OIG's investigation, but that is not their opinion. In this April testimony, he said, in this particular case, the OIG's investigation was negatively impacted and delayed by the fact that these senior EPA officials did not notify the OIG about their knowledge of the underlying incidents.

And my question again: Have you turned over the information from these investigations to the Office of the Inspector General?

Ms. MCCARTHY. I am not sure I understand what this refers to, sir, but I do not want——

Mr. PALMER. Okay. I will simplify it for you.

Ms. MCCARTHY. —you getting the impression that we are withholding any information that the IG needs to do its job.

Mr. PALMER. Reclaiming my time——

Ms. MCCARTHY. And I think the IG understands that.

Mr. PALMER. I will simplify it for you. Let me make it simple.
Ms. MCCARTHY. Okay.
Mr. PALMER. Have you turned over all of the information from the Office of Homeland Security to the OIG?
Ms. MCCARTHY. As far as I know, the IG and the Office of Homeland Security are working collaboratively to ensure that the Office of the Inspector General can do its job while the Office of Homeland Security can perform its programmatic functions.
Mr. PALMER. The reason I am pressing this——
Ms. MCCARTHY. That is how it is supposed to work.
Mr. PALMER. The reason I am pressing this is, throughout this period of time——
Ms. MCCARTHY. Yes.
Mr. PALMER. —you consistently offered to work with the OIG's office and did not do it. Okay? So I just want to know, are you going to do what you said you were going to do?
And I appreciate the fact that you rescinded the memorandum of understanding.
Ms. MCCARTHY. Thank you.
Mr. PALMER. But we would like to know definitively that you are turning over the information that the Office of Inspector General has requested. And, if you have not, when will it be done?
Ms. MCCARTHY. I have dictated that as an absolute requirement of our Office of Homeland Security. We met with the Federal Bureau of Investigation; we set up a process to ensure that is happening. And I have heard no further concern of the inspector general that information that he is aware of is being somehow withheld.
Mr. PALMER. Okay. We'll follow up on that later.
If the chairman will indulge me, I have one other question.
Five years ago, armed agents from the EPA conducted a raid on a city wastewater treatment facility in Dothan, Alabama. What I would like for you to do, Ms. McCarthy, is provide to this committee a copy of the threat assessment that justified armed agents in body armor conducting a raid on a municipal facility.
Mr. Chairman, I appreciate the additional time. Thank you.
Chairman CHAFFETZ. Thank you.
As we wrap——
Ms. MCCARTHY. Mr. Chairman, can I just make——
Chairman CHAFFETZ. Sure.
Ms. MCCARTHY. —sure I know which incident he is talking about?
I am aware of an investigation. I am unaware of any raid.
Mr. PALMER. Okay. It is the city of Dothan, Alabama.
Ms. MCCARTHY. Okay. Thank you.
Mr. PALMER. Thank you very much.
Chairman CHAFFETZ. We would appreciate your following up with Mr. Palmer on that.
Ms. MCCARTHY. Okay.
Chairman CHAFFETZ. As we wrap up here, I have just a few, sort of, cleanup questions here.
Can you provide this committee the bonuses, if any, that Mr. Paul Bertram received over the last 10 years?
Ms. MCCARTHY. I am happy to follow up on that, sir.

Chairman CHAFFETZ. And Susan Hedman, could we also look at those for the past 10 years, as well?

Ms. MCCARTHY. The Regional Administrator?

Chairman CHAFFETZ. Yes. Bonuses——

Ms. MCCARTHY. Certainly.

Chairman CHAFFETZ. —for the last 10 years. We would appreciate that.

Ms. MCCARTHY. Okay.

Chairman CHAFFETZ. She was the person in charge with all of these incidents that we have been talking about, the sexual harassment incidents, not the other issues that were sort of off-topic. What is your assessment of her performance in this?

Ms. MCCARTHY. In this instance?

Chairman CHAFFETZ. Regarding the sexual harassment issues, the retaliation, et cetera.

Ms. MCCARTHY. Well, I do not—I do not know what her direct involvement has been. I am aware of the full record, and I know that the employee in question basically left Federal service, which I think was the appropriate thing to do. I do not know her direct involvement in the retaliatory issues.

Chairman CHAFFETZ. And I guess that is the concern. I mean, it is risen to the level that we are having congressional hearings about this. We have expressed concern about this. These problems keep happening.

Ms. MCCARTHY. Generally——

Chairman CHAFFETZ. And, you know, it is one thing when you get one person complaining; it is another thing when you get three. And their testimony is consistent. Their authenticity seems to be as real as it gets.

Our professional staff have spoken to the victim here, one of multiple victims that were at the hands of Paul Bertram. And what is just sick and disgusting——

Ms. MCCARTHY. Yeah.

Chairman CHAFFETZ. —is that it was allowed to continue through years.

And we have brought this issue to you before, about when somebody does this and they do look at it, I do not understand why it is not in their record so that the next time they go to get a bonus or a promotion or come to some conclusion, that somebody can't look back at this and say—I mean, first of all, it should never get to the second time, ever. But, in this case, we are talking about 10 times.

Now, I respect the idea that you were not the Administrator the entire time. But it is your watch, and you have been there for a few years now. And we had a hearing about this earlier this year.

Ms. MCCARTHY. Yes.

Chairman CHAFFETZ. What specifically are you doing, not about issuing, "Hey, here's our sexual harassment policy," which is important, but what are you doing to make sure that nobody but nobody is allowed to get a bonus or promotion if they participate in sexual harassment?

And are you doing anything to look back into the record and find those people who have a serial problem with harassing women in

particular? And it can happen to men, too, but the cases we have heard have been primarily towards young, entry-level women.

Ms. MCCARTHY. Yeah.

Chairman CHAFFETZ. What exactly are you, as the Administrator, doing to get rid of those bad apples so we do not ruin somebody else's life? Because the atmosphere that we hear about today, it is still going on. I have no trust or belief that you have actually solved the problem.

Ms. MCCARTHY. Well, you know, we have to be as diligent as we possibly can, because——

Chairman CHAFFETZ. I know, but what is it? What are you doing?

Ms. MCCARTHY. —one is one too many, and I understand that.

I want to make it clear to you, Mr. Chairman, that we are not just putting another policy out. We are actually doing an implementation, procedures, so that the employees can know what it is, we can hold managers accountable for doing—for actually following those procedures.

So we are working through that with the union because I understood that this issue has been raised. But, you know, we'll continue to be as diligent as we possibly can. We'll find out what we need to do to make it more comfortable for these women to come forward. This is a very difficult situation that I take very seriously.

Chairman CHAFFETZ. I just do not hear the specifics. Here's what I want to hear: We are going to go through each and every personnel file, and anybody who has sexual harassment, we are going to go back and evaluate that, we are going to do criminal referrals where necessary, we are going to fire people who have participated in this habitually, and we are going to go through each and every one. It is going to take some time, but we are going to do that. And when it comes to our attention next time, we are going to get the inspector general involved, and we are going to take it very seriously so that everybody feels comfortable in their work environment at the EPA.

That is the answer I am looking for, and you are nowhere close to that. Did I say anything that you would disagree with?

Ms. MCCARTHY. You have not said anything I disagree with what—how you would handle it. My concern is making sure that we follow due process for the employees. That is equally important to me. Whether you are an employee or you are a manager, I am going to follow due process.

Chairman CHAFFETZ. Nobody's going to argue against due process——

Ms. MCCARTHY. Okay.

Chairman CHAFFETZ. —but what we heard testimony in the first panel is, when they went through the due process—we had some brave people stand up and say, you know what? A reprimand ain't good enough here. You are going to have to do something more.

Ms. MCCARTHY. But I want to make clear to you, Mr. Chairman, the managers in that situation absolutely agreed, as well. It provided an opportunity during——

Chairman CHAFFETZ. That is not true.

Ms. MCCARTHY. —the process for more women to come forward.

Chairman CHAFFETZ. That is not true.

Ms. MCCARTHY. That was the decision of the management, was to call for that gentleman's removal.

Chairman CHAFFETZ. That is not true. Because the original—the original recommendation was to move his cubicle four spaces down.

Ms. MCCARTHY. Well——

Chairman CHAFFETZ. And—no, no. Hold on. Fortunately, you had some people who came in and said, that ain't good enough, folks. And now they feel like there's retribution.

Look, we do not need to rehash the whole case.

Ms. MCCARTHY. No. I just wanted to say I couldn't agree with you more that we have to be serious and diligent. Let me go back and see what else the individuals or the unions would suggest, and we'll keep working through this issue.

I just do not want to leave here with you thinking that I do not take these issues seriously, because we absolutely do. And I am going through not just policies and procedures, but we will do everything we can to follow up on the issues that were raised to you today.

Chairman CHAFFETZ. I have——

Ms. MCCARTHY. Had they been raised to me earlier, maybe we would be further along. But I respect the rights of every employee at EPA and the unions to come to you or anybody else with these issues. And I will not hold that against them. I will work with them.

Chairman CHAFFETZ. I want to believe you. I just want to see the action. And I want you to——

Ms. MCCARTHY. Yes, sir.

Chairman CHAFFETZ. —follow up with this committee. We have jurisdiction over all of the Federal workforce. This is something that we are seeing not only at the EPA——

Ms. MCCARTHY. I will do that.

Chairman CHAFFETZ. —but other agencies, as well. And I think we need a clear definition of sexual harassment, sexual misconduct, and what are the consequences for that——

Ms. MCCARTHY. And, Mr. Chairman——

Chairman CHAFFETZ. —because it is happening government-wide——

Ms. MCCARTHY. —I am very happy that you are taking this seriously.

Chairman CHAFFETZ. —and it is a problem.

I do want to ask a last thing about the inspector general.

Ms. MCCARTHY. Yes.

Chairman CHAFFETZ. Do you think it would be appropriate or inappropriate—do you think it would be appropriate that, if you have a sexual misconduct or sexual harassment, to have that automatically referred to the Inspector General's Office?

Ms. MCCARTHY. I am happy to talk to the inspector general about that, but that is——

Chairman CHAFFETZ. No, I want you to talk to me about that.

Ms. MCCARTHY. Well, part of that is the discussion of our implementation that is currently happening with the unions——

Chairman CHAFFETZ. Why——

Ms. MCCARTHY. —because we want these issues implemented.

Chairman CHAFFETZ. Why not automatically refer this to the Inspector General's Office?

Ms. MCCARTHY. It is—generally, this is not a criminal issue. It is an administrative procedure that goes to our Office of Human Resources.

Chairman CHAFFETZ. Sexual harassment—sexual harassment is a crime.

Ms. MCCARTHY. But we work with the IG on these issues. We do not——

Chairman CHAFFETZ. No, you did not.

Ms. MCCARTHY. —exclude them from——

Chairman CHAFFETZ. You do not. You did not in this case. That is the problem. You did not refer it to the inspector general. You did not refer it to the criminal—to any criminal referral.

I would think that you would work with the person who is claiming the sexual harassment and work with her to figure out the proper remedy. She complained multiple times. It is not as if she came forward once. She came forward multiple times.

Ms. MCCARTHY. No—well——

Chairman CHAFFETZ. So——

Ms. MCCARTHY. —we do not need to rehash this, other than to recognize that we both share the same concern. And you have my assurance——

Chairman CHAFFETZ. But you are in a position to do something about it.

Ms. MCCARTHY. And I will. And I have.

Chairman CHAFFETZ. But you did not. You did not.

Ms. MCCARTHY. Well——

Chairman CHAFFETZ. You did not. We had the conversation earlier.

Ms. MCCARTHY. Yes.

Chairman CHAFFETZ. We want to look at making sure—last question about the IG, still on that same topic.

Ms. MCCARTHY. Yes, sir.

Chairman CHAFFETZ. What information is the IG not able to access? In other words, to me, the IG should have unfettered access to the information that it wants. What exceptions are there?

Ms. MCCARTHY. Well, in issues of national security, we just have to make sure that the appropriate individual receiving that information has the appropriate clearance.

Chairman CHAFFETZ. Understood. Other than that——

Ms. MCCARTHY. That is the agreement that was reached, and that is what we operate——

Chairman CHAFFETZ. Other than that, the IG should have unfettered access, correct?

Ms. MCCARTHY. I can't speak to whether it is unfettered. I know what my responsibility is, to make sure that they can do their jobs effectively and——

Chairman CHAFFETZ. We had the inspector general come before this committee and said that your agency is not allowing them the access to the personnel or the information that they want. I want to know why not and what they shouldn't be able—who they shouldn't be able to talk to and what documents they shouldn't be able to see.

Ms. MCCARTHY. I believe we are, but you can speak with Mr. Elkins directly. We have——

Chairman CHAFFETZ. I have. Now I am asking you. What—this should be a simple question.

Ms. MCCARTHY. It is. And I've answered the question, sir.

Chairman CHAFFETZ. I do not think so. Should the inspector general have total access to all personnel and all information?

Ms. MCCARTHY. They should have access that is appropriate for them to do their jobs and——

Chairman CHAFFETZ. Okay.

Ms. MCCARTHY. —and have the appropriate clearance.

Chairman CHAFFETZ. Why are you qualifying——

Ms. MCCARTHY. And they have that.

Chairman CHAFFETZ. Should they have access—it is appropriate for them to do their job by having access to all the personnel——

Ms. MCCARTHY. I just do not want——

Chairman CHAFFETZ. —and all the information.

Ms. MCCARTHY. I am not a lawyer. I just do not want to have you ask me a direct legal question and me pretend I am one, and I do not want to go down that road. I do not know——

Chairman CHAFFETZ. When will you provide us an answer?

Ms. MCCARTHY. —what the term "unfettered" means.

Chairman CHAFFETZ. Can you provide an answer to me? Pick a date. What is an appropriate time for you to come back and answer me that question?

Ms. MCCARTHY. Well, why do not we work with your staff and we'll make that determination——

Chairman CHAFFETZ. Give me a date.

Ms. MCCARTHY. —and I will do the best I can to meet that.

Chairman CHAFFETZ. Give me a date where I say, Administrator, it is past the deadline. What is an appropriate date to get that back?

Ms. MCCARTHY. I can explain to you, sir, how we have reached an agreement with both OHS and the——

Chairman CHAFFETZ. I do not want you to have to negotiate.

Ms. MCCARTHY. —and the FBI.

Chairman CHAFFETZ. The inspector general——

Ms. MCCARTHY. Well——

Chairman CHAFFETZ. The IG Act is very clear.

Ms. MCCARTHY. I am sorry, sir.

Chairman CHAFFETZ. This is taking far longer than it should. I just want you to give me a date as to when you can respond to me. That is all I am asking.

Ms. MCCARTHY. I've already responded that I believe we are providing them access to every information they need. And that is already happening, and there is a process for that. I had to protect the interests of the intelligence community. I've done that, and the IG can do their jobs.

Chairman CHAFFETZ. Okay. I want you to give me a date as to when you will give me a full and complete answer as to what limitations you think there are on the inspector general.

In my opinion, they should have total, complete access to all personnel and all of your records all the time. If there are exceptions to that, I need to know, I want to know what those are.

And you said you are not an attorney. I am giving you time to—I respect that.

Ms. MCCARTHY. Right.

Chairman CHAFFETZ. I want you to take some time, get the answer right. We also have jurisdiction over the inspectors general, so we want to get this right, as well.

What is an appropriate date? Do not tell me we are going to work with staff, because these continue on in perpetuity. Give me a date. I am letting you pick the date.

Ms. MCCARTHY. Would it be okay if I ask my——

Chairman CHAFFETZ. Sure.

Ms. MCCARTHY. —attorney what an——

Chairman CHAFFETZ. Ask him.

Ms. MCCARTHY. —appropriate date might be?

Chairman CHAFFETZ. Yeah.

Ms. MCCARTHY. Okay.

Is 30 to 60 days okay?

Chairman CHAFFETZ. How about the end of August? Is that fair, by the last day of August?

Ms. MCCARTHY. That sounds like 30.

Chairman CHAFFETZ. Yeah. Is that fair?

Ms. MCCARTHY. I would be happy do that.

Chairman CHAFFETZ. All right. Thank you.

Ms. MCCARTHY. And I apologize. I wasn't trying to confuse the issue. I just did not want to act like——

Chairman CHAFFETZ. I want you to have the proper time to get to the right answer. So we will say the end of August.

Ms. MCCARTHY. Thank you.

Chairman CHAFFETZ. All right.

Mr. Cummings.

Mr. CUMMINGS. Just very quickly, I just want to clarify some things, Ms. McCarthy, and I will be very, very brief.

It is my understanding that the intern had been—the first time she came and notified anybody of this was in March of 2011, although she had been being harassed at least a year, I guess, earlier.

Is that right? Is that your understanding?

Ms. MCCARTHY. I am aware of when she reported it and when the person was removed from——

Mr. CUMMINGS. Would that have been March 2011?

Ms. MCCARTHY. —Federal service. Yeah.

Mr. CUMMINGS. Yeah.

And there has been a little bit of confusion, because—and I wanted to straighten this out earlier, when the gentleman testified, Mr. Harris, because he talked about 10 statements, but I wanted to make sure.

As I understand it, based on our review of the witness statements provided to the committee, we understand that EPA manager Paul Horvatin only knew of one incident of sexual harassment prior to the March 2011 incident, although there were witness—we have witness statements.

Ms. MCCARTHY. Yes.

Mr. CUMMINGS. But as far as—we keep talking about——

Ms. MCCARTHY. I think 11 years prior to——

Mr. CUMMINGS. —10 people being harassed.

Ms. MCCARTHY. Yes.

Mr. CUMMINGS. I do not think that was clear.

It is not your fault, Mr. Harris. I had meant to clarify that before.

But the only thing I would say is this, Ms. McCarthy. I hope that you took the things that I said in the light——

Ms. MCCARTHY. I do.

Mr. CUMMINGS. —that I said them—that I meant them. And I just want to see if we can resolve these issues.

And I thought the points that the chairman and certainly the points that Ms. Norton made were just right-on. I mean, in some kind of way, we have got to be able to resolve these issues and create—and sort of memorialize——

Ms. MCCARTHY. Yeah.

Mr. CUMMINGS. —the solution, as opposed to rehashing over and over and over again. And that is all we are trying to do.

And we want to work with you, because I know that—I know you were about to tell the chairman in the very beginning about your own history, about your family and what you, I am sure, have seen in your life, as a woman being in all kinds of difficult situations. So we know you have the sensitivity. But now we have got to make sure that we bring all of that to bear so that people like the people who testified before us will feel that they do have an opportunity to get these things addressed.

Finally, let me ask you this. I would appreciate it—and this is just a little personal favor—is that you at least meet the three people and just say hello to them, because they may never get this chance again, to meet the top person in the agency that they've worked so hard for. They are still in the audience, and I hope that you would at least meet them and thank them.

Thank you.

Thank you, Mr. Chairman.

Chairman CHAFFETZ. Thank you.

As we wrap up, to the good men and women who work at the EPA, like I said, the overwhelming majority, they are good, honest, patriotic people working hard. You know, God bless you. They are important—there is important work to do.

We also know that there are going to be bad apples. You get that many people together, there are going to be some bad apples. We want to work with the unions, with the employees, with the administration, with the Congress. Let's weed out those bad apples, hold them accountable. It will make everybody's life better in every way, shape, and form. And that is the spirit in which we gather here today.

And I want to conclude with what I started with, to the Administrator. You have made yourself readily available to the committee and to other committees. You regularly testify before Congress. And, to that extent, we sincerely do appreciate it. So we thank you for being here today.

And this committee stands adjourned.

Ms. MCCARTHY. It is my honor, Mr. Chairman. Thank you.

[Whereupon, at 12:27 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

July 1, 2015

VIA FIRST CLASS AND ELECTRONIC MAIL

The Honorable Jason Chaffetz
2236 Rayburn House Office Building
Washington, DC 20515

&

The Honorable Elijah E. Cummings
2230 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

I am writing to you as the National Treasury Employees Union (NTEU), Chapter 279, President, on behalf of more than 400 Environmental Protection Agency (EPA) bargaining unit employees located in Cincinnati, OH, Erlanger, KY and Edison, N.J., to express our profound dissatisfaction with the EPA's handling of the Peter Jutro sexual harassment scandal, and to request your assistance to ensure continued oversight of the Agency's follow-up actions. The leadership you have shown as Chair and Ranking Member, respectively, of the House Oversight and Government Reform Committee (Committee) to compel EPA leadership to admit and correct this egregious situation has garnered our heartfelt respect and admiration. As hardworking federal employees, who come to work every day with an intense desire to serve the people of this country, and who undertake our duties without regard to political or ideological motivations, we appreciate the bipartisan nature of the support you have given to us and the recognition that good governance trumps politics or other concerns.

To date, employees in my bargaining unit, some of whom were the direct victims of Jutro's abuse, have indicated that management actions taken after the release of Office of the Inspector General investigations (enclosed), as well as the Committee hearing[1] which you conducted into the protracted sexual harassment conduct by Jutro, have failed to build the climate of confidence and trust in Agency officials which is needed to guarantee the safety and dignity of our employees. The prevailing opinion among our employees is that Agency leadership persist in minimizing and containing the fallout stemming from Jutro's gross misconduct, rather than taking responsibility for it and instituting the kind of effective actions that are needed. Our trust and confidence in EPA

[1] For your reference, this hearing took place on April 30, 2015.

leadership has sunk to an abysmal level and we respectfully submit to you that more remains to be done in order to correct this unacceptable situation.

A suitable beginning for Agency leadership would have included an acceptance of responsibility at all levels where blame rests and an apology for their pervasive failure to recognize the situation and then to decisively act on it. It is simply inexcusable that they allowed this situation to persist and may have, in fact, acted to cover it up. This behavior must stop and it appears unlikely that this Agency will take the actions which are needed without your close continuing oversight.

Therefore, we ask that you continue to be actively engaged in this process to ensure that the necessary corrective actions are taken and that a climate of justifiable trust is established. A crucial component of this process entails the need for your Committee, the OIG and Agency leadership to solicit the feelings and opinions of the employees who serve it in all parts of the Agency, and to continue this activity until major and sweeping improvement occurs. If you wish to speak directly with some of the employees who were impacted by the Jutro matter, please feel free to contact me and I will try to assist putting you in touch with them. These employees have many great ideas as to what reform would look like. Unfortunately, rather than exploring these ideas, the Agency has at times acted as though this was a group failure, as though frontline employees shared in the blame of Jutro's conduct.

Federal employees, all of whom swore an oath of allegiance to this country, and who each day strive to live up to that oath, deserve better treatment at the hands of Agency leadership. They deserve respect.

Thank you for your kind attention and we confide your continuing concern.

Sincerely,

Michael E. Ottlinger
President, NTEU Chapter 279
26 W. Martin Luther King Dr.
Office MS: Room 159
Cincinnati, OH 45268
(513) 569-7591
OttlingerME@gmail.com
{Ottlinger.Michael@EPA.GOV]

Cc: **Patrick Sullivan**, Assistant Inspector General, EPA, Office of the Inspector General, Office of Investigations
Mark Kaminsky, Special Agent, EPA, Office of the Inspector General, Office of Investigations
Encl. As stated herein

Witness Statement before the 114th Congress, the Government Reform Committee

Witness: Cynthia Colquitt, Management Analyst, EPA Region 5

Date: July 29, 2015

Introduction

Good Morning, Chairman Chaffetz, Ranking Member, Cummings and other distinguished members of the Committee. My name is Cynthia Colquitt, and I work for the EPA as a Management Analyst located in the Region 5, Chicago, Illinois Office. Thank you for allowing me to submit a statement for the record. In the year of 2011 and ongoing until October 2012, I was also discriminated against on the basis of Retaliation/Reprisal by several senior EPA managers within the region.

The retaliation began after I participated and assisted the Regional EEO Officer, Mr. Ronald Harris and the Office of Civil Rights (OCR) Director, Dr. Carolyn Bohlen in 2011. In July 2011, Dr. Bohlen was effectively terminated from her position in that office by former Deputy Regional Administrator (DRA) Bharat Mathur (retired February 2015) as a result of her processing a sexual harassment charge brought by an agency intern, Danielle Sass in the Great Lakes National Program Office. Dr. Bohlen had worked closely with EEO Officer, Ronald Harris, and together they infuriated the DRA Bharat Mather by processing Ms. Sass's complaint and by forwarding information about it to EPA Headquarters OCR in Washington, D.C. Immediately after, they were removed from their positions by Mr. Bharat Mathur, and then my victimization started.

Background

The recent Director who replaced Dr. Bohlen of the agency's (OCR) was Karen Vasquez (retired January 2015), who was my former supervisor prior to my October 2012 reassignment to the Office of Regional Counsel. Mr. Mathur had a meeting with the ORC staff in the beginning of May of 2011, while Dr. Bohlen was out on Sick Leave and told us that Ms. Vasquez will be starting as the Acting Director, while Dr. Bohlen was out on Sick Leave. Ms. Vasquez took orders from Mr. Mathur and harassed me and created a hostile work environment from her first day in the OCR. She even called me a "welfare case" where I would be put in a corner with no work to do. I remember her telling me that I was just a GS-4 and should not be in this position. She demoralized me and told me and others that I was incompetent and would never see the next grade which was a GS-12.

Like Dr. Bohlen, Mr. Harris likewise was transferred or reassigned out of his position and from the OCR staff the same week that Ms. Vasquez began her job with the OCR. Both Dr. Bohlen and Mr. Harris had worked prior to promote me from an EEO Assistant GS-9 position to my former position – EEO Specialist. In late April of 2011, I was promoted in a career-ladder GS-260-11/12 EEO Specialist position. I worked closely with Dr. Bohlen and Mr. Harris prior to Dr. Bohlen's involuntary reassignment, even to the point of being a witness in her case and completing an affidavit on her behalf. Dr. Bohlen's case has now been settled concerning her removal from the position in the Office of Civil Rights.

From the moment Ms. Vasquez replaced Dr. Bohlen as the OCR Director, it was clear that I was considered part of the "Problematic" team of Dr. Bohlen and Mr. Harris. Ms. Vasquez has treated me in a manner which reflected her interest in having me gone from that office. This included marginalizing me by giving me either no work or work that largely was clerical in nature. In short, I watched my EEO Specialist colleagues under Ms. Vasquez perform work commensurate with that position while I either

sat idle or was given clerical tasks. I felt empty every day I walked in that office and isolated and ostracized from the team. On October 23, 2011, I was asked to do a detail in another office (Resources Management Division) as the alternate Local Reasonable Accommodation Coordinator (LORAC) to substantiate my critical elements which was a part of my position description as the EEO Specialist GS-11/12. This was the position that Ronald Harris, EEO Specialist GS-13 was currently doing and was working in that position in the OCR before he was removed out of retaliation. He went on a detail to acting Branch Chief of the Employee Services Branch, so they ask me to come and assist Ronald Harris in that department to act in his absence and the hopes of keeping me permanently.

The following year I was due to be promoted to the EEO Specialist GS-12 in May 2012. I believe my promotion was delayed out of retaliation because of a previous complaint of engaging in a protected activity on being a witness in Dr. Bohlen's EEO case. Ms. Vasquez threatened me and told me that I would never see my GS-12. Shortly I inquired the next year around April 2012 about the status of my GS-12 promotion to be processed and when I found out the paperwork was not done properly and resulted in a delay, I informed the Union Officials and I was immediately terminated out of retaliation, from the detail in the Employee Services Branch and was sent back to the OCR on May 7, 2012, where I was assigned a list of clerical duties which was inconsistent with my position as the EEO Specialist. I asked Ms. Vasquez, *"now that I'm back in my original position, can I have the work back that I was doing?"* She stated that the detailee, Angela Brown (IT Specialist) who was also a GS-12 in the Office of Regional Counsel, had just started a day or two before I returned to the OCR and that she had no intentions on ending her detail just because I was back.

In September of 2012, I suffered serious 2nd Degree burns to my dominant right hand. I suffered permanent nerve damage with limited mobility in that hand and as I prepared to return to work from extended sick leave, I requested a reasonable accommodation from Ms. Vasquez, including a schedule that would allow me to attend therapy and treatment for my injury. After violating my medical privacy, Ms. Vasquez refused to provide these accommodations and made it clear that I should be working somewhere else. Ultimately, my work environment under Ms. Vasquez became so miserable that I was reassigned to the Office of Regional Counsel out of duress on November 5, 2012. I really wanted to remain in the position that I was promoted to as an EEO Specialist GS-12, in the Office of Civil Rights, but it was clear that I was not permitted to do that. I was told by Ms. Vasquez that there was not enough work to go around for me to do at the professional level and she would not be hiring another GS-13 and if the other EEO Specialist and Management Analyst there wanted to share their work they could, but it didn't happen. I was even denied a monetary/time-off award for that year, which was something everyone received in that office. I have been with the EPA for 23 years and have always done outstanding work and received awards every year for recognition. On October 12, 2012, I filed an EEO complaint under retaliation/reprisal. Thereafter, I was pressured into taking the offer to go to the Office of Regional Counsel as a reassignment.

Reassignment

On November 5, 2012, the Office of Regional Counsel began to do the paperwork to reassign me at the same time I relocated to that office under duress. My job title had changed from an EEO Specialist 0260-12 to a Management Analyst 0343-12 (unclassified). I worked without a PD being classified and final for over 60 days and in late January of 2013, I was sent a copy of a finalized PD and no Performance Standards in place. This tells me that I was definitely reassigned due to retaliation under Management Direction.

Feeling empty, scared, sad, depressed, humiliated, embarrassed and paranoid after being rushed into leaving the Office of Civil Rights where I have been since 2004.

In February 2013, a position was posted in the Office of Civil Rights. This position was an EEO Specialist, GS-13 under Job announcement# CI-R5-MP-2013-0006. I applied for the position, but because I was reassigned, and due to my GS-12 promotion being allegedly delayed, I did not qualify for the job and the detailee, Angela Brown was selected for the position who was in the detail less than a year. I had the specialized experience insofar as I was performing the job for the past 7 years but did not have the time within grade. I believed that they needed my FTE to create and recruit the position and make Ms. Brown permanent by offering her the position. So Angela Brown came from where I was reassigned to more like a trade type of deal between the Office of Regional Counsel and the Office of Civil Rights with the backing of the Deputy Regional Administrator, Bharat Mathur.

On April 25, 2013, I filed my second EEO complaint for non-selection and preferential treatment.

Conclusion

Based on the evidence submitted to this Honorable Committee, it is no doubt the I was also one of the victims retaliated against by management officials for providing the kind of assistance required of EEO positions under the anti-discrimination statutes and the federal regulations, including those imposed upon federal agencies by the U.S. Equal Employment Opportunity Commission. I pray that the agency and other agencies are held accountable for their egregious conduct.

Chairman Chaffetz, Ranking member, Cummings and other distinguished members of the committee, thank you for the opportunity to submit my written testimony.

My name is Deborah Lamberty and I was hired in 1991 by USEPA, Region 5 under Superior Academic Achievement as a Program Analyst for the Policy Coordination and Communications Branch (PCCB) in the Great Lakes National Program Office (GLNPO). I began training to work on the GLNPO's inaugural web sites in 1995. Web site development and graphic design became my primary work from approximately that time through 2011. I currently work in the Office of External Communications in the Office of the Regional Administrator. I am a Public Affairs Specialist, supposedly working on web development and editing, with collateral duties as an EEO counselor.

Prelude

It was in March of 2011 that I became involved in the exposure of a sexual harassment cover-up within the GLNPO. At that time, I had been working in the Monitoring Indicators and Reporting Branch (MIRB), reporting to the MIRB Chief, Paul Horvatin. I firmly believe I am continuously being punished for my role in exposing a long-standing practice of sexual harassment on the part of a older male scientist that had gone on for the better part of a decade with the full knowledge of the managers of the division and involved many young female interns in their early to mid twenties. That punishment has included having my primary duties stripped away from me, effectively being marginalized and ignored by the managers who had permitted the sexual harassment to occur until they were confronted by the Office of Civil Rights (OCR) through an investigation in which I was instrumental in initiating. The punitive radius resulting from bringing this outrageous matter to light is long, and, I fell within it

It was at that time that the Monitoring and Indicators Branch (MIRB) secretary told me that a young female intern was having an issue. She thought that because I was an American Federation of Government Employees (AFGE), Local 704 Union steward, that I might be able to help the young intern with her issue. Although she didn't explain the details, she felt that it was important for me to visit with the young intern and offer her some help. I found her in her cubicle. As I sat down, I explained that our secretary was worried about her, but that she didn't tell me why. I went on to say that she thought, in my role as a union steward, I could help her. It was then that this tense and frustrated young woman explained that she was receiving unwanted sexual attention for some time from her mentor, an older male scientist named Paul Bertram. He began his harassment by physically touching her back, shoulder, or leg; he then escalated to hugging until one day he kissed her. At the time, he was 62 and she was 24. She became so uncomfortable and freaked out, that she decided to inform our supervisor, Paul Horvatin. Despite reporting the matter to him, both verbally and in writing, he did nothing, escalating the tension she felt. She continued to be required to work on the same floor with this scientist and to interact with him on a daily basis. His sexual harassment of her continued in the form of winks and blown kisses. She was upset and extremely frustrated. I was stunned. Although I had experienced Mr. Horvatin's chauvinist treatment firsthand, but I couldn't believe that this poor young woman was being put through this with his full knowledge and disregard. I told her not to worry. I would get back to her that day with some advice.

It was then that I ran into Ronald Harris, EEO Officer in Region 5.

I told him about the outrageous behavior to which this intern was exposed. I also explained that she was working with the Human Resources Branch on this matter of sexual harassment by Dr. Bertram. I told him how upset she was that nothing was being done because, despite Human Resources' awareness of the problem, she saw Dr. Bertram every day and continued to be harassed by him. Mr. Harris told me that the best thing she could do was to come see him. OCR addresses allegations of sexual harassment in the work place. Like me, I knew Mr. Harris would listen to her and do the right thing.

When I returned to GLNPO, I went to see the intern. I told her that the best place for her to go would be the OCR because this matter falls directly under their jurisdiction and they could take more aggressive action. I explained to her that I had known Mr. Harris for years and that he was extremely capable. At some point after this, on my recommendation, she made contact with OCR and they began an investigation.

It was then that the careers of many of those directly involved in exposing and addressing the sexual harassment allegation were changed and, in my case, ruined. I was taken to task and humiliated for my involvement in doing what was right and bringing this matter to light.

Many senior and mid-level managers made decisions that stopped the investigation from going forward and attempted to cover it up after it was reported to the OCR. In this investigation it became clear that Dr. Bertram had harassed many young woman in his career with USEPA and in his career before USEPA. It was also clear the Mr. Horvatin, Bharat Mathar, the Deputy Regional Administrator (DRA), and GLNPO management were complicit for those many years. The sexual harassment was simply condoned. The Regional Administrator, Dr. Susan Hedman, a *woman* who had the power to discipline those involved in the cover up of a sexual harassment scandal against other *women* and reward those of us who did what was right, turned a blind eye to the situation. Even worse, she is complicit in allowing the retaliation and the marginalization of those few of us directly involved in bringing the matter to the light of day. She is complicit in our harassment and our humiliation; she allowed us to be stripped of our future with the Agency. To this very day she has yet to make things right and she allows and encourages the retaliation to continue. Because she can.

This will be her legacy.

Background

Sometime in October of 2010, I requested of my supervisor, Paul Horvatin, his support in my going forward with an accretion-of-duties desk audit. It was with his approval that I made arrangements in approximately February of 2011 to begin the process.

Meantime, in January of 2011, I was told that I was to be realigned to the Immediate Office of the Great Lakes National Program Office with other Web Developers and Information Technology staff. This information came directly from Dr. Susan Hedman.

Then in March 2011, I did the right thing and helped a woman find peace in the workplace.

Punishment, Part 1

The following information will reflect the continuous retaliation inflicted upon me for the past 4 years, whenever I made a move to resuscitate a career that was struck from my work

life. Retaliation isn't always loud and full of itself; it can be quiet and chilling, the soul-crushing kind, the kind that leaves you alone in your cubicle in tears in the middle of the day.

Sometime between April and May 2011 I discovered that, without my knowledge, I was being excluded from meetings on a SharePoint web site project that I was co-leading. Pranas Pranckevicius, a web site colleague and former mentor, was now acting in a lead role, my role, and the role that I had performed for the last year or so. In May 2011 I reported this to Ms. Carney, showing her an email sent out by the project's contractor which reduced me to a supporting role, hoping she would intervene and restore me to the leadership role listed in my PARS agreement. Instead, she allowed Louis Blume and Pranas Prackevicius to continue to exclude me from my lead role, which would have offered me advancement. I was also excluded as a member of the Steering Committee for the Annual GLRI Quality Assurance Technical Conference of which I was a member in the prior year.

I went to Ms. Carney for help but instead she was in on the reprisal, part of the syndicate that "leads" Region 5. Another grade controlling factor stripped. My career was disappearing with each passing month.

I decided to see Ross Tuttle, Human Capital Officer, about what was going on with the GLNPO realignment. In the course of our conversation we discussed the sexual harassment investigation within GLNPO. I explained to him that I was the person who got OCR involved by suggesting the young intern speak with Mr. Harris.

We also discussed career opportunities and he said he was looking for a Program Analyst. Later, after seeing my qualifications, he spoke with Wendy Carney, Deputy Director in GLNPO and David Cowgill, then acting Director of GLNPO, in approximately June 2011, about offering me a developmental detail to his branch. Mr. Tuttle testified in his EEO deposition for my EEO complaint that while he was speaking with Cyndi Colantoni, Associate Director, Resource Management Division (RMD), and Walter Kovalik, Assistant Regional Administrator, regarding a detail for me to the Human Resource Branch (HRB), Ms. Colantoni proclaimed to Mr. Tuttle "I can't believe you would consider using an activist." Also Mr. Kovalik thought that the "optics" had to be considered.

In June 2011 I remember Mr. Horvatin coming into my cubicle and bragging to me that he was the person behind Mr. Harris' reassignment. He had seen Mr. Harris and me commiserating near my cubicle during the sexual harassment investigation and knew we had a working relationship many years before. Because Mr. Horvatin rarely interacts with me, I found this revelation on his part to be a veiled threat to my own standing within the Division and the Agency.

In July 2011 two Program Analyst Grade 13 positions were posted for OCR. Since I was classified as a Program Analyst, and wanted a chance at a promotion, I applied for one of the positions but was found "not qualified." Yet, the person who was promoted to this Program Analyst position was hired when Ms. Vasquez removed the qualifications.

In September of 2011, with the support of Mr. Tuttle, Mary Ann LaFaire, Supervisor, Workforce Development Team (WDT), Human Resource Branch and I agreed that I would officially request a 120-day developmental detail of my managers, to Ms. LaFaire's Workforce Development team.

On October 4, 2012 in an email from Ross Tuttle, I was denied the chance to participate in the detail. Mr. Tuttle told me that he did not agree with this but had been directed to do this by his superiors, Mr. Kovalik and Ms. Colantoni, the same individuals who had earlier called me an activist and a troublemaker. Clearly reprisal.

It was more important for the senior staff to keep "an 'activist' and 'troublemaker,'" in my place rather than give me an opportunity to utilize my time constructively in the HRB, WDT.

An important indicator of this twisted way to manage human capital and "preserve resources" is that at that point I was without assignments. During the time period of the 120-day detail, beginning on October 8, 2011 and ending on approximately February 4, 2012, I was Idle, without work, unoccupied. I was given no new work to do until the end of January, and then only more basic grant administrative stuff. The 4 grants that I was assigned in 2010 only required basic administrative work. The cost to the taxpayers for me to be idled and preserve USEPA Region 5 syndicate's power was approximately $25,000.

During this period, Susan Hedman, Bharat Mathur, and Elissa Speizman, Senior Policy Program Advisor, ORA had been working behind the scenes with Human Resources to create a Web Group, which would report directly to the ORA. This was to be a new organization within the ORA. Mr. Tuttle believed this should be done as a reorganization. ORA, specifically Elissa Speizman, Senior Policy Program Advisor, and Cyndi Colantoni, Associate Director of the Resource Management Division said it was realignment. Those who were to be in the Web group were John Jeffrey Kelley on a detail from Superfund to ORA, Yvette Pina, recently reassigned from the Superfund Division to ORA, Karen Reshkin, who was to be realigned from Office of Public Affairs to ORA and Jennifer Ostermeier, Public Affairs Specialist in the Water Division, who was to be reassigned to ORA. Shared Service Center (SSC) in Cincinnati pronounced this to be reorganization.

As it was told to me by Mr. Tuttle, Cyndi Colantoni, Elissa Speizman, and Nancy Chicarello, Acting Director, Human Resource Management Division, of the Shared Service Center, made sure that in November of 2011 the formation of an illegal web group, regardless of that ruling and without the benefit of a reorganization, would go forward, made up of details and reassignments.

I was stripped of my career due to illegal actions on the part of primarily Dr. Hedman, Mr. Mathur, Ms. Colantoni, Ms. Chicarello, Ms. Speizman, Mr. Horvatin, and Mr. Kelley.

Before there was an approved ORA realignment or reorganization, I received written notification of a change in my critical elements of my 2012 Performance Appraisal and Recognition System (PARS): the removal of my web duties, the removal of my lead role in the Quality Assurance SharePoint site, and no longer being in any national workgroups that were part of those two elements. These web duties represented 95% of my duties at that time, which were then lined out from my Position Description (PD) with a pen and a ruler, signed by Paul Horvatin and Christopher Korleski, but never classified. (In my EEO ROI, there are two copies of this PD one without a signature and one with a signature; someone is HR signed and backdated the PD cover sheet). In his deposition for my EEOC, Mr. Horvatin admitted that *he had removed major duties from no other employee's position description in his thirty-three years of supervisory experience.*

This deliberate action removed 95% of my duties and has devastated my career. Since this Position Description (PD) was never classified, it is not my legally classified PD and my web duties remain in my legal position description. I was to be a full time Project officer, something that I had never done before in my (then) 20-year career with the US EPA, and had very little training to perform.

The removal of my primary duties and grade controlling functions would no longer allow me to seek a promotion based on accretion of duties. Without my web duties, without the SharePoint web site lead, and without membership in two national workgroups, I would no longer qualify for a promotion, which amounted to a constructive demotion. In fact, a desk audit done then, due to my lack of experience as a Project Officer, would have adversely affected my grade level. I was told by a colleague who was on a panel that selected PO as Program Analysts that I would not have qualified for a Program Analyst job posting at the GS 12 level. The absence of the grade controlling functions necessary to maintain my current grade level had been struck from my position.

What is curious is that there was an abundance of various kinds of web work being performed in GLNPO by those without these duties in the PD or the experience that I possess. This work is intentionally kept from me. For others who worked on this work has led to high profile assignments; greater chance for advancements; greater award amounts.

After I had filed a formal EEO complaint in February 2012, coincidentally a yearlong detail position (this detail had the potential to become permanent) of GS-13 Public Affairs Specialist within the Office of Regional Administrator was posted for competition. (This was the position that Jennifer Ostermeier was to be reassigned to before my complaint was filed). Ms. Ostermeier was included in web meetings with others who would make up the new Web Communications Section, tasked with the Region 5 Facebook page before the realignment/reorganization was to take place (an email that announced a Great Lakes Facebook page was distributed widely in GLNPO with the exception of me).

An ORA reorganization creating an External Communications Branch without the input of Human Resources was submitted to Human Resources for signature in July of 2012. Again, it shows favoritism and preferential treatment and neglected to mention those whose careers were adversely affected. It had been approved and signed by Dr. Hedman, the Regional Administrator. Mr. Tuttle testified in a deposition that he refused to sign what he saw as an illegal reorganization. Furthermore, he testified that a meeting between his supervisor, Cheryl Newton, Assistant Regional Administrator, Cyndi Colantoni, Associate Director of RMD, and Eric Cohen, Attorney, Office of Regional Council (ORC) was held in Cheryl's office regarding his refusal to sign. The reorganization was sent on to Headquarters for approval without the signature of the Human Capital Officer.

EEO and OSC

In November of 2011, I filed an informal EEO discrimination complaint based on several factors including retaliation.

This complaint became formal in February 2012. The investigation took almost 9 months longer than the law allows. This report was completed without benefit of my complete rebuttal. This treatment of my complaint has generated a faulty investigation.

After three-and-a-half years, I have no resolution. My opposition response to the Agency

motion for seeking findings and conclusions without a hearing is languishing on an Administrative judge's desk for over a year. The handling of my case in this manner will only cause more delays, be more costly to both the taxpayer and me, and further extend my suffering at work.

In my mid-year review in April of 2012, Mr. Horvatin made several references to my EEO complaint. He even mentioned the sexual harassment investigation, wanting to know if I had linked it to my complaint. This is against protocol. Mr. Michael Mikula, an AFGE Local 704 union steward, was also present as my representation, and he pointed out that my PD was never classified and therefore illegal.

Another noteworthy fact is that some agency managers got free legal advice while involved in the investigation of my complaint. This is against government protocol.

In October 2013, I filed a whistleblower complaint with the Office of Special Counsel (OSC). It was accepted for investigation and assigned an attorney. It too is languishing on someone's desk. After more than 18 months had passed with no action, I asked the case attorney if the Agency had even been offered to consider Alternative Dispute Resolution (ADR). They had not. The case was then moved to the ADR unit, and one of their representatives contacted the Agency to offer ADR. Without even a discussion, Region 5 flatly refused. The case is back in limbo, a place called the "Investigation and Prosecution Division." I again spoke with the attorney for OSC and she told me within the next two weeks (this was on 5/26/2015) they would begin conducting the investigation and interviewing witnesses. It is now July 21, 2015, and I am unaware of any kind action in this investigation.

As the saying goes, justice delayed is justice denied.

Wanting to be heard, I am now submitting testimony to the Congressional Committee on Oversight and Government Reform. I believe that this is as high as I can go.

Punishment, Part 2

Mr. Horvatin used 3 Great Lakes Restoration Initiative (GLRI) Full Time Equivalents (FTE) to hire three new employees. Their position descriptions have their organizational titles as "Project Officer" which requires that they perform 25-50% Project Officer duties. Yet, in 2011 -2013, they did as little as 10% to none of project officer work. This is one example of disparate treatment of me by GLNPO management.

I consistently asked for work other than Project Officer work and Mr. Horvatin tells me that he has nothing for me, there is no web work being done in the division, and he has no work that is listed in my PD. He refuses to distribute work within the Branch to me in a fair and equitable way. However, Ms. Hinchey Malloy performed some of the very duties in my PD that are going to get her a grade increase. I am not afforded the same opportunities or career development as anyone within the MIRB, GLNPO, or Region 5

I was told by Cynthia Colquitt, Program Analyst, ORC, that John Piper, Environmental Protection Specialist, GLNPO, was doing the Division's intranet web site. They chose to give this job to someone without ANY web experience over giving it to me.

An issue accepted for investigation in my EEO case concerns my exclusion from work on a

packet prepared relative to a research vessel, the Lake Guardian, managed by GLNPO. The document was a welcome packet. As much as anything, the issue represents Mr. Horvatin's motivation to isolate and idle me. The packet itself serves to demonstrate that Mr. Horvatin cannot be believed about anything.

The packet was created at a time when I had no work and continuously asked for it. I previously had prepared videos relative to the vessel and created the Lake Guardian web site. It would make sense that I would contribute to a welcome packet. When asked at his deposition why he did not seek to include me in the preparation of the packet, Mr. Horvatin's initial explanation was galling: he said he hadn't the faintest idea the I would have wanted to participate. He then altered course and explained that the document was highly technical. He testified that due to the highly technical nature of the document, he assigned a scientist with a PhD in chemistry to prepare it. Even a cursory review reveals that it is anything but "technical." No PhD is necessary to describe when meals are served or what combination of bells signal that a passenger has fallen overboard. The actual document, which the parties did not have present at Mr. Horvatin's deposition, represents compelling evidence that Mr. Horvatin lacks credibility.

At this time in GLNPO, 2011 through 2013, there were at least 7 workgroups or teams. I was a member of not one. Before March 2011, I was on at least 2 teams within the division, 1 regional workgroup, and 2 national workgroups. The change is significant and again points to disparate treatment and retaliation.

Having been stripped of my career and advancement, I have asked Ms. Cheryl Newton, Assistant Regional Administrator, to be reassigned and detailed at least 5 times, have applied for details and collateral opportunities for which I am qualified to better utilize my many skills. I have either been ignored or denied these opportunities by the influence of the syndicate members: Bharat Mathur, Susan Hedman, Cyndi Colantoni, Cheryl Newton, Wendy Carney, Karen Vasquez, Elissa Speizman and Walter Kovalik and their cronies: Paul Horvatin, Christopher Korleski, David Cowgill.

In January of 2012 I was invited to participate in several Workforce Development Team (WDT) workgroups. When I told Mr. Horvatin I would like to participate, he replied, "I am not aware what this effort is nor have you briefed me on what your involvement will entail and time commitments. Please schedule a meeting with me as soon as possible to brief me on this. Thanks." I scheduled a meeting for 1/23/2012 also including MaryAnn LaFaire, the supervisor of the WDT. After our meeting, Mr. Hovatin made a visit to Ms. Colantoni, syndicate kingpin. According to Mr. Tuttle, Ms. Colantoni pulled him and MaryAnn LaFaire into a meeting where she told him that Mr. Horvatin had contacted her because of the meeting that took place the previous week in with Maryann Lafaire and me.

In Mr. Tuttle's affidavit for the investigation into my EEO, he states that, "Mr. Horvatin had sent an e-mail to Ms. Colantoni in which he stated that he felt that the meeting he attended was a "set up" or word to that effect. Given that Ms. Colantoni had already directed me to deny a developmental detail to Ms. Lamberty some four months previous to this because she believed, and so stated, that Ms. Lamberty was a "trouble maker," a "Union activist," ...Ms. Colantoni was very agitated during this meeting with Maryann and me. She stated that she was "sick" of this (Mr. Horvatin calling her and complaining about being "set up", etc.) and stated that if she heard or received "one more incident" involving Deborah Lamberty that there would be significant trouble. We were

specifically told to NOT include her on any workgroups, teams, projects, etc. When I left her office, I was so upset that I was shaking. I genuinely feared that Ms. Colantoni would initiate some kind of action to remove me from federal service (I was career-conditional at this time)(and I had done nothing illegal or violated any regulations). The severe trepidation lasted for almost seven (7) more months until I crossed over to career-permanent status. I was being treated by a doctor for depression, anxiety, and taking prescription medication to keep me calm and focused on my job." I was now officially being excluded from workgroups of any kind.

I became a certified coach, paying for this certification myself. This enabled me to become a member of the Agency's "Coaching Cadre." The Office of Personnel Management (OPM) recognizes coaching as a valuable tool for improving employee productivity and morale. I have asked that the Coaching Cadre be included in the monthly newsletter that Ms. Newton edits and issues. This would alert staff to this free benefit of their employment. Every time I have submitted this information, it has been struck out. As recently as 4/2015, I was denied having this information posted on the regional intranet site via the Region's intranet suggestion box (see "Now").

I have had to endure the hostile work environment in which I find myself ostracized and vilified by colleagues, with managers and staff conspiring to keep work of consequence away from me. This has left me alone, isolated and sometimes in tears. This is humiliating, disheartening, and detrimental to my health and well being,

I was told by another staff person in my branch that she overheard a colleague asking our branch secretary, whom she sits directly behind, if she would help her "get Deborah." She also overheard this same colleague state that she refused to come into the office until she was moved to a cubicle far away from where I sat.

When working on reviewing new grants, it is beneficial to work on them at home, in solitude. This is pretty standard for POs within GLNPO. But Mr. Hovatin couldn't resist another chance to harass me by disapproving my request to review grants from my home in August of 2012. I elevated it to Ms. Carney, and Paul backed off.

While working at home on 8/7/2012, I was blind copied on an email from Valorie Vigilant. The salutation is "GLNPO," giving the appearance that it had gone to the whole division. The MIME Stream shows it went only to me, Deborah Lamberty.

The MIME stream indicates that there were others involved in the distribution of this harassment because there is the note in the MIME stream that reads:

"tell paul that Iwill bring that up in our initial meeting and get back to him"

This MIME stream message was from Valorie Vigilant to someone who knew about this fake email and knew to look in the MIME stream for messages. Paul Horvatin was my supervisor, so that is the Paul to whom Valorie is referring in the MIME stream. It is safe to assume that Mr. Horvatin had contacted Ms. Cyndi Colantoni and Mr. Ken Tindall, Information Management Branch Chief, about doing this kind of harassing message. This shows that Mr. Tindall, Valorie's supervisor, and Ms. Colantoni, Mr. Tindall's supervisor, were all complicit in this harassment of me.

When I first saw this message tucked into the MIME stream, it sent a chill up my spine. This

brought home that these senior people were undaunted in their continued harassment of me in subtle ways.

When I checked my VM that day, 8/7/2012, Mr. Horvatin had left me a message, and he was aware that I had not activated the EC500.

I applied to the Mentoring Program, a benefit and privilege allowed to *all* US EPA employees. My supervisor and other Regional managers were unwilling to approve this privilege for me until I elevated it to the AFGE Union Steward, Jeffrey Bratko. Mr. Horvatin waited until the very last minute to let me know that I was accepted into the mentoring program 4:17 PM on 9/18/2012. This behavior on his part is appalling and Wendy Carney, Chris Korleski, Cheryl Newton, senior managers, cooperated in this mistreatment of me.

Mr. Tuttle was pulled into a meeting with Cheryl Newton, Assistant Regional Administrator, Cyndi Colantoni, Associate Director of the RMD, and Mary Ann LaFaire, Supervisor, WDT, HRB. He was questioned as to why I was being allowed to participate. This illustrates their vengeful treatment of me not only in GLNPO but also throughout the Region.

On July 24, 2013 I received a letter from Ms. Cynthia Darden, Assistant Director, Office of Civil Rights, advising me that I was not selected for the EEO collateral-duty counselor, an opportunity for which I applied for in January 2013. The original announcement in EPA@Work Newsletter states that "While no prior counseling experience is required, previous counseling or mediation experience is helpful." As a certified Life/Career Coach, a member of the US EPA's Coaching Cadre, and a former AFGE Local 704 Union steward, I possess this experience. There was no clear explanation given as to why I was passed over for this collateral-duty position. Ronald Harris can testify that the selecting official on this type of position is the Director of OCR, Karen Vasquez.

It wasn't until 11/2014 that I got another opportunity to apply. Florine Matthews is the new EEO officer in the region. She was awarded this position through an EEO complaint against Ms. Vasquez. Ms. Vasquez was retiring so she had no more influence over the situation.

Not that she didn't try.

Ms. Matthews wanted me to know that when my application came to her for her perspective, she expressed to Ms. Vasquez that I would be a fine candidate. "But she has an EEO complaint in the system," Ms. Vasquez pointed out. Ms. Matthews has told me that she would sign a sworn affidavit stating that this occurred.

In August of 2013 awards were given out. For the first time in my USEPA career, I was passed over for a performance award. The continuing retaliation, marginalization, and disenfranchisement were escalating.

Something else that is noteworthy is that during that fiscal year, 7 or more staff from different branches within GLNPO were creating a SharePoint site, a type of web site. They all received large awards for this work. Being that I was constantly told that there was no web work in our division, I sent Paul an email asking why I wasn't involved in this. He emailed me that it was a SharePoint site, not a web site. This from a man who doesn't know what he is talking about but thinks he knows it all.

This is the incident on which the OSC decided to investigate my claims.

Now

Not much has changed with my new position. I was hired by Jeff Kelley to be an Editor-in-Chief for the Web Communications Section (WCS) in 12/2013. During my interview, there was a panel. This is highly unusual for a GS 12 position. It is standard for the higher graded positions but not for anything below GS 13. I In addition to Mr. Kelley was Karen Reshkin, (at the time) Acting Section Chief, and Anne Rowan, Chief of Public Affairs. They explained that the duties would involve redesigning web sites for the new OneEPA web site, be mostly content coordination and writing. I was told that computer work would be minimal. It sounded great. I had done writing professionally before, had a writing degree, and would like to get away from all the computer work. Mostly I wanted to get out of the hell I was mired in the GLNPO. Even though this was another lateral position and I had experience going back to 1995, I accepted the position, not before making sure Mr. Kelley understood that I wanted growth opportunities (It is noteworthy to mention that the other woman was hired to the same position at the same level without any experience in web development or web computer software).

I am still being marginalized in many ways. I have no voice in any decision-making or new career opportunities. In fact, the suggestions I make seem to be ignored until they become assignments for other staff.

I have minimally used my writing skills, mostly receiving assignments that require nothing more than computer skills. Instead, I am often idle or working on clerical-type web duties such as updating current web sites with new reports or materials. Others in this section are required to write daily. It is more of the same.

For fiscal year 2015, Mr. Kelley gave me a lower award then the previous year even though I received an enthusiastic recommendation by the EEO Officer for my work on a difficult and complex case as an EEO counselor. A few weeks later he sent an email saying he "had made an error on my award" and was giving me a cash award. Someone must've reminded him about my OSC complaint.

I was volunteered by my supervisor to be a coordinator for the Office of the Regional Administrator on the annual Awards ceremony. When I began coordinating the others involved, my supervisor made it clear to me that he was to carry out this coordination. I asked for clarification via email but received none. As per usual, I was given no assignments. It is extremely humiliating and awkward for me to sit in meetings with nothing to say or contribute. Same old song.

In an Office of External Communication meeting we were told by Ms. Rowan of an opportunity to work DIRECTLY with the DRA, Robert Kaplan, This project was the redesign of the employee intranet. Mr. Kelley announced that Resource Management Division was still going to be responsible for doing the maintenance and we would be responsible to redo the content. I was the only person at the meeting to volunteer. Ms. Rowan looked scared. Later, I asked my supervisor if I could lead the team, using the recent management training as a good reason. Also, Mr. Kelley told me in my mid-year review that I should have a project to work on, anything I wanted. Instead of even considering this, Mr. Kelley said he had given the lead to Mike Rogers, a writer who has no experience in web design. Opportunity for

others. Mr. Rogers intends on retiring in a few months and isn't looking for career advancement.

Instead of getting to work directly with the DRA, Mr. Kelley told me NOT to talk with the DRA on this project. I was stunned. Mr. Kaplan also happens to be my second line supervisor. In an all hands meeting, the DRA wanted to make it clear that ALL are welcome to talk with him, that he has an open door policy. I find this to be more evidence of a hostile work environment when it would be considered insubordination to talk to the DRA. Apparently, the door is only open for some.

One day an emergency web site needed to be created for a train wreck that had happened in Galena Illinois, posing an environmental emergency. The day before, all web developers were trained in the new software used for the new web pages. One individual called in sick, so didn't receive the training. On the day of the train wreck, Ms. Reshkin and I were in the office. Instead of giving me an opportunity to create this site, Mr. Kelley gave the assignment to the woman who didn't attend the training and didn't know the software. She was working at home that day, which can sometime affects direct communication, whereas I was right there in the office and easily accessible.

Mr. Kelley had no problem when the other GS 12 EIC suggested that she attend an important conference and "tweet" the highlights from the conference on Twitter. She wasn't given an invisible role but instead was lauded for this idea. I think this is great for her. I would like the same consideration and respect.

The Region had recently spent $4k to train me for leadership. The "give a dog a bone" strategy. Each of the trainee's supervisors was to do a 360 review of the trainee, assessing their strengths and weaknesses. I was the only person in the training without a 360 review. I was again humiliated.

Yes, I am a graduate of the Mid-level Leadership Development Program. Too bad no one has any intention on letting me use it because they don't really want leaders, they want followers. To me, this is cruel, leaving me feeling worthless and invisible.

As I am a certified coach and am recognized by the agency as such, when I try to get this information out to regional staff, my efforts are blocked.

On the new intranet there is a suggestion box. I thought I would suggest that the Region make use of my experience in this area: "The 2/15 Federal Employee News Digest's top story was about the cost savings of federal internal coaching. Wouldn't it be great if Region 5 knew that it has an internal certified coach (Deborah Lamberty, OEC)? Coaching information could be disseminated in the HR newsletter and intranet site."

There answer was that "The Human Capital Branch lists employees who have self-identified as a facilitator at (web site link)... Anyone who would like to be added as a coach should contact Pat Easely. Please note, the Region does not monitor or endorse specific facilitators or coaches."

Since I am not a facilitator, listing me with other facilitators is the same as not listing me at all. And the fact that they name individuals separately as facilitators is the same as endorsing them.

Another example that I am being targeted is that when I *lowered* my transit subsidy due to a change in seasonal transit needs, I was sent a threatening email from the comptroller, Dale Meyer. In addition, the HCO, Amy Sanders, thought this issue was important enough to email Mr. Kelley, my supervisor, over the weekend of 3/8 - 03/9/2015 with the hopes that this reduction was due to a disciplinary action (no email copy but Mr. Kelley did show it to me). I believe this action by Ms. Sanders is an example of my being in the crosshairs.

After more than 18 months of asking for some of the Great Lakes National Program web site work with which I am familiar, I was recently given some of those assignments. I have contacted Mr. Horvatin and his staff 3 times to begin the transformation of the material but have received only silence. This web transformation has a deadline of 9/15/2015.

As recently as Tuesday, 7/21/2015, I was receiving email notifications from Lynn Calvin, who is retired. These were email receipts. Someone is watching me and it isn't the retired Lynn Calvin.

Also noteworthy is the Mr. Horvatin was nominated for 3 awards by Dr. Hedman this past year and received them on 7/23/2015. His career is flourishing!

Conclusion

Although I thought I had a better opportunity in the WCS that has to not been the case. It is almost as if Mr. Kelley is following orders from his superiors. No doubt he is. He works very closely with Dr. Hedman and I am sure when I was hired, there were discussions on how I was to be "handled," or, more accurately, mishandled.

I live with this dire situation every day of my work life. I am grateful that I have been given the privilege of Flexiplace. It removes me from the reminder that, to my managers and staff, I am worthless and a troublemaker.

If given the choice to help out an upset intern, or anyone else in need of help, I would still do the same thing, the right thing.

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

REPLY TO
ATTENTION OF

CECW-CEO

15 May, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

MAB 15MAY15

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

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

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

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

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

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

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

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

Building Strong!

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

Encl.

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

REPLY TO
ATTENTION OF

CECW-CO-R

15 May 15

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

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

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

1. References

a. *Draft Final Economic Analysis of the EPA-Army Clean Water Rule*, U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, 21 April 2015

b. *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States*, U.S. Environmental Protection Agency, June 20[illegible]

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

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

EPA's Economic Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EPA's TSD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jennifer A. Moyer

JENNIFER A. MOYER
Chief, Regulatory Program

iew Comments on *Economic A rsis of the EPA-Army Clean Water Rule* (April 27, 2015)

Paul Scodari, CEIWR-GW
May 11, 2015

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

Major Revisions from 2014 Report

1. Revised estimate of increase in jurisdictional determinations.

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

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

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

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

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

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

3. Representation of USACE views

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

What Did Not Significantly Change from 2014 Report

1. Section 404 dominates estimated rule costs and benefits

In both the 2014 report and the 2015 report, estimated effects for Section 404 drive the estimates of rule costs and benefits. In the 2015 report, the "high" estimate for Section 404 compliance costs (sum of permit application and mitigation costs) represents 80% of total rule costs, and estimated Section 404 benefits accounts for 87% of total rule benefits. While the 2015 report did not include estimates of increase in USACE costs for administering the Section 404 program; revised estimates apparently were not yet available for inclusion in this draft.

2. Proportionality of estimated Section 404 benefits to costs

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

3. Section 404 benefits analysis

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

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

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

REPLY TO
ATTENTION OF

CECW-CEO

27 April, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

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

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

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

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

Building Strong!

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

Printed on Recycled Paper

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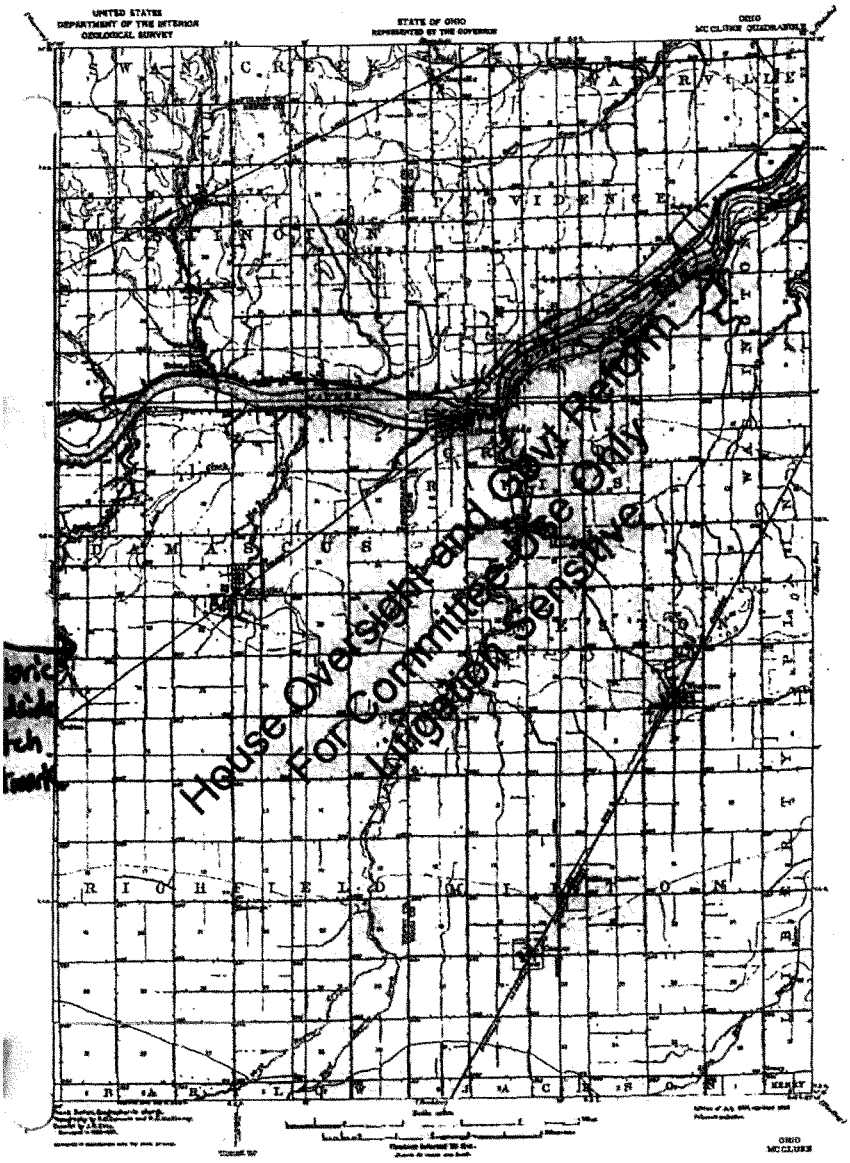


EXAMPLE #13

Adjacent Wetlands, Chickasawhatchee Creek, GA

31.345246°N, -84.446706°W

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

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

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

Associated with an unauthorized activity and an NWP action (SAS-2012-912).

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

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

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

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

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

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

Elmejet 8

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

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

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

Pete

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

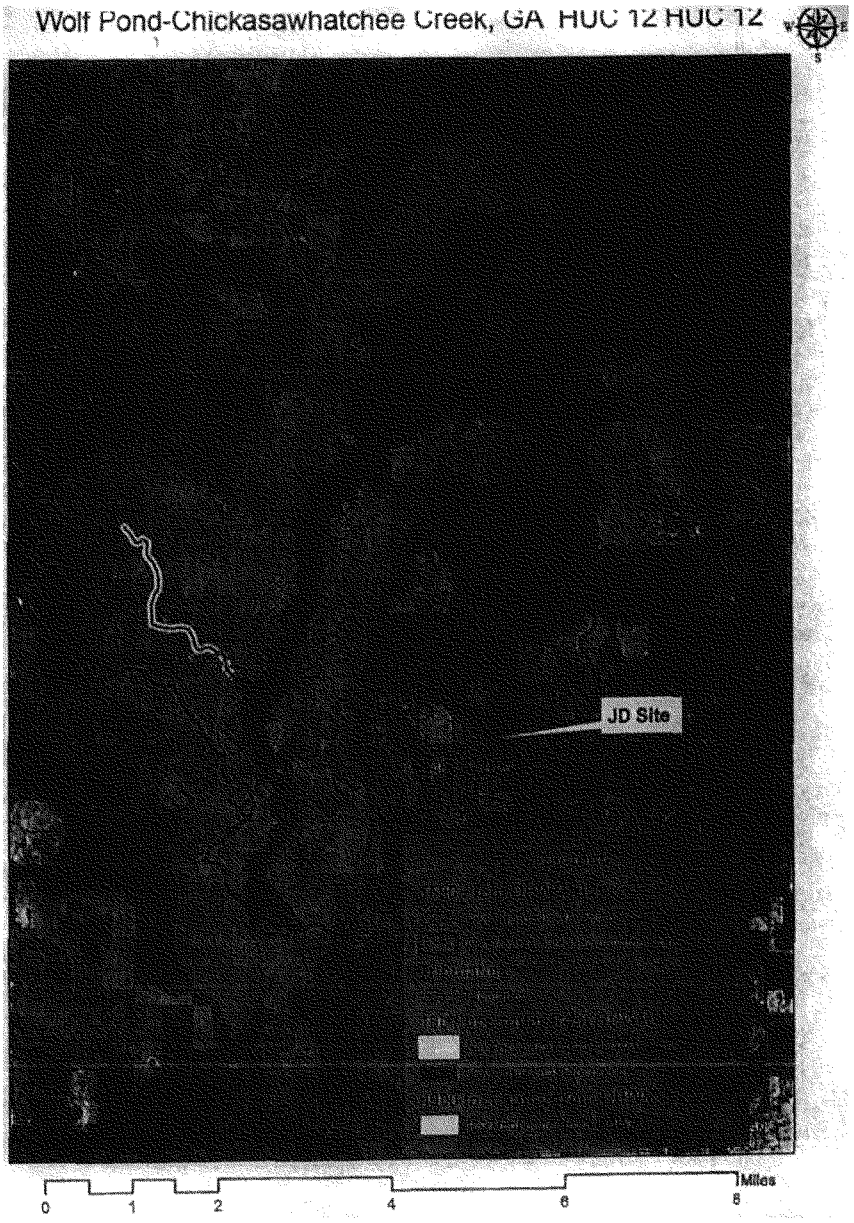
Washington, DC 20460

Room 4110

William Jefferson Clinton Federal Building South (WJC South)

Mail Code 2243A

202-564-1841


Wolf Pond-Chickasawhatchee Creek, GA HUC 12 HUC 12
JD Site
Miles
0
1
2
4
6
8

EXAMPLE #14

Adjacent Wetlands, California Creek, WA

48.929721°N, -122.635156°W

See map entitled, "Dakota Creek HUC 12."

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

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

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

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

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

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

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

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

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

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

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

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

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

Peter Stokely

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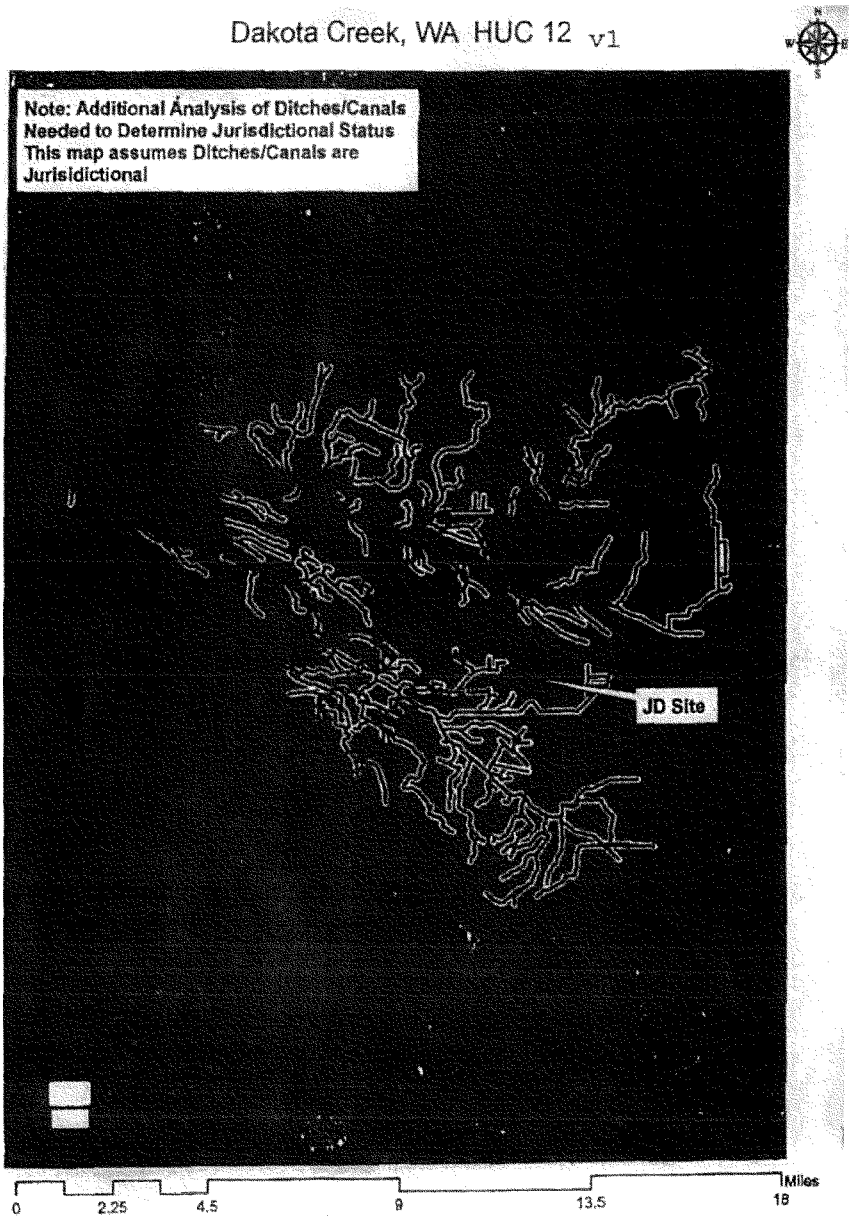
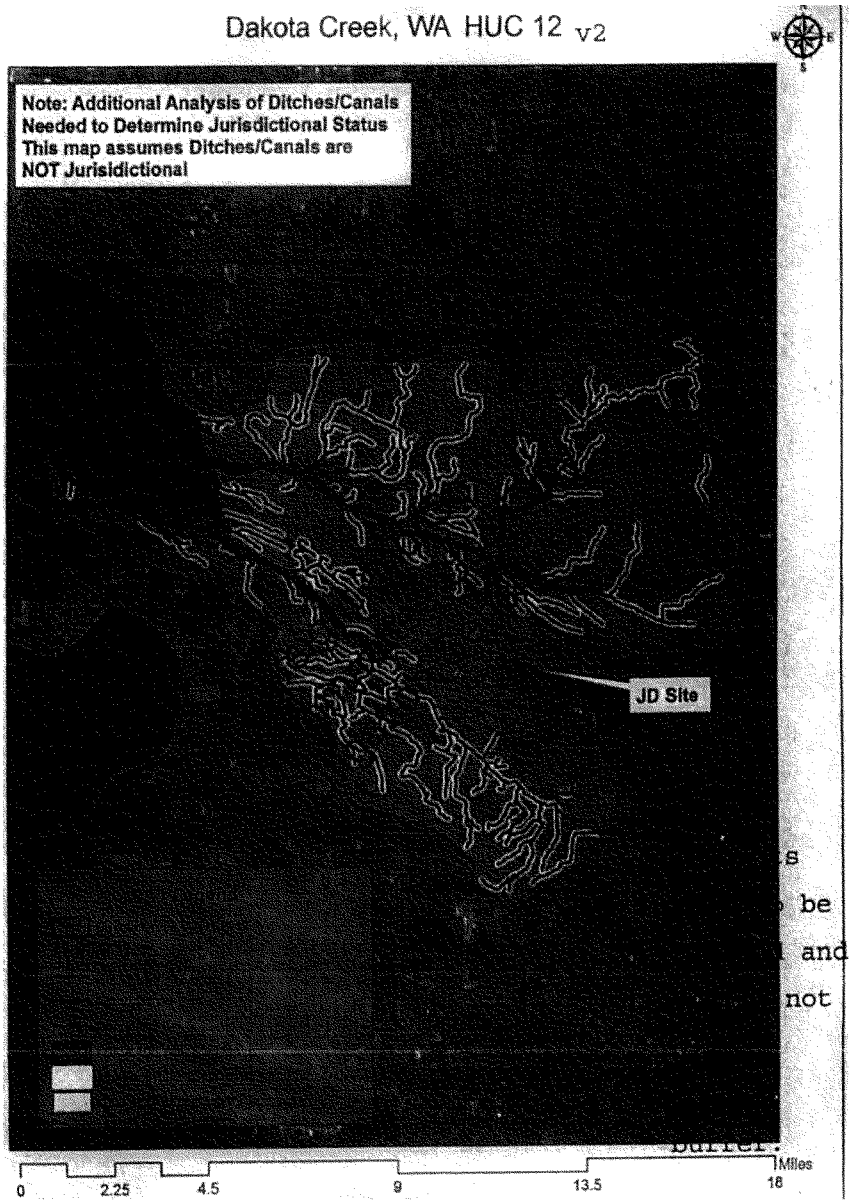

Dakota Creek, WA HUC 12 v1
Note: Additional Analysis of Ditches/Canals Needed to Determine Jurisdictional Status This map assumes Ditches/Canals are Jurisidictional
JD Site
0
2.25
4.5
9
13.5
18
Miles


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

s

be

and

not

EXAMPLE #15

Adjacent Wetlands, Edmondson Slough, Mississippi River, MS

37.290869°N, -89.482414°W

See map entitled, "Edmondson Slough HUC 12."

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

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

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

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

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

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

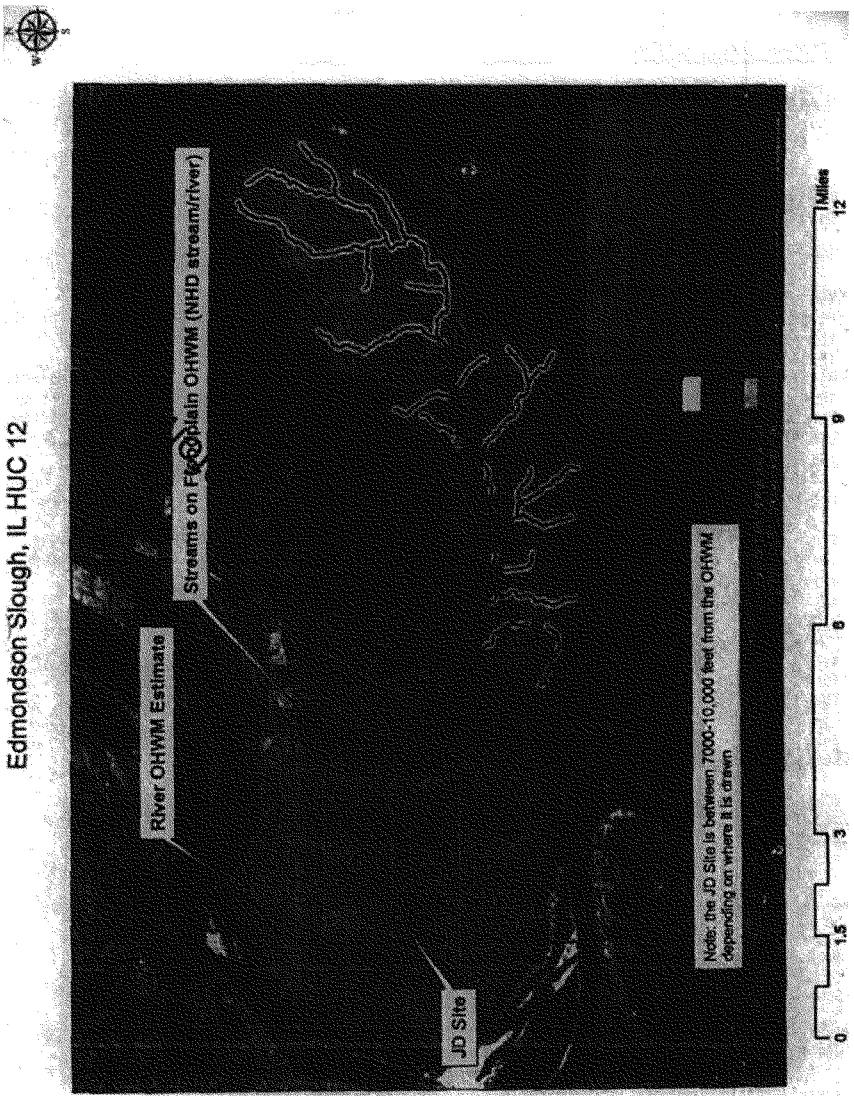
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 20 acres.

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

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

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


Edmondson Slough, IL HUC 12
River OHWM Estimate
Streams on Floodplain OHWM (NHD stream/river)
JD Site
Note: the JD Site is between 7000-10,000 feet from the OHWM depending on where it is drawn
0
1.5
3
6
9
12
Miles

Jensen, Stacey M HQ0?

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

Classification: UNCLASSIFIED
Caveats: NONE

Pete,

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

Lat/long: 37.290869, -89.482414.

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

Best wishes,
Stacey

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

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

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

Russell L. Kaiser
Chief, Wetlands & Aquatic Resources Regulatory Branch
401 Constitution Ave., N.W.
Room 7217M West Bldg.

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

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

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

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

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

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

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

Washington, DC 20460

APPENDIX B:

USAGE Implementation Challenges

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

Overarching Concerns:

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

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

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

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

5. Grandfathering provisions lacking granularity and clarity

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

Specifics:

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

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

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

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

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

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

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

REPLY TO
ATTENTION OF

CECW-CEO

27 April, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

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

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

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

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

Building Strong!

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

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

REPLY TO
ATTENTION OF

CECC-E

APR 24 2015

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

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

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

This memorandum responds to your request for a legal analysis of the draft final rule regarding the definition of the "waters of the United States" (WOUS) subject to Clean Water Act (CWA) jurisdiction, which the Environmental Protection Agency (EPA) submitted to the Office of Management and Budget (OMB) for inter-agency clearance on April 2, 2015.

Summary

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

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

Legal Standard

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

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

Loss of CWA Jurisdiction

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

The arbitrary nature of the 4000-feet cutoff of jurisdiction is demonstrated by the fact that EPA staff engaged in drafting the rule told Corps staff during a conference call in March 2015 that EPA was going to cut off CWA jurisdiction at a distance of 5000 feet from the OHWM/HTL of traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries. Then, three days later, EPA staff changed its position and decided to cut off CWA jurisdiction at the narrower 4000-feet limit from an OHWM/HTL. EPA staff has never provided any scientific support or justification for either a 5000-feet or 4000-feet cut-off. Both distances are arbitrary and either limitation would be very difficult to defend in the Federal courts when the final rule is challenged because neither limitation on CWA jurisdiction is supported by science or field-based evidence. It is significant that EPA's Science Advisory Board recommended against using any set distance to establish or limit CWA jurisdiction.

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

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

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

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

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

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

> "Significantly" as used in NEPA requires considerations of . . . intensity: (b) Intensity. This refers to the severity of the impact. . . . (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." (40 CFR 1508.27)

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

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

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

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

When these flaws were described to EPA staff during the April 9, 2013 meeting, the response was that the agencies have legal authority to place any limitation that they choose on the extent of CWA jurisdiction, even if that would have the effect of excluding from CWA jurisdiction lakes, ponds, and wetlands that have already been determined by the Corps to have a significant nexus with navigable waters, or that would apply that jurisdictional test in any future site-specific jurisdictional determination. Even if that assertion is valid, that sort of abandonment of CWA jurisdiction cannot take place without having first prepared an EIS to analyze and seek public comment on the potentially significant adverse effects on the natural and human environment that would result.

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

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

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

Definition of "Adjacent"

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

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

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

Definition of "Neighboring"

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

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

Categories of Isolated Waters

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

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

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

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

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

Functions of Wetlands/Water Bodies Indicating Significant Nexus

The draft final rule presents a limited and exclusive list of nine (9) functions that wetlands and other water bodies perform, which can be evaluated and documented to establish a significant nexus between that wetland or other water body and downstream navigable or interstate waters to establish CWA jurisdiction over that water body. The Corps on numerous occasions has advised EPA that the list of functions is incomplete, based on the Corps' experience and expertise in performing significant nexus evaluations in the nearly eight years since the release of the *Rapanos* guidance. During that period the Corps has made more than 1,800 significant nexus determinations by analyzing the biological, physical, and chemical functions provided by such water bodies. Nevertheless, thus far EPA has not expanded the list or revised the provision to designate EPA's list of functions as representative and non-exclusive. The proposed fix for this problem is presented in the attached revised draft final rule.

Transition to New Rule

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

Essential Principles in the Proposed Rule

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

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

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

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

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

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

Change in Definition of "Tributary"

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

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

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

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

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

Site-Specific JDs for Water Bodies Draining into Jurisdictional Waters

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

Isolated Waters Characterized as "Similarly Situated"

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

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

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

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

LANCE D. WOOD
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Environmental Law and Regulatory Programs

cc: Revised Draft Final Rule

PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

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

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

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

328.3 Definitions

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

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

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

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

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

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

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

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

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

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

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

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

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

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

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

Comment [DRC1]: Previous language, "found in southeastern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southeastern Oregon being omitted?

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

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

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

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

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

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

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

(3) The following ditches:

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

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

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

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

(4) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(56) *Significant Nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to [waters performing similar functions to 2] function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (H) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the

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

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

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

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

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

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

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

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

(DC) retention and or attenuation of flood waters;

(ED) runoff storage;

(FE) contribution of flow;

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

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

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

(H) habitat support for aquatic and wetland plant communities;

(I) groundwater discharge and recharge;

(J) carbon sequestration.

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

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

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

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

REPLY TO
ATTENTION OF

CECW-CO-R

24 April 2015

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

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

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

1. References

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

b. 2003 Post-SWANCC Guidance (FR Vol. 68, No. 10, p. 1991) (SWANCC Guidance).

c. 2008 Joint Agency Guidance "Clean Water Act Jurisdiction Following the U.S. Supreme Court Decisions in *Rapanos vs. United States* and *Carabell vs. United States* (*Rapanos* Guidance).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JENNIFER A. MOYER
Chief, Regulatory Program

cc: Revised Draft Final Rule

PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

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

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

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

328.3 Definitions

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

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

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

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

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

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

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

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

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

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

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

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

Comment [ORC1]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that waterbody with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPOE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPOE watershed, merely because similar waterbodies happen to lie on one side or the other of a line that demarcates adjacency.

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

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

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

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

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

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

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

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(1) through (6) of this section.

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

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

(3) The following ditches:

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

Comment [JAN4]: This language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

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

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

(4) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

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

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

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

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

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

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

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

(B) all waters located within the 100 year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~1500~~300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~1500~~300 feet of the ordinary high water mark and within t .00 year floodplain;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ED) runoff storage;

(FE) contribution of flow;

(GF) export, trapping, and transformation of organic matter ~~export of food resources~~ food resources;

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

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

(H) habitat support for aquatic and wetland plant communities;

(I) groundwater discharge and recharge;

(J) carbon sequestration.

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

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

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

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

APPENDIX A:

Representative Examples

EXAMPLE #1 ★

100 year floodplain example

Adjacent Wetlands to Ohio River, Indiana

37.868332°N, -87.633698°W

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

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

Subject wetland is approximately 3 acres in size.

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

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

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

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

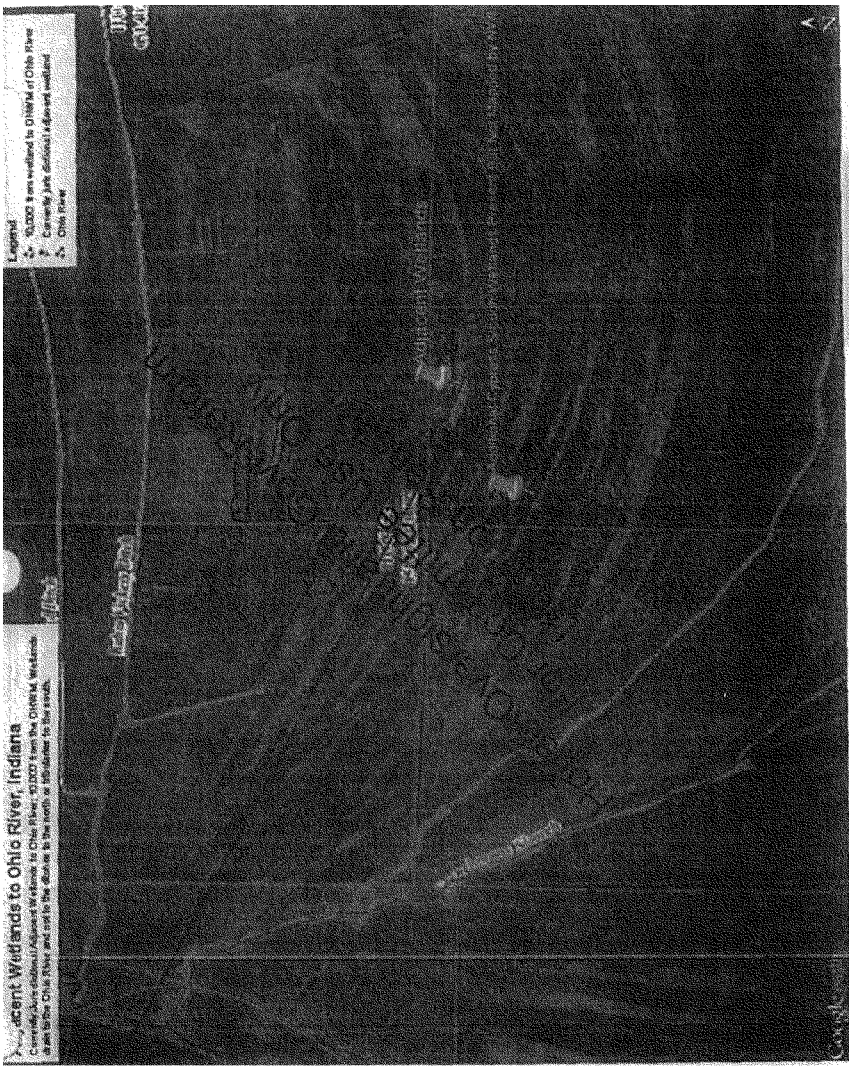
? Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the Ohio River.

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

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

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

This JD example was not coordinated with EPA.


Legend
Ohio River

Floodplain example

EXAMPLE #2

Adjacent Wetlands to Similk Bay, WA

48.417797°N, -122.530224°W

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

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

Subject wetlands are approximately 4 acres in size.

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

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

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

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

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

This scenario often occurs in the coastal floodplains. The coastal waters have very wide floodplains, and the adjacent wetlands are often located in the floodplain far beyond 4,000' from the HTL of the coastal waters to which the wetlands are adjacent.

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

This JD example was not coordinated with EPA.

Legend
Indian Rd

Strongly adjacency case – no drain

EXAMPLE #3

Adjacent Wetlands to Hickory Creek, TN

35.549058°N, -85.875673°W

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

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

Subject wetland is approximately 34 acres in size.

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

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

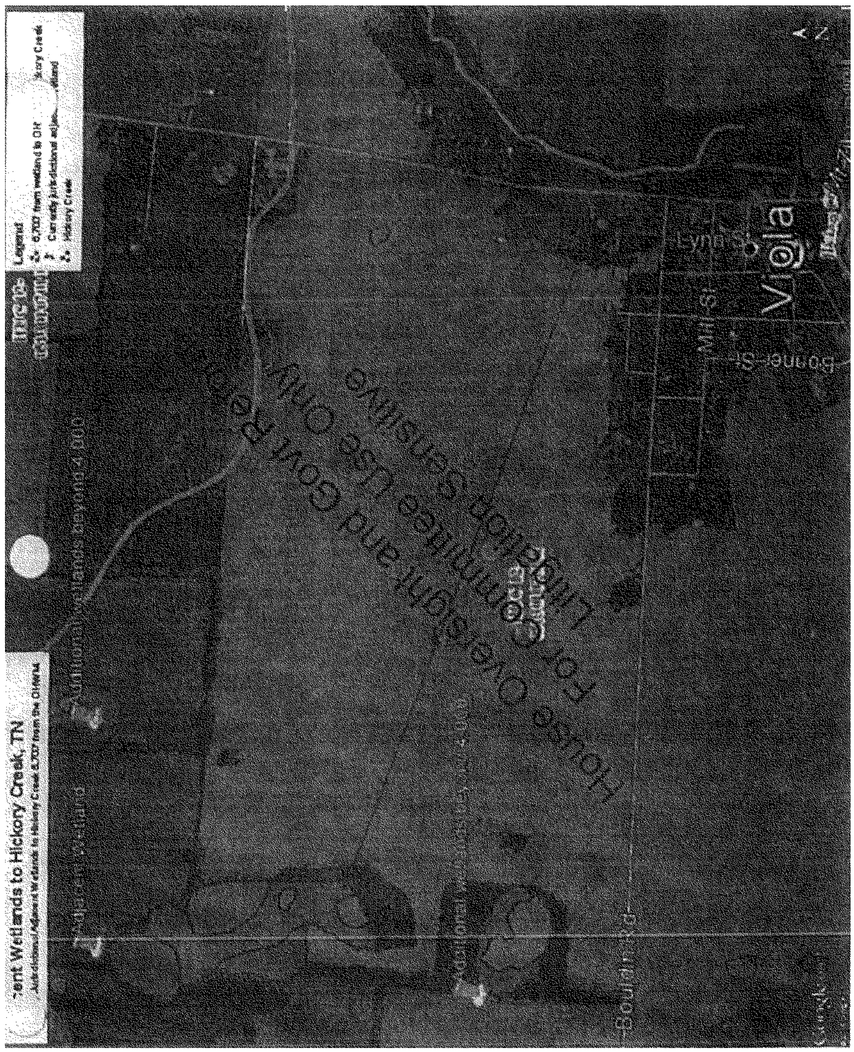
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of Hickory Creek.

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

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

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

This JD example was not coordi ed with EPA.


ent Wetlands to Hickory Creek, TN
Legend
Viola
Lynn St
Mill St
Bonner St
House Oversight and Govt Reform
For Committee Use Only
Litigation Sensitive

EXAMPLE #4

Wetlands Associated with Sinkholes in Clarksville, TN

Underground connection to TNW — shallow subsurface connection

36.574052°N, -87.246477°W

See map entitled, "Clarksville, TN."

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

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

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

SP authorization was provided for activities in these wetlands (LRN-2013-1043).

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

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

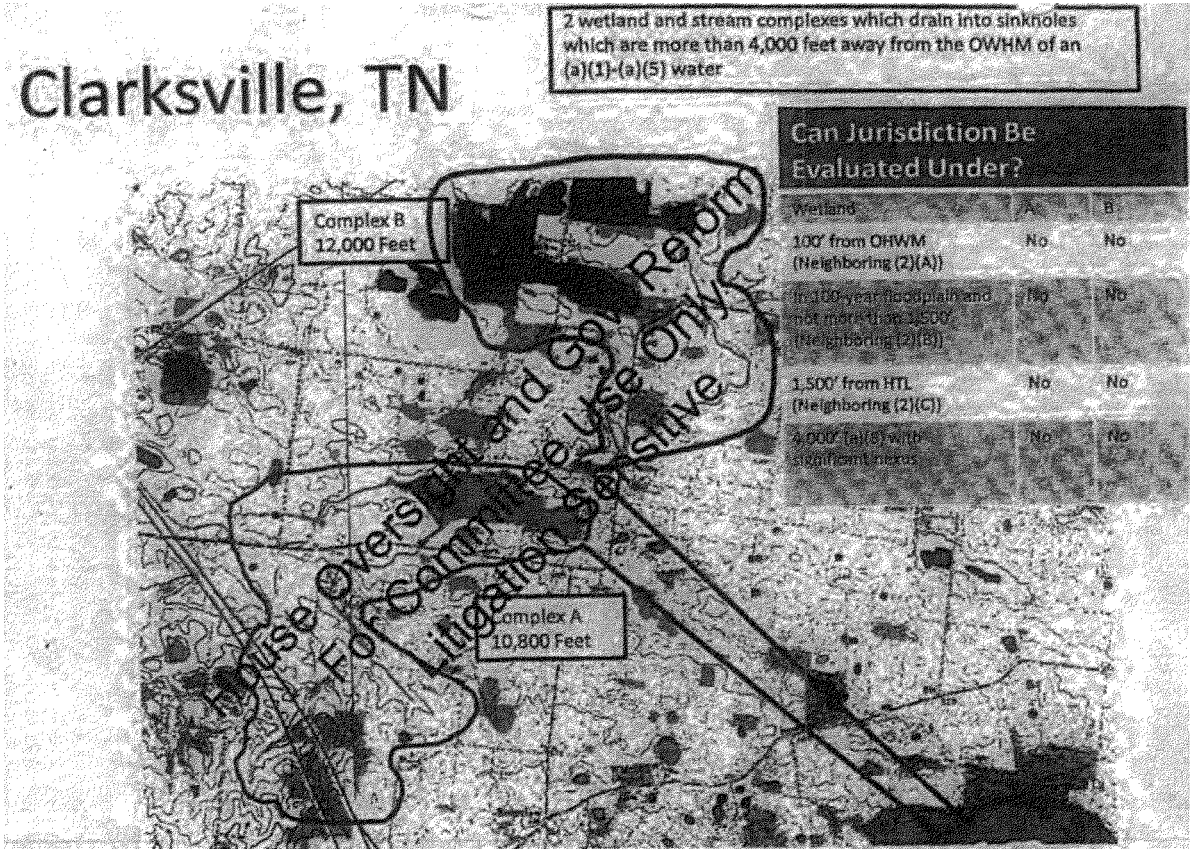
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,500' from the OHWM of the Red River.

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

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

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

This JD example was not coo[illegible]ed with EPA.


Clarksville, TN
2 wetland and stream complexes which drain into sinkholes which are more than 4,000 feet away from the OWHM of an (a)(1)-(a)(5) water
Complex B
12,000 Feet
Complex A
10,800 Feet
House Oversight and Gov. Reform
For Committee Use Only
Litigation Sensitive
Can Jurisdiction Be Evaluated Under?
Wetland
A
B
100' from OHWM (Neighboring (2)(A))
No
No
In 100-year floodplain and not more than 1,500' (Neighboring (2)(B))
No
No
1,500' from HTL (Neighboring (2)(C))
No
No
4,000' (a)(5) with significant nexus
No
No

Give here subsurface connect

EXAMPLE #5

Adjacent Wetlands in Grassy Cove, TN

35.831103°N, -84.916600°W

See map entitled, "Grassy Cove, TN."

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

Subject wetlands are approximately 45 acres in size.

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

JD action only; currently in pre-application stage for restoration activities under LRN-2013-649.

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

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

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

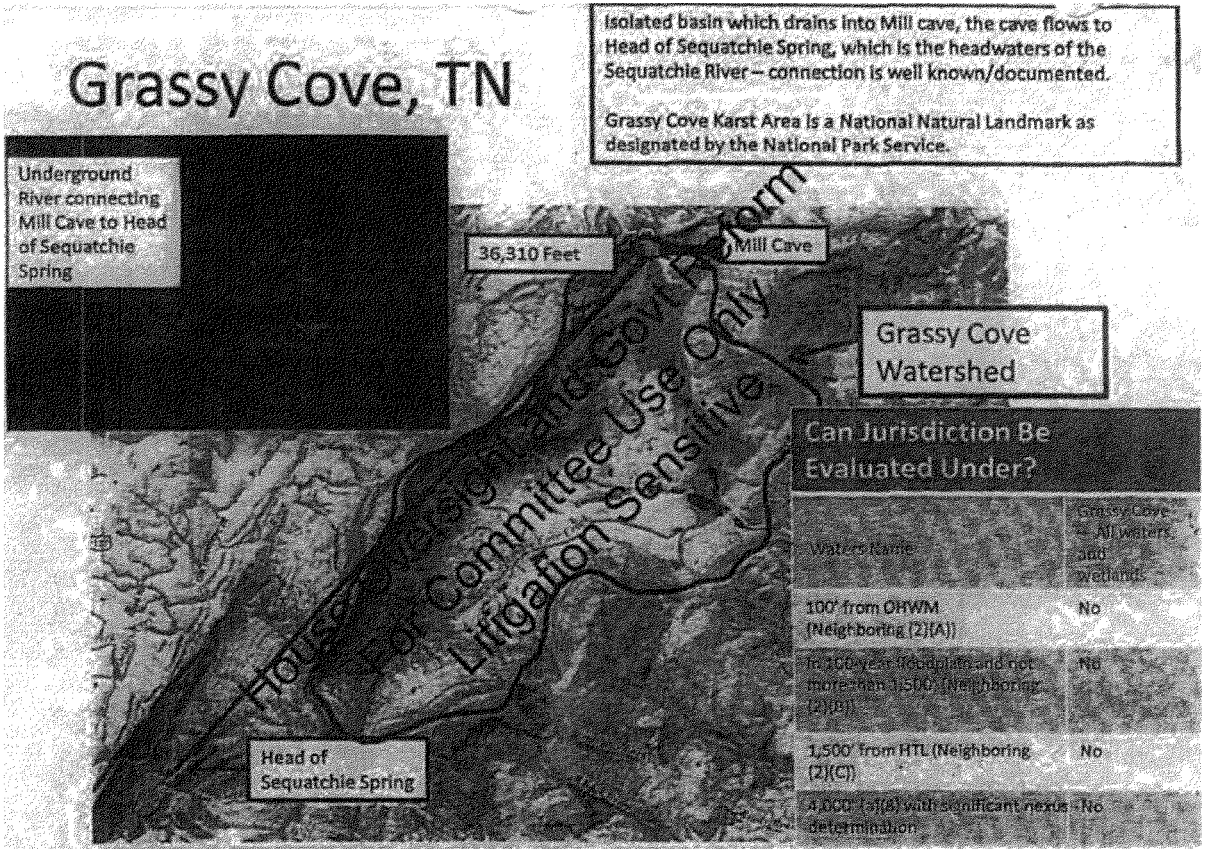
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

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

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

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

This JD example was not coordinated with EPA.


Grassy Cove, TN
Isolated basin which drains into Mill cave, the cave flows to Head of Sequatchie Spring, which is the headwaters of the Sequatchie River – connection is well known/documented.
Grassy Cove Karst Area is a National Natural Landmark as designated by the National Park Service.
Underground River connecting Mill Cave to Head of Sequatchie Spring
36,310 Feet
Mill Cave
Grassy Cove Watershed
House Oversight and Gov Reform Committee Use Only Litigation Sensitive
Head of Sequatchie Spring
Can Jurisdiction Be Evaluated Under?
Waters Name
Grassy Cove – All waters and wetlands
100' from OHWM (Neighboring (2)(A))
No
In 100 year floodplain and not more than 1,500' (Neighboring (2)(B))
No
1,500' from HTL (Neighboring (2)(C))
No
4,000' (a)(8) with significant nexus determination
No

shallow subsurface connections in Alaska

EXAMPLE #6

POA JD Appeals

64.767167°N, -147.362109°W

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

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

Subject wetlands total over 500 acres in size.

Associated with SP actions for the projects (e.g., POA-2010-190); multiple JD appeal actions.

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

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

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

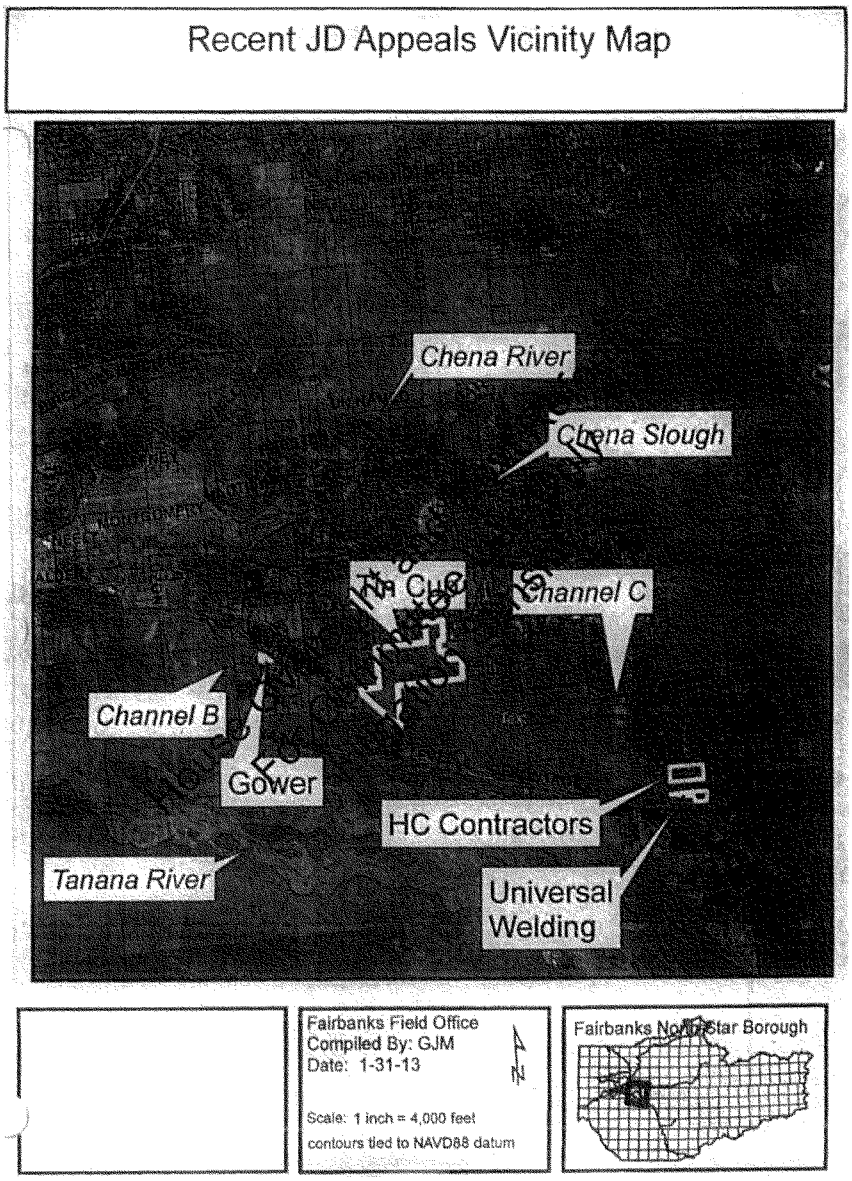
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

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

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

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

This JD example was not coordinated with EPA.


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

EXAMPLE #7

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

48.588557°N, -96.068048°W

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

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

Subject wetlands are approximately 500 acres in size.

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

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

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

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

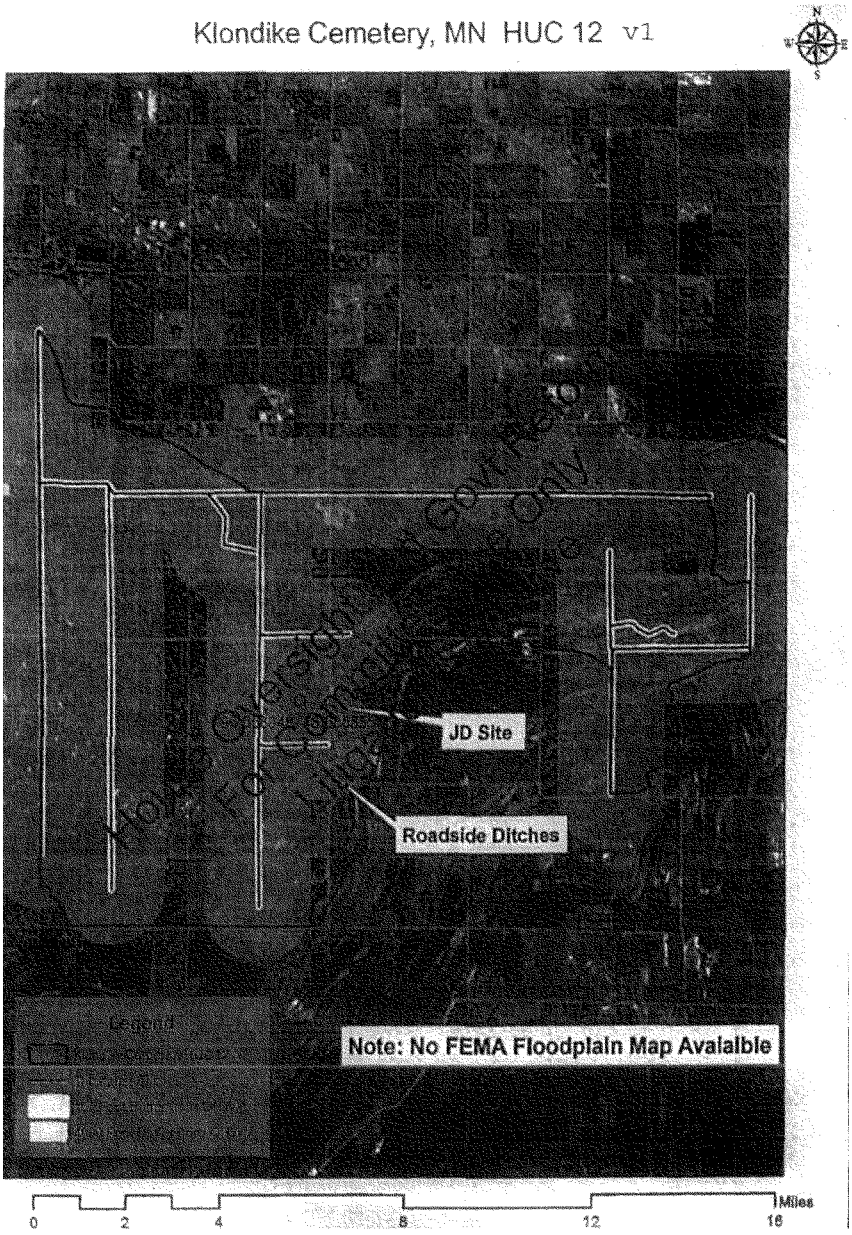
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the South Branch of Two Rivers.

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

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

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

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


Klondike Cemetery, MN HUC 12 v1
JD Site
Roadside Ditches
Note: No FEMA Floodplain Map Avalaible
Legend
0
2
4
8
12
16
Miles

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

Classification: UNCLASSIFIED
Caveats: NONE

Pete,

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

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

Best wishes,
Stacey

HQUSACE Regulatory Program Manager
441 G Street NW
Washington, DC 20314-1000
Phone (202) 761-5825

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

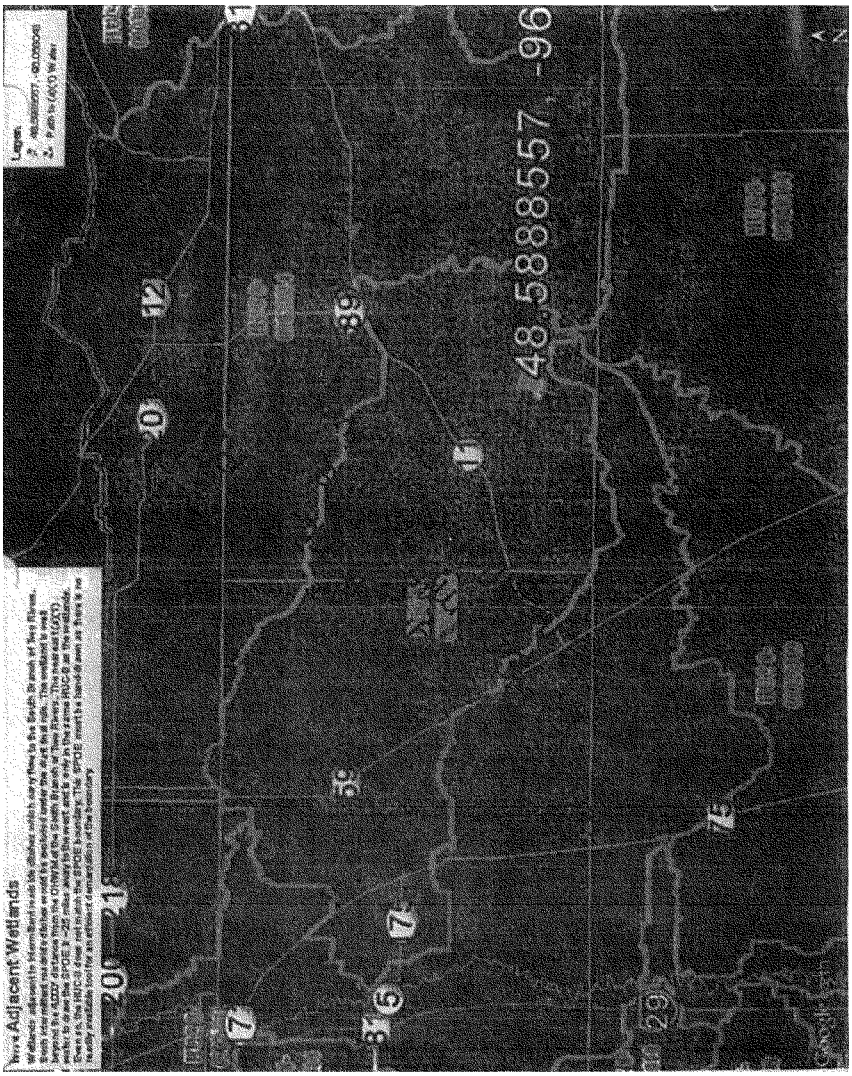
Attached is another map, this one is a ditched area in MN with relatively spare NHD mapped drainage, most of the mapped drainage appear to be roadside ditches (did not try to figure out their flow or whether they may have bee tribs), also there may be additional unmapped ditches near the site.

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

Adjacent Wetlands
Greenbush
Halmassa
Karlstad
Strathcona


Adjacent Wetlands
48.588557, -96

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

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

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

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

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

-----Original Message-----
From: Jensen, Stacey M HQ02 [mailto:Stacey.M.Jensen@usace.army.mil]
Sent: Thursday, April 16, 2015 7:29 AM
To: Stokely, Peter; Kaiser, Russell
Subject: RE: Last One (UNCLASSIFIED)

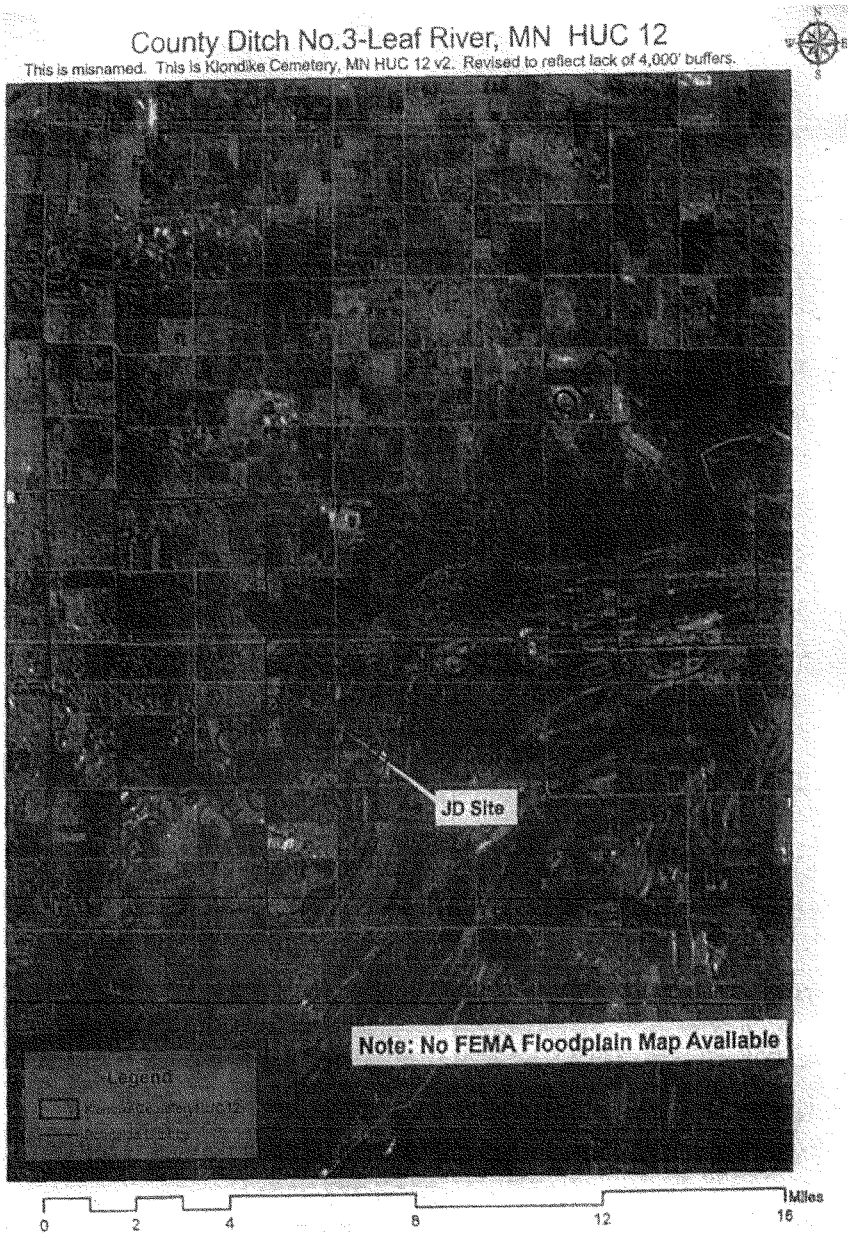
Classification: UNCLASSIFIED
Caveats: NONE

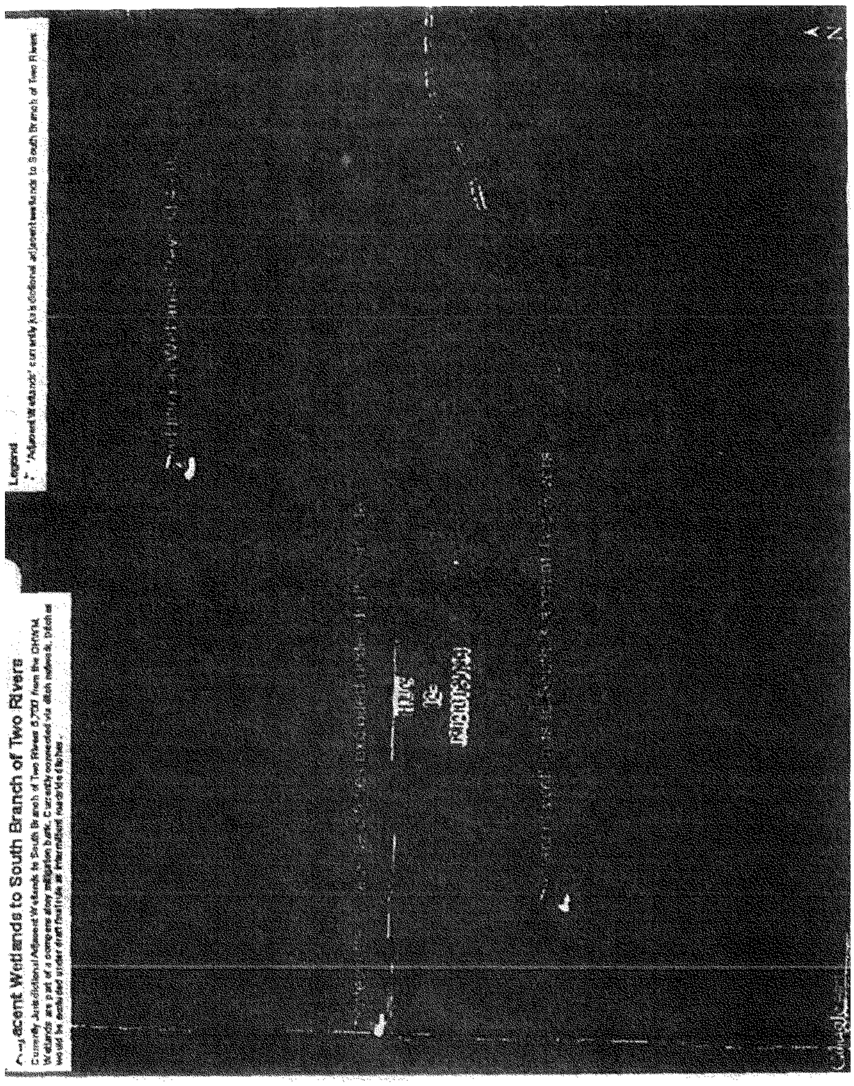
Pete,

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

Best wishes,
Stacey

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


County Ditch No.3-Leaf River, MN HUC 12
This is misnamed. This is Klondike Cemetery, MN HUC 12 v2. Revised to reflect lack of 4,000' buffers.
JD Site
Note: No FEMA Floodplain Map Available
Legend
0
2
4
8
12
16
Miles


Wetlands to South Branch of Two Rivers
Legend

EXAMPLE #8

Adjacent Wetlands Compensatory Mitigation Bank in Lower Tarmac, MN

48.243669°N, -94.52144°W

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

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

Subject wetlands are approximately 150 acres in size.

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

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

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

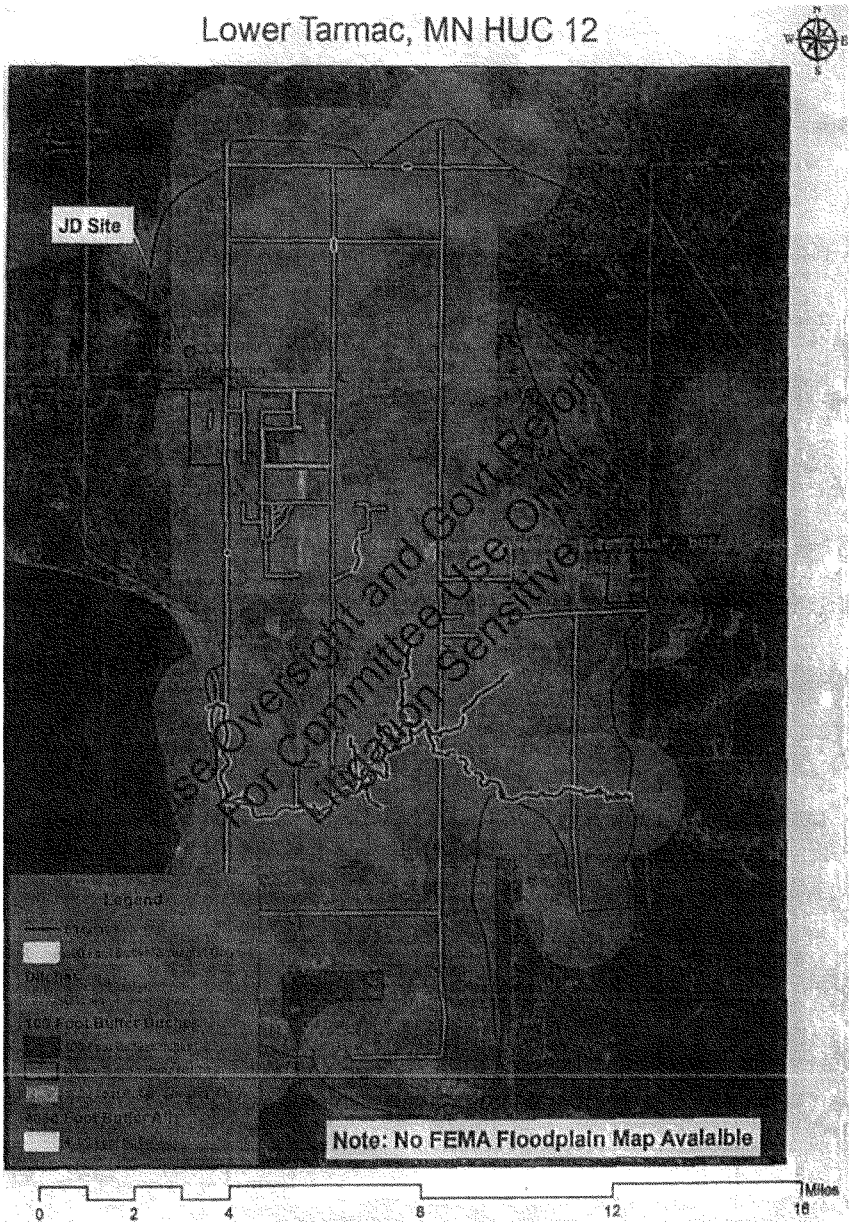
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of the Upper Red Lake. In addition, these wetlands are located in agricultural field which would preclude them from being considered adjacent when 404(f)(1)(A) activities occur in them.

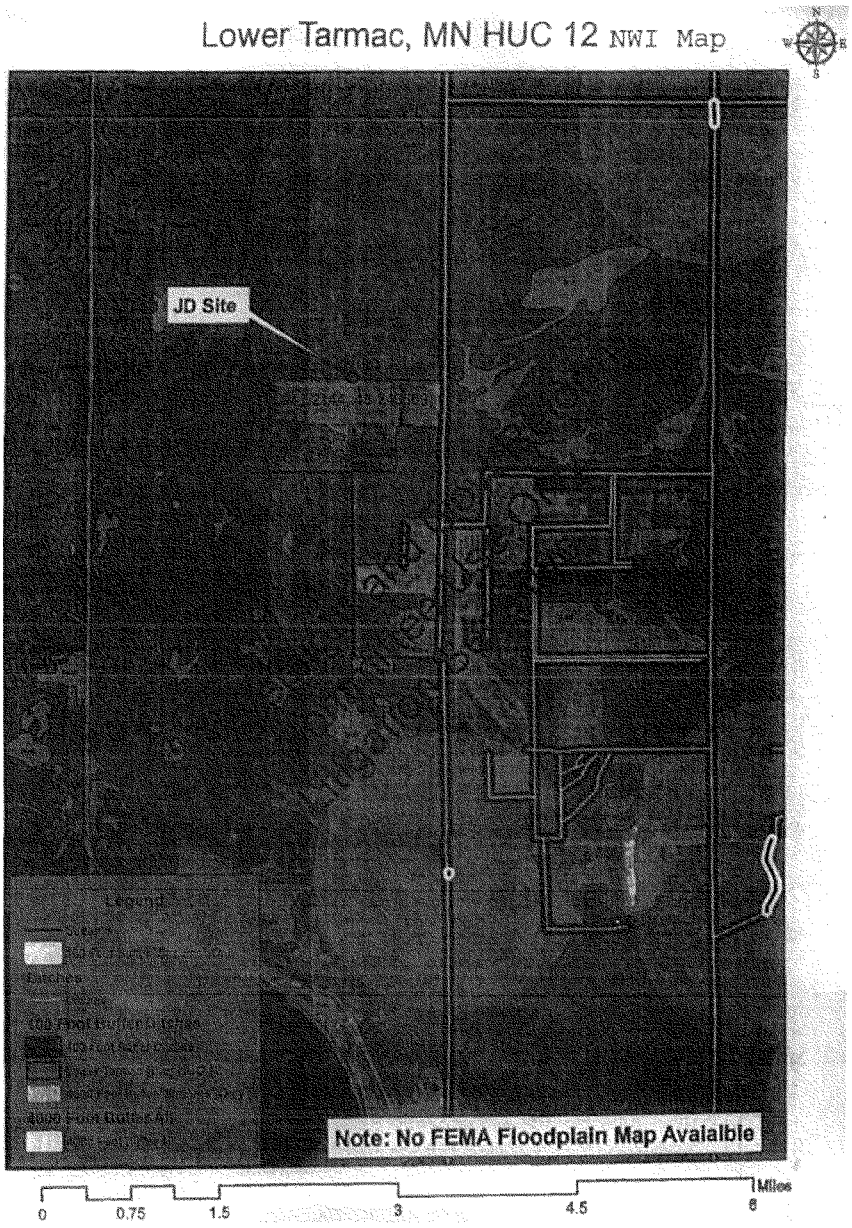
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of the Upper Red Lake.

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

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

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


Lower Tarmac, MN HUC 12
JD Site
Note: No FEMA Floodplain Map Avalalble
0
2
4
8
12
16
Miles
Use Oversight and Govt Reg
for Committee Use Only
Litigation Sensitive


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

EXAMPLE #9

Adjacent Wetlands, Wing River, MN

46.4231821°N, -95.065699°W

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

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

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

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

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

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

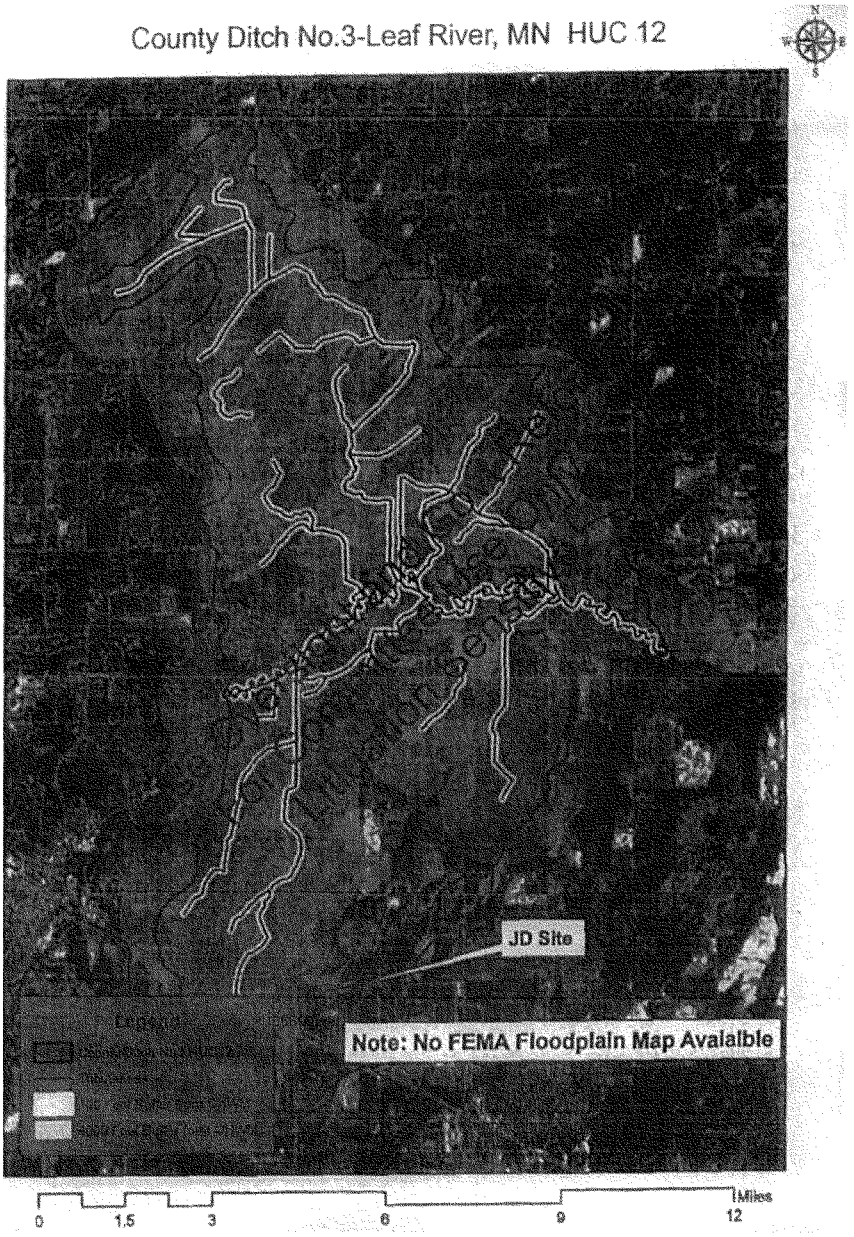
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Wing River.

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

Note that the wetlands present that lie beyond the subject wetlands would also be non-jurisdictional. The acreage totals approximately [illegible] acres.

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

County Ditch No.3-Leaf River, MN HUC 12



EXAMPLE #10

Headwater Adjacent Wetlands, English Creek, FL

28.018817°N, -82.053704°W

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

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

Subject wetlands total approximately 50 acres in size.

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

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

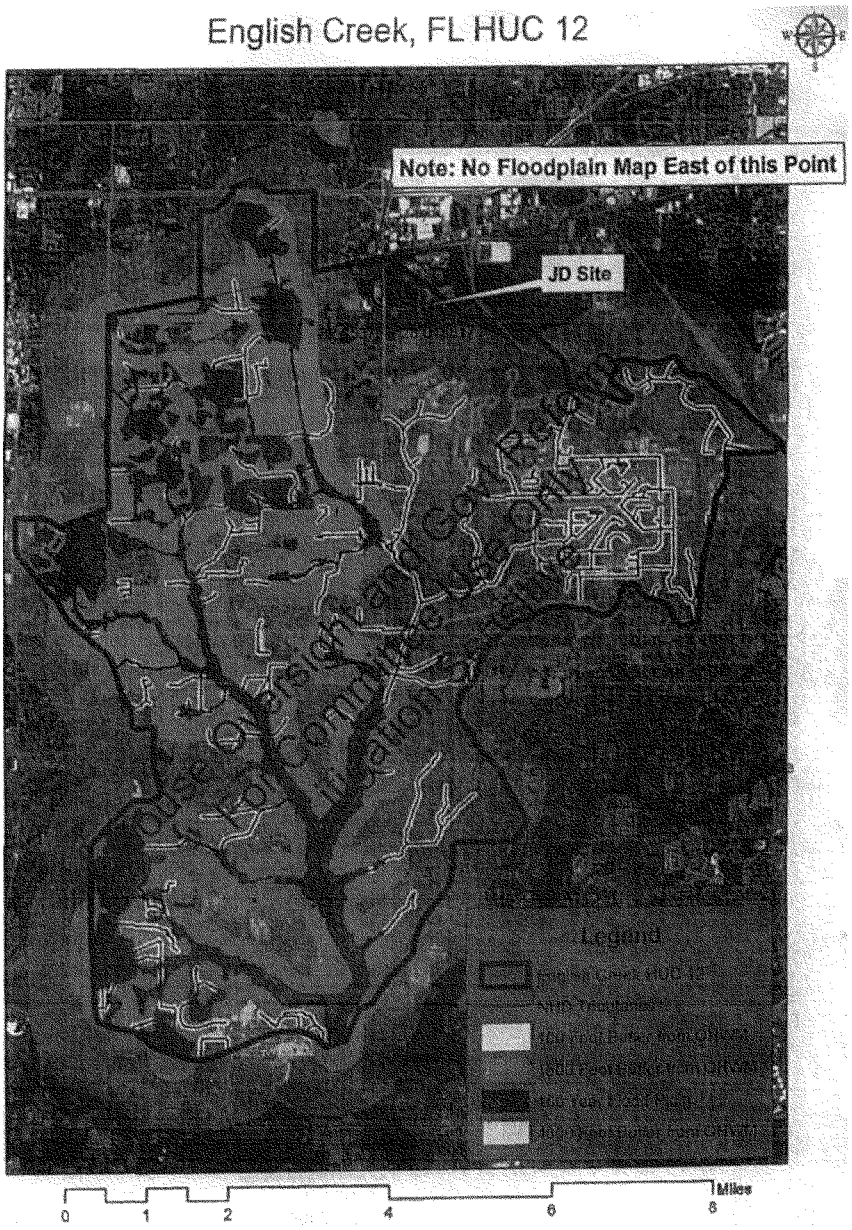
Under the draft final rule, these wetlands would not be considered adjacent as they are beyond 1,500' from the OHWM of English Creek.

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

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

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

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


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

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

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

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

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

Washington, DC 20460

Room 4110

William Jefferson Clinton Federal Building South (WJC South)

Mail Code 2243A

202-564-1841

EXAMPLE #11

Adjacent Wetlands, Rowell Creek, FL

30.26194°N, -81.87274°W

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

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

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

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

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

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

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

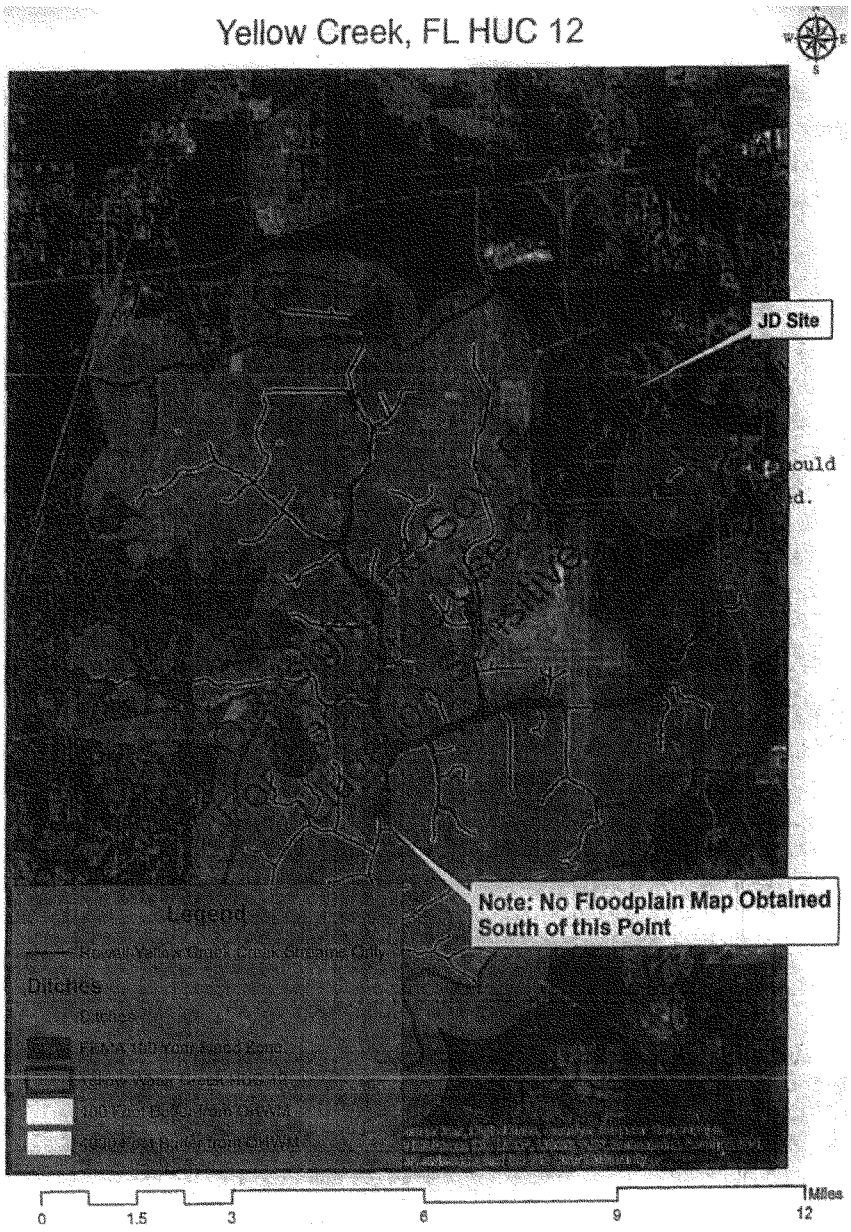
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Rowell Creek.

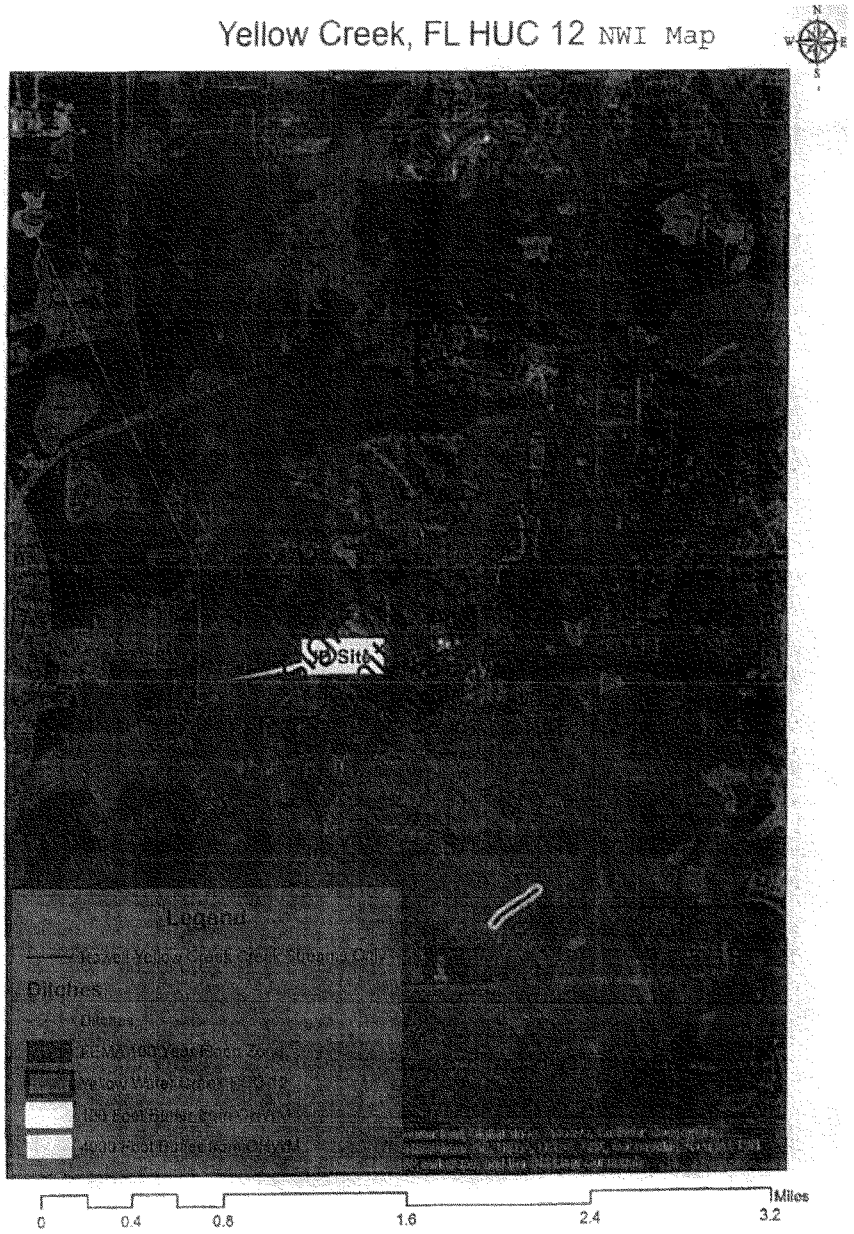
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 500 acres.

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

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


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


Yellow Creek, FL HUC 12 NWI Map
N
W
E
S
Site
Legend
Ditches
Miles
0
0.4
0.8
1.6
2.4
3.2

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

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

Peter Stokely

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Washington, DC 20460

Room 4110

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Mail Code 2243A

202-564-1841

EXAMPLE #12

Adjacent Wetlands, Big Creek, OH

41.271053°N, -83.949624°W

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

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

Subject wetlands are approximately 2.5 acres in size.

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

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

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

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

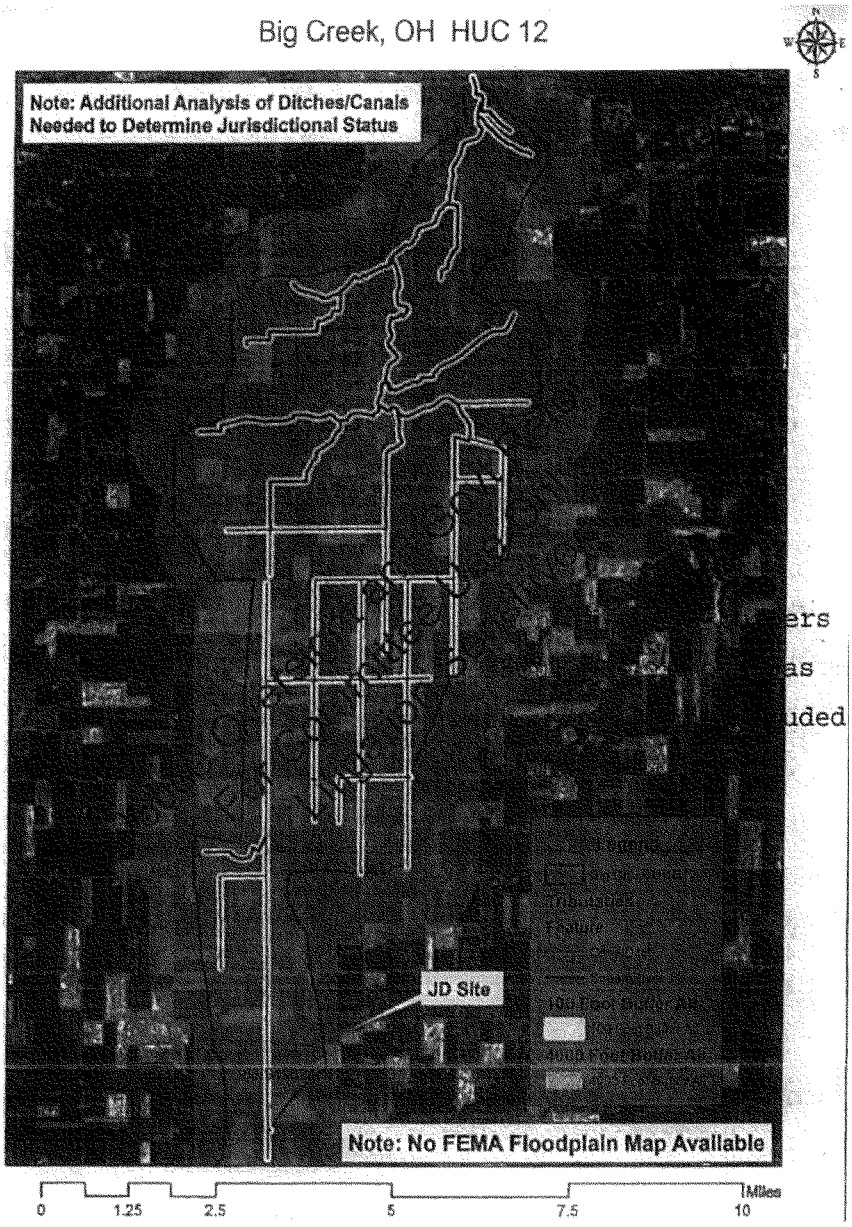
Under the draft final rule, these wetlands would not be considered under a case-specific significant nexus determination as they are beyond 4,000' from the OHWM of Big Creek.

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

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

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

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


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

From: Stokely, Peter
To: Kaiser, Russell
Cc: Jens [redacted] v M HQ02
Subject: [EXT courtesy] Big Creek, OH HUC 12
Date: Thursday, April 16, 2015 11:44:33 AM

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

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

Peter Stokely

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Washington, DC 20460

Room 4110

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Mail Code 2243A

202-564-1841

Jensen, Stacey M HQ02

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

Classification: UNCLASSIFIED
Caveats: NONE

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

Best wishes,
Stacey

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

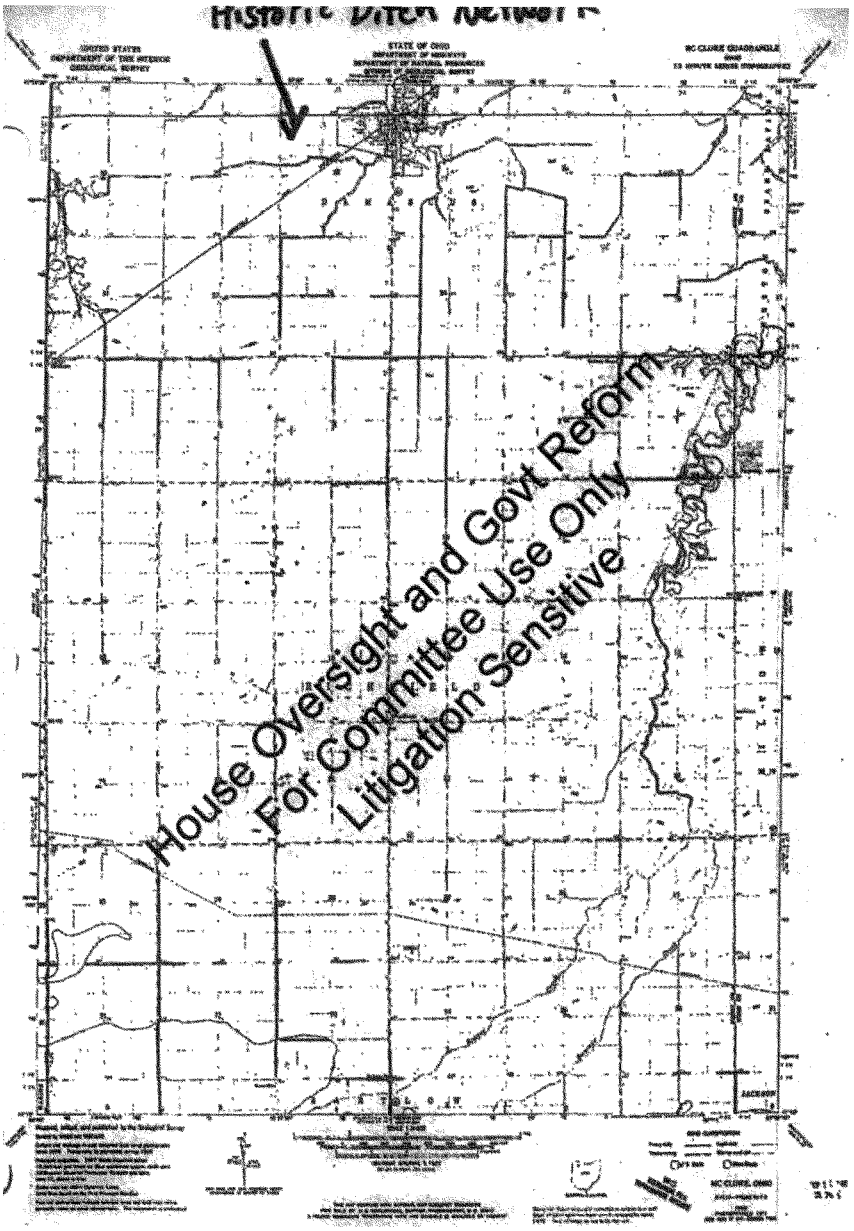
-----Original Message-----
From: Stokely, Peter [mailto:Stokely.Peter@epa.gov]
Sent: Thursday, April [illegible], 2015 10:43 AM
To: Kaiser, Russell
Cc: Jensen, Stacey M HQ02
Subject: [EXTERNAL] Big Creek, OH HUC 12

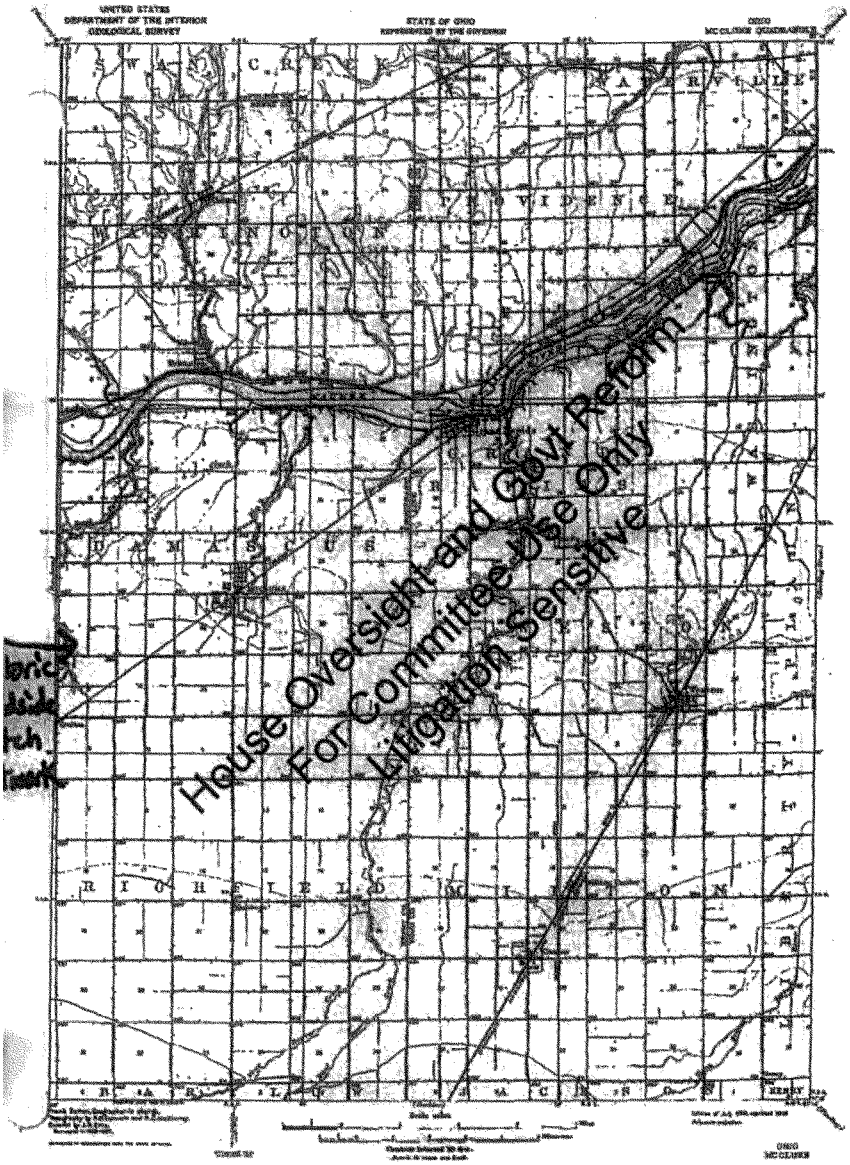
In this case the HUC 12 may be the SPOE (in most other maps, the HUC 12 was not the SPOE and was used only to represent adjacency measures).

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

Peter Stokely

Office of Civil Enforcement


Historic Ditch Network
House Oversight and Govt Reform
For Committee Use Only
Litigation Sensitive



EXAMPLE #13

Adjacent Wetlands, Chickasawhatchee Creek, GA

31.345246°N, -84.446706°W

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

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

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

Associated with an unauthorized activity and an NWP action (SAS-2012-[illegible]12).

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

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

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

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

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

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

cent Wetlands to Chicken Ranch Slough, CA
Legend
Elmcrest

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

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

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

Pete

Peter Stokely

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Mail Code 2243A

202-564-1841


Wolf Pond-Chickasawhatchee Creek, GA HUC 12 HUC 12
JD Site
Legend
Tributaries
0
1
2
4
6
8
Miles

EXAMPLE #14

Adjacent Wetlands, California Creek, WA

48.929721°N, -122.635156°W

See map entitled, "Dakota Creek HUC 12."

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

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

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

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

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

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

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

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

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

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

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

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

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

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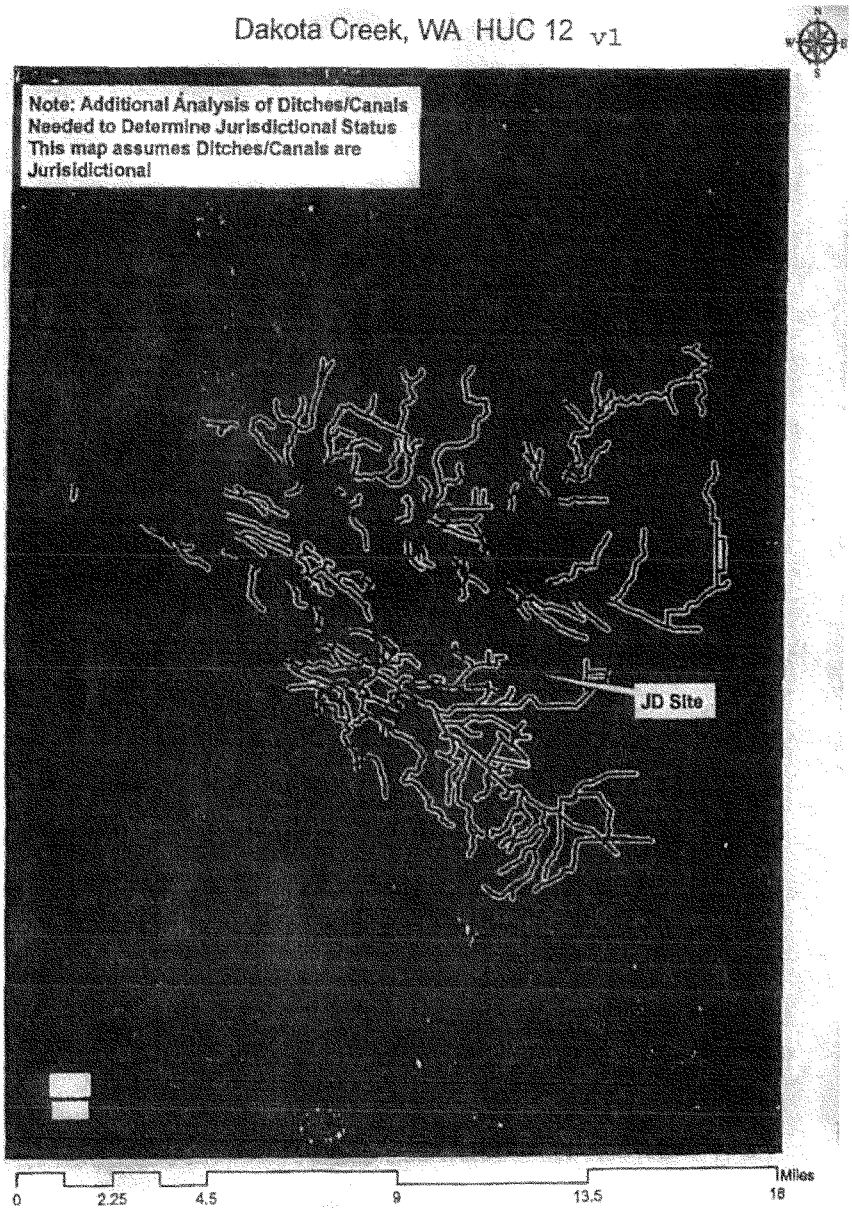
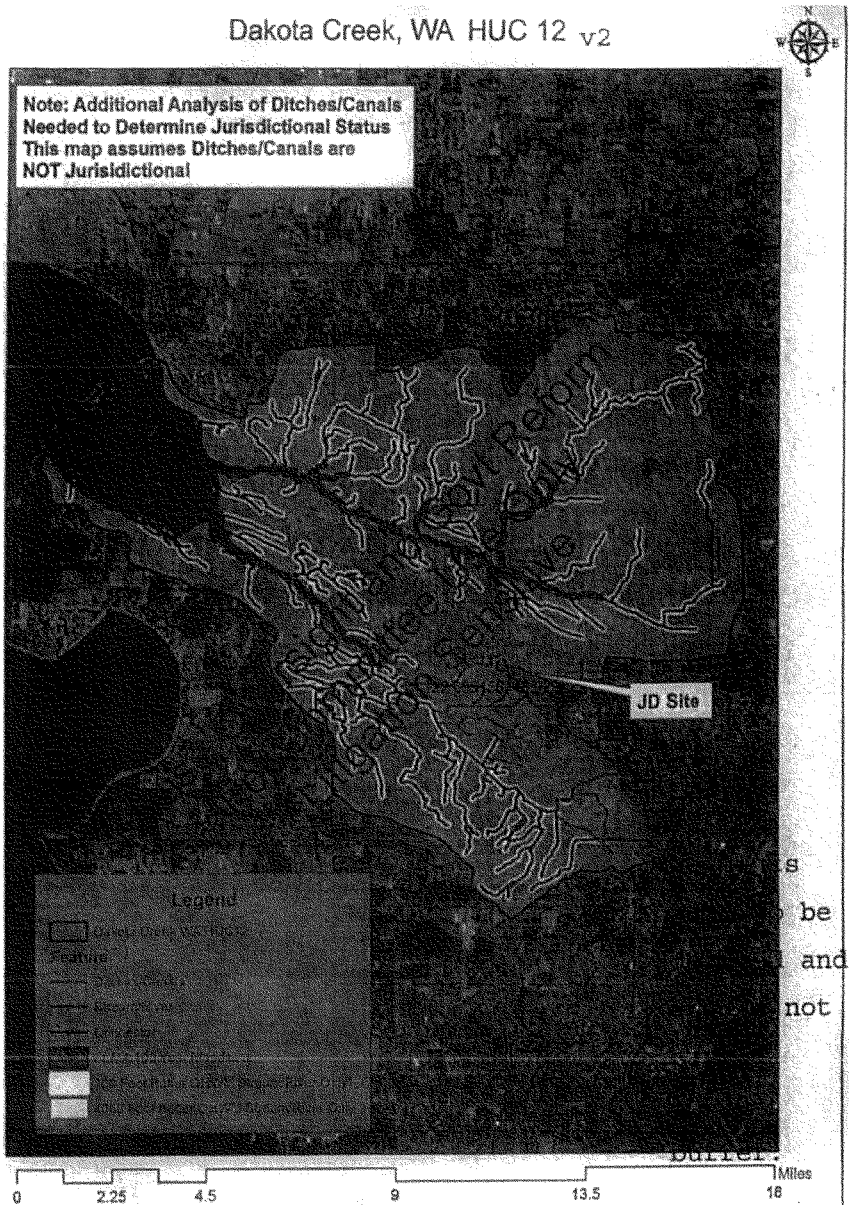
202-564-1841


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


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

EXAMPLE #15

Adjacent Wetlands, Edmondson Slough, Mississippi River, MS

37.290869°N, -89.482414°W

See map entitled, "Edmondson Slough HUC 12."

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

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

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

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

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

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

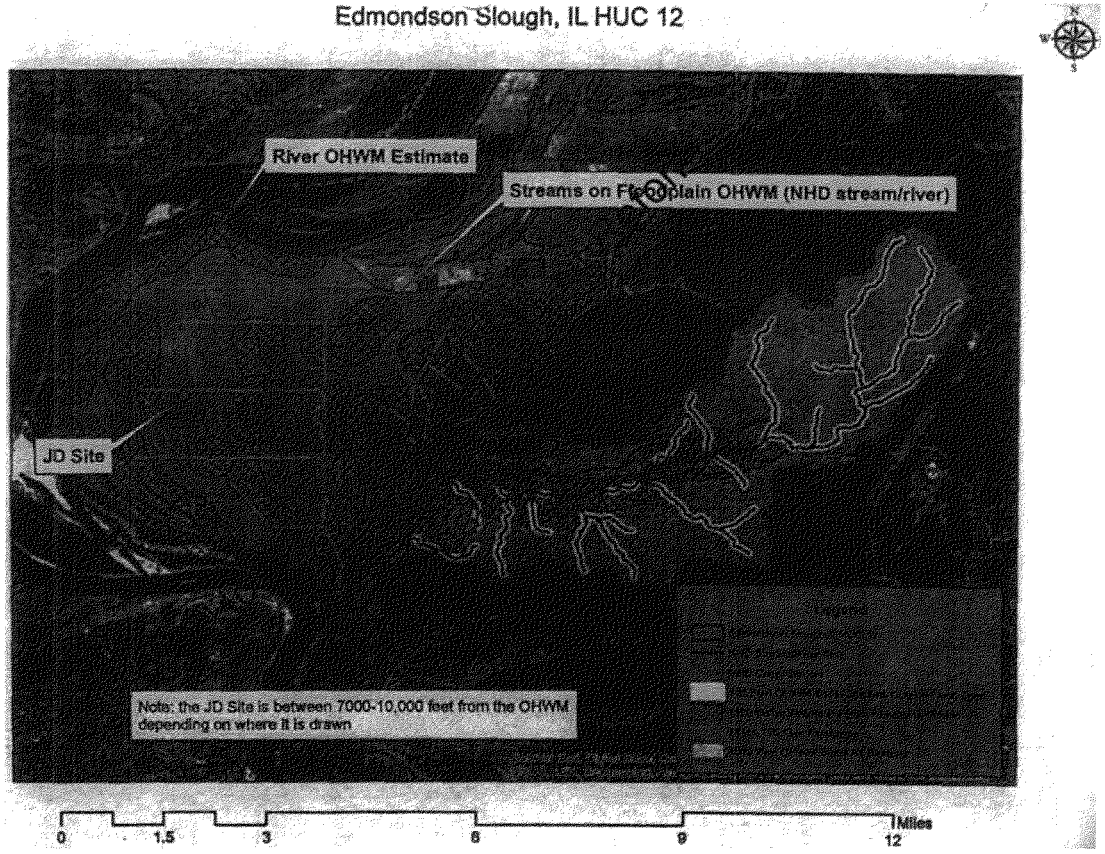
Therefore, under the draft final rule these currently jurisdictional wetlands would be non-jurisdictional.

Note that the wetlands present that are beyond the subject wetlands would also be non-jurisdictional. The additional acreage totals over 20 acres.

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

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

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


Edmondson Slough, IL HUC 12
River OHWM Estimate
Streams on Ft. Coplain OHWM (NHD stream/river)
JD Site
Note: the JD Site is between 7000-10,000 feet from the OHWM depending on where it is drawn
0
1.5
3
6
9
12
Miles

Jensen, Stacey M HQ0?

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

Classification: UNCLASSIFIED
Caveats: NONE

Pete,

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

Lat/long: 37.290869, -89.482414.

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

Best wishes,
Stacey

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

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

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

Russell L. Kaiser
Chief, Wetlands & Aquatic Resources Regulatory Branch
901 Constitution Ave., N.W.
Room 7217M West Bldg.

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

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

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

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

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

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

Peter Stokely

EPA Office of Civil Enforcement

1200 Pennsylvania Ave, NW

Washington, DC 20460

APPENDIX B:

USAC's Implementation Challenges

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

Overarching Concerns:

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

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

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

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

5. Grandfathering provisions lacking granularity and clarity

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

Specifics:

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

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

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

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

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

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

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

OCT 1 3 2015

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your August 14, 2015, letter and the opportunity to respond to the questions for the record from the House Committee on Oversight and Government Reform's hearing on July 29, 2015, entitled *EPA Mismanagement Part II*. Please find our responses in the attached document.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may contact Christina J. Moody, in the EPA's Office of Congressional and Intergovernmental Relations, at moody.christina@epa.gov or at (202) 564-0260.

Sincerely,

Laura Vaught
Associate Administrator

Enclosures

Questions for the Record
Administrator Gina McCarthy
US Environmental Protection Agency
"EPA Mismanagement Part II"

July 29, 2015 Hearing

Chairman Jason Chaffetz (UT):

On April 30, 2015, the Committee held a hearing titled "EPA Mismanagement", which examined cases of serious misconduct carried out by employees at the Environmental Protection Agency (EPA). In the case involving Mr. Peter Jutro, an OIG investigation found that Mr. Jutro engaged in a pattern of "conduct and exchanges, including some of a sexual nature considered to be unwelcome" by sixteen female EPA employees. Despite senior level EPA officials having knowledge of this behavior, Mr. Jutro was still given a detail to the EPA Office of Homeland Security (OHS).

1. **What steps has the EPA taken to address the management failures that allowed Mr. Jutro to be promoted despite his history of sexual harassment?**

Response: Peter Jutro's conduct was inexcusable, not consistent with the agency's values, and not at all representative of the high standards of integrity demonstrated by the vast majority of EPA employees. At the time Jutro was selected for his temporary detail, the selecting officials did not have all the information we have now. Senior staff have since carefully reviewed the investigation report from EPA's Office of Inspector General (OIG) regarding the process of selecting Jutro for the detail; the report clearly states that OIG did not substantiate any violation of a duty by EPA officials who selected Jutro for the detail. While the OIG interviews revealed a selection process that was reasonable, as an improvement to that process, hiring officials within the Office of the Administrator have now been directed to always specifically consult with a preferred candidate's immediate supervisor before final selection.

Two recently uncovered memoranda authored by senior Army Corp staff on April 27, 2015 and May 15, 2015 raised serious concerns about various legal and scientific deficiencies of the Waters of the United States rule, published on June 29, 2015. Examples include that EPA misused Corps data in the development of the rule and the rule's Economic Analysis and Technical Support Document created by the EPA contain "numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies, and logical inconsistencies." The Corps also assert that the rule contradicts standing legal principles and regulations underlying the clean Water Act and is inconsistent with SWANCC and Rapanos, the two Supreme Court decisions the rule was intended to clarify.

As you acknowledged in your testimony, the Corps walked through the concerns raised in these memoranda with the EPA and it is your understanding that all of the concerns raised by the Corps were satisfied in the final rule. In a July 30, 2015 letter, the Committee shared the memoranda with you and asked you to "provide a response to the committee on whether each of the issues and recommendations raised by the Corps in these documents were, in fact, adopted or otherwise addressed in the final rule" and "if certain recommendations or issues were not adopted

or addressed, please provide a detailed explanation of the EPA's justifications for making those decisions." You did not provide an answer to either of these requests.

2. **I again ask you whether each of the issues and recommendations raised by the Corps in these documents were, in fact, adopted or otherwise addressed in the final rule?**

Response: The final Clean Water Rule reflects consideration of, and decisions on, each of the issues raised by both Corps and EPA staff. The rulemaking process represents years of interagency discussion, coordination, and decision-making consistently involving technical, policy and legal input from staff, managers, and senior policy executives. The final rule represents conclusions based on the best available science, agency experience, and the law. These conclusions were accepted by both EPA and the Army Corps and reviewed through an interagency process coordinated by the Office of Management and Budget.

3. **How were each of these issues and recommendations raised by the Corps in these documents adopted or otherwise addressed in the final rule?**

Response: Issues and recommendations from the agencies were addressed through discussions of science, data, policy, law, expertise, and implementation experience. The results of those discussions were memorialized in the contents of the rule text, preamble, and other materials that make up the administrative record for the rulemaking.

4. **Specifically, what is the EPA's response to each of the Corps' allegations of:**
   a. **Misuse of Corps data;**
   b. **Flaws in the rule's Economic Analysis; and**
   c. **Flaws in the rule's Technical Support Document?**

Response: The Department of the Army and the EPA engaged in robust discussions to ensure a scientifically sound, legally supportable, and clearly implementable final rulemaking. Discussions and recommendations regarding use of Corps data, development of the economic analysis, and development of the technical support document included ensuring that staff concerns were fully discussed and carefully considered.
Following completion of the final rulemaking, the General Accountability Office conducted an independent review of the agencies compliance with all relevant administrative requirements, including the economic analysis and the Administrative Procedures Act, and concluded that the agencies met every requirement.

5. **What was EPA's justification for not adopting or addressing certain issues or recommendations raised by the Corps in these documents?**

Response: All final decisions made by the Department of the Army and the EPA reflect careful consideration of input from Corps and EPA staff and represent the best science, agency experience with administration of the Clean Water Act, and the law.

6. **On what date(s) did the EPA "walk through the concerns" with the Corps?**

Response: The final Clean Water Rule is the result of many years of coordination and discussion between EPA and Corps staff during which time both agencies were involved in extensive evaluation,

coordination, and final decision-making. During this process, EPA, Army, and Corps staff talked on perhaps hundreds of occasions to share perspectives, provide information, and discuss options. Discussions also involved experts from other agencies on legal, technical, and policy issues to ensure the final rule represents the best science, agency experience, and the law.

7. **Please provide a list of EPA staff who engaged in these conversations or meetings with the Corps.**

Response: Interagency discussions among Corps, EPA, and Army staff during the rulemaking process – in which both EPA and Corps issues and concerns were raised and discussed – included numerous staff, managers, and senior policy executives from both agency Headquarters and field staff. EPA participants in this interagency dialogue incorporated a diverse set of officials drawn from a broad cross-section of the agency, ranging from the Office of Policy (OP), to the Office of Water (OW), to the Office of Research and Development (ORD), to the Office of General Counsel (OGC). The Corps and Army are better positioned to identify the offices from which their participating staff were drawn.

8. **Please provide a list of EPA staff involved in or responsible for drafting or reviewing the rule's Economic Analysis and Technical Support Document.**

Response: Numerous EPA staff were involved over time and to varying degrees in the development and review of the Economic Analysis and Technical Support Document. Staff with relevant expertise were drawn from a broad cross-section of the agency, ranging from the Office of Policy (OP), to the Office of Water (OW), to the Office of Research and Development (ORD), to the Office of General Counsel (OGC).

9. **The EPA's Administrative Records Guidance directs that "[t]he record also includes documentation to support findings under relevant statutory authorities, regulatory authorities, or executive orders, such as the economic analysis prepared pursuant to Executive Order (EO) 12866, analyses of economic impacts on small entities prepared under the Regulatory Flexibility Act, and records of consultation required under the Unfunded Mandates Reform Act..."**

   a. **Please indicate whether or not EPA included all documentation related to the following in the rule's administrative record:**

      i. The finding that the rule will not have a significant economic impact on a substantial number of small entities.

Response: This finding may be found in the preamble for the final rule at 80 FR 124 page 37102.

      ii. The decision not to hold a Small Business Advocacy Review Plan (otherwise known as a SBREFA panel) in the Administrative Record.

Response: In addition to the discussion in the preamble, please see the Compendium 11, Volume 1 of the Response to Comments.

      iii. The economic analysis prepared pursuant to EO 12866.

Response: The Economic Analysis and supporting documentation are in the administrative record.

iv. The decision not to complete an Initial Regulatory Flexibility Analysis.

Response: The decision is reflected in the preamble for the final rule at 80 FR 124 page 37102.

b. If not, please provide the Committee with a list of which documents were not included and an explanation as to why each of these documents were excluded.

Response: These documents are in the administrative record.

Congressman Rod Blum (IA):

Recently, there have been several instances of the Environmental Protection Agency (EPA) ignoring the input or concerns of Cabinet level agencies with regards to rule formulation. Senator Inhofe explored the disagreement and a lack of input from the U.S. Army Corps of Engineers over the Waters of the United States, issued jointly by the EPA and the Corps, in a letter in July.

Additionally, in October of 2014, EPA published an incomplete risk assessment titled "Benefits of Neonicotinoid Seed Treatments to Soybean Production," which drew a public rebuke from the U.S. Department of Agriculture (USDA). USDA specifically requested EPA conduct a full assessment to account for the benefits of neonicotinoid seed treatment for all crops.

1. **Why did EPA decide to ignore the request of USDA and publicly release this incomplete assessment? Is this behavior typical to ignore a request from a Cabinet level agency or department?**

2. **Were you concerned that releasing an incomplete and one-sided report would result in public misunderstanding which could adversely affect farmers?**

Response: The EPA conducted its assessment of the benefits on neonicotinoid treatments to soybean seed as part of the ongoing registration review for this class of compounds that began in 2008. As part of that re-evaluation process, the agency is assessing the potential risks posed by these treatments and the benefits that these uses provide to agriculture. In the process of assessing the risks posed by the neonicotinoids, the EPA became aware of several studies, including one that had been co-authored by a USDA scientist, studying whether neonicotinoids provided benefits when used as treatments to soybean seed in South Dakota in 2009 and 2010. Those studies did not evaluate the benefits of those seed treatments to soybean producers across the range of regions, under different soybean prices, or under different growing conditions that are typical of US soybean production. Nor did those studies evaluate the impact of neonicotinoid seed treatment on pollinators or the impact of alternative pesticide treatments such as foliar sprays on pollinators.

Based in part on those studies, the EPA decided to evaluate the benefits of the soybean seed treatment use. The EPA document analyzes how neonicotinoid seed treatments are currently used in soybeans (e.g., target pests), the alternatives to seed treatments, and the biological and economic benefits of seed treatments compared to other pest control options.

As part of that analysis, we asked USDA to provide data from USDA's regional Integrated Pest Management (IPM) centers, which are funded through grants from the National Institute of Food and Agriculture, on the use and importance of neonicotinoid seed treatments in the production of 17 crops, including soybeans. Those data are not publicly available and are still preliminary.

Additionally, the EPA met and shared the preliminary benefits analysis document with USDA's Office of Pest Management Policy (OPMP) on three occasions for their review. Prior to publication, the EPA corrected one reference in response to the preliminary comments provided by OPMP's review, pointed OPMP to areas of the document that address uncertainties that OPMP raised regarding the regional/conditional need for seed treatment, worked with USDA on obtaining additional information and input from IPM Centers, and explained why other OPMP comments were not relevant to the document.

Consistent with our transparency principles, the EPA sought public input on its draft assessment. We expect to finalize this analysis later this year and will consider the results as we determine whether risk mitigation is necessary for the neonicotinoids. As part of this ongoing re-evaluation process, we will again seek comment from USDA and the public on our analysis and any identified risk mitigation before finalizing the agency's risk management decision.

The EPA assessment concludes there are "no clear or consistent economic benefits on neonicotinoid seed treatments in soybeans." However, the USDA, along with the soybean farmers in my district, disagrees with that assessment.

3. Given the opposition by the agency with the most expertise about the use of neonicotinoid pesticides, does EPA intend to review its assessment?

Response: On pesticide matters, the EPA primarily coordinates with USDA's Office of Pest Management Policy (OPMP) and relies on OPMP to coordinate with other parts of USDA. USDA's Office of the Chief Economist (OCE) submitted their comments after publication of the soybean benefits document and as part of the public comments. The EPA also received official comments from USDA's Agricultural Research Service (ARS) of which OPMP is a part, on April 6, 2014. Both sets of submitted comments from USDA (one from USDA-ARS and one from USDA-OCE) are attached for reference.

The EPA discussed its benefit analysis for soybeans with USDA on several occasions in 2014. USDA/OPMP reviewed the preliminary benefits analysis document, and provided oral and written comments prior to publication. USDA's final written comments prior to publication of the analysis (October 15, 2015), which reflect the comments that USDA raised throughout the process (as the EPA provided updates on their soybean benefits document), are attached. The EPA evaluated and considered USDA's comments in developing the benefits document that was released on October 16, 2014.

Based on these comments, the EPA corrected one reference in the document, pointed USDA/OPMP to areas of the document that address uncertainties that USDA/OPMP raised regarding the regional/conditional need for seed treatment, incorporated additional information and input from IPM Centers (see paragraph below), and explained why other USDA/OPMP comments were not relevant to the document.

After the preliminary review and discussion in the summer of 2014, USDA helped facilitate the collection of additional information via USDA's Integrated Pest Management Centers (IPMC). Twenty-

one entomologists from seventeen states responded to the IPMC questionnaire with preliminary and non-public data for 17 crops. Their responses included information on the most regionally important pests, the effectiveness of neonicotinoid seed treatments in comparison to alternatives, the value of preventative pest control in their regions, and their general thoughts on seed treatment benefits for 17 different crops. The EPA incorporated information on soybean treatment, only into the October 2014 document. As noted above, we expect to finalize our benefits analysis later this year.

Ranking Member Elijah E. Cummings (MD):

1. **Administrator McCarthy, as a follow up to your July 29, 2015 hearing testimony, please review Mr. Ronald Harris' recommendation for a regional Ombudsman's office to oversee Title VII claims and provide the Committee with the agency's views on this recommendation.**

Response: We have reviewed Mr. Harris' recommendation for a regional Ombudsman's office and will take the recommendation into consideration as we continue to make improvements to our civil rights program. One such improvement, which calls for a 100% completion by our workforce of No Fear training, has already been made as we recognize the importance of training employees and managers about their non-discrimination in employment obligations and rights to pursue such claims. In FY 2014, EPA achieved that training goal and as part of the training, provided employees information about retaliation discrimination. Similarly, because we recognize the importance of employees and managers having a clear understanding of how to process harassment complaints, we created an EPA Order which outlines anti-harassment procedures that is being coordinated with the unions. More specifically, a feature of our non-harassment procedures is that any "affected person," (that is, a Federal employee; applicant for employment; grantee employee; contractor employee; EPA Federal Advisory Committee Act (FACA) member; Senior Environment Employee (SEE) enrollee; student volunteer; or Public Health Service Officer (PHSO)), who believes s/he has been subjected to harassment in the course of his or her employment or performance of agency-related functions may report allegations of harassment to supervisors, managers or agency human resources officials.

Congresswoman Eleanor Holmes Norton (DC):

1. **Administrator McCarthy, after you testified at the July 29, 2015 hearing, I asked you whether you supported giving unpaid interns protection under the nation's anti-discrimination laws. Please review H.R. 3231, the Federal Intern Protection Act of 2015, which would protect unpaid federal interns from discrimination, and provide the Committee with your views on the bill and comments you may have from your experience, including whether or not you would support this legislation.**

Response: We believe that unpaid interns at EPA deserve equal protection under the law. As such, we would be happy to work with the Committee on legislation that provides these important protections.

2. **Administrator McCarthy, during the hearing you stated that you would be happy to talk to Ms. Karen Kellen of AFGE to discuss how EPA could proactively address issues at the agency, as well as allow employees to provide input on manager performance. Please provide the Committee with an update on the status of your discussions with Ms. Kellen.**

Response: EPA senior management held a meeting with Ms. Kellen on August 11, 2015, to discuss various issues and will continue to meet with her and other union representatives.

Congresswoman Brenda Lawrence (MI):

1. **Administrator McCarthy, as a follow-up to your July 29, 2015 hearing testimony, please discuss the agency's management training for addressing allegations of sexual harassment, discrimination and retaliation. Please also include discussion of how managers are held accountable for training requirements and consequences for managers who fail to meet the agency's training requirements. In addition, please include the agency's efforts to train non-management employees to ensure that they know their rights and how and where to lodge their complaints.**

Response: The EPA takes the issues of sexual harassment, discrimination and retaliation very seriously. On December 15, 2014, the Administrator issued a statement to all employees reaffirming the agency's commitment to prohibiting harassment of any kind and its Anti-Harassment Policy. The agency is currently finalizing *EPA Order 4711: Procedures for Addressing Allegations of Workplace Harassment* which provides uniformity and transparency related to processing complaints of harassment; procedures for reporting and responding to complaints; and guidance for engaging in related fact-finding and decision making.

EPA's Office of Civil Rights and the Office of Human Resources are working with EPA's unions to finalize the order. Consequently, the EPA is scheduling anti-harassment training conducted by the Equal Employment Opportunity Commission for supervisors and managers. EPA plans to launch the training this fall. Once the order is issued, EPA will provide training on the order to all agency employees.

USDA United States Department of Agriculture | Research Education Economics | Office of the Under Secretary | Room 216W Jamie L. Whitten Building Washington, DC 20250-0110

APR 0 1 2015

Mr. Richard Keigwin
Director, Pesticide Re-evaluation Division
Office of Pesticide Programs
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW.
Washington, D.C. 20460

Dear Rick:

This is an official transmittal from my office of the Agricultural Research Service's comments on soybeans and neonicotinoids.

Thank you for considering this new information.

Regards,

Ann M. Bartuska
Deputy Under Secretary
for Research, Education, and Economics

cc:
Jim Jones, EPA
Sheryl Kunickis, ARS

ARS Comment to EPA's public docket for the Agency's assessment of benefits of neonicotinoid seed treatments to soybean production.

USDA-ARS welcomes the opportunity to respond to the initiative EPA has taken to review the value of neonicotinoid seed treatments on soybeans and potentially other crops. There has been a long-standing question about whether the widespread use of neonicotinoids will accelerate evolution of resistance in target-pest populations. Added to this concern are myriad questions regarding negative effects of neonicotinoids on honey bees and other non-target organisms. As EPA gathers information for its risk-benefit analyses, it will be important to understand as fully as practicable the risk a grower faces from pests in the absence of a neonicotinoid seed treatment. Our main goal in this comment is to convey our view that there is no simple answer to the question of whether neonicotinoid seed treatments have value as a prophylactic treatment in soybeans, and most other crops for that matter. It is a complicated situation with many facets and important nuances that must be considered. We emphasize some of the more important pest management considerations here.

Use of neonicotinoid seed treatments is prophylactic, in the sense that growers do not have current-year knowledge of target pest pressure when they purchase their seed. Prophylactic use of an insect management tool is not necessarily a bad idea, and such a strategy can play a central role in an Integrated Pest Management (IPM) program depending on the context – host plant resistance is the classic example, because it eliminates or reduces the need for in-season rescue treatments. Use of transgenic Bt crops also is prophylactic by nature. Neonicotinoid seed treatments cost ~ $7-8/ac (as reported in the EPA memorandum). From an IPM point of view, the value to a grower should outweigh this cost, at least when averaged over years, for use to be economically justified. Neonicotinoid seed applications are purported to provide early-season, broad-spectrum pest control, enhancing plant vigor and crop yield potential.

Pest complexes and cropping practices vary widely across U.S. soybean production regions. The abundance and diversity of different pest populations also vary, even within different production regions. Projecting the frequency and intensity of pest infestations is an important management consideration, especially when one is making pest control decisions at planting. Using neonicotinoid seed treatments for protection against a certain pest in one region of the country may be justified much of the time, whereas prophylactic protection against the same pest in another part of the country may be seldom warranted. For example, soybean growers in the southern U.S. face a much more diverse and serious threat from insect pests than growers in the Midwest, and the value of protection afforded by prophylactic insecticides likely will vary accordingly.

In the case of soybean, neonicotinoid seed treatments primarily target minor, sporadic or occasional pest problems. While damage by these pests certainly can be quite severe under certain conditions, losses are usually minor, and serious losses are sporadic in space and time. This is why they are considered "minor" or "occasional" pests. Even infestations by some primary pests like soybean aphid are sporadic, because colonization of a specific field in a given year depends on insect dispersal, which in turn depends on the vagaries of local weather and many other variables. Information on pest pressure by scouting is often the best way to assess

need for control, but for many of the pests targeted by neonicotinoid seed treatments, especially below-ground insects, scouting is impractical or there is no viable rescue treatment available once a real-time problem is detected. In these cases, prophylactic seed treatments may be warranted if predicted risk of damage is high enough.

There are environmental and pest situations that can significantly increase the risk of an economic infestation by a specific pest in a particular field in a particular year. These include scenarios of crop rotation, soil type, landscape features and a field's relative position within it, ambient weather, overwintering mortality, mobility of the insect, population cycles and history of infestation, weed complex and prevalence in a field, natural enemy complex and prevalence, planting date, tillage, crop residue management, and biotic/abiotic interactions arising from these. For example, wireworms and white grubs are below-ground pests that are a serious concern in fields rotating out of pasture, CRP land, or certain other crops (e.g., cereals, potatoes); in areas of silty or sandy soils including knolls within fields; and in early-planted fields during a cool wet spring. Risk from white grubs further increases if fields are near tree lines or adjacent to pastures. Both of these insects spend multiple years as larvae in the soil, so risk does not automatically dissipate after one year. Seed maggots present a higher risk in fields that received manure or buried green matter before planting, but they are not a significant risk in no-till fields. Black cutworms are a risk if the field was weedy before planting and if winds from overwintering regions were favorable for long-distance transport of migrant females into the area. Fields with few weeds are usually not at risk even when winds are favorable, because egg-laying females will not be attracted to them. Such examples are indicative of the complex nature of infestation and population dynamics of minor and occasional pests.

These examples illustrate that scenarios putting fields at risk of serious secondary pest pressure are not uniformly distributed in space or time, but neither are they rare. Some fields undoubtedly will benefit from protection by neonicotinoid seed treatments in some years while others will not. A one-size-fits-all assessment of value of neonicotinoid seed treatments is not possible except from a very high vantage point that deals with overall averages. In USDA, we are concerned with providing tools to individual growers and their advisors to assist them in making good pest management decisions on their farms, and overall averages are not always the best tool for determining the best course of action on the scale of individual farms.

We caution that the very widespread use of neonicotinoid seed treatments on soybeans and other crops cannot be taken as direct evidence of their value to growers, because in most cases untreated seed of the varieties desired by a grower is not available for purchase. In other words, declining treatment is generally not an option for a grower under current market circumstances. We also caution against assuming that non-use of seed treatments will automatically necessitate replacement by some other form of protection against the target pests. The need for any pest control approach depends on pest pressure or, in many cases, the risk of pest pressure, for which national or even regional averages are not sufficiently informative.

Information and development of risk factors for minor and occasional pests targeted by neonicotinoid seed treatments are among the first steps in assessing their value to growers and American agriculture. For the reasons presented above, these are complicated questions for which simple answers cannot be expected. At a minimum, the realized benefits of neonicotinoid

seed treatments will vary depending on crop and region of the country. In reality, as described above, they will vary depending on many additional interacting variables as well. It will be important to understand these variables when weighing the benefits of these compounds against the risks to the environment, and in designing the most appropriate path forward. USDA-ARS scientists and others are actively engaged in synthesizing what is already known that can be of potential use in assessing the value of neonicotinoid seed treatments for major U.S. crops, and in conducting meta-analyses of relevant published and unpublished data. The results should reveal the most serious knowledge gaps that we (the scientific community) can most profitably address in future research.

United States Department of Agriculture
Office of the Chief Economist
Room 112-A J.L. Whitten Building
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April 6, 2015

Mr. Richard Keigwin
Director, Pesticide Re-evaluation Division
Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460–0001

Re: USDA Public Comments on the EPA's *Benefits of Neonicotinoid Seed Treatments to Soybean Production* document published in the October 22, 2014 Federal Register; EPA docket identification (ID) number EPA-HQ-OPP-2014-0737.

Dear Mr. Keigwin:

America's farmers face numerous challenges as they work to produce the food, feed, and fiber for a strong and healthy America. On October 22, 2014, EPA added an additional and unnecessary burden by publishing a portion of an incomplete risk assessment titled "*Benefits of Neonicotinoid Seed Treatments to Soybean Production*" which again puts growers in the position of defending their pest management decisions. USDA staff had specifically requested EPA to complete the full risk assessment that would more robustly describe the benefits of neonicotinoid seed treatment for all crops. Instead, EPA released the report regarding soybean seed treatment without additional consideration of other crops or to USDA cautions about releasing a premature assessment of the costs and benefits of such seed treatments. EPA's release of the incomplete report has resulted in a plethora of articles which cast doubt on the value of seed treatment and neoniconitoids for agricultural production and the choices made by farmers. EPA's report indicates that most neonicotinoid seed treatments were prophylactic in nature and that there are available alternative foliar insecticide treatments that would be as effective at similar cost to neonicotinoid seed treatments. EPA concludes that there "... are no clear or consistent economic benefits of neonicotinoid seed treatments in soybeans."

As a whole, USDA disagrees with that assessment. We believe that pest management strategies are made in consideration of pest pressures, climate, landscape, and numerous other factors.

Growers should have the ability to use the best tools available to manage pests that include choices in seed treatment and pest management tactics. Each knows best what works for his or her individual situation.

Again, thank you for the opportunity to review. Our comments are below.

Sincerely,

Robert Johansson
Acting Chief Economist

USDA Public Comments on the EPA Document

"Benefits of Neonicotinoid Seed Treatments to Soybean Production"

Background

It is clear that the soybean crop is of significant size and importance to overall US production. In 2013, US farmers harvested 3.36 billion bushels of soybeans on 76.25 million acres, which was valued at $41.84 billion. Average soybean yield was 44 bushels per acre. In 2013, soybean price at the farm averaged $14.30 per bushel.

It is also clear that expenditures on neonicotinoid seed treatment for soybeans are substantial and not insignificant. In 2013 neonicotinoid seed treatment sales exceeded $1 billion and more than $400 million for soybean seed treatments, or roughly 9 percent of seed costs. There are at least 36 different EPA registered neonicotinoid-based products for seed treatments in soybean. Many of those products are also registered in 40 or more States in addition to the federal registration.

The agricultural sector, including the soybean sector, is typically viewed as competitive. As such it is unlikely that most farmers would be purchasing seed treatments if there was no value to them. For example, extension agents at the University of Mississippi point out that adoption of neonicotinoid seed treatments for soybeans in MS has risen from 2 percent in 2007 to 90 percent today. That pace is more rapid than adoption of herbicide resistant soybeans[1] and has been driven by the value MS soybean producers place on the protections afforded by neonicotinoid seed treatments.[2]

EPA Findings

EPA argues that it would be equally cost-effective for producers to substitute protections afforded by neonicotinoid seed treatments with other foliar applications of pesticides. The report makes the broad generalization that "…At most, the benefits to soybean growers from using neonicotinoid treated seeds are estimated to be 1. 7% of net operating revenue in comparison to soybean growers using foliar insecticide…"

To come to that conclusion, EPA has had to make several broad generalizations and to rely on scarce and limited data that are not public. For example, EPA assumes that foliar spraying of pesticides is done by all producers who are purchasing seed treatments, that such spraying does not incur additional costs in management or equipment purchases, and that such spraying can address the same pests over the same time window as seed treatments. EPA did not consider any potential environmental consequences of foliar spraying such as compaction issues with farm fields if additional treatments are required, increased risk of exceeding food tolerance residue levels when compared to seed treatments, effects of increased foliar sprays to farm workers, pollinators, other beneficial arthropods or integrated pest management systems, nor regulatory barriers to spraying created by other environmental regulations. The EPA analysis assumes that foliar spraying is environmentally preferable to using seed treatments.

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[1] See discussion at http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx.

[2] See http://www.mississippi-crops.com/2014/10/31/do-neonicotinoid-seed-treatments-have-value-regionally-in-soybeans/.

EPA notes some additional limitations in their report, which they indicate may affect their conclusions:

- EPA acknowledges that there may be risk management benefits to using neonicotinoid seed treatments, but that they lack information to quantify those benefits.
- EPA acknowledges that neonicotinoid seed treatments may be more or less valuable to soybean producers in conjunction with other crop management technologies, such as IPM or crop residue management. EPA has not included any of those cross effects in their analysis.
- EPA acknowledges that the use of neonicotinoid seed treatment may help soybean producers manage pesticide resistance. The efficacy of alternatives to neonicotinoid seed treatments are not adjusted for such resistance issues.
- EPA also acknowledges that other costs of soybean production not accounted for in this analysis may influence the extent that uncertainty in EPA's analysis would affect the conclusions.

Conclusion

USDA disagrees with the general assertion by EPA that there are "no clear" economic benefits to seed treatments in soybeans. In 2013 neonicotinoid seed treatment sales exceeded $1 billion and more than $400 million for soybean seed treatments. In general, USDA would suggest that farmers are efficient and would not use management practices that did not generate expected benefits that were at least as great as the cost of that management practice. Farmers will generally employ such practices to the point when the marginal benefit of that practice is equal to the marginal cost of that practice. In this case, employing a menu of pesticide practices that includes seed treatments is balanced against the costs of using those practices.

Because, those decisions are based on expected crop prices and expectation that in some years pest management will be more or less necessary based on environmental conditions it may be that in any given year costs of pest management exceed the benefit provided in that year. However in other years such investments are repaid and would cover previous year's use of those practices. Similarly, pest management in one region may protect crops from certain pests at a different rate than in other regions. Given the pace of adoption of neonicotinoid seed treatments particularly in some regions of the country, it is clear that there are economic benefits to using those seed treatments.

Unfortunately, EPA's conclusions are not supported by complete data nor analysis. EPA's analysis does not include potential labor and management savings afforded by seed treatments. Moreover, it does not consider cases when timely foliar applications are not possible or as effective due to general field and weather conditions. Applications of pesticides are required to mitigate the adverse effect of those pests on a newly emergent crop. EPA's calculation does not include consideration of control for soil pests that would not be affected by foliar applications. EPA's calculation does not include any additional regulatory expenditure by landowners, such as costs to revise pesticide permit applications, or costs to submit new applications for foliar spraying. EPA does not consider the benefits of seed treatments when soybeans are grown in rotation with other crops, such as corn, which may be higher than consideration of benefits on a year by year and crop by crop basis. Under a reasonable sensitivity analysis it can be shown that EPA's calculations could be understated by more than a factor of 10 for soybean producers in certain regions.

USDA is disappointed that EPA published this report in such a preliminary format without offering USDA an opportunity to help EPA reframe their analysis and correct the misrepresentation of economic costs and benefits that underlie this report. Farming is different from running a dry cleaning enterprise or an electrical utility. It is the nature of farming that production conditions are uncertain and variable. Producers have to employ a variety of processes and technologies that are best suited to a particular farm, farm family, and environmental condition. As such it is inappropriate to draw conclusions about the entirety of soybean production across regions of the United States under different environmental conditions by simply looking at national averages over several years.

Seed treatments are a preventative measure that guard against yield losses due to certain pests in certain years in certain places. Because farmers have shown rapid adoption of that management technology in some states it is clear that there is value to those treatments. Seed treatments are just one of the tools a producer has to manage pests on the farm. USDA agrees that in some situations different pesticide methods may be equally effective as seed treatments in a given year. And it is likely that in some soybean growing regions, there are more cost-effective pest management treatments. However, in other situations or regions, environmental conditions would likely favor the efficacy of seed treatments over those afforded by foliar spraying.

For many regions, it is generally agreed in the soybean IPM research community that use of neonicotinoid insecticides may not be useful in enhancing yield in soybean, especially for aphid control since it does not persist to the period when aphids are most damaging to yield. However, yield enhancement is not the only consideration for using neonicotinoids in crop production, including in soybeans. Those insecticides may have benefits in soybeans to help produce seed without mottling by reducing virus transmission by beetles, especially around edges of fields. Seed producers get "docked" for mottled seed.

Environmental or ecological consequences of neonicotinoids may not be as great as other traditional insecticidal insect control, especially with regard to unintended mortality of beneficial insects since, in soybeans, it does not persist to the period when most beneficial insects are most active.

Based on the above points, soybean is not a good model for judging the value of neonicotinoids to yield enhancements. Pesticides are considered in production systems as a whole and all crops in that system are generally included. The soybean belt has rotations with corn and soybeans included and neonicotinoids are used in corn as well. Soybeans are now a big part of the production systems in the cotton belt where neonicotinoids have been found to be effective in enhancing cotton yields. Integrated systems rely on every tool available and assessments of any component in the system should include all other possible components.

Because of the many limitations and uncertainties acknowledged by EPA, USDA suggests that EPA revise their study to evaluate the full costs and benefits of neonicotinoid seed treatments in all crops and regions. Furthermore, because EPA has relied on data currently unavailable to the public, USDA requests that EPA include more survey results from the recently released reports that indicate that farmers are using neonicotinoid seed treatments for a variety of reasons.[3]

[3] See recent studies on this topic published by AgInformatics (http://growingmatters.org/studies/).

Specific Comments

1. USDA suggests EPA reframe their analysis to consider the full costs or benefits of neonicotinoid seed treatments as it would typically do under its FIFRA requirements.

When considering pesticide uses under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), EPA provides a benefit assessment in conjunction with a risk assessment and other materials that inform the determination of whether the use of a pesticide results in unreasonable adverse effects on the environment. Consideration of benefits is required during EPA's decision-making process. During registration, registration review or when considering cancellation of a pesticide, USDA and the public receive the entire set of documents relevant to the Administrator's determination of unreasonable adverse effects on the environment.

In cases where the Administrator proposes cancellation of a product or proposes a regulatory action, the Secretary is provided the relevant documents prior to the interagency review with the option to provide formal comments to be included in the Federal Register notice when the regulatory action is published in the Federal Register. All of the neonicotinoid pesticides are currently undergoing registration review with data generation projected to be completed by 2015 for imidacloprid; 2016 for thiomethoxam, clothianidin, and dinotefuran; and 2017 for acetamiprid and thiocloprid. Risk management decisions are to follow in 2016 to 2019. Normally the benefits assessment for specific uses would not be released to the public prior to the interim risk management decision. For example, the interim decision and benefits assessment for flutolanil was released in September while the pesticide was in the last stages of registration review and a full six months following the release of its human health risk assessment in March. In the case of neonicotinoid seed treatments, USDA and the public will see only the soybean neonicotinoid seed treatment benefits assessment without a risk assessment or notice of the decision under consideration. Soybean seed treatment is singled out among all of the neonicotinoid seed treatments, without explanation, creating uncertainty among growers and seed providers over the future of this tool.

2. The potential change in use for neonicotinoid seed treatments assumed in EPA's analysis is economically significant

Because the value of these treatments are in excess of $1 billion in sales for the US, any analysis of the costs and benefits of using neonicotinoid seed treatments would be considered economically significant and would undergo full notice and comment by OMB and USDA before public comments were solicited.

Even when limiting the scope to soybean seed treatments, the sales of neonicotinoid treatments exceeded $400 million in 2013, likely making any economic analysis of restricting the use of those treatments economically significant. If EPA recommended cancellation of soybean seed treatments, the Secretary would be asked to comment on EPA's analysis of the impacts on the agricultural economy. As such, USDA suggests that EPA consider the costs and benefits of neonicotinoid seed treatments per the guidance provided by OMB Circular A-4 and the OMB Information Quality Guidelines. Such analysis would explore the many limitations noted in this study and would also examine the efficient use of pest management systems across crop species and regions while considering potential resistance issues.

3. The report does not consider the environmental benefits of neonicotinoid seed treatments for soybeans.

In general, EPA analysis would consider both the costs and benefits of a particular use of a pesticide in question. Despite the title of this report, EPA does not consider any environmental benefits in this analysis. Using seed treatments minimizes the exposure of non-target insect populations to active ingredients included in foliar sprays. Such potential benefits to those insect populations have not been included in this analysis.

Several reports recently have noted the positive environmental benefits associated with seed treatments. For example, the AgInformatics Value Report (2014) indicates that soybean producers that choose to use neonicotinoid seed treatments say that family and worker safety (70%), protecting water quality (57.5%), and protecting beneficial insects (43.8%) are 'very important' considerations when selecting pest management strategies. And extension agents at the University of Mississippi note, "...Neonicotinoids are a class of chemistry that are highly efficacious against insect pests and very safe to mammals. This has led to increased use in many crops grown in the Midsouth region..."

4. Preventative seed treatments are likely to be more or less effective under certain conditions and regions.

Most management techniques for growing crops work better in some years than others. For example, during a period of low precipitation it is more useful to irrigate your crop. In other periods, the investment in irrigation technology may not show an economic return. That is also the case with seed treatments. In some years in some regions, neonicotinoid seed treatment may prevent significant yield losses; whereas in others it may not be as beneficial. In some of those instances, the producers may not be able to effectively use foliar sprays as an alternative. That could be due to a number of reasons, such as lack of appropriate conditions for spraying foliar sprays. In addition, common pests are found in both corn-bean rotations. Controlling pests during the soybean rotation may provide benefits for the corn rotation. It does not appear that EPA has considered those potential benefits.

Some foliar pests cannot be effectively controlled with foliar sprays for a period at the beginning of the plant cycle; e.g., germination. Extension agents at the University of Tennessee indicate that seed treatments are most effective in the 3-4 weeks at the beginning of crop growth, which is the critical period for protecting seedlings when they are most vulnerable to pests. Early in the season, it is often the case that fields are wet and therefore difficult for producers to get out into the fields for foliar pesticide applications. In addition, some pests may be below ground and therefore not controlled by foliar sprays.

EPA does not consider protection from the wide range of pests that are controlled by neonicotinoid seed treatments, but simply focuses on three. Other pests often do not cause significant damage to seedlings, but some may: weevils, trochanter mealybug, grape colaspis, wireworms, three-cornered alfalfa hopper, bean leaf beetle, thrips, white-fringed beetles, etc. Indeed, EPA notes that "... In instances where seed treatments may provide some insurance benefit against unpredictable outbreaks of sporadic pests, such as seed maggots or three cornered alfalfa hoppers, BEAD cannot quantify benefits with currently available information. However,

this insurance benefit may exist for some growers, particularly those in the Southern U.S. Given currently available information, BEAD projects that any such benefits are not likely to be large or widespread, given the negligible historical pesticide usage targeting these pests in soybeans…."

5. Seed treatments minimize the management and labor investment required for scouting and foliar spraying.

It does not appear that EPA has considered the time and labor savings afforded producers by use of seed treatments. EPA assumes that all producers are already applying foliar sprays and so the addition of active ingredients to address the same pest spectrum does not come at any cost other than the actual ingredients. However, not all soybean producers apply foliar sprays and those that do may not be applying them at the same time as covered by the seed treatment window of pest control.[4]

6. EPA's use of limited data to support their analysis is unfortunate, when they were aware that several other studies on this topic would be released at roughly the same time. Those additional data could have been used to augment the limited data cited by EPA in their report.

EPA's use of unpublished and sparse data to make overly broad conclusions about the efficacy and economic value of neonicotinoid seed treatments does not comport with OMB's Information Quality Guidelines or EPA's Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency. As an example, EPA states "when asked when growers should use neonicotinoid seed treatments, 11 of 20 respondents indicated that they should be used under specific conditions – for example, when planting soybean in an area experiencing high infestation rates, or in double cropping scenarios or when planting early season soybeans. Compare that to the AgInformatics Value Report that shows soybean farmers select insecticidal treatments (seed versus foliar) based on cost, consistency of yield and duration of protective effects. The AgInformatics Value Report included 622 soybean farmers from 14 States.

7. EPA's Table 4 should show sensitivity analysis as is standard practice for cost benefit analysis.

EPA derives their conclusion that neonicotinoid seed treatments do not provide any significant benefits from their calculations in Table 4. EPA describes that table as providing conservative results. USDA would disagree. EPA has not considered many things that would affect those calculations. Indeed, it seems that EPA agrees and acknowledges many of those limitations,

- EPA acknowledges that there may be risk management benefits to using neonicotinoid seed treatments, but that they lack information to quantify those benefits.

[4] See discussion at https://www.pioneer.com/home/site/us/template.CONTENT/agronomy/crop-management/high-yield-management/soybean-aphids/guid.069BE58A-CCEA-CE6C-A77D-3E5B02A320EB and http://www.farmdoc.illinois.edu/manage/newsletters/fefo04_04/fefo04_04.pdf.

- EPA acknowledges that neonicotinoid seed treatments may be more or less valuable to soybean producers in conjunction with other crop management technologies, such as IPM or crop residue management. EPA has not included any of those cross effects in their analysis.
- EPA acknowledges that the use of neonicotinoid seed treatment may help soybean producers manage pesticide resistance. The efficacy of alternatives to neonicotinoid seed treatments are not adjusted for such resistance issues.
- EPA also acknowledges that other costs of soybean production are not accounted for in this analysis may influence the extent that uncertainty in EPA's analysis would affect the conclusions. For example, foliar applications of pesticides often require landowners to apply for pesticide application permits and to undertake more burdensome pesticide applications precautions. Such additional regulatory costs are costly to producers and have not been included in this analysis.

Those limitations further calls into question the overly broad conclusions EPA has published. By considering some reasonable alternatives to EPA's limited comparison, USDA notes that seed treatments could be very beneficial to producers under certain conditions that are unknown to a producer at planting time (see table below).

Revenue and Cost	Units	EPA Assumptions	Sensitivity Analysis			
		Seed Treatment	Alt. 1	Alt. 2	Alt. 3	Alt. 4
Yield	(bu/ac)	45	45	45	45	38
Other pests	(bu/ac)				-1	-1
Price	($/bu)	$12.03	$12.03	$12.03	$12.03	$9.59
Gross revenue	($/ac)	$536	$536	$536	$529	$355
Insecticide costs	($/ac)					
Seed treatment	($/ac)	$8				
Foliar spray	($/ac)		$14	$14	$14	$14
Labor & Mgmt	($/ac)		$0	$7	$7	$7
Other variable costs	($/ac)	$173	$173	$173	$173	$173
Total variable costs	($/ac)	$180	$186	$194	$194	$194
Net operating revenue	($/ac)	$356	$350	$343	$336	$161
Percent difference	(%)		1.69%	3.79%	4.05%	41.76%

- Alternative 1: EPA assumptions: yield protection of foliar sprays is equal to seed treatment; no additional costs of pesticide treatments for labor and management or scouting. Assumes flubendiamide is the active ingredient in foliar spray. Requires 2 gallons of water per acre for aerial application and 10 gallons per acre for ground application. A recent California study of various emusifiable concentrations estimated the per acre cost of aerially applying flubendiamide at 2.0 fl. oz at $22.10 per acre. Flubendiamide is used in soybeans at 2 – 3 fl. oz per acre.
- Alternative 2: Includes a cost of applying foliar pesticides range from $6 to $25 based on prices quoted in Soybean Business, a magazine for Minnesota growers. See also Johnson, K.D., et al. (2009) "Probability of Cost-Effective Management of Soybean Aphid

(Hemiptera: Aphididae) in North America," *Journal of Economic Entomology* 102(6): 2101 – 2108.

- Alternative 3: Considers the case that foliar sprays do not control for potential soil pests or that the optimal time to apply pesticides are not available due to field or environmental conditions. As such, the yield benefits afforded by foliar sprays are assumed to be 1 bu/ac less than those provided by seed treatments.
- Alternative 4: Same as alternative 3, but in a region where the yields are lower than the national average (e.g., Mississippi soybean yield in 2009 was 38 bu/ac and the national yield was 44 bu/ac) in a year with low prices (e.g., average price received by farmers in 2009 for soybeans was $9.59 per bu).