

# OVERSIGHT OF THE IMPACT OF EPA AND FWS REGULATIONS ON CITIZENS PRIVATE PROPERTY

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## FIELD HEARING

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, WASTE  
MANAGEMENT, AND REGULATORY OVERSIGHT  
OF THE

COMMITTEE ON  
ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE  
ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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AUGUST 30, 2016

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# **OVERSIGHT OF THE IMPACT OF EPA AND FWS REGULATIONSON CITIZENS PRIVATE PROPERTY**

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**TUESDAY, AUGUST 30, 2016**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.*

## **OPENING STATEMENT OF HON. MIKE ROUNDS, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA**

Senator Rounds. Good morning, everyone. one bit of house-keeping, I would remind all of the witnesses that are going to be testifying today that the mics that are there in front of them are hot all the time and they are very sensitive, so just be aware of that.

Good morning, ladies and gentlemen. The Environment and Public Works Subcommittee on Superfund, Waste and Regulatory Oversight is meeting today to conduct a field hearing entitled "Oversight of the Impact of U.S. Environmental Protection Agency and Fish and Wildlife Service Regulations on Citezens' Private Property Rights."

I would like to thank our witnesses for being with us today, and I look forward to hearing your testimony.

Thoroughout this Congress, this subcommittee has conducted systematic oversight of the federal regulatory process to make certain federal

regulations are promulgated in a transparent, open process with adequate public participation. We have held hearings conducting oversight on various aspects of the rule-making process including the adequacy of the science the agencies rely on when promulgating regulations, the increasing number of unfunded mandates agencies impose on state and local governments, and the impacts these regulations have on small businesses and state and local governments.

Today we will continue our oversight and hear testimony about how the Environmental Protection Agency and Fish & Wildlife Service regulations affect citizens' private property rights. We will hear about how increasing regulations affect citizens' ability to use, develop and prosper while working their land. We will also hear from the agencies as to how they work with the public to assist the public in understanding regulations, as well as offering suggestions as to how this relationship between the agencies and the public can be improved, and how the regulatory process can be improved to minimize the impact of regulations on private land.

According to the American Action Forum, since taking office the Obama Administration has finalized 2,865 regulations. These regulations have cost the American people nearly \$810 billion since 2009. Of

these finalized regulations, 168 of them have come from the Environmental Protection Agency and have cost American taxpayers \$312 billion, nearly half of the total cost of all regulations finalized by this Administration.

Not only are the costs of these regulations passed on to all citizens, but landowners who bear the burden of complying with many of these regulations have limited resources to comply with these costly and complicated regulations.

In 2015, the EPA moved forward with finalizing the Waters of the U.S. Rule, or WOTUS, broadly expanding the Clean Water Act, which would give the EPA unprecedented authority over significant land masses not currently subject to EPA jurisdiction.

This rule creates significant hurdles to normal agricultural operations. And despite EPA's claims that the rule will have minimal economic impact, the final rule is contrary to the comments of agricultural groups, the Small Business Administration and numerous state governors and attorneys general.

Although the Sixth Circuit issued a nationwide stay on the rule, we have heard evidence that the U.S. Army Corps may be moving forward with implementing the WOTUS rule. However, the U.S. Court system should not be the primary backstop

against overly burdensome rules.

If the EPA worked more closely with landowners, states and agricultural groups throughout the rule-making process, the end result would be better rules that minimize the impact and costs on private landowners and American businesses while still achieving the goal of environmental protection.

The U.S. Fish and Wildlife Service is responsible for implementing and enforcing the Endangered Species Act. The Endangered Species Act, or ESA, was enacted by Congress in 1973 with the goal of protecting and recovering endangered and threatened species and their habitats. There are currently 1,226 species listed as endangered and 367 listed as threatened in the United States under the Endangered Species Act, and approximately half of the listed species have 80 percent of their habitat on private land. While the Fish and Wildlife Service attempts to work with landowners to encourage voluntary species management and conservation, the ESA continues to impede landowners' ability to utilize and develop their land by imposing significant restrictions on what landowners can do on their own land.

Adding to the regulatory maze that landowners



face is the confusion caused by the myriad of lawsuits that can change or stop a regulation from being implemented based on a court's ruling. These lawsuits simply add more confusion to an already complex regulatory process. While lawsuits challenging the WOTUS rule resulted in a nationwide injunction, it was also a lawsuit that has led the Fish and Wildlife Service to review the potential listing of more than 250 species for consideration on the Endangered Species List.

It is landowners, not the Federal Government, who are the best stewards of their land. However, more often than not, federal agencies impose burdensome, complicated regulations and dictate to landowners what they believe is the best way to conserve our land and our resources.

Rather than creating an adversarial relationship, agencies should strive to work in cooperation with landowners towards the shared goal of environmental conservation.

Again, I'd like to thank our witnesses for being with us here today, and I look forward to hearing your testimony.

Our witnesses joining us on the first panel for today's hearing are Mr. Shaun McGrath, Region 8

Administrator, U.S. Environmental Protection Agency;  
and Ms. Noreen Walsh, Regional Director,  
Mountain-Prairie Region, Fish and Wildlife Service.

Welcome to both of you, and thank you for being  
here.

We will now turn to our witnesses,  
Administrator Shaun McGrath, for five minutes.

And, Administrator McGrath, you may begin.

**STATEMENT OF SHAUN McGRATH, REGION 8 ADMINISTRATOR,  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

MR. SHAUN McGRATH. Thank you, Mr. Chairman. I  
appreciate the opportunity to testify today on how  
the EPA helps stakeholders understand federal  
environmental laws and regulations, including  
opportunities for public input, feedback and  
education.

As the Regional Administrator for EPA Region 8,  
I will be focusing my remarks on how the EPA engages  
stakeholders in the region regarding current and  
proposed environmental regulations.

The agency uses a variety of outreach tools to  
educate the public and to learn about specific  
questions and concerns from stakeholders. This  
information informs and greatly enhances the  
agency's rule-making process and outcomes by helping  
ensure that regulations comport with the public  
health and environmental priorities of local, state

and tribal stakeholders.

As an example, the Clean Water Rule was developed jointly by the EPA and the Army Corps of Engineers in response to several Supreme Court decisions regarding the scope of the Clean Water Act, Members of Congress, state and local officials, industry, agriculture and environmental groups, and the public asked for a rule-making.

In developing the Clean Water Rule, EPA, in conjunction with the Army Corps, conducted a multi-year engagement effort that included hundreds of meetings with stakeholders across the country and evaluated over 1 million public comments representing perspectives from all sides. Our regional office in Denver held over 50 meetings and calls with agricultural producers and leaders in all of the Region 8 states, including South Dakota. These discussions provided the agency with an understanding of the unique issues facing farmers, while providing producers with an understanding of how the scope of the Clean Water Act would and would not affect their operations.

As a result, the agency's final rule reflected the valuable input received from throughout the region and through similar efforts throughout the

country.

EPA is fully complying with the order issued by the U.S. Court of Appeals for the Sixth Circuit by staying implementation of the Clean Water Rule and implementing the prior regulations consistent with the best science and the law.

The agency also conducts outreach on Clean Water Act issues to the agricultural community through our partnerships with states in the Clean Water Act Nonpoint Source Program. Currently, EPA is supporting the South Dakota Department of Environment and Natural Resources in several efforts to provide outreach and information including: A project that is helping to educate ranchers across the state that result in sustainable management practices for grass resources and livestock operations; a small grants program through the South Dakota Discovery Center to support local nonpoint source information and education efforts; and six active watersheds projects across the state that are focused on watershed restoration and outreach to local landowners on conservation practices that can improve water quality and economic sustainability. Two of those projects, the Belle Fourche and the Spring Creek projects, are just down the road from

us here in Rapid City.

Outreach to the agricultural community is a top priority for the region. Agriculture is a major industry in every EPA Region 8 state. And consequently, Region 8 partners with states, tribes and agricultural associations conducting annual meetings with the state agriculture commissioners, periodic joint meetings with state agriculture and environmental directors, annual meetings with State Agriculture Department and Tribal Pesticide Program Directors, and periodic Webinars.

We also work with interested states, legislative officials and agricultural associations to customize specific events. Recent examples include a one-week outreach tour on spill prevention, control and countermeasure requirements organized with the South Dakota Farm Bureau in which we conducted training, clarified misconceptions and answered producer questions in eight towns across South Dakota.

EPA's Water Security Division conducted a multi-stakeholder water preparedness and resiliency workshop in the City of Pierre in July of 2014. And additionally, beginning in 2014, EPA Region 8 initiated a replicable drought resilience project in

the upper Missouri River Basin to demonstrate how to leverage federal and state resources in the development and implementation of watershed drought resiliency plans.

While my testimony provides just a snapshot of our public outreach activities, I hope that these examples of the engagement activities that the EPA delivers regionally and in South Dakota provide insight into our commitment to engage in meaningful outreach with all of our stakeholders.

I'd like to close by emphasizing that EPA's permitting and rule-making actions include important requirements for public participation to ensure meaningful feedback and input on agency actions, and we take these requirements seriously, not just because they're required but because they help us make more effective rules that more closely align with the priorities of the public and interested stakeholders.

And with that, I look forward to your questions, Mr. Chairman.

[The prepared statement of Mr. McGrath follows:]

Senator ROUNDS. Thank you, sir. And I would be remiss if I didn't thank you for being here, Shaun. We go back quite a ways back to western governor days. And I know that you were working

**Testimony of Shaun McGrath, Region 8 Administrator  
U.S. Environmental Protection Agency  
Before the  
Senate Committee on Environment and Public Works  
Subcommittee on Superfund, Waste Management and Regulatory Oversight  
Rapid City, South Dakota**

**August 30, 2016**

Thank you, Mr. Chairman, for the opportunity to testify today on how the EPA helps stakeholders understand federal environmental laws and regulations, including opportunities for public input, feedback, and education. As the Regional Administrator for EPA Region 8, I will be focusing my remarks on how the EPA engages stakeholders in the region regarding current and proposed environmental regulations.

The agency uses a variety of outreach tools to educate the public and to learn about specific questions and concerns from stakeholders. This information informs and greatly enhances the agency's rulemaking process and outcomes by helping ensure regulations comport with the public health and environmental priorities of local, state and tribal stakeholders.

Clean Water Act Public Outreach

As an example, the Clean Water Rule was developed jointly by the EPA and the Army in response to several Supreme Court decisions regarding the scope of the Clean Water Act. Members of Congress, state and local officials, industry, agriculture, environmental groups, and the public asked for a rulemaking. In developing the Clean Water Rule, the EPA, in conjunction with the Army, conducted a multi-year engagement effort that included hundreds of meetings with stakeholders across the country and evaluated over one million public comments representing perspectives from all sides. Our office held over 50 meetings and calls with

agricultural producers and leaders in all of the Region 8 states. These discussions provided the agency with an understanding of the unique issues facing farmers, while providing producers with an understanding of how the scope of the Clean Water Act would and would not affect their operations. As a result, the agency's final rule reflected the valuable input received from throughout the region and through similar efforts throughout the country. The EPA is fully complying with the order issued by the U.S. Court of Appeals for the Sixth Circuit by staying implementation of the Clean Water Rule and implementing the prior regulations consistent with the best science and the law.

The agency also conducts outreach on Clean Water Act issues to the agricultural community through our partnerships with states in the Clean Water Act Nonpoint Source Program. Currently, the EPA is supporting the South Dakota Department of Environment and Natural Resources in several efforts to provide outreach and information including:

- A project that is helping to educate ranchers across the state that result in sustainable management practices for grass resources and livestock operations;
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- Six active watershed projects across the state that are focused on watershed restoration and outreach to local landowners on conservation practices that can improve water quality and economic sustainability. Two of those projects, the Belle Fourche and the Spring Creek projects, are just down the road from us here in Rapid City.



EPA Region 8 Outreach to the Agriculture Community

Outreach to the agriculture community is a top priority for the region. Agriculture is a major industry in every EPA Region 8 state. Consequently, Region 8 partners with states, tribes, and agriculture associations, conducting annual meetings with the State Agriculture Commissioners, periodic joint meetings with State Agriculture and Environmental Directors, annual meetings with State Agriculture Department and Tribal Pesticide Program Directors, and periodic webinars. We also work with interested states, legislative officials, and agricultural associations to customize specific events. Recent examples include:

- A one-week outreach tour on Spill Prevention, Control, and Countermeasure requirements organized with the South Dakota Farm Bureau in which we conducted training, clarified misconceptions, and answered producer questions in eight towns across South Dakota;
- The EPA's Water Security Division conducted a multi-stakeholder water preparedness and resiliency workshop in the City of Pierre, South Dakota, in July 2014. Additionally, in 2014, EPA Region 8 initiated a replicable drought resilience project in the upper Missouri River Basin to demonstrate how to leverage federal and state resources in the development and implementation of watershed drought resiliency plans.

Conclusion

While my testimony provides just a snapshot of our public outreach activities, I hope that these examples of the engagement activities that the EPA delivers regionally and in South Dakota provide insight into our commitment to engage in meaningful outreach with all of our stakeholders. I'd like to close by emphasizing that the EPA's permitting and rulemaking actions

include important requirements for public participation to ensure meaningful feedback and input on agency actions and we take those requirements seriously—not just because they are required but because they help us make more effective rules that more closely align with the priorities of the public and interested stakeholders.

Thank you and I look forward to your questions.

with the State of South Dakota at that time as a liaison between western governors in South Dakota. So you know the West; you grew up out here. And you live in Colorado, Boulder. And I think you were mayor of Boulder, as a matter of fact.

MR. SHAUN McGRATH. Yes, sir.

Senator ROUNDS. And I appreciate you changing your travel plans to make this meeting out here as well. Thank you.

MR. SHAUN McGRATH. Sure.

Senator ROUNDS. We will now turn to our next witness, Regional Director Noreen Walsh, for five minutes.

Director Walsh, you may begin.

**STATEMENT OF NOREEN WALSH, REGIONAL DIRECTOR,  
MOUNTAIN-PRAIRIE REGION, FISH AND WILDLIFE SERVICE**

MS. NOREEN WALSH. Thank you. Good morning, Chairman, and thank you for the opportunity to provide this testimony here today.

The Service's mission is working with others to conserve fish, wildlife and their habitat for the continuing benefit of the American people. Collaboration with private landowners is integral to what we do, and our primary tool is the Partners for Fish and Wildlife Program.

Since 1987, the Partners Program has offered voluntary habitat projects to benefit both wildlife

and over 50,000 landowners. Every dollar invested through this program leverages over \$8 in total project funding and generates \$15 in economic returns.

But numbers and dollars don't tell the true story of the Partners Program. Our core values include open communication and building trust, and we place a high premium on streamline delivery and quick adaptation to landowner needs. For example, during the drought conditions of 2012 and '13, we expedited funding for over 200 new livestock water developments to help South Dakota landowners maintain healthy grasslands and their cows during that difficult time. Because the Partners Program is based on finding mutual interests, it often results in parties exploring additional voluntary conservation opportunities, including conservation easements.

The Dakotas are the heart of the most productive habitat for waterfowl in the United States, and voluntary easements are an important conservation tool. Under our easement terms, landowners are paid to keep wetlands and grasslands on their property, yet they are able to farm the wetlands when they are dry, graze grasslands without

restriction and hay grasslands after the nesting season.

Each of these voluntary easements represents a unique and valued relationship with a South Dakota landowner that starts one on one, usually with coffee around a kitchen table discussing what kind of options may or may not work for that individual. We work hard to maintain those relationships. We feel confident that this program works for landowners because there is high interest. We have a backlog of over 700 South Dakota landowners who are interested in participating when funding becomes available.

Private landowners are also vital partners in administering the Endangered Species Act. Many of our activities under the ESA involve working cooperatively with landowners to help ensure that species do not need the protection of the ESA.

In the case of the sage grouse, we worked with ranchers in western states to develop Candidate Conservation Agreements with Assurances. These agreements conserve sage grouse while ensuring viable ranching operations, with no future regulatory restrictions, even in the event of a future ESA listing for this species.

Within recent years, the Service listed under the ESA two butterflies historically found in native grasslands of the Dakotas. We worked closely with individual landowners to address their concerns. One butterfly was listed as threatened, allowing us to use the flexibilities inherent in the ESA, and therefore routine operations such as fence and corral construction, noxious weed control and haying after July 15th are not impacted at all.

As we evaluated areas for ESA critical habitat designation as required by the law, we held public and individual meetings with landowners. We listened very carefully. In the end, we excluded from critical habitat any private lands that already had an ongoing conservation effort and whose owners did not want their lands designated as critical habitat.

In South Dakota and across the nation, the Service is working hard with people to accomplish our conservation mission, because our conservation mission is for people, including the next generation of farmers, ranchers and landowners.

I have been fortunate to visit South Dakota many times, and I have found much in common with the landowners that I have visited with, including

deeply held values for family and a concern for future generations.

Three weeks ago I hosted a meeting in Aberdeen for Fish and Wildlife Service leadership from all across the nation. We visited with several landowners during that meeting. We heard good advice about building relationships between the agency and landowners, and we heard genuine appreciation for our voluntary conservation programs. We heard a landowner express excitement that a listed butterfly was found on her property because that meant that she had healthy grasslands. And lastly, we heard an urging for the Service to continue to help landowners ensure that prairie grasslands remain on the landscape, supporting future generations of both people and wildlife.

Thank you for the opportunity to provide these comments today.

[The prepared statement of Ms. Walsh follows:]

Senator ROUNDS. Thank you for your testimony, Director Walsh.

I will begin my questions for this panel, and then we'll move to the next panel.

First of all I just, once again, want to thank both of you for being with us here today.

Mr. McGrath, do you feel that the current

**Statement of Noreen Walsh, Regional Director, Mountain-Prairie Region  
U.S. Fish and Wildlife Service, Department of the Interior  
Before the Senate Committee on Environment and Public Works, Subcommittee on  
Superfund, Waste Management, and Regulatory Oversight**

August 30, 2016

Good morning Chairman Rounds, and Members of the Subcommittee. My name is Noreen Walsh. I am the Regional Director for the U.S. Fish and Wildlife Service's Mountain-Prairie Region. Thank you for the opportunity to provide testimony to the Subcommittee today on the U.S. Fish and Wildlife Service's (Service) work with private landowners and other partners.

I want to begin by hearkening to the Service's mission, which is, "working with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people." The Service's origins as a federal agency began in both the Department of Commerce, in response to declines in fish stocks important for human consumption, and in the Department of Agriculture, to better understand the positive effects of birds in controlling agricultural pests. A little over a century ago, the U.S. signed a treaty with Canada to protect migratory birds as declines in their populations reached unsustainable levels. The responsibility for implementing the treaty for the United States, which was later codified by the Migratory Bird Treaty Act of 1918, fell to the Service and was a turning point in our agency's long tradition of protecting migratory birds.

These origins are important in South Dakota, a key component of America's "duck factory." In addition to migratory bird conservation, the Service restores nationally significant fisheries, conserves and restores wildlife habitat such as wetlands, supports state fish and wildlife agencies, and manages over 150 million acres of National Wildlife Refuge System lands. However, without the support of our partners and the contributions of private landowners we would not be able to achieve our mission.

**Collaboration through Partners for Fish and Wildlife Program**

Many fish and wildlife species depend on private lands for their habitat, so collaboration with partners, especially private landowners, is integral to the Service's mission. The Service has been successful at conservation by engaging with private landowners to collaboratively discern common sense solutions to complex ecological problems. One of the Service's primary tools for this collaboration with private landowners is through the Partners for Fish and Wildlife (Partners) program. The Partners program, founded in 1987, offers voluntary habitat restoration and enhancement options which are tailored to mutually benefit both wildlife and landowner needs. These voluntary efforts have resulted in over 4 million acres of uplands, 1.2 million acres



of wetlands, and more than 12,500 miles of stream habitat restored and enhanced across the Nation.

In 2014, *Restoration Returns*, a report on the economic benefits of the Partners program, found that the program, nationwide, returned more than \$15 to the economy for every Federal dollar invested in the program, supporting over 3,500 jobs. The Partners program makes contributions to the economies of many rural communities and strives to harmoniously balance landowner objectives with wildlife habitat to ensure the needs of people and wildlife are met for future generations of Americans.

To date, the Partners program nationally has worked with over 50,000 landowners and collaborated with over 5,000 agency and non-governmental partners to achieve these shared successes. In spite of these achievements, every year we lose significant amounts of privately-owned farmland, forest and open space due to the pressures of development. Conservation on private lands complements and leverages the benefits of national wildlife refuges, national parks, national forests and other protected areas by providing important fish and wildlife habitat. Ultimately, successful long-term conservation will depend on habitat restoration efforts on both public and private lands.

The Mountain-Prairie Region of the Service has one of the largest and most successful Partners programs in the Nation. In fact, the Partners program began in the Prairie Pothole Region (PPR) with wetland and grassland restoration and enhancement projects. These priority projects increased the populations of a full suite of priority waterfowl species that were important to local communities, hunters, wildlife conservationists, and tourists. These projects also helped ranchers and farmers increase the quality of their water and grass, ensuring viable agricultural operations in local communities.

The Partners program will be celebrating its 30th anniversary next year. Over the course of these 30 years, the Mountain-Prairie Region has restored and enhanced 3.2 million upland acres, 257,000 wetland acres, 2,900 miles of stream, and accomplished 250 projects that ensure fish can pass upstream. These accomplishments involved a wide variety of state, federal, tribal, and non-governmental partnerships. These projects were made possible because of the 16,400 landowners that voluntarily partnered with the Service through the Partners program.

South Dakota has one of the largest Partners programs of any state in the Nation. Since 1987, the South Dakota Partners program has implemented 6,676 voluntary cost-share agreements with landowners throughout the state, representing over 838,000 acres of collaborative conservation on working farms and ranches. A core value of the South Dakota Partners program is to work closely with landowners to develop common sense conservation solutions that are based on strong communication and trust. The South Dakota Partners program places a high premium on streamlined project delivery as well as the ability to quickly react to the needs of landowners.

For example, during the drought conditions of 2012-2013, the South Dakota Partners program quickly adapted and expedited funding for over 200 new livestock water developments to help landowners manage grasslands and maintain their cows during that difficult time.

Likewise, in recent years the South Dakota Partners program has responded to landowners' accelerated interest in grazing management and grassland restoration. Between 2014 and 2016, the program worked with 264 landowners to implement grazing management systems on over 90,000 acres to simultaneously benefit rangeland health, wildlife conservation, livestock performance, and water quality.

As one landowner with a grazing management project noted, "the Partners program partnered with me to improve our pasture management options. It was a real win-win project for us by improving our sustainability, profitability, lifestyle and natural resources for the future." As the South Dakota Partners program moves forward it will continue to focus on the program's core values of open communication, trust, and flexibility that garnered these 2003 remarks from the Sioux Falls Argus Leader Editorial Board, "a federal program that brings different interests together and works without a lot of red tape? Wonderful." Because the Partners program is based on finding mutual goals and interests, and building trust between individuals, it often results in parties exploring additional conservation opportunities, including conservation easements.

### **Conservation Easements**

South Dakota is a key state in the PPR, or "duck factory" as it is often called. The PPR stretches from Iowa to Alberta, Canada and the Dakotas are in the heart of the most productive habitat for waterfowl in the U.S. The Service recognizes the importance of this part of the country and has been working with local partners to protect this key habitat since the early 1960s.

Our strongest partners in protecting this unique American landscape are private landowners. Since the early 60s, the Service has protected over 500,000 acres of wetlands and 900,000 acres of grasslands in South Dakota alone through voluntary conservation easements with private landowners. Under the terms of these voluntary easements, farmers and ranchers are paid to keep wetlands and grasslands on their property but are able to farm the wetlands when they are dry, graze grasslands without restriction, and hay grasslands after nesting season (July 15). Without the participation and help of these landowners, we would never achieve our conservation goals and in some instances, without our easements, some ranchers would be unable to continue this great American tradition. We believe wholeheartedly in the motto, "Love the prairies? Thank a rancher."

Each of these over 13,000 voluntary easements represents a unique relationship with a farmer or rancher in South Dakota. We value each and every one of these relationships and work hard to

maintain them. One measure of that success is the exceedingly low rate of non-compliance we see each year with easement terms, typically only around 1 percent of all of our easements. When we encounter activities that are restricted under the terms of an easement, we work hard to resolve them directly with the landowner; and in the last five years, we have only issued two violation notices. We measure the success of our easement efforts not in terms of tickets written, but by the number of restorations we achieve and problems we solve with landowners.

Another reason we feel confident that this program works for both landowners and the Service is landowner interest. We have a backlog of over 1,400 landowners (about 720 in South Dakota) who are interested in participating in voluntary conservation easements when funding becomes available.

I have had the pleasure to travel to the PPR and South Dakota on many occasions. On each trip, I make a point to visit with some of our private landowner partners. With each conversation, I walk away with a deep and profound respect for their connection with and their stewardship of this wonderful landscape. I have made several friends and many more acquaintances in the Dakotas, and our work in the prairies is one of the things I am most proud of as the Regional Director. I am also proud that I recently hosted the Service Directorate, which includes all the senior executives in the Service from around the country, in South Dakota so they could personally experience the landscape. This area is a high priority for the Service. As part of that visit, we spent several hours visiting with a group of our private landowner partners. The Service Directorate was deeply motivated by the passion of these landowners for the prairie they call home.

#### **Endangered Species Act**

The Service is also charged with administering the Endangered Species Act (ESA) to ensure America's fish and wildlife heritage remains for future generations. Fortunately, in South Dakota, the number of species requiring the protection of the ESA remains relatively low. Across the nation, private landowners play a vital role conserving habitat for fish, wildlife, and plants. In fact, more than two-thirds of the nation's threatened and endangered species use habitat found on private land. If not for the efforts of private landowners, we stand to lose the rich diversity of our nation's natural heritage.

Across the country, many of our activities involve working cooperatively with landowners on voluntary actions that help ensure that species do not need the protection of the ESA. For example, in Harney County, a large, rural county in eastern Oregon, ranchers, the County Soil and Water Conservation District, and other partners developed a Candidate Conservation Agreement with Assurances (CCAA) to conserve greater sage-grouse while ensuring viable ranching operations, even in the event of a potential regulatory status change for the sage-grouse. Through communication and collaboration, the Service enrolled nearly 300,000 acres of private

lands in the CCAA, through which participating landowners will reduce threats to the sage-grouse by removing invasive cheatgrass and encroaching juniper trees, protecting sage-grouse nesting grounds, placing tags on fences as alerts to prevent in-flight collisions, and installing escape ramps for the birds in stock tanks.

The Service strongly believes that the Harney County CCAA is a model for voluntary conservation efforts on large, complex landscapes, especially on working landscapes where we are pursuing the twin goals of sustainable wildlife populations and vibrant rural communities. Similar efforts are underway in Wyoming and Montana. Mr. Tom Sharp, a Harney County rancher participating in this CCAA said, "what's good for the bird is good for the herd," pointing to the mutually beneficial relationship between well-managed grazing operations, a healthy sagebrush landscape, and his bottom line.

In September 2015, Interior Secretary Jewell, joined by a bipartisan delegation of Governors from sagebrush country, announced that the Service had determined the greater sage-grouse did not require the protections of the ESA. This determination was the result of an unprecedented effort by a constellation of public and private partners, all working to deliver effective conservation measures across an 11-state landscape spanning the Great Basin to the western Dakotas. Ultimately, this effort helped to significantly reduce threats to sage-grouse across the species' range and highlighted the value of the ESA in bringing together stakeholders to build solutions to today's most pressing wildlife conservation challenges. In the Dakotas, the states were active participants in this effort and thanks to their work, their respective fish and game agencies will continue to manage greater sage-grouse.

While a large part of the Service's decision not to list the greater sage grouse under the ESA rested on the comprehensive revisions to Bureau of Land Management and U.S. Forest Service's land management plans affecting more than half of the species' 173 million acre range, the Service also actively pursued a diverse suite of voluntary conservation efforts, including restoration of important habitat through our Partners program; development of CCAAs across the range; and, active fiscal and material support for our partners' private lands conservation programs, including the Natural Resources Conservation Service's Sage-Grouse Initiative.

Yet, despite the success of this effort in conserving greater sage-grouse, our collective work in the sagebrush must continue. Close collaboration with diverse stakeholders, including states, Tribes, sportsmen and women, and private landowners is required. To actively support this diverse and growing coalition of stakeholders in the sagebrush, the Service is investing heavily in voluntary, collaborative conservation efforts, including increasing our conservation delivery capacity on private lands in key sagebrush habitats; promoting communications among sagebrush stakeholders; supporting state-led initiatives to develop a science framework and a range-wide conservation plan; and, funding partnerships aimed at controlling invasive weeds,

which fuel too frequent rangeland fire that threatens people and wildlife in the sagebrush ecosystem.

Within recent years, the Service listed under the ESA two butterflies historically found in the Dakotas, the Dakota Skipper (as threatened) and the Poweshiek Skipperling (as endangered). The potential for these listings and the designation of critical habitat was of concern to private landowners in the Dakotas. The Service worked closely with the states and with individual private landowners to lessen that concern. Both species are only found in native grasslands, not cropland, thus flexibility for farming activities was not needed. We proposed and finalized the listing of Dakota skippers as threatened, a less protective designation than endangered, and we developed a special regulation under Section 4(d) of the ESA that allows us to lessen any prohibitions against "take" to only those necessary. Through this regulation we were able to exempt routine operations such as livestock grazing, fence and corral construction, development of watering facilities, noxious weed control, and haying after July 15. Poweshiek skipperlings were also listed as endangered at the same time, however, there are no known populations remaining in the Dakotas and thus the listing has had no impacts to private landowners in the two states.

We recognized that those landowners and Tribes who have kept intact rangelands have already done the most important thing for both of these butterflies: they have maintained grassland. As we evaluated areas for critical habitat designation, as required under the ESA, we took several steps to increase communication, lessen any unnecessary regulation, and find common ground. First, the Service held both public and individual meetings with interested landowners. We listened carefully to understand concerns and shared information about the potential listing and critical habitat designation process. In the end, in accordance with our policy, private lands that already had a voluntary conservation easement or other ongoing conservation effort, the owners of which did not want their land designated as critical habitat, were excluded from the final designation. These landowners are important partners in the maintenance of intact grasslands that support many native species. Through collaboration, it is our hope that they will remain on the land and will once again host populations of these native butterflies.

Northern Long-eared Bats (NLEB), a forest-dwelling species, were listed as threatened in 2015 due to devastating population losses from a disease called White-nose syndrome (WNS). Again, after carefully listening to all interested parties, a special rule under section 4(d) of the ESA was prepared. It confined incidental take prohibitions to only those areas inside the WNS zone where bats are impacted by disease. That is, in other areas where the disease is not present, the Service seeks to minimize regulations. Data suggests that WNS will spread throughout the range of this bat species, and regulations were promulgated to anticipate the WNS zone moving westward. Currently, a few southeastern South Dakota counties are within this zone. Even within the WNS zone, only activities that may cause take and are within a quarter mile of known hibernacula or within 150 feet of a known maternity roost tree are prohibited. Further, the 4(d) rule also

exempts from any prohibition the act of removing bats from a house to be released outside and bats that need to be euthanized for rabies testing. No critical habitat was proposed or designated for this species, because the major and overwhelming threat to it is disease. In these ways, the Service sought to use the provisions of the ESA in the most common sense way that would protect the species from the major factor causing the decline and lessen any unnecessary regulations to landowners or industry.

The gray wolf is an iconic yet controversial example of the ESA's success in preventing extinction and promoting recovery. Wolves were extirpated from most of the lower 48 states early in the 20th century, with the exception of northern Minnesota and Isle Royale in Michigan. The gray wolf was added to the list of endangered species in 1974, with the listing of both the Northern Rocky Mountain gray wolf and the eastern timber wolf. By 1978, wolves were listed as an endangered species throughout the contiguous United States and Mexico, except for those wolves in Minnesota classified as threatened. With the protections afforded by the ESA, wolves were able to repopulate the Western Great Lakes (WGL) and Northern Rocky Mountain (NRM) regions, both through natural dispersal and the reintroduction of wolves into Yellowstone National Park and central Idaho in 1995 and 1996.

Since the species was first listed, the gray wolf has rebounded from the brink of extinction to exceed population targets set for the WGL and NRM and continuing to expand their range into Washington and Oregon. We have undertaken multiple delisting rulemakings in recent years, acknowledging the fact that these populations are biologically recovered. In 2011, the Service determined that gray wolves were successfully recovered in the WGL and NRM states of Montana, Idaho, eastern Washington, eastern Oregon, and north central Utah and delisted those distinct population segments. In 2012, the Service delisted gray wolves in the state of Wyoming. In 2014, the final rules delisting gray wolves in Wyoming and in the WGL were vacated by district courts, and ESA protections were reinstated for these populations. The wolves maintain federal protections while those decisions are on appeal.

While wolves in Idaho, Montana, eastern Oregon, eastern Washington, and north-central Utah remain de-listed, the Service continues to manage gray wolves elsewhere under the ESA. The Service works in close partnership with state agencies, Tribes, private landowners, and others throughout the wolf's range, and this cooperative effort is largely to thank for the rebound in wolf populations since the species was first listed. Wolf restoration has been an amazing success due to both the resiliency of wolves and the cooperative efforts of Federal, State, and Tribal agencies, conservation groups, and private citizens, including ranchers, sportsmen, and outfitters.

### **Conclusion**

In South Dakota and across the nation, the Service is working diligently to build and maintain open channels of communication, to develop trust, and to forge durable, collaborative

partnerships. Indeed, we are working hard with people to accomplish our conservation mission, because our mission is for people, including the next generations of farmers, ranchers, and landowners.

I was fortunate to participate in a May 2015 tour sponsored by the South Dakota Grassland Coalition, where I met with many ranchers. I found we had much in common: deeply held values for family, as well as a desire to pass on healthy rangeland habitats for future generations. I listened with interest to one rancher in particular who spoke with deep passion about his sons' desire to break into the ranching profession, but for whom high commodity prices had driven land values to the point that land was out of their reach. Then, parcels that had a Service conservation easement on them came up for sale – and because of the easement, the lower per-acre value put them in reach for his sons. His sons are now in the business – continuing the next generation of ranchers and prairie stewards.

As I mentioned earlier, three weeks ago, I hosted a meeting in Aberdeen, South Dakota, for all Service leadership from across the nation. Again, we were fortunate to visit with and hear the perspectives of several South Dakota ranchers. We heard genuine appreciation for both our Partners for Fish and Wildlife program and our voluntary easement program. We heard a landowner express excitement that the Dakota skipper butterfly was found on her property, because that meant she had healthy grasslands. We heard some very good advice, including that any conservation partnership must start with building relationships between the Service and individual people. And lastly, we heard an urging for the Service to continue to help them ensure that prairie grasslands remain on the landscape, supporting future generations of people and wildlife. We listened, and will continue to build on and create new relationships with partners to further the Service's mission, to “work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.”

Thank you for the opportunity to provide these comments today.

process is sufficient for involving the public in the rule-making process and that the public comments are fully considered when the agency is promulgating regulations?

MR. SHAUN McGRATH. Thank you, Senator. Yes, in my experience, and I've been through the rule making of both the Clean Water Rule and the Clean Power Plan as a couple of examples where there really is a very directive outreach effort to propose a rule, to provide public comment opportunities, to have hearings, public meetings. And the feedback, the input that we receive as a result of that process really does have an impact on what is ultimately proposed in the final rule.

Senator ROUNDS. The reason why I ask the question, if you take a look at the huge number of critical comments the agency has received and the number of lawsuits challenging EPA regulations, it seems to be a testament to the flaws in the regulatory process. How do you believe the EPA can better engage the public? And do you believe that more substantive, and I mean more direct and thorough public engagement, could result in fewer lawsuits, less adversity between the EPA and the public and regulations that are more accommodating



to private landowners' rights?

MR. SHAUN McGRATH. Senator, I --

Senator ROUNDS. I mean, the number of lawsuits are significant when it comes to, in particular, WOTUS and the Clean Power Plan.

MR. SHAUN McGRATH. And I don't dispute that. The challenge, of course, is regardless of what the proposal is going to read, there's always going to be the threat of lawsuits. It's very difficult in these kinds of environmental regulations to propose something that is going to please everybody and be able to avoid lawsuits. So -- but I don't dismiss the spirit of your question, which is how can we engage, do more active engagement with the public to inform, as reasonable as an approach as we're able to. And I can assure you that the agency is very much willing to engage and provide those opportunities for input. And, again, we do take to heart the feedback that we get.

Senator ROUNDS. Let me just look at just a couple of specifics. And perhaps -- and if you're not up to speed on them, just tell me and we'll move on.

MR. SHAUN McGRATH. Sure.

Senator ROUNDS. But when it comes to Atrazine,

it's a vital tool in a producer's toolbox for controlling small seeded grounders in grasses. The EPA is currently reviewing its registration. Has your office communicated with or solicited feedback from producers, ag organizations and State Departments of Ag regarding this review and what impact it may have for them?

MR. SHAUN McGRATH. So, Senator, you're absolutely correct, it is under registration review, and that process does require, as we're looking at the ecological risk assessment, does require that there be a public comment period. And so there will be opportunity for that engagement. I can, though, take the question back to my folks and provide more specific information of what that engagement entails.

Senator ROUNDS. I'm just curious: What is the EPA's process for informing and working with State Departments of Ag when a pesticide violation occurs within the state?

MR. SHAUN McGRATH. So, Senator, we work closely with our state partners, and so there is coordination that happens. It depends on the case, of course. But often with enforcement where the state has delegated responsibilities, then they

would be the lead, and we would be doing oversight of the enforcement program of the state.

Where the state doesn't have the delegation, then the EPA would be in the lead. But, again, we would inform the state, work with them to agree that it was appropriate.

Senator ROUNDS. Director Walsh, in your testimony you noted the number of permanent conservation easements that the Service enters into with landowners. Does the Service provide other conservation options for landowners who do not want the burden of placing their land with a lifetime easement that is passed down through the generations? Do you have other options out there available? And do you provide information to landowners who might want shorter term leases or shorter term easements?

MS. NOREEN WALSH. Thank you, Senator. We do. We provide, through the Partners for Fish and Wildlife Program that I mentioned, the ability to enter into contracts as short as ten years or as long as 30 years on habitat improvement projects.

But also very importantly, our Partners for Fish and Wildlife Program biologists who visit with landowners, as they sit down with an individual

landowner are able to represent to that landowner not only the service programs that are available but those programs through USDA, through NRCS, through South Dakota Game, Fish & Parks or private entities like the Nature Conservancy or Pheasants Forever. So they do their best job to understand the landowners' needs and objectives for their property and point them in the direction of the program that would fit those needs the best.

Senator ROUNDS. You also point out the Partners Program as one of the most successful collaborative conservation programs between the Service and landowners, partly attributed to the lack of red tape and the ease of the program. How do you eliminate the usual bureaucratic red tape in the Partners Program? And should this program be a model to replace other more burdensome regulations?

MS. NOREEN WALSH. Thank you, Senator. We've worked very hard in the Partners Program over its 30-year history to keep the agreement and the paperwork, the paperwork that we send landowners, to be very streamlined and very clear. And so it starts one on one with sitting down with that landowner understanding what they are interested in and making sure that it's clearly articulated in

what is less than a ten-page agreement that they end up signing.

Senator ROUNDS. I notice that you had mentioned your work with regard to two butterfly species. And there's been some success in reducing the impact a listing has to landowners such as the steps the Service was taking or has taken in regards to the Dakota skipper and the, I'm going to mispronounce this but it's the poweshiek skipperling butterfly?

MS. NOREEN WALSH. Yes.

Senator ROUNDS. However other species that should be delisted such as the gray wolf remain embroiled in lengthy legal battles. Why is there such a difference in the approaches to these two species, and how can the Service eliminate the inconsistencies that exist among the listings?

MS. NOREEN WALSH. Thank you, Senator. The two butterflies that I mentioned were both recently listed in 2015, so they're very early onto the list and very early in developing a recovery program for those species. Because we were able to work so closely with landowners as we made those listing decisions and the critical habitat decision, I think we have a very good foundation for working with

private landowners where these butterflies mostly reside to work on recovery actions that will help get them off the list.

The poweshiek skipperling isn't found in South Dakota anymore and is in a pretty precarious state. Recovery may be a ways off for that.

In the case of the gray wolf species listed for a lot longer, that I think some people find very charismatic and other people find very problematic. So while the Service has firmly believed that the gray wolf in the northern Rocky Mountains and in the western Great Lakes are biologically recovered and do not need to be on the list anymore, we have faced litigation over those decisions. In both cases we're appealing that litigation and hopeful that we will again have them off the list.

Senator ROUNDS. Do you find any difference between the way that you approached the work concerning the butterflies in the way that you approached it with landowners? Was it different than the way that it's been done previously with other species?

MS. NOREEN WALSH. With the butterflies that primarily exist on private land, we made a very, I would say, extraordinary effort to work through our

landowner contacts to reach out individually to those landowners who might have butterflies on their property and to discuss one on one with them. And we certainly have found over time that the ability to have staff in the field to get to those people and have those conversations one on one makes all the difference in the world in how we can work with private landowners.

Senator ROUNDS. And I think it comes to bear that nearly 1,600 species that are listed under the ESA, only 66 have been delisted, and some of these not due to recovery but due to extinction or an error in data that required a listing revision. This is a pretty dismal success rate, and it seems to make the ESA a rather failed program at this point, or at least at the very least a program in desperate need of reform, especially considering the huge burden imposed on landowners when species are listed. I'm just curious your thoughts with regard to, you've been with it and you've followed it, if there were changes that you would make in the way that this process works, the first one or two that would come to mind, what would they be?

MS. NOREEN WALSH. Thank you, Senator. We have delisted 31 species due to recovery. We have

prevented the extinction of 99 percent of the species that have been listed, so we consider that the first step on the road to recovery.

But as we move forward to delist even more species to bring them to the point where they don't need the protections of the act, my experience has been and I think the experience across our agency has been that we need to have the time and the resources to work with individuals to not only help them understand why species get listed in the first place and what their recovery needs are but to figure out how we can tailor those to their constraints. So we have developed many programs for conservation on private land that are respectful of those concerns and looked for those win/win solutions and what we need as we move into the future to really be able to focus on those programs. And the Partners Program is one of those.

Senator ROUNDS. And I think that's one that has had some success.

I want to go to one specific program just as a difference between the way that it worked for you and the one that doesn't seem to be working. And can you explain the work that the Service has done regarding the black footed ferret and why it appears



that millions of taxpayer dollars have been spent over the past 30 years to conserve a species that has shown little increase in population.

MS. NOREEN WALSH. Yes, thank you, Senator. I think that the black footed ferret is a species that is firmly on the road to recovery but it is not there yet. And so as I know that you and others are aware, one of the greatest impediments to the recovery of this species is Sylvatic Plague, an introduced disease that the species didn't have to contend with historically but now has to contend with. And so one of the things that we are working on most, with the most significance in this road to recovery for the ferrets is developing a vaccine, an oral plague vaccine that could be administered much more efficiently to prairie dogs than the current approach of dusting individual prairie dog burrows with insecticides. We've done some small scale testing that has shown a lot of success with that, and we are moving this season to larger scale testing of this oral plague vaccine. We're very hopeful that having that tool passed through this experimental phase of being able to use it on the ground will prevent the kind of catastrophic die-offs of prairie dog towns that take ferret

populations that have increased and bring them back down.

Senator ROUNDS. Now, before we go on, I just -- I want to work my way through this because I can tell you right now that that will be the headline, if we don't verify or work our way through this a little bit, that the U.S. Fish and Wildlife Service is planning on vaccinating large numbers of prairie dogs across the United States, and there's going to be a lot of discussion about where you're going to get the money to do that kind of a program and so forth. So I'm going to let you qualify just a little bit as to where this is at before this is hung out to dry real quick, okay?

MS. NOREEN WALSH. Thank you.

Senator ROUNDS. Yes.

MS. NOREEN WALSH. So we're in an experimental phase right now, and we'll have to finish that experimental phase before we use it as a widespread tool. But to put it in context, I would tell you that the recovery plan for the black footed ferret contemplates having 3,000 total adult ferrets across the entire Great Plains and contemplates needing only one-tenth of 1 percent of existing prairie dog habitat that exists now. So recovery for the ferret

involves a very small proportion of prairie dog habitat.

Senator ROUNDS. So what you're saying -- and this is the reason why I ask: We've been out to places where when you protect prairie dogs or you set them in a position to where they are supposed to be left alone and not managed, most ranchers will tell you they don't mind having a few dogs around but they want them managed. And the problem you've got is if you don't manage them, they multiply. And pretty soon either you have a drought like we had back in 2002 to 2006 and we saw what it did to the Conata Basin down here, and it literally turned it into a moonscape. It was unbelievable what had happened.

And then they would migrate. And in doing so they became a real pest. And then they got to the point where they were migrating out to where the different dog towns were actually connecting. And when the plague hit, it moved right on through the entire population. And that didn't do the black footed ferret any good at all.

So what you're suggesting is that you would be able to maintain -- I'm not trying to put words in your mouth, but what you're suggesting is you could

maintain and would look at smaller populations or pockets of prairie dogs rather than very large towns like what we're looking at today in the management for the black footed ferret? Is that a fair statement?

MS. NOREEN WALSH. Very close, I think. We consider there to be three very important prongs to get to recovery. One of them is provide incentives for landowners who might be willing to host prairie dogs on their property.

The other one is the disease that we talked about.

But the third one is boundary control around the areas where we do have ferrets and prairie dogs. Because we recognize that even if an individual landowner is willing to host these two species, his or her neighbors may not be, and so providing boundary control for prairie dogs around the boundary of those properties is an important prong of recovery. And I would just mention that USDA APHIS has been a very important partner with us in ensuring that we can do that.

Senator ROUNDS. Thank you.

Mr. McGrath, is there anything that you wanted to add before we --

MR. SHAUN McGRATH. No. Thank you.

Senator ROUNDS. Okay, great. Thank you very much.

First of all, I just want to say thank you to both Administer McGrath and Director Walsh for taking the time to be here with us today.

I'd now like to dismiss the first panel and invite our witnesses on the second panel to come on up.

And while the second panel is coming up, I'd like to submit for the record the statement of the South Dakota Farm Bureau. And I believe Wanda Blair, the vice president of the South Dakota Farm Bureau, has joined us in the audience for today's hearing. And I'd like to thank her for taking the time to attend our hearing as well.

We really do appreciate it. Thank you.

So our witnesses joining us here today for the second panel are Mr. Larry Rhoden, Mr. Jeff Lage, Mr. Myron Williams, Mr. Chuck Clayton and Ms. Denise Parker.

Come on up.

First of all, let me just begin by saying thank you very much for taking the time today to come on out and to do this.

I'm just going to work my way through the line very similar to what we did with our first panel. I'll introduce each of you and then ask you to give an opening statement. And when we're done, we'll move right on through it, and then I've got a series of questions that we'd like to ask. I think I'll begin with Mr. Clayton.

You're the first in line over here on this side.

Mr. Clayton is the president of Prairie Pothole Consulting on behalf of the Izaak Walton League of America.

And after Mr. Clayton, Ms. Denise Parker, volunteer of the Humane Society for the United States. Thank you for being here today.

Mr. Larry Rhoden, rancher and former state senator and a good friend, I might add. We've worked together when I was governor and also when I was in the legislature.

Mr. Jeff Lage, president of the South Dakota Home Builders Association.

I think I'm saying that correct, am I not?

MR. JEFF LAGE: It's getting really close.

SENATOR ROUNDS: Lage?

MR. JEFF LAGE: Lage.

Senator ROUNDS: Lage. I'll get it right yet.

And Mr. Myron Williams, South Dakota  
Cattlemen's Association. And I appreciate you  
coming out today as well.

Turn to our first witness, Mr. Chuck Clayton.  
Mr. Clayton, you may begin.

**STATEMENT OF CHUCK CLAYTON, PRESIDENT, PRAIRIE POTHOLE  
CONSULTING ON BEHALF OF THE IZAAK WALTON LEAGUE OF AMERICA**

MR. CHUCK CLAYTON. Well, Chairman Rounds and  
Senator Markey, staff, and members of the  
Subcommittee, I appreciate the opportunity to  
testify today concerning the importance of  
conserving and restoring streams, wetlands and other  
water resources that are essential to the economy,  
outdoor recreation and public health in South Dakota  
and across the nation.

I am Chuck Clayton. I'm the past president of  
the Izaak Walton League of America, and I live in  
Huron, South Dakota.

Healthy streams and wetlands are vital to  
hunting and angling, communities and the outdoor  
recreation economy.

Wetlands and streams provide vital fish habitat  
and duck habitat, for wildlife. For example,  
prairie pothole wetlands through the northern plains  
and southern Canada support about 50 percent of the  
North American duck population. And in a good year

when we have the water and the grass, as much as 70 percent.

Ducks that hatch and grow to adulthood in these wetlands are harvested throughout the United States every fall.

However, following two confusing U.S. Supreme Court decisions (SWANCC in 2001 and Rapanos in 2006) and subsequent agency guidance, many streams and wetlands increasingly are at risk of being polluted or drained and filled. According to the U.S. Environmental Protection Agency, 117 million people in the United States get their drinking water from one of these at-risk streams. In South Dakota -- it's one in three Americans. And in South Dakota 309,000 residents are served by these streams for their public drinking water, and that's consistent with the national.

In the most current Status and Trends of Wetlands report by the U.S. Fish and Wildlife Service concludes that wetland loss increased by 140 percent during a time period of 2004 to 2009, the years immediately following those two Supreme Court decisions, compared with the previous assessment period in 1998 to 2004. From 2008 to 2012 South Dakota has lost 12,640 acres of wetlands



to agricultural land use conversion, the most of any other state according to Lark, et al., University of Wisconsin, a Madison study in 2015.

Each year nearly 47 million Americans head into the field to hunt and fish. They support jobs, manufacturing and the overall economy. These directly support 1.5 million American jobs, and it ripples through the economy to more than \$2 billion a year is generated from this. According to the Fish and Wildlife Service, in 2011 270,000 resident and non-resident hunters took to the fields in South Dakota and spent nearly \$597 million. And also more than 260,000 anglers spent more than \$203 million. Pheasant hunting in the prairie pothole region attracted 80,000 out-of-state hunters in 2010, according to the Game, Fish and Parks.

When we think about the value of outdoor recreation, think about the economy that this tourism brings to South Dakota, it's our second largest industry, with an estimated annual positive economic impact of over \$2 billion according to the Department of Revenue in South Dakota.

Natural wetlands are also arguably one of the most cost-effective protections against flooding for communities large and small. The National Weather

Service said that the 30-year average for flood damage is 8.2 billion annually. Water cannot be in two places at one time. If it's not in seasonal or temporary wetlands and naturally functioning streams in wetlands, it'll be in your basement or in a business.

What the Clean Water Rule, WOTUS, as the Senator called it, will and will not do: The Clean Water Rule adopted by the Army Corps of Engineers and the EPA in 2015 identified waters that are not and are covered by the Clean Water Act. It narrows the historic scope of Clean Water Act jurisdiction. It clearly defines the limits of tributaries. It draws a bright line physical and measurable boundaries on covering adjacent and nearby waters. It preserves and enhances existing exemptions for farming, ranching, forestry and other land uses. The exemptions from the Clean Water Act are maintained and enhanced.

Since 1977, the Clean Water Act has included 404 exemptions for farming, for construction, for farm and stock ponds, irrigation ditches, maintenance of ditches and roads. Under the language of the Clean Water Act, discharges associated with a broad range of activities are

already exempt, and have been for 30 years. These statutory exemptions can only be modified by Congress. The agencies are bound by them and they cannot change them.

For the first time in regulation, explicitly excludes specific types of waters from the definition of "Waters of the United States." The following are among those types of waters: Prior converted cropland; many drainage ditches provided they are not excavated in a tributary; artificially irrigated areas; artificial, constructed lakes and ponds, including farm stock ponds and irrigation ponds; erosional features such as gullies, rills and other ephemeral features; puddles; groundwater, including groundwater draining from drain tile is exempted. When you consider the context of the existing statutory exemptions for certain discharges, the final rule more clearly identifies the waters not covered under the Clean Water Act and incorporates exemptions that had previously not been in the regulation.

The Clean Water Rule is critically important to safeguarding our nation's water resources, hunting and angling traditions and the outdoor recreation economy. The final rule provides more clarity. The

rule is based on overwhelming science and common sense.

Thank you, Senator.

[The prepared statement of Mr. Clayton follows:]

Senator ROUNDS. Mr. Clayton, thank you very much for your testimony and for being here today.

We will now hear from Ms. Denise Parker.

Ms. Parker, you may begin.

**STATEMENT OF DENISE PARKER, VOLUNTEER, HUMANE  
SOCIETY OF THE UNITED STATES**

MS. DENISE PARKER: Senator Rounds, Senator Markey's staff and members of the subcommittee, I appreciate the opportunity to appear before you on behalf of the Humane Society of the United States and as a citizen of the State of South Dakota concerning the importance of the Endangered Species Act and how the loss of adequate funding to maintain a strong ESA would have a disastrous impact on endangered species that call South Dakota home or use South Dakota as a migratory corridor, in particular the gray wolf.

I am Denise Parker. I come to you as a proud South Dakotan, a resident of Lead in the beautiful Black Hills. I am a Navy veteran having served 26 years on active duty. In the last ten years I have expanded my knowledge on the environment through the Yellowstone Institute under the tutelage of some of America's foremost biologists, naturalists and



THE IZAAK WALTON LEAGUE OF AMERICA

**Testimony of Charles Clayton  
On Behalf of the Izaak Walton League of America**

**Subcommittee on Superfund, Waste Management and Regulatory Oversight  
Committee on Environment and Public Works  
United States Senate**

**August 30, 2016**

Chairman Rounds, Senator Markey, and members of the Subcommittee, I appreciate the opportunity to testify today concerning the importance of conserving and restoring streams, wetlands, and other water resources that are essential to the economy, outdoor recreation, and public health in South Dakota – and across the nation.

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

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

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

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

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

in these wetlands are harvested throughout the United States every fall. In addition, headwaters and other small streams are vital to fish. These waters provide essential spawning habitat for trout, salmon and other fish and are then essential to supporting these fish throughout their lifecycles.

However, following two confusing U.S. Supreme Court decisions (*SWANCC* in 2001 and *Rapanos* in 2006) and subsequent agency guidance, many streams and wetlands are increasingly at risk of being polluted or drained and filled. According to U.S. Environmental Protection Agency (EPA), the types of streams that flow to public drinking water supplies for more than 117 million, or one in three, Americans are at increased risk of pollution. In South Dakota, based on the EPA analysis, more than 309,000 residents are served by public drinking water systems that receive water from these at-risk streams.

Wetlands are not only at greater risk, the nation is losing natural wetlands at a growing rate. In the most current *Status and Trends of Wetlands* report, the U.S. Fish and Wildlife Service (FWS) concludes the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions – compared with the previous assessment period (1998-2004). This is the first documented acceleration of wetland loss since the Clean Water Act was approved more than 40 years ago. More recently, a study published last year by researchers from the University of Wisconsin – Madison showed that these wetland losses are hitting close to home. From 2008-2012, South Dakota lost 12,640 acres of wetlands to agricultural land use conversion—the third most of any state in the country (Lark *et al.*, 2015).

Each year, nearly 47 million Americans head into the field to hunt or fish. These are not simply traditions or hobbies – they are fundamental components of our nation’s economy. The money sportsmen and women spend benefits major manufacturing industries and small businesses in communities across the country. These expenditures directly and indirectly support more than 1.5 million American jobs and ripple through the economy to the tune of more than \$200 billion per year. According to the FWS, in 2011, 270,000 hunters (resident and non-resident) spent nearly \$597 million in South Dakota while more than 260,000 anglers spent about \$203 million. Pheasant hunting in the prairie pothole region of our state attracted nearly 80,000 out-of-state hunters in 2010, according to South Dakota Game, Fish, and Parks. High-quality hunting and fishing in our state – and nationwide – depend first and foremost on abundant and healthy wildlife and habitat. Clean water and natural wetlands are essential habitat features.

When we think about the value of the outdoor recreation economy, think about this: tourism is the second largest industry in South Dakota and growing, with an estimated annual positive economic impact of \$2 billion in 2014.

In addition to providing critical habitat for fish and wildlife and directly supporting hunting and angling, wetlands also provide a host of other benefits to people and communities across the country. Natural wetlands are arguably the most cost-effective protection against flooding for communities large and small. According to the National Weather Service, the 30-year average for flood damage is \$8.2 billion annually. Our flood risks are on the rise here in South Dakota, too, as researchers at the University of Iowa showed an increase in flood frequency over a swath of land from the Dakotas to Indiana in a 2015 study. Conserving wetlands is a fiscally prudent alternative to building higher levees and concrete storm walls and armoring every stream bank with rip-rap. Water cannot be in two places at once. It will either be in a seasonal or temporary wetland or it will be in someone’s basement or business. We believe protecting and enhancing our wetland and grassland habitats in South Dakota and in other areas of the nation will continually save tax dollars and protect our citizens and our infrastructure.

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

The Clean Water Rule adopted by the Army Corps of Engineers and EPA in 2015 is science-based, limited and more specifically identifies waters that are – and are not – covered by the Clean Water Act.

The final rule represents a scientifically and legally sound definition of covered waters that:

- **Narrows the historic scope of the Clean Water Act jurisdiction**, excluding protections for some wetlands and other waters that were protected under the Act before 2001.
- **Clearly defines the limits of tributaries** through physical features, including bed, bank and ordinary high water mark, and distinguishes tributaries from dryland ditches and erosional features.
- **Draws bright line physical and measureable boundaries on covering adjacent and nearby waters.**
- **Preserves and enhances existing exemptions for farming, ranching, forestry and other land uses.**

### **Exemptions from the Clean Water Act are Maintained and Enhanced by the Clean Water Rule**

Since 1977, the Clean Water Act has included a number of exemptions from the section 404 dredge and fill permit process for discharges associated with farming, construction, mining and other activities. For example, the discharge of dredge or fill material “from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices” (section 404(f)(1)(A)) is generally exempt from permitting. Other provisions exempt “construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches” (section 404(f)(1)(C)); “construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters” (section 404(f)(1)(D)); and “construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment . . .” (Section 404(f)(1)(E)). These exemptions do not apply to activities that would bring waters of the United States into uses for which they had not previously been used or where the flow or circulation of such waters would be reduced.

Under the plain language of the Clean Water Act, discharges associated with a broad range of activities are already exempt – and have been for nearly 30 years. These statutory exemptions can only be modified by Congress; federal agencies cannot alter them and are bound by law to follow them. The final rule in no way limits or alters these exemptions.

Moreover, in an effort to provide even greater clarity and certainty about the types of waters covered by the Clean Water Act, the final rule maintains existing regulatory exemptions and – for the first time in regulation – explicitly excludes specific types of waters from the definition of “waters of the United States.” **The following are among the types of waters that are excluded from the regulatory definition:**

- Waste treatment systems.
- Prior converted cropland.
- Many drainage ditches provided they are not excavated in a tributary.
- Artificially irrigated areas that would revert to dry land if irrigation ceased.
- Artificial, constructed lakes and ponds created in dry land, including farm and stock ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds or cooling ponds.
- Artificial reflecting pools or swimming pools created in dry land.
- Small ornamental waters.
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining sand or gravel that may fill with water.
- Erosional features, including gullies, rills and other ephemeral features.
- Puddles.
- Groundwater, including groundwater drained through subsurface drainage systems.

When considered in context with the existing statutory exemptions for certain discharges, the final rule more clearly defines the waters **not covered** by the Clean Water Act and incorporates exemptions that had previously not been in regulation.

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

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

I appreciate the opportunity to testify and would be happy to answer any questions.

Respectfully submitted:

Charles “Chuck” Clayton  
Izaak Walton League of America  
798 11th Street SW  
Huron, SD 57350  
clayton@hur.midco.net  
605-354-0955



environmentalists. I can tell you that some of my most memorable experiences in the wild have been encounters with gray wolves. One such experience was sharing a sighting of a mother wolf and her pups through a spotting scope with a foreign visitor whose only common language with me was the realization of what we were witnessing was something few in the world could say they had ever experienced, a wild wolf in its natural habitat. This experience could never have been possible were it not for the existence of the Endangered Species Act.

Recognizing that extinction is irreversible, the United States did in 1973 what no other country had done before, we established the Endangered Species Act. The act reflected the resolve of a society mature enough to guarantee a future for the rest of creation. America continues to stand behind that guarantee that says all creatures are important, not just for this generation but generations to come. Now 43 years later, the act itself has become under endangered by different entities that want free rein to dig, blast, kill, extract and pollute wherever they see fit. They want to dismantle the act through the members of

Congress. Yet according to a national poll recently conducted, it shows 90 percent of American voters do support the ESA. The act is based on common sense, proven science and balanced solutions that offer flexibility to communities, private landowners and government agencies.

Today the gray wolf is protected under the ESA in all of South Dakota. Currently there is no known established population of gray wolves in South Dakota. What is known is that single wolves have been sighted and in several cases killed traversing through South Dakota. This suggests that these wolves are utilizing parts of South Dakota as a corridor migrating in search of a mate or other friendly wolves.

In 2012 a gray wolf was shot in Custer County. DNA testing showed that wolf came from the Great Lakes Region. Also in 2012 a radio collared wolf was found to be from Yellowstone National Park and was hit and killed on the Pine Ridge Reservation. Of alarming importance is the fact that the South Dakota Department of Game, Fish and Parks has no management plan for the gray wolf, either now or in the event of the loss of federal protections under the ESA.

Additionally, our state legislature amended existing laws to list the wolf as a varmint. Were the gray wolf to lose federal protections, wolves could be shot on sight. In fact, one of our elected state legislators openly professes and encourages the doctrine of "shoot, shovel and shut up," even as the wolves are in a protected status. Certainly this type of behavior does not provide conservation minded South Dakotans with a feeling that our interests have meaning when it comes to the seriousness of the ESA.

Partnerships are critical in the efforts to conserve endangered species. The U.S. Fish and Wildlife Service has developed many tools and incentives under the ESA to protect the interests of private landowners. These programs are elaborated on in my submitted written testimony. All of these programs built into the ESA are meant to help, not harm or impede private landowners in any way.

In closing, sir, the science is clear, delisting wolves prematurely will have a catastrophic effect not only for the survival of the species but for the ecosystems that depend on them. Delisted populations are left to the devices of state management plans. South Dakota has none for

the gray wolf.

The American people need the assurances made to us 43 years ago that all species are critical to our environment in its whole. Do not allow disassembly of a program that is working. A properly and adequately funded ESA remains the most important law our nation has ever passed to protect imperiled species for our children and generations to come.

Thank you, sir, and I would be happy to answer any questions.

[The prepared statement of Ms. Parker follows:]

Senator ROUNDS. Thank you, Ms. Parker, for your testimony today.

At this time we will turn to Mr. Larry Rhoden.

Mr. Rhoden, you may begin.

**STATEMENT OF LARRY RHODEN, RANCHER AND FORMER STATE SENATOR**

MR. LARRY RHODEN: Thank you, Senator. Well, Ms. Parker has made my comments -- distracted me slightly, and so I will resist the temptation to respond to the previous testimony and stick with the subject at hand.

Thanks for the opportunity to come before this committee this morning and testify on the impact of federal regulations on private property rights of South Dakota farmers and ranchers.

My name is Larry Rhoden. I ranch with my family near Union Center in western South Dakota.

**Testimony of Denise Parker  
Testifying as a South Dakota citizen and as a volunteer for the Humane Society of the  
United States**

**Subcommittee on Superfund, Waste Management and Regulatory Oversight Committee on  
Environment and Public Works  
United States Senate**

**August 30, 2016**

Chairman Rounds, Ranking Member Markey and members of the subcommittee. I appreciate the opportunity to appear before you today concerning the importance of the Endangered Species Act (ESA), potential adverse impact any degradation in the strength or funding of the ESA could have and the significance the loss of a strong ESA would have on certain listed species that call South Dakota home or utilize South Dakota as part of their migratory corridor.

I am Denise Parker; I come before you as a proud South Dakotan a resident of the City of Lead in the beautiful Black Hills. I have been a longtime volunteer and supporter of the Humane Society of the United States who speaks on behalf of likeminded South Dakotans such as me. I attended the University of West Florida studying Marine and Vertebrate Biology and I am a U. S. Navy veteran having served 26 years on active duty. Since my retirement from the Navy I have devoted a large portion of my time studying the passion that often took a backseat to my duties in the Navy: the environment and its inhabitants. I have taken many courses through the Yellowstone Institute at Yellowstone National Park under the tutelage of some of America's foremost biologists, naturalists and environmentalists. Spending literally hundreds of hours in the wild I can honestly tell you that some of the most memorable experiences have been encounters with wolves. Either dog mushing along a trail in Minnesota and suddenly sharing a frozen lake with a traveling lone wolf or sharing a sighting of a mother wolf and her pups playing, through a spotting scope with a foreign visitor, whose only common language with me was the realization that what we were witnessing was something few in the world could say they had experienced, a wild wolf its natural habitat. None of these observations could ever have been possible were it NOT for the existence of the Endangered Species Act.

**Endangered Species Act (1973)**

Recognizing that extinction is irreversible the United States did in 1973 what no other country had done before, we established what amounts to a Bill of Rights for plants and animals: the Endangered Species Act. The act reflected the resolve of a society mature enough to guarantee a future not just for itself but for the rest of creation.

More than 43 years later, America continues to stand behind that guarantee it committed to in 1973, a guarantee that says that all creatures are important to all Americans, not just to this generation but generations to come. But now 43 years later, that act itself has become endangered by different entities that want free rein to dig, blast, kill, extract and pollute wherever they see fit. They want to dismantle the ESA through the members of Congress, elected by the people, to serve the people. These special entities want to make it a priority to pick apart protections for our wildlife, fish, plants and the habitats upon which endangered and threatened

species depend. Yet according to a national poll conducted just a year ago in June of 2015, 90% of American voters support the ESA. The ESA is based in commonsense, proven science and balanced solutions that offer flexibility to communities, private landowners and government agencies. When properly and adequately funded, the Endangered Species Act has succeeded in pulling species back from the brink of extinction and ensures all species are here for future generations.

### **South Dakota and the Grey Wolf**

Today the gray wolf is protected under the ESA in all of South Dakota. In Western South Dakota they are listed pursuant to the contiguous U.S. listing that has existed since the 1970s (Western South Dakota is not in any of the distinct population segments (DPS) that have been carved out from that listing). The eastern half of the state because the Great Lakes DPS in which that portion of South Dakota is included is not currently delisted. Currently there is no established population of gray wolf in the state of South Dakota.

What is known is that single wolves were sighted and in several cases killed traversing through South Dakota. This suggests these wolves are utilizing parts of South Dakota as a corridor, migrating in search of a mate or other friendly wolves. In 2012 a gray wolf was shot in Custer County. DNA testing showed that wolf came from the Great Lakes region. Also in 2012 a radio transmitted collared wolf from Yellowstone National Park was hit and killed on the Pine Ridge Indian Reservation. There have been other reports in various parts of South Dakota some having been confirmed but most going in the unconfirmed category.

What is important to note is that the South Dakota Department of Game, Fish and Parks (SDGF&P), Wildlife Damage Management Program Report for fiscal year 2015 listed no confirmed or alleged depredation attributed to the gray wolf. Of equal and alarming importance is the fact that SDGF&P has no management plan, either now or in the unfortunate event of the loss of Federal Protections under ESA.

Additionally the other arm of government tasked with guidance and oversight, our state legislature amended existing law several years ago listing the wolf as a varmint. Were the gray wolf to lose federal protections, under South Dakota law, wolves could be shot on sight. In fact one of our elected legislators openly professes and encourages the doctrine of “shoot, shovel and shut up”. Certainly this type of oversight by the two main state government arms tasked to do so does not provide conservation minded South Dakotans with the feeling that our interests are being considered when it comes to the gray wolf or other endangered and threatened species. We can only look to our Federal government to fulfill its promise made to all Americans in 1973.

### **Private Landowners and the ESA**

Partnerships are critical in the efforts to conserve endangered and threatened species. Two thirds of federally listed species have at least some habitat on private land, and some species have most of their remaining habitat on private land. The U.S. Fish and Wildlife Service (FWS) has developed many tools and incentives under the ESA to protect interests of private landowners while encouraging management activities that benefit listed and other at risk species. Safe harbor

agreements (SHAs) provide regulatory assurance for nonfederal landowners who voluntarily aid in the recovery of listed species by improving or maintaining wildlife habitat. There are Candidate Conservation Agreements (CCAs) which are voluntary agreements between landowners-including federal land management agencies, Candidate Conservation Agreements with Assurances (CCAA), for nonfederal landowners who volunteer to work with the FWS on plans to conserve candidate and other at risk species so that the protection of the ESA is not needed. These are just three programs built into the ESA meant to help not harm or impede private land owners in the protection of endangered or threatened species.

### **In Conclusion**

Without strong protections under the endangered species act the gray wolf and other endangered and threatened species will once again be in the crosshairs for extinction. What is at stake? FWS has spent tens of millions of dollars restoring wolf populations in several areas, but wolves still occupy less than 5% of their historic range, ESA protections are clearly needed to continue protecting the gray wolf. Delisted populations are left to the devices of state management plans. South Dakota has none. The science is clear; gray wolves need to remain protected under the Endangered Species Act. Delisting them prematurely will have catastrophic effects not only for the survival of the species but for the ecosystems that depend on them. The American people need the assurances made to us 43 years ago that all species are critical to our ecological environment in its totality. Please do not allow special interests to systematically disassemble a program that is working. A properly and adequately funded ESA has prevented the extinction of 99% of species placed under its protection and remains the most important law our nation has ever passed to protect imperiled species. Keep in place decisions made on sound fact-based science rather than conjecture. And always ensure that the people have the right to continued judicial review protections.

I appreciate the opportunity to testify before you and would be happy to answer any questions.

I've also served in the South Dakota Legislature and was a member of the Ag and Natural Resources Committee during my tenure there.

The topic of today's hearing is an important conversation, and farmers and ranchers are on the front lines in dealing with mandates and overreaching policies coming from the EPA. I've always been a staunch defender of private property rights and there's no question that the impact of federal regulations is real. Federal requirements, whether from the U.S. Environmental Protection Agency, the Department of Labor or the Fish and Wildlife Service can and do have an immediate on-the-ground impact on how farmers and ranchers manage their land and how they tend and harvest their crops and ultimately on the profitability and sustainability of their operations.

Make no mistake, private property ownership comes with rights, and the landowners understand that. We also understand that along with those rights comes great responsibility of stewardship of the land. Farmers and ranchers are self-driven to protect the land and water because our livelihood depends on it. As a western South Dakota rancher, I do a great deal to keep waters clean and safe



because it's essential to our survival. Farmers and ranchers throughout the country exhibit that stewardship through effective management practices such as pasture rotation, creating and maintaining wildlife habitat, buffer strips, water quality protection and much, much more. The notion that a government agency would know better how to manage water than the people actually living on the land and depending on water availability and quality for our livestock as a natural resource is simply outrageous.

The only thing hindering farmers and ranchers from doing what they already know to do in order to protect our water resources is the EPA. And we know the EPA is targeting areas that are not even close to qualifying as waterways, in spite of what we may have heard. Waters of the U.S. is an infringement of property rights and our ability to do what we need to to run our operations.

The WOTUS rule creates risk and uncertainty for farmers and ranchers and others who depend on their ability to work the land. The definition of tributary has been broadened to include landscape features that may not even be visible to the human eye or that existed historically but that are no

longer present.

Farmers face enforcement action and severe penalties under WOTUS for using the same safe, scientifically sound and federally approved crop protection tools that they've used for years. What's more is the WOTUS language is disturbingly vague, leaving farmers and ranchers at risk for wrong interpretation and ultimate consequences. The obscurity in definitions and qualifications of WOTUS are confusing and the maps are difficult to understand. How is a rancher supposed to know what is or isn't a "Water of the U.S."? Many of the areas seldom, if ever, run water, yet we have very little way of knowing what is under the control of WOTUS.

We have diligently cared for the land for generations, and all of a sudden we may be subject to federal jurisdiction. There's also the threat of prosecution and penalties for normal practices such as cleaning out dams or building fences or even driving on land under EPA jurisdiction.

The WOTUS rules are oppressive and intimidating to ranchers and private property owners. EPA is out of line when increasingly complicated regulations cause angst among landowners who don't even know

what to comply with.

I wanted to part from the rest of my testimony because I have one last point I wanted to make, and I think it's crucial for this conversation. I wanted to direct it to Mr. McGrath.

Because as I talk to farmers and ranchers, they feel a great deal of disdain and they feel very convinced that the EPA is out of touch. And you commented about the lengths you go to to communicate with the people. I can speak for myself as a legislator for 14 years, having served on the ag committee, chaired the senate state ag committee, was past national president of state ag and rule leaders, and in those -- in that period of time I've never once been approached by the EPA and asked for input or invited to a meeting. I've carried and passed resolutions specifically addressed and sent to the EPA mapping out our concerns. If I feel that out of touch and unapproachable by the EPA, how much more so is the average citizen of South Dakota going to feel that anything they say is going to fall on deaf ears? And all we want to do is provide common-sense solutions and approaches to some of the problems that you may perceive as real that may not be.

So with that, Mr. Chairman, thanks again for the opportunity to testify before this committee. I look forward to answering questions at the appropriate time.

[The prepared statement of Mr. Rhoden follows:]

Senator ROUNDS. Larry, thank you for your testimony.

We will now turn to our next witness, Mr. Jeff Loge -- Loge, I'm going to get it right yet, for his statement.

Mr. Loge.

**STATEMENT OF JEFF LOGE, PRESIDENT, SOUTH DAKOTA  
HOME BUILDERS ASSOCIATION**

MR. JEFF LOGE. Chairman Rounds, I appreciate the opportunity to discuss the impact of regulation on the home-building industry and housing affordability.

My name is Jeff Loge. I am co-owner of Loge Construction, a small business based in Rapid City, South Dakota. And I am also the president of the South Dakota Home Builders Association and represent some 1,900 members, several who are here in the audience.

Home building is one of the most regulated activities in the country. Surprisingly, government regulation can account for up to 25 percent of the cost of a single-family home. Unfortunately, the added cost of regulation prevents many families from

Mr. Chairman and Members of the Committee,

Thank you for this opportunity to provide testimony to the committee this morning on the impact of Federal regulations on the private property rights of South Dakota farmers and ranchers. My name is Larry Rhoden and I ranch with my family near Union Center in western South Dakota. I also served in the South Dakota legislature and was a member of the Agriculture and Natural Resources committee during my term.

The topic of today's hearing is an important conversation and farmers and ranchers are on the front lines in dealing with mandates and overreaching policies coming from the EPA. I have always been a staunch defender of private property rights and there is no question that the impact of Federal regulations is real. Federal requirements – whether from the U.S. Environmental Protection Agency, the Department of Labor or the Fish and Wildlife Service – can have an immediate, on-the-ground impact on how farmers and ranchers manage their land, how they tend and harvest their crops, and ultimately on the profitability and sustainability of their operations.

Make no mistake, private property ownership comes with rights, but along with those rights comes the responsibility to stewardship of the land. Farmers and ranchers are self-driven to protect the land and water because our livelihood depends on it. As a western South Dakota rancher, I do a lot to keep water clean and safe because it is essential for my survival.

Farmers and ranchers throughout the country exhibit that stewardship through effective management practices such as pasture rotation, creating and maintaining wildlife habitat, buffer strips, water quality protection and much more. The notion that a government agency would know better how to manage water than the people actually living on the land and depending on water availability and quality for our livestock and as a natural resource is outrageous.

The only thing hindering farmers and ranchers from doing what they already know to do in order to protect our water sources is the EPA. And we know the EPA is targeting areas that are not even close to qualifying as a waterway. Waters of the US is an infringement of property rights and our ability to do what we need to do to run our operations.

The WOTUS rule creates risk and uncertainty for farmers, ranchers and others who depend on their ability to work the land. The definition of "tributary" has been broadened to include landscape features that may not even be visible to the human eye, or that existed historically but are no longer present.

Farmers face enforcement action and severe penalties under WOTUS for using the same safe, scientifically sound and federally approved crop protection tools they've used for years. What's more is the WOTUS language is disturbingly vague, leaving farmers and ranchers at risk for wrong interpretation and ultimate consequences. The obscurity of the definitions and qualifications of a WOTUS are confusing and the maps are difficult to understand. How is a rancher supposed to know what is or isn't a 'Water of the US'? Many of the areas seldom if ever run water, yet we have very little way of knowing if we are under the control of WOTUS.

We've been contentiously caring for the land for generations and all of a sudden we may be subject to federal jurisdiction. There is a threat of prosecution and penalties for normal practices such as leaning out dams, building fences, or even driving on land under EPA jurisdiction. The WOTUS rules are

oppressive and intimidating to ranchers and private property owners. EPA is out of line when increasingly complicated regulations cause angst because landowners don't even know what to comply with.

I have disdain for how completely out of touch EPA seems and how unaccountable it operates. The comment periods that allow citizens the opportunity to voice their opinion seem to be a complete waste of time. As a legislator, I carried and helped pass several resolutions opposing WOTUS with overwhelming support of the legislature, yet it seems to have had zero affect or impact. EPA appears to disregard the common sense voice of the citizens of the US.

The costs of EPA overreach as with WOTUS, and FWS regulations, such as the Endangered Species Act, are impacting landowners' ability to utilize, develop and profit from their land. This isn't just about private property rights, these regulations impact my ability as a rancher to make a living. Not to mention the added burden of arbitrary regulations, including added paperwork, additional costs and man-hours. Landowners have to make sacrifices in order to account for increased compliance costs.

These specific items are not exhaustive but do represent some of the most pressing issues farmers and ranchers currently face from EPA regulations. I commend the Committee for undertaking this oversight hearing, and I urge you to push for common sense reforms that reflect Congressional intent without infringing on the legitimate private property rights of landowners.

I appreciate this opportunity to testify before the committee and will be pleased to respond to any questions.

Larry Rhoden

realizing the American dream of home ownership. Most important to these -- most important to these compliance efforts is a permitting system that is, or a permitting system that is consistent, predictable and timely.

Unfortunately, the EPA finalized a rule that falls well short of providing the clarity and certainty the construction industry needs. This rule will increase federal regulatory power over private property and will lead to increased permit requirements, litigation and lengthy delays. The expansion of the government's authority will not improve water quality because much of the rule improperly encompasses water features that are already regulated at the state level.

Under this rule the ability to sell, build or expand real estate projects will suffer notable setbacks, including added costs and delays. Currently it takes an average of 788 days and almost \$300,000 to obtain an individual permit and 313 days and close to \$30,000 for a streamlined nationwide permit. These costs are passed on to homeowners, and even relatively small price increases can price low to moderate income home buyers out of the market.

In addition to Clean Water Act challenges, builders face repercussions when the proposed land development or construction activity occurs where endangered species exist or in an area that the ESA designated as critical habitat.

The Fish and Wildlife Service's critical habitat rule changes the purpose of establishing critical habitat from supporting a specie's survival to supporting its recovery. This concept conflicts with Congress' intention that the critical habitat be limited to areas that are essential to the specie's continued existence, meaning its survival.

The rule significantly expands both the size of future critical habitat designations and the magnitude of the impact on the homebuilding industry, while creating confusion and uncertainty. It will empower the government to regulate vast areas of land, much of which is not occupied by the species and is not essential for the specie's survival. The ESA does not allow for such expansive designations.

The Fish and Wildlife Service's goal is to establish critical habitat in unoccupied areas that could potentially, potentially serve as habitat. The dusky gopher frog offers an excellent example of



the expanded scope of critical habitat. 1,555 acres of private land was designated as unoccupied critical habitat for the frog. However, the frog's habitat requires specific physical or biological features for its survival and this land would have to be substantially altered in order to potentially support the frog's habitat. These elements needed to support the frog are absent, and the only way to make the land suitable is through controlled burns and revegetation, which the government admits it cannot mandate on privately held land. Yet the land will still be regulated as critical habitat. Where does the regulatory authority stop?

This rule will cause significant project delays, costly project modifications and additional requirements when building in a critical habitat designated area. In some cases the project cannot proceed, resulting in the loss of the landowner's investment.

It is extremely difficult to be a homebuilder in this current regulatory environment. Regulations add to the cost of any home and increase the time it takes to build it. Protecting our nation's natural treasures is important, however my business cannot continue to thrive, grow or thrive in this atmosphere. We must work together to find an

appropriate balance so that South Dakotans can raise their families in safe and affordable homes while also enjoying our state's natural resources.

Thank you, Chairman Rounds.

[The prepared statement of Mr. Lage follows:]

Senator ROUNDS. Mr. Lage, thank you for your testimony.

At this time we'd like to invite Mr. Myron Williams to deliver his testimony.

**STATEMENT OF MYRON WILLIAMS, SOUTH  
DAKOTA CATTLEMEN'S ASSOCIATION**

MR. MYRON WILLIAMS. Thank you, Senator.

Good morning. My name is Myron Williams. I ranch and farm near Wall. I'm a cow/calf producer, background feeder, and I raise wheat, corn and alfalfa.

Thank you, Senator Rounds, and other committee members, for allowing me to testify today on the impacts of the Environmental Protection Agency's WOTUS rule and the U.S. Fish & Wildlife's implementation of the Endangered Species Act.

First to address the Waters of the U.S. Rule, let's be clear, everyone wants clean water. Farmers and ranchers rely on clean water to be successful in our businesses, but expanding the federal regulatory reach of the EPA and Army Corps of Engineers does not equal clean water. If this final rule is fully

**Testimony of Jeff Lage,  
Co-owner, Lage Construction**

**Before the Senate Subcommittee on Superfund, Waste Management, and Regulatory  
Oversight**

**Hearing on “Oversight of the Impact of U.S. Environmental Protection Agency and Fish  
and Wildlife Service Regulations on Citizens’ Private Property Rights.”**

**August 30, 2016**

Chairman Rounds, Ranking Member Markey, and members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Jeff Lage and I am a co-owner of Lage Construction, a construction and development company based in Rapid City, South Dakota.

NAHB members are involved in the home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. Our industry is largely dominated by small businesses, with our average builder member employing 11 employees. Since the Association’s inception in 1942, NAHB’s primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

My business is dedicated to the development, preservation, and management of affordable housing for all citizens. I have a unique understanding of how the federal government’s regulatory process impacts businesses in the real-world. Additional regulations make it more difficult for me to provide homes at a price point that is affordable to working families.

Housing serves as a great example of an industry that would benefit from smarter and more sensible regulation. According to a study completed by the NAHB, government regulations can account for up to 25% of the price of a single-family home. Nearly two-thirds of this impact is due to regulations that affect the developer of the lot, with the rest due to regulations that are imposed on the builder during construction.<sup>1</sup> The regulatory requirements we face as builders do not just come from the federal government. A key component of effective regulation is ensuring that local, state and federal agencies are cooperating, where possible, to streamline permitting requirements and respect the appropriate responsibilities of each level of government. Importantly, more sensible regulation will translate into job growth in the construction industry.

The growth potential in the home building industry is particularly important because few industries have struggled more during the Great Recession than home building. The decline in home construction was historic and unprecedented. Single-family housing production peaked in

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<sup>1</sup> Survey conducted by Paul Emrath, National Association of Home Builders, “How Government Regulation Affects the Price of a New Home,” 2011

early 2006 at an annual rate of 1.8 million homes, but construction fell to 353,000 homes per year in 2009, an 80% decline in activity. In contrast, a normal year driven by underlying demographics should see 1.4 million single-family homes produced. Clearly, if home building were operating at a normal level, there would be millions of more jobs in home building and related trades. Smart regulation can help unleash that growth.

Our impact on the economy is more than just job creation. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community. NAHB estimates the first-year economic impacts of building 100 typical single family homes to include \$28 million in wage and business profits, \$11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts of building 100 typical rental apartments include \$10.8 million in wages and business profits, \$4.2 million in federal, state and local taxes and 113 jobs.

As an industry, we have finally turned the corner and are contributing to, rather than subtracting from, Gross Domestic Product growth and improving the labor market. Thus, any effort to advance our nation's housing recovery is smart economic policy. To reach these goals, however, we need policies that streamline and enhance existing efforts and remove regulatory hurdles, not ones that add layers of regulatory red tape and provide minimal benefits.

Rules recently finalized by the Environmental Protection Agency and the Fish and Wildlife Service (FWS) that expand federal jurisdiction of the Clean Water Act (CWA) and the Endangered Species Act (ESA), represent a particularly significant threat to home builders in South Dakota and across the country.

#### **Final Rule Defining "Waters of the United States" under the Clean Water Act**

As a lifelong South Dakotan, I recognize the need for a clean environment and the benefits that it brings to communities, residents, and potential home buyers. Visitors from all over the world travel to South Dakota for its beautiful landscapes, waters and National Parks. I have a vested interest in preserving and protecting our nation's land and water resources. The CWA and the ESA have helped to make significant strides in improving the quality of our water and land resources. As environmental stewards, the nation's home builders build neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources.

Home builders must often obtain and comply with the CWA to complete their projects. What is most important to these compliance efforts is a regulatory scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. Unfortunately, such a permitting program is becoming more and more elusive.

On May 27, 2015, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") finalized a rule redefining the scope of waters protected under the CWA. For years, land owners and regulators alike have been frustrated with the ongoing uncertainty surrounding the scope of federal jurisdiction over "navigable waters," which Congress defined as "waters of the United States." By improving the CWA's implementation, removing redundancy,

and further clarifying jurisdictional authority, the agencies could have improved compliance while protecting and improving the aquatic environment.

Unfortunately, the rule falls well short of providing the clarity and certainty the construction industry seeks. Disregarding Congressional intent and recent Supreme Court rulings, the rule expands CWA jurisdiction to channels that only flow when it rains, isolated ponds and most ditches. This rule will increase federal regulatory power over private property and will lead to increased permit requirements, litigation, and lengthy delays for any business trying to comply. These changes will not improve water quality, as much of the rule improperly encompasses water features that are already properly regulated at the state level.

The agencies assert that the scope of CWA jurisdiction is narrower under this final rule than under current practices and that it does not assert jurisdiction over any new types of waters. This is simply not accurate. In reality, the rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, most ditches, and certain regional wetlands, including isolated prairie potholes. The FWS estimates there are 22 million acres of prairie potholes in South Dakota.<sup>2</sup> Under previous regulations, most of these were not under federal authority. According to the new rule, however, land development and home building activities that impact nearly all of these isolated features will require a federal permit.

Importantly, these changes provide no additional benefits for these newly jurisdictional areas as many already comfortably rest under state and/or local authority. The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit. For any small business trying to comply with the law, the last thing it needs is a new set of vague and convoluted definitions that only provide another layer of uncertainty.

The CWA was designed to strike a careful balance between federal and state authority. This has proven to be a difficult task, and to some extent, the efforts of the courts have had limited success in providing clarity. However, the courts have been clear on one issue: there is a limit to federal jurisdiction over waters. In fact, the Supreme Court has twice affirmed that both the U.S. Constitution and CWA place limits on federal authority over intrastate waters. While many were optimistic that this rule would finally translate the Court's directives to a workable framework, the regulation instead is a marked departure from past Supreme Court decisions and raises significant constitutional questions.

With the enactment of the CWA, Congress intended to protect our nation's water resources by creating a partnership between the federal agencies and state governments. Congress states in section 101 of the CWA that "[f]ederal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource." Under this notion, there is a point where federal authority ends and state authority begins. The rule issued by the agencies blatantly ignores this history of partnership and fails to recognize that there are limits on federal authority.

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<sup>2</sup> Dahl, T.E. 2014. Status and trends of prairie wetlands in the United States 1997 to 2009. U.S. Department of the Interior; Fish and Wildlife Service, Ecological Services, Washington, D.C. (67 pages).

States have successfully regulated their own waters and wetlands for years. States take their responsibilities to protect their natural resources seriously and do not need the federal government to overreach their authority and assert jurisdiction. If you looked around the country you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted.

*Potential Impacts on Construction*

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Due to the lack of clarity, developers are generally ill-equipped to make their own jurisdictional determinations and must hire environmental consultants to secure necessary permits and approvals under CWA programs. Delays often lead to greater risks and higher costs. Under this rule, the ability to sell, build, expand, or retrofit real estate projects will suffer notable setbacks, including added costs and delays for development and investment.

The picture becomes starker when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and \$271,596 to obtain an individual permit and 313 days and \$28,915 for a “streamlined” nationwide permit. Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.<sup>3</sup> Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to find a necessary balance between protecting our nation’s water resources and allowing citizens to build and develop their land.

In addition, many federal statutes tie their approval/consultation requirements to those of the CWA – meaning that if one has to obtain a CWA permit, he/she must also obtain other federal approvals (examples include the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act). As more features across the landscape are considered jurisdictional, more CWA permits will be required, triggering these additional statutory reviews. Because project proponents do not have a seat at the table during these additional reviews and the consulting agencies are generally not bound by a specific time limit, builders and developers are immediately placed at a disadvantage. Drawing out the time it takes to get a permit will only lead to more meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the agencies will be equipped to handle this inflow.

The agencies must start over in order to create a more meaningful and balanced rule. Fortunately, there is a solution. Last year, the House of Representatives passed legislation that will force the agencies to withdraw this rule, go back and consult with state and local governments, conduct meaningful discussions with small business stakeholders, and produce an accurate cost-benefit analysis. The agencies could then re-propose an updated rule. And in the Senate, legislation (S. 1140) introduced by Senators John Barrasso (R-WY), Joe Donnelly (D-IN), Jim Inhofe (R-OK), Heidi Heitkamp (D-ND), Pat Roberts (R-KS) and Joe Manchin (D-WV) accomplishes this same

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<sup>3</sup> David Sunding and David Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 2002

goal while also providing the agencies with guidance on how to identify a jurisdictional water. Following the guidelines of these legislative proposals will get us back on track towards establishing a workable and constitutional definition of “waters of the United States.”

#### **Endangered Species Act Rule Establishing Critical Habitat**

In addition to CWA challenges, builders face repercussions when the proposed land development or construction activity occurs where endangered species exist or in an area that is ESA-designated critical habitat. NAHB members, and by extension members of the public who are seeking to purchase or develop land, are directly impacted by the ESA whenever the FWS determines their otherwise lawful land development could either “jeopardize the continued existence”<sup>4</sup> of an endangered species or result in the “destruction or adverse modification” of an area that has been designated as critical habitat. The ESA requires the FWS to designate critical habitat whenever the Agency lists (i.e., protects) a species under the Act.<sup>5</sup> Despite this Congressional mandate, FWS regularly failed to designate critical habitat during the first twenty-five years of the ESA’s implementation. It claimed the designation of critical habitat yielded no additional benefit to an endangered species beyond those protections afforded to the species by virtue of being listed. This explains why there is no critical habitat for the thirteen federally protected species found in South Dakota (yet). However, numerous successful lawsuits by environmental groups against the FWS for failure to designate critical habitat, as well as recent rule changes by the FWS, will compel the FWS to designate critical habitat whenever a new species is considered endangered.

Therefore, as the number of species on the endangered species list grows, so does the amount of land that is designated as critical habitat. Because these lands are often within close proximity to existing cities and towns, they tend to be highly desirable real estate for community growth and economic development. If a proposed land use activity requires a federal permit, such as a Section 404 CWA permit, and occurs in an area that either has an endangered species or has been designated as critical habitat, (occupied critical habitat or unoccupied critical habitat) and the Service determines the activity could “jeopardize” an endangered species or “destroy or adversely modify” critical habitat, the ESA Section 7 consultation process is triggered.

As a result of Section 7 consultation, NAHB’s members may face significant project delays, costly project modifications (i.e., forfeiture of buildable lots), and/or additional requirements to avoid a determination that the project will result in the “destruction or adverse modification of critical habitat.” In extreme cases, the project cannot proceed, resulting in the loss of the landowner’s investment. Therefore, it comes as no surprise that NAHB’s members are very concerned about the FWS recent changes to key regulatory definitions and criteria for designating critical habitat under the ESA.

<sup>4</sup> Federal regulations (50 C.F.R. §402.02) defines “jeopardize the continued existence of a species” to mean an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

<sup>5</sup> 16 U.S.C. §1533(a)(3)(A)

Homebuilders support the designation of critical habitat when it is completed within the confines of the ESA and in a manner that is consistent with Congressional intent. Specifically, the designation of critical habitat should occur concurrently with a species listing, be limited in its geographical scope, focus on those specific areas actually occupied by the species, and contain specific and identifiable “physical or biological features” that are essential to the conservation of the species. In other words, the habitat must be “critical” to the species. Furthermore, the designation of unoccupied areas should only occur under unusual circumstances and must be supported by a determination that such areas are essential for the conservation (i.e., survival) of the species.

Unfortunately, FWS’s recent critical habitat rule<sup>6</sup> does not follow these limits. Instead it significantly expands both the size of future critical habitat designations and the magnitude of the impact on the homebuilding industry while creating confusion and uncertainty. It does so by creating entirely new regulatory definitions and modifying existing definitions to expressly (and inappropriately) insert the concept of “recovery” into the designation process and eliminate any constraints on their ability to designate critical habitat. These changes undermine Congress’s clear intent that critical habitat be limited in scope and focused on the immediate survival needs of the species. Furthermore, the changes impose significant regulatory burdens on landowners, regardless of whether their property supports listed species.

*Critical Habitat: Recovery v. Survival*

This new critical habitat rule changes the threshold of establishing critical habitat by asserting that the “purpose of critical habitat is to identify areas that are or will be essential to the species’ recovery.”<sup>7</sup> This concept squarely conflicts with Congress’ intention that critical habitat be limited to areas that are essential to the species’ continued existence—in other words, its survival.

Congress intended the role of critical habitat to be small when it enacted the ESA in 1973. The ESA contained no definition of critical habitat and no procedures or requirements for determining what areas should be specified as critical habitat.<sup>8</sup> Legislative history suggests that Congress intended critical habitat to be habitat essential to the species’ survival and that land containing such habitat should be acquired and protected rather than regulated through Section 7. The ESA provided only one mention of critical habitat and no guidance on how Section 7 was intended to work. To address this uncertainty, the Services jointly issued guidelines to other federal agencies in 1976.<sup>9</sup> The regulations defined “critical habitat” as:

[A]ny air, land, or water (exclusive of those man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the

<sup>6</sup> Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 50 CFR Part 424 (February 11, 2016)

<sup>7</sup> *Id.* at 7414

<sup>8</sup> See generally Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973).

<sup>9</sup> See *Interagency Cooperation Regulations; Final Rule*, 43 Fed. Reg. 870 (Jan. 4, 1978).



survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.<sup>10</sup>

Congress believed this definition was too broad and quickly amended the ESA to narrow the scope of critical habitat to focus on species' survival and reduce its regulatory impact.

Throughout the 43 years since the ESA's enactment, Congress has made changes to the Act. However, the notion that critical habitat is not intended to be recovery habitat has never wavered. Through this rule, the FWS has expanded the scope of critical habitat by focusing on recovery even though Congress intended critical habitat be limited to areas that are essential to the species' survival.

*Critical Habitat must Consist of Areas Essential for the Species Survival: Occupied v. Unoccupied*

In 1978, Congress added the definition of "critical habitat" to the ESA to "narrow[] the scope of the term as it is defined in the existing regulations."<sup>11</sup> This definition distinguishes between occupied and unoccupied areas:

- (1) Occupied: The specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features which are (i) essential to the conservation of the species and (ii) which may require special management considerations or protections; and
- (2) Unoccupied: Specific areas outside the geographical area occupied by the species at the time it is listed that are determined to be essential for the conservation of the species.<sup>12</sup>

This two-part definition effectively creates a regulatory hierarchy under which unoccupied areas should not be designated as critical habitat absent exceptional circumstances. This hierarchy was created to address Congress's concern about the Services' practice of designating unoccupied areas for future population expansion, as opposed to the areas that are truly critical to the species' survival.<sup>13</sup>

Congress never envisioned treating occupied and unoccupied areas the same, and in fact they struggled whether the Services should be allowed to designate unoccupied areas as critical habitat under any circumstances. Furthermore, the distinction between occupied and unoccupied

<sup>10</sup> *Id.* at 874-75 (emphasis added).

<sup>11</sup> H.R. Rep. No. 95-1625, at 25, reprinted in 1978 U.S.C.C.A.N. at 9475.

<sup>12</sup> Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(1), 92 Stat. 3751 (1978) (currently at 16 U.S.C. § 1532(5)(A)(i) & (ii)).

<sup>13</sup> See, e.g., *ESA Leg. Hist.* at 970 ("[T]he committee has been concerned over the Fish and Wildlife Service's policy to treat areas to extend the range of an endangered species the same as areas critical for the species' survival." (statement of Sen. Wallop)); *id.* at 971 ("Much of the proposed critical habitat for the grizzly bear is not critical to the continued existence of the [species], but is instead proposed so that populations within truly critical habitat can expand.").

areas has been recognized by the courts.<sup>14</sup> Quite simply, areas that are unoccupied and lack the physical or biological features essential to support the life-history needs of the species do not meet the definition of critical habitat and should not be designated.

For years, the FWS and the Department of Interior have been violating the ESA and ignoring the intent of Congress when designating critical habitat. When critical habitat has been designated, it often contains a vast area, much of which is not occupied by the species and is not essential for the species' continued existence.<sup>15</sup> The law does not allow for such expansive designation.

Given that habitat loss is almost always the principal justification for listing a species, if there are millions of acres of land that contain the physical and biological features essential to the species, the species should not be listed. However, most areas designated as critical habitat actually are unoccupied and lack habitat essential for the species' survival. Instead, they are set aside for future population expansion—a practice Congress strongly criticized in 1978 when it amended the ESA to restrict critical habitat. This rule will codify these practices and empower the FWS to establish critical habitat in unoccupied areas that could potentially serve as habitat.

#### Dusky Gopher Frog

The endangered Dusky Gopher Frog offers an excellent example of the expansion of the scope of critical habitat. In 2012, the FWS designated 1,555 acres of private land, currently being used for timber harvesting in Louisiana, as unoccupied critical habitat for the Dusky Gopher Frog. FWS admits that the land is not presently occupied by the species and may never be occupied by the species if the property owner is permitted to continue to use the property in its current use (e.g., forestry operations.) In fact, FWS designated the forested land as unoccupied critical habitat based on pure speculation; hoping that the land may someday be managed by private landowners for the species' conservation. The land would have to be substantially altered in order to potentially support the frog habitat. The only way to make the land suitable is through controlled burns and revegetation which FWS admits it cannot mandate on privately held land.

The landowner, a NAHB member, filed suit in the U.S. District Court in New Orleans, Eastern District, on February 7, 2013. On Aug. 22, 2014, the Judge reluctantly upheld the critical habitat designation as lawful. Although the Judge described the designation as "remarkably intrusive" and potentially even abusive, he ultimately upheld it based on what he described as the "extraordinary scope of the ESA." An appeal to the Fifth Circuit was filed, and in a 2-1 decision, the Fifth Circuit affirmed the district court and upheld the critical habitat designation. Thus, under this decision the FWS can designate an area as critical habitat as long as the property could be modified in a manner that would allow the species in question to survive.

<sup>14</sup> See, e.g., *Ariz. Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (16 U.S.C. § 1532(5)(a) "differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas . . .").

<sup>15</sup> See, e.g., *Designation of Revised Critical Habitat for the Northern Spotted Owl*, 77 Fed. Reg. 71876 (Dec. 4, 2012) (designating nearly 9.6 million acres as critical habitat); *Revised Designation of Critical Habitat for Bull Trout*, 75 Fed. Reg. 63899 (Oct. 18, 2010) (designating 19,729 miles of streams and 488,252 acres of reservoirs as critical habitat); *Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*, 74 Fed. Reg. 8616 (Feb. 25, 2009) (designating nearly 25 million acres as critical habitat).

### Challenges to the Regulated Community

The FWS's critical habitat rule presents many challenges to the regulated community because it changes not only how critical habitat is identified, but also how it will be evaluated and designated. While the FWS contends the intent of the rule is to provide clarity on the procedures for designating critical habitat, NAHB is concerned that the changes would have the exact opposite effect. The rule gives the FWS the power to designate habitat based on the entire species' range, effectively eliminating the distinction between "occupied" and "unoccupied" habitat. These and the many other changes proposed by the FWS will result in a dramatic expansion of critical habitat – well beyond what is essential to the conservation of listed species. Such an expansion is unwarranted, as it exceeds the limits of the ESA, and is not in line with Congressional intent. It will result in a regulatory program that is wholly unwieldy and untenable. Therefore, home builders strongly suggest that the rule be revised to ensure that any subsequent rule is in line with Congressional intent and meets the goals the agencies have set out.

### Conclusion

It is extremely difficult to be a homebuilder in this current regulatory environment. Regulations add to the cost of any home and increase the time it takes to build it. Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a \$1,000 price increase. Nationally, this price difference means that when a median new home price increases from \$225,000 to \$226,000, 232,447 households nationwide can no longer afford that home.

Regulatory red tape prevents many families from realizing the American dream of owning a home because I am unable to provide affordable housing in a professional and timely manner. Protecting our state's natural treasures is important. However, my business cannot continue to grow and thrive in this atmosphere. We must work together to find an appropriate balance so that South Dakotans can raise their families in safe and affordable homes while also enjoying our state's natural resources.

implemented it could conceivably impact every aspect of my operation by potentially regulating every tributary, stream, pond and dry streambed on my land. What's worse is the ambiguity in the rule that makes it difficult, if not impossible, to determine just how much my operations will be affected.

We are pleased the courts saw fit to impose a stay on the implementation of the WOTUS rule and hope, Senator, you and Congress will require the EPA to go back to the drawing board and engage with farmers and ranchers and other stakeholders to seek viable solutions before any new rules are formulated.

Regarding the Endangered Species Act (ESA), many in my area are familiar with the burdens this can bring thanks to the reintroduction of the black footed ferret in the Conata Basin which you referenced in your opening testimony. I explained the seriousness of the prairie dogs to you one day in Wall, and you had the viability to come look at the situation and sent Secretary Larry Gabriel to establish these buffer zones which are still functioning today and protecting adjacent private property. Between that and the plague, the prairie

dogs have been controlled.

But we are losing the battle on the black footed ferret. After 30 plus years and many millions of dollars, there are 75 ferrets that can be accounted for. And my question to you is: Is this a viable project? Is it worth the estimated 600,000 per surviving ferret when the national debt is \$19 trillion?

Today the number of species listed on the Endangered Species list is 2,226 with only about half of those, 1,156, having recovery plans in place. In the history of the ESA, only 66 species have been delisted. This means we spend millions and millions of taxpayer dollars on a program that has roughly a 1.4 percent success.

There was an article in last week's Tristate News on the grizzly bear and its relocation and how that problem is working and the problem it's causing landowners with losses to livestock which they have no control over. And the same with the gray wolf program, many other states have tried to develop a program but been fought by the environmental community to not delist it.

We want to continue to do our part for wildlife and the environment, but the "sue and settle"

tactics of the so-called environmental organizations have turned the good intentions that was created by the EPA and Fish and Wildlife decades ago into a farce. Today these two important government agencies are frequently pawns that must either do the bidding of radical environmentalists or face costly lawsuits than waste valuable time, human resources and taxpayer dollars.

Nobody depends on the conservation of our natural resources more than family farms and ranches, many of which are multi-generational businesses like mine that hope to continue for many generations in the future. In order for that to be possible, we urge Congress to stop the regulation by bureaucracy and halt the onslaught of costly and burdensome rules that don't achieve measurable results.

We look forward to continuing to work with Congress to ensure that we have the ability to do what's best, produce the world's safest, most nutritious, abundant and affordable protein while giving consumers the choice they deserve. Together we can sustain our country's excellence and prosperity.

I appreciate the opportunity to visit with you

today and thank you for your time.

One comment I would make, if nobody even thought about it, but during the '70s when those regulations were in place, we had built the interstate system before that. Today, Senator, I don't think we'd have in there an interstate system. We would not have dams on the Missouri River, and we wouldn't have any pipelines.

Thank you for your time.

[The prepared statement of Mr. Williams follows:]

Senator ROUNDS. Mr. Williams, thank you for your testimony today.

At this time I will begin questioning. Time constrains the total number of questions that I can ask, but I would like to work my way through a series of them and see where it goes.

I'd like to begin with Mr. Clayton.

Mr. Clayton, in your opinion how can the agencies better collaborate with landowners and the recreational community to eliminate the conflicts that have often occurred over the regulatory process?

MR. CHUCK CLAYTON. Well, thank you, Senator.

The Izaak Walton League of America, both here in South Dakota and also in Washington, D.C. seems to be the ones that -- we don't let the perfect get

Testimony of

**Myron Williams, Owner** Williams Ranch

Wall, South Dakota

with regards to

**“Oversight related to US Environmental Protection Agency  
& Fish & Wildlife Service Regulations”**

submitted to the

United States Senate

Committee on Environment & Public Works – Subcommittee on Superfund, Waste Management, and  
Regulatory Oversight

Senator M. Michael Rounds, Chairman

August 30, 2016

Rapid City, SD



Good morning, my name is Myron Williams. I am a cow calf producer, background feeder, and raise wheat, corn and alfalfa. Thank you, Senator Rounds, for allowing me to testify today on the impacts of Environmental Protection Agency and Fish & Wildlife Service regulations on our farms and ranches.

Because we are in the business of producing food, agriculture is, rightly, a highly regulated enterprise. While federal regulations affect all aspects of farming and ranching, my comments today will primarily focus on the EPA's Waters of the United States (WOTUS) rule and the FWS' Endangered Species Act (ESA) regulations, as they both have significant impacts on how farmers and ranchers put their property to work for the benefit of food production.

As a beef producer, I take pride in being a good steward of our country's natural resources. Along with my fellow farmers and ranchers, I maintain open spaces, healthy rangelands, and provide wildlife habitat while working to feed the world. However, in order to provide all of these important functions, we must be able to operate without excessive federal burdens, like the ESA and WOTUS regulations.

First to address the Waters of the US rule. Let's be clear - everyone wants clean water. Farmers and ranchers rely on clean water to be successful in our businesses. But, expanding the federal regulatory reach of the EPA and Army Corps *does not* equal clean water. If this final rule is implemented, it could conceivably impact every aspect of my operation, and all other farms and ranches, by potentially regulating every tributary, stream, pond, and dry streambed on my land. What's worse is the ambiguity in the rule that makes it difficult, if not impossible, to determine *just how much* my operation will be affected. This ambiguity over key definitions will result in disparate interpretation by bureaucrats in different regions of the country and place all landowners in a position of uncertainty and inequity.

If EPA and the Army Corps are allowed to fully implement the WOTUS rule, it seems to me I could be required to obtain federal permits to plow certain fields, apply fertilizer, graze cattle or build a fence across my pasture. In addition, if certain wet, and even dry, features on my land are now "federal water", there are additional considerations under the National Environmental Policy Act and the Endangered Species Act due to the federal decision-making in granting or denying a permit.

There is also the citizen suit provision under Section 505 of the Clean Water Act that would expose my family farm and ranch to frivolous legal action and unnecessary expense. For the price of a postage stamp someone who disagrees with eating red meat could throw me into court where I will have to spend time and money proving that I am not violating the Clean Water Act. This is not what anyone had in mind when Congress passed the Clean Water Act more than four decades ago.

We are pleased the Courts saw fit to impose a stay on implementation of the WOTUS rule, but hope Congress will continue to be engaged to prohibit the rule's implementation. Further, we hope you will encourage, or force, EPA to go back to the drawing board and engage with farmers, ranchers and other stakeholders to discuss our concerns and viable solutions, *before* any new rules or regulations are formulated.

Regarding the Endangered Species Act (ESA), many in my area are familiar with the burdens this can bring thanks to the reintroduction of the Black Footed Ferret in the Conata Basin of the Buffalo Gap National Grasslands. As I've previously expressed, farmers and ranchers are committed to natural resource conservation, which includes wildlife and wildlife habitat. Without the efforts of private and public lands ranchers, species conservation would be difficult, if not impossible. As such, implementation of the ESA must be done in a way that allows for continued operations.

Senator Rounds, you may recall that I visited with you when Wall was "Capitol of the Day", which was during your first term as Governor of South Dakota. I explained to you the seriousness of the prairie dogs and ferrets in our area. You flew over the Conata Basin and you sent Secretary of Ag Gabriel out to review the situation. You established buffer zones with the Forest Service which are still functioning today and protecting adjacent private property. Between that and the sylvatic plague, the prairie dogs have been controlled. But we are losing the battle on black footed ferret. After 30 plus years, and many million dollars, there are only 75 ferrets that can be accounted for. My question to you would be is this a viable project? Is it worth spending the estimated \$600,000 per surviving ferret when the national debt is \$19 trillion and rising by the minute?

Surely Congress never intended the Endangered Species Act to function as a "roach motel" where species check in but never check out. Today, the total number of species listed as threatened or endangered is 2,226 with only about half of those (1,156) having recovery plans in place. In the history of the ESA, only 66 species have been delisted. This means we spend millions and millions of taxpayer dollars annually on a program that has roughly a 1.4% success rate.

Comprehensive ESA reform is needed to ensure species recovery plans are developed and executed in a manner consistent with sound science rather than pressure from radical environmental groups. The FWS should be allowed to prioritize species in real jeopardy without fear of being overwhelmed by lawsuits. How many times has the Black Tailed Prairie Dog been proposed for listing, citing one questionable assertion their "historic range" covered 80-100 million acres, despite the fact they are found today on at least 2.4 million acres in 11 states, with an estimated population of 24 million (<https://www.fws.gov/mountain-prairie/es/species/mammals/btpairedog/>)?

We want to continue to do our part for wildlife and the environment, but the “sue and settle” tactics of the so-called environmental organizations have turned the good intentions that created the EPA and the FWS decades ago into a farce. Today, these two important government agencies are frequently pawns that must either do the bidding of radical environmentalists or face costly lawsuits that waste valuable time, human resources and taxpayer dollars.

Nobody depends on the conservation of our natural resources more than family farms and ranches, many of which are multi-generation businesses like mine that hope to continue that family business for many generations in the future. In order for that to be possible, we urge Congress to stop the “regulation by bureaucracy” that has become the norm in recent years and regain control of the reins to halt the onslaught of costly and burdensome rules that don’t achieve intentional or measureable results. We look forward to continuing to work with Congress to ensure that we have the ability to do what we do best – produce the world’s safest, most nutritious, abundant and affordable protein while giving consumers the choice they deserve. Together we can sustain our country’s excellence and prosperity, ensuring the viability of our way of life for future generations. I appreciate the opportunity to visit with you today. Thank you for your time.

### **Biography**

Myron and his wife Mary operate a cow-calf and backgrounding operation in western South Dakota with their sons. Their diversified operation also includes wheat, alfalfa, and corn enterprises, in addition to Myron’s order-buying business. Myron is a dedicated member of his community, serving in a variety of capacities from the local school board to the church council and local fair boards. Myron has also served the beef industry in various leadership roles at the local, state, and national levels, including the Cattlemen’s Beef Board where he served on the Operating Committee for five years and the Executive Committee for two years. Myron also served as the Chairman of the National Cattlemen’s Beef Association’s Federation Division in 2005. Presently he serves as the Federal Lands Committee Chair for South Dakota Cattlemen and is on the Federal Lands Committee for NCBA. He is a director for the South Dakota Ag and Rural Leadership Board and was appointed to the South Dakota State Brand Board in 2015.

in the way of the good, and we are known for working between the groups and passing, trying to pass laws and get cooperation from both landowners, sportsmen, builders, everybody. And I think if state agencies, especially ones that deal with things regulated that private landowners own, we would advance our causes a lot more. Oftentimes what happens is in the South Dakota Legislature and in Washington, D.C. all of a sudden this bill pops up by special interest. And one side loves it and the other side hates it and there's nobody in the middle. So if we could have more groups like our own and other sportsmen's groups that would be willing to sit down with landowners and ranchers, farmers and talk, I think it would be a lot better. I used to do that when I was the president of the South Dakota Wildlife Federation and South Dakota Izaak Walton League. I don't see anything wrong with that process.

Senator ROUNDS. This is off a little bit, but I'm just going to ask anyway. The Conservation Reserve Program was a ten-year program. It seemed to me that it was very good for wildlife and it was a good option for a lot of farmers and ranchers out there. Has your group seen good support for the CRP program?

MR. CHUCK CLAYTON. Oh, we support it immensely, but the problem is we had all the push from the input industries that sell feed, seed, fertilizer, tractors, and they didn't want that CRP because that cut into their business. So, as you know, you have this balancing act between all sides.

Senator ROUNDS. Sure. Landowners have got to decide where they can actually afford to pay for the land they've got and maintain the land they've got.

MR. CHUCK CLAYTON. Exactly.

Senator ROUNDS. Personally I'm a proponent of CRP. I like it.

Ms. Parker, I agree with the goals of the Endangered Species Act, but I'm concerned with what appears to be a very low success rate. According to the U.S. Fish & Wildlife Act, there are 1,226 species currently listed as endangered. In the history of the ESA only 66 species have been delisted, some of them due to extinction and others due to errors in the organizations that required the removal. The Fish & Wildlife Service has had errors which required that their removal, you know, be ordered from the list. How should the Endangered Species Act be reformed in order to increase the success rate, and how can private landowners become

more engaged in conservation in order to prevent a species from being listed?

MS. DENISE PARKER. Well, in the case of landowners, I highly recommend, because the Fish & Wildlife Service does have several programs that will work with landowners in various ways to help them to balance as far as if they have an endangered species that's within the confines of their land, I think working with those programs that are already in place that a lot of times landowners are not even aware of.

As far as what appears to be a low success rate is -- probably our greatest success rate is that of the removal of the bald eagle. And of course everybody knows how important the Bald Eagle is to our country.

Some of the species that are still struggling along are struggling because of the interaction with humans in various areas of our country.

I like to look toward South Dakota. I worry about the black footed ferret. I worry about the long eared bat, our dipper which we can oftentimes find in Spearfish Canyon. But it is a matter of working with landowners, the stakeholders and compromising a lot of times. And I don't think that

we do enough of that.

Certainly the efforts of certain groups to attach riders to unrelated bills in Congress that are seeking to either defund or tie the hands of the U.S. Fish & Wildlife, you know, who works very hard, I mean talk about a balancing act, these folks are under fire all the time. And, you know, their primary mission is not only to conserve wildlife but also work on behalf of all the homeowners -- or the landowners and stakeholders in this.

Senator ROUNDS. Thank you. I actually have a house on the river, and it's one of the greatest things in the morning to come on out and see whether or not if one of the baldies is sitting on one of the trees behind the house. And it's a marvelous opportunity to see a beautiful bird, and it's something that you get up and you enjoy doing.

I do have a question for Mr. Rhoden. And you've testified that the Environmental Protection Agency actually hinders farmers and ranchers from being able to effectively manage and conserve resources on their lands. Can you explain how the EPA is often an obstacle to environmental conservation?

MR. LARRY RHODEN. Well, I believe probably the

most important factor, especially with WOTUS, you know, we don't know what effect that will have because it's not been implemented yet. What we don't do in western South Dakota -- and I understand, you know, we have two different worlds in South Dakota. The things that affect eastern South Dakota and the management practices are significantly different than in western South Dakota, the topography, but all the more reason for public input and common sense in the way that we set forth rules.

One size does not fit all. And when I look at rules that are proposed for western South Dakota under Waters of the United States, it's hard to fathom how we would deal with it as far as what they describe as waterways and how, you know, the criteria they use to describe what constitutes a waterway. And so it's up to the imagination to know what effect that will have. I mean, it goes anywhere from none at all to catastrophic as far as our ability to do with land what we need to do to maintain our operation.

I think we lose track of the fact -- you know, I've been on the same place for 57 years. My father put the place together before me when he came home



from World War II. My brother is on the original homestead. That is a story that we see repeated all across the state. We want what's best for the land, not because, you know, we're good guys, but we need to sustain that land. We have, you know, the skin in the game in protecting the water quality. Our survival depends upon it. And so -- and all we want to do is make a living and protect the land and fulfill our responsibility to the land.

So to have a government agency come along, especially with the type of rules that we've seen that just blow your mind as far as common sense -- so I don't have a good answer to your question. God forbid I do in a couple years because it's implemented and now we're dealing with the fallout and the regulations that are being proposed under WOTUS.

Senator ROUNDS. Thank you. I just have -- Larry, I'll just make a point that you were a majority leader when I was governor, and during that time we worked through the issue of regulations then. Any difference between the way you see the process of if you were working with a state agency and the processes we use in South Dakota versus the processes that you've seen in terms of your national

affiliations and so forth working with the EPA or the U.S. Fish & Wildlife Service?

MR. LARRY RHODEN. Yeah, you know, I -- yeah, pretty dramatic. You know, we worked together on a prairie dog management plan to help, you know, come up with a solution, you know, to back away from the brink, if you will, as far as the danger of having the prairie dog listed as an endangered species.

So Eric Bogue was the majority leader in the Senate; I was majority leader in the House, and we carried the companion bills or the same bill. House and Senate prime sponsors worked with your office to develop that management plan and the Department of Agriculture, and it was a long process but it was a good process.

During that time we had committee hearings where we invited all South Dakotans, anybody that had a stake in the game to come and testify. So that's a good process. That's the way it should work. We should be able to look the people that it's going to affect in the eye, hear a real-world scenario of how that's going to affect them, work through the process and change and tweak it to represent some common sense and sound logic. And, you know, I think it's a good process. I wish we

had more of that at the federal level.

Senator ROUNDS. Thank you.

Mr. Lage, you testified about the fact that project proponents do not have a seat at the table during additional statutory reviews triggered by the Clean Water Act and this puts builders at a disadvantage. Could you explain how builders are placed at a disadvantage and the impact this has on the ability to construct new homes in South Dakota?

MR. JEFF LAGE. Well, we have an issue with affordability all over the country. And that's within South Dakota also. You know, when 25 percent of the cost of a home is government regulation, we need to have a bigger seat at the table.

People want to experience the, you know, American dream of home ownership. We need to be allowed to participate, face on the table, and put out our concerns rather than writing letters and writing reports and writing details. So we need to get -- we need to be involved. We need to be involved up front.

There's some numbers out there that are rather scary when it comes to home construction. And one is, you know, it goes back to affordability again, when you raise the price of a house on a median home

a thousand dollars, 234,000 people can no longer qualify to buy that home.

And costs, they get passed on. When there's excessive costs, they get passed on through the process. Just like any business, you're going to add whatever cost is at the bottom product.

So we just need to be able to have a more upfront, face-to-face, accept what's going on. Home building is one of the major factors for the country.

Senator ROUNDS. I noticed, if I could, in terms of nationally, in your testimony you talked a little bit about this, but the vague definitions that you referred to in the Waters of the U.S. could result in the Agency interpreting regulatory terms in an overly broad manner that could greatly expand the Agency's regulatory authority. Do your members across the country have concerns that different EPA Regional Offices could interpret in different ways leading to a patchwork of varying Clean Water Act permitting issues and regulations? And I'm just curious if you want to expand on that a little bit.

MR. JEFF LAGE. Yeah, that is a major concern across the country. And, like you said, there's too much interpretation in the law.

I'm going to give you an example. I live in a subdivision south of Rapid City. We use our ditches to move our water. In theory, it could be interpreted anything that could possibly hold water or run water at any time could be impacted. Our utilities are in the ditches. So if we need to do utility work, hook up to a water hydrant, hook up or dig up a water line, we would possibly have to get a permit, depending on the interpretation of those theories. And, you know, it just puts so much burden. You don't know whether you can even mow your own ditch in front of your yard because it could potentially hold water.

I think it should be -- I mean, this is huge to every American that owns property. You are being told what you can do with your property. And you're taking away private property rights, by the government. You're not getting compensated for it. You just have to play by their rules. Like, you own a piece of property, Here's what you can do with it; here's what you can't do with it. You can't touch that because it could have water in it. You know, it's just complete overreach of the Federal Government.

Senator ROUNDS. Mr. Williams, in your

testimony you mentioned that under WOTUS rule you may be required to obtain federal permits for normal ag operations. Your concern with the additional costs this could impose on your operation, how would you manage it, and how do you see this actually impacting? Are you thinking of the core permits or getting the core permits, or are there specifics that you found out about already that you're concerned with? Could you expand a little bit about --

MR. MYRON WILLIAMS. I guess I haven't found out about it specifically, but what we've been told, going by our major organizations, Farm Bureau and other ones, the Housing Association, that they're going to be there. I haven't experienced it myself, but I know of people personally that have gotten in trouble, thought they had the right permits and all of a sudden they were looking at \$44,000-a-day fine. That's the scary part is the interpretation of what the Agency said is okay, and then if we're going to forget that, I guess I don't trust. I guess I feel that that's an area that's pretty vague. And we need it to be isolated.

I think we were a lot better when it was Navigable Waters of the United States, not All

Waters of the United States. But I think that's a key word.

Senator ROUNDS. You also testified about your concerns with the black footed ferret and the amount of taxpayer dollars that have been spent aimed at the conservation of the species. Can you tell us your experiences with the conservation of this species and the impact that it's had on your land?

MR. MYRON WILLIAMS. Well, it has worked on the federal land user, and that's where the Conata Basin is is on federal lands.

Senator ROUNDS. Down in the Badlands?

MR. MYRON WILLIAMS. Badlands, yes, but it's also owned by the Forest Service. And it's in cooperation with it. It joins the Badlands National Park. So those two agencies are trying to grow the ferret population, but they're such a critical species that they think the best way to establish that species is to give it more room and more acres so that limits the amount of control they can do.

And limiting that control, those things are migrating. I live 5 miles from the nearest dog town, and we have them on a private section of our place that I eradicate three or four times a year. They migrate. They're just like hitchhikers, you'll

see them come up on gravel roads in the spring of the year looking for a place to go. And they find them. They've got GPS. They find places to go. And they're a residual little critter. They devastate a pasture. And there's nothing wrong with having some of them, but I think there's a number.

And just, you know, the idea of it -- I've been doing this for 30 years. I mean, shouldn't they in some way draw the line in the sand and say, Well, I guess this didn't work? I mean, I would. If I was in business and failed that long, somebody would put me out of business.

Senator ROUNDS. I want to thank all of the panel for being here today.

I come away with this: I know the landowners here. I've been on their places or I've been around their places, and I know that they're pretty proud of them, the work they do in terms of conservation efforts.

I also respect what our association representatives have brought in here in terms of their interests in just seeing that the endangered species be protected and their interest in conservation as well.

I was born, as my dad continues to remind me,



on the opening day of pheasant season. And he reminded me the other day that I still owe him a pheasant hunt that I had cost him.

And I think when we talk about the economic opportunities of having clean water and clean land, that's critical. The issue I think more than anything else seems to be how we come up with the appropriate national policies that can be implemented at the local level when you have so many differing types of local needs and accepted practices.

We've heard over a period of several different committee meetings or different inquiries that there is a difference between one location and another in terms of how they are interpreted.

The Corps of Engineers, we've had testimony from one farm group in our last meeting that they were actually still implementing WOTUS in terms of ag practices and changing from one ag practice to another ag practice, and that was clearly not the intent of the law when it was created.

So I think as much as anything, when we do these subcommittee meetings and hearings, we're looking not only to try to ferret out those areas that we see specific problems on, but we also are

trying to determine whether or not the processes that we use can be improved.

And most certainly for those of us that have had experience at the local level, we've seen where the rule-making process in South Dakota can actually work, and it's one in which the legislative body has the final say as to whether or not that rule actually goes in and becomes effective.

At the federal level we haven't had that. In fact, where 41 states have a rules review process in place similar to South Dakota's, at the federal level one of the most frustrating parts, and I think our folks here from the U.S. Fish & Wildlife and from EPA have probably heard the frustration of not -- although there is testimony provided, the same folks that make up the rule in the first place take the testimony, and then those same folks that wrote the rule in the first place decide whether or not the rule gets changed or whether it doesn't get changed. And to change on the part of Congress, anything happening actually takes an act of Congress to become effective. So what you've got is -- the default position is is that a rule being proposed by an unelected organization, an agency, then becomes effective unless the organized elected body,

Congress, can get 60 votes in the United States Senate, or if the President disagrees, a two-thirds vote of both the House and the Senate in order to stop a rule or modify a rule.

That's different than what the states do where there's a rules review process that slows the rule-making process down to the point where you have modifications made. Because in many cases the agencies do want the rule to go into effect, but they do it with the blessing of a congressional committee or a legislative committee. That does not occur at the federal level. And I think that's one of the major changes that we have to look at is the rules-making process and whether or not Congress should have an active role in the rule making before it becomes effective, other than going through the onerous process of actually writing the legislation, passed by both the House and the Senate and passed by or, and also signed by the President.

On only two occasions that I'm aware of has the rule -- or the congressionally directed current process been effective in actually changing a rule since at least the 1990s. And when you think about the fact that we have over a million federal regulations on the books today and we're creating

them at the rate of over 3,000, close to 3,500 more per year, you suddenly realize that the true legislative body at the federal level today are the agencies and not Congress.

And I think what we're hearing today are some of the frustrations but also the desires that these processes put in place actually work. Because when you have over -- you know, the vast majority of the land in the United States is actually operated by private landowners, you start to realize that you've got to have cooperation of landowners and acceptance by landowners if you really want the Endangered Species Act to work and if you really want a Navigable Waterways process to be accepted by folks who actually live and work on the land.

So with that, I just want to take this opportunity to thank all of our witnesses for being here today. You all add to this discussion, and it is greatly appreciated.

The hearing record will be open for two weeks, which brings us to Tuesday, September 13th.

And with this, this hearing is adjourned.

Thank you.

[Whereupon, at 12:35 p.m. the committee was adjourned.]