Statement of the American Farm Bureau Federation

Testimony of

Ellen Steen
General Counsel and Secretary
American Farm Bureau Federation

before the

Senate Committee on the Judiciary

"Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity"

June 10, 2015

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Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you for calling this important hearing on the transparency and integrity of federal agency rulemaking and inviting me to testify on behalf the American Farm Bureau Federation (AFBF) and the nation's farmers and ranchers.

My name is Ellen Steen, and I am the General Counsel and Secretary of AFBF. In my current position and in two decades of private law practice prior to joining AFBF, I have been involved in dozens of agency rulemakings, primarily focused on U.S. Environmental Protection Agency (EPA) rules under the Clean Water Act. I have litigated the validity and interpretation of EPA rules and policies, experiencing first-hand the deference that courts show agency regulations and agency interpretations of their regulations.

As I explain below, the new "waters of the U.S. rule" rulemaking broke new ground, turning an already imperfect process into essentially a public relations campaign. Like any campaign, the last year has been full of "spin" created by former campaign officials now leading agency communications teams, mutual accusations of misleading the public, public officials derisively dismissing concerns of the opposition, suggestions that opposition to the rule amounts to opposition to clean water, tit-for-tat responses and public rejection of opposing views—all in the middle of a rulemaking public comment period. If this characterization of the rulemaking process troubles the Committee, it should. I invite the Committee to peruse the attachments to this testimony to get a flavor of what has become of our federal rulemaking process.

Executive Summary

The notice-and-comment procedure for rulemaking is designed to ensure that agencies take honest account of the thoughts and concerns of the regulated public and to hold agencies to their stated rationales when regulations are challenged in court. When it works as it should, the notice-and-comment process guarantees just what Congress, with the APA, set out to accomplish: a deliberative process of soliciting and considering public input, followed by an agency decision and response to the public's input. It's often not exciting—sometimes even dull—but that back-and-forth is essential to sound decision-making and to the integrity of the rulemaking process.

EPA's handling of the Waters of the United States Rule—a regulation of extraordinary practical and financial importance to farmers, ranchers and most anyone else who grows, builds,

or makes anything in this Nation—flouted the APA's notice-and-comment process in three key respects:

- *First*, throughout the rulemaking process, EPA publicly derided concerns expressed about the proposed rule (including the concerns of Farm Bureau and our farmer and rancher members). Legitimate concerns how the rule would affect agriculture, in particular, were subtly twisted and then dismissed as "silly" and "ludicrous" and "myths." Public statements from the agency's highest officials made it clear that the agency was not genuinely open to considering objections to the rule.

- *Second*, EPA engaged in an extraordinary public relations campaign to solicit support for (but not informed comment on) the rule. The campaign consisted almost entirely of non-substantive platitudes about the rule's purported benefits, while omitting any meaningful information about the actual content of the rule—i.e. *what the rule would do, and what activities would be regulated as a result*. The campaign substituted blogs, tweets and UTube videos for what should have been an open and honest exchange of information between the agency and the public.

- *Finally*, the agency allowed its own internal timeline, and perhaps the presidential election cycle, to dictate issuance of a proposed rule before the fundamental scientific study underlying the proposal was complete and available for public review—and then to dictate issuance of a final rule without providing a further opportunity for public comment on major changes made in that final rule. Regardless of the agency's motivations, the integrity of the rulemaking process demands that the public have an opportunity to review and comment on the basis for an agency's proposal and on any major changes *before* they appear in a final regulation.

This flawed process recently culminated in the issuance of a deeply flawed regulation, the true costs and regulatory impact of which have not been seriously considered and may not be known for years. But regardless of whether you supported, opposed, or never heard of that rule, you should shudder to think that this is how controversial regulations will be developed in the age of social media. Agencies must strive maintain an open mind throughout the rulemaking process—and to inform rather than indoctrinate and obfuscate—even when policy issues have become controversial and politicized.

The overbroad and vague rule that EPA has promulgated to define "waters of the United States" perfectly illustrates another serious problem with agency rulemaking. The federal courts' current approach to determining whether a rule is lawful involves deferring to the agency's interpretation of a statute and deferring again to the agency's interpretation of its own rules. As scholars and some of the Justices of the Supreme Court have pointed out, this two-stage system of deference actually encourages agencies to promulgate broad and vague rules, and then to expand their power by interpreting those rules broadly during the course of implementation and enforcement.

With the "waters" rule, EPA has repeatedly and emphatically assured farmers and the public, in speeches and blogs, that the new rule will not increase permitting obligations for farmers or "get in the way" of farming. But those of us who have litigated agency rules, and

agency interpretations of their rules, know that courts are unlikely to give much weight to speeches and blogs. Months and years from now, with an ambiguous regulation before a judge, the agency's interpretation will be unassailable. The end result is that the regulated community is ambushed: the rules allow for a wide range of interpretations, the agency's informal campaign during rulemaking provides a narrow and comforting interpretation, and the regulated first learn their actual obligations and liabilities when the enforcement actions begin. This is not how it was meant to be.

Introduction

As the Members of this Committee know better than most, the statutes enacted by Congress—no matter how carefully drafted—frequently leave room for interpretation. That isn't necessarily a bad thing. It would be as unwise and it would be impracticable for Congress to attempt to foresee every possible application of each statute that it writes. Leaving room for interpretation introduces common sense flexibility as unanticipated circumstances arise. The law gets worked out as much in its implementation as it does in its drafting.

As the Supreme Court explained in the watershed case, *Chevron v. Natural Resources Defense Council*, by leaving interpretive "gaps" in statutes, Congress leaves it to expert agencies to promulgate regulations to *fill* those gaps. But there is reason to be cautious on that score. There is very little, after all, to distinguish a statute enacted by Congress from the statute's implementing regulations, promulgated by a federal agency comprising unelected bureaucrats. According to the Supreme Court, agency rules that fill gaps in statutes have the force and effect of law and, under *Chevron* deference, are given controlling weight by the courts. Put simply, rules that fill gaps in statutes have *legislative* effect.

For that reason, it's essential that the process for promulgating agency rules be open and transparent and ensure accountability. That is precisely the purpose of the APA. The APA was enacted in 1946 against a background of rapid expansion of administrative rulemaking as a check on federal agencies whose enthusiasm for rulemaking risked regulatory excesses not contemplated by Congress. The Act guards against such excesses in part by mandating a public notice-and-comment process.

The notice-and-comment process is at the heart of the APA and the goals it was designed to achieve. As a general matter, before an agency makes a rule, it must *first* notify the public of the proposal and invite comment on the rule's perceived virtues and vices; *second*, consider the comments and arguments submitted by the public; and *finally*, make a final decision and explain that decision in a statement of the rule's basis and purpose. This process should force agencies to take honest account of the knowledge, experience, and concerns of the public (including the regulated public) and allow courts to later hold agencies to their stated rationales when regulations are challenged in court. When it works as it should, the notice-and-comment process ensures just what Congress set out to accomplish with the APA: ensuring meaningful public input and a public record to hold agencies accountable for their stated rationale and intent in the rulemaking process.

Unfortunately, agencies have recently been testing—and we think exceeding—the limits of what the notice-and-comment procedure permits. AFBF's recent experience with EPA's "Waters of the United States Rule" offers a troubling example.

First, a little background. Under the 1972 Clean Water Act, it is illegal (without a permit or other specific statutory authorization) to discharge pollutants from a point source—such as nozzles on equipment used to spread fertilizer and pesticides—into the "navigable waters." Congress defined "navigable waters" as "waters of the United States." The term has been the subject of controversy, rulemaking by both EPA and the U.S. Army Corps of Engineers, and inconsistent judicial interpretation ever since. Not surprisingly, EPA's most recent regulation defining its jurisdiction over "waters of the United States" was the subject of vigorous debate.

It is no surprise that agriculture and other industries that engage in activities on the land have very serious substantive concerns with scope of EPA's Waters of the U.S. rule—which defines as "waters of the U.S." many features that simply look like *land,* not *water,* and that are ubiquitous across the countryside It will not be a surprise that we strongly believe the rule is an arbitrary and capricious interpretation of the Clean Water Act, exceeds EPA's constitutional authority, and is simply bad policy that will cause costly and unhelpful disruptions in the national economy. But we understand those concerns are beyond the scope of this Committee's current inquiry. Here we will focus on the defects in the process by which EPA arrived at the rule, which we believe help to explain why EPA got the substance of the rule so wrong. EPA made mistakes because it finalized the rule according to an opaque and deeply flawed process that failed to hold EPA to account to state and local governments, the regulated public, and the basic economic and other analyses that are meant to inform agency rulemaking—in fact, it treated these as obstacles to be overcome rather than as sources of input and information that would improve the final rule.

There were three core problems with the rulemaking process that should be of special concern to the Committee and its Members, which I have identified in bullet points in the Executive Summary of this testimony. I'll now say a bit more about each of these concerns.

Closed-Mindedness

EPA first published the proposed Waters of the United States rule on April 21, 2014, and the public comment period remained open until November 14, 2014. AFBF did not immediately oppose the rule. Rather than jump to conclusions, our staff carefully reviewed the lengthy proposal and came to the conclusion that the rule's vague language would dramatically expand EPA's jurisdiction, allowing it to regulate virtually all "waters"—including countless land areas across the countryside where rain channels and flows only immediately after rainfall, ditches running alongside and within farm fields, and isolated low spots in the middle of farm fields. We prepared information for our members to help them understand the rule and voice their concerns (since we are a grassroots advocacy organization). In the end, we and scores of other organizations representing agriculture and other industries' interests—plus the vast majority of state, county and municipal goverments—submitted detailed comments as part of the notice-and-comment process, expressing grave concerns about the impact of the rule on a wide range of commonplace and essential land use and land management activities.

But long before we sent the official comments to the record, all indications were that EPA's mind had already been made up, and that our comments had no hope of being taken seriously. For example, in an article appearing in *Farm Futures* (perma.cc/KH98-6WVU), EPA Administrator Gina McCarthy was quoted—*on July 9, 2014, in the middle of the public comment period*—as calling the Farm Bureau's concerns "ludicrous" and "silly" and based on "myths." Farmers and ranchers across the country told us they read her remarks and took them personally. How could we expect our comments to receive fair consideration when they were already being dismissed out-of-hand as silly? The answer—we could not.

Instead, as described below, EPA's conduct over the coming months demonstrated not only that its mind and ears were closed, but also that it was firmly entrenched and fiercely "messaging" a misleading picture of the proposed rule designed to placate opposition within the regulated community and build ill-informed support among the lay public.

Manipulation of the Public and the Process

EPA's conduct throughout the rulemaking gave the striking appearance of advocacy aimed at generating public support and "cooking the books" to overcome procedural hurdles like the economic and regulatory impact analyses.

With regard to public support, EPA engaged in an aggressive social media and promotional campaign designed to dampen opposition and manufacture support for the rule. Immediately upon releasing the proposed rule (before we at Farm Bureau or the general public had even had an opportunity to read it), EPA announced purportedly wide-spread support for the rule from businesses and agriculture.[1] Fast on the heals of that came a public webcast sponsored by EPA's Watershed Academy, proclaiming that the rule "does NOT protect any new types of waters", "does NOT broaden historical coverage of the Clean Water Act," "does NOT expand regulation of ditches," would "benefit" agriculture, and was shaped by "input from the agricultural community."[2]

EPA's campaign right out of the gate made it incumbent on Farm Bureau, the nation's largest general agricultural organization representing farmers and ranchers, to not only develop comments to the agency, but to launch our own campaign to inform our members and the public about the true impact of the rule. The result was our "Ditch the Rule" grassroots campaign, which explained to farmers and rural America through our website and social media how EPA's proposed rule would expand federal jurisdiction over stormwater drainage paths, ditches, and small "wetland" areas—in the process increasing federal permit requirements for routine farming and ranching practices as well as other common private land uses, like building homes.

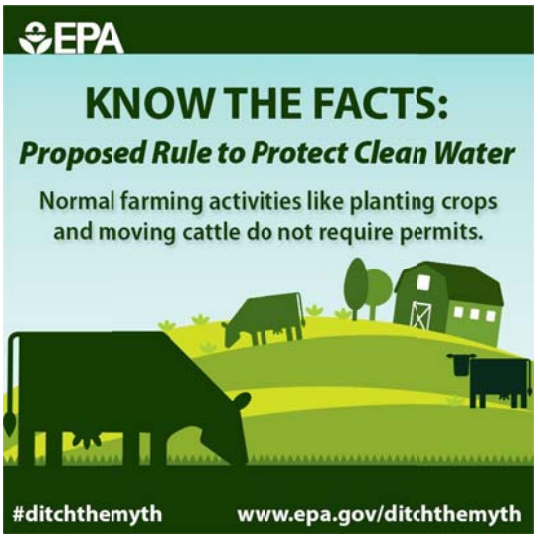
Not long after our campaign went live, a competing campaign called "Ditch the Myth" went public and continues today. Remarkably, however, that campaign was not launched by an environmental advocacy group—instead, it was launched by *EPA itself*. To our knowledge, this

[1] EPA News Release, "Here's What They're Saying About the Clean Water Act Proposed Rule" (March 25, 2014).

[2] EPA Waters of the U.S. Proposed Rule Webcast (April 7, 2014).

was an unprecedented move. The APA requires EPA to listen to comments and concerns on its proposed rule; it does not contemplate an agency engaging in a publicly funded campaign to influence the comments that the public makes and explicitly reject public criticisms of a proposed rule during the comment period.

Worse, the content of EPA's "Ditch the Myth" campaign was fundamentally misleading and directed at rejecting criticisms made by the very same industries that would be regulated by the rule. For example, EPA's "Know the Facts" slides assured the public that "normal farming activities like planting crops and moving cattle do not require permits." But that is extremely misleading, since "normal" farming under the Clean Water Act is in fact a term of art that has been extremely narrowly interpreted and has *never* been construed to include moving cattle (not to mention commonplace activities like applying fertilizer and crop protection products). The agency also asserted that "regulation of ditches is actually decreased." But that, too, is simply false—the rule would automatically regulate many ditches as "tributaries," whereas previously any ditch that does not carry water most of the time could only be regulated after a case-specific analysis by the agency. In the end, most claims that EPA made in its public campaign were, at best, artfully phrased to mislead the public:



Similarly, throughout the summer and early fall of 2014, EPA put out official blogs on its websites and "question and answer" documents for public consumption—again, in the middle of the public comment period—rejecting the Farm Bureau's and other groups' arguments that the rule: (1) dramatically expands the agency's jurisdiction compared to current law (given that the Supreme Court has long since found the previous decades-old overbroad regulations to be unlawful); (2) perpetuates the costly vagueness of prior rules; and (3) would allow EPA and the Corps of Engineers to require permits or simply disallow innumerable commonplace activities on the land nationwide, including farming and ranching activities like building a fence, fertilizing and protecting crops, and grazing livestock. The question-and-answer document put forth a new round of carefully crafted and misleading statements that the rule would not increase federal jurisdiction (false), would not regulate land where water flows after rainfall (false), and would

not require permits for the protection and fertilization of crops (false).[3] Farm Bureau responded the following month with a detailed rebuttal,[4] and the public battle waged on. Strikingly, this battle was not over the policy merits of expanding jurisdiction or of increasing federal permitting of farming and other land uses—which would be a worthwhile public discussion—but simply over whether or not the rule *would* expand jurisdiction and increase federal regulation of land use. EPA has insisted it will not, but those statements are absent from the official public notices that judges would typically look to in construing an agency rule.

Beyond its "Ditch the Myth" campaign, EPA engaged in an aggressive "Thunderclap" social media campaign, designed to drum up superficial support for the rule outside the regulated community. Thunderclap is a company that provides a "crowdspeaking" platform, which, in its own words, "allows a single message to be mass-shared, flash mob-style, so it rises above the noise" and helps "create action and change like never before." *See* perma.cc/EBD4-KLR5. EPA's Thunderclap campaign coupled a picture of a child drinking water over a meaninglessly one-dimensional statement: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community." Thunderclap then directed people to a link so they could support the rule through social media and further the campaign. EPA's Thunderclap campaign purportedly reached 1.8 million people.[5]

Through Thunderclap and the coordinated efforts of environmental groups and political action groups (in particular, Organizing for America (OFA)), EPA was able to boost superficial support for the rule by hundreds of thousands of well-intended people who never read or even looked at the proposed rule. In the preamble to its final rule, EPA boasts that the agency received "over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule." Of course, this omits that over 900,000 of the so-called "comments" fit on less than four single-paced pages. It also omits that the rule was overwhelmingly opposed in detailed substantive comments by the majority of state governments, county and municipal governments, and associations and companies from virtually every sector of the U.S. economy.[6] Of course, agency rulemaking does not and should turn on public polling—but for EPA to claim to be responsive to public comments—in this context—rings hollow.

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[3] *See* Questions and Answers – Waters of the U.S. Proposal, EPA and U.S. Army Corps of Engineers (undated but released in September 2014) (attached).

[4] *See* Trick or Truth? What EPA and the Corps of Engineers Are *Not* Saying About Their "Waters of the U.S." Proposal (Oct. 30, 2014) (attached).

[5] "I Choose Clean Water" Thunderclap, by U.S. Environmental Protection Agency (attached).

[6] Although agencies traditionally have discounted comments submitted as part of a mass campaign, EPA appears to have adopted a different approach—counting and tallying up individual non-substantive comments like petition signatures, postcards, and copied emails. For example, rather than counting one electronic petition bearing 218,542 names as one comment, EPA appears to have counted it as 218,542 comments. Similarly, a petition organized by OFA, the former campaign for the President Obama (which still uses the President's picture on its communications), generated 69,369 signatures, each of which was counted as a separate comment. In contrast, a single, detailed substantive comment letter signed by attorneys general from 11 states and governors from 6 states opposing the rule appears to have been counted as one comment.

EPA also seems to have gamed the economic and other required analyses designed to ensure an informed final rule. EPA's economic analysis, for example, cited a 3% increase in the scope of its jurisdiction, which was revised for the final rule to 4% . EPA widely cited this 3% figure in its public communications, as evidence of the modest impact of the rule. The final economic analysis itself (at page vi), however, states that it *does not* purport to estimate the scope of the increase in CWA jurisdiction under the rule—and indeed EPA has made no effort to estimate the degree of expansion:

> "To estimate how the costs and benefits of CWA programs may change as a result of a change in the number of positive jurisdictional determinations under this rule, the EPA reviewed a sample of negative jurisdictional determinations (JDs) (i.e., determinations of no jurisdiction) completed by the Corps in fiscal years 2013 and 2014 to assess how the JD would change if the final rule had been in place. The EPA looked at a random sample of 188 jurisdictional determination files, which represents 782 individual waters in 32 states. *It is important to emphasize that the economic analysis focuses exclusively on the costs and benefits from CWA programs that would result from the associated change in negative JDs, rather than an analysis of how the* ***scope of jurisdiction*** *changes - nationwide data do not exist on the extent of all waters covered by the CWA.* The agencies generally only make jurisdictional determinations on a case-specific basis at the request of landowners." (emphasis added)

Thus, according to the agencies' economic analysis, they actually do not know, and haven't attempted to estimate, how much the scope of CWA jurisdiction will increase under the rule.

Likewise, EPA certified that the proposed rule would not have a significant economic impact on small businesses for purposes of Section 609(b) of the Regulatory Flexibility Act, asserting that the rule would be *narrower* in scope that previous regulations. Yet those prior rules have long since been found overbroad and unlawful, and which therefore do not reflect current practice, as pointed out in an objection by the SBA Office of Advocacy.[7]

In promoting the environmental benefits of the rule to the lay public, however, the agencies use a much larger figure. In this context, EPA boasts that the rule will protect 60% of the nation's flowing streams, and millions of acres of wetland, that otherwise lack clear protection.[8]

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[7] SBA Office of Advocacy letter to The Honorable Gina McCarthy (Oct. 1, 2014).

[8] "But right now 60 percent of the streams and millions of acres of wetlands across the country aren't clearly protected from pollution and destruction. In fact, one in three Americans—117 million of us—get our drinking water from streams that are vulnerable…. EPA and the U.S. Army Corps of Engineers has proposed to strengthen protection for the clean water that is vital to all Americans." EPA Thunderclap campaign ending Sept. 29, 2014 (copy attached). "The Supreme Court decisions in 2001 and 2006 left 60 percent of the nation's streams and millions of acres of wetlands without clear federal protection, according to EPA, causing confusion for landowners and government officials." http://abcnews.go.com/Politics/wireStory/epa-rules-protect-drinking-water-regulate-small-streams-31332848

So how big is this expansion of EPA's regulatory reach? 3-4%, 0%, or 60%? Most seasoned Clean Water Act practitioners would tell you the answer is somewhere closer to 60%—maybe more. Yet this is nowhere reflected in the economic and regulatory impact analysis underlying the rule.

Circumvention of Notice and Comment

Much of the communication by EPA to AFBF, other stakeholder groups, and the public during this rulemaking occurred outside the Federal Register and the formal public comment process. Yet even within the formal notice-and-comment process, EPA gave short shrift to the substantive give-and-take that Congress envisioned when it enacted the APA. Under settled APA notice and comment requirements, "[a]mong the information that must be revealed for public evaluation are the technical studies and data upon which the agency [relies in its rulemaking]." *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008). Agencies are not permitted to promulgate rules based on "data that, to a critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 376, 393 (D.C. Cir. 1973). Instead, the "critical factual material" used by the agency must *itself* be "tested through exposure to public comment." *American Radio Relay League*, 524 F.3d at 236.

That did not happen in the Waters of the U.S. rulemaking. Throughout the comment period, the EPA's linchpin scientific report was undergoing review by the Science Advisory Board. It wasn't until October 2014 that the Advisory Board submitted its formal review to the agency. And that review suggested major changes to the report, which as a result was not finalized until well *after* the close of the comment period. Organizations like the Farm Bureau should have had an opportunity to comment on the final science report, which we believe is deeply flawed. EPA could easily have reopened the comment period for a short time for the express purpose of allowing comment on the amended science report. Consistent with its efforts to marginalize critical comments, however, EPA issued a final rule and report without ever having allowing the public to comment on the amended version of the science report that underlies the final rule.

Furthermore, the substantial changes that EPA made between its proposed and final rule means that many of the key provisions of the final rule, including definitions of key concepts like "tributary," "neighboring," and "significant nexus," have never been tested by notice and comment. While we understand EPA's desire to limit rulemaking to one round of notice and comment, there is no doubt that when an agency makes substantial changes from the proposed rule the rulemaking process would benefit from seeking comments on those changes. A practice of reopening the comment period to address major changes before a rule becomes final would improve agency transparency and accountability and result in better rules that are less open to attack in litigation. And the lack of such a practice could encourage agencies to save the "real" rule for final publication and thereby avoid public comment on key but controversial provisions of the rule.

Conclusion

The net result of all of this should, in our view, be of deep concern to the Members of this Committee. As a result of its unprecedented public relations campaign and the cutting short of the comment process, EPA effectively pulled the wool over the lay public's eyes. Among EPA's public explanations for the rule was its promise that the rule would bring greater clarity and predictability. In fact, the rule accomplished the exact opposite, leaving agency bureaucrats with unbridled discretion to determine the reach of the Clean Water Act. The result will be widespread uncertainty and enforcement risk for the hundreds of thousands of family farmers and ranchers whose interests the Farm Bureau represents.

But beyond its practical impact on the regulated public, this uncertainty does even further violence to the integrity of the notice-and-comment rulemaking process. As you know, the general rule is that courts will defer to an agency's interpretation of its own ambiguous regulations. The Supreme Court has warned in recent cases that this so-called *Auer* deference encourages agencies to be vague in framing regulations, which then allows them the discretion to make case-by-case "interpretations" of the regulation later. The result is that subsequent interpretations of vague regulations—many of which will be made, in this case, in the context of enforcement actions—form the true substance of the regulation, but are never tested through the notice and comment procedure. *See Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part). In other words, *Auer* deference allows an agency, "under the guise of interpreting a regulation, to create de facto a new regulation" without going through formal APA rulemaking. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011). That is just what the Waters of the U.S. rule accomplishes—EPA has promulgated a vast and vague regulation, the *real* substance of which will be determined by unaccountable agency staff, without notice-and-comment rulemaking. Such opaque and unaccountable governance should be of deep concern to every member of this Committee, and to the public at large.

We at the American Farm Bureau Federation appreciate the Committee's willingness to listen to our concerns. Thank you.