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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

September 21, 2017

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Douglas W. Lamont
Deputy Assistant Secretary of the Army
108 Army Pentagon
Washington, DC 20310

Re: *EPA Docket No. EPA-HQ-OW-2017-0203, Definition of "Waters of the United States" – Recodification of Pre-existing rules*

Dear Administrator Pruitt and Deputy Assistant Secretary Lamont:

We commend you for your proposal to withdraw the deeply flawed "Waters of the United States" (WOTUS) rule that was promulgated by the prior administration in June 2015.[1]

Your proposal solicits comment as to whether it is desirable and appropriate to withdraw the 2015 WOTUS rule. 82 Fed. Reg. 34899, 34903 (July 27, 2017). Not only is it desirable and appropriate, the proposed action is necessary.

As you know, on August 27, 2015, Judge Erickson of the District of North Dakota, issued an injunction that prevented the WOTUS rule from going into effect in 13 states because the rulemaking record is "inexplicable, arbitrary, and devoid of a reasoned process." In October of 2015, the Sixth Circuit Court of Appeals issued a nationwide stay of the 2015 WOTUS rule.

Eighty-eight members of Congress filed an *amicus* brief on November 8, 2016, in support of state petitioners, and business and municipal petitioners, challenging the 2015 WOTUS rule. All 88 members of Congress concluded that the 2015 WOTUS rule exceeds the authority granted to the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps) by Congress.[2] The 2015 WOTUS rule should be withdrawn because the rule exceeds the authority granted to these agencies by Congress.

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[1] 80 Fed. Reg. 37,054 (Jun. 29, 2015).

[2] *See* Brief of Members of Congress as Amici Curiae in Support of State Petitioners and Business and Municipal Petitioners, 6th Cir. Case No. 15-3751, Nov. 8, 2016 (hereinafter Congressional Amicus Brief) (attached).

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Further, as demonstrated by memoranda prepared by the Corps of Engineers, as well as testimony received by the Committee on Environment and Public Works on April 26, 2017, at a hearing entitled "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule," the 2015 WOTUS rule is not based on the experience and expertise of the Corps of Engineers, and cannot be justified by scientific studies.[3] Thus, the 2015 WOTUS rule is arbitrary and capricious and must be withdrawn on this basis as well.

We submit this comment letter and its attachments for your consideration.

The 2015 WOTUS Rule Is Contrary To Law

The 2015 WOTUS rule was based on the erroneous premise that federal jurisdiction over water is whatever the federal agency wants it to be to advance its latest policy objectives. The courts have been clear however that a federal agency may not exceed the statutory authority granted to it by Congress. Courts have made this point many times:

- *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000))("[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ... we typically greet its announcement with a measure of skepticism.").

- *Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (Scalia, J., plurality) ("This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose.").

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *id.* at 173 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.").

- *Rodriguez v. United States*, 480 U.S. 522, 525-266 (1987) ("But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates, rather than effectuates, legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.").

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[3] *See* April 27, 2015 letter from General Peabody to Assistant Secretary of the Army Darcy; May 15, 2015 letter from General Peabody to Assistant Secretary of the Army Darcy; May 15, 2015 memorandum from Jennifer Moyer to General Peabody; April 24, 2015 memorandum from Lance Wood to General Peabody; April 24, 2015 Memorandum from Jennifer Moyer to General Peabody; April 26, 2017 Testimony of Dr. Michael Josselyn before the Senate Committee on Environment and Public Works; April 26, 2017 Testimony of MG John Peabody (ret.) before the Senate Committee on Environment and Public Works; April 26, 2017 Testimony of Misha Tseytlin before the Senate Committee on Environment and Public Works. (all attached).

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- *Mexichem Fluor, Inc. v. Environmental Protection Agency*, D.C. Cir. Case no. 15-1348 (Aug. 8, 2017) ("The agency must have statutory authority for the regulations it wants to issue.").

- *National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress.").

In the 2015 WOTUS rule, EPA and the Corps attempted to expand their authority to meet their policy preferences. However, in the Federal Water Pollution Control Act, Congress did not grant EPA and the Corps unlimited authority to define the extent of their own regulatory authority. Thus, it does not matter if EPA and the Corps concluded in 2015 that all water is connected, including isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, and water that does not contribute pollutants to navigable water. Congress did not give the agencies the authority to regulate such water.

The limitations on federal jurisdiction under the Federal Water Pollution Control Act are apparent from the text of the statute as well as the contemporaneous debate over federal authority that provides context to both the 1972 and the 1977 amendments to the Federal Water Pollution Control Act.

The 1972 amendments to the Federal Water Pollution Control Act directly responded to concerns over the limits of both the permitting authority under the 1899 Rivers and Harbors Act and enforcement of water quality standards under the 1965 amendments to the Federal Water Pollution Control Act.[4] The 1972 amendments established a regulatory framework under which state-developed water quality standards were federally enforceable in intrastate navigable waters, as well as interstate navigable waters and their tributaries, and under which the states could take the lead in issuing permits applying effluent limitations for discharges into those waters.[5]

In support of the 2015 WOTUS rule, the previous administration, EPA and the Corps made the novel claim that federal jurisdiction over water is as broad as the objective of the Federal Water Pollution Control Act set forth in section 101(a) (stating that the objective of the Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters"). 80 Fed. Reg. at 37,055-56. These agencies further reinterpreted the objective of the Act to expand the reference to "physical" integrity to encompass water supply and the reference to "biological" integrity to encompass wildlife habitat. This claim of authority conflicts with the Supreme Court's rulings in *Rodriguez*, and other cases cited above, as well as the language and structure of the statute and its legislative history.[6] The goal statement of the Federal Water Pollution Control Act does not address jurisdiction at all. It is nothing more than a statement of water *quality* goals for the water that is regulated.[7]

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[4] *See* S. Rept. 92-414, 92nd Cong. 1st Sess. 70-71.

[5] *Id.* at 77.

[6] *See Congressional Amicus* Brief at 15-18.

[7] *See* Congressional *Amicus* Brief at 18 (citing the explanation of the Act's objective provided by Senator Muskie).

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In 1965, Congress made water quality standards federally enforceable in interstate navigable waters only. The 1972 amendments expanded federal jurisdiction from interstate navigable waters and their tributaries to include intrastate navigable waters and their tributaries, if part of a highway of commerce that could include highways and railways, in addition to water transportation.[8]

In enacting this expansion, at no time did Congress consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, water that does not contribute pollutants to navigable water, or waters based solely on their use as wildlife habitat. In fact, the 1973 report issued by the congressionally-chartered National Water Commission *after* the enactment of the current definition of "waters of the United States," recommended that *states* protect state-owned wetlands used by waterfowl. None of the water experts who served on the Commission suggested that those wetlands were already regulated by the federal government.[9]

Consistent with the legislative history of the Act, the Commission described the jurisdictional expansion in the 1972 amendments as follows: "The water quality standards established in response to the 1965 Water Quality Act are retained as a floor under the new effluent limitations and are expanded to include *all navigable waters*."[10] The Commission further noted that permits for dredging and channel alteration issued by the Corps of Engineers Act "are required only when the waters are navigable in interstate or foreign commerce, and no application for a Corps permit need be filed for those activities in other inland waters."[11] As a result, the Commission made the following recommendation: "Since the States historically have been viewed as having regulatory jurisdiction over waters which are not navigable in interstate or foreign commerce, the Commission believes that the States should enact statutes which would provide adequate measures of protection to fish and wildlife values."[12] This contemporaneous interpretation of the 1972 amendments confirms that the objective of the Federal Water Pollution Act is to protect the quality of navigable water, not wildlife habitat generally, which is an important subject addressed in other federal and state legislation.

Nothing in *United States v. Riverside Bayview Homes, Inc*, 474 U.S. 121 (1985) contradicts this interpretation. In that case the Supreme Court deferred to the Corps' determination that regulation of navigable water included regulation of adjacent wetlands because the agencies must make a determination of where open waters end and dry land begins. *Id.* at 132. In the fact pattern presented to the Court, the wetlands were an extension of the navigable water. That may be an "ecological" connection, but *Riverside Bayview* does not support an argument that <u>any</u> "ecological" connection to navigable water creates jurisdiction. If there was any doubt of that fact, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001) the Supreme Court put that doubt to rest. Use of water as

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[8] *See* Congressional *Amicus* Brief at 5-6.

[9] *See* Congressional *Amicus* Brief at 8-9.

[10] *See* National Water Commission (June 1973), Water Policies For The Future: Final Report to the President and to the Congress of the United States at 87 (emphasis added) (attached).

[11] *Id.* at 201.

[12] *Id.* at 202.

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wildlife habitat is not a basis for federal jurisdiction under the Federal Water Pollution Control Act. *Id.* at 172-173.

In expanding the jurisdiction of the Federal Water Pollution Control Act to include intrastate navigable water, Congress also did not consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, and water that does not contribute pollutants to navigable water, based on their effects on water supply. Congress made that very clear in 1977, when Congress added section 101(g) to the Federal Water Pollution Control Act.[13] This amendment responded to an attempt by federal agencies to use the Act to regulate surface flows and groundwater. According to the amendment's sponsor: "This 'State's jurisdiction' amendment reaffirms that it is the policy of Congress that this act is to be used for water *quality* purposes only." 123 Cong. Rec. 39, 211-12 (1977) (floor statement of Senator Wallop) (emphasis added).[14]

Despite the limited grant of federal authority in the Federal Water Pollution Control Act, the June 2015 WOTUS rule purports to regulate water based on its use by birds or mammals or insects, based on its use to control supplies of water through runoff storage, or based on its use to augment water supplies by movement through the ground or over the land. The statute does not give the agencies that authority. The Federal Water Pollution Control Act is and always was a water quality protection statute. The primary responsibilities and rights of States to "to plan the development and use . . . of land and water resources" are expressly preserved. 33 U.S.C. § 1251(b). Thus, the June 2015 WOTUS rule is contrary to law.

The 2015 WOTUS Rule Is Arbitrary and Capricious

The preamble to the 2015 WOTUS rule and the Technical Support Document for that rule repeat nearly *100 times* the claim that the rule is based on the agencies' expertise and/or experience. These documents also claim over *500 times* that the rule is based on "science" or relies on "science." The preamble to the final rule further states:

> This immersion in the science along with the practical expertise developed through case specific determinations across the country and in diverse settings is reflected in the agencies' conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn boundaries demarking where "waters of the United States" end. 80 Fed. Reg. at 37,065.

The brief filed by the U.S. Department of Justice on January 13, 2017, defending the WOTUS rule, makes similar claims. The brief states *over 30 times* that the rule is based on agency experience and/or expertise and references the "science" or EPA's Science Report *over 150 times.*

These statements are not supported by the record.

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[13] "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act." 33 U.S.C. § 1251(g).
[14] *See* Congressional *Amicus* Brief at 21-22.

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The Corps of Engineers is the agency that makes the vast majority of jurisdictional determinations that identify waters that are regulated under the Clean Water Act. However, according to memoranda sent by Major General John Peabody, former Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, to Assistant Secretary Darcy on April 24, 2015, and on May 15, 2015, EPA shut the Corps of Engineers out of the development of the WOTUS rule. These memoranda state that the WOTUS rule is *not* based on the experience and expertise of the Corps. For example, an attachment to General Peabody's May 15, 2015 memorandum stated:

> "The [Technical Support Document] emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule... *[T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that 'the agencies' did this work or that it is reflective of Corps experience or expertise."*[15]

Further, the 2015 WOTUS rule is not justified or supported by scientific findings. In May 2011, the prior administration issued a draft guidance that purported to delineate the extent of federal jurisdiction under the Federal Water Pollution Control Act. After receiving criticism for issuing a guidance instead of a rule, EPA developed a proposed rule to mirror the draft guidance and collected ecological studies to justify the conclusions *already made* in the draft guidance. In September 2013, the prior administration sent a draft proposed rule to OMB. At the same time, the prior administration issued a draft "Connectivity Study" that purported to justify the proposed rule.

The prior administration convened a panel of scientists to review their study. The panel unsurprisingly agreed that ecological studies show connections among all waters. However, the Connectivity Study does not demonstrate that all waters covered by the rule must be regulated to protect the quality of navigable water. In fact, most of the studies do not even mention navigable water.[16]

A panel member, Dr. Josselyn, raised concerns about the lack of scientific support for regulating ephemeral water in his preliminary comments on the Connectivity Study:

> "The Draft Report contains references that are focused on more perennial and intermittent flowing streams, but presents *very little information on the processes occurring within ephemeral streams.* Because these systems are often the focus of jurisdictional disputes, the specific case history discussion contained in the Draft Report on southwestern streams is very useful. A conclusion reached is that such systems are important to recharging local groundwater systems following surface flow events; however, *it is not clear how this would relate to downstream water quality."*[17]

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[15] May 15, 2015 memorandum from Jennifer Moyer to MG Peabody (attached). See also testimony of General Peabody before the Senate Environment and Public Works Committee on Apr. 26, 2017 (attached).

[16] *See* Congressional *Amicus* Brief at 22-23, 25, 29.

[17] *See* December 2, 2013 letter from Dr. Josselyn to Dr. Rodewald (attached). *See also* testimony of Dr. Josselyn before the Senate Environment and Public Works Committee on Apr. 26, 2017 (attached).

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Corps legal counsel raised similar concerns about the lack of scientific support for the tributary definition in the WOTUS rule:

> "[T]he draft final rule asserts CWA jurisdiction by rule over every 'stream' in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert southwest, even though those ephemeral dry wastes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary."[18]

The brief filed by states in the litigation challenging the rule explains the inadequacies of the scientific record:

> "According to the Agencies, the scientific basis for the Rule is that water flows downhill to create hydrological connections, see 80 Fed. Reg. at 37,063, and that the "protection of upstream waters is critical to maintaining the integrity of the downstream waters," id. at 37,056. This is nothing but a truism, and implies a limitless expansion of federal power."
>
> "The mere existence of a hydrological connection—even a continuous one—is insufficient under Justice Kennedy's holding in Rapanos, 547 U.S. at 769, but that is all the Connectivity Study demonstrates."[19]

Accordingly, even if EPA and the Corps had the authority to expand federal control over land and water, which these agencies do not, the 2015 WOTUS rule lacks record support, is arbitrary and capricious, and should be withdrawn.

The 2015 WOTUS Rule Has Little Chance of Surviving Judicial Review

The indefensibility of the 2015 rule also is a justification for its withdrawal. In addition to the grounds stated by the courts staying the 2015 WOTUS rule, its notable that the Corps raised similar concerns before the final rule was issued, stating that the rule is "... not likely to survive judicial review in federal courts," and is "...inconsistent with SWANCC and Rapanos." The Corps further stated that, "This assertion of CWA jurisdiction over millions of acres of isolated waters...undermines the legal and scientific credibility of the rule"[20]

Given the indefensibility of the 2015 rule, it is preferable to withdraw that rule now, rather than wait for the judicial *vacatur*.

The Economic Impacts of the 2015 WOTUS Rule

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[18] April 24, 2015 Memorandum from Lance Wood to MF Peabody (emphasis in original) (attached).

[19] *See* Opening Brief of State Petitioners, 6th Cir. Case No. 15-3751, Nov. 1, 2016, at 55, 57 (attached). *See also* Tseytlin testimony, at 15.

[20] April 24, 2015 memorandum from Lance Wood to General Peabody, at 9-10.

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In November 2015, four months after the final WOTUS rule was published, EPA added a review of 199 jurisdictional determinations to the WOTUS rule docket.[21] Of the 199 jurisdictional determinations EPA evaluated, 57 were negative. In 47 of those 57 negative jurisdictional determinations, the Corps concluded that federal jurisdiction did not exist because there was no surface connection to navigable water. The 2015 WOTUS rule however no longer requires a surface connection to navigable water to establish federal jurisdiction. Accordingly, some or all of the 47 negative jurisdictional determinations evaluated by EPA could become positive jurisdictional determinations under the 2015 WOTUS rule. If all of the 47 jurisdictional determinations were positive, it would represent 82 percent of the negative jurisdictional determinations reviewed. That is a substantial expansion of federal jurisdiction which would cause economic impacts that should be addressed.

Small Entity Impacts and Federalism

The proposed withdrawal alleges that the action will not have a significant impact on small entities, and does not have federalism implications. 82 Fed. Reg. at 34904. We strongly disagree. Withdrawing the 2015 WOTUS rule will lift a significant threat to small businesses and small governmental entities across the country. Withdrawing the 2015 WOTUS rule also acknowledges the existence of waters of the State that are not federally regulated, consistent with the intent of Congress.

Conclusion

In closing, we noted that the proposed withdrawal of the 2015 WOTUS rule is styled as a "Recodification of Pre-existing Rules." However, the agencies also disavow any intent to reconsider the pre-existing definition. 82 Fed. Reg. at 34903. Accordingly, we interpret the agencies' proposed rule to be a proposal to withdraw the 2015 WOTUS rule. While that withdrawal will result in the reinstatement of the pre-existing regulations, that is a ministerial task of updating the Code of Federal Regulations necessitated by the withdrawal, not a substantive proposal to adopt those regulations.

Having said that, we urge EPA and the Corps to develop a replacement WOTUS rule as soon as possible. The definition of waters of the United States has been the subject of many years of litigation, which could be brought to rest by a scientifically sound WOTUS rule that respects the intent of Congress.

Thank you for considering these comments and supporting documents as you develop your final rule to withdraw the 2015 WOTUS rule.

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[21] *See* Analysis of Jurisdictional Determinations for Economic Analysis and rule, EPA-HQ-OW-2011-0880-20877 (attached).

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Sincerely,

John Barrasso, M.D.
Chairman

Dan Sullivan
United States Senator

Shelley Moore Capito
United States Senator

John Boozman
United States Senator

Joni K. Ernst
United States Senator

Roger Wicker
United States Senator

Jerry Moran
United States Senator

James M. Inhofe
United States Senator

M. Michael Rounds
United States Senator

Richard C. Shelby
United States Senator

Deb Fischer
United States Senator

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United States General Accounting Office

GAO

Testimony

Before the Committee on Agriculture,
House of Representatives

For Release on Delivery
Expected At 10:00 am
Wednesday, June 28, 2000

CLEAN WATER ACT

Proposed Revisions to EPA Regulations to Clean Up Polluted Waters

Statement of Peter F. Guerrero, Director,
Environmental Protection Issues,
Resources, Community, and Economic
Development Division

GAO/T-RCED-00-233

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Mr. Chairman and Members of the Committee:

We are pleased to be here to discuss our recent analysis of economic and compliance issues associated with two recently proposed rulemakings by the Environmental Protection Agency (EPA) intended to strengthen its Total Maximum Daily Load (TMDL) program. The TMDL program is intended to ensure that the nation's waters meet water quality standards. TMDLs are used to restore water quality by identifying how much pollution a body of water can receive and still meet its standards. The amount of pollution entering the water is then reduced to that level.

TMDLs were first required by the Clean Water Act in 1972. EPA first issued regulations governing states' development of TMDLs in 1985 but did little to ensure that states enforced them. In recent years, lawsuits alleging inaction by EPA and the states have spurred increased attention to the development of TMDLs by imposing judicial deadlines on some states. Nonetheless, only about 1,300 of the up to 40,000 TMDLs estimated as needed to clean up the nation's polluted waters were approved by EPA through fiscal year 1999.

EPA's TMDL proposal is actually comprised of two parts. The first part (the TMDL regulation) would add requirements to clarify and strengthen how waters requiring TMDLs are identified, and would provide more specific requirements as to how TMDLs are developed. Specifically, the proposal would include requirements for implementation plans and other provisions intended to help ensure that pollutant reduction allocations in a TMDL will be implemented so that water quality standards will be attained and maintained.

The second part (the NPDES regulation) would revise EPA's National Pollutant Discharge Elimination System program that controls the discharge of pollutants from "point" sources of pollution (e.g., industrial facilities and municipal wastewater treatment plants that discharge pollutants through a pipe). The revisions would expand

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EPA's authority to issue permits in certain circumstances. It would also require new large or significantly expanding facilities to obtain offsetting reductions in discharges from other facilities releasing pollutants into a polluted body of water before these new or expanding facilities can begin discharging into those waters. In addition, the revisions would allow, under certain circumstances, the use of point source discharge permits to control pollution from certain agricultural and silvicultural activities that have generally been treated as "nonpoint" sources. These revisions are intended to help states and EPA in developing and implementing TMDLs, and hence were issued at the same time as the proposed TMDL regulation.

Certain statutes governing federal rulemaking activities generally require EPA to evaluate the economic impacts of proposed regulations such as the two proposals discussed at today's hearing. Specifically, the Regulatory Flexibility Act requires an agency to prepare an "initial regulatory flexibility analysis" if it determines that a proposed regulation will have "a significant economic impact on a substantial number of small entities" such as small businesses and small governmental jurisdictions. In addition, if on the basis of a preliminary analysis an agency determines that a proposed regulation includes a federal mandate that may result in annual expenditures of $100 million or more by state, local, and tribal governments in the aggregate, or by the private sector, the Unfunded Mandates Reform Act of 1995 requires more detailed analyses of costs, benefits, and alternatives. A similar directive is imposed on agencies by Executive Order 12866.

On the basis of its economic analyses, EPA concluded that neither proposed regulation would result in expenditures by governments and the private sector in excess of $100 million in any one year, and therefore did not conduct more detailed analyses under the Unfunded Mandates Reform Act. With respect to the Regulatory Flexibility Act, EPA determined that because neither proposed regulation directly regulates small entities, neither would have a significant economic impact on a substantial number of small entities. As requested by the House Committee on Transportation and Infrastructure, our report assessed (1) the reasonableness of EPA's economic analyses for the two

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proposed regulations and (2) whether EPA's determinations under the Unfunded Mandates Reform Act of 1995 and the Regulatory Flexibility Act were adequately supported.[1]

In summary, Mr. Chairman, we found the following:

> Limitations with EPA's economic analyses of the proposed regulations for the TMDL and NPDES programs raise questions about their reasonableness and about the determinations that EPA has based on them. Of particular consequence, the outcomes of the analyses were heavily influenced by a number of key assumptions. Among the most important of these assumptions was that states are essentially in full compliance with current regulations, or will be as a result of existing statutory and regulatory requirements. Therefore, EPA included in its estimate only the costs that would result from the new requirements in the proposed regulations and not the costs of doing TMDLs generally. However, compliance with existing TMDL regulations has been problematic, and future compliance in the absence of the proposed regulation is uncertain. We found similar uncertainties with key "baseline" assumptions that affect the cost estimates associated with the proposed NPDES regulation. Another key limitation of the analyses was that they did not sufficiently recognize that the key water quality data available to EPA to identify the number of waters not meeting standards (and, hence, the number of TMDLs that will be needed) are incomplete, inconsistently collected by states, and sometimes based on outdated and unconfirmed sources. As a result of these limitations, EPA's cost estimates are subject to substantial uncertainty. Under these circumstances, it would have been appropriate for EPA to assess the effect of different assumptions on the agency's cost estimates. Had it done so, the agency would likely have produced a range of possible costs exceeding those included in its analyses.

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[1] Clean Water Act: Proposed Revisions to EPA Regulations to Clean Up Polluted Waters (GAO/RCED-00-206R, June 21, 2000).

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Given the uncertainties surrounding EPA's cost estimates, we disagree with EPA that the agency's analyses adequately supported its determinations under the Unfunded Mandates Reform Act of 1995 that more detailed analyses of costs, benefits, and alternatives were not needed for either of the proposed regulations. However, in the case of the requirements for additional analyses under the Regulatory Flexibility Act, case law supports EPA's determination that because its proposed revisions to both regulations do not directly regulate small entities, additional analyses were not required.

Background

The primary changes in EPA's proposed revisions to its TMDL regulations include requiring the states to (1) establish a more comprehensive listing of waters that do not meet standards, (2) consider specific factors when prioritizing their listed waters, (3) develop TMDLs within 15 years once a water is listed, (4) include 10 specific elements in a TMDL, and (5) develop implementation plans that include 8 elements such as demonstrating "reasonable assurance" that a TMDL will be implemented. The reasonable assurance requirement is intended to help ensure that pollutant reduction allocations in a TMDL will be implemented so that water quality standards will be attained and maintained. This means that for point sources, states will issue enforceable NPDES permits and for nonpoint sources (such as farms), states must demonstrate that controls are likely to be implemented, such as through state programs requiring the use of "best management practices."

EPA estimated the annual cost that states would incur in implementing the proposed TMDL revisions to be between $10.3 million and $24.4 million per year (in 1999 dollars) from 1999 through 2015. The agency estimated costs for developing implementation plans ($5.3 million to $14.3 million per year); administrative costs to the states resulting from public participation requirements ($4.8 million to $9.5 million per year); and administrative costs to EPA for tasks such as reviewing implementation plans (about $18,000 annually). The amounts do not include costs to meet current regulations,

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consent decrees, and commitments states have made to EPA for developing TMDLs within a specified time period.

The primary changes to the NPDES program include requiring new large (or significantly expanding) dischargers to obtain an "offset" of up to 1.5 times their proposed discharge before releasing pollutants into an impaired water; giving states and EPA, under certain circumstances, discretionary authority to require dischargers of stormwater from forestry activities to have a NPDES permit; and giving EPA authority to designate certain sources (including some animal feeding operations and aquatic animal production facilities) as needing NDPES permits in cases where EPA develops a TMDL. The proposed NPDES regulation would also provide EPA authority to object to (and ultimately reissue) expired and state-issued permits that have been administratively continued for dischargers to impaired waters in NPDES-authorized states, where there is no TMDL or where the permit contains limits that are inconsistent with a TMDL.

EPA estimated the annual costs to private entities and federal and state governments in implementing the proposed NPDES regulation to be between $17.2 million and $65.2 million per year (1999 dollars) from 1999 to 2015. The major areas in which EPA estimated costs were for the construction industry and other storm water dischargers to obtain offsets ($11.33 million to $41.76 million per year); for the silvicultural industry to implement pollutant controls ($3.45 million to $12.93 million per year); for animal feeding operations and aquatic animal production facilities to implement pollutant controls ($1.92 million to $9.58 million per year); and for federal and state governments' administrative costs ($0.515 million to $ 0.964 million per year).

Limitations in EPA's Economic Analyses Raise Concerns About the Usefulness of its Cost Estimates

We found limitations with EPA's economic analyses of the proposed regulations for the TMDL and NPDES programs that raise questions about their reasonableness and about the determinations that EPA has based on them. Some of these limitations are common to both of the analyses. Such is the case, for example, regarding EPA's use of water

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quality data that are incomplete and in some cases unreliable. Other limitations are more specific to the individual analyses. As a result of these limitations, EPA's cost estimates are subject to substantial uncertainty. Under these circumstances, it would have been appropriate for EPA to assess the effect of different assumptions on the agency's cost estimates.

EPA's Economic Analysis of the TMDL Proposal

We identified several limitations of EPA's economic analysis for the agency's proposed TMDL regulation that raise questions about its usefulness for decision-making. The most significant of these relate to EPA's assumption of full compliance with existing regulations and the agency's use of key water quality data that are of limited quality. Other limitations include the use of unverified information, the exclusion of private sector costs and costs to other federal agencies, and a limited analysis of benefits and discount rates.

Assumption of Full Compliance.

In our view, the most significant limitation of this analysis is its assumption that states are, or will be, in full compliance with existing regulations. The practical effect of this assumption on EPA's cost estimate is that the agency did not include costs associated with states' implementation of current TMDL regulations; it only included costs associated with the specific changes and additions to the TMDL program set forth in the proposed regulation. For example, EPA estimated the costs of developing implementation plans and for additional public participation requirements that are not currently required but are in the proposed regulation.

EPA believes that full compliance with existing regulations is a reasonable assumption in this case since at the time of its analysis (Dec. 1998), there were consent decrees in 11 states to enforce existing TMDL requirements and pending litigation in another 15 states. EPA officials also told us that the likelihood of future lawsuits would be sufficient to ensure that all states will be in compliance with existing regulations at some point in the

future. In addition, EPA cited the fact all states have submitted comprehensive schedules to EPA stating when they would develop TMDLs for their impaired waters. Agency officials said this was further evidence that full compliance was a reasonable expectation.

Nevertheless, it is clear that substantial noncompliance exists with current TMDL regulations, and there is uncertainty as to if, and when, states will achieve full compliance. Indeed, one of the stated purposes of the proposed TMDL regulation is to strengthen the existing program. Among other things, the proposed regulation would require states to develop TMDLs within 15 years of listing impaired waters, and would require reasonable assurance that controls will be implemented so that water quality standards will be attained and maintained.

Absent the proposed revisions to EPA's regulations, full compliance with the existing program's requirements is uncertain. For example, only about 1,300 of the up to 40,000 TMDLs that EPA estimates are needed had been developed by the end of 1999. Moreover, the litigation record indicates that not all lawsuits have resulted in consent decrees; a few of the existing decrees addressed only a subset of the waters in the state; and not all states have pending lawsuits. Furthermore, the commitments that many states have made to EPA to develop TMDLs within a certain time period are non-binding, and their fulfillment will likely depend on the availability of state funding. Given that funding for water quality management programs has been documented to be significantly less than needed, and that TMDL development competes with other priority activities (such as NPDES permitting and enforcement), we believe it is uncertain as to when states will be able to develop all needed TMDLs.

Uncertainties about compliance with existing regulations are addressed in both the OMB's "Best Practices" (for conducting economic analyses) and EPA's economic guidance. Both acknowledge that full compliance is often not a reality and that the degree of compliance with existing regulations can significantly affect the results of the

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analysis. In addition, both documents state that an agency's economic analysis should consider the way the world would look absent the proposed regulation (referred to as the "baseline") and that many factors may influence this scenario—including the degree of compliance with existing regulations. EPA's own guidance for conducting economic analyses states that, if noncompliance is known, then the economic analyses should consider both the costs of achieving full compliance with existing regulations as well as the costs of achieving full compliance with proposed regulations.

Limitations of Water Quality Data

Another limitation that directly affects the cost estimate for the proposed regulation is that EPA relied on water quality data that are known to be of limited quality. Specifically, EPA relied on data from states' "303d" lists regarding the number of waters that do not meet standards and which may therefore require TMDLs. These data represent only a portion of the nation's waters, are collected inconsistently by states, and may be based on outdated or unconfirmed information. For example, our recent report, Water Quality: Key EPA and State Decisions Limited By Inconsistent and Incomplete Data (GAO/RCED-00-54) noted that only six states had a majority of the data they needed to fully assess their waters and less than half the states had a majority of the data needed to determine whether they should list waters they have assessed. While the economic analysis of the TMDL proposal acknowledges that additional waters needing TMDLs will "undoubtedly" be identified, EPA did not estimate costs for developing TMDLs for these waters.

Other Limitations

Unverified Data. EPA based its cost estimate for preparing a TMDL implementation plan on information obtained from one state official. However, the agency did not verify whether this information was representative of all states. As a result, EPA's cost estimate for developing these plans may not be representative of costs likely to be incurred by other states.

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Costs to the Private Sector. EPA did not include the costs that certain private sector entities will likely incur as a result of the proposed regulations because, according to agency officials, these costs would be incurred anyway under existing regulations and/or these entities will voluntarily implement controls. However, the proposed regulation includes new provisions that emphasize TMDL implementation by requiring implementation plans and "reasonable assurance" that pollution control activities will achieve their intended result. As a result of states' implementation of the reasonable assurance requirement, nonpoint sources such as farms will likely incur costs to control discharges to waters that they may not have incurred under existing regulations. Officials from the U.S. Department of Agriculture (USDA) told us that they believe the private sector will incur additional costs as a result of the proposed regulation.

Costs to Other Federal Agencies. EPA did not include costs that other federal agencies might incur as a result of the proposed regulation. Of particular note, USDA officials told us that their workload may increase as a result of the proposed regulation for such activities as providing technical support to EPA, states, and farmers.

Analysis of Benefits. EPA did not quantify (and monetize) the proposed regulation's benefits and, as a result, its analysis does not indicate whether the expected benefits of the regulation outweigh expected costs. EPA officials said that because the proposed regulation was not economically significant (i.e., would not have an annual effect on the economy of $100 million or more) they did not believe they were required to quantify the benefits of the proposed regulation. Instead, qualitative benefits were briefly mentioned in the proposal for the regulation. Although EPA's proposed regulation may well have benefits, without a monetary estimate of both the benefits and costs, one cannot confirm that the regulation is economically justified (i.e., that it would have positive net benefits).

Executive Order 12866 states that agencies shall assess both the benefits and costs of significant regulatory actions, regardless of whether the regulation is economically significant. EPA's proposed regulation was deemed significant by the agency because it

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addressed "novel legal or policy issues." In addition, OMB officials told us that, ideally, federal agencies should assess both benefits and costs of proposed regulations to compare the net benefits of alternative regulatory actions.

Analysis Did Not Sufficiently Account for Uncertainty

In light of the uncertainty associated with several of EPA's key assumptions and data, we believe that sensitivity analysis to assess the effect of alternative assumptions would have been appropriate. For example, given the uncertainty associated with future compliance by states with existing TMDL regulations, an analysis of the effect of alternative compliance rates on the cost estimate would have been particularly useful. Such analyses would likely have indicated a range of possible costs exceeding those estimated by EPA.

EPA's Economic Analysis of the NPDES Proposal

We also found key limitations in EPA's analysis of its proposed NPDES regulation. Two key limitations are that the analysis (1) used water quality data that are in some cases incomplete and unreliable and (2) assumed that federal agencies and most states have, or will have, enforceable authorities to control discharges from silvicultural operations. We have also identified other limitations that, taken together, indicate that the EPA cost estimates associated with this proposal are subject to substantial uncertainty.

Limitations of Water Quality Data

As in the case of its analysis of the TMDL regulation, EPA's analysis of the NPDES regulation relied on water data of limited quality. Specifically, EPA used data from its National Water Quality Inventory to estimate the number of currently-impaired waters and the number of "offsets" required for new large or significantly expanding facilities (e.g., construction sites). It also relied on these data to estimate the number of permits needed to control discharges from silvicultural activities, animal feeding operations, and aquatic production facilities designated as point sources. As noted earlier, we recently reported that reliance on these data would likely lead to an underestimate of the number

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of impaired waters requiring TMDLs because so few waters have been assessed. EPA's estimate does not include the additional costs to firms required to obtain offsets or permits as additional impaired waters are identified.

Federal and States' Authority Assumed to be Adequate

EPA assumed that existing authorities would be sufficient to control discharges from silvicultural activities on public and private lands in most states. However, this assumption is subject to substantial uncertainty. For example, EPA assumed that 30 states have, or will have, adequate enforceable authorities over silviculture, and that these states would therefore incur no costs as a result of the regulation. However, EPA's proposed regulation did not specify the types of controls that would be adequate to control silvicultural sources of pollution. Without such information, state foresters and forestry experts expressed concern to us that costs could be incurred as a result of additional control requirements. Their views are supported by data from EPA's National Water Quality Inventory, which indicate uncertainty as to whether current state programs effectively control discharges from silvicultural sources. In particular, some of the states with existing authorities to control silvicultural pollution have waters currently listed as impaired by silviculture, although it is unclear whether these impairments are a result of ineffective controls, lack of enforcement, or poor practices before the authority was established.

Other Limitations

Costs of Delay in Obtaining Offsets. EPA did not account for the potential cost of delay that a firm may incur in obtaining offsetting pollutant reductions needed from other firms discharging to the same impaired water. Although EPA's analysis recognized that delay is possible, it assumed these firms would be able to purchase an offset by the time the facility construction or expansion project is approved (about 3 years). However, the market for nonpoint source offsets is not well defined and there has been minimal trading to date. Thus, there is some uncertainty as to whether firms will be able to

purchase offsets, and any delay in time required to purchase offsets could impose additional costs on the firm.

Private Sector Costs. EPA's analysis does not account for the added costs to the private sector associated with more aggressive implementation by states of their existing authority. According to EPA, states will avail themselves of all existing authorities before using burdensome and costly NPDES permits. If this were true, this would create an added incentive for the states to implement their existing authorities more aggressively. Accordingly, more aggressive implementation would impose control costs on silvicultural, animal feeding, and aquatic production operations that would result from the proposed regulation.

Omitted Silvicultural Activities. EPA's estimate of the cost of applying best management practices for silviculture is based primarily on the volume and acres of timber harvested in counties with impaired waters. Although the proposed regulation states that a post-harvest activity, such as preparing the site for replanting, may cause significant adverse impacts on water quality, EPA did not estimate the costs of controlling pollution from these activities. Also, the cost of controlling discharges associated with pest and fire control activities were not included.

Benefits. EPA did not quantify (or monetize) benefits associated with the NPDES proposed regulation. The agency briefly discussion the proposal's benefits in the preamble to the regulation. As in the case of the TMDL regulation, although the proposed regulation may well have benefits, one cannot confirm that it is economically justified (i.e., that it would have positive net benefits) without a monetary estimate of both the benefits and costs.

Analysis Did Not Sufficiently Account for Uncertainty

Given the uncertainty associated with several of EPA's key assumptions and data, we believe that sensitivity analysis to assess the effect of alternative assumptions and data

would have been appropriate. In particular, given the uncertainty associated with future listings of impaired waters and, hence, the number of TMDLs needed, we believe that assessing the effect of additional future listings on the number of NPDES permits and associated costs would have been useful. Had such sensitivity analyses been undertaken, they would likely have indicated a range of possible costs exceeding those estimated by EPA.

Analyses Do Not Support EPA's Determinations Under the Unfunded Mandates Reform Act

Given the uncertainties surrounding EPA's cost estimates, we do not believe that the agency has established that the annual costs of its proposed regulations will not exceed $100 million. Accordingly, we disagree with EPA that the agency's economic analyses adequately supported its determination under the Unfunded Mandates Reform Act that more detailed analyses of costs, benefits, and alternatives were not needed for either of the proposed regulations.

In the case of the requirements for additional analyses under the Regulatory Flexibility Act, case law supports EPA's determination that because its proposed revisions to both the TMDL and NPDES regulations do not directly regulate small entities, additional analyses were not required. Specifically, several court decisions discussed in our report have ruled in analogous situations that agencies' regulations were not subject to the Regulatory Flexibility Act's requirements for additional analysis.

Observations

Our major disagreement with EPA regarding its economic analyses was with its assumption of full compliance, the effect of which was to exclude any costs to be incurred by states that have yet to meet the requirements of the existing program. In excluding these costs, we believe EPA has underestimated the costs of implementing the proposed regulations. However, the larger issue is that regardless of whether one attributes the costs to develop and implement TMDLs to the existing or proposed

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regulations, an indisputable fact remains—the costs to develop and implement TMDLs will be substantial. In addition, as we recently reported, states need more comprehensive data on water quality to both ensure they adequately identify impaired waters and to develop the TMDLs themselves.

This concludes our prepared statement, Mr. Chairman. We would be pleased to address any questions that you or other Members of the Committee may have.

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September 27, 2017

RE: Docket ID No. EPA–HQ–OW–2017–0203

Comment on the Proposed Rule Titled "Definition of 'Waters of the United States' - Recodification of Preexisting Rules"

The Natural Resources Defense Council files the following comments on behalf of our more than three million members and online activists and on behalf of the Environmental Working Group and Clean Water Action. The Environmental Protection Agency and Army Corps of Engineers' proposed repeal of the agencies' 2015 Clean Water Rule violates the law, common sense, and basic norms of good government. It must be withdrawn.

I. Pollution Plagues the Nation's Waters, Requiring Vigorous Clean Water Act Enforcement.

The agencies' proposal to repeal clean water protections ignores the essential role of the Clean Water Act. The proposal likewise ignores the current state of America's water bodies. Had the agencies taken proper account of Congressional intent and the problems that continue to threaten water quality across the country, they would never have proposed this repeal.

Congress enacted the Clean Water Act in response to rampant contamination of waterways and brought about important improvements across the nation. By the 1960s, pollution brought numerous water bodies to the brink of death. The Cuyahoga River, running through Cleveland, Ohio into Lake Erie, became so polluted with industrial waste in the 1950s and 1960s that it caught fire on more than one occasion.[1] Lake Erie itself received so much municipal waste and agricultural runoff that it was projected to become biologically dead. Unchecked water pollution in inland waterways accounted for record fish kills; for example, some 26 million fish died as a result of the contamination of Lake Thonotosassa, Florida.[2] Industry discharged mercury into the

[1] *U.S. v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).
[2] Robert W. Adler, et al., *The Clean Water Act: 20 Years Later* 5 (1993). An excerpt from this book, along with the bulk of the material cited in these comments, has been sent to the docket of this rulemaking via two separate

Detroit River at a rate of between 10 and 20 pounds per day, causing in-stream water to exceed the Public Health Service limit for mercury six times over.[3] Waterways in many cities across the country served as nothing more than sewage receptacles for industrial and municipal waste. The rate of wetlands loss from the 1950s to the 1970s was approximately 450,000 acres per year.[4]

Leaving the problem to individual states coupled with piecemeal federal law clearly failed. Our decision-makers generally – and accurately – understood that past approaches relying on state-by-state water quality standards could not clean up the waters and, indeed, waters were becoming more polluted. There was clearly a need for a broader federal role to address water pollution. Public outcry demanded a strong response from Congress. As Senator Edmund Muskie told the Senate when introducing the bill that was to become the new Act, "The committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the national effort to abate and control water pollution is inadequate in every vital aspect."[5]

So Congress responded. The 1972 Act represented the first truly comprehensive federal water pollution legislation. Congressman John Blatnik, Chairman of the House Public Works Committee, characterized it as a "landmark in the field of environmental legislation."[6] Senator Jennings Randolph, Chairman of the Senate Committee on Public Works, said, "It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment."[7] To take but one example, the Act required industry-specific discharge standards, which now prevent more than 700 billion pounds of toxic pollutants per year from being dumped into the nation's waters. The rate of wetlands loss decreased substantially compared to the pre-Clean Water Act era. Thanks to these and other innovations, Americans benefit from numerous services water bodies provide, and being able to use waterways across the country for a variety of purposes.

However, despite the pollution controls Congress adopted in the Clean Water Act, most the nation's waters still face challenges to their health 45 years later. The country remains far short of the Clean Water Act's goal of swimmable and fishable waters (a goal Congress intended the country to reach by 1983). Consider a few facts:

- Lakes and ponds: The most recent available data from states indicate that, of assessed lakes, reservoirs, and ponds, 70.5 percent (12,918,363 acres) are impaired for some water quality standard. The 2012 National Lakes Assessment found that 35 percent of lakes

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submissions because the agencies state they "will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system)," 82 Fed. Reg. 34899 (July 27, 2017), and because individually uploading the numerous materials would be extremely time-consuming. *See* Letter from Jon Devine, NRDC, to EPA Docket EPA-HQ-OW-2017-0203 (Aug. 11, 2017), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-1346; Letter from Jon Devine, NRDC, to EPA Docket EPA-HQ-OW-2017-0203 (Sept. 25, 2017). Additional material will be submitted along with these comments.

[3] *Id.*; *see also* Comm. on Pub. Works, Committee Print 93d Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1253 (1973) (hereinafter "1972 Legislative History").

[4] W.E. Frayer et al., U.S. Fish & Wildlife Service, *Status and Trends of Wetlands and Deepwater Habitats in the Coterminous United States, 1950s to 1970s* at 3 (Apr. 1983).

[5] *Id.* at 1253 (emphasis added).

[6] 1972 Legislative History at 350.

[7] *Id.* at 1269.

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assessed had excess nitrogen and 40 percent had excess phosphorus. Moreover, the Assessment reported "that 31% of lakes have degraded benthic macroinvertebrate communities, which include small aquatic creatures like snails and mayflies." [8] And some indicators of lake health worsened since the 2007 assessment; in that five-year period, the Assessment examined "the density of cyanobacteria cells, which can produce cyanotoxins, as an indicator of toxic exposure risk," and it showed "8.3% more lakes in the most disturbed condition in 2012 than in 2007." Additionally, detection of the algal toxin microcystin, which prompted the multi-day contamination event in Toledo, Ohio, that deprived several hundred thousand people of drinking water, increased by 9.5 percent.

- Rivers and streams: Based on state water quality inventories, 52.7 percent of assessed rivers and streams (a total of 579,166 miles – more than twice the distance to the moon) fail to meet one or more state water quality standards. Similarly, the 2008/2009 Rivers and Streams Assessment paints a discouraging picture. Only 28 percent of rivers and streams were in good condition and 46 percent were in poor condition. More than 40 percent of rivers and streams have excess nutrients. [9] Nearly a quarter of river and stream miles have bacteria levels above thresholds that indicate a threat to human health when people are exposed via recreation. And "[o]ver 13,000 miles of rivers are found to have mercury in fish tissue at levels that exceed thresholds protective of human health."
- Wetlands: In the 2011 National Wetland Condition Assessment, fewer than 50 percent of wetlands (48 percent) were in good biological condition and nearly one-third (32 percent) were in poor condition. [10] Moreover, as documented in the most recent report to Congress on the status and trends in the nation's wetlands,[11] the country continues to experience a net loss of wetlands and "[f]or the first time in 50 years, the rate of net wetland loss had accelerated, increasing by a whopping 140 percent from the previous survey. The nation lost 45,000 more wetland acres per year during 2004−2009 than during the previous period. Even worse, wetland losses have recently accelerated in areas of particular importance to waterfowl, such as the Prairie Pothole Region."[12]
- Other waters: Of assessed bays and estuaries, 79.5 percent (44,692 square miles) were found to be impaired for some water quality standard. In 2017, the Gulf of Mexico "dead zone" was the largest ever measured since surveying started in 1985; this year it "is 8,776 square miles, an area about the size of New Jersey."[13]

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[8] U.S. EPA, The National Lakes Assessment (NLA) 2012, available at https://www.epa.gov/sites/production/files/2016-12/documents/nla_fact_sheet_dec_7_2016.pdf.

[9] U.S. EPA, The National Rivers and Streams Assessment 2008/2009, available at https://www.epa.gov/sites/production/files/2016-03/documents/fact_sheet_draft_variation_march_2016_revision.pdf.

[10] U.S. EPA, The National Wetland Condition Assessment 2011, available at https://www.epa.gov/sites/production/files/2016-05/documents/2011_nwca_fact_sheet_final.pdf.

[11] T.E. Dahl, U.S. Fish & Wildlife Serv., Status and Trends of Wetlands in the Conterminous United States 2004 to 2009 (2011), available at https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.

[12] Scott Yaich, Ducks Unlimited, Conservation: Gains and Losses, available at http://www.ducks.org/conservation/waterfowl-habitat/conservation-gains-and-losses.

[13] Natl. Oceanic & Atmospheric Admin., Gulf of Mexico 'dead zone' is the largest ever measured (Aug. 2, 2017), available at http://www.noaa.gov/media-release/gulf-of-mexico-dead-zone-is-largest-ever-measured.

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Thus, neither the historic nor the present condition of the nation's water bodies justifies the agencies shirking the responsibility with which Congress entrusted them. As discussed in the following section, the Supreme Court's decisions during the 2000s likewise dictate that waters that significantly impact the condition of downstream waterways warrant protection.

II. The 2015 Clean Water Rule Represents a Modest and Well-Documented Response to Water Quality Challenges and Congress's Direction in the Clean Water Act.

The Clean Water Act is a watershed statute, in both senses of the word. Congress recognized that to achieve its ambitious goal of restoring and protecting our Nation's waters, it would be necessary to "control pollution at the source." Thus, the Act applied not just to navigable-in-fact waters, but to the "waters of the United States." As the Supreme Court concluded, that term extends to waters that have a significant impact on traditionally navigable waters.

To develop the Clean Water Rule, EPA and the Army Corps decided they needed to demonstrate, through an examination of the scientific evidence, which waters significantly influence traditionally navigable and interstate waters. They did so by undertaking an unprecedented review of the scientific literature describing the many vital connections between tributaries, wetlands, and downstream waters. The resulting Science Report found extensive and compelling evidence that tributaries and adjacent wetlands play critical roles in maintaining the physical, chemical, and biological integrity of downstream waters.

The agencies also considered a wealth of input from numerous stakeholders. The rulemaking process for the Clean Water Rule took approximately four years to complete.[14] The agencies solicited comments on the proposed rule for more than 200 days, and the Rule reflects over one million public comments submitted on the proposal, "as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others."[15]

Based on their deliberate approach, the Agencies restored categorical regulatory coverage for tributaries and adjacent waters, as defined in the Rule, and retained the ability to protect certain other waters on a case-by-case basis.

A. The Clean Water Act is an ambitious statute, aimed at restoring and protecting the "total water resources of the United States."

In the Clean Water Act, Congress laid a weighty charge on the Agencies: the Act's objective is nothing less than to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). But our leaders also provided strong tools to achieve that objective; Congress "knew exactly what it was doing" when it defined "navigable waters"

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[14] *See* 80 Fed. Reg. at 37,102-03 (describing consultation with states, local governments, and Indian tribes at the "onset of rule development in 2011"); Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,188, 22,196 (Apr. 21, 2014) (stating that a draft of EPA's report on the connectivity of streams, wetlands, and downstream waters, which provides much of the scientific basis for the Rule, was completed in October 2011).

[15] 80 Fed. Reg. at 37,057.

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broadly to mean the "waters of the United States." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1323 (6th Cir. 1974) (quoting 33 U.S.C. § 1362(7)). Congress's "clear intention … was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution a part of a navigable stream." *Id.* at 1323. That is because the Act's ambitious goal could not be achieved unless its protections applied to "'all water bodies, including main streams and their tributaries.'" *Id.* at 1325 (quoting statement of Rep. Dingell). Any reading of the Act that interpreted it not to apply to non-navigable tributaries of navigable waters would "violate the specific language of the [Act] and turn a great legislative enactment into a meaningless jumble of words." *Id.*

Likewise, the Supreme Court recognized the Act's broad scope when it upheld the Act's application to adjacent wetlands. As the Court observed, the Act incorporates a "broad, systemic view of the goal of maintaining and improving water quality." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). The Court also noted Congress's determination that "[p]rotection of aquatic ecosystems … demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132–33 (quoting S. Rep. No. 92-414, p. 77 (1972)).

Consistent with Congress's vision, for nearly three decades the Agencies implemented the Act to comprehensively protect the waters of the United States.

B. After *SWANCC* and *Rapanos*, the Agencies struggled to realize Congress's vision.

In the 2000s, two Supreme Court cases and the Agencies' guidance documents that followed those decisions created confusion over the scope of the Act's coverage.

In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court ruled that the Agencies' "Migratory Bird Rule," which interpreted the Agencies' regulations to protect waters used by migratory birds, on the basis of a link to interstate commerce, was not authorized under the Act when applied to "an abandoned sand and gravel pit." 531 U.S. 159, 162, 164, 174 (2001).

In *Rapanos v. United States*, the Court remanded, for further review, the Corps' application of the Act to four wetlands lying "near ditches or man-made drains that eventually empty into traditional navigable waters."[16] *Rapanos* produced splintered opinions, with no majority: a four-Justice plurality proposed one test for determining whether a water body is a "water of the United States."[17] Justice Kennedy, concurring in the judgment, proposed another; he concluded that the Act protects wetlands that have a "significant nexus" to waters traditionally considered

[16] 547 U.S. 715, 729, 757 (2006).

[17] *Id.* at 739 (citation omitted) ("[T]he phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes.' The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.") The opinion also would require wetlands to have a "continuous surface connection" to jurisdictional waters to be protected. *Id.* at 742.

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navigable.[18] And four dissenting Justices would have left the Agencies' definition in place, but would at a minimum uphold protection for waters satisfying either the plurality's or Justice Kennedy's test.[19]

Even though neither *SWANCC* nor *Rapanos* invalidated any regulatory provision, they led the Agencies to retreat from enforcing the regulations on the books, leaving critical waters vulnerable.[20] The Agencies also exacerbated the confusion by implementing informal policies, not compelled by the Supreme Court's decisions, that made it difficult to apply the Act's protections to certain waters. Specifically:

- The guidance that followed *SWANCC* required the Agencies' field staff to receive headquarters' approval to apply Clean Water Act protections to any "isolated waters that are both intrastate and non-navigable,"[21] but the Agencies have implemented this guidance as an effective ban on protecting such waters. As EPA acknowledged in 2011: "Since *SWANCC*, no isolated waters have been declared jurisdictional by a federal agency."[22]

- Although the guidance that followed *Rapanos* properly stated that the Agencies would not deny Clean Water Act protection to water bodies that satisfied either the plurality's test or Justice Kennedy's, the Agencies significantly undermined the "significant nexus" analysis. Specifically, the post-*Rapanos* guidance directed the Agencies' staff to ignore all waters except for the specific tributary into which a discharge would be made and the wetlands adjacent to that tributary; indeed, the guidance even more myopically focuses just on the "reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." Consequently, the "significant nexus" analysis does not evaluate the watershed-wide impact of similar waters (tributaries and

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[18] *Id.* at 759, 787 (Kennedy, J., concurring in the judgment). Wetlands possess such a nexus when they, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in the judgment).

[19] *Id.* at 810 (Stevens, J., dissenting).

[20] *See* Letter from Representatives James Oberstar & Henry Waxman to Stephen Johnson, EPA Administrator (July 7, 2008) (attaching internal memorandum from Granta Nakayama, Assistant Administrator for Enforcement & Compliance Assurance to Benjamin Grumbles, Assistant Administrator for Water, which identified hundreds of cases in which EPA chose not to pursue formal enforcement action or lowered the priority of the case, or in which defendants raised jurisdictional defenses); Earthjustice et al., *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm* (Aug. 2004); Earthjustice et al., *Courting Disaster: How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It* (2009); U.S. EPA Inspector Gen., *Special Report: Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation*, Report No. 09-N-0149, at 1 (Apr. 30, 2009).

[21] 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003).

[22] U.S. EPA, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction, at 3 (Apr. 27, 2011). There is no reason to think this practice has changed in more recent years. *See* NRDC et al., Letter to Docket ID No. EPA-HQ-OW-2011-0880, at 19-22 (Nov. 14, 2014) (hereinafter "NRDC Proposed CWR Comments") (collecting evidence of agencies' practice of treating "isolated," non-navigable, intrastate waters as unprotected), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15437.

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adjacent wetlands, e.g.), and ignoring those collective impacts increases the risk that individual waters will be left unprotected.[23]

The net practical effect of the Court's decisions, the interpretation of those decisions by lower courts, and the Agencies' guidance has been confusion in many instances and the absence of pollution protection in many others. First, so-called "isolated" waters effectively lack federal protection from the Agencies, even if they have a significant nexus to traditional navigable waters. Second, because lower courts dealt with *Rapanos* differently, and not all courts adopted the Agencies' approach of considering either the plurality's or Justice Kennedy's test,[24] "almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination."[25] Third, because the Agencies' guidance takes such a constrained geographic view of the "significant nexus" analysis rather than examine the question at a more appropriate scale, these demonstrations could be inconsistent across the country, as well as time-consuming and costly, even if a significant nexus could ultimately be shown.

Numerous parties therefore urged the Agencies to revise their regulations. NRDC and other conservation groups sought a rule that included clear protections for water bodies in a way that both respected the Supreme Court's decisions and remained true to Congress's original design.[26]

C. The Rule largely restores the Act's proper scope of coverage.

The Clean Water Rule largely restores the scope of coverage that Congress intended, by protecting waters that are scientifically demonstrated to have a significant impact on navigable waters.[27] Because the Agencies' reliance on case-by-case significant nexus determinations had hamstrung their practical ability to enforce the Act, a main purpose of the rulemaking effort was to provide the scientific basis for coverage of entire categories of waters, obviating the need for individual review. Thus, EPA began by producing and vetting the Science Report, a state-of-the-

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[23] This practice also conflicts with Justice Kennedy's formulation of the "significant nexus" analysis. *See Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) ("wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone *or in combination with similarly situated lands in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" (emphasis added)); *id.* at 780-81 ("Through regulations or adjudication, the Corps may choose to identify *categories of tributaries* that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, *in the majority of cases*, to perform important functions for an aquatic system incorporating navigable waters." (emphasis added)).

[24] Courts, however, consistently rejected the sole reliance on the plurality's test to determine Clean Water Act coverage. Every court of appeals to decide the issue held that at least those waters that met Justice Kennedy's test qualified as "waters of the United States" under the Act. *See* U.S. EPA & U.S. Army Corps of Eng'rs, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, at 41-42 (May 27, 2015) (citing cases). This fact, as discussed below, means that the agencies' present plan ultimately to adopt rules based on the plurality test is unlawful; and that unlawfulness is one reason why the agencies cannot treat the instant rulemaking as simply an interim step.

[25] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015).

[26] *See, e.g.,* NRDC Proposed CWR Comments, *supra*; NWF Comments, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15020; Earthjustice Comments, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14564.

[27] We say "largely" above not because the Rule is over-inclusive, as Administrator Pruitt, discharging industries, and other critics often claim, but rather because it excludes some waters that should be protected under the Act.

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art review and synthesis of the extensive scientific literature describing the numerous important connections between tributaries, adjacent waters, and downstream waters.[28]

The Science Report found unequivocal evidence that all tributaries, including perennial, intermittent, and ephemeral streams, "exert a strong influence on the integrity of downstream waters." Science Report at ES-2. Relying on the Science Report's findings, the Agencies determined that all tributaries have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas (collectively, "foundational waters"). Thus, the Agencies restored the Act's categorical coverage of tributaries, as defined in the Rule. 33 C.F.R. § 328.3(a)(5).

The Science Report also found clear evidence that wetlands and open waters in floodplains are "highly connected" to tributaries and rivers "through surface water, shallow groundwater, and biological connectivity." Science Report at ES-2, 4-39. Relying on these findings, the Agencies concluded that all waters adjacent to foundational waters, impoundments, and tributaries have a significant nexus to foundational waters. The Agencies therefore restored the Acts' categorical coverage of adjacent waters, as defined in the Rule. 33 C.F.R. § 328.3(a)(6).

Finally, the Science Report found that wetlands and open waters located outside of floodplains also provide numerous functions, such as storage of floodwater, that benefit downstream water integrity. Science Report at ES-3. Based on these findings, the Agencies retained the ability to find that certain non-adjacent waters qualify as waters of the United States if they are determined on a case-by-case basis to have a significant nexus to foundational waters. 33 C.F.R. § 328.3(a)(7)-(8).

D. The Rule complies with the Clean Water Act because it properly protects waters that have a significant nexus to downstream waters.

1. The Rule's reliance on the significant-nexus test comports with Supreme Court case law.

At a minimum, the Supreme Court's decisions stand for the proposition that a water body is a "water of the United States"—and therefore protected under the Clean Water Act—if it belongs to a category of waters that significantly affects a traditional navigable water, interstate water, or the territorial seas. The Agencies properly used this significant-nexus standard when defining the breadth and application of the Act's protections under the Rule.

The Supreme Court's first interpretation of the scope of the Clean Water Act expressly upheld federal authority to regulate discharges into both traditional navigable waters and wetlands adjacent to such waters. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131, 135 (1985). Even though wetlands are not ordinarily navigable, the Court stated that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133. The Court explained that in light of the "breadth of federal regulatory authority contemplated by the Act," and the difficulty of line-drawing in this context, the agency's ecological judgment that wetlands have significant

[28] U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA/600/R-14/475F (Jan. 2015).

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impacts on water quality and the aquatic ecosystem in adjacent waterways is sufficient to deem such wetlands covered by the Act. *See id.* at 134. If the covered wetlands have such effects in the majority of cases, all such wetlands may be covered. *Id.* at 135 n.9.

The Court reiterated the importance of a waterway's impacts on traditional navigable waters when examining the Act's scope in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*. 531 U.S. 159 (2001). There, the Court addressed a narrow issue and overturned a regulatory interpretation that would have protected "an abandoned sand and gravel pit" on the basis that it was used by migratory birds. *Id.* at 162, 164, 174. The Court distinguished the wetlands at issue in *Riverside Bayview* from the sand and gravel pit in *SWANCC* because of the "significant nexus" the *Riverside Bayview* wetlands had with other waters of the United States. *See id.* at 167. The Court, however, did not invalidate any portion of the federal regulations in *SWANCC*—it held only that the regulations, "as clarified and applied to petitioner's balefill site" under the Migratory Bird Rule, exceeded the Corps' authority under the Clean Water Act. *Id.* at 174.

Finally, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court remanded for further review the Corps' determination that certain wetlands, which were adjacent to non-navigable waters, were "waters of the United States." Id. at 729, 757, 759. A four-Justice plurality devised one test for the courts to apply on remand in identifying "waters of the United States," *id.* at 757 (plurality opinion); Justice Kennedy employed another, *id.* at 759 (Kennedy, J., concurring in the judgment); and four dissenting Justices would have deferred to the Corps' regulations as the proper test, but also said they would uphold coverage for any water satisfying either the plurality or Justice Kennedy's test. *Id.* at 810 (Stevens, J., dissenting).

The Rule employs the test articulated by Justice Kennedy in *Rapanos*, which drew on *Riverside Bayview* and *SWANCC*. Justice Kennedy concluded that the Act protects wetlands with a "significant nexus" to waters traditionally considered navigable. *Id.* at 759, 787 (Kennedy, J., concurring in the judgment). Such a nexus exists where the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Justice Kennedy explained that the Corps was free, by regulation, to "identify categories of tributaries that, due to their volume of flow…, their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 780-81.

Justice Kennedy pointed out that ephemeral waterways, which may be dry much of the time, as well as wetlands without a surface connection to tributaries, can still meet the significant nexus standard. He described the plurality's attempt to impose a continuous flow requirement as making little sense, because "torrents thundering at irregular intervals through otherwise dry channels," which could significantly affect downstream waterways, would not be covered. *Id.* at 769; *see also* fig.2 below. Similarly, Justice Kennedy noted that wetlands separated by land from another waterway can be vital to it: if such a wetland is destroyed, "floodwater, impurities, or runoff that would have been stored or contained in the wetlands" could instead "flow out to major waterways." *Id.* at 775. The very absence of a hydrological connection could thus make

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protection of the wetland critical. *Id.* Subsequently, courts have held time and again that waters meeting Justice Kennedy's test qualify as "waters of the United States."[29]

Justice Kennedy made clear that water bodies could be shown to have a significant nexus on a categorical basis, and all water bodies within those categories could be protected, even if specific individual waters in the class did not influence downstream water quality. *Id.* at 780-81 ("the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, *in the majority of cases*, to perform important functions for an aquatic system incorporating navigable waters." (emphasis added)). This categorical approach follows that of the unanimous Court in *Riverside Bayview*, which noted:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that *in the majority of cases*, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n. 9 (emphasis added). In making these categorical judgments, the agencies' ecological judgment about the importance of certain types of waters need not be so refined that each and every water body within the category must, alone or cumulatively, have significant downstream effects. Waters qualify for Clean Water Act coverage on a categorical basis if the agencies reasonably conclude that a majority of waters in the category likely have a "significant nexus."

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[29] Although the Supreme Court has not decided that Justice Kennedy's opinion in *Rapanos* is controlling, every Court of Appeals to have decided the question has found that if Justice Kennedy's "significant nexus" test is satisfied, jurisdiction is proper. *See United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006) (Justice Kennedy's "significant nexus" standard governs or suffices); *United States v. Robison*, 505 F.3d 1209, 1222 (11th Cir. 2007) (same); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (same); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (if either plurality or Justice Kennedy's test is met, there is a "water of the United States"); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011) (same); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (same). EPA and the Army Corps likewise concluded that Justice Kennedy's test is sufficient to establish Clean Water Act coverage, though the agencies went a step further and concluded that the plurality test also serves as an independent basis for coverage. *See* U.S. EPA & U.S. Army Corps of Eng'rs, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States& Carabell v. United States,* at 3 (Dec. 2, 2008) (hereinafter "2008 Guidance"), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf ("regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied").

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Drawing on these Supreme Court opinions, including Justice Kennedy's concurrence in *Rapanos*, the Rule interprets the scope of the Act in line with the significant nexus standard. 80 Fed. Reg. 37,060. Waters are "waters of the United States" under the Rule if they "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." *Id.* The Rule requires that some waters meet this test on a case-specific basis. 33 C.F.R. 328.3(a)(7)-(8). The Rule also protects waters that the Agencies found categorically meet this test—specifically, tributaries and "adjacent" waters. 33 C.F.R. 328.3(a)(5)-(6).

As explained further below, the extensive scientific record amply supports the Agencies' determination that covered tributaries and adjacent waters categorically satisfy the significant nexus standard. The majority of waters in these categories likely have significant effects downstream, either alone or when considered collectively.

2. The scientific record confirms that tributaries and adjacent waters significantly influence downstream waters

The scientific record overwhelmingly supports the Agencies' determination that tributaries and adjacent waters have a significant nexus to foundational waters. As the Science Report demonstrates, tributaries and adjacent waters play fundamental roles in determining both the course a river takes and what is in it. They do this by supplying the materials that form the river's bed and banks, such as sediment, and the materials that fill it, such as water, nutrients, and organisms. *See, e.g.*, Science Report at 3-47 tbl.3-1, 4-40 tbl.4-3. And in some cases they do this by keeping out, or delaying the delivery, of other materials, like contaminants or floodwaters. *Id.* at 3-47 tbl.3-1, 4-40 tbl.4-3.

To understand the significance of the connections between tributaries and downstream waters, or between adjacent waters and downstream waters, one must consider the combined effect of those connections across the watershed and over time. *Id.* at 6-10. Although opponents of the Rule often talk about, or show images of, dry waterways, doing so misleadingly implies that one can assess the importance of those waterways to downstream waters by viewing a single photograph. But if you wanted to learn how local traffic contributed to traffic on an arterial highway, you would not rely on a snapshot of a single local road in the middle of the afternoon, much less one photo hand-picked by lawyers or lobbyists for someone claiming the roads had insignificant traffic. If you did that, you might conclude, incorrectly, that local roads were not contributing any traffic to the highway. To accurately gauge such a roadway's impact, you would collect data from roads and interchanges throughout the area, at low-traffic and high-traffic times, and look at all the data together to understand the impact of local traffic on the highway.

Just as a highway has many inputs, so does a river—each tributary contributes water, sediment, chemicals, and organic material, and together these inputs help constitute the river. And, just as traffic on a highway fluctuates at different times of the day and week and year, river networks expand and contract as the seasons change and as precipitation comes and goes. The illustration below shows the same river during wet and dry periods. See fig.1. If you looked only at the connections between the river and its adjacent wetlands during the dry period, you might underestimate the significance of those connections. As the Science Report concluded, the

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effects of tributaries and adjacent waters on downstream waters are cumulative, and the connections between those waters must be analyzed together. Science Report at 6-10.

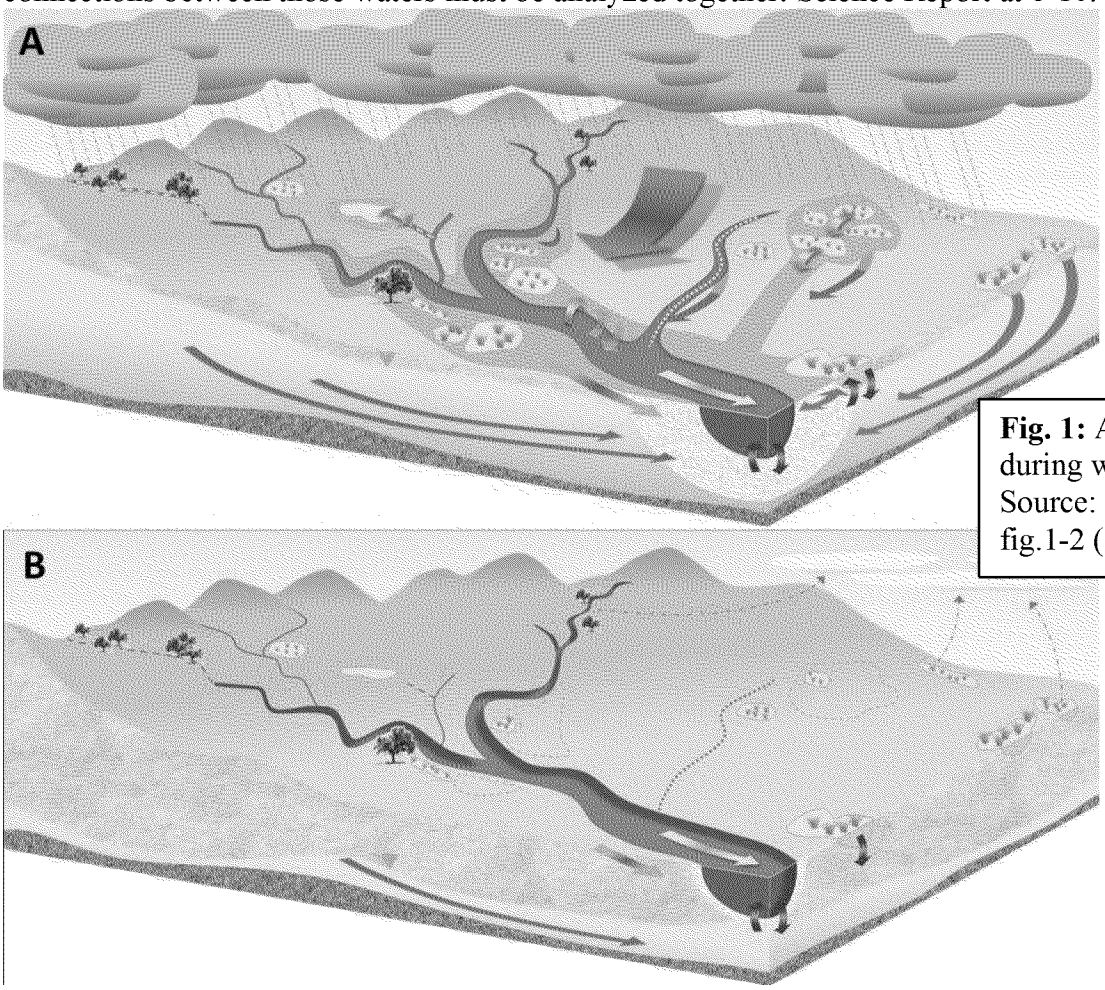

Fig. 1: A river network during wet and dry periods. Source: Science Report 1-7 fig.1-2 (including key).

As described in the following paragraphs, the Science Report amply demonstrates that tributaries—including ephemeral and intermittent ones—and adjacent waters have a significant nexus to downstream waters.

a. Tributaries significantly affect the physical, chemical, and biological condition of downstream waters.

The Science Report defines "tributary" more broadly than the Rule: for purposes of the report, a tributary is any stream that flows into a larger stream or river, and has a bed and banks. See id. at A-13 (defining "tributary"), A-12 (defining "stream"), 2-2 (explaining that channels are "defined by the presence of continuous bed and bank structures"). In contrast, under the Rule a tributary must meet three requirements: (1) it must contribute flow to a downstream water, and it must exhibit the physical indicators of (2) a bed and banks and (3) an ordinary high water mark. See 33 C.F.R. § 328.3(c)(3).

Even analyzing tributaries more broadly (i.e., without the narrowing requirement of an ordinary high water mark), the Science Report concluded that all tributaries, including ephemeral and

intermittent ones, are "physically, chemically, and biologically connected to downstream rivers." Science Report at 6-1. Individually or cumulatively, tributaries "exert a strong influence on the integrity of downstream waters." *Id.*

One reason tributaries are so important to downstream waters is that, to a large degree, they determine what's in them—physically, chemically, and biologically. *Id.* at 3-45 to 3-46. For example, most rivers get most of their water from tributaries, as opposed to rain or groundwater. *Id.* at 3-5, 6-2. A watershed is like a funnel: tributaries cover a broader expanse than rivers do, and they collect water and other materials across that broad area, and deliver it toward a concentrated point downstream. *Id.* at 3-5.

In the arid and semiarid Southwest, where most tributaries are seasonally dry, *id.* at 2-29, flows from ephemeral tributaries are a "major driver" of flows in downstream rivers, *id.* at B-59. Ephemeral channels supply substantial amounts of surface water to rivers during infrequent, but influential, flood events. *Id.* For instance, during a high-intensity storm in New Mexico that dropped up to one-quarter of the area's annual rainfall over the course of two days, flood flows from the Rio Puerco, an ephemeral tributary to the Rio Grande River, accounted for 76% of the flood flow downstream in the Rio Grande. *Id.* at 3-7 to 3-8; Vivoni 2006; see fig.2.

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Fig. 2: Floodwaters swelling and receding in the Rio Puerco, an ephemeral tributary. Source: Vivoni 2006.

Even when water in ephemeral tributaries sinks into the ground before reaching downstream rivers, it plays a critical role in replenishing shallow groundwater flows. These groundwater flows, in turn, are a vital source of surface water for the downstream rivers. See Science Report at B-59, 5-8 (ephemeral tributaries supply roughly half of the San Pedro River's "baseflow," the portion of the river fed by groundwater), B-39 (most perennial and intermittent rivers in the Southwest are groundwater dependent).

Tributaries also have a major influence on the chemical composition of downstream waters. *Id.* at 3-46, 6-1 to 6-2. This makes sense: tributaries supply a large proportion of the water in rivers, and that water carries chemicals with it. *Id.* at 3-22. For example, in the Southwest, organic material, important for biological productivity, accumulates in ephemeral channels during dry periods, and is carried downstream in great quantities when those channels fill with rain and floodwater. *See id.* at 3-29, B-48 (in the San Pedro River, dissolved organic carbon doubled or tripled during storm events from a flush of terrestrial organic matter and nutrients). Tributaries

can also affect the chemical makeup of downstream waters by removing, transforming, or delaying the delivery of harmful chemicals discharged upstream. *Id.* at 3-47 tbl.3-1.

Finally, tributaries are essential to the living organisms in downstream waters. *Id.* at 3-46. Headwater tributaries provide crucial habitat for many aquatic species, including plants, insects, crustaceans, and fish. *Id.* at 3-38, 6-3. In the arid and semiarid Southwest, fish may not travel up ephemeral channels to the same degree, but water flowing down those channels nonetheless has a significant influence on fish in downstream rivers. Native fish are adapted to the variable flows that ephemeral tributaries provide, and these adaptations allow them to outcompete invasive species. *Id.* at B-38, B-58.

b. Adjacent waters significantly affect the physical, chemical, and biological condition of downstream waters.

The Rule defines adjacent waters as "bordering, contiguous, or neighboring" foundational waters, impoundments, or tributaries. 33 C.F.R. § 328.3(a)(6) & (c)(1). "Neighboring" waters are those waters that are very close to a foundational water, impoundment, or tributary (i.e., within 100 feet, *id.* § 328.3(c)(2)(i), or within 1,500 feet of tidally influenced waters or the Great Lakes, *id.* § 328.3(c)(2)(iii)), or that are within the 100-year floodplain of such a water, out to a distance of 1,500 feet, *id.* § 328.3(c)(2)(ii)).

Smaller tributaries have smaller floodplains than large rivers, Science Report at 4-6, and some tributaries have little or no floodplain, *id.* at 2-5, 2-6; *see* fig.3. As a result, for some tributaries the area in which waters are "adjacent" will be limited to a shorter distance than 1,500 feet, because the 100-year floodplain will not extend that far. And for some rivers with large floodplains, the 100-year floodplain will extend well beyond 1,500 feet, but only waters within 1,500 feet will be deemed "adjacent."

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A. Headwater Stream with Riparian Area and Minimal or No Floodplain

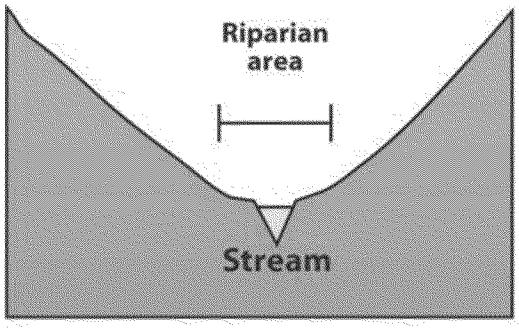
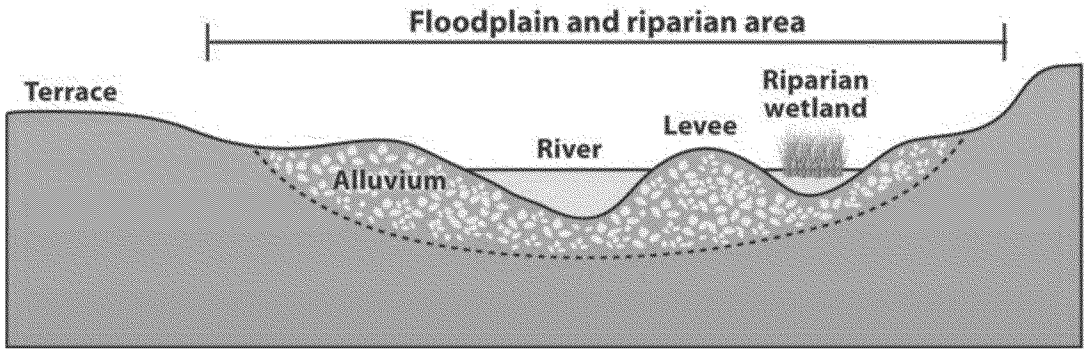


Fig. 3: A tributary with minimal or no floodplain, and a river with a larger floodplain. Source: Science Report at 2-6 fig.2-3.

B. River with Riparian Area and Floodplain



The Science Report found clear evidence that wetlands located in floodplains are "highly connected" to rivers and tributaries. *Id.* at 4-39. Although the word "floodplain" may give the impression that these connections occur primarily during times of flooding, in fact, many important connections between rivers and floodplain wetlands persist at other times as well. *Id.*

The physical connections between rivers and floodplain wetlands are extensive. Floods, even if infrequent, have significant, lasting impacts because they allow rivers and wetlands to exchange water and other materials, in two directions. *Id.* at 4-1, 4-39. For example, sediment released from wetlands during a flood can help shape a river's channel and thereby affect its physical integrity. *Id.* at 4-39. Floodplain wetlands also reduce floods by storing water that overflows from rivers. *Id.* at 4-1, 6-4.

Even when there is no surface-water connection between a river and a neighboring wetland, however, shallow groundwater flows may provide important connections. *Id.* at 4-39. That is because tributaries and rivers are not "pipes" that simply carry water from one place to another. *Id.* at 2-21. Instead, they are porous, and water from a river's channel regularly enters the shallow subsurface, where it may mix with other subsurface water (including water from neighboring wetlands) before returning to the channel again. *Id.* at 2-12, 4-7.

Floodplains are frequently composed of alluvium—a combination of silt, sand, or other matter deposited over time—that tends to be "highly permeable" and thus particularly well suited to conveying shallow groundwater flows. *Id.* at 2-12; see fig.3 (above). These flows can connect

rivers to floodplain wetlands during both high-flow and low-flow periods. *Id.* at 2-12, 4-7; *see* fig.4.

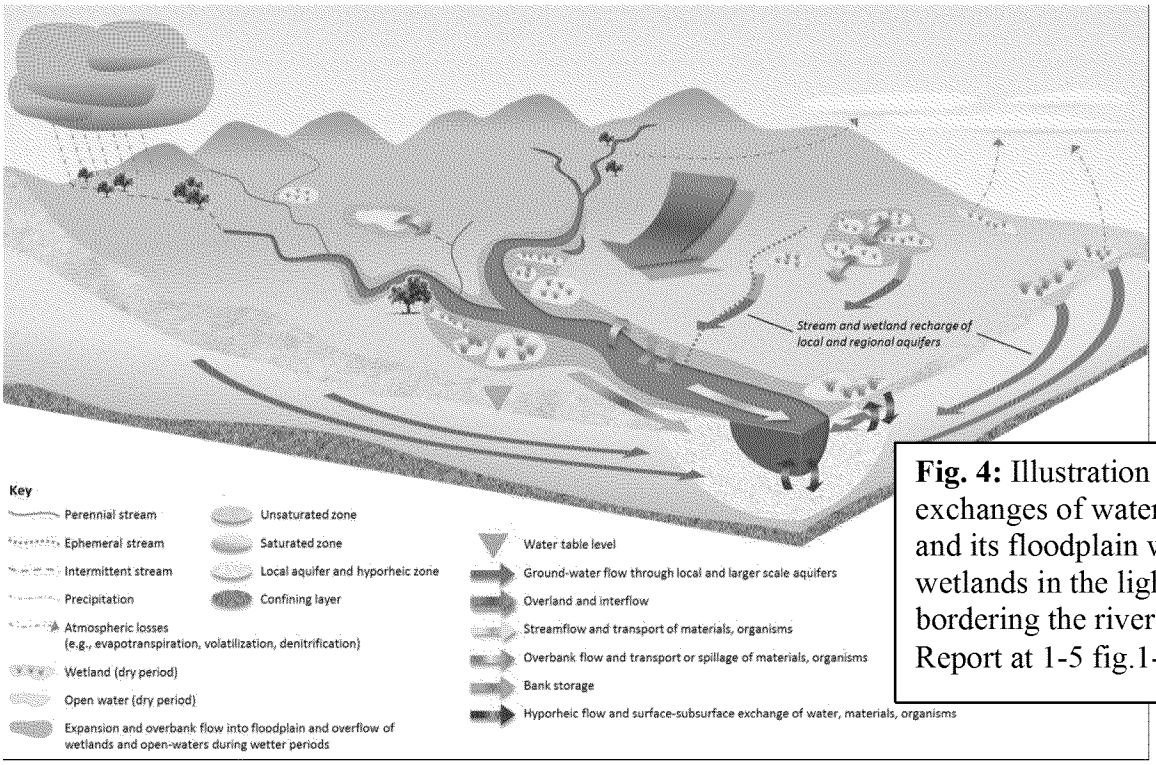


Fig. 4: Illustration of subsurface exchanges of water between a river and its floodplain wetlands (i.e., wetlands in the light blue band bordering the river). Source: Science Report at 1-5 fig.1-1A.

The subsurface flows connecting floodplain wetlands to rivers also convey chemicals. *Id.* at 4-11. One of the most important functions of floodplain wetlands is to intercept contaminants, such as excess fertilizer and pesticides from agricultural operations, by filtering them through the roots of wetland plants. The plants absorb the contaminants and prevent them from reaching the river. *Id.* at 4-11, 4-14.

Finally, wetlands provide essential habitat for many aquatic animals, including fish that use wetlands as nurseries. *Id.* at 4-17. There is strong evidence that fish can move between rivers and floodplain wetlands, even when the hydrological connections between these water bodies are seasonal or temporary. *Id.*

The Science Report found compelling evidence of strong and extensive connections between tributaries and downstream waters, and between floodplain wetlands and downstream waters. *Id.* at 6-1 to 6-5. The Agencies therefore reasonably concluded that tributaries and adjacent waters have a significant nexus to foundational waters, and are categorically entitled to the protections of the Act.

During the subsequent litigation about the Clean Water Rule, numerous scientists and scientific societies supported the agencies' analysis. For example, a friend-of-the-court brief filed in the Sixth Circuit on behalf of several scientists stated:

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> Amici curiae are wetland and water scientists, actively involved in research and teaching about the fresh and estuarine waters of the United States. As practicing scientists who have spent our careers studying streams, wetlands, and other aquatic ecosystems, we – and many in our profession – have long explored the ways in which human activities that affect one part of a watershed can also affect – and damage – other parts of that watershed. In doing so, we have applied the basic tools of our profession: literature review, on-site observations, measurements, experimental manipulations, studies of "natural experiments," and modeling based on observations and our understanding of the physical sciences. Based upon these tools, we believe that current science provides sound support for the Clean Water Rule.[30]

c. Waters not considered "adjacent" can significantly affect the physical, chemical, and biological condition of downstream waters.

The Rule provides for Clean Water Act coverage on a case-by-case basis for non-tributary waters that, because of their distance from other "waters of the United States," the rule considers not to be adjacent. Specifically, the Rule protects such waters "where they are determined, on a case-specific basis, to have a significant nexus" to foundational waters,[31] and defines "significant nexus" consistent with Justice Kennedy's opinion in *Rapanos*.[32] For some kinds of non-adjacent waters, the agencies found that they are "similarly situated," such that the Rule requires a cumulative analysis of all such waters in the region; this approach applies to prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands.[33]

The Rule's approach to these waters comports with the scientific evidence. When asked to review the proposed rule, the Science Advisory Board said the following about these "other waters":

> The scientific literature has established that "other waters" can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define "other waters" as waters of the United States on a case-by-case basis, either alone or in combination with

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[30] Amicus Brief of Dr. M. Siobhan Fennessy et al., *In re: Envtl. Protection Agcy. & Dept. of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, No. 15-3751, at 1 (Jan. 20, 2017); *see also* Letter from Soc. of Wetland Scientists et al. to President Trump (Mar. 1, 2017) at 1 (representing views of SWS, American Fisheries Society, American Institute of Biological Sciences, Ecological Society of America, Phycological Society of America, Society for Ecological Restoration & Society for Freshwater Science) ("The organizations that have signed this letter agree with the [Fennessy et al.] brief and its use of sound science to explain the urgent need for the Clean Water Rule.").

[31] 33 C.F.R. §§328.3(a)(7) & (8).

[32] *Id.* §328.3(c)(5) ("The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term 'in the region' means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters."); *see also id.* (identifying aquatic functions relevant to significant nexus analysis).

[33] *Id.* §§328.3(a)(7)(i)-(v).

ED_001803A_00005935-00018

similarly situated waters in the same region. As mentioned previously for adjacent waters, distance should not be the sole indicator used to evaluate the connection of "other waters" to jurisdictional waters.

There is also adequate scientific evidence to support a determination that certain subcategories and types of "other waters" in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, chemical and biological integrity of downstream waters and are similarly situated on the landscape) and thus could be considered waters of the United States. Furthermore, as the science continues to develop, other sets of wetlands may be identified as "similarly situated." The Board notes, however, that the existing science does not support excluding groups of "other waters" or subcategories thereof.[34]

In the same vein, the Science Report concluded that non-adjacent waters "provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species."[35] Because the strength of these functions depend on "the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters," the Science Report notes that these waters' connectivity to downstream waters "occurs along a gradient," such that "current science does not support evaluations of the degree of connectivity for specific groups or classes of wetlands (e.g., prairie potholes or vernal pools)," though "[e]valuations of individual wetlands or groups of wetlands … could be possible through case-by-case analysis."[36]

E. Summary: The Clean Water Rule Includes Sensible Protections Reflecting the Function of Various Categories of Water Bodies.

The Clean Water Rule takes account of the Supreme Court's analysis in *Riverside Bayview*, *SWANCC*, and *Rapanos* and the painstakingly-compiled scientific record to ensure categorical protection for water bodies that unquestionably perform numerous important functions for downstream waters' integrity. It also properly provides for case-by-case protections for non-adjacent waters which significantly influence the downstream physical, chemical, or biological integrity of other waters.

III. The Agencies Justify Their Proposed Repeal of the Clean Water Rule for Only One Reason.

As described above, the Clean Water Rule appropriately applies the legal framework in the Clean Water Act – as interpreted by the Supreme Court – to the scientific evidence of water bodies' functions in order to fulfill the purpose of the Act: restoring the integrity of the nation's

[34] Letter from Dr. David T. Allen, Chair, Science Advisory Board, to EPA Administrator Gina McCarthy, at 3 (Sept. 30, 2014).
[35] Science Report at 6-5.
[36] *Id.*

ED_001803A_00005935-00019

waters. Against that backdrop, the agencies now propose to repeal the Clean Water Rule, but offer a single reason for doing so: avoiding uncertainty about the standard that applies, given ongoing litigation about the Rule. This section describes the background of, and justification for, the proposed repeal.

A. Litigation Over the Rule Leads to Stay and Cases Pending in the Sixth Circuit and Supreme Court.

The agencies adopted the Clean Water Rule in June, 2015. Despite dozens of lawsuits by polluting industries and several states – including litigation initiated by now-Administrator Pruitt – the Rule took effect in the vast majority of states that August.[37] At that point in time, the agencies implemented the Clean Water Rule everywhere but 13 states,[38] a practice that continued until October 9, 2015, when the Sixth Circuit stayed implementation of the Rule pending judicial review.[39] Briefing on the merits began in that court in late 2016, with the agencies filing a 245-page vigorous defense of the Clean Water Rule in January 2017, saying: "The Clean Water Rule is a carefully tailored response to Supreme Court precedent, peer-reviewed science, and the Agencies' long experience in implementing the Act."[40]

Although the Sixth Circuit noted that the stay was "for the time being," and envisioned that it would be "temporarily" in place while the merits were litigated in that court,[41] intervening events prolonged the stay. Specifically, the Supreme Court granted review of a jurisdictional issue in the case – whether challenges to the Rule belonged exclusively in the courts of appeal or in the district courts – and the Sixth Circuit accordingly stayed further proceedings in that court. The Supreme Court case will be argued in October, 2017.

B. President Trump Issues an Executive Order Initiating Review of the Rule Based not on the Status of the Litigation, but on Numerous Falsehoods.

The lawfulness of, and technical support for, the Clean Water Rule thus were on track to be resolved (albeit on a delayed timeline) via judicial review until President Trump and Administrator Pruitt intervened. On February 28, the president signed Executive Order 13778, titled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."[42] The order contains three provisions relevant to the current rulemaking action:

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[37] *North Dakota v. U.S. EPA*, 127 F.Supp.3d 1047 (D.N.D. 2015) (issuing preliminary injunction against Clean Water Rule); *North Dakota v. U.S. EPA*, No. 3:15-cv-59, Order Limiting the Scope of Preliminary Injunction to the Plaintiffs (D.N.D. Sept. 4, 2015) (clarifying that injunction applied only in 13 states that had sued in that court).
[38] *Compare, e.g.*, http://www.lrc.usace.army.mil/Portals/36/docs/regulatory/jd/2015/LRC-2015-547jd.pdf (determination dated Sept. 9, 2015, applying Clean Water Rule to features located in Illinois) *with* http://www.nwo.usace.army.mil/Portals/23/docs/regulatory/ND/jds/NWO-2015-1471-BIS.pdf (determination dated Sept. 23, 2015, applying pre-Rule guidance to features located in Nebraska).
[39] *In re: Envtl. Protection Agcy. & Dept. of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, 803 F.3d 804 (6th Cir. 2015).
[40] *In re: EPA*, No. 15-3751, Brief for Respondents, at 2 (6th Cir. Jan. 13, 2017).
[41] *In re: EPA.,* 803 F.3d at 808.
[42] 82 Fed. Reg. 12,497 (Mar. 3, 2017).

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Section 1. *Policy*. It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.

Sec. 2. *Review of the Waters of the United States Rule*. (a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) shall review the final rule entitled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

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Sec. 3. *Definition of "Navigable Waters" in Future Rulemaking*. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The text of the Executive Order said that the agencies should evaluate, "as appropriate and consistent with law," changing or repealing the Clean Water Rule,[43] likely phrased that way because it would be unlawful for the agencies to choose an outcome expressly prior to undertaking notice and comment rulemaking. But in his remarks while signing the order, President Trump made clear what he wanted the agencies to do – repeal the Rule. In particular, the president made numerous false claims about the Rule, displaying obvious antipathy for it, and stated that, by his order, he was "directing the EPA to take action, paving the way for the elimination of this very destructive and horrible rule."[44]

- False Claim #1 – President Trump said the Rule "has truly run amok" and is hurting farmers and ranchers. "It's prohibiting them from being allowed to do what they're supposed to be doing. It's been a disaster." In fact, as discussed above, the Rule is not being implemented.
- False Claim #2 – President Trump said the Rule seeks to regulate "nearly every puddle." In fact, the Rule explicitly excludes "puddles" from oversight.
- False Claim #3 – President Trump said the Rule seeks to regulate "every ditch." In fact, the Rule expressly excludes from regulation numerous man-made waters; this includes a variety of ditches on farms, as well as those alongside roadways, airports or railroads.
- False Claim #4 – President Trump said the Rule represents "a massive power grab." In fact, the Clean Water Act mandates protection of the nation's important waters, and

[43] *Id.* (directing agencies to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law").
[44] The White House, Office of the Press Secretary, Remarks by President Trump at Signing of Waters of the United States (WOTUS) Executive Order (Feb. 28, 2017), available at https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-signing-waters-united-states-wotus-executive.

ED_001803A_00005935-00021

protecting those waters requires protecting the wetlands and streams that flow into those waters. The Rule also does not cover any kinds of waters the law historically excluded.

- False Claim #5 – President Trump said "The EPA's regulators were putting people out of jobs by the hundreds of thousands." In fact, there is no evidence of jobs being affected by the Rule, especially given that it is not being implemented. There is also no factual support for the claim that the rule would have the kinds of impacts the President described.
- False Claim #6 – President Trump said the Rule treats "small farmers and small businesses as if they were a major industrial polluter." In fact, the Rule maintains exemptions for normal farming operations and agricultural runoff and it treats small businesses no different from any other group, just like Clean Water Act itself does.
- False Claim #7 – President Trump said "If you want to build a new home, for example, you have to worry about getting hit with a huge fine if you fill in as much as a puddle, just a puddle on your lot." In fact, again, the Rule explicitly excludes "puddles" from oversight.
- False Claim #8 – President Trump cited a case in which the EPA fined a Wyoming rancher "for digging a small watering hole for his cattle." In fact, this case had nothing to do with the Clean Water Rule, as it began even before the Rule was proposed, and the Trump administration did not drop the case despite urging from the landowner's attorneys.[45]

Administrator Pruitt likewise routinely misleads the public about the Clean Water Rule, as discussed in more detail below.

To implement the Executive Order, EPA and the Corps plan to conduct two rulemaking actions, the first of which would repeal the Clean Water Rule, and the second of which would establish new standards for what waters qualify for Clean Water Act protection.[46] The current proposal constitutes the first step in the process.

C. The Agencies Argue the Proposed Repeal Rule is Needed to Address Litigation-Related Uncertainty.

The agencies now propose to repeal the Clean Water Rule and to adopt, as the regulatory definition of "waters of the United States," the same language (including typographical errors and incorrect cross-references)[47] once used in the regulations that the Clean Water Rule replaced. One major exception to that principle, however, is that the agencies "will administer the

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[45] Pacific Legal Foundation, Press Release, Final pre-trial hearing set for Friday in feds' suit against farmer for plowing (June 14, 2017) ("Duarte and his attorneys with Pacific Legal Foundation — along with farming advocates across the country — have asked the Trump Administration to abandon the unprecedented prosecution, which was commenced during the Obama Administration."), available at https://pacificlegal.org/press-release/final-pre-trial-hearing-set-for-friday-in-feds-suit-against-farmer-for-plowing/.

[46] *See* U.S. EPA, Waters of the United States (WOTUS) Rulemaking: Rulemaking Process, available at https://www.epa.gov/wotus-rule/rulemaking-process.

[47] *See, e.g.*, *id.*at 34,905 (proposed 33 C.F.R. § 328.3(a)) (referring to "cooling ponds as defined in 40 CFR 423.11(m)," a section of the Code of Federal Regulations that defines the term "coal pile runoff"); *id.* at 34,908 (proposed 40 C.F.R. §232.2) (referring to "paragraphs (g)(1)-(4) of this section" and "paragraphs (q)(1)-(6) of this section," neither of which exist).

ED_001803A_00005935-00022

regulations as they are currently being implemented, consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents."[48]

Although the preamble to the current proposal discusses the legal basis for the Clean Water Rule, a few specific requirements of the Clean Water Act, and the Supreme Court cases that preceded the Clean Water Rule, none of those things constitute the rationale for, or even seem related to, the proposed repeal. Rather, the agencies indicate that such issues will be considered in the second planned rulemaking, saying: "[t]he scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations *on the ultimate regulation*."[49]

The sole rationale for the repeal action is that the agencies claim it will ensure certainty about which regulatory standards apply if developments in the litigation lead to the partial implementation of the Clean Water Rule while the agencies seek to develop a follow-on rulemaking at some future date. The agencies' full rationale for the current rulemaking consists of just three paragraphs:

> The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation. While engaging in such deliberations, however, the agencies recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of "waters of the United States." The pre-CWR regulatory regime is in effect because of the Sixth Circuit's stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit's order and could be altered at any time by factors beyond the control of the agencies. The Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit's exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.
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> As noted previously, prior to the Sixth Circuit's stay order, the District Court for North Dakota had preliminarily enjoined the rule in 13 States (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). Therefore, if the Sixth Circuit's nationwide stay were to expire, the 2015 rule would be enjoined under the North Dakota order in States covering a large geographic area of the country, but the rule would be in effect in the rest of the country pending further judicial decision-making or substantive rulemaking under the Executive Order.
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> Adding to the confusion that could be caused if the Sixth Circuit's nationwide stay of the 2015 rule were to expire, there are multiple other district court cases pending on the 2015 rule, including several where challengers have filed motions for preliminary injunctions. These cases—and the pending preliminary injunction motions—would likely be reactivated

[48] *Id.* at 34,900.
[49] 82 Fed. Reg. at 34,902 (emphasis added).

ED_001803A_00005935-00023

> if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule. The proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit's jurisdiction while the agencies reconsider the 2015 rule. It would ensure that, during this interim period, the scope of CWA jurisdiction will be administered exactly the way it is now, and as it was for many years prior to the promulgation of the 2015 rule. The agencies considered other approaches to providing stability while they work to finalize the revised definition, such as simply withdrawing or staying the Clean Water Rule, but did not identify any options that would do so more effectively and efficiently than this proposed rule would do. A stable regulatory foundation for the status quo would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of "waters of the United States" that best effectuates the language, structure, and purposes of the Clean Water Act.[50]

Notably, the agencies do not argue that the proposed regulations (and implementation practices) are substantively preferable to the Clean Water Rule, or even that they are reasonable definitions of "waters of the United States." Moreover, the agencies do not intend to evaluate the merits of the rules and policies they seek to adopt, as they specifically discourage public comment on the appropriateness of these rules; the preamble says "the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations."[51]

IV. The Agencies' Proposed Clean Water Rule Repeal and Enactment of Policies They Recognize as Inferior is Unlawful.

The proposal raises a very simple legal question: if an agency repeals a rule and adopts another in its place, if it gives absolutely no substantive justification for the repeal, and if it provides only one non-substantive justification that is transparently not accomplished by the rule it adopts, can the action stand? The answer obviously is no.

As described in the following sections, the agencies' proposal represents as clear an example of arbitrary and capricious decision-making as is imaginable. Moreover, the proposal violates basic procedural requirements. It is thoroughly unlawful. In particular, the entire regulatory action rests on a fundamentally arbitrary and therefore illegal foundation: the agencies ask stakeholders to believe that the present action – which enacts an enormous change in the substantive regulations that determine the scope of federal protection for waters across the country– is so ministerial that they need not justify the substance of their action or accept public comment on it.[52]

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[50] *Id.* at 34,902-03.
[51] *Id.* at 34,903.
[52] *Compare id.* at 34,900 ("In this proposed rule, the agencies define the scope of 'waters of the United States' that are protected under the Clean Water Act (CWA).") *with id.* at 34,901 (In the second step the agencies will undertake a "substantive review of the appropriate scope of 'waters of the United States.'").

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A. The Proposed Rule is Arbitrary and Capricious.

An agency rule is arbitrary and capricious if, among other things, "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[53] As described further below, the action here fails each of these tests and more.

First, the agencies' proposal relies on factors ("continuity and certainty") to the exclusion of the Clean Water Act's objectives. Second, the proposal entirely fails to consider an important aspect of the problem -- the relative substantive value of the regulations it will adopt compared to the Clean Water Rule, and the very real possibility that enacting the text of the 1986 regulations will not be temporary. Third, the proposal offers an explanation that runs counter to the evidence, because its solution to claimed uncertainty will plunge implementation of the Clean Water Act back into a regime that was characterized by uncertainty – a fact underscored by the agencies' inability to even articulate in the proposal what the rules they plan to adopt will require. Finally, the proposal depends on implausible bases, including reliance on a methodologically deficient and politically-motivated economic analysis that improperly ignores enormous benefits associated with implementing the Clean Water Rule.

1. The Proposal Undermines, Rather than Serves, the Clean Water Act's Objective.

The agencies' proposal relies on a factor Congress did not intend for it to consider exclusively. The lone rationale stated for the repeal rulemaking is avoiding possible inconsistency in, and confusion about, the standards by which the term "waters of the United States" will be evaluated. But the agencies do not explain how the consistency the repeal would allegedly deliver (which it will not, as discussed below) serves Congress's overriding purpose in adopting the Clean Water Act – clean water. Because the repeal rule would actually undermine this purpose, the proposal is arbitrary and capricious.

Congress declared the objective of the Clean Water Act forcefully: "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." As noted above, Congress determined that achieving this objective required protections that controlled pollution at its source, a principle Congress achieved by defining "navigable waters" broadly to mean "the waters of the United States." Indeed, both the House and Senate expressed concern about potential narrow interpretations of which waters they intended to be covered by the new Act.[54] The House Public Works Committee stated its concern as follows:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term

[53] *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983).
[54] For additional detail on the extensive evidence of Congressional intent to cover waters broadly under the law, *see* NRDC Proposed CWR Comments at 4-12.

ED_001803A_00005935-00025

> "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.[55]

The Senate Committee on Public Works stated:

> Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.[56]

In the same vein, when Congress reconsidered the proper scope of the law in 1977, it kept the broad approach intact. For example, Senator Baker emphasized that:

> Comprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors.[57]

To avoid this outcome, the Senate Environment and Public Works Committee developed an amendment that exempted certain activities from needing permits, but which did not backtrack on jurisdiction. Senator Gary Hart then framed the choice for his colleagues:

> The Congress can capitulate. The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those *small streams, marshes, wetlands, and swamps* which will make their way into the bigger waterways of this country…. Or we can establish a program of the sort the committee has established, which will protect all of those water systems; which will protect *all of the elements of those systems*, which will not permit dredge and fill activities to deposit very toxic materials into those waterways."[58]

In contrast to this manifest Congressional intent, the agencies' proposal seeks to narrow the Clean Water Act's applicability compared to the Clean Water Rule,[59] and they do not explain how weakening the standards to achieve consistency (which, again, this rule will not actually

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[55] H.R. Rep. No. 92-911 at 131 (1972), Comm. on Pub. Works, Committee Print 93d Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 818 (1973) (hereinafter "1972 Legislative History").
[56] S. Rep. No. 92-414 at 77 (1971), 1972 Legislative History at 1495.
[57] Comm. on Env't & Pub. Works, Committee Print, 95th Cong., 2d Sess., Legislative History of the Clean Water Act of 1977, at 920 (Oct. 1978); *see also id.* at 922 (Senator Baker stating: "Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource."); *id.* at 923 (Senator Baker continuing, "let me emphasize that the protection of water quality must encompass the protection of the interior wetlands and smaller streams.").
[58] *Id.* at 908 (emphasis added).
[59] *See* 82 Fed. Reg. at 34,903 ("The agencies estimated that the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented").

ED_001803A_00005935-00026

achieve) will better ensure the integrity of the Nation's waters. Consequently, the agencies' proposal relies – indeed, depends entirely – upon a factor Congress did not intend for them to consider exclusively.

2. The Proposal Entirely Fails to Consider Important Aspects of the Definition of "Waters of the United States"

a. The proposal entirely ignores the Clean Water Rule's legal and scientific record.

The agencies propose to permanently repeal the Clean Water Rule without any consideration of the legal and scientific support that undergirds it. As discussed above, the Rule conservatively relies on the "significant nexus" approach outlined in *Rapanos*, which the Bush administration and every federal appeals court to consider the question found to be a proper basis for Clean Water Act coverage. And to determine whether certain waters have such a nexus with foundational waters, the Rule appropriately depends on a massive and state-of-the-art scientific analysis of the functions that various kinds of water bodies perform in the watersheds in which they are located.

In contrast to the proposal's silence, the agencies forcefully declared the reasonableness and appropriateness of the Clean Water Rule in a brief filed in the U.S. Court of Appeals for the Sixth Circuit in January of this year. The agencies' full-throated defense of the Rule begins:

> The Clean Water Act ("CWA" or "Act") was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act protects "navigable waters," which is defined as "waters of the United States." 33 U.S.C. § 1362(7). The agencies charged with implementing the CWA—the United States Environmental Protection Agency and the United States Army (the "Agencies")—"must necessarily choose some point at which water ends and land begins," which is no easy task because "[w]here on this continuum to find the limit of 'waters' is far from obvious." United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985). After three Supreme Court decisions and years of determining CWA jurisdiction on a case-by-case basis, and in response to suggestions by Supreme Court Justices, Congress, and the public, the Agencies conducted a multi-year rulemaking culminating in the Clean Water Rule, a regulation interpreting the scope of "waters of the United States."
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> The foundation of the Agencies' interpretation is the significant nexus standard. The overwhelming scientific evidence—virtually unchallenged here—demonstrates a continuum of chemical, physical, and biological connections between important downstream waters and streams, ponds, wetlands, and other waters. The Agencies' task in interpreting the statutory term "waters of the United States" was to identify where on that continuum the nexus is "significant" enough to bring waters within the Act's jurisdictional reach and under what circumstances the Act does not apply notwithstanding a possible nexus. The Agencies' overarching goal was to make identification of waters protected under the CWA easier to understand and more predictable, while protecting the streams, wetlands, and other waters at the core of our Nation's water resources.

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> The Clean Water Rule is a carefully tailored response to Supreme Court precedent, peer-reviewed science, and the Agencies' long experience in implementing the Act.[60]

The agencies have not repudiated any aspect of this legal analysis or the scientific evidence and conclusions on which the Rule relies. Nevertheless, the proposal's entire discussion of the Clean Water Rule's formulation is one sentence: "Following public notice and comment on a proposed rule, the agencies published a final rule defining the scope of 'waters of the United States' on June 29, 2015 (80 FR 37054)."[61] The agencies thus completely failed to consider not only an important element of this issue, but the very essence of it: they have proposed to repeal the Rule without considering the Rule.

b. The proposal ignores the relative substantive value of the rule text it seeks to enact compared with the Clean Water Rule.

The agencies' proposal does two things – it repeals the Clean Water Rule and it enacts into positive law the text of the prior regulations. Given the choice between these two sets of regulations, the agencies provide absolutely no analysis of how each approach serves Congress's intent in enacting the law. The proposal lacks any substantive justification for promulgating the text of the rules as they previously existed, to be interpreted based on case law and guidance documents, rather than maintaining the regulations adopted through the Clean Water Rule. Because the agencies fail to analyze the substantive merit of the rules they propose to repeal and those they propose to enact, the proposal fails to consider an essential issue.[62]

The agencies concede that they have no substantive justification for enacting the text of the once-governing rules, by saying: "the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations."[63] Moreover, as described above, the proposal lacks any evaluation of the Clean Water Rule itself, in terms of whether it reasonably protects features important to achieving the objective of the Clean Water Act. The agencies say they "will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking."[64] They do not even bother to take issue with their own strong defense of the Rule in the Sixth Circuit. Absent analysis of the relative merits of the rules being repealed and enacted, the agencies' decision to adopt one rather than the other lacks a reasoned justification.

Ironically, the proposal cites a Supreme Court decision, *FCC v. Fox Television Stations, Inc.*,[65] that underscores the unlawfulness of the agencies' plan. In that case, which involved an agency's change of policy, the Court stated that not every such change does warrants a heightened review,

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[60] *In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, No. 15-3751, Brief for Respondents, at 1-2 (6th Cir. Jan. 13, 2017).
[61] 82 Fed. Reg. at 34,901.
[62] *N. Carolina Growers' Ass'n, Inc. v United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012).
[63] 82 Fed. Reg. at 34,903.
[64] *Id.*
[65] 556 U.S. 502 (2009).

ED_001803A_00005935-00028

but noted that simply passing reasonableness review means "of course the agency must show that there are good reasons for the new policy," and that the agency must indicate it "believes [the new policy] to be better [than the old one]."[66] The agencies here do not even meet that basic threshold of reasoned decision-making: they do not claim the pre-Clean Water Rule regulations are "better" policy than the Clean Water Rule; indeed, they acknowledge they do not intend to consider the matter.[67]

Similarly, another case cited in the preamble, *Nat'l Assn of Home Builders v. EPA*,[68] makes clear that the agencies' actions here are illegal. In that case, the agency's change of course was not arbitrary because EPA "reasonably believed [the amended rule] would be more reliable, more effective, and safer than the original rule,"[69] considerations that were directly relevant under the governing statute. Here, EPA and the Corps give no such "reasoned explanation," instead giving only a non-substantive rationale that has nothing to do with the core objective of the Clean Water Act, as discussed in the preceding section.[70]

Although the present proposal fails to satisfy even the least rigorous reasonableness review, the agencies must provide a more detailed explanation in the present case because the agencies *acknowledged* that the Clean Water Rule was needed and substantively preferable to the state of affairs created by the policies this rulemaking seeks to reinstate. Moreover, the agencies offer no reason to think this is no longer true.[71]

c. The proposal ignores the very real possibility that enacting the text of the pre-Clean Water Rule regulations will not be temporary.

The agencies suggest that this rulemaking will provide a consistent set of requirements to bridge the supposedly brief gap until its promised second rule replaces this one. As noted above, the agencies expect to base their planned second rulemaking on Justice Scalia's opinion in *Rapanos*. But there are numerous reasons to suspect the second rule will not happen, will take substantial time to develop, or will be invalidated. Treating the second rulemaking as a foregone conclusion ignores those likely outcomes, and thus an important aspect of this issue.

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[66] *Id.* at 515.

[67] *Fox* also states that an agency changing policy must at a minimum "display awareness that it is changing position. An agency may not, for example ... simply disregard rules that are still on the books." 556 U.S. at 515. In the present rulemaking, the agencies fail to acknowledge that they are changing the law, repeatedly referring to this as an enactment of the "*status quo*," even though they are repealing duly-adopted rules that are on the books.

[68] 682 F.3d 1032 (D.C. Cir. 2012).

[69] *Id.* at 1039

[70] The preamble suggests that the two-step rulemaking effort as a whole will address the proper balance of state-federal authority, 82 Fed. Reg. at 34,901 ("Re-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated"), but it does not suggest that inquiry acts as a rationale for *this* action and in fact concludes that this rulemaking has no federalism implications. *Id.* at 34,904.

[71] *FCC v. Fox*, 556 U.S. at 516 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay ... the prior policy").

ED_001803A_00005935-00029

First, the outcome of the second rulemaking process necessarily cannot legally be definitively determined today, as even the President's executive order itself recognizes.[72] The agencies therefore cannot rely on the content, or even completion, of the second rulemaking they now contemplate.

Second, the Clean Water Rule is supported by an extensive and compelling scientific record, and there are strong legal justifications for its protections; these factors will require the agencies to carefully explain and support any new rule they may propose that does not enact the same protections.[73] At a minimum, doing so will take time.

Third, the agencies could well be convinced to abandon their Scalia-based scheme upon consideration of public input. Some stakeholders provided pre-proposal input on the planned second rule this summer, but the agencies have yet to hear from the vast majority of affected people about what a proposal should contain,[74] much less receive actual comments on such a proposal. Already, however, signs point to opposition and trepidation about the agencies' Scalia-based approach. For instance, when EPA requested input on "regulations that may be appropriate for repeal, replacement, or modification,"[75] in response to Executive Order 13777, the overwhelming majority of the submitted comments that referred to the scope of the Clean Water Act opposed weakening the Clean Water Rule. In June, NRDC analyzed the submitted comments based on several word searches and obtained the following results:[76]

Search term	Number of records	Total comments supporting Rule	Total comments opposing Rule
"Clean Water Rule"	3685	3655	30
"Waters of the US"	24882	24854	28
"Waters of the United States"	10330	10215	115
"Waters of the U.S."	1655	1595	60
"WOTUS"	149	46	103

As further evidence that the agencies' planned second rulemaking may never come to fruition, at least in anything resembling the form they now imagine, and may take substantial time to

[72] *See* Exec. Order No. 13,778, 82 Fed. Reg. at 12,497, § 2 (ordering the agencies to review the Rule and publish a proposal rescinding or revising it "as appropriate and consistent with law"); *see also Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (it is unlawful for an agency official to prejudge irrevocably the outcome of a rulemaking).

[73] *See FCC v. Fox*, 556 U.S. at 515–16 (when an agency changes regulatory policy, it "must show that there are good reasons for the new policy," and when, for example, the new policy "rests upon factual findings that contradict those which underlay [the] prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate"); *State Farm*, 463 U.S. at 43 (an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks omitted)).

[74] *Cf.* U.S. EPA, Waters of the United States (WOTUS) Rulemaking: Outreach Meetings (announcing schedule for teleconferences in which participants can make three minute presentations on a first-come, first-served basis), available at https://www.epa.gov/wotus-rule/outreach-meetings.

[75] U.S. EPA, Laws & Regulations: Regulatory Reform, available at https://www.epa.gov/laws-regulations/regulatory-reform.

[76] NRDC analysis of Docket ID: EPA-HQ-OA-2017-0190 (completed June 16, 2017).

ED_001803A_00005935-00030

complete, consider the views about that second rulemaking the Association of Clean Water Administrators provided to EPA in August. In a letter, ACWA requested "that EPA and the Corps take whatever time is needed to ensure that a final rule is the result of thorough examination of the science and implementation concerns, as well as extensive consultation with states throughout the rulemaking."[77] Furthermore, ACWA requests additional pre-proposal interaction with the agencies, by urging "EPA to continue to take advantage of consulting with our members by asking for feedback as the text of the proposed rule is drafted and prior to publication of a proposed rule."[78] And ACWA notes that the second planned rulemaking raises numerous potential thorny issues, including: "what are potential impacts, both intended and unintended, of a definition inspired by Justice Scalia's *Rapanos* decision on state CWA programs, how states would react to changes in federal jurisdiction (given that some states have 'Waters of the State' definitions that cannot be more stringent than EPA's definition while others have more expansive 'Waters of the State' definitions), and how states with less robust state permitting infrastructure would adapt to changes in the number of jurisdictional waters."[79]

Fourth, the agencies may also shift course in response to new evidence. Critically, the agencies have yet to evaluate a Scalia-based rule's impact on water quality—which should be the single most important factor in enacting a rule under the Clean Water Act. That much became clear when the agencies began discussing the Scalia-based rule with states this spring; in that context, the agencies suggested a wide range of possible interpretations for key terms in Justice Scalia's *Rapanos* opinion, and asked states for their thoughts on the impacts of embracing those differing interpretations.[80] Similarly, the Southern Environmental Law Center sought records on this very subject from both EPA and the Corps, namely:

> all records relating to any preliminary or final studies, analyses, reports, or inquiries that the Corps has performed, commissioned, or collected that compare:

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[77] Letter from Jennifer Wigal, ACWA President, to Stacy Jensen, U.S. Army Corps of Eng'rs & Donna Downing, U.S. EPA, at 1 (Aug. 31, 2017)

[78] *Id.* at 2.

[79] *Id.* Because the agencies only recently made them public, we have not had sufficient time for a detailed review of the numerous submissions received from state, local, and tribal stakeholders about a Scalia-based rule. However, we note that a number of commenters strongly discouraged the agencies' planned approach. *See, e.g.,* Letter from Robert J. Klee, Commissioner, Connecticut Dept. of Energy & Envtl. Prot., to EPA Administrator Pruitt & Douglas W. Lamont, Army Corps of Eng'rs, at 2 (June 19, 2017) ("Connecticut is extremely concerned that any revision to the WOTUS definition not exclude intermittent headwaters (streams and wetlands) from protection under the federal Clean Water Act. Headwater streams and wetlands are essential to the protection of our cold water stream ecosystems and the native brook trout populations these waters support. Protection of these waters becomes critical when considering the potential of a warming climate."), available at https://www.epa.gov/sites/production/files/2017-09/documents/ct-deep_2017-06-19.pdf; Letter from Richard Whitman, Oregon Dept. of Envtl. Quality et al., to EPA Administrator Pruitt & Douglas W. Lamont, Army Corps of Eng'rs, at 1 (June 19, 2017) ("The Waters of the United States (WOTUS) rule is vitally important to the nation's ecological and economic wellbeing. The State of Oregon supported the 2015 WOTUS rule because it was based on sound science and took into account the practical and ecological realities of hydrology, seasonality and interconnected waters. Any rule that replaces the 2015 rule must accomplish the same in order to achieve the objective of protecting the chemical, physical and biological integrity of Oregon's and our nation's waters."), available at https://www.epa.gov/sites/production/files/2017-09/documents/or-governor-brown_2017-06-19.pdf.

[80] U.S. EPA, PowerPoint presentation: The Definition of "Waters of the U.S." E.O. 13132 Federalism Consultation Meeting, at 9-11 (Apr. 19, 2017) (suggesting potential interpretations of "relatively permanent" & "continuous surface connection" & posing numerous questions about implications of different approaches).

ED_001803A_00005935-00031

1) the Scalia test and the Kennedy test to determine the waters of the United States that would be identified under both tests;
2) a Scalia-only test to the current test that applies both the Scalia and Kennedy tests to determine waters of the United States; and
3) a Scalia-only test to the Clean Water Rule test, which relies primarily on the Kennedy test.

The only responsive document either agency identified was the economic analysis for the repeal rule, which does not evaluate the Scalia approach's impact. Thus, it appears that the agencies know very little about how decreasing federal protection using a Scalia-based approach would harm water quality. If the agencies take their Clean Water Act responsibilities seriously, they will only pursue a Scalia-based rule after understanding its impacts and reasonably concluding that water quality will not suffer. Because that analysis remains undone and because it is almost certain to show that pollution will increase under such a regime, the agencies cannot presume now that it will come to pass.

Fifth and most importantly, because relying on Justice Scalia's opinion is flatly illegal, the agencies likely will not adopt a Scalia-based final rule or, if they do, the rule will be invalidated in court. A majority of the justices in *Rapanos* explicitly rejected Justice Scalia's view of the Clean Water Act; five justices – Justice Kennedy and the dissenting justices – held that the limitations Justice Scalia read into the Act did not in fact constrain what kinds of aquatic features the law protects.[81] Courts have confirmed that the agencies cannot shirk responsibilities entrusted to them under the Act by refusing to regulate sources or waterbodies that Congress intended to include within the scope of the Act. As the agencies told the Sixth Circuit: "No court has held that the plurality standard is the sole available method for establishing CWA jurisdiction."[82] Finally, adopting a Scalia-only approach would contradict the Bush administration's interpretation of *Rapanos*.[83]

In combination, the preceding factors make it exceedingly unlikely that the agencies will promptly issue a rule to replace the one that the present rulemaking seeks to enact. Indeed, the agencies seem quite likely to repeat a prior regulatory misadventure, when the agencies considered weakening the Clean Water Act regulations in the wake of *SWANCC*. Back then, citizen groups, states, members of Congress, and scientists raised such an outcry that it deterred the agencies from weakening the Clean Water Act jurisdictional rules at the beginning of the George W. Bush administration.[84]

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[81] *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in the judgment) (stating that Justice Scalia's plurality opinion "is inconsistent with the Act's test, structure, and purpose."); *id.* at 800 (Stevens, J., dissenting) ("Even setting aside the plurality's dramatic departure from our reasoning and holding in *Riverside Bayview*, its creative opinion is utterly unpersuasive.").
[82] *In re: EPA*, No. 15-3751, Brief for Respondents, at 50.
[83] 2008 Guidance at 3 ("regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied").
[84] *See* EPA, Press Release, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003) ("After soliciting public comment to determine if further regulatory clarification was needed, the EPA and the Corps have decided to preserve the federal government's authority to protect our wetlands."), available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/540f28acf38d7f9b85256dfe00714ab0.html

ED_001803A_00005935-00032

d. The proposal suggests that the regulatory text proposed to be included in the Code of Federal Regulations may be illegal as written.

The agencies propose to adopt, as a new regulation, the text of the regulations that were in place prior to the Clean Water Rule's enactment. 82 Fed Reg at 34,901. But they also propose *not* to enforce that text as written. Instead, they will enforce the rule as "informed by" "applicable" guidance documents — listing (as examples) 2003 and 2008 guidance documents —as well as "relevant" memoranda and guidance letters, and "consistent with" the *SWANCC* and *Rapanos* Supreme Court decisions, "applicable" case law, and "longstanding agency practice." *Id.* at 34,902; *see also id.* at 34,899, 34,900.

The agencies therefore will not follow the text of the Code of Federal Regulations they are proposing to enact, but rather a set of rules that may be found in various guidance documents, memoranda, letters, case law, and "agency practice." As described below, this violates the APA's notice and comment requirements, because the notice does not adequately describe the rule the agencies are actually proposing, and deprives the public of an opportunity to comment meaningfully on the rules the agencies have in mind.

That scheme is also substantively arbitrary and capricious. The agencies are proposing a rule for the Code of Federal Regulations that they apparently think either *should* not or *cannot* be enforced as written—if it could, the long list of "informative" guidance documents would be unnecessary. Indeed, the agencies suggest that enforcing the text of the proposed rule might contravene Supreme Court precedent; they note that the *SWANCC* and *Rapanos* decisions "limited" the way the regulations were implemented.[85] They also state that the Clean Water Rule increased the Act's coverage as compared to pre-Rule practice, but *decreased* coverage as compared to the pre-Rule regulations themselves, suggesting that the practice resulted in a narrower scope of coverage than the pre-Rule regulations alone would have.[86] Indeed, the 2003 guidance referenced by the agencies says that with regard to certain types of waterways, "it is uncertain" whether there "remains any basis for jurisdiction" under certain sections of the rule that the agencies are now proposing to enact into law.[87]

Proposing a rule that *the agency itself* believes is at least in part unwise or potentially illegal is patently arbitrary and capricious. *State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *see also FCC v. Fox*, 556 U.S. 502, 515 (2009) (an agency action is not arbitrary and capricious if, among other things, the "agency *believes* [the new policy] is better"); *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 531–32 (2009) (banking regulation invalidated as beyond statutory authority despite the agency's attempt to limit the regulation via narrowing language in the rule's preamble).

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[85] *See* 82 Fed Reg at 34,901

[86] *Id.* at 34,903; *see also supra* (describing how the practical impact of *SWANCC* and *Rapanos* was to curtail the agencies' assertion of coverage under the Act).

[87] 68 Fed. Reg. 1991, 1996 (Appendix A: Joint Memorandum to Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "waters of the United States").

ED_001803A_00005935-00033

A major proposed rule interpreting the scope of the Clean Water Act should not be a convenient expedient; it should reflect the interpretation of the Act that the agencies think is best. It should *not* be a rule that the agencies themselves find to be, at least in part, on "uncertain" legal footing such that they claim they will not even enforce it as written.

3. The Proposal Offers an Explanation for Repeal Counter to the Evidence.

The sole explanation the agencies offer for the rulemaking is that enacting the pre-Clean Water Rule text will provide certainty and continuity to stakeholders, but that rationale directly contradicts the available evidence. In contrast to the agencies' assumptions, the evidence strongly supports the conclusion that reinstating the pre-Clean Water Rule regime would perpetuate the confusion and inconsistency that defined that approach. Moreover, the available evidence provides no reason to think that implementing the Clean Water Rule in some places, even if it were to be stayed elsewhere, would cause confusion. And even if one accepted the premise that the possibility of different jurisdictional rules applying in different places could create confusion, the agencies ignore strong evidence that such a regime will result from this very rulemaking.

a. The pre-Clean Water Rule regime lacked clarity and consistency.

The agencies justify enacting the text of the pre-Clean Water Rule regulations by claiming that doing so will promote continuity and reduce confusion, but this runs counter to the evidence that the pre-Rule regime was inconsistent and confusing. Even the preamble for the present proposal acknowledges that the agencies adopted the Clean Water Rule in response to confusion following the Supreme Court's *SWANCC* and *Rapanos* decisions and calls from multiple sectors for clarification about what kinds of features the Act protects. As the agencies acknowledge, "[t]he *SWANCC* decision created uncertainty with regard to the jurisdiction of other isolated non-navigable waters and wetlands."[88] Moreover, the proposal notes,"[a]fter issuance of the 2008 guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA."[89]

The pre-Clean Water Rule regime lacked clarity in several ways, in large part because the agencies leaned heavily on guidance documents and internal practices that created considerable uncertainty. These guidance documents first introduced uncertainty by making most jurisdictional questions decided on a water-by-water basis, and by leaving it to those individual jurisdictional assessments whether and to what extent the guidance documents would even be followed. Take, for instance, the issue of so-called "isolated" waters. The post-*SWANCC* guidance raises the specter of leaving such waters entirely without protection, but fails to resolve

[88] 82 Fed. Reg. at 34,900.
[89] *Id.* at 34,901; *see also* U.S. EPA, Persons and Organizations Requesting Clarification of Waters of the US by Rulemaking.

ED_001803A_00005935-00034

the question.[90] It also adds to then-existing uncertainty about those waters' status in the states of the Fourth Circuit.[91] Finally, the guidance punts on the matter – directing field staff to seek headquarters approval prior to treating any "isolated" water as protected.[92] As a consequence of these statements, the stated policy of the United States is that "isolated" waters are legally eligible for protection, but the actual practice of the United States is to treat such waters as unprotected.[93]

The post-*Rapanos* guidance fares no better at providing certainty and consistency to stakeholders. It expressly disclaims that it delivers any such certainty, as it says field staff may well not follow it "depending on the circumstances," and it says that others could challenge its "appropriateness" to a given situation, without saying how either determination should be made:

> The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.[94]

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[90] 68 Fed. Reg. at 1996 ("in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)–(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce)").

[91] *Compare id.* ("Furthermore, within the states comprising the Fourth Circuit, CWA jurisdiction under 33 CFR § 328.3(a)(3) in its entirety has been precluded since 1997 by the Fourth Circuit's ruling in United *States v. Wilson*, 133 F. 3d 251, 257 (4th Cir. 1997) (invalidating 33 CFR § 328.3(a)(3))."*)* *with* U.S. EPA & U.S. Army Corps of Eng'rs, Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson*, at 6 (May 29, 1998) (stating that "neither the Corps nor the EPA will cite or rely upon the regulatory provision of 33 C.F.R. 328.3(a)(3) as a basis for asserting CWA jurisdiction over any area for any purpose within the Fourth Circuit"; noting, however, that both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, within the Fourth Circuit, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce, and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce."), available at http://bit.ly/2xAN112.

[92] 68 Fed. Reg. at 1996.

[93] *See* Testimony of Benjamin H. Grumbles, EPA Assistant Administrator for Water, Hearing of House Transportation & Infrastructure Committee: "The 35th Anniversary of the Clean Water Act: Successes and Future Challenges" (Oct. 18, 2007), available at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg38565/html/CHRG-110hhrg38565.htm ("[T]he basic point there is in the guidance we held open the possibility that there could be circumstances under (a)(3) paragraphs of our regulations where there could be an assertion of jurisdiction over isolated interstate non-navigable waters without relying on the migratory bird rule provisions. As a legal matter, that is still possible, but as a practical matter we had not asserted jurisdiction over those types of wetlands based on that guidance, which is still in place.").

[94] 2008 Guidance at 4 n. 17.

ED_001803A_00005935-00035

Adding to the uncertainty the guidance created, the regulations on the books disagreed with the agencies' guidance and/or practice. For instance, the regulations on their face provided (and will provide again, if the agencies adopt this proposal) coverage of waters "the use, degradation, or destruction of which would or could affect interstate or foreign commerce, including any such waters … [w]hich are used or could be used for industrial purposes by industries in interstate commerce." But, as discussed throughout these comments, the evidence reveals that the agencies will not protect such waters if they consider them "isolated." Similarly, although the pre-Clean Water Rule regulations (and therefore the rules proposed here for adoption) cover tributaries and adjacent wetlands without qualification, the pre-Clean Water Rule guidance specifies that protection depends on a case-specific showing that the water in question satisfies either the significant nexus or Scalia test.

These multiple ambiguities had real-world effects. When the EPA Inspector General interviewed the Director of EPA's Office of Enforcement and Compliance Assurance, Wetlands Enforcement Division, and his staff, they openly acknowledged the lack of regulatory clarity and its impact on efficient administration of the Clean Water Act, saying:

- *Rapanos* has created a lot of uncertainty with regards to EPA's compliance and enforcement activities. Processing enforcement cases where there is a jurisdictional issue has become very difficult. ***
- Overall, CWA enforcement activities (for Sections 311 (oil spills), 402 (National Pollutant Discharge Elimination System), and 404) have decreased since the *Rapanos* ruling. An estimated total of 489 enforcement cases (Sections 311, 402, and 404 combined) have been affected such that formal enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered as a result of jurisdictional uncertainty, or lack of jurisdiction was asserted as an affirmative defense to an enforcement action.
- *** In the wake of *Rapanos*, however, it has become "almost impossible" for EPA to refer a case to the Department of Justice on "significant nexus" grounds. Lingering uncertainty over the limits of Federal jurisdiction has made the Department of Justice reticent to accept referrals wholly on these grounds.
- Staff also stated that the Department of Justice is "willing" to take CWA Section 404 cases, in principle, but they are often loathe [sic] to right now because of the lingering jurisdictional uncertainties associated with *Rapanos*. ***[95]

Tellingly, the agencies' proposal does not attempt to argue that the pre-Clean Water Rule regulations and guidance together provided clear direction to stakeholders attempting to understand the scope of the Clean Water Act.

In fact, the extreme nature of the agencies' proposal reveals that the "regulatory certainty" rationale is a sham. If the agencies were actually concerned only with consistent nationwide application of the Clean Water Act during the pending litigation, they would have proposed for notice-and-comment rulemaking a stay of the Rule during the litigation—not a permanent repeal that is designed to, and will, persist well beyond the end of litigation. A stay would be illegal for

[95] U.S. EPA Inspector Gen., *Special Report: Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation*, Report No. 09-N-0149, at 1-2 (Apr. 30, 2009).

ED_001803A_00005935-00036

many of the same reasons the proposed repeal is illegal—for instance, it also would undermine the objective of the Act, and there would be absolutely no good reason for it. But the point is that the agencies have chosen to take an axe to the Rule when, on its face, a much less drastic action would seem better suited to their professed rationale. That reveals the true aim of this proposal as not being "certainty" but simply getting rid of the Rule—preferably without having to address its merits.[96] The APA will not allow this.

The pre-Clean Water Rule regime also lacked national consistency, which will return if the agencies implement this rule as they claim they will. Depending on where a particular pollution discharge occurred, the standard (or standards) varied for assessing whether an area contains a "water of the United States." As the agencies explained to the Sixth Circuit:

> Three courts of appeals have given effect to the common denominator between Justice Kennedy's concurrence and the four-Justice dissenting opinion in holding, consistent with the Agencies' position, that CWA jurisdiction is established if Justice Kennedy's significant nexus standard is met. *See Donovan*, 661 F.3d at 180-84; *United States v. Bailey*, 571 F.3d 791, 797-99 (8th Cir. 2009); *Johnson*, 467 F.3d at 62-66. These decisions also allow the Agencies to assert jurisdiction under the *Rapanos* plurality standard. *** [Other] decisions hold that Justice Kennedy's significant nexus standard is either sufficient or exclusive. *See United States v. Robison*, 505 F.3d 1208, 1219-22 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 724 (7th Cir. 2006).[97]

Accordingly, because the proposal seeks to reinstate the uncertain and inconsistent legal regime that pre-dated the Clean Water Rule, the proposal's clarity and consistency rationale contradicts the available evidence.

b. Partially implementing the Clean Water Rule would not create confusion.

The agencies claim that the possibility of different rules applying in different locations would create confusion, but direct evidence indicates otherwise. The exact scenario the agencies allegedly fear actually played out for roughly a month and a half because – with the exception of the 13 states that obtained a preliminary injunction against the rule from the U.S. District Court for the District of North Dakota -- the Rule took effect nationwide in August 2015 and the agencies implemented different rules in different places until the Sixth Circuit issued a nationwide stay.[98] Notably, the United States opposed applying the North Dakota injunction nationally, even though the consequence of its position would be having two different regimes in place in different parts of the country.[99] Despite having numerous records from the period in

[96] The agencies claim that a stay of the Rule would not achieve the agency's objectives as "effectively and efficiently" as a full-blown repeal, without saying why. 82 Fed Reg at 34,903.
[97] *In re: EPA*, No. 15-3751, Brief for Respondents, at 49-50; *see also supra* (discussing status of 33 C.F.R. § 328.3(a)(3) in the states of the Fourth Circuit).
[98] *See* 82 Fed. Reg. at 34,901 (acknowledging period during which Clean Water Rule was effective except in 13 states).
[99] *See N. Dak. v. U.S. EPA*, No. 15-00059, Federal Defendants' Response to the Court's August 28, 2015 Order Setting Briefing Schedule (D.N.D., Sept. 1, 2015).

ED_001803A_00005935-00037

which the agencies simultaneously implemented these two approaches, the agencies point to no evidence that it was confusing or difficult to accomplish; indeed, they make no effort to examine the jurisdictional determinations made during that time period to see if their assumption that this is a problem requiring drastic regulatory action has any basis in fact. The evidence simply does not support the agencies' nonsensical assumption that implementing confusion everywhere is better than having clarity in at least some states.

Underscoring the lack of evidence for the agencies' conclusion, the economic analysis document accompanying the proposal acknowledges that the agencies possess no meaningful information about the effects of the supposed reduced uncertainty: "Absent a great deal more data concerning how various land developers and manufacturers make decisions about new projects and in light of remaining jurisdictional uncertainty, the agencies are unable to quantify the benefits of the reduced uncertainty."[100]

The agencies also ignore a key fact: if the circumstances the agencies describe actually arise, and if they actually result in confusion, the relevant courts will have inherent authority to manage and fix the situation. The proposal only obliquely acknowledges this critical detail, when the agencies state that differential standards might result in the absence of "further judicial decision-making" by courts hearing challenges to the Clean Water Rule.[101]

Naturally, conservation groups would prefer that strong, national standards be consistently applied across the country. Having the Clean Water Rule implemented less than nationwide thus is not ideal. But it is a far sight better than repealing the Clean Water Rule altogether and returning nationwide to the conditions that necessitated the Rule.

c. The very same outcome the agencies claim to be guarding against could result from the adoption of this rule.

If the agencies can be believed, the proposal seeks to avoid the prospect of different regimes being implemented if the Supreme Court were to hold that challenges to the Clean Water Rule should have been filed in district court.[102] Yet if the Supreme Court in fact reaches that conclusion, challenges to this repeal action also would appropriately belong in the district courts, which just as easily could reach contradictory results – that is, some courts might invalidate the repeal as to certain jurisdictions (thereby maintaining the Clean Water Rule there) and others might uphold it. The net result of such litigation? Stakeholders in different places would be subject to different standards (the Clean Water Rule and the newly promulgated replacement). In other words, this rule quite likely could lead to the identical state of affairs the agencies claim it will prevent.

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[100] U.S. EPA, Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, at 12 (June 2017) (hereinafter "2017 Economic Analysis").
[101] 82 Fed. Reg. at 34,903.
[102] Ironically, the agencies' rationale depends on the Supreme Court rejecting the United States' position about where challenges to rules like the Clean Water Rule belong.

ED_001803A_00005935-00038

4. The Proposal Depends on Implausible Bases, Including a Grossly Inaccurate Economic Analysis.

As discussed throughout these comments, the agencies' lone rationale for repealing the Clean Water Rule and adopting the text of the regulations that predated that Rule lacks any reasonable basis. However, we strongly suspect that the stated rationale does not matter to the agencies, as their primary objective is getting rid of the Clean Water Rule however possible. Therefore, in case the agencies decide to shift rationales,[103] we discuss below why one such potential basis – that the quantified economic benefits of the action allegedly outweigh the quantified costs – is wholly implausible.

a. The agencies concluded that the benefits associated with the Clean Water Rule could not be quantified.

The economic analysis the agencies developed recognizes that, because the proposal would completely reverse the Clean Water Rule (by repealing it and enacting the rule text that was in the Code of Federal Regulations before the Rule), the costs and benefits of this action should be mirror images of those associated with the Clean Water Rule. Specifically, costs to industry dischargers (permitting expenses, e.g.) arising from the Clean Water Rule would become benefits (in the form of avoided costs) from the repeal. The Clean Water Rule's benefits would be lost, however, becoming costs of this repeal. Because the agencies found when enacting the Clean Water Rule that its benefits outweighed the costs, a straightforward analysis of repealing it should have found that the costs of repeal outweigh the benefits.

But that did not happen. Instead, the document takes the steps described above but with one critical alteration – the agencies now say that the value of wetlands' ecosystem services, which make up the largest component of the benefits from the Clean Water Rule, cannot be quantified. The primary reason the agencies present for ignoring the benefits of wetlands is the age of the benefits studies relied on for the 2015 Clean Water Rule analysis. This remarkable shift relies on sheer speculation: "The studies were published between 1986 and 2000, although the agencies attempted to find more recent studies. More recent wetland studies were not available. The age of these studies introduces uncertainty, because public attitudes toward nature protection *could* have changed."[104] In addition, the agencies suggest that the forgone benefits of the Clean Water Rule's protections might be less if states protect more than the federal definition does.

> "[S]tates' responses to this proposed rulemaking could have a significant impact on the avoided costs and forgone benefits. *** The agencies were unable to factor the magnitude of this effect into the analysis leading to increased uncertainty. This additional uncertainty applies to both the avoided costs and the forgone benefits. In the case of the forgone benefits of wetland protection the agencies believe the cumulative uncertainty in this context is too large to include quantitative estimates in the main analysis for this proposed rule."[105]

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[103] We do not concede the agencies could lawfully do so. *See State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").
[104] 2017 Economic Analysis at 8-9 (emphasis added).
[105] *Id.* at 9.

ED_001803A_00005935-00039

But this is no basis for revising the benefits estimate, as the agencies make no effort to identify the amount of waters subject to state-level coverage, nor to evaluate which, if any, of the various protections in the Clean Water Act attach to state-protected waters. The agencies claim they were "unable" to take factors related to state-level protection into account, leading to further "uncertainty" on this score, but that is simply untrue. Of course, an analysis of the scope of state-level water protections is entirely possible. The agencies simply chose not to do it.

The agencies acknowledge that treating a huge category of benefits as unquantifiable distorts reality, but it appears the agencies intended that outcome. The economic analysis states: "As the categories not estimated all fall in the benefits column, comparing the quantified totals may potentially lead to a lower estimate of net benefits, depending on any regulatory response by the states."[106] This decision, according to a former agency staffer, was not driven by any reasoned agency decision-making, but instead directed by political appointees:

> E.P.A. employees say that in mid-June, as Mr. Pruitt prepared a proposal to reverse the rule, they were told by his deputies to produce a new analysis of the rule — one that stripped away the half-billion-dollar economic benefits associated with protecting wetlands.
>
> "On June 13, my economists were verbally told to produce a new study that changed the wetlands benefit," said Elizabeth Southerland, who retired last month from a 30-year career at the E.P.A., most recently as a senior official in the agency's water office.
>
> "On June 16, they did what they were told," Ms. Southerland said. "They produced a new cost-benefit analysis that showed no quantifiable benefit to preserving wetlands."[107]

b. The agencies' failure to quantify wetland benefits from the Clean Water Rule depends on implausible bases.

Because the critical decision to exclude significant benefits was political, not principled, close scrutiny of the reasoning in the agencies' economic analysis reveals numerous methodological flaws.

First, despite the agencies' implication that the 2015 analysis lacked accuracy, that prior document specifically notes: "Since completion of the economic analysis at proposal the Corps of Engineers undertook significant efforts to complete quality assurance on 404 program data. This resulted in improvements in data availability and data quality, which in some instances revised previously-reported values."[108]

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[106] *Id.* at 8.
[107] Coral Davenport & Eric Lipton, Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say, New York Times (Aug. 11, 2017), available at https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html?mcubz=3.
[108] U.S. EPA & U.S. Army Corps of Eng'rs, Economic Analysis of the EPA-Army Clean Water Rule, at 6 (May 20, 2015).

ED_001803A_00005935-00040

Second, the economic analysis runs afoul of standard government practice. Specifically, guidance documents from both the Office of Management and Budget and EPA urge agencies to deal with uncertainty about the precise amount of costs or benefits by expressing them as a numerical range, rather than as a single point value and rather than treating them as not quantifiable at all. As OMB states:

> When benefit and cost estimates are uncertain…, you should report benefit and cost estimates (including benefits of risk reductions) that reflect the full probability distribution of potential consequences. Where possible, present probability distributions of benefits and costs and include the upper and lower bound estimates as complements to central tendency and other estimates."[109]

Similarly, EPA's guidance for performing economic analyses states:

> Ideally, an economic analysis would present results in the form of probability distributions that reflect the cumulative impact of all underlying sources of uncertainty. When this is impossible, due to time or resource constraints, results should be qualified with descriptions of major sources of uncertainty. If at all possible, information about the underlying probability distribution should be conveyed.[110]

The agencies' failure to heed this advice in the economic analysis accompanying the present rulemaking creates a false impression about the impacts of the rule they propose.

Third, effectively zeroing out the wetland benefits of the Clean Water Rule ignores recent evidence that these waters contribute enormously to public well-being. For example, "[c]oastal wetlands thwarted $625 million worth of property damage during Hurricane Sandy in 2012, according to a study published … in Scientific Reports."[111] That study revealed:

> temperate coastal wetlands reduced flood heights and thus avoided more than US $625 Million in flood damages across 12 coastal states affected by Hurricane Sandy, from Maine to North Carolina. In total, wetlands are estimated to have reduced a little over 1% of the flood damage from Hurricane Sandy though this value varies considerably between zip-codes. Across the 707 zip-codes flooded, wetlands reduced flood damages by an average of 11%. Wetlands reduced flood heights and damages in 80% of the region and increased flood heights and damages in 20% of the region. In 382 of the 707 zip-codes

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[109] Office of Management & Budget, Circular A-4 (Sept. 17, 2003), available at https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/; *see also id.* ("If the non-quantified benefits and costs are likely to be important, you should carry out a 'threshold' analysis to evaluate their significance. Threshold or 'break-even' analysis answers the question, 'How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?'").

[110] U.S. EPA, Natl. Ctr. for Envtl. Econ., Guidelines for Preparing Economic Analyses, at p. 11-9 (Dec. 17, 2010; updated May 2014), available at https://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf.

[111] Nsikan Akpan, "Wetlands stopped $625 million in property damage during Hurricane Sandy. Can they help Houston?", PBS Newshour (Aug. 31, 2017), available at http://www.pbs.org/newshour/updates/wetlands-stopped-650-million-property-damage-hurricane-sandy-can-help-houston/.

ED_001803A_00005935-00041

(i.e. just over half), avoided damages exceeded 0.5% of the total. Across these zip-codes, the average reduction in damages due to wetlands was 22%.[112]

Likewise, numerous recent articles have suggested a connection between wetlands loss and Houston's increased vulnerability to flooding, such as the devastation experienced because of Hurricane Harvey.[113]

Fourth, several independent reviews of the agencies' analysis find it to be unsupportable and internally inconsistent. Dr. John Whitehead, a professor in the Department of Economics at Appalachian State University, reviewed the document for the Southern Environmental Law Center. Dr. Whitehead identified several flaws in the agencies' failure to quantify wetlands benefits:

> There is no need for the agencies to resort to qualitative analysis of the wetland mitigation benefits. A review of the pre-2000 studies now dismissed by the agencies indicates that many of the concerns made by EPA-Army (2017) are not justified. ***
>
> In addition, there have been more recent wetland valuation studies that have appeared in the literature. *** These studies suggest that the wetland mitigation benefits estimated by the agencies in their original economic analysis (EPA-Army 2015) were accurately measured.
>
> Finally, the agencies have taken two extreme positions with regard to the uncertainty of wetland mitigation benefits. *** Using a sensitivity analysis as an appropriate strategy is discussed below.
>
> Considering these issues, the agencies' decision to consider only qualitative wetland mitigation benefits appears to be an overreaction to a normal level of uncertainty in the conduct of standard benefit-cost analysis of environmental policy. Even if the agencies now feel justified in only presenting qualitative wetland mitigation benefits, there is no

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[112] Siddharth Narayan et al., "The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA," 7 Scientific Reports, article 9463, at 2 (Aug. 31, 2017) (citations omitted), available at https://www.nature.com/articles/s41598-017-09269-z.

[113] *See, e.g.*, Ana Campoy & David Yanofsky, "Houston's flooding shows what happens when you ignore science and let developers run rampant," Quartz (Aug. 29, 2017), available at https://qz.com/1064364/hurricane-harvey-houstons-flooding-made-worse-by-unchecked-urban-development-and-wetland-destruction/; Leanna Garfield, "Houston was a ticking time-bomb for a devastating hurricane like Harvey," Business Insider (Aug. 28, 2017), available at http://www.businessinsider.com/hurricane-harvey-why-houston-flooded-2017-8; Terence Cullen, "Houston's development boom destroyed wetlands that naturally absorbed flood water — and left thousands in Harvey's path," New York Daily News (Aug. 30, 2017), available at http://www.nydailynews.com/news/national/houston-development-boom-destroyed-water-absorbing-wetlands-article-1.3454807; David Schaper, "3 Reasons Houston Was A 'Sitting Duck' For Harvey Flooding," Natl. Pub. Radio (Aug. 31, 2017), available at http://www.npr.org/2017/08/31/547575113/three-reasons-houston-was-a-sitting-duck-for-harvey-flooding; Shawn Boburg & Beth Reinhard, "Houston's 'Wild West' growth," Washington Post (Aug. 29, 2017), available at https://www.washingtonpost.com/graphics/2017/investigations/harvey-urban-planning/?utm_term=.8e6f81391196; Henry Grabar, "Don't Blame Houston's Lax Zoning for Harvey's Destruction," Slate (Aug. 31, 2017), available at http://www.slate.com/articles/business/metropolis/2017/08/how_houston_and_harris_county_s_zoning_approach_affected_hurricane_harvey.html.

> evidence that these benefits would be so small as to reverse the sign on the net benefits calculation (i.e., positive net cost savings on page 20 in EPA-Army (2017)). The only way to justify a negative net benefit calculation would be to conduct the appropriate sensitivity analysis, as discussed below, and show that negative net benefits are more likely than positive net benefits, which was not done.[114]

SELC also obtained a second review, this one conducted by Dr. Jeffrey Mullen, an associate professor in the College of Agricultural and Environmental Sciences at the University of Georgia. Dr. Mullen likewise concluded that the agencies' new analysis erroneously disregarded the Clean Water Rule's benefits while continuing to consider its costs. In particular, Dr. Mullen noted that the claimed reasons for the agencies' decision not to quantify the Clean Water Rule's benefits likewise applied to its costs, which the agencies still quantified in the new analysis:

> Several sources of uncertainty are noted: an insufficient number of studies were used to establish the estimates, the data were too old, and those studies may not have followed what are currently considered best practices for data collection and analysis. Ironically, the same sources of uncertainty are also relevant to the permit application cost estimates for CWA Section 404 – those estimates relied on just two studies conducted during the same time period as the benefit studies, and they fail to report sufficient information to assess whether best practices for data collection and analysis have been followed.[115]

Like Dr. Whitehead, Dr. Mullen also notes that "there have been numerous empirical studies published in peer-reviewed journals since 2000" regarding the value of wetlands.[116]

Similarly, the Institute for Policy Integrity reviewed the agencies' analysis and concluded it is "biased, incomplete, and inaccurate." Summarizing Policy Integrity's principal findings, the review states:

- First, evidence used in economic analyses should be selected based on quality and relevance and should not be mechanically excluded based solely on the study's age. The criteria for inclusion should be applied consistently across evidence of both costs and benefits. Currently, the agencies wrongly exclude relevant studies on the environmental benefits of wetlands based purely on their age, while including old studies of compliance costs, which may actually be outdated because of changing circumstances.
- Second, when estimating costs, the agencies have failed to consider changing conditions like mitigation banks, making these estimates unreliable.

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[114] John C. Whitehead, Comments on "Economic Analysis for the Proposed Definition of 'Waters of the United States' – Recodification of Pre-existing Rules" at 2 (Sept. 2017) (prepared for & submitted by the Southern Environmental Law Center).
[115] Review of the 2017 EPA Economic Analysis for the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules at 13 (Sept. 2017) (prepared for & submitted by the Southern Environmental Law Center).
[116] *Id.*

ED_001803A_00005935-00043

- Third, relevant evidence for quantifiable, forgone benefits from wetland protection was ignored by the agencies, including recent estimates of positive economic value for isolated wetlands.
- Fourth, evidence shows that the 2015 Clean Water Rule would have substantial additional value relative to state-level regulations.
- Finally, the agencies should maintain the 2015 Clean Water Rule as the baseline for analysis.[117]

The agencies' economic analysis is thus a thoroughly implausible basis on which to rely for the action to repeal the Clean Water Rule.

B. The proposal is "without observance of procedure required by law"

1. The agencies may not refuse to accept and consider comments on the substance of the rule they are repealing or the rule they are issuing.

a. The Administrative Procedure Act imposes notice-and-comment requirements that govern this action.

The APA requires agencies to follow certain procedures before "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (defining rulemaking). The agency must (1) publish a general notice of proposed rulemaking in the Federal Register that includes "the terms or substance of the proposed rule or a description of the subjects and issues involved"; (2) give "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) "[a]fter consideration of the relevant matter presented, . . . incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* § 553(b), (c); *see N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012).

"The important purposes of [the APA's] notice and comment procedure cannot be overstated." *North Carolina Growers*, 702 F.3d at 763. The process promotes informed agency decisionmaking by allowing agencies to "benefit from the expertise and input of the parties who file comments," *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), and ensuring that "agency regulations are tested via exposure to diverse public comment," *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011). The process also helps ensure that "the agency maintains a flexible and open-minded attitude towards its own rules." *Nat'l Tour Brokers*, 591 F.2d at 902.

The notice-and-comment process is no less important when an agency is repealing a rule. "The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982).

[117] Institute for Policy Integrity Comments to Docket EPA-HQ-OW-2017-0203, at 1-2 (Sept. 2017).

ED_001803A_00005935-00044

Regardless whether an agency is issuing, amending, or repealing a rule, the "opportunity for comment must be a meaningful opportunity." *Prometheus Radio*, 652 F.3d at 450. "That means enough time with enough information to comment and for the agency to consider and respond to the comments." *Id.*

b. The content restriction imposed by the agencies violates the APA.

There is no question that the APA's notice-and-comment requirements apply here. The agencies are repealing a duly promulgated rule, the Clean Water Rule, and are formulating a new rule, by reinstating the regulatory text that preceded the Clean Water Rule. Indeed, the agencies have implicitly acknowledged that these requirements apply, by soliciting public comment on their action. But the agencies have imposed a content restriction on public comments: they ask the public not to comment on the substance of either the Clean Water Rule or the pre-Clean Water Rule text, which they are now enacting into law. 82 Fed. Reg. at 34,903. This content restriction violates the APA.

In *North Carolina Growers*, the Fourth Circuit held that a similar content restriction violated the APA. There, the Department of Labor suspended a rule for nine months, pending a rulemaking to replace the rule. In the interim, the Department reinstated the prior rule. Although the Department sought public comment, it stated that it "only would consider comments concerning the suspension action itself, and not regarding the merits of either set of regulations." 702 F.3d at 761. The Fourth Circuit held that the record "clearly demonstrate[d] that the Department did not satisfy its notice and comment obligations." *Id.* at 769. The content restriction "was so severe in scope, by preventing any discussion of the 'substance or merits' of either set of regulations, that the opportunity for comment cannot be said to have been 'a meaningful opportunity.'" *Id.* at 770 (quoting *Prometheus Radio*, 652 F.3d at 450). The same is true here.

The agencies advance two justifications for the content restriction they impose here. First, they claim that they are "simply codify[ing] the legal *status quo*" by reinstating the pre-Clean Water Rule text. 82 Fed. Reg. at 34,903. Second, they claim that their action is a "temporary, interim measure pending substantive rulemaking." *Id.* Neither justification is valid.

First, by claiming that they are codifying the status quo, the agencies try to avoid acknowledging what they are actually doing: engaging in rulemaking. A court may have stayed the Clean Water Rule pending a legal challenge (a stay that could be lifted, as the agencies acknowledge in their proposal, *id.* at 34,902). But that judicial stay doesn't change the fact that the rule on the books is the Clean Water Rule. *E.g.*, 33 C.F.R. § 328.3; *see also Fox*, 556 U.S. at 515 ("An agency may not . . . simply disregard rules that are still on the books."). By proposing to repeal the Clean Water Rule and issue a different rule (which is not currently on the books), the agencies are engaging in rulemaking, and the APA's notice-and-comment requirements apply.

It does not matter that the agencies are proposing to "reinstat[e]" regulations that previously were in effect and that those regulations "previously had been subject to notice and comment procedures." *North Carolina Growers*, 702 F.3d at 764. Notice-and-comment requirements apply whenever an agency formulates a rule, regardless "whether the rule at issue was newly drafted or

ED_001803A_00005935-00045

was drawn from another source." *Id.* at 765. When the agencies issued the Clean Water Rule in June 2015, it "superseded the [prior] regulations." *Id.* at 765. "As a result, the [prior] regulations ceased to have any legal effect, and their reinstatement would . . . put in place a set of regulations that [are] new and different 'formulations' from the [Clean Water Rule]." *Id.* This is rulemaking. *Id.* at 765-66.

In fact, the agencies acknowledge they are engaging in rulemaking. They refer repeatedly to their action as a "proposed rule" and a "rulemaking," 82 Fed. Reg. at 34,899-904, and they solicit public comments, albeit with a content restriction, *id.* at 34,903. This "conduct . . . is highly relevant and shows that the [agencies] view[] the reinstatement of the [prior] regulations as 'rule making.'" *North Carolina Growers*, 702 F.3d at 765. "Similar attempts by an agency to comply with APA notice-and-comment procedures suggest that the agency believed them to be applicable, and support the conclusion that those procedures were applicable." *Id.* (internal quotation marks omitted).

Second, the agencies cannot justify their content restriction by claiming that the reinstatement of the pre-Clean Water Rule text is temporary. There is no guarantee that the reinstatement will be temporary; as discussed above, the agencies may not even complete the second step of their envisioned rulemaking at all, much less quickly. But even if the reinstatement were temporary, that would not matter. The agencies are still repealing a rule and issuing a new rule, and they must comply with APA notice-and-comment requirements, regardless of the length of time the new rule will be in effect. In *North Carolina Growers*, the rule suspension was expressly temporary—just nine months—but that did not change the court's analysis. The court concluded that, "by reinstating the superseded and void [prior] regulations (albeit temporarily), the Department engaged in the 'formulating' and the 'repealing' aspects of 'rule making' under the APA," and notice-and-comment requirements therefore applied. *Id.* at 765-66.

Because the agencies are engaging in a rulemaking proceeding and the APA's notice-and-comment requirements apply, the agencies are "obligated to identify and respond to relevant, significant issues raised during [this] proceeding[]." *Id.* at 769. Here, as in *North Carolina Growers*, the merits of the rule the agency proposes to repeal and the rule it proposes to reinstate are "not only 'relevant and important,' but [are] integral to the proposed agency action and the conditions that such action [seeks] to alleviate." *Id.* at 769-70. Here, as discussed above, the agencies' entire rationale for the action is to ensure clear regulatory standards. For starters, then, the question whether the pre-Clean Water Rule text or the Clean Water Rule is more likely to achieve regulatory clarity is highly relevant to the action.

Even more critically, the agencies cannot avoid analyzing, and seeking comment on, the substance of the two rules by pretending that this is not a substantive rulemaking. *Cf. P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1024 (D.C. Cir. 2008) (holding that Corps did not "reopen" regulations to challenge where Corps did not even propose to amend regulations, much less formally repeal and replace regulations), cited at 82 Fed. Reg. at 34,903. It is hard to imagine a more substantive outcome to a rulemaking than repealing a rule in its entirety and replacing it with a different rule. "It quite defies belief that the [proposal] deem[s] comments on the merits of the regulations to be suspended or the regulations to be reinstated out of bounds. . . . In other words, the very agency actions that would most affect those subject to the

varying sets of regulations [are] ruled off limits to discussion." *North Carolina Growers*, 702 F.3d at 772 (Wilkinson, J., concurring).

By refusing to receive comments on the substance of the Clean Water Rule or the pre-Clean Water Rule text, the agencies are "ignor[ing] important aspects of the problem" and are "not follow[ing] procedures required by law." *Id.* at 770. "This all risks giving the impression that the agency ha[s] already made up its mind and that the comment period [i]s, at best, for show and provided only in an effort to do the minimum necessary to squeak by judicial review." *Id.* at 772 (Wilkinson, J., concurring). The proposal violates the APA and must be withdrawn.

2. The agencies may not propose one rule for the Code of Federal Regulations while proposing to enforce a different and ambiguous set of unpublished rules

The agencies' proposal is without observance of procedure required by law (5 U.S.C. § 706(2)(D)) for a second reason: it does not give the "terms or substance of the proposed rule," *id.* § 553(b)(3), and so does not give interested citizens "an opportunity to participate in the rule making," *id.* § 553(c).

a. Enacting one rule while proposing to enforce some other vaguely described rules violates the agencies' obligation to give notice of the proposal.

The agencies propose to codify "the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule." 82 Fed Reg at 34,901. But they do not plan to enforce that text outright. Instead, they will enforce the rule *as informed by*:

- "applicable" guidance documents (giving two examples),
- "relevant" memoranda,
- guidance letters,
- Supreme Court decisions,
- "applicable" case law, and
- "longstanding agency practice."

Id. at 34,902, 34,899. In other words, the agencies propose to follow rules that are not expressly spelled out in the proposal, but that apparently may be found somewhere on a long, vague list of outside documents.

This does not give the public adequate notice of the rules the agencies are proposing to enforce and apply. As described above, the most salient characteristic of the regulatory regime the agencies are proposing to reenact (*i.e.*, the application of the pre-2015 text as "informed by" various guidelines and case law interpretations) was confusion. The proposal to return willingly to an opaque and inconsistent set of guidelines and principles necessarily deprives the public of a meaningful opportunity to comment.

ED_001803A_00005935-00047

It is no answer for the agencies to say that this confusing practice is already in place—the "status quo." While a regulatory regime might, over time, become unclear, that hardly excuses an agency's decision to *purposefully enact an unclear legal framework*. It is even less acceptable for the agencies to have already ended that confusing legal framework by issuing the Clean Water Rule, and then propose to scrap the extant clarifying regulation in favor of a regression to a legal mess. The so-called "status quo" that the agencies are proposing was such a mess; the proposal therefore does not, and perhaps cannot, clearly delineate exactly what rules and definitions the agencies are proposing to apply here.

Proposing a set of ill-defined rules to be found in a long list of outside documents violates the requirement to give fair notice and enable informed comment. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (notice requirements are designed to ensure that regulations are tested via exposure to public comment, to ensure fairness to affected parties, and to give affected parties a chance to develop evidence to support their objections and thereby enhance judicial review).

b. If the agencies are proposing to treat the "guidance documents" as law, they must go through the notice-and-comment process.

The preamble to the proposed rule suggests that the agencies will apply at least the guidance outlined in two documents from 2003 and 2008. If the guidance documents will constrain the agency's discretion in determining the scope of the Clean Water Act, they are "legislative rules" and should be included as part of the proposal for notice and comment. *See e.g.*, *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (rule is a legislative rule that must be subject to notice and comment if it is "of present binding effect" and constrains the agency's discretion). Although the agencies have a footnote in the proposal saying that the 2008 guidance *says* it is not "intended" to create legally binding requirements, 82 Fed. Reg. at 34,901 n.1, what matters is whether in practice the agency's discretion is constrained. *McLouth*, 838 F.2d at 1320 ("EPA's current claim that 'it does not consider itself ... bound by [the VHS] model' ... is obviously of little weight. The agency's past characterizations, and more important, the nature of its past applications of the model, are what count."); *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) (agency pronouncement will be considered binding as a practical matter if it *either* appears on its face to be binding *or* is *applied* by the agency in a way that indicates it is binding). As described above, before the Clean Water Rule's enactment, the agencies' discretion in making jurisdictional determinations was in practice constrained by the guidance outlined in the 2008 memorandum. Assuming the agencies are proposing to return to that practice, at least that memorandum must be formally proposed for notice and comment.

Finally, for the same reasons the agencies' statement that they will not consider substantive comment on the proposal generally is a violation of the APA, as discussed above, the failure to consider substantive comment on the guidance documents violates the APA.

ED_001803A_00005935-00048

3. Administrator Pruitt's closed mind violates due process.

The proposal also does not observe legally-required procedure because the chief decision-maker in this matter clearly intends to repeal the Clean Water Rule, no matter what legal or factual information stakeholders bring to bear during the comment period. The EPA Administrator has ultimate responsibility for implementing the definition of "waters of the United States" under the Clean Water Act, as a formal Attorney General's opinion confirms.[118] That role requires Administrator Pruitt to provide meaningful opportunity for public input and – critically for the present rulemaking – to fairly consider that input in making a final decision.[119] "Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments."[120] Unfortunately, Administrator Pruitt vehemently opposes the Clean Water Rule, has done so for years, and does not have a mind open to the possibility of retaining the Rule. Instead, the instant action simply serves as Administrator Pruitt's attempt to accomplish the repeal without having to justify himself. The law does not permit such behavior.

Administrator Pruitt has appeared in numerous public (and some less public) forums to condemn the Clean Water Rule. His remarks reveal a perspective that the Rule is unlawful, uncertain, and overreaching, and that it is a "bad" rule that he would "ditch." He also routinely repeats documented falsehoods about the Clean Water Rule, such that he cannot be trusted to "rationally consider arguments" in favor of retaining the Rule. Below, we present several examples of this perspective; as a whole, they clearly show Administrator Pruitt's "unalterably closed mind" and his complete unwillingness to consider contrary views.

On the day President Trump signed the executive order directing the agencies to review and consider changes to the Clean Water Rule, Administrator Pruitt gave a speech to the American Farm Bureau Federation, a longtime opponent of the Rule which sued the agencies over their adoption of the Rule.[121] During his speech, Administrator Pruitt described the executive order's purpose as "to withdraw the waters of the United States Rule," and celebrated along with the attendees that "relief is on the way with respect to withdrawing the Waters of the United States

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[118] 43 U.S. Op. Atty. Gen. 197 (Sept. 5, 1979) ("The Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe the jurisdictional term 'navigable waters' under § 404 of the Federal Water Pollution Control Act."); *see also id.* at 200-01 ("The term 'navigable waters,' moreover, is a linchpin of the Act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402 permit program for point source discharges, the regulation of discharges of oil and hazardous substances in § 311 and the regulation of discharges of vessel sewage in § 312. Its definition is not specific to § 404, but is included among the Act's general provisions.") (citations omitted); *id.* at 201 ("It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether-and to what extent-any particular water body comes within the jurisdictional reach of the Federal Government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement.") (citations omitted).

[119] *Grand Canyon Air Tour Coal. v. F.A.A.*, 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them.").

[120] *Air Transport Ass'n of America, Inc. v. National Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (citing *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C.Cir.1979)).

[121] https://www.youtube.com/watch?v=yVzz3IYrpac

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Rule. It's already started." Later, Administrator Pruitt derided the Rule as a vast overreach, and claimed falsely that "puddles" are covered by the Rule, as he has done frequently thereafter:

> That rule reflected a power grab. It reflected an issue that said the EPA was going to take dry creek beds and puddles – literally – and exercise jurisdiction over those areas to require what? Permitting and cost at the expense of fines and penalties if you didn't comply. And that was all because a statute was taken and reimagined in a way that gave this agency – tried to give this agency – more power than what Congress intended.[122]

On a radio broadcast this July, Administrator Pruitt again misled his audience. He repeated the falsehood that the Clean Water Rule covered puddles and – in case one might think he was exaggerating for effect – he doubled down on that statement by saying, "and that's not hyperbole…."[123] He also claimed that the Clean Water Rule's implementation confused landowners,[124] despite identifying no evidence to support that claim and despite the fact that the Rule was enforced for a relatively short time period prior to the Sixth Circuit's stay, making claims of widespread problems hard to believe.

In another radio interview, Administrator Pruitt argued that the Clean Water Rule violated the law, and intimated that courts agreed with him. After being asked about his multiple lawsuits against EPA prior to leading the agency, he said, "my response to that is they deserved it. And they deserved it because the exceeded their statutory authority, they exceeded their constitutional authority, and when they got outside of their lane, they got sued and they got stopped."[125] He maintained inaccurately that a preliminary hold on the Rule showed it to be unlawful: "The EPA got the definition wrong. How do we know they got it wrong? The Sixth Circuit said so. They issued a stay against the WOTUS rule…." And Administrator Pruitt ascribed an ill motive to the prior administration for adopting the Rule, saying, "that was all about power. They wanted to make land use decisions in place of private property owners and the states."[126]

Appearing on Fox News on June 30, Administrator Pruitt responded to concerns about undermining protections for sources of drinking water by using one of his regular talking points: "Look, dry creek beds, puddles, and drainage ditches don't apply under the Clean Water Act."[127] He also suggested that the Clean Water Rule, which applied – appropriately -- to numerous non-navigable waters, violated the law, because "[t]he only authority we have under the Clean Water Act is the authority that Congress gives us. And historically, as you know, that's navigable streams and waters, interstate commerce clause of the Constitution."[128]

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[122] *Id.* The notion that the Clean Water Rule reached "puddles" is demonstrably false. 33 C.F.R. § 328.3(b)(4)(vii) (Clean Water Rule provision explicitly exempting puddles).
[123] WCCO Morning News with Dave Lee, available at https://omny.fm/shows/dave-lee/7-19-17-epa-administrator-scott-pruitt?
[124] *Id.* ("That's what we saw in application, and so it created tremendous uncertainty for those building subdivisions, private property owners just using their land, farming and ranching….").
[125] Rob Port, WDAY, "Audio: EPA Administrator Scott Pruitt Touts Friendlier, More Cooperative Relationship With States" (May 10, 2017), available at https://www.sayanythingblog.com/entry/audio-epa-administrator-scott-pruitt-touts-friendlier-cooperative-relationship-states/.
[126] *Id.*
[127] Fox News: America's Newsroom, available at http://video.foxnews.com/v/5489092917001/?#sp=show-clips.
[128] *Id.*

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Within days of becoming Administrator, Mr. Pruitt said in a newspaper interview that the Clean Water Rule overstepped the authority EPA has under the Act and had to be changed. First, he characterized the Rule as unlawful because it "defined waters of the United States so broadly … that there really weren't any boundaries between federal and state jurisdiction…."[129] And he said the Rule "so expanded jurisdiction of the Clean Water Act that it just made it a statute like Congress never intended it to be. They never intended the EPA to have … jurisdiction over puddles and dry creek beds across the country…."[130] Second, Administrator Pruitt revealed that he has a set view that the alleged overreach has to be changed: "Federal jurisdiction usurped and displaced state jurisdiction. So that needs to be fixed." He labeled the basis for the Rule – the significant nexus analysis from *Rapanos* – as "the poorest form of rule-making," and said, "[t]hat has to be fixed going forward, and that means the Kennedy definition is something that doesn't provide" clarity.[131]

As part of a multi-state tour in which Administrator Pruitt barnstormed around the country to meet with organizations and officials that likewise opposed the Clean Water Rule, he visited Iowa and held up an American Farm Bureau Federation sign that said "It's Time to Ditch the Rule," as pictured below. It's hard to imagine a more obvious display of a closed mind than embracing the anti-Clean Water Rule campaign created by one of the Rule's principal opponents.

[129] Philip Brasher, "Pruitt: EPA rewrite will limit reach of WOTUS rule," Agri-Pulse (Mar. 1, 2017), available at https://www.agri-pulse.com/articles/8981-pruitt-epa-rewrite-will-limit-reach-of-wotus-rule.
[130] *Id.*
[131] *Id.*

During an Iowa television interview, Administrator Pruitt repeated his claim that the Clean Water Rule inappropriately covers puddles, dry creek beds, and ephemeral drainage ditches, and alleged that the Rule "would've covered 97 percent of the state of Iowa as a water of the United States."[132] These claims are false. As noted above, the plain text of the Rule belies Administrator Pruitt's "puddles" contention, and copious data disprove the notion that the vast majority of Iowa or any state would be considered a water body.[133] Administrator Pruitt also defended his prior extensive litigation against EPA, including his challenge to the Clean Water Rule, and said that EPA "deserved" those lawsuits.[134]

Sadly, the preceding summary represents only a fraction of Administrator Pruitt's active advocacy against, and closed mind with respect to, the Clean Water Rule. Some other examples include:

- Administrator Pruitt appeared in a video produced by the National Cattlemen's Beef Association, a longtime opponent of the safeguards in the Clean Water Rule. He repeated the same indictments of the Rule – that it overreached and applied to features, including puddles, never meant to be covered – as he has many times before. He also indicated that the outcome of the rulemaking was sure; after denigrating the Clean Water Rule, he said "we're fixing that…."[135] The NCBA video urged viewers to visit its website to comment on the repeal proposal, from which people could copy a form letter saying, among other things: "I am writing to support the proposal to repeal the 2015 "Waters of the U.S." rule. As a cattle producer, I strongly support this effort."[136]
- On July 18, Administrator Pruitt tweeted that he wants EPA to "work with farmers to protect the environment w/o overreaching with rules like #WOTUS."[137]
- On the day he signed the instant proposal, he re-tweeted a message from Speaker Ryan treating the repeal as a foregone conclusion. It said: "The West has finally won in the battle over the Obama administration's WOTUS rule. *** I applaud the Trump administration for siding with American jobs and *rescinding this harmful rule.*[138]
- At an appearance at the Concordia Annual Summit on September 19, Administrator Pruitt repeated his false claim about the Rule applying to "a dry creek bed, a puddle, an ephemeral ditch," and definitively declared the result of the present rulemaking: "*we're withdrawing the bad rule – the one in 2015* that created uncertainty, that enlarged the definition inconsistent with the text and the legislative history."[139]

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[132] KCCI Des Moines, "KCCI Close Up: The Environmental Protection Agency" (Aug. 23, 2017), available at http://www.kcci.com/article/kcci-close-up-the-environmental-protection-agency/12005746.
[133] *See, e.g.*, Iowa Dept. of Natl. Resources, Iowa's Wetlands ("Prior to European settlement, wetland basins covered 4 to 6 million acres, or approximately 11% of Iowa's surface area. Wetlands were part of every watershed in the state, but nearly 95% of them have been drained."), available at http://www.iowadnr.gov/Environmental-Protection/Water-Quality/Water-Monitoring/Wetlands.
[134] KCCI Close Up.
[135] https://www.youtube.com/watch?v=vTVd54WyhDQ&hd=1
[136] Natl. Cattlemen's Beef Ass'n, News Releases: Take Action Now – Tell EPA to Kill WOTUS Today!, available at http://www.beefusa.org/newsreleases1.aspx?newsid=6381.
[137] https://twitter.com/EPAScottPruitt/status/887350781749284864.
[138] https://twitter.com/SpeakerRyan/status/879769583263076356 (emphasis added).
[139] https://www.youtube.com/watch?v=dnq-D-DlQcQ (emphasis added) (Administrator Pruitt's appearance begins at approximately the 4 hour, 7-minute mark).

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- The astonishing political decision discussed above – to effectively treat the benefits of wetlands protection as zero – likewise supports the notion that the present rulemaking is a sham public process with a preordained outcome.
- According to an Iowa Farm Bureau report on Administrator Pruitt's August visit to the state, the Administrator condemned the Clean Water Rule as unlawful,[140] pledged to repeal it,[141] and repeated falsehoods about its scope and the regulatory process.[142]

In contrast to these numerous statements showing that Administrator Pruitt already made up his mind to repeal the Clean Water Rule, we are unaware of any comparable statement in which he indicated an openness to retaining the Rule. That is a textbook example of a due process violation, and is yet another reason why the proposed repeal is illegal.

4. The 60-day public comment period is arbitrary and capricious and not consistent with the Clean Water Act.

As the foregoing comments make clear, because this rulemaking action seeks to entirely redefine what aquatic features the Clean Water Act can cover, it is as consequential as one can imagine. Nevertheless, the agencies provided only a 60-day comment period on the proposal, a stark contrast to the approach the agencies took in adopting the very rules that they now seek to repeal. Limiting stakeholder input to such an abbreviated time fails to comply with applicable requirements because it provides inadequate opportunity to the public to fully participate.

Both the APA and the Clean Water Act require meaningful time and opportunity to comment on proposed rules. The APA directs that agencies undertaking rulemaking allow "interested persons an opportunity to participate," and empowers courts to invalidate agency decisions where the length of the comment period is "arbitrary and capricious" or "an abuse of discretion".[143] The Clean Water Act similarly provides that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States."[144]

The opportunity afforded stakeholders to comment on this proposal pales in comparison to that associated with the Clean Water Rule. The agencies published the Clean Water Rule proposal in

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[140] Dirck Steimel, EPA leader pledges to rescind and replace WOTUS rule, Iowa Farm Bureau ("'The agency has not operated within the rule of law,' Pruitt said. 'You had an agency that took the definition of a water of the U.S. under the Clean Water Act and reimagined it. No one in Congress ever thought that a puddle in Iowa should be considered a water of the U.S.'"), available at https://www.iowafarmbureau.com/Article/EPA-leader-pledges-to-rescind-and-replace-WOTUS-rule.

[141] *Id.* ("'We want to get rid of this bad rule and replace it with something much better'").

[142] *Id.* ("The new rule, Pruitt said, will protect the environment without the spreading federal jurisdiction over vast portions of the country. 'We are going to make sure that puddles, dry creek beds, ephemeral drainage ditches, man-made tile lines and irrigation ponds are not considered a water of the United States,' he said."); *see also id.* (Administrator Pruitt reportedly falsely alleged that the Clean Water Rule was the product of improper collusion with conservation organizations: "Another big problem was that the EPA did not go through the prescribed federal rulemaking process in writing WOTUS and instead encouraged litigation from environmental activist groups, the EPA administrator told the Iowa farm leaders. That subverts the process and hurts those regulated, he said.").

[143] 5 U.S.C. §§ 553(c); 706(2)(A).

[144] 33 USC §1251(e).

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the Federal Register on April 21, 2014, and the comment period ended on November 14, 2014 – a total of 207 days. Such a period is reasonable in view of the significance of the definition of "waters of the United States" to the proper implementation of the Clean Water Act. The agencies' current proposal acknowledges as much, even while trying to downplay the significance of this action; the preamble states that the "scope of CWA jurisdiction is an issue of great national importance," one that warrants "robust deliberations" about the law's coverage.[145] However, the comment period on this proposal – even accounting for the paltry 30-day extension the agencies granted – only runs from July 27 to September 27, or 62 days.

At a minimum, this brief period of time is arbitrary and capricious and an abuse of the agencies' discretion. The period runs for less than one-third the length of the Clean Water Rule's comment opportunity. Moreover, the time provided is only as long as the presumptive minimum comment period for run-of-the-mill rulemakings pursuant to Executive Order 12,866,[146] rendering it manifestly unreasonable for an action, like this one, "of great national importance".

Finally, the agencies discouraged and frustrated meaningful public input, violating the Clean Water Act's directive to encourage and assist such participation. For instance, the agencies withheld critical information – namely, the views of state, local, and tribal authorities on the propriety of hastily promulgating a follow-up rule based on Justice Scalia's *Rapanos* opinion – until only two weeks before the close of the comment period. In addition, the agencies made commenting practically much more difficult by failing to include in the docket, and therefore imposing on the public the obligation to collect and submit, all relevant materials from prior administrative actions concerning the "waters of the United States" definition.

V. Conclusion

Please abandon this reckless and cynical attempt to take away safeguards for streams, wetlands, and other waters on which people across the country depend for pollution filtration, outdoor recreation, flood control, and drinking water supply. The agencies' proposal represents woefully misguided and unlawful environmental policy and also denies concerned citizens meaningful public participation opportunities.

Sincerely,

Jon P. Devine, Jr.
Senior Attorney, Water Program
Natural Resources Defense Council
1152 15th St NW, Suite 300
Washington, D.C. 20005

[145] 82 Fed. Reg. at 34,902.

[146] Exec. Order 12,866, 58 Fed. Reg. No. 190, § 6(a)(1) (Oct. 4, 1993) ("each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days").

ED_001803A_00005935-00054

To: Bailey, Ethel[Bailey.Ethel@epa.gov]
From: Bodine, Susan
Sent: Thur 9/21/2017 6:29:21 PM
Subject: Fwd: Pre-Brief for upcoming meeting w/Administrator Pruitt >$50M ROD re: San Jacinto Superfund Site, call in number Ex. 6 - Personal Privacy
San Jacinto ROD Briefing. DRAFT. 09-21-17.pptx
ATT00001.htm

Sent from my iPad

Begin forwarded message:

From: "Edlund, Carl" <Edlund.Carl@epa.gov>
To: "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>, "Bodine, Susan" <bodine.susan@epa.gov>, "Mackey, Cyndy" <Mackey.Cyndy@epa.gov>, "DeLeon, Rafael" <Deleon.Rafael@epa.gov>, "Patterson, Kenneth" <Patterson.Kenneth@epa.gov>, "Lammie, Benjamin" <Lammie.Benjamin@epa.gov>, "Ergener, Deniz" <Ergener.Deniz@epa.gov>, "Berube, Anne" <berube.anne@epa.gov>, "Breen, Barry" <Breen.Barry@epa.gov>, "Woolford, James" <Woolford.James@epa.gov>, "Stalcup, Dana" <Stalcup.Dana@epa.gov>, "Peycke, Mark" <Peycke.Mark@epa.gov>, "Openchowski, Charles" <openchowski.charles@epa.gov>, "Michaud, John" <Michaud.John@epa.gov>
Cc: "Poore, Christine" <Poore.Christine@epa.gov>, "Payne, James" <payne.james@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Phillips, Pam" <phillips.pam@epa.gov>, "Foster, Anne" <Foster.Anne@epa.gov>, "Crossland, Ronnie" <Crossland.Ronnie@epa.gov>, "Meyer, John" <Meyer.John@epa.gov>, "Sanchez, Carlos" <sanchez.carlos@epa.gov>, "Miller, Garyg" <Miller.Garyg@epa.gov>, "Banipal, Ben" <banipal.ben@epa.gov>, "Johnson, Lydia" <johnson.lydia@epa.gov>
Subject: RE: Pre-Brief for upcoming meeting w/Administrator Pruitt >$50M ROD re: San Jacinto Superfund Site, call in numbe Ex. 6 - Personal Privacy

Thanks for the opportunity to run this by all of you.

Ex. 5 - Deliberative Process

Regards

-----Original Appointment-----
From: Starfield, Lawrence
Sent: Wednesday, September 20, 2017 1:59 PM
To: Starfield, Lawrence; Bodine, Susan; Mackey, Cyndy; DeLeon, Rafael; Patterson, Kenneth; Lammie, Benjamin; Ergener, Deniz; Berube, Anne; Breen, Barry; Woolford, James; Stalcup, Dana; Edlund, Carl; Peycke, Mark; Openchowski, Charles; Michaud, John
Cc: Poore, Christine; Payne, James; Coleman, Sam; Phillips, Pam; Foster, Anne; Crossland, Ronnie; Meyer, John; Sanchez, Carlos; Miller, Garyg; Banipal, Ben; Johnson, Lydia
Subject: Pre-Brief for upcoming meeting w/Administrator Pruitt >$50M ROD re: San Jacinto Superfund Site, call in number Ex. 6 - Personal Privacy
When: Thursday, September 21, 2017 3:00 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: 3216WJC-South

To: Knopes, Christopher[Knopes.Christopher@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
Cc: Hindin, David[Hindin.David@epa.gov]; Dombrowski, John[Dombrowski.John@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]
From: Bodine, Susan
Sent: Fri 11/3/2017 9:10:33 PM
Subject: RE: SRF Materials (partial) RE: Follow-up OC Bi-Weekly 10-30-17

Do you also have the CAFO implementation Technical Paper?

From: Knopes, Christopher
Sent: Wednesday, November 1, 2017 6:00 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Hindin, David <Hindin.David@epa.gov>; Dombrowski, John <Dombrowski.John@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>
Subject: SRF Materials (partial) RE: Follow-up OC Bi-Weekly 10-30-17

Cari,

Here are two of the three SRF items requested as follow-up to Monday's OC bi-weekly: Barnes memo and addendum and the draft SRF Round 3 report for Texas. We have drafted a description of the Region 4 annual data metric analysis and have asked the region to review it for accuracy. We will get that to you shortly.

Chris

Chris Knopes, Director

Planning, Measures, and Oversight Division

Office of Compliance, OECA

202-564-2337

From: Shiffman, Cari
Sent: Monday, October 30, 2017 11:27 AM
To: Hindin, David <Hindin.David@epa.gov>; Dombrowski, John <Dombrowski.John@epa.gov>
Cc: Knopes, Christopher <Knopes.Christopher@epa.gov>; Mason, Michael <Mason.Michael@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Subject: Follow-up OC Bi-Weekly 10-30-17

David,

Here are some follow-up items from today's bi-weekly:

1) State Review Framework (SRF) Overview

a. Send copies of Barnes memo and addendum

b. Provide a description of Region 4's Annual Data Metric Analysis

c. E-mail Patrick a copy of the draft SRF Round 3 Texas Report

2) Follow-up on NPDES e-reporting rule Implementation

a. Provide copy of NPDES e-rule CAFO Implementation Technical Paper

Thanks,

Cari Shiffman, Special Assistant

U.S. Environmental Protection Agency

Office of Enforcement and Compliance Assurance

Office: (202) 564-2898 | Mobile: (202) 823-3277

To: Emmerson, Caroline[Emmerson.Caroline@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]
Cc: Mackey, Cyndy[Mackey.Cyndy@epa.gov]; DeLeon, Rafael[Deleon.Rafael@epa.gov]; Badalamente, Mark[Badalamente.Mark@epa.gov]; Healy, Helena[Healy.Helena@epa.gov]; Gardner, Monica[Gardner.Monica@epa.gov]; Sander, Matthew[Sander.Matthew@epa.gov]; Boehr, Craig[Boehr.Craig@epa.gov]; Previ, Caroline[Previ.Caroline@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Miles, Erin[Miles.Erin@epa.gov]
From: Bodine, Susan
Sent: Wed 11/15/2017 7:31:01 PM
Subject: RE: Action Requested: Review of OSRE's Proposed Response to House T&I Minority BF question related to municipal owner/operator liability

Thank you, I have no comments.

From: Emmerson, Caroline
Sent: Wednesday, November 15, 2017 12:37 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Mackey, Cyndy <Mackey.Cyndy@epa.gov>; DeLeon, Rafael <Deleon.Rafael@epa.gov>; Badalamente, Mark <Badalamente.Mark@epa.gov>; Healy, Helena <Healy.Helena@epa.gov>; Gardner, Monica <Gardner.Monica@epa.gov>; Sander, Matthew <Sander.Matthew@epa.gov>; Boehr, Craig <Boehr.Craig@epa.gov>; Previ, Caroline <Previ.Caroline@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>
Subject: RE: Action Requested: Review of OSRE's Proposed Response to House T&I Minority BF question related to municipal owner/operator liability

Susan,

In response to your comments, OSRE has revised the response to House T&I Minority staff below. We will bring copies to the OSRE general.

Caroline

OSRE's Draft Response to House T&I Minority Staff

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Bodine, Susan
Sent: Tuesday, November 14, 2017 9:04 AM
To: Emmerson, Caroline <Emmerson.Caroline@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>

Cc: Mackey, Cyndy <Mackey.Cyndy@epa.gov>; DeLeon, Rafael <Deleon.Rafael@epa.gov>; Badalamente, Mark <Badalamente.Mark@epa.gov>
Subject: RE: Action Requested: Review of OSRE's Proposed Response to House T&I Minority BF question related to municipal owner/operator liability

Ex. 5 - Deliberative Process

From: Emmerson, Caroline
Sent: Monday, November 13, 2017 6:31 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Mackey, Cyndy <Mackey.Cyndy@epa.gov>; DeLeon, Rafael <Deleon.Rafael@epa.gov>; Badalamente, Mark <Badalamente.Mark@epa.gov>
Subject: Action Requested: Review of OSRE's Proposed Response to House T&I Minority BF question related to municipal owner/operator liability

Susan,

As you know, last Tuesday (11/7) we had a conference call with HEC and House T&I staff regarding BF legislation. Following that call, T&I Minority staff (Ryan Seiger) requested our TA comments on the attached language. Specifically, he wants to know if this language would codify the current statutory requirements for properties acquired voluntarily, involuntarily, or through the use of eminent domain with regard to "care" standards for hazardous substances at a facility for State or local governments to avail themselves of Superfund liability protections within CERCLA 101(20)(D).

Per OCIR, we are offering edits and suggestions to T&I's draft language. OCIR's summary of our 11/7 conference call with HEC and T&I staff follows. Please let me know if you have any comments/edits regarding OSRE's proposed response below. These comments include input from DOJ (Leslie Allen and Tom Swegle) and OGC (Patrick Chang). Our comments are **due by noon tomorrow (Tuesday, 11/14)**. Sorry for the short timeline. Thanks, Caroline

OSRE's Draft Response to House T&I Minority Staff

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Snyder, Raquel
Sent: Thursday, November 09, 2017 11:11 AM
To: Folkemer, Nathaniel <Folkemer.Nathaniel@epa.gov>; Emmerson, Caroline <Emmerson.Caroline@epa.gov>; Mills, Derek <Mills.Derek@epa.gov>
Cc: Harwood, Jackie <Harwood.Jackie@epa.gov>; Boehr, Craig <Boehr.Craig@epa.gov>; Sander, Matthew <Sander.Matthew@epa.gov>; Chang, Patrick <Chang.Patrick@epa.gov>
Subject: T&I Minority Brownfields question related to municipal owner/operator liability
Importance: High

Good morning,

Here is the T&I requested IOU from the call we had on Tuesday morning.

From T&I:

Ex. 5 - Attorney Client

The T&I reported changes to 101(20)(D) were as follows:

"Section 101(20)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(20)(D)) is amended –

"(1) by striking "ownership or control" and all that follows through "by virtue" and

inserting "ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue"; and

"(2) by inserting "or fails to exercise appropriate care (as described in paragraph (40)(D)) following acquisition," after "from the facility".

Ex. 5 - Attorney Client

Again, we cannot draft language but we can make edits and suggestions. **Please provide any edits or comments on or before COB Monday 11/13**.

Please let me know if you have questions or need more time.

Many thanks,

Raquel Snyder

Congressional Liaison

U.S. EPA/Office of Congressional Affairs

(202)564-9586

To: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]
From: Bodine, Susan
Sent: Mon 11/27/2017 8:52:35 PM
Subject: Fwd: November 26 - Update on TransCanada "Ludden +17" Spill

Sent from my iPhone

Begin forwarded message:

From: "Ostrander, David" <Ostrander.David@epa.gov>
Date: November 27, 2017 at 3:49:52 PM EST
To: "Bodine, Susan" <bodine.susan@epa.gov>, "Benevento, Douglas" <benevento.douglas@epa.gov>, "Traylor, Patrick" <traylor.patrick@epa.gov>, "Davis, Patrick" <davis.patrick@epa.gov>, "Smidinger, Betsy" <Smidinger.Betsy@epa.gov>
Cc: "Dhieux, Joyel" <Dhieux.Joyel@epa.gov>
Subject: FW: November 26 - Update on TransCanada "Ludden +17" Spill

Susan,

Transcanada is removing free oil and soils at this time. The soils are being staged for disposal on a lined and bermed pad in accordance with state regulations. They will segregate the more saturated soils (i.e. the area around the rupture) from the less impacted soils (i.e. area lightly sprayed). Soils (and most waste streams) will be sampled and characterized prior to disposal. They are still a few weeks from disposal, thus no soil samples for disposal have been collected at this point. Transcanada intends to test the soils for hazardous waste characteristics and manage them appropriately as solid or hazardous wastes. According to Transcanada, these wastes are not exempt E&P wastes.

Thanks, and let us know if you have any other questions.

From: Bodine, Susan

Sent: Monday, November 27, 2017 8:09 AM

To: Ostrander, David <Ostrander.David@epa.gov>

Cc: Benevento, Douglas <benevento.douglas@epa.gov>; Traylor, Patrick

<traylor.patrick@epa.gov>

Subject: FW: November 26 - Update on TransCanada "Ludden +17" Spill

See question below – got an out of office reply from Betsy.

From: Bodine, Susan

Sent: Monday, November 27, 2017 10:03 AM

To: Smidinger, Betsy

<Smidinger.Betsy@epa.gov<mailto:Smidinger.Betsy@epa.gov>>

Cc: Benevento, Douglas

<benevento.douglas@epa.gov<mailto:benevento.douglas@epa.gov>>; Patrick

Traylor (traylor.patrick@epa.gov<mailto:traylor.patrick@epa.gov>)

<traylor.patrick@epa.gov<mailto:traylor.patrick@epa.gov>>

Subject: FW: November 26 - Update on TransCanada "Ludden +17" Spill

Betsy,

Ex. 5 - Deliberative Process

Thanks,

Susan

From: Traylor, Patrick

Sent: Monday, November 27, 2017 7:54 AM

To: Jackson, Ryan <jackson.ryan@epa.gov<mailto:jackson.ryan@epa.gov>>;

Bodine, Susan <bodine.susan@epa.gov<mailto:bodine.susan@epa.gov>>;

Bowman, Liz <Bowman.Liz@epa.gov<mailto:Bowman.Liz@epa.gov>>; Ferguson,

Lincoln <ferguson.lincoln@epa.gov<mailto:ferguson.lincoln@epa.gov>>

Subject: Fwd: November 26 - Update on TransCanada "Ludden +17" Spill

FYSA

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance U.S. Environmental

Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

Begin forwarded message:

From: "Smidinger, Betsy"

<Smidinger.Betsy@epa.gov<mailto:Smidinger.Betsy@epa.gov>>

To: "Benevento, Douglas"

<benevento.douglas@epa.gov<mailto:benevento.douglas@epa.gov>>,

"Thomas, Deb" <thomas.debrah@epa.gov<mailto:thomas.debrah@epa.gov>>,

"Davis, Patrick"

<davis.patrick@epa.gov<mailto:davis.patrick@epa.gov>>, "Traylor,

Patrick" <traylor.patrick@epa.gov<mailto:traylor.patrick@epa.gov>>

Cc: "Mutter, Andrew"

<mutter.andrew@epa.gov<mailto:mutter.andrew@epa.gov>>, "Ostrander, David" <Ostrander.David@epa.gov<mailto:Ostrander.David@epa.gov>>, "Williams, Laura" <williams.laura@epa.gov<mailto:williams.laura@epa.gov>>, "Dhieux, Joyel" <Dhieux.Joyel@epa.gov<mailto:Dhieux.Joyel@epa.gov>>, "Griswold, Hays" <Griswold.Hays@epa.gov<mailto:Griswold.Hays@epa.gov>>

Subject: Fwd: November 26 - Update on TransCanada "Ludden +17" Spill

Hi All - Here is Joyel's update for today.

Sent from my iPhone

Betsy Smidinger

ARA, Ecosystems Protection and Remediation Region 8, US EPA Denver, CO

(303) 312-6231 (o)

(303) 335-7627 (c)

Begin forwarded message:

From: "Dhieux, Joyel" <Dhieux.Joyel@epa.gov<mailto:Dhieux.Joyel@epa.gov>>

To: "Smidinger, Betsy" <Smidinger.Betsy@epa.gov<mailto:Smidinger.Betsy@epa.gov>>, "Ostrander, David" <Ostrander.David@epa.gov<mailto:Ostrander.David@epa.gov>>, "Williams, Laura" <williams.laura@epa.gov<mailto:williams.laura@epa.gov>>, "Griswold, Hays" <Griswold.Hays@epa.gov<mailto:Griswold.Hays@epa.gov>>

Subject: November 26 - Update on TransCanada "Ludden +17" Spill

Hi All,

I've attached the updated Incident Briefing for the TransCanada "Ludden +17" Spill. The pipeline was successfully drained last night and will removed tonight. The damaged section of pipeline will be sent to PHMSA for analysis.

If you have any questions, please let me know. Tomorrow is my last planned day on-site.

Joyel

.....

Joyel Dhieux

Federal On-Scene Coordinator

U.S. EPA Region 8

Tel: 303-312-6647

Cell: 720-441-9961

<Incident Briefing 11.26.17.docx>

<20171126 _ICS 209 Incident Status Summary.pdf>

To: Emmerson, Caroline[Emmerson.Caroline@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]
Cc: Mackey, Cyndy[Mackey.Cyndy@epa.gov]
From: Bodine, Susan
Sent: Fri 11/17/2017 3:14:29 PM
Subject: RE: T&I Minority Brownfields TA Related to Municipal Owner/Operator Liability

Ex. 5 - Deliberative Process

Here is the question asked:

Does the attached language T&I provided codify the current statutory requirements for properties acquired voluntarily, involuntarily, or through the use of eminent domain (w/r/t "care" standards for hazardous substances at a facility) for State or local governments to avail themselves of Superfund liability protections within 101(20)(D)?

From: Emmerson, Caroline
Sent: Friday, November 17, 2017 10:03 AM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Mackey, Cyndy <Mackey.Cyndy@epa.gov>
Subject: T&I Minority Brownfields TA Related to Municipal Owner/Operator Liability

Susan,

OCIR (Aaron and Raquel) reconsidered their comments on our draft response to House T&I that I sent you yesterday. The latest version (attached in redline/strikeout) from OCIR has much less text deleted and contains minor edits that do not change any of the substance. Cyndy approved this version. Please let me know if you have any comments.

Thanks,

Caroline

To: Ferguson, Lincoln[ferguson.lincoln@epa.gov]
Cc: Greenwalt, Sarah[greenwalt.sarah@epa.gov]; Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Tue 11/21/2017 7:11:37 PM
Subject: RE: Benzine

Benzene.

Ex. 5 - Deliberative Process

From: Ferguson, Lincoln
Sent: Tuesday, November 21, 2017 2:01 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: Benzine

Hazardous?

Sent from my iPhone

To: Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Fri 11/3/2017 8:47:51 PM
Subject: RE: Enforcement Weekly
Asset forfeiture fund.pdf

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Traylor, Patrick
Sent: Friday, November 3, 2017 4:38 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: RE: Enforcement Weekly

What do you think about Ex. 5 - Deliberative Process k

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process his would be more of an orientation to the work of CID through this example, rather than briefing him on a controversial or upcoming case.

In addition, I met with Jessica Taylor today to get her working on a pipeline of interesting cases in various stages of development that we can use going forward.

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

Ex. 6 - Personal Privacy cell)

From: Bodine, Susan
Sent: Friday, November 3, 2017 4:23 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>
Subject: RE: Enforcement Weekly

I'll add Ex. 5 - Deliberative Process and the Oct 27 lead wrap up.

And I'll look at the draft press releases.

Anything from your CID visits?

From: Traylor, Patrick

Sent: Friday, November 3, 2017 4:13 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: Enforcement Weekly

Susan:

I went through the enforcement weekly report and didn't see anything that jumped out at me as worthy of discussion during our meeting with the Administrator.

I started a draft briefing paper for Tuesday, but I only have Ex. 5 - Deliberative Process on it

Patrick

Patrick Traylor

Deputy Assistant Administrator

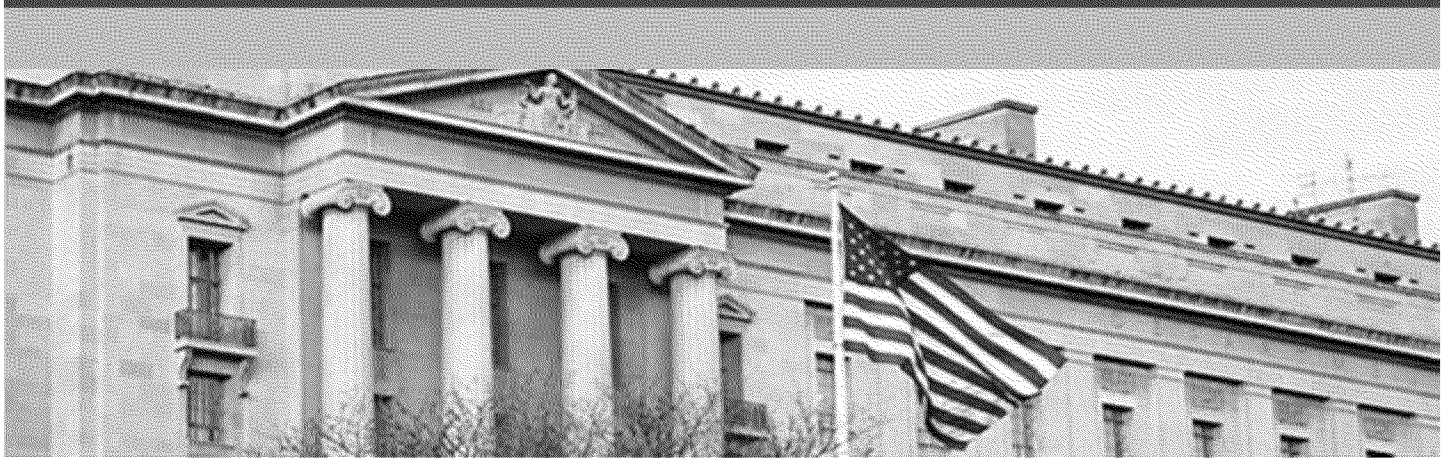
Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

Ex. 6 - Personal Privacy ell)

Office of the Inspector General
U.S. Department of Justice



Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2016

Audit Division 17-06 December 2016

ED_001803A_00005961-00001

ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND
ANNUAL FINANCIAL STATEMENTS
FISCAL YEAR 2016

OFFICE OF THE INSPECTOR GENERAL
COMMENTARY AND SUMMARY

This audit report contains the Annual Financial Statements of the Assets Forfeiture Fund and Seized Asset Deposit Fund (AFF/SADF) for the fiscal years (FYs) ended September 30, 2016, and September 30, 2015. Under the direction of the Office of the Inspector General (OIG), KPMG LLP performed the AFF/SADF's audit in accordance with auditing standards generally accepted in the United States of America. The FY 2016 audit resulted in an unmodified opinion on the financial statements. An unmodified opinion means that the financial statements are presented fairly, in all material respects, in accordance with U.S. generally accepted accounting principles. For FY 2015, the AFF/SADF also received an unmodified opinion on its financial statements (OIG Audit Report No. 16-04).

KPMG LLP also issued reports on internal control over financial reporting and on compliance and other matters. The auditors identified one significant deficiency in the FY 2016 *Independent Auditors' Report on Internal Control over Financial Reporting Based on an Audit of Financial Statements Performed in Accordance with Government Auditing Standards*. The significant deficiency related to inadequate internal controls over financial reporting. Improvements are needed in the AFF/SADF financial reporting process, specifically, controls over budgetary information presented in the financial statements, and completeness and accuracy of donation and forfeiture revenue.

No instances of noncompliance or other matters were identified during the audit that are required to be reported under *Government Auditing Standards*, in the FY 2016 *Independent Auditors' Report on Compliance and Other Matters Based on an Audit of Financial Statements Performed in Accordance with Government Auditing Standards.* Additionally, KPMG LLP's tests disclosed no instances in which the AFF/SADF financial management systems did not substantially comply with the *Federal Financial Management Improvement Act of 1996*.

The OIG reviewed KPMG LLP's reports and related documentation and made necessary inquiries of its representatives. Our review, as differentiated from an audit in accordance with *Government Auditing Standards*, was not intended to enable us to express, and we do not express, an opinion on the AFF/SADF's financial statements, conclusions about the effectiveness of internal control, conclusions on whether the AFF/SADF's financial management systems substantially complied with the *Federal Financial Management Improvement Act of 1996*, or conclusions on compliance and other matters. KPMG LLP is responsible for the attached auditors' reports dated November 9, 2016, and the conclusions expressed in the reports. However, our review disclosed no instances where KPMG LLP did not comply, in all material respects, with auditing standards generally accepted in the United States of America.

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AUDIT OF THE
ASSETS FOREITURE FUND
AND SEIZED ASSET DEPOSIT FUND
ANNUAL FINANCIAL STATEMENTS
FISCAL YEAR 2016

TABLE OF CONTENTS

MANAGEMENT'S DISCUSSION AND ANALYSIS 3

INDEPENDENT AUDITORS' REPORTS

Report on the Financial Statements 17

Report on Internal Control over Financial Reporting Based on an Audit of Financial Statements Performed in Accordance with *Government Auditing Standards* 21

Report on Compliance and Other Matters Based on an Audit of Financial Statements Performed in Accordance with *Government Auditing Standards* 29

PRINCIPAL FINANCIAL STATEMENTS AND RELATED NOTES

Consolidated Balance Sheets 33

Consolidated Statements of Net Cost 34

Consolidated Statements of Changes in Net Position 35

Combined Statements of Budgetary Resources 36

Notes to the Principal Financial Statements 39

OTHER INFORMATION

Combined Schedules of Spending 73

APPENDIX : OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT 77

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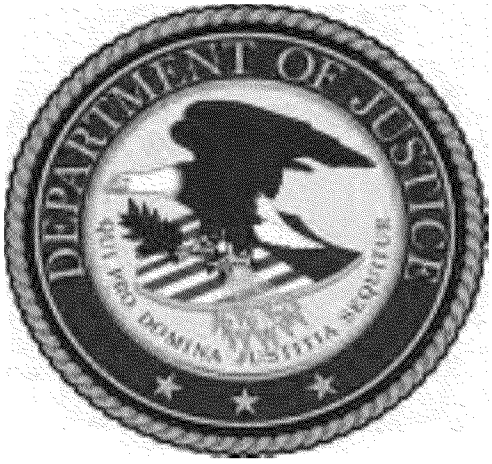
Department of Justice

Assets Forfeiture Fund and Seized Asset Deposit Fund
FY 2016 Management's Discussion and Analysis
(Unaudited)



September 30, 2016

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U.S. Department of Justice
Assets Forfeiture Fund and Seized Asset Deposit Fund
Management's Discussion and Analysis
(Unaudited)

MISSION

The mission of the Department of Justice (DOJ or Department) Asset Forfeiture Program (AFP) is to support the use of asset forfeiture consistently and strategically to disrupt and dismantle criminal enterprises, deprive wrongdoers of the profits and instrumentalities of criminal activity, deter crime, and restore property to victims of crime while protecting individual rights. Components responsible for the administration and financial management of the AFP are charged with lawfully, effectively, and efficiently supporting law enforcement authorities in the application of specified forfeiture statutes.

ORGANIZATION STRUCTURE

An agency is by definition a participating member of the AFP if the forfeited proceeds of its seized assets are deposited into the Assets Forfeiture Fund (AFF). Only member agencies that contribute to the AFF in this way are eligible to receive an annual allocation of resources from it. AFP participants from the Department of Justice include, the Asset Forfeiture Management Staff (AFMS) of the Justice Management Division; Asset Forfeiture and Money Laundering Section (AFMLS) of the Criminal Division; Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); Drug Enforcement Administration (DEA); Executive Office for Organized Crime Drug Enforcement Task Forces (OCDETF); Executive Office for United States Attorneys (EOUSA) and United States Attorneys' Offices (USAOs); Federal Bureau of Investigation (FBI); United States Marshals Service (USMS); and INTERPOL Washington, which withdrew from the AFP in March 2016. Other participants are United States Postal Inspection Service (USPIS); Department of Agriculture, Office of the Inspector General (USDA); Department of Defense, Defense Criminal Investigative Service (DCIS); Department of Health and Human Services, Food and Drug Administration, Office of Criminal Investigations (FDA); and Department of State, Bureau of Diplomatic Security (DS).

Table 1 displays the primary functional activities of the participating agencies in the AFP. These agencies investigate or prosecute criminal activity under statutes, such as the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Racketeer Influenced and Corrupt Organizations statute, the Controlled Substances Act, and the Money Laundering Control Act, or provide administrative support services to the AFP.

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Table 1. Asset Forfeiture Program Participants by Function

Function	AFMLS	OCDETF	AFMS	ATF	DCIS	DEA	DS	USAO	FBI	FDA	INTERPOL Washington	USDA	USMS	USPIS
Investigation		◆		◆	◆	◆	◆		◆	◆	◆	◆		◆
Litigation	◆							◆						
Custody of Assets				◆		◆			◆				◆	
Management	◆		◆										◆	

FINANCIAL STRUCTURE

The AFF and Seized Asset Deposit Fund (SADF) together comprise a single financial reporting entity of the DOJ, which includes cash and property seized for forfeiture, and the transactions and program activities of the DOJ AFP components and other participating agencies.

The AFF was created by the Comprehensive Crime Control Act of 1984 to be the repository of the proceeds of forfeitures under any law enforced by members of the AFP or administered by the DOJ (28 U.S.C. § 524(c)). The AFF is a special fund listed in the U.S. Treasury Federal Account Symbols and Titles (FAST) Book as 15X5042. Special funds are credited with receipts from specific sources that are earmarked by law for a specific purpose. At the point of collection these receipts are available immediately for expenditure depending upon statutory requirements.

The SADF is a deposit fund listed in the FAST Book as 15X6874. The SADF holds seized cash, the proceeds of any pre-forfeiture sale of seized property, and forfeited cash not yet transferred to the AFF. Income from operating businesses under seizure also may be held in the SADF. Because funds held in the SADF are not Government property, monies in the SADF cannot be expended. SADF balances are transferred to the AFF upon the successful conclusion of a forfeiture action or returned to the appropriate parties if the forfeiture is not accomplished.

Monies deposited in the AFF are used to cover operating costs of the AFP. These costs include, for example, forfeiture-related litigation and investigative expenses; asset management and disposition expenses; equitable sharing payments to participating state, local, and foreign governments; information systems; contract service payments; and payments of innocent third party claims. Salaries and employment related expenses may or may not be paid by the AFF. The *Attorney General's Guidelines on Seized and Forfeited Property* (July 1990, amended November 2005) generally prohibits payments of personnel expenses from the AFF. However, the Attorney General (AG) granted a number of waivers to cover the salaries and employment related costs of a specified number of personnel dedicated to the AFP who work within AFMS, AFMLS, EOUSA/USAOs, and USMS, as well as attorneys, FBI agents, and specialized contract support dedicated to the Kleptocracy Asset Recovery Initiative created by the AG to bring kleptocrats to justice. Salaries and employment related costs for which the AG has not granted such a waiver are reported in the financial statements of the participants' reporting agencies.

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FY 2016 RESOURCE INFORMATION

The AFF receives most of its revenue from the forfeiture of cash and other monetary assets and, secondly, from the sale of forfeited property. AFP participants may receive annual allocations by sub-allotment advice or reimbursement agreement. The AFF's first priority is to cover the operational expenses of the AFP. After it is determined that operational requirements are sufficiently covered by receipts, allocations may be made for investigative expenses, such as awards for information, purchase of evidence, and equipping of conveyances; and also discretionary expenses, such as storage, protection, and destruction of controlled substances. The sources of AFF revenue are presented in Table 2.

Table 2. Sources of AFF Resources
(Dollars in Thousands)

Source	FY 2016	FY 2015	Change %
Exchange Revenue	$14,877	$14,557	2.2%
Budgetary Financing Sources			
Nonexchange Revenues	34,336	6,610	419.5%
Donations and Forfeitures of Cash or Cash Equivalents	1,686,050	1,285,294	31.2%
Transfers-In/Out Without Reimbursement	(807,200)	(1,100,014)	26.6%
Other Financing Sources			
Donations and Forfeitures of Property	200,868	337,357	(40.5)%
Transfers-In/Out Without Reimbursement	(4,209)	(4,890)	13.9%
Imputed Financing from Costs Absorbed by Others	1,531	1,571	(2.5)%
Total Asset Forfeiture Fund Resources	$1,126,253	$540,485	108.4%

Limitations on the use of the Assets Forfeiture Fund

The AFF is defined by statute. Authorities and limitations governing the use of the AFF are specified in 28 U.S.C. § 524(c). In addition, use of the AFF is controlled by laws and regulations governing the use of public monies and appropriations (e.g., 31 U.S.C. § 1341-1353 and 1501-1558, Office of Management and Budget (OMB) Circulars, and provisions of annual appropriation acts). The AFF is further controlled by the *Attorney General's Guidelines on Seized and Forfeited Property* (July 1990, amended November 2005), and various other policy memoranda, and statutory interpretations issued by appropriate authorities. Unless otherwise provided by law, restrictions on the use of AFF monies retain those limitations after any monies are made available to a recipient agency. Moreover, monies are available for use only to the extent that receipts are available in the AFF.

Excess unobligated balances identified at the end of a fiscal year may be declared a "Super Surplus" balance. After Congressional notification, Super Surplus balances may be allocated at the discretion of the AG for "any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the DOJ" pursuant to 28 U.S.C. § 524(c) (8) (E). The most recent Super Surplus declaration in the AFF was in FY 2012.

Pursuant to 21 U.S.C. § 881(e)(1) and 19 U.S.C. § 1616(a), as made applicable by 21 U.S.C. § 881(d) and other statutes, the AG has the authority to equitably transfer forfeited property and cash to state and local agencies that directly participate in the law enforcement effort leading to the seizure and forfeiture of property. All property and cash transferred to state and local agencies and any income

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generated by this property and cash is to be used for law enforcement purposes. As a result, state and local law enforcement programs and capabilities benefit from their cooperative efforts with Federal law enforcement agencies. Among the uses of equitable shares, priority is given to supporting community policing activities, training, and law enforcement operations intended to result in further seizures and forfeitures. To ensure effective management and assure that the AFF/SADF are used for the purpose for which they were provided, the AFP follows internal control procedures referenced in Section X of the *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (April 2009) including review of regular reports from state and local law enforcement agencies receiving resources under the Equitable Sharing Program and external audit reports, when required.

As indicated in Table 3, the AFF resources supported Strategic Goal 2 of the AG's Strategic Plan for Fiscal Years 2014 – 2018, which includes Strategic Objective 2.2 - *Prevent and Intervene in Crimes Against Vulnerable Populations; Uphold the Rights of, and Improve Services to, America's Crime Victims.*

Table 3. How AFF Resources are Spent
(Dollars in Thousands)

Strategic Goal (SG)	FY 2016	FY 2015	Change %
SG 2: Prevent Crime, Protect the Rights of the American People, and Enforce Federal Law			
Total Gross Cost	$1,215,946	$1,551,414	
Less: Total Earned Revenue	(14,877)	(14,557)	
Total Net Cost of Operations	$1,201,069	$1,536,857	(21.8)%

Strategic Goal 2, Prevent Crime, Protect the Rights of the American People, and Enforce Federal Law. Expenditures made to achieve Strategic Goal 2 include case, program, investigative, and other authorized support costs incurred by AFP participants to operate the activities of the AFP. The AFF's resources cover the costs of seizing, evaluating, inventorying, maintaining, protecting, advertising, forfeiting, and disposing of property seized for forfeiture. These costs are necessary to support the AFP and fluctuate in direct relation to the forfeiture activity levels of the investigative, prosecutive, litigative, and administrative participants of the AFP. For the fiscal year ended September 30, 2016, $1,201.1 million was expended (net of earned revenue) compared with $1,536.9 million in FY 2015.

Holding and Accounting for Seized and Forfeited Property

The USMS has primary responsibility for holding and maintaining real and tangible personal property seized by participating agencies for disposition. The USMS takes custody of firearms and ammunition seized or forfeited, in cases investigated by the DOJ agencies other than ATF. ATF has primary authority over the disposition of firearms and ammunition seized and forfeited by the ATF. Forfeited property is subsequently sold, placed into official use, destroyed, or transferred to another agency. Seized and forfeited property is not considered inventory held for resale in the normal course of business.

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ANALYSIS OF FINANCIAL STATEMENTS

The AFF/SADF financial statements were prepared from the accounting records of AFF/SADF in conformity with the accounting principles generally accepted in the United States and OMB Circular A-136, *Financial Reporting Requirements*.

2016 Financial Highlights

Consolidated Balance Sheets

Assets : The AFF/SADF Consolidated Balance Sheet as of September 30, 2016, shows $7,620.6 million in total assets compared with $8,735.4 million in FY 2015, a decrease of $1,114.8 million. The majority of the decrease is the result of the $900 million from the General Motors wire fraud case held in the SADF in FY 2015, and forfeited in FY 2016 and transferred to the AFF, which mitigated the $746 million permanent rescission from the AFF in FY 2016. If seized assets, which are in custody of the government but not yet owned by the government, are excluded from both figures the adjusted total assets of the AFF decreased to $6,397.8 million in FY 2016 compared with $6,513.1 million in FY 2015, a decrease of $115.3 million. Seized cash, both on deposit in the SADF and in the custody of participating agencies, is reflected on the Balance Sheet.

Liabilities: Total liabilities of the AFF/SADF were $6,160.4 million as of September 30, 2016 compared with $7,185.5 million in FY 2015, a decrease of $1,025.1 million. If the liabilities for the seized assets held by the SADF are backed out of both figures, the adjusted total liabilities of the AFF decrease to $4,943.2 million in FY 2016 compared with $4,963.2 million in FY 2015. The SADF deposit fund liability is presented on the Balance Sheet. There are no liabilities associated with seized property. The decline in total liabilities is the result of the General Motors case as $900 million seized cash was on deposit in SADF on September 30, 2015 along with the related liability.

Consolidated Statements of Net Cost

Net Cost: The Consolidated Statements of Net Cost present the AFF's net cost of operations in relation to DOJ's Strategic Goal 2 :*Prevent Crime, Protect the Rights of the American People, and Enforce Federal Law*. Net cost over a five-year period is presented in Figure 1.

The net cost of operations for the year ended September 30, 2016 totaled $1,201.1 million compared with $1,536.9 million in FY 2015, a decrease of $335.8 million. The decrease is primarily due to the $300 million liability for victims of the Commerzbank fraud case in 2015. To the extent that financing sources do not cover net costs, AFF's carry forward balances are used to support AFP expenses. The carry forward balances consist of prior years' resources in excess of operational requirements. There are no costs associated with the SADF.

By January 31, 2017, FY 2016 expenses by category of expense and recipient agency will be posted on the Justice Asset Forfeiture Program website https : //www.justice.gov/afp

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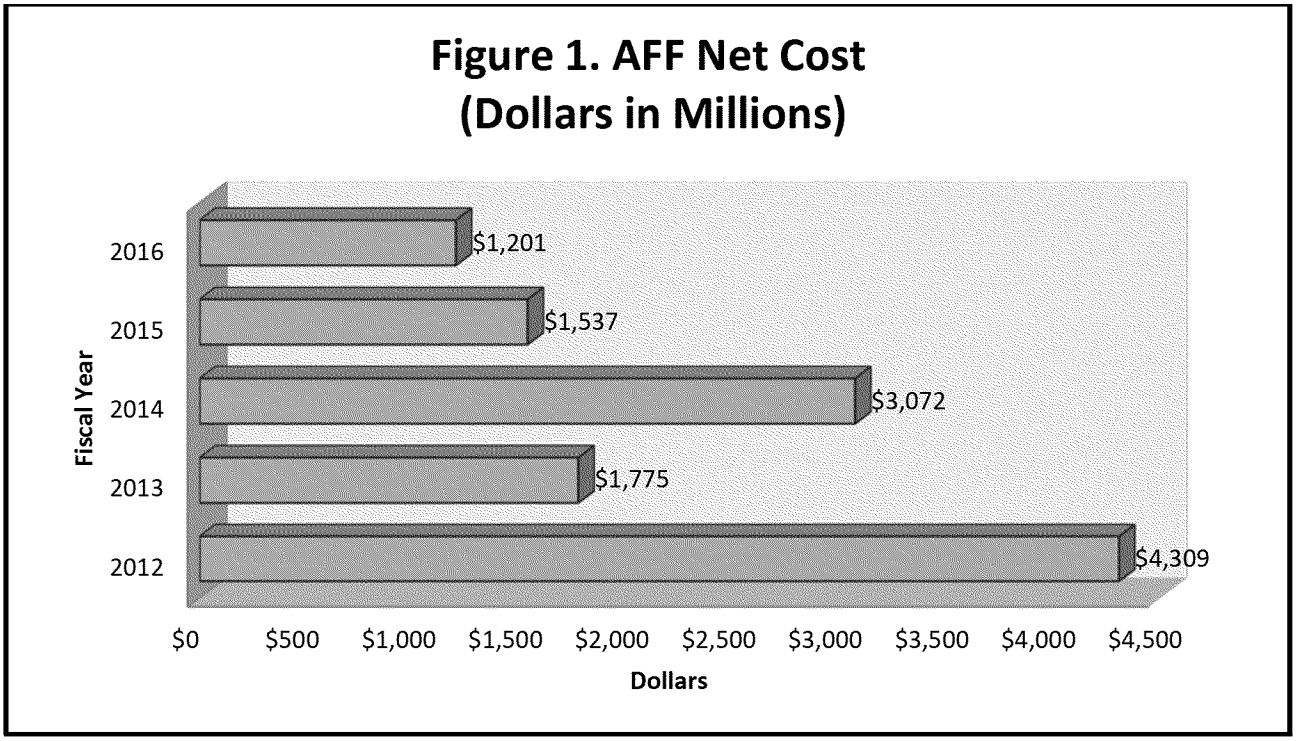

Consolidated Statements of Changes in Net Position

Donations and Forfeitures of Cash and Cash Equivalents and Donations and Forfeitures of Property: These two lines, in Table 2, comprise the AFF's gross forfeiture revenue. The AFF reported $1,886.9 million in forfeiture revenue in FY 2016 and $1,622.7 million in FY 2015, an increase of $264.2 million. This increase is the result of the $900 million from the General Motors wire fraud case held in the SADF in FY 2015, and forfeited in FY 2016 and transferred to the AFF. Included in these figures are receipts from the Treasury Forfeiture Fund (TFF) for the Department's participation in cases that resulted in forfeiture revenue to the TFF of $73.6 million and $30.2 million in FY 2016 and FY 2015, respectively.

Nonexchange Revenue: Cash balances from both the AFF and SADF are invested in Government securities. Earnings over a five-year period are presented in Figure 2. Investment interest earnings (i.e. nonexchange revenue) of $34.3 million were realized in FY 2016 compared with $6.6 million earned in FY 2015. The increased earnings are due primarily to the continual increase in short term interest rates for Treasury-backed securities throughout FY 2016. Amounts available for investment are difficult to predict because many factors influence the balance available. These factors may include unanticipated cash seizures and forfeitures increasing funds available for investment or orders to pay victims and other innocent third party payments decreasing the funds available for investment.

Total financing sources: The total financing sources realized by the AFF as of September 30, 2016 were $1,111.4 million versus $525.9 million in FY 2015, an increase of $585.5 million. Earnings on SADF investments are deposited in the AFF and included on the Statement of Changes in Net Position. The majority of the increase is the result of an increase in forfeiture revenue of $264.2 million and a decrease in transfers out of $292.8 million.

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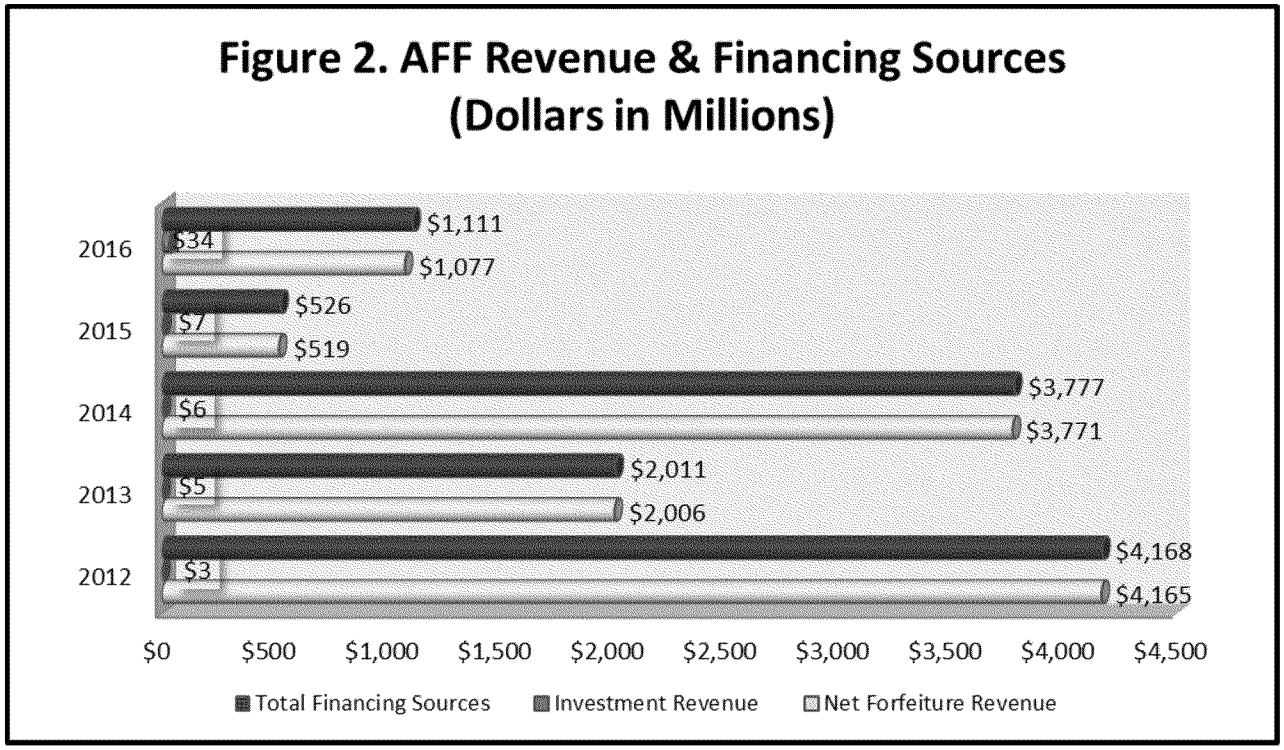

Transfers-In/Out Without Reimbursement: Pursuant to the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235), in FY 2015 the AFF transferred $1,100 million to the USMS Office of the Federal Detention Trustee (OFDT) for necessary expenses related to United States prisoners in the custody of the USMS. The Continuing Appropriations Act, 2016 (P.L. 114-53) provided the authority for the AFF to transfer an additional $61.2 million to OFDT in FY 2016. These transfers were treated as expenditure transfers of the AFF.

Also in FY 2016, the Bipartisan Budget Act of 2015 (P.L. 114-74), enacted in November 2015 included a $746 million permanent rescission from the AFF, which was transferred to the U.S. Treasury in September 2016.

Net Position: The AFF/SADF Net Position, or excess of assets over liabilities, is an indicator of its ability to support ongoing operations in the future. At the end of FY 2016, Net Position totaled $1,460.2 million versus $1,549.9 million at the end of FY 2015, a decrease of $89.7 million. Factors that consume resources and influence the AFF/SADF's net position include the short-term interest rates that affect revenue from investments in Government securities and the transfers of properties placed into official use.

Combined Statements of Budgetary Resources

Budgetary Resources: For FY 2016, the Budgetary Resources totaled $1,973.3 million compared with $3,743.9 million in FY 2015, a decrease of $1,770.6 million. The decrease is the result of the expenditure transfer in FY 2015 of $1,100 million to OFDT and decreased appropriations received in FY 2016 of $907 million primarily due to permanent and temporary rescissions. These factors also impact the categories discussed below.

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Agency Outlays, Net: The net outlays totaled $1,213.7 million in FY 2016 versus $2,404.5 million in FY 2015, a decrease of $1,190.8 million. The decrease is mainlythe result of the expenditure transfer in FY 2015 of $1,100 million to OFDT.

Obligations: The new obligations and upward adjustments totaled $1,333.6 million in FY 2016 versus $2,727.4 million in FY 2015, a decrease of $1,393.8 million. The decrease is mainly the result of the transfer to OFDT discussed in the Agency Outlays, Net section above.

Super Surplus: The last AFF Super Surplus declaration was made in FY 2012. Unexpended prior years' Super Surplus funds allocated to the AFP's participating agencies are reviewed annually and the authority is renewed for use by the recipient agency if sufficient cause is given. In FY 2015, $10 thousand was transferred out to EOUSA, with disbursements of $7 thousand and $3 thousand was deobligated. In FY 2016, no unexpende d Super Surplus authority was renewed.

FY 2016 REPORT ON SELECTED RESULTS

PERFORMANCE INFORMATION

STRATEGIC GOAL 2: Prevent Crime, Protect the Rights of the American People, and Enforce Federal Law.

This goal is supported by 100% of the AFF's Net Costs.

There are no applicable AFP performance measures. No performance measures are indicated because the AFP's operations are performed by its participants. The AFP is considered to be an enabling/administrative activity where resources are spread across agencies in accordance with full program costing guidance.

ANALYSIS OF SYSTEMS, CONTROLS AND LEGAL COMPLIANCE

Federal Managers' Financial Integrity Act of 1982

The Federal Managers' Financial Integrity Act of 1982 (FMFIA orIntegrity Act) provides the statutory basis for management's responsibility for and assessment of internal accounting and administrative controls. Such controls include program, operational, and administrative areas, as well as accounting and financial management. The Integrity Act requires Federal agencies to establish controls that reasonably ensure obligations and costs are in compliance with applicable law; funds, property, and other assets are safeguarded against waste, loss, unauthorized use, or misappropriation; and revenues and expenditures are properly recorded and accounted for to maintain accountability over the assets. The Integrity Act also requires agencies to annually assess and report on the internal controls that protect the integrity of Federal programs (FMFIA § 2) and whether financial management systems conform to related requirements (FMFIA § 4).

Guidance for implementing the Integrity Act is provided through OMB Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control*. In addition to

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requiring Federal agencies to provide an assurance statement on the effectiveness of programmatic internal controls and conformance with financial system requirements, the Circular requires agencies to provide an assurance statement on the effectiveness of internal control over financial reporting.

Internal Controls Program

AFMS is responsible for maintaining internal accounting and administrative controls that are adequate to ensure that: (1) transactions are executed in accordance with applicable budgetary and financial laws and other requirements, consistent with the purposes authorized, and are recorded in accordance with Federal accounting standards; (2) assets are properly safeguarded to deter fraud, waste, and abuse; and (3) management information is adequately supported. AFMS, along with other AFP participants who use the Unified Financial Management System (UFMS), monitors financial transactions on an ongoing basis. AFMS also requires participants who enter AFF/SADF transactions into their own financial systems to provide reports of their financial transactions at least quarterly to update the AFF obligation status.

FMFIA Assurance Statement

In accordance with OMB Circular A-123, AFMS conducted its annual assessment of the effectiveness of internal controls to support effective and efficient programmatic operations, reliable financial reporting, and compliance with applicable laws and regulations (FMFIA § 2). In addition, AFMS considered assessments made by the Department's OMB Circular A-123 Senior Assessment Team, the Justice Management Division's (JMD's) Internal Review and Evaluations Office, and JMD's Quality Control and Compliance Group.

Based on the results of these assessments, AFMS provided reasonable assurance that its internal controls met the objectives of FMFIA § 2, with the exception of the significant deficiency summarized below. AFMS assessed the effectiveness of internal controls over financial reporting and disclosed to the auditors all known deficiencies in their design or operation that were specific to the financial statements. During FY 2016 AFMS implemented corrective actions to mitigate those deficiencies. Based on those actions, AFMS provided reasonable assurance that internal control over financial reporting was effective. There have been no changes to internal control over financial reporting subsequent to September 30, 2016, or other factors that might significantly affect the effectiveness of internal control over financial reporting. AFMS also provided reasonable assurance that its financial management systems conformed to the financial systems requirements in FMFIA § 4.

FMFIA Section 2 – Significant Deficiency

The AFF/SADF determined that its internal controls over financial reporting were insufficient to detect a misclassification on the Consolidated Statement of Budgetary Resources for the period ended March 31, 2016. Internal controls were implemented in FY 2016 and corrected this deficiency in the third and fourth quarters' financial reports. Independent auditors also identified exceptions pertaining to transactions for aged property and nonexchange revenue. These represented increases over the exception rates noted by the independent auditors in FY 2015. Corrective actions include increased focus and oversight of these areas.

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FMFIA Section 4 – Material Nonconformances

For FY 2016, the AFF/SADF reported no material nonconformances of its financial-mixed IT system CATS. In FY 2016, the DOJ did not identify any systems noncomformances required to be reported under FMFIA Section 4. The AFF/SADF relies upon the Department's UFMS managers in JMD for Section 4 compliance on the Department's financial system of record.

Federal Financial Management Improvement Act of 1996

The Federal Financial Management Improvement Act of 1996 (FFMIA) was designed to advance Federal financial management by ensuring that Federal financial management systems provide accurate, reliable, and timely financial management information to the government's managers. Compliance with the FFMIA provides the basis for the continuing use of reliable financial management information by program managers, as well as the President, Congress, and the public. The FFMIA requires agencies to have financial management systems that substantially comply with Federal financial management system requirements, applicable Federal accounting standards, and the application of the U.S. Government Standard General Ledger (USSGL) at the transaction level. FFMIA also requires independent auditors to report on agency compliance with the three requirements in the financial statement audit report. The Federal Information Security Management Act (FISMA) states that to be substantially compliant with FFMIA, there are to be no significant deficiencies in information security policies, procedures or practices.

FFMIA Compliance Determination

We have assessed the AFF/SADF's financial management systems to determine whether they comply substantially with Federal financial management systems requirements, applicable Federal accounting standards, and application of the USSGL at the transaction level. Our assessment was based on guidance issued by OMB Circular A-123, Appendix D. The AFF/SADF's financial management systems complied substantially with Federal financial management systems requirements, applicable Federal accounting standards, and application of the USSGL at the transaction level as of September 30, 2016.

IMPROPER PAYMENTS INFORMATION ACT OF 2002, AS AMENDED

In accordance with OMB Circular A-123, Appendix C, *Requirements for Effective Estimation and Remediation of Improper Payments*, and the Departmental guidance for implementing the Improper Payments Information Act of 2002 (IPIA), as amended, the Department implemented a top-down approach to assess the risk of significant improper payments across all five of the Department's mission-aligned programs, and to identify and recapture improper payments through a payment recapture audit program. This approach promotes consistency across the Department and enhances internal control related to preventing, detecting, and recovering improper payments. Because of the OMB requirement to assess risk and report payment recapture audit activities by agency programs, the results of the Department's risk assessment and recapture activities are reported at the Department-level only.

In accordance with the Departmental approach for implementing IPIA, as amended, the AFF/SADF assessed its activities for susceptibility to significant improper payments and conducted its payment

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recapture audit program. AFMS reported the results of both the risk assessment and payment recapture audit activities to the Department for the Department-level reporting in the FY 2016 Agency Financial Report.

POSSIBLE FUTURE EFFECTS OF EXISTING EVENTS AND CONDITIONS

FY 2016 Budget Position

The Bipartisan Budget Act of 2015 (P.L. 114-74) enacted in November 2015 included a $746 million permanent rescission from the AFF. The Consolidated Appropriation Act of 2016, signed into law on December 18, 2015, included an additional $606.4 million temporary rescission in the FY 2016 AFF budget. Consequently, the AFF needed to absorb a $1.4 billion decrease in budgetary resources during FY 2016 and the Department immediately deferred the obligation and disbursement of equitable sharing payments to the AFP's state, local, and tribal partners. By deferring equitable sharing temporarily, the Department preserved its ability to resume equitable sharing payments once the AFF's financial position improved. On March 28, 2016, the Department announced the resumption of equitable sharing payments to state, local and tribal law enforcement agencies.

LIMITATIONS OF THE FINANCIAL STATEMENTS

- The financial statements have been prepared to report the financial position and results of operations of the AFF/SADF, pursuant to the requirements of 31 U.S.C. § 3515(b).
- While the statements have been prepared from the books and records of the AFF/SADF in accordance with U.S. generally accepted accounting principles for Federal entities and the formats prescribed by OMB, the statements are in addition to the financial reports used to monitor and control budgetary resources, which are prepared from the same books and records.
- The statements should be read with the realization that they are for a component of the U.S. Government, a sovereign entity.

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U.S. DEPARTMENT OF JUSTICE

Assets Forfeiture Fund and Seized Asset Deposit Fund

Independent Auditors' Reports

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KPMG LLP
Suite 12000
1801 K Street, NW
Washington, DC 20006

Independent Auditors' Report on the Financial Statements

Inspector General
U.S. Department of Justice

Chief Financial Officer
Assets Forfeiture Fund and Seized Asset Deposit Fund
U.S. Department of Justice

We have audited the accompanying consolidated financial statements of the U.S. Department of Justice Assets Forfeiture Fund (AFF) and Seized Asset Deposit Fund (SADF), which comprise the consolidated balance sheets as of September 30, 2016 and 2015, and the related consolidated statements of net cost a nd changes in net position, and the combined statements of budgetary resources for the years then ended; and the related notes to the consolidated financial statements.

Management's Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of these consolidated financial statements in accordance with U.S. generally accepted accounting principles; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of the consolidated financial statements that are free from material misstatement, whether due to fraud or error.

Auditors' Responsibility

Our responsibility is to express an opinion on these consolidated financial statements based on our audits. We conducted our audits in accordance with auditing standards generally accepted in the United States of America, in accordance with the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States, and in accordance with Office of Management and Budget (OMB) Bulletin No. 15-02, *Audit Requirements for Federal Financial Statements*. Those standards and OMB Bulletin No. 15-02 require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the consolidated financial statements. The procedures selected depend on the auditors' judgment, including the assessment of the risks of material misstatement of the consolidated financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the consolidated financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the consolidated financial statements.

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We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion on the Financial Statements

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the financial position of the U.S. Department of Justice Assets Forfeiture Fund and Seized Asset Deposit Fund as of September 30, 2016 and 2015, and its net costs, changes in net position, and budgetary resources for the years then ended in accordance with U.S. generally accepted accounting principles.

Other Matters

Required Supplementary Information

U.S. generally accepted accounting principles require that the information in the Management's Discussion and Analysis section be presented to supplement the basic consolidated financial statements. Such information, although not a part of the basic consolidated financial statements, is required by the Federal Accounting Standards Advisory Board who considers it to be an essential part of financial reporting for placing the basic consolidated financial statements in an appropriate operational, economic, or historical context. We have applied certain limited procedures to the required supplementary information in accordance with auditing standards generally accepted in the United States of America, which consisted of inquiries of management about the methods of preparing the information and comparing the information for consistency with management's responses to our inquiries, the basic consolidated financial statements, and other knowledge we obtained during our audits of the basic consolidated financial statements. We do not express an opinion or provide any assurance on the information because the limited procedures do not provide us with sufficient evidence to express an opinion or provide any assurance.

Other Information

Our audits were conducted for the purpose of forming an opinion on the basic consolidated financial statements as a whole. The Combined Schedules of Spending and Appendix are presented for purposes of additional analysis and are not a required part of the basic consolidated financial statements. Such information has not been subjected to the auditing procedures applied in the audits of the basic consolidated financial statements, and accordingly, we do not express an opinion or provide any assurance on it.

KPMG

Other Reporting Required by Government Auditing Standards

In accordance with *Government Auditing Standards* , we have also issued our report dated November 4, 2016 on our consideration of the AFF/SADF's internal control over financial reporting and our report dated November 9, 2016 on our tests of its compliance with certain provisions of laws, regulations, contracts, and other matters. The purpose of those reports is to describe the scope of our testing of internal control over financial reporting and compliance and the result of that testing, and not to provide an opinion on the internal control over financial reporting or on compliance. Those reports are an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the AFF/SADF 's internal control over financial reporting and compliance.

KPMG LLP

Washington, D.C.
November 9, 2016

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KPMG LLP
Suite 12000
1801 K Street, NW
Washington, DC 20006

Independent Auditors' Report on Internal Control over Financial Reporting Based on an Audit of Financial Statements Performed in Accordance with *Government Auditing Standards*

Inspector General
U.S. Department of Justice

Chief Financial Officer
Assets Forfeiture Fund and Seized Asset Deposit Fund
U.S. Department of Justice

We have audited, in accordance with auditing standards generally accepted in the United States of America, the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States, and Office of Management and Budget (OMB) Bulletin No. 15-02, *Audit Requirements for Federal Financial Statements*, the consolidated financial statements of the U.S. Department of Justice Assets Forfeiture Fund (AFF) and Seized Asset Deposit Fund (SADF), which comprise the consolidated balance sheets as of September 30, 2016 and 2015, and the related consolidated statements of net cost and changes in net position, and combined statements of budgetary resources for the years then ended, and the related notes to the consolidated financial statements, and have issued our report thereon dated November 9, 2016.

Internal Control over Financial Reporting

In planning and performing our audit of the consolidated financial statements as of and for the year ended September 30, 2016, we considered the AFF/SADF's internal control over financial reporting (internal control) to determine the audit procedures that are appropriate in the circumstances for the purpose of expressing our opinion on the consolidated financial statements, but not for the purpose of expressing an opinion on the effectiveness of the AFF/SADF's internal control. Accordingly, we do not express an opinion on the effectiveness of the AFF/SADF 's internal control. We did not test all internal controls relevant to operating objectives as broadly defined by the *Federal Managers' Financial Integrity Act of 1982*

A deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, misstatements on a timely basis. A material weakness is a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected, on a timely basis. A significant deficiency is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Our consideration of internal control was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control that might be material weaknesses or significant deficiencies and therefore, material weaknesses or significant deficiencies may exist that have not been identified. Given these limitations, during our audit we did not identify any deficiencies in internal control that we consider to be material weaknesses. We did identify a deficiency in internal control, described in Exhibit I, which we consider to be a significant deficiency.

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Exhibit II presents the status of the prior year's finding and recommendations.

AFF/SADF's Response to Findings

The AFF/SADF's response to the significant deficiency identified in our audit and described in Exhibit I was not subjected to the auditing procedures applied in the audit of the consolidated financial statements and, accordingly, we express no opinion on the response.

Purpose of this Report

The purpose of this report is solely to describe the scope of our testing of internal control and the result of that testing, and not to provide an opinion on the effectiveness of the AFF/SADF's internal control. This report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the AFF/SADF's internal control. Accordingly, this communication is not suitable for any other purpose.

KPMG LLP

Washington, D.C.
November 9, 2016

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Significant Deficiency

This section contains our discussion of the significant deficiency that we identified in internal control over financial reporting.

Improvements Needed in Controls over Budgetary Information Presented in Financial Statements and Completeness and Accuracy of Donation and Forfeiture Revenue.

In fiscal year (FY) 2016, the Justice Management Division's Asset Forfeiture Management Staff (AFMS) and federal agencies participating in the Department of Justice's (DOJ's) Assets Forfeiture Program (AFP) completed corrective actions to address certain previously-identified control deficiencies. However, based on our current year testing, we determined that deficiencies continued to exist in the internal controls over financial reporting. Collectively, these deficiencies indicate that improvements are still needed to ensure the accuracy of financial reporting. Specifically, improvements are needed in the financial reporting process to include reconciling and researching differences in budgetary information reported in the financial statements. Additionally, AFMS and federal agencies participating in the AFP continue to have weaknesses in gathering and evaluating the supporting judicial information prior to recognizing revenue and evaluating adjustments to revenue accounts. Cash property assets are recognized as revenue at the time a forfeiture decision is signed conveying ownership of the asset to the government.

Presentation and Adjustments to Budgetary Information in the Financial Statements

During our FY 2016 audit, we determined that certain portions of the unobligated balance were misclassified between apportioned and unapportioned on the Statement of Budgetary Resources (SBR) in the March 31, 2016 Financial Statement Package, which was generated for internal purposes. Specifically, we noted that Unobligated Balance, End of Period – Apportioned was understated by $616.7 million and Unobligated Balance, End of Period – Unapportioned was overstated by $616.7 million.

This presentation error was not detected and corrected because the reconciliation of the SBR to the *Report on Budget Execution and Budgetary Resources* (SF-133) did not contain the correct balances from the SBR for Unobligated Balance, End of Period – Apportioned and Unobligated Balance, End of Period – Unapportioned. Furthermore, the reconciliation was not reviewed before the second quarter Financial Statement Package was certified. We did note that the elements of unobligated balance were properly presented in the SF-133 that was submitted to the Office of Management and Budget as of March 31, 2016.

In addition, we noted that Distributed Offsetting Receipts reported in the SBR as of September 30, 2016 were overstated by $22.1 million. This occurred because AFMS and Finance Staff incorrectly included certain nonexchange revenue related to the amortization of investment discounts in the Distributed Offsetting Receipts line item. Furthermore, AFMS and Finance Staff did not have a process in place to reconcile receipt accounts included in Distributed Offsetting Receipts reported in the SBR to the U.S. Department of the Treasury's Agency Standard Report Module in the Central Accounting Reporting System (CARS). This error was subsequently corrected as of September 30, 2016.

The Government Accountability Office's (GAO) *Standards for Internal Control in the Federal Government,* states that "Management should design control activities to achieve objectives and respond to risks." It further states that "…Management may design a variety of transaction control activities for operational processes, which may include verifications, reconciliations, authorizations and approvals, physical control activities, and supervisory control activities."

OMB Circular No. A-136 – *Financial Reporting Requirements*, section II.4.6.8 states:

> **Distributed Offsetting Receipts**. Offsetting receipts are collections that are credited to general fund, special fund or trust fund receipt accounts and that offset gross outlays…. The Quarterly Distributed Offsetting Receipts by Department Report can be accessed through the Agency Standard Report Module in the Central Accounting Reporting System. Agencies should include in the SBR, the receipt accounts in this report classified as:
>
> - Proprietary Receipts from the Public;
> - Intrabudgetary Receipts Deducted by Agencies; and
> - Offsetting Governmental Receipts.

Incomplete and Inaccurate Information in the Consolidated Assets Tracking System (CATS) Impacting Revenue Cut-off and Recognition

During our testing over a sample of 208 cash and property revenue items, we identified 19 items totaling $5.3 million that were forfeited in a prior fiscal year but were incorrectly recorded as revenue in FY 2016 because of incomplete or inaccurate information in CATS. As a result of these errors, we performed further analyses over the revenue population and determined that the projected misstatement caused by these and similar entries was a $12.1 million overstatement of current year revenue and an understatement of prior year revenue for the same amount. From the same revenue sample, we also determined that forfeiture decisions for three items were not entered into CATS until the quarter after the final forfeiture was approved.

We also tested a sample of 20 aged forfeited property items in which we identified 4 forfeited property items totaling $90 thousand that were either disposed or transferred to official use property but the records were not updated in CATS or the CATS asset value did not agree to the valuation support. Furthermore, we tested 189 current year forfeited property items in which we identified 8 items totaling $11.0 million that were not updated in CATS or the CATS asset value did not agree to the valuation support. We projected these errors to the sampled populations of aged and current year forfeited property, which resulted in a combined projected overstatement of $13.3 million in deferred revenue. AFMS subsequently corrected $9.7 million of the identified errors as of September 30, 2016.

In addition, we noted that AFMS incorrectly recorded an adjusting journal entry as of September 30, 2016 that reversed $17.2 million of revenue. The revenue was properly recognized earlier in the year when a U.S. Attorney's Office correctly entered a forfeiture decision for a seized cash asset into CATS but they subsequently removed it from the system in error at the end of the fiscal year. As a result of the forfeiture decision removal from CATS, the asset custodian scheduled a transfer to move the cash from the AFF back to the SADF, and prompted AFMS to record an adjusting journal entry to reverse the revenue. However, AFMS did not obtain sufficient documentation to support that the entry was appropriate. This error initially

caused revenue to be understated by $17.2 million but was corrected in the September 30, 2016 financial statements.

The above issues were primarily caused by the inconsistent application of Executive Office for United States Attorneys (EOUSA) guidelines and a lack of formal policies and procedures for the participating agencies related to the accounting treatment of forfeiture decisions that may be subject to claims, petitions, and appeals. As a result, U.S. Attorneys applied their individual judgment regarding the entry or removal of forfeiture decisions in CATS, which impacted the recognition of revenue. Furthermore, participating agencies inconsistently applied policies and procedures in place over the valuation and recording of assets in CATS.

Statement of Federal Financial Accounting Standards (SFFAS) No. 7, *Accounting for Revenue and Other Financing Sources and Concepts for Reconciling Budgetary and Financial Accounting,* states that "Nonexchange revenues are inflows of resources that the Government demands or receives by donation. Such revenue should be recognized when a specifically identifiable, legally enforceable claim to resources arises, to the extent that collection is probable (more likely than not) and the amount is reasonably estimable."

Specifically, as it relates to forfeiture revenue, SFFAS No. 7 states that "The timing of revenue recognition depends on how the property is forfeited and the nature of the property. … In the case of property acquired through forfeiture proceedings, the timing of recognition depends on the nature and disposition of the property. For monetary instruments, the revenue is recognized at the time of obtaining forfeiture judgment; for property that is sold, at the time of sale; and for property that is held for internal use or transferred to another Federal agency, at the time of obtaining approval to use the property internally or transfer it."

SFFAS No. 3, *Accounting for Inventory and Related Propert* y, states tha t "The market value of seized property other than monetary instruments is to be disclosed in the notes to the financial statements. Seized monetary instruments are recognized as assets with an offsetting liability. This treatment was provided to foster a higher level of control over seized monetary instruments. Forfeited property is recognized as an asset upon forfeiture and valued at market value less any liens. Revenue recognition is deferred until sale except for monetary instruments."

GAO's *Standards for Internal Control in the Federal Government* (the Standards) requires that transactions be promptly recorded to maintain their relevance and value to management in controlling operations and making decisions. This applies to the entire process or life cycle of a transaction or event from the initiation and authorization through its final classification in summary records.

The Standards also states, "Management designs control activities in response to the entity's objectives and risks to achieve an effective internal control system. Control activities are the policies, procedures, techniques, and mechanisms that enforce management's directives to achieve the entity's objectives and address related risks. As part of the control environment component, management defines responsibilities, assigns them to key roles, and delegates authority to achieve the entity's objectives. As part of the risk

assessment component, management identifies the risks related to the entity and its objectives, including its service organizations; the entity's risk tolerance; and risk responses. Management designs control activities to fulfill defined responsibilities and address identified risk responses."

RECOMMENDATIONS:

We recommend that the Justice Management Division:

1. Implement more effective procedures over review of the Annual Financial Statements to supplement higher-level management reviews over the Trial Balance and financial statements, to include reconciling and researching differences in budgetary information. *(Updated)*

   Management Response:

   The Justice Management Division's (JMD's) AFMS, Budget Staff, and Finance Staff concur with this recommendation. AFMS and the Finance Staff have already implemented and tested new reconciliation procedures into the financial statement preparation process that proved effective when preparing the 3rd and 4th quarter Financial Statements Packages. In addition, AFMS and the Finance Staff have implemented weekly face-to-face meetings between all staff involved in the financial statement preparation process. These meetings have already resulted in self-identification of differences in budgetary information that are then resolved prior to financial reporting.

2. Work with all participating agencies to develop and implement formal policies and control procedures to ensure forfeiture decisions are accurately reflected and updated in CATS in a timely manner, which should include specific policies and procedures for the appropriate accounting treatment of forfeiture orders that are subsequently reversed or appealed. *(Updated)*

   Management Response:

   AFMS concurs with this recommendation. In the past 9 months, the AFMS Director personally addressed this issue at 3 quarterly working groups attended by 75 to 100 forfeiture prosecutors, agents, and program managers from all 13 participating agencies. As part of the FY 2017 budget allocation process, the AFMS approved a number of senior program management positions within the EOUSA and each of the investigative agencies that are designed to help improve administrative oversight, internal controls, enterprise risk management, and operational policy functions. These positions will be responsible for improving transparency around what we seize and forfeit, as well as how and why we seize and forfeit those assets.

3. Continue to reinforce with the EOUSA's and U.S. Attorneys' offices the importance of timely reporting of the forfeiture decision to ensure that data in the property and financial management systems are updated in a timely manner as changes in status occur. (*Updated*)

   Management Response:

   AFMS concurs with the recommendation. The AFMS Director personally briefed approximately 164 Assistant United States Attorneys representing all 94 Districts about the importance of timely recording of forfeiture decisions. In addition, AFMS prepared and distributed a 1-page handout, outlining the forfeiture case-related events that must be recorded into CATS, including the associated CATS fields that needed to be updated and the supporting documents that needed to be uploaded. He also briefed the importance of this issue directly to the Attorney General's Advisory Committee, comprised of the United States Attorneys from roughly a dozen and half of the districts representing the largest portion of asset forfeiture-related cases.

4. Continue to reinforce procedures among investigative agencies to ensure that data in CATS is recorded in a timely manner as changes in status and valuations occur. (*New*)

   Management Response:

   AFMS concurs with the recommendation. AFMS is regularly engaging with these investigative agencies about the importance of this issue during quarterly working group meetings and formal training events. As noted in the response to Recommendation 2, the newly-authorized government program management positions are an additional step in ensuring accountability in this area.

5. Develop and implement procedures to reconcile quarterly Distributed Offsetting Receipts to the Agency Standard Report Module in CARS. (*New*)

   Management Response:

   JMD's AFMS and Finance Staff concur with this recommendation. All personnel responsible for preparing the AFF/SADF financial statements implemented procedures to properly report Distributed Offsetting Receipts in the final FY 2016 Financial Statement Package. The AFMS and the Finance Staff will update the process for preparing the financial statements to include reconciling and reporting Distributed Offsetting Receipts in accordance with the Agency Standard Report Module in CARS.

EXHIBIT II

STATUS OF PRIOR YEAR'S FINDING AND RECOMMENDATIONS

As required by *Government Auditing Standards* issued by the Comptroller General of the United States, we have evaluated whether AFF/SADF has taken appropriate corrective action to address the finding and recommendations from the prior year's financial statements audits th at could have a material effect on the financial statements or other financial data significant to the audit objectives. The following table provides the Office of the Inspector General report number where the deficiency was reported, our recommendation for improvement, and the status of the previously identified material weakness and recommendations as of the end of FY 2016.

Report	Material Weakness	Recommendations	Status
Annual Financial Statements Fiscal Year 2015 Report No. 16-04	Improvements Needed in Controls over Budgetary Information Presented in Financial Statements and Completeness and Accuracy of Donation and Forfeiture Revenue	**Recommendation No. 1:** Implement more effective procedures over review of the Annual Financial Statements and related journal entries to supplement existing higher-level management reviews over the Trial Balance and financial statements, to include reconciling and researching differences in budgetary information.	In Process (Updated by Current Year Recommendation No. 1)
		Recommendation No. 2: Improve communication between budget and accounting staff to facilitate appropriate treatment of events impacting budgetary information.	Completed
		Recommendation No. 3: Work with participating agencies to develop clear policies and procedures for entering judicial information in CATS that more clearly address situations when attorneys have been using judgment to assess and enter information in CATS.	In Process (Updated by Current Year Recommendation No. 3)
		Recommendation No. 4: Work with participating agencies to develop and implement effective controls to ensure that all relevant judicial claim information is accurately and timely entered and updated in CATS.	In Process (Updated by Current Year Recommendation No. 2)
		Recommendation No. 5: Implement procedures to analyze and correct, when necessary, differences identified by analytical and review procedures.	Completed

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Independent Auditors' Report on Compliance and Other Matters Based on an Audit of Financial Statements Performed in Accordance with *Government Auditing Standards*

Inspector General
U.S. Department of Justice

Chief Financial Officer
Assets Forfeiture Fund and Seized Asset Deposit Fund
U.S. Department of Justice:

We have audited, in accordance with auditing standards generally accepted in the United States of America, the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States, and Office of Management and Budget (OMB) Bulletin No. 15-02, *Audit Requirements for Federal Financial Statements* , the consolidated financial statements of the U.S. Department of Justice Assets Forfeiture Fund (AFF) and Seized Asset Deposit Fund (SADF) , which comprise the consolidated balance sheets as of September 30, 2016 and 2015, and the related consolidated statements of net cost and changes in net position, and the combined statements of budgetary resources for the years then ended, and the related notes to the consolidated financial statements, and have issued our report thereon dated November 9, 2016.

Compliance and Other Matters

As part of obtaining reasonable assurance about whether the AFF/SADF's consolidated financial statements are free from material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, and contracts, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed no instances that are required to be reported under *Government Auditing Standards* or OMB Bulletin No. 15-02.

We also performed tests of its compliance with certain provisions referred to in Section 803(a) of the *Federal Financial Management Improvement Act of 1996* (FFMIA). Providing an opinion on compliance with FFMIA was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests of FFMIA disclosed no instances in which the AFF/SADF's financial management systems did not substantially comply with the (1) Federal financial management systems requirements, (2) applicable Federal accounting standards, and (3) application of the United States Government Standard General Ledger at the transaction level.

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Purpose of this Report

The purpose of this report is solely to describe the scope of our testing of compliance and the result of that testing, and not to provide an opinion on the AFF/SADF's compliance. This report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the AFF/SADF's compliance. Accordingly, this communication is not suitable for any other purpose.

KPMG LLP

Washington, D.C.
November 9, 2016

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U.S. DEPARTMENT OF JUSTICE

Assets Forfeiture Fund and Seized Asset Deposit Fund

Principal Financial Statements and Related Notes

See Independent Auditors' Report on Financial Statements

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U.S. Department of Justice
Assets Forfeiture Fund and Seized Asset Deposit Fund
Consolidated Balance Sheets
As of September 30, 2016 and 2015

Dollars in Thousands	2016	2015
ASSETS (Note 2)		
Intragovernmental		
Fund Balance with U.S. Treasury (Note 3)	$ 115,389	$ 153,034
Investments, Net (Note 5)	7,233,684	7,404,322
Accounts Receivable, Net (Note 6)	3,141	3,194
Other Assets (Note 9)	88	89
Total Intragovernmental	7,352,302	7,560,639
Cash and Other Monetary Assets (Note 4)	155,871	1,041,590
Accounts Receivable, Net (Note 6)	1,732	-
Forfeited Property, Net (Note 7)	110,138	132,420
General Property, Plant and Equipment, Net (Note 8)	556	752
Other Assets (Note 9)	38	-
Total Assets	**$ 7,620,637**	**$ 8,735,401**
LIABILITIES (Note 10)		
Intragovernmental		
Accounts Payable	$ 164,377	$ 128,284
Other Liabilities (Note 12)	278	197
Total Intragovernmental	164,655	128,481
Accounts Payable	4,665,588	4,699,405
Accrued Payroll and Benefits	1,158	1,006
Accrued Annual and Compensatory Leave Liabilities	1,650	1,900
Deferred Revenue	110,138	132,420
Seized Cash and Monetary Instruments (Note 11)	1,217,222	2,222,270
Total Liabilities	**$ 6,160,411**	**$ 7,185,482**
Contingent Liabilities (Note 13)		
NET POSITION		
Cumulative Results of Operations - Funds from Dedicated Collections (Note 14)	$ 1,460,226	$ 1,549,919
Total Net Position	**$ 1,460,226**	**$ 1,549,919**
Total Liabilities and Net Position	**$ 7,620,637**	**$ 8,735,401**

The accompanying notes are an integral part of these financial statements.

ED_001803A_00005961-00039

U.S. Department of Justice
Assets Forfeiture Fund and Seized Asset Deposit Fund
Consolidated Statements of Net Cost
For the Fiscal Years Ended September 30, 2016 and 2015

Dollars in Thousands

		Gross Costs			Less: Earned Revenues			
	FY	Intra-governmental	With the Public	Total	Intra-governmental	With the Public	Total	Net Cost of Operations (Note 15)
Goal 2	**2016**	$ 619,482	$ 596,464	$ 1,215,946	$ 14,877	$ -	$ 14,877	$ 1,201,069
	2015	$ 578,656	$ 972,758	$ 1,551,414	$ 14,557	$ -	$ 14,557	$ 1,536,857
Total	**2016**	**$ 619,482**	**$ 596,464**	**$ 1,215,946**	**$ 14,877**	**$ -**	**$ 14,877**	**$ 1,201,069**
	2015	**$ 578,656**	**$ 972,758**	**$ 1,551,414**	**$ 14,557**	**$ -**	**$ 14,557**	**$ 1,536,857**

Goal 2: Prevent Crime, Protect the Rights of the American People, and Enforce Federal Law

The accompanying notes are an integral part of these financial statements.

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U.S. Department of Justice
Assets Forfeiture Fund and Seized Asset Deposit Fund
Consolidated Statements of Changes in Net Position
For the Fiscal Years Ended September 30, 2016 and 2015

Dollars in Thousands	2016	2015
	Funds from Dedicated Collections	Funds from Dedicated Collections
Cumulative Results of Operations		
Beginning Balances	$ 1,549,919	$ 2,560,848
Budgetary Financing Sources		
Nonexchange Revenues (Note 19)	34,336	6,610
Donations and Forfeitures of Cash and Cash Equivalents (Note 20)	1,686,050	1,285,294
Transfers-In/Out Without Reimbursement (Note 18)	(807,200)	(1,100,014)
Other Financing Sources		
Donations and Forfeitures of Property (Note 20)	200,868	337,357
Transfers-In/Out Without Reimbursement (Note 18)	(4,209)	(4,890)
Imputed Financing from Costs Absorbed by Others (Note 16)	1,531	1,571
Total Financing Sources	**1,111,376**	**525,928**
Net Cost of Operations	(1,201,069)	(1,536,857)
Net Change	(89,693)	(1,010,929)
Cumulative Results of Operations	**$ 1,460,226**	**$ 1,549,919**
Net Position	**$ 1,460,226**	**$ 1,549,919**

The accompanying notes are an integral part of these financial statements.

ED_001803A_00005961-00041

U.S. Department of Justice
Assets Forfeiture Fund and Seized Asset Deposit Fund
Combined Statements of Budgetary Resources
For the Fiscal Years Ended September 30, 2016 and 2015

Dollars in Thousands		2016		2015
Budgetary Resources:				
Unobligated Balance, Brought Forward, October 1	$	1,016,485	$	1,915,572
Recoveries of Prior Year Unpaid Obligations		104,138		69,845
Other Changes in Unobligated Balance		1,528		2,826
Unobligated Balance from Prior Year Budget Authority, Net		1,122,151		1,988,243
Appropriations (discretionary and mandatory)		835,348		1,742,356
Spending Authority from Offsetting Collections (discretionary and mandatory)		15,788		13,292
Total Budgetary Resources	**$**	**1,973,287**	**$**	**3,743,891**
Status of Budgetary Resources:				
New Obligations and Upward Adjustments (Total) (Note 17)	$	1,333,585	$	2,727,406
Unobligated Balance, End of Year:				
Apportioned, Unexpired Accounts		624,216		796,822
Unapportioned - Unexpired Accounts		15,486		219,663
Unexpired Unobligated Balance, End of Year		639,702		1,016,485
Unobligated Balance - End of Year (Total)		639,702		1,016,485
Total Status of Budgetary Resources:	**$**	**1,973,287**	**$**	**3,743,891**
Change in Obligated Balance:				
Unpaid Obligations:				
Unpaid Obligations, Brought Forward, October 1	$	5,037,587	$	4,813,200
New Obligations and Upward Adjustments (Total)		1,333,585		2,727,406
Outlays, Gross (-)		(1,242,354)		(2,433,174)
Recoveries of Prior Year Unpaid Obligations (-)		(104,138)		(69,845)
Unpaid Obligations, End of Year		5,024,680		5,037,587
Uncollected Payments:				
Uncollected Payments from Federal Sources, Brought Forward, October 1 (-)		(5,576)		(11,503)
Change in Uncollected Customer Payments from Federal Source		(856)		5,927
Uncollected Customer Payments from Federal Sources, End of Year (-)		(6,432)		(5,576)
Memorandum (non-add) Entries:				
Obligated Balance, Start of Year	**$**	**5,032,011**	**$**	**4,801,697**
Obligated Balance, End of Year	**$**	**5,018,248**	**$**	**5,032,011**
Budgetary Authority and Outlays, Net:				
Budgetary Authority, Gross (discretionary and mandatory)	$	851,136	$	1,755,648
Less: Actual Offsetting Collections (discretionary and mandatory)		16,459		22,045
Change in Uncollected Customer Payments from Federal Sources (discretionary and mandatory)		(856)		5,927
Recoveries of Prior Year Paid Obligations (discretionary and mandatory)		1,528		2,826
Budget Authority, Net (discretionary and mandatory)	**$**	**835,349**	**$**	**1,742,356**
Outlays, Gross (discretionary and mandatory)	$	1,242,354	$	2,433,174
Less: Actual Offsetting Collections (discretionary and mandatory)		16,459		22,045
Outlays, Net (discretionary and mandatory)		1,225,895		2,411,129
Less: Distributed Offsetting Receipts		12,220		6,610
Agency Outlays, Net (discretionary and mandatory)	**$**	**1,213,675**	**$**	**2,404,519**

The accompanying notes are an integral part of these financial statements.

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U.S. DEPARTMENT OF JUSTICE

Assets Forfeiture Fund and Seized Asset Deposit Fund

Notes to the Principal Financial Statements

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U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 1. Summary of Significant Accounting Policies

A. Reporting Entity

The Assets Forfeiture Fund (AFF) and Seized Asset Deposit Fund (SADF) together comprise a single financial reporting entity of the Department of Justice (DOJ or Department), herein after AFF/SADF. Property seized for forfeiture, and the transactions and Asset Forfeiture Program (AFP) activities of DOJ AFP components and other participating agencies as described more fully herein.

The primary mission of the DOJ AFP is to maximize the effectiveness of forfeiture as a deterrent to crime. This is accomplished by means of depriving drug traffickers, racketeers, and other criminal syndicates of their ill-gotten proceeds and instrumentalities of their trade. Components responsible for administration and financial management of the AFP are charged with lawfully, effectively, and efficiently supporting law enforcement authorities in the application of specified forfeiture statutes.

The AFF was created by the Comprehensive Crime Control Act of 1984 to be a repository of proceeds from forfeitures under any law enforced and administered by the DOJ. AFF and SADF are managed by the Asset Forfeiture Management Staff (AFMS), Justice Management Division (JMD). The SADF was created administratively by the Department to ensure control over monies seized by agencies participating in the Department's AFP.

B. Basis of Presentation

These financial statements have been prepared from the books and records of the AFF/SADF in accordance with United States generally accepted accounting principles issued by the Federal Accounting Standards Advisory Board (FASAB) and presentation guidelines in the Office of Management and Budget (OMB) Circular No. A-136, *Financial Reporting Requirements*. These financial statements are different from the financial reports prepared pursuant to OMB directives, which are used to monitor and control the use of the AFF/SADF budgetary resources. To ensure that the AFF/SADF financial statements are meaningful at the entity level and to enhance reporting consistency within the Department, Inventory and Related Property, Other Assets and Other Liabilities as defined by OMB Circular No. A-136 have been disaggregated on the Consolidated Balance Sheets. These include Forfeited and Seized Property, Net; Accrued Payroll and Benefits; Accrued Annual and Compensatory Leave Liabilities; Deferred Revenue; and Seized Cash and Monetary Instruments.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

C. Basis of Consolidation

The consolidated/combined financial statements include the accounts of the AFF and SADF. All significant proprietary intra-entity transactions and balances have been eliminated in consolidation. The Statements of Budgetary Resources are combined statements for FYs 2016 and 2015, and as such, intra-entity transactions have not been eliminated.

D. Basis of Accounting

Transactions are recorded on the accrual and budgetary bases of accounting. Under the accrual basis, revenues are recorded when earned and expenses are recorded when incurred, regardless of when cash is exchanged. Under the budgetary basis, however, funds availability is recorded based upon legal considerations and constraints. As a result, certain line items on the proprietary financial statements may not equal similar line items on the budgetary financial statements.

E. Non-Entity Assets

Non-entity assets consist of seized cash and investments of seized cash that are not available to fund the operations of the AFP.

F. Fund Balance with U.S. Treasury, and Cash and Other Monetary Assets

Generally, the U.S. Treasury processes cash receipts and disbursements for the AFF and SADF. The funds in the AFF, a special fund receipt account, are entity assets and are used to finance the operations of the AFP. Seized cash is deposited and accounted for in the SADF, a deposit fund, until a determination has been made as to its disposition. If title passes to the U.S. Government, the forfeited cash is then transferred from the SADF to the AFF. The cash balance in the SADF is a non-entity asset and is not available to finance the AFP activities, but AFMS does have statutory authority for the investment of idle AFF and SADF cash.

G. Investments

The AFF and SADF are authorized by 28 U.S.C. § 524(c) to invest idle funds in excess of the AFP's immediate needs in U.S. Treasury Securities. Investments are short-term, non-marketable market-based Federal Debt securities issued by the Bureau of Fiscal Service (BFS) and purchased exclusively through the BFS's Division of Federal Investments. Investments are reported on the Consolidated Balance Sheet at their net value, the face value plus or minus any unamortized premium or discount. Premiums and discounts are amortized using the straight-line method over the life of the Treasury security. AFF and SADF intend to hold investments to maturity. Accordingly, no provision is made for unrealized gains or losses on these securities.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

H. Accounts Receivable

Intra-governmental accounts receivable consist of amounts due from the Treasury Executive Office for Asset Forfeiture for goods or services provided by the AFP. Receivables arising from services provided to the Treasury Executive Office for Asset Forfeiture are considered fully collectible. Therefore, no allowance for uncollectible accounts is established.

Accounts receivable with the public consist of the proceeds of forfeited property sales not yet received. These accounts receivable are also considered fully collectible and there is no allowance for uncollectible accounts.

I. General Property, Plant and Equipment

The General Services Administration (GSA), which charges rent equivalent to the commercial rates for similar properties, provides a building on a reimbursable basis in which AFP operates. The Department does not recognize depreciation on buildings owned by the GSA.

Below are the capitalization thresholds:

Type of Property	Thresholds
Real Property	$250
Personal Property	$50
Internal Use Software	$5,000

Except for land, all general property, plant and equipment (PP&E) will be capitalized when the cost of acquiring or improving the property meets the threshold noted in the table above and has a useful life of two or more years. Land is capitalized regardless of the acquisition cost. Except for land, all general PP&E is depreciated or amortized, based on historical cost, using the straight-line method over the estimated useful life of the asset. Land is never depreciated.

J. Advances and Prepayments

Advances and prepayments include advances to other Federal agencies for any law enforcement, litigative/prosecutive, and correctional activity, or any other authorized purpose of the DOJ, as well as, travel advances issued to Federal employees for official travel. Travel advances are limited to meals and incidental expenses expected to be incurred by employees during official travel. Payments in advance of the receipt of goods and services are recorded as prepaid charges at the time of payment and are recognized as expenses when the goods and services are received. Advances and prepayments involving other Federal agencies are classified as Other Assets on the Balance Sheet.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

K. Forfeited and Seized Property

Property is seized as a consequence of a violation of public law. Seized property can include monetary instruments, real property, and tangible personal property of others in the actual or constructive possession of the custodial agency. The value of seized property is its estimated fair market value at the time it was seized. Most seized property is held by the USMS from the point of seizure until its disposition. In certain cases, the investigative agency will keep seized property in its custody if the intention is to place the property into official use after forfeiture or to use the property as evidence in a court proceeding. Seized cash and monetary instruments are presented as assets with offsetting liabilities on the balance sheet. Seized property other than cash and monetary instruments are presented in the footnotes only.

Forfeited property is property for which title has passed to the U.S. Government. This property is recorded at the estimated fair market value at the time of forfeiture and is not adjusted for any subsequent increases and decreases in estimated fair market value. The value of the property is reduced by estimated liens of record. The amount ultimately realized from the forfeiture and disposition of these assets could differ from the amounts initially reported. The proceeds from the sale of forfeited property are deposited in the AFF.

L. Liabilities

AFF accounts payable represent liabilities to both Federal and non-Federal entities. Deferred revenue represents the value of forfeited property not yet sold or placed into official use. Seized cash and monetary instruments represent liabilities for SADF amounts on deposit pending disposition.

M. Contingencies and Commitments

The AFF is party to various administrative proceedings, legal actions and claims. The balance sheet includes an estimated liability for those legal actions where management and the Chief Counsel consider adverse decisions "probable" and amounts are reasonably estimable. Legal actions where management and the Chief Counsel consider adverse decisions "probable" or "reasonably possible" and the amounts are reasonably estimable are disclosed in Note 13, *Contingencies and Commitments*. However, there are cases where amounts have not been accrued or disclosed because the amounts of the potential loss cannot be estimated or the likelihood of an unfavorable outcome is considered "remote".

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

N. Annual, Sick, and Other Leave

Annual leave and compensatory leave are expensed as earned with an offsetting liability. Liabilities are reduced as leave is taken. At the end of each fiscal quarter, the balance in the accrued annual leave liability account is adjusted to reflect valuation at current pay rates. To the extent current-year or prior-year appropriations are not available to fund annual and compensatory leave that is earned but not taken; funding will be obtained from future financing sources. Sick leave and other types of non-vested leave are expensed as taken.

O. Interest on Late Payments

Pursuant to the Prompt Payment Act, 31 U.S.C. § 3901-3907, Federal agencies must pay interest on payments for goods or services made to concerns after the due date. The due date is generally 30 days after receipt of a proper invoice or acceptance of the goods or services, whichever is later.

P. Retirement Plans

With few exceptions, employees of the AFF/SADF are covered by one of the following retirement programs:

1) Employees hired before January 1, 1984, are covered by the Civil Service Retirement System (CSRS). The AFF contributes 7% of the gross pay for regular employees and 7.5% for law enforcement officers.

2) Employees hired January 1, 1984 or later, are covered by the Federal Employees Retirement System (FERS).

   a. Employees hired January 1, 1984 through December 31, 2012, are covered by the FERS. The AFF contributes 13.7% of the gross pay for regular employees and 30.1% for law enforcement officers.

   b. Employees hired January 1, 2013 through December 31, 2013, are covered by the Federal Employees Retirement System-Revised Annuity Employees (FERS-RAE). The AFF contributes 11.9% of the gross pay for regular employees and 28.4% for law enforcement officers.

   c. Employees hired January 1, 2014 or later are covered by the Federal Employees Retirement System-Further Revised Annuity Employees (FERS-FRAE). The AFF contributes 11.9% of the gross pay for regular employees and 28.4% for law enforcement officers.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

P. Retirement Plans (Continued)

All employees are eligible to contribute to the Federal Thrift Savings Plan (TSP). For those employees covered by the FERS, FERS-RAE and FERS-FRAE, a TSP account is automatically established to which the AFF/SADF is required to contribute an additional 1% of gross pay and match employee contributions up to 4%. No government contributions are made to the TSP accounts established by the CSRS employees. The AFF/SADF does not report CSRS or FERS assets, accumulated plan benefits, or unfunded liabilities, if any, which may be applicable to its employees. Such reporting is the responsibility of the Office of Personnel Management (OPM). Statement of Federal Financial Accounting Standards (SFFAS) No. *5*, *Accounting for Liabilities of the Federal Government*, requires employing agencies to recognize the cost of pensions and other retirement benefits during their employees' active years of service. Refer to Note 16, *Imputed Financing from Costs Absorbed by Others*, for additional details.

Q. Intragovernmental Activity

Intragovernmental costs and exchange revenue represent transactions made between two reporting entities within the Federal Government. Costs and earned revenues with the public represent exchange transactions made between the reporting entity and a non-Federal entity. The classification of revenue or cost as "intragovernmental" or "with the public" is defined on a transaction-by-transaction basis. The purpose of this classification is to enable the Federal Government to prepare consolidated financial statements, not to match public and intragovernmental revenue with the costs incurred to produce public and intragovernmental revenue.

R. Revenues and Other Financing Sources

The funds in the AFF are derived primarily from financing sources and are presented on the Consolidated Statements of Changes in Net Position as both Budgetary and Other Financing Sources. Financing sources consist of (1) interest earned on investments (i.e., nonexchange revenues) and (2) donations and forfeitures, which include forfeited cash, proceeds from the sale of forfeited property (or conversion of deferred revenue to realized revenue through sale), receipt of payments in lieu of property forfeiture, recovery of asset management expenses, and financing sources from judgments. These financing sources are recognized when cash is forfeited; forfeited property is sold, placed into official use, or transferred to another Federal agency. The financing sources from legal judgments are not recognized until the judgment has been enforced. Deferred revenue is recorded when the property is forfeited. When the property is sold or otherwise disposed, the deferred revenue becomes earned and a financing source is recognized. The AFF recognizes exchange revenue when the United States Attorneys Offices provide services in judicial forfeiture cases brought by agencies participating in the U.S. Department of the Treasury (Treasury), Treasury Forfeiture Fund (TFF). The AFF recognizes exchange revenue on a reimbursement basis and the revenue is presented on the Consolidated Statements of Net Cost as

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

R. Revenues and Other Financing Sources (Continued)

earned revenue. In accordance with 28 U.S.C. § 524 and AFMS Memorandums of Understanding, donations and forfeitures available for use by certain Federal Agencies are treated as returns of financing sources when disbursed. The funds in the SADF are held in trust until a determination is made as to their disposition. These funds include seized cash, proceeds from pre-forfeiture sales of seized property, and income from property under seizure. No revenue recognition is given to cash deposited in the SADF.

S. Funds from Dedicated Collections

SFFAS No. 27, *Identifying and Reporting Funds from Dedicated Collections*, as amended by SFFAS No. 43, *Funds from Dedicated Collections: Amending Statement of Federal Financial Accounting Standards 27, Identifying and Reporting Earmarked Funds* defines 'funds from dedicated collections' as being financed by specifically identified revenues, provided to the Government by non-Federal sources, often supplemented by other financing sources, which remain available over time. These specifically identified revenues and other financing sources are required by statute to be used for designated activities, benefits, or purposes, and must be accounted for separately from the Government's general revenues. The three required criteria for a fund from dedicated collections are:

1. A statute committing the Federal Government to use specifically identified revenues and/or other financing sources that are originally provided to the Federal Government by a non-Federal source only for designated activities, benefits or purposes;

2. Explicit authority for the funds to retain revenues and/or other financing sources not used in the current period for future use to finance the designated activities, benefits or purposes; and

3. A requirement to account for and report on the receipt, use, and retention of the revenues and/or other financing sources that distinguishes the fund from the Federal Government's general revenues.

The AFF meets the definition of funds from dedicated collections, but the SADF does not meet the definition of funds from dedicated collections because seized cash is not available to finance the AFP.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

T. Tax Exempt Status

As an agency of the Federal Government, AFF/SADF is exempt from all income taxes imposed by any governing body whether it be a Federal, state, commonwealth, local, or foreign government.

U. Use of Estimates

The preparation of financial statements requires management to make certain estimates and assumptions that affect the reported amounts of assets and liabilities and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

V. Reclassifications

The FY 2015 financial statements were reclassified to conform to the FY 2016 Departmental and OMB financial statement presentation requirements. The reclassifications had no material effect on total assets, liabilities, net position, changes in net position or budgetary resources previously reported.

W. Subsequent Events

Subsequent events and transactions occurring after September 30, 2016 through the date of the auditors' opinion have been evaluated for potential recognition or disclosure in the financial statements. No changes were necessary for proper presentation of the financial statements. The date of the auditors' opinion also represents the date that the financial statements were available to be issued.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 2. Non-Entity Assets

Non-entity assets are assets that are held by the AFF/SADF but are not available to fund the AFP.

As of September 30, 2016 and 2015

	2016	2015
Intragovernmental		
Investments, Net (Note 5)	$ 1,067,000	$ 1,180,680
With the Public		
Cash and Other Monetary Assets (Note 4)	155,871	1,041,590
Total Non-Entity Assets	1,222,871	2,222,270
Total Entity Assets	6,397,766	6,513,131
Total Assets	$ 7,620,637	$ 8,735,401

Note 3. Fund Balance with U.S. Treasury

As of September 30, 2016 and 2015

	2016	2015
Fund Balances		
Special Funds	$ 115,389	$ 153,034
Status of Fund Balances		
Unobligated Balance - Available	$ 624,216	$ 785,369
Unobligated Balance - Available in Subsequent Periods	-	11,453
Unobligated Balance - Unavailable	15,486	219,663
Obligated Balance not yet Disbursed	5,018,248	5,032,011
Other Funds (With)/Without Budgetary Resources	(5,542,561)	(5,895,462)
Total Status of Fund Balances	$ 115,389	$ 153,034

Unobligated Balance - Available in Subsequent Periods includes amounts apportioned for future fiscal years that are available for obligation in a subsequent period (apportioned as Category C).

Other Funds (With)/Without Budgetary Resources primarily represent the AFF investments in short-term securities less amounts Temporarily not Available Pursuant to Public Law.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 4. Cash and Other Monetary Assets

Cash consists of seized cash deposited in the SADF. Monetary assets include seized cash in DOJ custody but not yet deposited in the SADF.

As of September 30, 2016 and 2015

	2016	2015
Cash		
SeizedCash Deposited	$ 134,580	$ 1,023,825
Other Monetary Assets		
Seized Monetary Instruments	21,291	17,765
Total Cash and Other Monetary Assets	$ 155,871	$ 1,041,590

Note 5. Investments, Net

The Federal Government does not set aside assets to pay future benefits or other expenditures associated with AFF or SADF. The cash receipts collected from the public for the AFF, a dedicated collections fund, or the SADF, a deposit fund, are deposited in the U.S. Treasury, which uses the cash for general Government purposes. Treasury securities are issued to the AFF and SADF as evidence of its receipts. Treasury securities are an asset to the AFF and a liability to the U.S. Treasury. Because the AFF/SADF and the U.S. Treasury are both parts of the Federal Government, these assets and liabilities offset each other from the standpoint of the Federal Government as a whole. For this reason, they do not represent an asset or a liability in the U.S. Government-wide financial statements.

Treasury securities provide the AFF with authority to draw upon the U.S. Treasury to make future benefit payments or other expenditures. When the AFF requires redemption of these securities to make expenditures, the Federal Government finances those expenditures out of accumulated cash balances, by raising taxes or other receipts, by borrowing from the public or repaying less debt, or by curtailing other expenditures. This is the same way that the Federal Government finances all other expenditures.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 5. Investments, Net (continued)

	Face Value	Unamortized Premium (Discount)	Investments, Net	Market Value
As of September 30, 2016				
Intragovernmental				
Non-MarketableSecurities				
Market-Based				
AFF	$ 6,173,391	$ (6,707)	$ 6,166,684	$ 6,166,639
SADF	1,072,717	(5,717)	1,067,000	1,070,749
Total	$ 7,246,108	$ (12,424)	$ 7,233,684	$ 7,237,388

	Face Value	Unamortized Premium (Discount)	Investments, Net	Market Value
As of September 30, 2015				
Intragovernmental				
Non-MarketableSecurities				
Market-Based				
AFF	$ 6,225,468	$ (1,826)	$ 6,223,642	$ 6,224,797
SADF	1,182,704	(2,024)	1,180,680	1,181,034
Total	$ 7,408,172	$ (3,850)	$ 7,404,322	$ 7,405,831

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 6. Accounts Receivable, Net

Accounts receivable consist of amounts owed to the AFF from the Treasury Executive Office for Asset Forfeiture services provided to Treasury and amounts owed to the AFF by AFP's Federal participating agencies for the use of Forfeiture.gov for publication of forfeiture notices. There is no allowance for uncollectible accounts since accounts receivable from business with Federal entities are considered fully collectible.

As of September 30, 2016 and 2015

	2016	2015
Intragovernmental		
Accounts Receivable	$ 3,141	$ 3,194
With the Public		
Accounts Receivable	1,732	-
Total Accounts Receivable, Net	$ 4,873	$ 3,194

Note 7. Forfeited and Seized Property, Net

Property seized for any purpose other than forfeiture and held by the seizing agency or a custodial agency is reported in the financial statements of the seizing or custodial agency. All property seized for forfeiture, including property with evidentiary value, is reported in the financial statements of the AFF/SADF. Federal Financial Accounting and Auditing Technical Release No. 4, *Reporting on Non-Valued Seized and Forfeited Property*, requires disclosure of property that does not have a legal market in the United States or does not have a value to the Federal Government.

A. Forfeited Property, Net

The following tables show the analysis of changes in and methods of disposition of forfeited property, excluding cash, during the fiscal years ended September 30, 2016 and 2015.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 7. Forfeited and Seized Property, Net (continued)

Analysis of Change in Forfeited Property -- For the Fiscal Year Ended September 30, 2016

Forfeited Property Category		Beginning Balance	Adjustments(1)	Forfeitures	Disposals	Ending Balance	Liens and Claims	Ending Balance, Net of Liens
Financial Instruments	Number	349	427	537	(980)	333		333
	Value	$ 4,386	$ 2,034	$ 52,328	$ (55,670)	$ 3,078	$ -	$ 3,078
Real Property	Number	463	10	320	(406)	387		387
	Value	$ 91,616	$ 3,408	$ 75,043	$ (98,189)	$ 71,878	$ (2,078)	$ 69,800
Personal Property	Number	3,846	128	3,268	(4,517)	2,725		2,725
	Value	$ 39,967	$ 3,854	$ 44,795	$ (50,578)	$ 38,038	$ (778)	$ 37,260
Non-Valued Firearms	Number	24,147	(439)	19,980	(15,689)	27,999		27,999
Total	Number	28,805	126	24,105	(21,592)	31,444		31,444
	Value	$ 135,969	$ 9,296	$ 172,166	$ (204,437)	$ 112,994	$ (2,856)	$ 110,138

(1) Adjustments include property status, asset group, and valuation changes that occurred during the current year for assets that were already on hand at the start of the year. Asset group changes occur primarily when cash is substituted for a different asset category. Valuation changes occur primarily due to changes in appraisals.

Methods of Disposition of Forfeited Property -- For the Fiscal Year Ended September 30, 2016

Forfeited Property Category		Converted Financial Instruments/Property	Destroyed/Donated/ Transferred	Sold/ Liquidated(1)	Official Use/ Transfer for Equitable Sharing	Returned Assets	Variance (2)	Total
Financial Instruments	Number	951	15	12	-	2	-	980
	Value	$ 54,926	$ 88	$ 619	$ -	$ 37	$ -	$ 55,670
Real Property	Number	1	2	384	-	19	-	406
	Value	$ 104	$ 18	$ 94,509	$ -	$ 3,558	$ -	$ 98,189
Personal Property	Number	6	1,227	2,750	382	152	-	4,517
	Value	$ 2,813	$ 1,527	$ 37,078	$ 4,787	$ 4,373	$ -	$ 50,578
Non-Valued Firearms	Number	-	15,058	-	468	163	-	15,689
Total	Number	958	16,302	3,146	850	336	-	21,592
	Value	$ 57,843	$ 1,633	$ 132,206	$ 4,787	$ 7,968	$ -	$ 204,437

(1) The sold/liquidated total dollar value does not agree to Donations and Forfeitures of Property on the Statement of Changes in Net Position and Note 20 because the sold/liquidated amount above represents the assets at their appraised values at forfeiture, and the Donations and Forfeitures of Property on the Statement of Changes in Net Position and Note 20 represents the proceeds realized upon disposition.

(2) Variances can result from differences between the value of the property when seized and the value of the property when disposed.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 7. Forfeited and Seized Property, Net (continued)

Analysis of Change in Forfeited Property -- For the Fiscal Year Ended September 30, 2015

Forfeited Property Category		Beginning Balance	Adjustments(1)	Forfeitures	Disposals	Ending Balance	Liens and Claims	Ending Balance, Net of Liens
Financial Instruments	Number	284	469	577	(981)	349		349
	Value	$ 4,907	$ 9,819	$ 188,277	$ (198,617)	$ 4,386	$ -	$ 4,386
Real Property	Number	458	(15)	384	(364)	463		463
	Value	$ 88,679	$ (4,585)	$ 88,425	$ (80,903)	$ 91,616	$ (3,200)	$ 88,416
Personal Property	Number	3,232	78	5,305	(4,769)	3,846		3,846
	Value	$ 48,915	$ (4,162)	$ 53,858	$ (58,644)	$ 39,967	$ (349)	$ 39,618
Non-Valued Firearms	Number	25,965	3,956	15,639	(21,413)	24,147		24,147
Total	Number	29,939	4,488	21,905	(27,527)	28,805		28,805
	Value	$ 142,501	$ 1,072	$ 330,560	$ (338,164)	$ 135,969	$ (3,549)	$ 132,420

(1) Adjustments include property status, asset group, and valuation changes that occurred during the current year for assets that were already on hand at the start of the year. Asset group changes occur primarily when cash is substituted for a different asset category. Valuation changes occur primarily due to changes in appraisals.

Methods of Disposition of Forfeited Property -- For the Fiscal Year Ended September 30, 2015

Forfeited Property Category		Converted Financial Instruments/Property	Destroyed/Donated/ Transferred	Sold/ Liquidated(1)	Official Use/ Transfer for Equitable Sharing	Returned Assets	Variance (2)	Total
Financial Instruments	Number	921	52	5	-	2	1	981
	Value	$ 192,759	$ 10	$ 5,845	$ -	$ 4	$ (1)	$ 198,617
Real Property	Number	-	2	342	-	20	-	364
	Value	$ -	$ 235	$ 73,650	$ -	$ 7,018	$ -	$ 80,903
Personal Property	Number	3	914	3,047	631	174	-	4,769
	Value	$ 3,680	$ 354	$ 43,456	$ 8,462	$ 2,692	$ -	$ 58,644
Non-Valued Firearms	Number	-	20,748	-	448	217	-	21,413
Total	Number	924	21,716	3,394	1,079	413	1	27,527
	Value	$ 196,439	$ 599	$ 122,951	$ 8,462	$ 9,714	$ (1)	$ 338,164

(1) The sold/liquidated total dollar value does not agree to Donations and Forfeitures of Property on the Statement of Changes in Net Position and Note 20 because the sold/liquidated amount above represents the assets at their appraised values at forfeiture, and the Donations and Forfeitures of Property on the Statement of Changes in Net Position and Note 20 represents the proceeds realized upon disposition.

(2) Variances can result from differences between the value of the property when seized and the value of the property when disposed.

These notes are an integral part of the financial statements.

ED_001803A_00005961-00058

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 7. Forfeited and Seized Property, Net (continued)

B. Seized Property

The following tables show the analysis of changes in and methods of disposition of property seized for forfeiture during the fiscal years ended September 30, 2016 and 2015. In the following tables, Seized Cash and Monetary Instruments includes seized cash in transit as well as pre-forfeiture deposits into the SADF of monetary instruments and depository account balances, proceeds from pre-forfeiture sales, and cash received in lieu of seized property. Financial Instruments include negotiable instruments and restricted depository accounts.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 7. Forfeited and Seized Property, Net (continued)

Analysis of Change in Seized Property -- For the Fiscal Year Ended September 30, 2016

Seized Property Category		Beginning Balance	Adjustments (1)	Seizures	Disposals	Ending Balance	Liens and Claims	Ending Balance Net of Liens
Seized Cash and Monetary Instruments	Number	11,234	612	7,448	(9,069)	10,225		10,225
	Value	$ 2,222,270	$ 18,931	$ 706,942	$ (1,730,921)	$ 1,217,222	$ (291,503)	$ 925,719
Financial Instruments	Number	377	(59)	270	(172)	416		416
	Value	$ 186,764	$ (21,061)	$ 24,290	$ (11,030)	$ 178,963	$ (1,931)	$ 177,032
Real Property	Number	80	9	111	(117)	83		83
	Value	$ 33,858	$ (3,392)	$ 27,195	$ (41,576)	$ 16,085	$ (7,787)	$ 8,298
Personal Property	Number	5,487	456	3,578	(4,260)	5,261		5,261
	Value	$ 128,426	$ (10,909)	$ 65,039	$ (69,421)	$ 113,135	$ (39,545)	$ 73,590
Non-Valued Firearms	Number	25,251	3,047	16,503	(22,026)	22,775		22,775
Total	Number	42,429	4,065	27,910	(35,644)	38,760		38,760
	Value	$ 2,571,318	$ (16,431)	$ 823,466	$ (1,852,948)	$ 1,525,405	$ (340,766)	$ 1,184,639

(1) Adjustments include property status, asset group, and valuation changes that occurred during the current year for assets that were already on hand at the start of the year. Asset group changes occur primarily when cash is substituted for a different asset category. Valuation changes occur primarily due to changes in appraisals.

Methods of Disposition of Seized Property -- For the Fiscal Year Ended September 30, 2016

Seized Property Category		Converted Financial Instruments/Property	Destroyed/Donated/ Transferred	Sold/ Liquidated	Returned Assets	Forfeited (1)	Variance (2)	Total
Seized Cash and Monetary Instruments	Number	8	115	-	742	8,204	-	9,069
	Value	$ 393	$ 2,592	$ -	$ 62,427	$ 1,665,509	$ -	$ 1,730,921
Financial Instruments	Number	1	3	-	6	162	-	172
	Value	$ 122	$ 12	$ -	$ 156	$ 10,740	$ -	$ 11,030
Real Property	Number	-	-	-	14	103	-	117
	Value	$ -	$ -	$ -	$ 1,439	$ 40,137	$ -	$ 41,576
Personal Property	Number	-	53	1	988	3,218	-	4,260
	Value	$ -	$ 286	$ 23	$ 27,847	$ 41,265	$ -	$ 69,421
Non-Valued Firearms	Number	-	5,723	-	1,944	14,359	-	22,026
Total	Number	9	5,894	1	3,694	26,046	-	35,644
	Value	$ 515	$ 2,890	$ 23	$ 91,869	$ 1,757,651	$ -	$ 1,852,948

(1) Forfeitures reported on the Analysis of Changes in Forfeited Property may be greater because some assets are not seized until after they are declared forfeited.

(2) Variances can result from differences between the value of the property when seized and the value of the property when disposed.

These notes are an integral part of the financial statements.

ED_001803A_00005961-00060

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 7. Forfeited and Seized Property, Net (continued)

Analysis of Change in Seized Property -- For the Fiscal Year Ended September 30, 2015

Seized Property Category		Beginning Balance	Adjustments (1)	Seizures	Disposals	Ending Balance	Liens and Claims	Ending Balance Net of Liens
Seized Cash and Monetary Instruments	Number	13,824	662	8,985	(12,237)	11,234		11,234
	Value	$ 1,373,316	$ 39,752	$ 2,064,442	$ (1,255,240)	$ 2,222,270	$ (156,523)	$ 2,065,747
Financial Instruments	Number	357	(70)	345	(255)	377		377
	Value	$ 124,376	$ (79,070)	$ 193,711	$ (52,253)	$ 186,764	$ (491)	$ 186,273
Real Property	Number	131	9	98	(158)	80		80
	Value	$ 52,586	$ (3,112)	$ 30,738	$ (46,354)	$ 33,858	$ (11,451)	$ 22,407
Personal Property	Number	7,293	526	4,184	(6,516)	5,487		5,487
	Value	$ 147,805	$ (11,498)	$ 73,400	$ (81,281)	$ 128,426	$ (35,847)	$ 92,579
Non-Valued Firearms	Number	24,394	6,481	14,725	(20,349)	25,251		25,251
Total	Number	45,999	7,608	28,337	(39,515)	42,429		42,429
	Value	$ 1,698,083	$ (53,928)	$ 2,362,291	$ (1,435,128)	$ 2,571,318	$ (204,312)	$ 2,367,006

(1) Adjustments include property status, asset group, and valuation changes that occurred during the current year for assets that were already on hand at the start of the year. Asset group changes occur primarily when cash is substituted for a different asset category. Valuation changes occur primarily due to changes in appraisals.

Methods of Disposition of Seized Property -- For the Fiscal Year Ended September 30, 2015

Seized Property Category		Converted Financial Instruments/Property	Destroyed/Donated/ Transferred	Sold/ Liquidated	Returned Assets	Forfeited (1)	Variance (2)	Total
Seized Cash and Monetary Instruments	Number	44	46	-	1,071	11,076	-	12,237
	Value	$ 15,658	$ 792	$ -	$ 71,075	$ 1,167,715	$ -	$ 1,255,240
Financial Instruments	Number	8	2	-	25	220	-	255
	Value	$ 846	$ 200	$ -	$ 2,334	$ 48,873	$ -	$ 52,253
Real Property	Number	-	-	-	25	133	-	158
	Value	$ -	$ -	$ -	$ 8,610	$ 37,744	$ -	$ 46,354
Personal Property	Number	-	39	3	1,228	5,246	-	6,516
	Value	$ -	$ 182	$ 37	$ 27,835	$ 53,227	$ -	$ 81,281
Non-Valued Firearms	Number	-	5,093	-	4,842	10,414	-	20,349
Total	Number	52	5,180	3	7,191	27,089	-	39,515
	Value	$ 16,504	$ 1,174	$ 37	$ 109,854	$ 1,307,559	$ -	$ 1,435,128

(1) Forfeitures reported on the Analysis of Change in Forfeited Property may be greater because some assets are not seized until after they are declared forfeited.

(2) Variances can result from differences between the value of the property when seized and the value of the property when disposed.

These notes are an integral part of the financial statements.

ED_001803A_00005961-00061

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 8. General Property, Plant and Equipment, Net

As of September 30, 2016	Acquisition Cost	Accumulated Depreciation	Net Book Value	Useful Life
Equipment	$ 402	$ (203)	$ 199	5-12 years
Leasehold Improvements	1,119	(762)	357	5 years
Total	$ 1,521	$ (965)	$ 556	

	Federal	Public	Total
Sources of CapitalizedProperty, Plant and Equipment Purchases for FY 2016	$ -	$ -	$ -

As of September 30, 2015	Acquisition Cost	Accumulated Depreciation	Net Book Value	Useful Life
Equipment	$ 402	$ (137)	$ 265	5-12 years
Leasehold Improvements	1,119	(632)	487	5 years
Total	$ 1,521	$ (769)	$ 752	

	Federal	Public	Total
Sources of CapitalizedProperty, Plant and Equipment Purchases for FY 2015	$ -	$ 328	$ 328

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 9. Other Assets

As of September 30, 2016 and 2015

	2016	2015
Intragovernmental		
Advances and Prepayments	$ 88	$ 89
Total Intragovernmental	88	89
Other Assets With the Public	38	-
Total Other Assets	$ 126	$ 89

Note 10. Liabilities not Covered by Budgetary Resources

As of September 30, 2016 and 2015

	2016	2015
With the Public		
Accrued Annual and Compensatory Leave Liabilities	$ 1,650	$ 1,900
Total Liabilities not Covered by Budgetary Resources	1,650	1,900
Total Liabilities Covered by Budgetary Resources	6,158,761	7,183,582
Total Liabilities	$ 6,160,411	$ 7,185,482

Note 11. Seized Cash and Monetary Instruments

The Seized Cash and Monetary Instruments represent liabilities for seized assets held by the SADF pending disposition.

As of September 30, 2016 and 2015

	2016	2015
Investments, Net (Note 5)	$ 1,067,000	$ 1,180,680
Seized Cash Deposited (Note 4)	134,580	1,023,825
Seized Monetary Instruments (Note 4)	21,291	17,765
Seized Cash in Transit to Forfeiture	(5,649)	-
Total Seized Cash and Monetary Instruments	$ 1,217,222	$ 2,222,270

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 12. Other Liabilities

All Other Liabilities are current liabilities.

As of September 30, 2016 and 2015

	2016	2015
Intragovernmental		
Employer Contributions and Payroll Taxes Payable	$ 278	$ 197

Note 13. Contingencies and Commitments

	Accrued Liabilities	Estimated Range of Loss	
		Lower	Upper
As of September 30, 2016			
Reasonably Possible	$ -	$ 2,500	$ 5,000
As of September 30, 2015			
Reasonably Possible	$ -	$ 1,000	$ 2,500

Note 14. Funds from Dedicated Collections

The AFF, a fund from dedicated collections, exists to eliminate economic disincentives to operation of an extensive national asset forfeiture program by providing a stable source of funds to pay costs, not otherwise funded under agency appropriations, to execute forfeiture functions. This is made possible by depositing the proceeds of all forfeitures under any laws enforced or administered by the Department into the Fund, and using those receipts to finance expenses associated with asset forfeiture functions.

The funds in the AFF are derived primarily from financing sources and are presented on the Consolidated Statement of Changes in Net Position as both Budgetary and Other Financing Sources. Financing sources consist of (1) interest earned on Treasury investments (i.e., nonexchange revenues) and (2) non-governmental donations and forfeitures, which include forfeited cash, proceeds from the sale of forfeited property (or conversion of deferred revenue to realized revenue through sale), receipt of payments in lieu of property forfeiture, recovery of asset management expenses, and financing sources from judgments.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 14. Funds from Dedicated Collections (continued)

The AFF recognizes exchange revenue, on a reimbursement basis, when the United States Attorneys Offices provide services in judicial forfeiture cases brought by agencies participating in the TFF. This revenue is presented on the Consolidated Statement of Net Cost as earned revenue. In accordance with 28 U.S.C. § 524 donations and forfeitures available for use by certain Federal agencies are treated as returns of financing sources when disbursed.

All funds deposited to the AFF are considered "public" monies, i.e., funds belonging to the U.S. Government. The monies deposited into the AFF are available to cover all expenditures in support of the AFP that are allowable under the Fund statute created by the Comprehensive Crime Control Act of 1984 (P.L. 98-473, dated October 12, 1984) at 28 U.S.C. § 524(c).

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 14. Funds from Dedicated Collections (continued)

As of September 30, 2016 and 2015

	2016	2015
Balance Sheet		
Assets		
Fund Balance with U.S. Treasury	$ 115,389	$ 153,034
Investments, Net	6,166,684	6,223,642
Other Assets	115,693	136,455
Total Assets	$ 6,397,766	$ 6,513,131
Liabilities		
Accounts Payable	$ 4,829,965	$ 4,827,689
Other Liabilities	107,575	135,523
Total Liabilities	$ 4,937,540	$ 4,963,212
Net Position		
Cumulative Results of Operations	$ 1,460,226	$ 1,549,919
Total Net Position	$ 1,460,226	$ 1,549,919
Total Liabilities and Net Position	$ 6,397,766	$ 6,513,131

For the Fiscal Years Ended September 30, 2016 and 2015

Statement of Net Cost		
Gross Cost of Operations	$ 1,215,946	$ 1,551,414
Less: Earned Revenue	14,877	14,557
Net Cost of Operations	$ 1,201,069	$ 1,536,857
Statement of Changes in Net Position		
Net Position Beginning of Period	$ 1,549,919	$ 2,560,848
Budgetary Financing Sources	913,186	191,890
Other Financing Sources	198,190	334,038
Total Financing Sources	1,111,376	525,928
Net Cost of Operations	(1,201,069)	(1,536,857)
Net Change	(89,693)	(1,010,929)
Net Position End of Period	$ 1,460,226	$ 1,549,919

These notes are an integral part of the financial statements.

ED_001803A_00005961-00066

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 15. Net Cost of Operations by Suborganization

The AFF's statute, 28 U.S.C. § 524(c), authorizes the AFF to fund Forfeiture Operations Expenses, including those for asset management and disposal, third party payments, equitable sharing payments, forfeiture case prosecution, forfeiture systems, special contract services, forfeiture training and printing, contracts to identify assets, and other program management; and General Investigative Expenses, including those for awards for information, purchases of evidence, equipping of conveyances, investigative costs leading to seizure and joint law enforcement operations.

For the Fiscal Year Ended September 30, 2016	Forfeiture Operations Expenses	General Investigation Expenses	Total
Goal 2: Prevent Crime, Protect the Rights of the American People, and Enforce Federal Law			
Gross Cost	$ 950,677	$ 265,269	$ 1,215,946
Less: Earned Revenue	14,877	-	14,877
Net Cost of Operations	$ 935,800	$ 265,269	$ 1,201,069

For the Fiscal Year Ended September 30, 2015	Forfeiture Operations Expenses	General Investigation Expenses	Total
Goal 2: Prevent Crime, Protect the Rights of the American People, and Enforce Federal Law			
Gross Cost	$ 1,286,397	$ 265,017	$ 1,551,414
Less: Earned Revenue	14,557	-	14,557
Net Cost of Operations	$ 1,271,840	$ 265,017	$ 1,536,857

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 16. Imputed Financing from Costs Absorbed by Others

Imputed Inter-Departmental Financing Sources are the unreimbursed (i.e., non-reimbursed and under-reimbursed) portion of the full costs of goods and services received by the AFF/SADF from a providing Federal entity that is not part of the Department of Justice. In accordance with SFFAS No. 30, *Inter-Entity Cost Implementation: Amending SFFAS 4, Managerial Cost Accounting Standards and Concepts*, the material Imputed Inter-Departmental Financing Sources recognized by the AFP are the cost of benefits for the Federal Employees Health Benefits Program (FEHB), the Federal Employees' Group Life Insurance Program (FEGLI), the Federal Pension plans that are paid by other Federal entities, and any un-reimbursed payments made from the Treasury Judgment Fund on behalf of the AFP. The Treasury Judgment Fund was established by the Congress and funded at 31 U.S.C. § 1304 to pay in whole or in part the court judgments and settlement agreements negotiated by the Department on behalf of agencies, as well as certain types of administrative awards. Interpretation of Federal Financial Accounting Standards Interpretation No. 2, *Accounting for Treasury Judgment Fund Transactions*, requires agencies to recognize liabilities and expenses when unfavorable litigation outcomes are probable and the amount can be estimated and will be paid by the Treasury Judgment Fund.

SFFAS No. 5, *Accounting for Liabilities of the Federal Government,* requires that employing agencies recognize the cost of pensions and other retirement benefits during their employees' active years of service. SFFAS No. 5 requires OPM to provide cost factors necessary to calculate cost. OPM actuaries calculate the value of pension benefits expected to be paid in the future, and then determine the total funds to be contributed by and for covered employees, such that the amount calculated would be sufficient to fund the projected pension benefits. The cost factors are as follows:

	Category	Cost Factor (%)
Civil Service Retirement System (CSRS)	Regular Employees	33.5
	Regular Employees Offset	24.6
	Law Enforcement Officers	57.9
	Law Enforcement Officers Offset	49.7

Federal Employees Retirement System (FERS)	Regular Employees	15.1
	Regular Employees – Revised Annuity Employees (RAE)	15.6
	Regular Employees – Further Revised Annuity Employees (FRAE)	15.7
	Law Enforcement Officers	33.4
	Law Enforcement Officers – RAE	34.1
	Law Enforcement Officers – FRAE	34.1

The cost to be paid by other agencies is the total calculated future costs, less employee and employer contributions. In addition, the cost of other retirement benefits, which included health and life insurance that are paid by other Federal entities, must also be recorded.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 16. Imputed Financing from Costs Absorbed by Others (continued)

Imputed Intra-Departmental Financing Sources as defined in SFFAS No. 4, *Managerial Cost Accounting Standards and Concepts*, are the unreimbursed portion of the full costs of goods and services received by the AFP from a providing entity that is a part of the U.S. Department of Justice. Recognition is required for those transactions determined to be material to the receiving entity. The determination of whether the cost is material requires considerable judgment based on the specific facts and circumstances of each type of good or service provided. SFFAS No. 4 also states that costs for broad and general support need not be recognized by the receiving entity, unless such services form a vital and integral part of the operations or output of the receiving entity. Costs are considered broad and general if they are provided to many, if not all, reporting components and not specifically related to the receiving entity's output. The AFP does not have any imputed intra-departmental financing sources that meet the reporting requirements.

For the Fiscal Years Ended September 30, 2016 and 2015

	2016	2015
Imputed Inter-Departmental Financing		
Health Insurance	$ 1,153	$ 1,041
Life Insurance	5	4
Pension	373	526
Total Imputed Inter-Departmental	$ 1,531	$ 1,571

Note 17. Information Related to the Statement of Budgetary Resources

Apportionment Categories of New Obligations and Upward Adjustments:

	Direct Obligations Incurred	Reimbursable Obligations Incurred	Total Obligations Incurred
For the Fiscal Year Ended September 30, 2016			
Apportioned Under			
Category A	$ 20,106	$ -	$ 20,106
Category B	1,297,638	15,841	1,313,479
Total	$ 1,317,744	$ 15,841	$ 1,333,585
For the Fiscal Year Ended September 30, 2015			
Apportioned Under			
Category A	$ 20,442	$ -	$ 20,442
Category B	2,693,655	13,309	2,706,964
Total	$ 2,714,097	$ 13,309	$ 2,727,406

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 17. Information Related to the Statement of Budgetary Resources (continued)

Apportionment categories are determined in accordance with the guidance provided in Part 4 *Instructions on Budget Execution* of OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*. Category A represents resources apportioned for calendar quarters. Category B represents resources apportioned for other periods.

Status of Undelivered Orders:

Undelivered Orders (UDOs) represent the amount of goods and/or services ordered, which have not been actually or constructively received. This amount includes any orders which may have been prepaid or advanced but for which delivery or performance has not yet occurred.

As of September 30, 2016 and 2015

	2016	2015
UDO Obligations Unpaid	$ 193,278	$ 208,695
UDO Obligations Prepaid/Advanced	88	89
Total UDO	$ 193,366	$ 208,784

Permanent Indefinite Appropriations:

28 U.S.C. § 524(c)(1) authorizes the Attorney General to use AFF receipts to pay program operations expenses, equitable sharing to state and local law enforcement agencies who assist in forfeiture cases, and lien holders. This permanent indefinite authority is open-ended as to both its period of availability (amount of time the agency has to spend the funds) and its amount.

Legal Arrangements Affecting Use of Unobligated Balances:

Unobligated balances represent the cumulative amount of budget authority that is not obligated and that remains available for obligation, unless otherwise restricted. Excess unobligated balances identified at the end of a fiscal year may be declared a "Super Surplus" balance. Super Surplus balances may be allocated at the discretion of the Attorney General for "…any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the DOJ" pursuant to 28 U.S.C. § 524(c)(8)(E). See Note 18, *Transfers In/Out Without Reimbursement, Super Surplus*, for more information.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 17. Information Related to the Statement of Budgetary Resources (continued)

Statement of Budgetary Resources vs. the Budget of the United States Government:

The reconciliation as of September 30, 2016 is not presented because the submission of the Budget of the United States (Budget) for FY 2018, which presents the execution of the FY 2015 Budget, occurs after publication of these financial statements. The Department of Justice Budget Appendix can be found on the OMB website and will be available in early February 2017.

For the Fiscal Year Ended September 30, 2015
(Dollars in Millions)

	Total Budgetary Resources	Obligations Incurred	Distributed Offsetting Receipts	Agency Outlays, Net
Statement of Budgetary Resources (SBR)	$ 3,744	$ 2,727	$ 7	$ 2,405
Funds not Reported in the Budget				
AFF/SADF Forfeiture Activity	10	8		8
Funds not Reported in the SBR				
SequestrationIncrease	(6)			
Other			(1)	
Budget of the United States Government	$ 3,748	$ 2,735	$ 6	$ 2,413

Funds not Reported in the Budget - Forfeiture Activity, primarily represent forfeiture activities that are unavailable until the authority is granted in the subsequent year. These activities represent real estate sales and accrued revenue. Other differences represent financial statement adjustments, timing differences and other immaterial differences between amounts reported in the AFF/SADF's SBR and the Budget of the United States.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 18. Transfers In/Out Without Reimbursement

Super Surplus. 28 U.S.C. § 524(c)(8)(E), provides the Attorney General with the authority to use the AFF's excess unobligated balance remaining at the end of a fiscal year, without fiscal year limitation, for any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the Department of Justice. The excess unobligated balance consists of the AFF's unobligated balance at the end of the fiscal year after the AFP's operational needs for the subsequent year are reserved. The excess unobligated balance is historically known as "Super Surplus."

At the beginning of FY 2015, unused prior years' Super Surplus authority totaling $10 was renewed, allowing EOUSA to incur expenses against that authority for another fiscal year, and there were no additional Super Surplus declarations during the fiscal year ended September 30, 2015. For the fiscal year ended September 30, 2015, $10 of authority was transferred out to EOUSA, with disbursements of $7 and $3 was deobligated. There was no Super Surplus authority renewed for FY 2016.

Official Use Transfers. Property was distributed pursuant to the Attorney General's authority to share forfeiture revenues with agencies that participated in the forfeiture that generated the property, and pursuant to the DOJ's authority to place forfeited property into official use by the Government. For the fiscal years ended September 30, 2016 and 2015, transfers-out of forfeited property for official use totaled $4,209 and $4,880, respectively.

Transfers Pursuant to Public Law. Pursuant to the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235) in FY15, the AFF transferred $1,100 million to the USMS Office of the Federal Detention Trustee (OFDT) for necessary expenses related to United States prisoners in the custody of the USMS. The Continuing Appropriations Act, 2016 (P.L. 114-53) adopted this approach and the AFF transferred an additional $61.2 million to OFDT in FY 2016. These transfers were treated as expenditure transfers of the AFF.

Further, the Bipartisan Budget Act of 2015 (P.L. 114-74) enacted in November 2015 included a $746 million permanent rescission from the AFF, which was transferred to the U.S. Department of the Treasury in September 2016.

Note 19. Nonexchange Revenues

Nonexchange revenue consists of income from the investment of the AFF and SADF in U.S. Treasury securities. The investment accrual revenue represents the amortization of the discount on marketable bills using the straight-line basis.

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 19. Nonexchange Revenues (Continued)

For the Fiscal Years Ended September 30, 2016 and 2015

	2016	2015
Total Investment Income	$ 34,336	$ 6,610

Note 20. Donations and Forfeitures

Forfeiture income includes forfeited cash, sales of forfeited property, penalties in lieu of forfeiture, recovery of returned asset management costs, judgment collections, and other miscellaneous income. For the Fiscal Years ended September 30, 2016 and 2015, net forfeiture income attributable to the AFF totaled $1,886,918 and $1,622,651 respectively, after the following payments and returns to agencies participating in seizures that led to forfeiture.

	FY 2016	FY 2015
Payments to individuals or organizations for proceeds from assets forfeited and deposited into the AFF and subsequently returned to them through a settlement agreement or by a court order.	$ 581	$ 656
Return of forfeiture income to the TFF for its participation in seizures that led to forfeiture.	57,398	17,213
Return of forfeiture income to the U.S. Postal Service for its participation in seizures that led to forfeiture.	10,728	3,153
Return of forfeiture income to the other Federal Agencies for their participation in seizures that led to forfeiture.	5	-
Total Return of Forfeiture Income	$ 68,712	$ 21,022

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 21. Reconciliation of Net Cost of Operations (proprietary) to Budget

For the Fiscal Years Ended September 30, 2016 and 2015

	2016	2015
Resources Used to Finance Activities		
Budgetary Resources Obligated		
New Obligations and Upward Adjustments (Total)	$ 1,333,585	$ 2,727,406
Less: Spending Authority from Offsetting Collections and Recoveries	121,454	85,963
Obligations Net of Offsetting Collections and Recoveries	1,212,131	2,641,443
Less: Offsetting Receipts and Nonexchange Revenue	34,336	6,610
Net Obligations	1,177,795	2,634,833
Other Resources		
Donations and Forfeitures of Property	200,868	337,357
Transfers-In/Out Without Reimbursement	(4,209)	(4,890)
Imputed Financing from Cost Absorbed by Others (Note 16)	1,531	1,571
Net Other Resources Used to Finance Activities	198,190	334,038
Total Resources Used to Finance Activities	1,375,985	2,968,871
Resources Used to Finance Items not Part of the Net Cost of Operations		
Net Change in Budgetary Resources Obligated for Goods, Services, and Benefits Ordered but not Yet Provided	16,329	(29,653)
Resources That Fund Expenses Recognized in Prior Periods (Note 22)	(250)	
Budgetary Offsetting Collections and Receipts That do not Affect Net Cost of Operations	(166,532)	(330,746)
Resources That Finance the Acquisition of Assets	-	(328)
Other Resources or Adjustments to Net Obligated Resources That do not Affect Net Cost of Operations	(56,991)	(1,095,110)
Total Resources Used to Finance Items not Part of the Net Cost of Operations	(207,444)	(1,455,837)
Total Resources Used to Finance the Net Cost of Operations	$ 1,168,541	$ 1,513,034

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 21. Reconciliation of Net Cost of Operations (proprietary) to Budget (continued)

For the Fiscal Years Ended September 30, 2016 and 2015

	2016	2015
Components of Net Cost of Operations That Did not Require or Generate Resources in the Current Period		
Components That Will Require or Generate Resources in Future Periods (Note 22)	$ -	$ 134
Depreciation and Amortization	195	204
Other	32,333	23,485
Total Components of Net Cost of Operations That Did not Require or Generate Resources in the Current Period	$ 32,528	$ 23,823
Net Cost of Operations	$ 1,201,069	$ 1,536,857

U.S. Department of Justice
Notes to the Principal Financial Statements
(Dollars in Thousands, Except as Noted)

Note 22. Explanation of Differences Between Liabilities not Covered by Budgetary Resources and Components of Net Cost of Operations Requiring or Generating Resources in Future Periods

Liabilities that are not covered by realized budgetary resources and for which there is no certainty that budgetary authority will be realized, such as the enactment of an appropriation, are considered liabilities not covered by budgetary resources. These liabilities totaling $1,650 and $1,900 on September 30, 2016 and 2015, respectively, are discussed in Note 10, *Liabilities not Covered by Budgetary Resources*. Decreases in these liabilities result from current year budgetary resources that were used to fund expenses recognized in prior periods. Increases in these liabilities represent unfunded expenses that were recognized in the current period. These increases, along with the change in the portion of exchange revenue receivables from the public, which are not considered budgetary resources until collected, represent components of current period net cost of operations that will require or generate budgetary resources in future periods. The changes in liabilities not covered by budgetary resources and receivables generating resources in future periods are comprised of the following:

For the Fiscal Years Ended September 30, 2016 and 2015

	2016	2015
Resources that Fund Expenses Recognized in Prior Periods		
Decrease in Liabiltites Not Covered by Budgetary Resources:		
Decrease in Accrued Annual and Compensatory Leave Liabilities	$ (250)	$ -
Total Resources that Fund Expenses Recognized in Prior Periods	$ (250)	$ -
Components That Will Require or Generate Resources in Future Periods		
Increase in Accrued Annual and Compensatory Leave Liabilities	$ -	$ 134
Total Components that Will Require or Generate Resources in Future Periods	$ -	$ 134

U.S. DEPARTMENT OF JUSTICE

Assets Forfeiture Fund and Seized Asset Deposit Fund

Other Information
(Unaudited)

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U. S. Department of Justice
Assets Forfeiture Fund and Seized Asset Deposit Fund
Combined Schedules of Spending
For the Fiscal Years Ended September 30, 2016 and 2015

Dollars in Thousands		2016	2015
What Money is Available to Spend?			
Total Resources		$ 1,973,287	$ 3,743,891
Less: Amount Available but Not Agreed to be Spent		624,216	796,822
Less: Amount Not Available to be Spent		15,486	219,663
Total Amounts Agreed to be Spent		**$ 1,333,585**	**$ 2,727,406**
How was the Money Spent?			
Personnel Compensation and Benefits			
1100	Personnel Compensation	$ 37,227	$ 30,923
1200	Personnel Benefits	12,980	10,563
Other Program Related Expenses			
2100	Travel & Transportation of Persons	5,597	7,253
2200	Transportation of Things	1,798	1,738
2300	Rent, Communications, and Utilities	34,618	25,340
2400	Printing and Reproduction	414	528
2500	Other Contractual Services	1,149,240	1,522,835
2600	Supplies and Materials	3,482	3,262
3100	Equipment	3,385	12,658
3200	Land and Structures	1,750	-
4200	Insurance Claims and Indemnities	106	101
4300	Interest and Dividends	-	76
4400	Refunds for Forfeited Assets	21,788	12,129
	Expenditure Transfer to the U.S. Marshals Service	61,200	1,100,000
Total Amounts Agreed to be Spent		**$ 1,333,585**	**$ 2,727,406**
Who did the Money go to?			
For Profit		619,905	1,492,065
Federal Government		643,827	1,172,202
Employees		37,227	30,923
Other		32,626	32,216
Total Amounts Agreed to be Spent		**$ 1,333,585**	**$ 2,727,406**

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U.S. DEPARTMENT OF JUSTICE

Assets Forfeiture Fund and Seized Asset Deposit Fund

Appendix

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OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The Office of the Inspector General (OIG) provided a draft of the *Independent Auditors' Report on Internal Control over Financial Reporting Based on an Audit of Financial Statements Performed in Accordance with Government Auditing Standards* to the Assets Forfeiture Fund and Seized Asset Deposit Fund (AFF/SADF). The AFF/SADF's response is incorporated in the *Independent Auditors' Report on Internal Control over Financial Reporting Based on an Audit of Financial Statements Performed in Accordance with Government Auditing Standards* of this final report. The following provides the report's recommendations, the status of the recommendations, the OIG analysis of the response, and a summary of actions necessary to close the report.

Recommendations:

1. **Implement more effective procedures over review of the Annual Financial Statements to supplement higher-level management reviews over the Trial Balance and financial statements, to include reconciling and researching differences in budgetary information.**

   Resolved. The Justice Management Division's (JMD's) Asset Forfeiture Management Staff (AFMS), Budget Staff, and Finance Staff concurred with our recommendation. The AFF/SADF management stated in its response that the AFMS and the Finance Staff have already implemented and tested new reconciliation procedures into the financial statement preparation process that proved effective when preparing the 3rd and 4th quarter Financial Statements Packages. In addition, AFMS and the Finance Staff have implemented weekly face-to-face meetings between all staff involved in the financial statement preparation process. These meetings have already resulted in self-identification of differences in budgetary information that are then resolved prior to financial reporting.

   This recommendation can be closed when subsequent annual financial statement audit testing verifies that management has sufficiently implemented procedures that reconciles its budgetary information and researches differences between the Trial Balance and the financial statements.

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2. **Work with all participating agencies to develop and implement formal policies and control procedures to ensure forfeiture decisions are accurately reflected and updated in the Consolidated Assets Tracking System (CATS) in a timely manner, which should include specific policies and procedures for the appropriate accounting treatment of forfeiture orders that are subsequently reversed or appealed.**

Resolved: The AFMS concurred with our recommendation. The AFF/SADF management stated in its response that in the past 9 months, the AFMS Director personally addressed this issue at 3 quarterly working groups attended by 75 to 100 forfeiture prosecutors, agents, and program managers from all 13 participating agencies. As part of the FY 2017 budget allocation process, the AFMS approved a number of senior program management positions within the Executive Office for United States Attorneys (EOUSA) and each of the investigative agencies that are designed to help improve administrative oversight, internal controls, enterprise risk management, and operational policy functions. These positions will be responsible for improving transparency around what the AFF/SADF seize and forfeit, as well as how and why the AFF/SADF seize and forfeit those assets.

This recommendation can be closed when subsequent annual financial statement audit testing verifies that management has developed and adequately instructed its participating agencies to comply with formal policies and control procedures designed to ensure forfeiture decisions are accurately reflected and updated in CATS in a timely manner, which includes specific policies and procedures for appropriate accounting treatment of forfeitu orders that are subsequently reversed or appealed.

3. **Continue to reinforce with the EOUSA's and U.S. Attorneys' offices the importance of timely reporting of the forfeiture decision to ensure that data in the property and financial management systems are updated in a timely manner as changes in status occur.**

Resolved: The AFF/SADF concurred with our recommendation. The AFF/SADF management stated in its response that the AFMS Director personally briefed approximately 164 Assistant United States Attorneys representing all 94 Districts about the importance of timely recording of forfeiture decisions. In addition, AFMS prepared and distributed a 1 page handout, outlining the forfeiture case related events that must be recorded into CATS, including the associated CATS fields that needed to be updated and the supporting documents that needed to be uploaded. The AFMS Director also briefed the importance of this issue directly to the Attorney General's Advisory Committee, comprised of the United States Attorneys from roughly a dozen and half of the districts representing the largest portion of asset forfeiture-related cases.

This recommendation can be closed when subsequent annual financial statement audit testing verifies that AFMS has adequately reinforced the

timeliness of entering forfeiture decisions into CATS by the EOUSA/U.S. Attorneys' offices to ensure the data in the property and financial management systems are updated timely.

4. Continue to reinforce procedures among investigative agencies to ensure that data in CATS is recorded in a timely manner as changes in status and valuations occur.

Resolved. The AFF/SADF concurred with our recommendation. The AFF/SADF management stated in its response that AFMS is regularly engaging with these investigative agencies about the importance of this issue during quarterly working group meetings and formal training events. As noted in the response to Recommendation No. 2, the newly-authorized government program management positions are an additional step in ensuring accountability in this area.

This recommendation can be closed when subsequent annual financial statement audit testing verifies that AFMS has adequately reinforced the procedures among its investigative agencies for timely recording changes in status and valuations for forfeited and seized assets in CATS.

5. Develop and implement procedures to reconcile quarterly Distributed Offsetting Receipts to the Agency Standard Report Module in the Central Accounting Reporting System (CARS).

Resolved. The AFF/SADF concurred with our recommendation. The AFF/SADF management stated in its response that all personnel responsible for preparing the AFF/SADF financial statements implemented procedures to properly report Distributed Offsetting Receipts in the final FY 2016 Financial Statement Package. The AFMS and the Finance Staff will update the process for preparing the financial statements to include reconciling and reporting Distributed Offsetting Receipts in accordance with the Agency Standard Report Module in CARS.

This recommendation can be closed when subsequent annual financial statement audit testing verifies that procedures have been developed and implemented to reconcile quarterly Distributed Offsetting Receipts to the Agency Standard Report Module in CARS.

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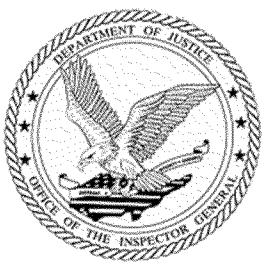

Office of the Inspector General
U.S. Department of Justice
www.justice.gov/oig

To: Bailey, Ethel[Bailey.Ethel@epa.gov]; Benitez-Clark, Rowena[benitez-clark.rowena@epa.gov]; Miles, Erin[Miles.Erin@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]
From: Bodine, Susan
Sent: Mon 11/6/2017 9:46:24 PM
Subject: Fwd: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

Sent from my iPhone

Begin forwarded message:

From: "Ringel, Aaron" <ringel.aaron@epa.gov>
Date: November 6, 2017 at 4:39:24 PM EST
To: "Traylor, Patrick" <traylor.patrick@epa.gov>, "Beck, Nancy" <Beck.Nancy@epa.gov>, "Baptist, Erik" <baptist.erik@epa.gov>, "Fotouhi, David" <Fotouhi.David@epa.gov>, "Bodine, Susan" <bodine.susan@epa.gov>, "Wagner, Kenneth" <wagner.kenneth@epa.gov>, "Schuster, Cindy" <Schuster.Cindy@epa.gov>, "Holsman, Marianne" <Holsman.Marianne@epa.gov>
Cc: "Lyons, Troy" <lyons.troy@epa.gov>, "Shimmin, Kaitlyn" <shimmin.kaitlyn@epa.gov>, "Rodrick, Christian" <rodrick.christian@epa.gov>, "Jackson, Ryan" <jackson.ryan@epa.gov>
Subject: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

All,

See below email from Conference Chairwoman McMorris Rogers' Chief of Staff requesting a meeting between EPA staff from OECA/OGC/OCSPP and the Congresswoman in regards to a constituent company (Sterling International) and their concerns about the chemical registration process not applying to their competitor Black Fly. After speaking with Ryan, he suggested Region 10 should be included in this as well so I am looping in Ken Wagner from DC as well as Cindy Schuster and Marianne Holsman from R10.

To help facilitate this meeting I would appreciate you letting us know your availability to meet with the Congresswoman on one of the below dates she is available. The meeting would be on the hill and shouldn't take more than 30-45 minutes. If you could respond back ASAP it would be much appreciated, they are looking to get this set up quickly and the first date is Thursday of this week.

•□□□□□□□□ Thursday, November 9 at 11:00am

•□□□□□□□□ Monday, November 13 at 2:00pm

•□□□□□□□□ Tuesday, November 14 at 3:30pm

Best,

Aaron

Aaron E. Ringel

Deputy Associate Administrator

Office of Congressional & Intergovernmental Relations

U.S. Environmental Protection Agency

W: 202.564.4373

Ringel.Aaron@epa.gov

From: Ringel, Aaron [mailto:ringel.aaron@epa.gov]
Sent: Thursday, November 2, 2017 5:42 PM
To: Field, Ian
Cc: Jackson, Ryan; Neill, Andrew; Rodrick, Christian; Lyons, Troy
Subject: Re: Requesting meeting with EPA Team Regarding Black Fly Registration

Hi Ryan and Aaron,

I understand you have been an incredible help to our constituent (Sterling International) as they deal with concerns over their competitor's (Black Fly) compliance with EPA's chemical registration process. Thank you so much!

Despite your help, we just heard EPA will no longer require Black Fly to register their products and comply with the same standards. As you may recall, our constituent's company, Sterling, paid over $2 million complying with these standards. And to make matters worse, after they registered their formula Black Fly was able to copy it.

The Congresswoman's goal is fairness. She has been working on this issue for nearly a decade, dealing with much pushback and delay during the former administration. We appreciate your attention to this matter and would like the chance to learn more about why Black Fly and Sterling International seem to be treated differently.

Could we set up a meeting with the Congresswoman and the following:

- Representative from EPA biopesticides office
- Representative from EPA enforcement and compliance office
- EPA General Counsel
- An EPA political appointee

Is there someone on your team who can help us set this up? We'd like to get something on the books as soon as possible.

Thank you very much,

Ian

Ian Field

Chief of Staff

Congresswoman Cathy McMorris Rodgers (WA-5)

To: Shiffman, Cari[Shiffman.Cari@epa.gov]
From: Bodine, Susan
Sent: Fri 10/6/2017 1:56:31 PM
Subject: Fwd: HQ EOC Spot Report: Region 8, Damage to Crow Agency Water Treatment Facility, Crow Agency, MT

Sent from my iPhone

Begin forwarded message:

From: "Eoc, Epahq" <Eoc.Epahq@epa.gov>
Date: October 5, 2017 at 7:19:57 PM EDT
To: "Eoc, Epahq" <Eoc.Epahq@epa.gov>
Subject: HQ EOC Spot Report: Region 8, Damage to Crow Agency Water Treatment Facility, Crow Agency, MT

This report is being sent as a bcc to prevent accidental reply-all messages

UNCLASSIFIED//FOR OFFICIAL USE ONLY

HQ EOC Spot Report: Region 8, Damage to Crow Agency Water Treatment Facility, Crow Agency, MT

U.S. Environmental Protection Agency

Report as of October 5, 2017 at 19:15 ET

Overview: On October 4, vandals broke into the Crow Agency water treatment facility (serving approximately 1,300 persons per day year-round) and damaged it with a shotgun in Crow Agency, MT. There have been varying accounts of damage reported by the Bureau of Indian Affairs (BIA) Police, Crow Agency and the FBI. All sources agree that the chlorine tank was damaged and was leaking from the valve set. A 40-pound bag of "filter aid" – a polymer coagulant – was thrown into the clear well. There is concern that this may have released polyacrylamide into the clear well and further into the system before the plant was shut down. The facility was manually shut off yesterday at approximately 08:00 MT. The water system provided and distributed a door-to-door "Do Not Use " advisory. The notice will also be posted in conspicuous locations and announced on the local radio station. In addition, Region 8 is issuing an Emergency Administrative Order to ensure proper system evaluation and startup. The residents are being provided bottled water as a precaution.

State, Local and other Federal Agency Actions: Region 8 is supporting the Crow Agency tribe's request for assistance in getting the plant back on-line. In addition to working with multiple internal entities (i.e., EPA Montana Office, EPA Drinking Water Unit, EPA Drinking Water Enforcement Unit, EPA Criminal Investigation Division, OECA, and the EPA Tribal Assistance Program), Region 8 is also coordinating with the Tribe, the System operator, the FBI, the BIA Police, and numerous other governmental and legal authorities to assist in the investigation, damage assessment, and response.

EPA Actions: A Region 8 OSC was deployed and is working with the treatment chemical supplier and Region 8 drinking water staff to assess and understand any potential threat posed by contaminated water that may have been released into the distribution system from the clear well. Additionally, the OSC is assisting the plant operator with damage assessment of the plant, developing steps required to bring it back on-line, and assessing residual chlorine monitoring in the distribution system and taking steps to start to clean/decontaminate the plant. Region 8 CID agents conducted an investigation of the facility after the OSC could confirm that there were no elevated vapors in the facility.

Media Interest: Medium

http://billingsgazette.com/news/state-and-regional/montana/tribe-delivers-bottled-water-to-crow-agency-after-treatment-facility/article_1833b0e3-f89e-57f0-901b-fa0d0172d076.html

http://mtpr.org/post/vandals-destroy-crow-agency-water-treatment-plant

The HQ EOC will continue to monitor and provide updates as needed

UNCLASSIFIED//FOR OFFICIAL USE ONLY

Steve Ridenour, Senior Watch Officer

U.S. Environmental Protection Agency

Headquarters Emergency Operations Center

1200 Pennsylvania Ave

Washington, DC 20004

202-564-3850 (24hrs)

eoc.epahq@epa.gov

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
From: Bodine, Susan
Sent: Mon 9/25/2017 3:44:45 PM
Subject: Fwd: EPA - DOJ/ENRD Weekly Update Call
2017.09.25 EPA-ENRD Legal Leadership Call.DOCX
ATT00001.htm

Sent from my iPad

Begin forwarded message:

From: "Brightbill, Jonathan (ENRD)" <Jonathan.Brightbill@usdoj.gov>
Date: September 25, 2017 at 11:36:37 AM EDT
To: "Wood, Jeffrey (ENRD)" <Jeffrey.Wood@usdoj.gov>, "'Schwab, Justin'" <schwab.justin@epa.gov>, "Minoli Kevin (minoli.kevin@epa.gov)" <minoli.kevin@epa.gov>, "'Schmidt.Lorie@epa.gov'" <Schmidt.Lorie@epa.gov>, "'Srinivasan.Gautam@epa.gov'" <Srinivasan.Gautam@epa.gov>, "'fotouhi.david@epa.gov'" <fotouhi.david@epa.gov>, "'Baptist, Erik'" <baptist.erik@epa.gov>, "'bodine.susan@epa.gov'" <bodine.susan@epa.gov>, "Gelber, Bruce (ENRD)" <Bruce.Gelber@usdoj.gov>, "Middleton, Brandon (ENRD)" <Brandon.Middleton@usdoj.gov>, "Grant, Eric (ENRD)" <Eric.Grant@usdoj.gov>
Cc: "'Traylor, Patrick'" <traylor.patrick@epa.gov>, "Snow, Corinne (ENRD)" <Corinne.Snow@usdoj.gov>
Subject: RE: EPA - DOJ/ENRD Weekly Update Call

All – Attached is the agenda for today's EPA-ENRD legal leadership call. OECA indicates that 3:30 PM does not work for many of its participants this week. Given that, we are going to plan to proceed with OGC at 4:00 PM (as usual), then do OECA at 4:30 PM. If 4:30 PM today does not work for OECA, we can look to reschedule for another time this week, or just handle those items on an *ad hoc* basis.

Jonathan D. Brightbill
Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 2133
Washington, D.C. 20530
Office: (202) 514-2766
Mobile: (202) 598-3370
Jonathan.Brightbill@usdoj.gov

To: Ferguson, Lincoln[ferguson.lincoln@epa.gov]
Cc: Kenneth Wagner (wagner.kenneth@epa.gov)[wagner.kenneth@epa.gov]; Forsgren, Lee[Forsgren.Lee@epa.gov]; Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]; Letendre, Daisy[letendre.daisy@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]
From: Bodine, Susan
Sent: Mon 10/23/2017 12:45:58 PM
Subject: Briefing paper for NAHB meeting on Tuesday 10-24
102417-NAHB Mtg.docx

Lincoln, attached is a background briefing paper for tomorrow's meeting with NAHB in the Alm room.

To: Miles, Erin[Miles.Erin@epa.gov]
Cc: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]
From: Bodine, Susan
Sent: Wed 9/20/2017 9:58:43 PM
Subject: RE: Whitehouse response follow up
Dear Senator Whitehouse and Senator Merkley v 3.docx

Revised letter

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Miles, Erin
Sent: Tuesday, September 19, 2017 8:48 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Cc: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>
Subject: Whitehouse response follow up

Susan,

Here are some suggested edits from OC/OCE to the response to the Whitehouse letter. The **Ex. 5 - Deliberative Process** but maybe we can discuss tomorrow morning. --Erin

Suggested edits to the NPM paragraph:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Question #8 - Do you believe all covered water systems should follow EPA's drinking water analytical methods when testing drinking water for contamination? If so, what efforts will you undertake to ensure all water systems are brought into compliance?

Ex. 5 - Deliberative Process

Question #9 - Rhode Island ozone air quality issues are largely due to transported emissions from upwind states leading to ozone formation that pollutes the air and lungs of people in downwind states like mine. The Rhode Island Department of Environmental Management reports that there remain a number of power plants located in upwind states that have pollution control equipment installed to reduce nitrogen oxides emissions that either do not use that equipment during the ozone season or do not use it in a way that optimizes the reduction of nitrogen oxides emissions. Why would this be the case?

Ex. 5 - Deliberative Process

Cc: Senn, John[Senn.John@epa.gov]
To: Hull, George[Hull.George@epa.gov]
From: Bodine, Susan
Sent: Thur 12/7/2017 2:07:53 AM
Subject: Fwd: FOR REVIEW: Adminstrator's Emphasis List press release
Adminstrator's Emphasis List press release.docx
ATT00001.htm

Sent from my iPad

Begin forwarded message:

From: "Mackey, Cyndy" <Mackey.Cyndy@epa.gov>
Date: December 6, 2017 at 9:02:05 PM EST
To: "Senn, John" <Senn.John@epa.gov>, "Bodine, Susan" <bodine.susan@epa.gov>, "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>
Cc: "McCullough, Mary" <McCullough.Mary@epa.gov>, "DeLeon, Rafael" <Deleon.Rafael@epa.gov>, "Patterson, Kenneth" <Patterson.Kenneth@epa.gov>, "Gardner, Monica" <Gardner.Monica@epa.gov>
Subject: Fwd: FOR REVIEW: Adminstrator's Emphasis List press release

FYI - OSRE has reviewed the press release and list of sites and we are fine with these. See below for press release and list of sites.

Cyndy Mackey
Director, OSRE
(202) 564-8206 (Office)
(202) 591-6184 (Office cell)

Begin forwarded message:

From: "Woolford, James" <Woolford.James@epa.gov>
Date: December 6, 2017 at 8:05:37 PM EST
To: "Mackey, Cyndy" <Mackey.Cyndy@epa.gov>, "DeLeon, Rafael" <Deleon.Rafael@epa.gov>, "Bertrand, Charlotte" <Bertrand.Charlotte@epa.gov>, "Leonard, Paul" <leonard.paul@epa.gov>, "Gervais, Gregory" <Gervais.Gregory@epa.gov>
Subject: Fwd: FOR REVIEW: Adminstrator's Emphasis List press release

FYSA. Looks like Friday rollout...

Sent from my iPhone, please excuse spelling errors.

Thanks, Jim.

Begin forwarded message:

From: "Siedschlag, Gregory" <Siedschlag.Gregory@epa.gov>
Date: December 6, 2017 at 5:19:37 PM EST
To: OLEM OSRTI Press <OLEM-OSRTI-Press@epa.gov>, "Woolford, James" <Woolford.James@epa.gov>, "Stalcup, Dana" <Stalcup.Dana@epa.gov>, "Bucci, Anthony" <bucci.anthony@epa.gov>, "Hovis, Jennifer" <Hovis.Jennifer@epa.gov>
Subject: FOR REVIEW: Adminstrator's Emphasis List press release

Hi all,

I've attached a draft press release. Please review and send me your comments by 1 p.m. Thursday.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Anthony – can you see my note about confirming the site info?

I'll be across the river for training from 9-12 in the morning, back in the office around 12:30-1.

Best,

Greg Siedschlag

Outreach and Communications Specialist

Office of Superfund Remediation and Technology Innovation

U.S. Environmental Protection Agency

Office: (703) 603-9044

Cell: (571) 255-0284

Follow us on Twitter @EPALand

https://www.epa.gov/superfund

To: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Bailey, Ethel[Bailey.Ethel@epa.gov]
Cc: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Mon 11/13/2017 10:46:23 PM
Subject: RE: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

Yes, it is in the Alm room so there is plenty of space.

From: Kelley, Rosemarie
Sent: Monday, November 13, 2017 5:41 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Bailey, Ethel <Bailey.Ethel@epa.gov>
Cc: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Subject: RE: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

Larry, Patrick, Susan—

Please let me know whether you want someone from OCE to attend this meeting. I do not think anyone from our office is on the invite.

Rosemarie

From: Bodine, Susan
Sent: Monday, November 13, 2017 5:37 PM
To: Bailey, Ethel <Bailey.Ethel@epa.gov>
Cc: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Subject: FW: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

For Thursday's Black Flag meeting.

From: Ringel, Aaron

Sent: Monday, November 13, 2017 5:33 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>; Beck, Nancy <Beck.Nancy@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Wagner, Kenneth <wagner.kenneth@epa.gov>; Schuster, Cindy <Schuster.Cindy@epa.gov>; Holsman, Marianne <Holsman.Marianne@epa.gov>
Cc: Lyons, Troy <lyons.troy@epa.gov>; Shimmin, Kaitlyn <shimmin.kaitlyn@epa.gov>; Rodrick, Christian <rodrick.christian@epa.gov>
Subject: RE: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

All, I wanted to make sure you had the below and attached additional information (timeline of Sterling International's issues/letter to EPA from CMR) from Rep. McMorris Rogers office that were sent to me today in regards to our briefing with her on Thursday morning. Of note, they have just made me aware that she will be bringing Marc Himmelstein, President of National Environmental Strategies, along with her who is the lobbyist for Sterling International.

FROM CMR STAFF:

Joining the first meeting:

Marc Himmelstein, President of National Environmental Strategies.

We recently heard that Black Fly will not have to register their fly trap on FIFRA. Sterling, a business started out of the CEO's own home, complied with EPA's demand that he register his trap under FIFRA and through that process, lost millions of dollars. We will have the number at the meeting. I've attached the timeline that we've been working this issue and the correspondence with EPA dating back to 2011.

-Aaron

From: Ringel, Aaron
Sent: Monday, November 6, 2017 4:39 PM

To: Traylor, Patrick <traylor.patrick@epa.gov>; Beck, Nancy <beck.nancy@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Ken Wagner (wagner.kenneth@epa.gov) <wagner.kenneth@epa.gov>; Schuster, Cindy <Schuster.Cindy@epa.gov>; Holsman, Marianne <Holsman.Marianne@epa.gov>
Cc: Troy Lyons (lyons.troy@epa.gov) <lyons.troy@epa.gov>; Shimmin, Kaitlyn <shimmin.kaitlyn@epa.gov>; Christian Rodrick (Rodrick.Christian@epa.gov) <Rodrick.Christian@epa.gov>; Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov>
Subject: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

All,

See below email from Conference Chairwoman McMorris Rogers' Chief of Staff requesting a meeting between EPA staff from OECA/OGC/OCSPP and the Congresswoman in regards to a constituent company (Sterling International) and their concerns about the chemical registration process not applying to their competitor Black Fly. After speaking with Ryan, he suggested Region 10 should be included in this as well so I am looping in Ken Wagner from DC as well as Cindy Schuster and Marianne Holsman from R10.

To help facilitate this meeting I would appreciate you letting us know your availability to meet with the Congresswoman on one of the below dates she is available. The meeting would be on the hill and shouldn't take more than 30-45 minutes. If you could respond back ASAP it would be much appreciated, they are looking to get this set up quickly and the first date is Thursday of this week.

- Thursday, November 9 at 11:00am
- Monday, November 13 at 2:00pm
- Tuesday, November 14 at 3:30pm

Best,

Aaron

Aaron E. Ringel

Deputy Associate Administrator

Office of Congressional & Intergovernmental Relations

U.S. Environmental Protection Agency

W: 202.564.4373

Ringel.Aaron@epa.gov

From: Ringel, Aaron [mailto:ringel.aaron@epa.gov]
Sent: Thursday, November 2, 2017 5:42 PM
To: Field, Ian
Cc: Jackson, Ryan; Neill, Andrew; Rodrick, Christian; Lyons, Troy
Subject: Re: Requesting meeting with EPA Team Regarding Black Fly Registration

Hi Ryan and Aaron,

I understand you have been an incredible help to our constituent (Sterling International) as they deal with concerns over their competitor's (Black Fly) compliance with EPA's chemical registration process. Thank you so much!

Despite your help, we just heard EPA will no longer require Black Fly to register their products and comply with the same standards. As you may recall, our constituent's company, Sterling, paid over $2 million complying with these standards. And to make matters worse, after they registered their formula Black Fly was able to copy it.

The Congresswoman's goal is fairness. She has been working on this issue for nearly a decade, dealing with much pushback and delay during the former administration. We appreciate your attention to this matter and would like the chance to learn more about why Black Fly and Sterling International seem to be treated differently.

Could we set up a meeting with the Congresswoman and the following:

- Representative from EPA biopesticides office
- Representative from EPA enforcement and compliance office
- EPA General Counsel
- An EPA political appointee

Is there someone on your team who can help us set this up? We'd like to get something on the books as soon as possible.

Thank you very much,

Ian

Ian Field

Chief of Staff

Congresswoman Cathy McMorris Rodgers (WA-5)

To: Lovell, Will (William)[lovell.william@epa.gov]
Cc: Forsgren, Lee[Forsgren.Lee@epa.gov]; Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Bodine, Susan
Sent: Wed 12/6/2017 7:42:45 PM
Subject: RE: Meeting with Kinder Morgan

I do not have any information.

This is an ESA issue, which is FWS.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Lovell, Will (William)
Sent: Wednesday, December 6, 2017 9:27 AM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: FW: Meeting with Kinder Morgan

Good morning, Susan,

Would you happen to have information on the American Burying Beetle/ESA issue and its impact on the oil and gas sector? I have material on every other topic for the memo to the Administrator.

Thank you,

Will

From: Ford, Hayley
Sent: Monday, November 27, 2017 5:57 PM
To: Dravis, Samantha <dravis.samantha@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Kelly, Albert <kelly.albert@epa.gov>; Beck, Nancy <Beck.Nancy@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Ferguson, Lincoln <ferguson.lincoln@epa.gov>; Lovell, Will (William) <lovell.william@epa.gov>; Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: Meeting with Kinder Morgan

All –

The Administrator will be meeting with Kinder Morgan on Dec 7 at 4:45PM. Attendees are below, as well as issues they'd like to discuss. Please let me know if you should attend this meeting, as well as if you can prepare a briefer on the below issues prior to the meeting. It is small, so I think one staff from each of the issue areas (or one who can speak to a few issues) is plenty.

Attendees:

Larry Huddleston, Vice President-Commercial
Dirk Cockrum, Vice President-Environment, Safety and Health
Tom Hutchins, Vice President-Environment, Safety and Health
Dave Conover, Vice President-Corporate Communications/Public Affairs

Key Issues:

- NSPS OOOOa rule-making
- Superfund cleanup sediment policy
- American Burying Beetle/ESA issue and its impact on the oil and gas sector

- EPA participation in FERC-led natural gas project permitting NEPA analyses

Thank you!

Hayley Ford

Deputy White House Liaison and Personal Aide to the Administrator

Environmental Protection Agency

ford.hayley@epa.gov

Phone: 202-564-2022

Cell: 202-306-1296

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Wed 11/22/2017 1:14:10 PM
Subject: RE: Portland -- updated redline of OHA's 11/20 draft BCA
Comp Agrmt PWB draft 11-20 (with OECA comments 11_21 at 2 pm EST).docx

Thanks Larry, I agree with all of OCE's comments Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Susan

From: Starfield, Lawrence
Sent: Tuesday, November 21, 2017 7:14 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Subject: FW: Portland -- updated redline of OHA's 11/20 draft BCA
Importance: High

Susan and Patrick,

As Ed Kowalski said, he doesn't want to share something with Oregon that is not our final, agreed-upon position. Please try to take a look and see if you are good with this version, recognizing that it includes a couple of placeholders.

Thanks.

Larry

This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

From: Kelley, Rosemarie
Sent: Tuesday, November 21, 2017 2:31 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>
Cc: Theis, Joseph <Theis.Joseph@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>; Pollins, Mark <Pollins.Mark@epa.gov>; Rog, Morgan <Rog.Morgan@epa.gov>; King, Carol <King.Carol@epa.gov>; Bendik, Kaitlyn <bendik.kaitlyn@epa.gov>
Subject: FW: Portland -- updated redline of OHA's 11/20 draft BCA
Importance: High

Larry, Patrick, and Susan—

Attached is our markup of the Oregon order. We think this reflects the concerns we discussed yesterday.

Please let us know if you are comfortable sharing this with the Region.

Rosemarie

From: King, Carol
Sent: Tuesday, November 21, 2017 2:19 PM
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Theis, Joseph <Theis.Joseph@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>; Pollins, Mark <Pollins.Mark@epa.gov>
Cc: Rog, Morgan <Rog.Morgan@epa.gov>; Bendik, Kaitlyn <bendik.kaitlyn@epa.gov>
Subject: Portland -- updated redline of OHA's 11/20 draft BCA
Importance: High

We attach an updated version of the PWB BCA redline. We tried to address OECA management's concerns. Please let us know if you have additional changes. Also, will you be sending it to Ed in Region 10 today, or does it have to go to Larry, Susan and Patrick first?

Thanks,

Carol

Carol DeMarco King, Acting Chief
Municipal Enforcement Branch
Water Enforcement Division

Office of Enforcement and Compliance Assurance

U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
Phone: (202) 564-2412
Email: king.carol@epa.gov

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To: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
Cc: Theis, Joseph[Theis.Joseph@epa.gov]
From: Bodine, Susan
Sent: Fri 11/17/2017 1:55:40 AM
Subject: RE: Recent Events in Chemours GenX Matter in Cape Fear NC

Thank you. I knew about the revocation of the permit, but not the new release.

From: Kelley, Rosemarie
Sent: Thursday, November 16, 2017 8:54 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>
Cc: Theis, Joseph <Theis.Joseph@epa.gov>
Subject: Fwd: Recent Events in Chemours GenX Matter in Cape Fear NC

Larry, Patrick, and Susan-

You may have heard about these developments from other sources, but I am forwarding on the off chance you have not.

Rosemarie

Begin forwarded message:

Subject: Recent Events in Chemours GenX Matter in Cape Fear NC

- NC DEQ is moving to revoke the Chemours' NPDES permit. When it is posted on the state's website, you can view it at:

https://deq.nc.gov/news/hot-topics/genx-investigation/genx-news-releases

- November Release: This morning the Region learned of ANOTHER release at the Chemours facility two days ago (11/14/2017) associated with a leak in the Vinyl Ethers South Condensation Tower (not the GenX process).

Mark Garvey

EPA Headquarters

Office of Civil Enforcement

Attorney

202-564-4168

garvey.mark@epa.gov

NOTE: This email and its attachments may contain confidential information, attorney-work product, enforcement sensitive material or privileged information.

To: Wood, Jeffrey (ENRD)[Jeffrey.Wood@usdoj.gov]; bruce. gelber (bruce.gelber@usdoj.gov)[bruce.gelber@usdoj.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Senn, John[Senn.John@epa.gov]
Cc: Bowman, Liz[Bowman.Liz@epa.gov]; Wilcox, Jahan[wilcox.jahan@epa.gov]
From: Bodine, Susan
Sent: Mon 10/23/2017 10:22:39 PM
Subject: FW: Planning for ENRD/EPA Press Call -- PDC and ExxonMobil Clean Air Act Settlements

Since the AG is not participating, the Administrator's office decided that the press availability for the PDC and Exxon cases does not rise to the Administrator's level. We will put Patrick on the phone to answer reporters' questions (with help from staff).

We would, however, like a quote from the Administrator in the press releases for these cases.

Susan

From: Wilcox, Jahan
Sent: Saturday, October 21, 2017 12:38 PM
To: Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Subject: Re: Planning for ENRD/EPA Press Call -- PDC and ExxonMobil Clean Air Act Settlements

I think so let me add Liz.

Sent from my iPhone

On Oct 21, 2017, at 11:38 AM, Flores, Sarah Isgur (OPA) <Sarah.Isgur.Flores@usdoj.gov> wrote:

Y'all on board w this?

Begin forwarded message:

From: "Abueg, Mark (OPA)" <mabueg@jmd.usdoj.gov>
Date: October 21, 2017 at 11:37:12 AM EDT
To: "Flores, Sarah Isgur (OPA)" <siflores@jmd.usdoj.gov>, "Prior, Ian (OPA)" <IPrior@jmd.usdoj.gov>
Cc: "Hornbuckle, Wyn (OPA)" <whornbuckle@jmd.usdoj.gov>, "Edwards, Jeremy M. (OPA)" <jmedwards@jmd.usdoj.gov>
Subject: Planning for ENRD/EPA Press Call -- PDC and ExxonMobil Clean Air Act Settlements

Sarah and Ian,

ENRD wants to conduct a joint press call (either Monday, Oct. 30 or Tuesday, Oct. 31) with the EPA to announce two separate settlements that resolve violations of the Clean Air Act. One involves PDC Energy, Inc. (EPA's Region 8) and the other is with ExxonMobil (EPA Region 6).

Speakers on the call would include the following:

- DOJ, ENRD
- EPA, Office of Enforcement and Compliance Assurance (OECA)
- EPA Region 6
- EPA, Region 8

Just wanted to make sure this is okay and that there are no conflicts on either day.

Best,

Mark

Mark Abueg
Public Affairs Specialist
U.S. Department of Justice

Office of Public Affairs

Office: (202) 353-6836
Cell: (202) 353-5132
Email: mark.abueg@usdoj.gov
Website: www.justice.gov

To: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Brooks, Phillip[Brooks.Phillip@epa.gov]
Cc: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]
From: Bodine, Susan
Sent: Wed 12/6/2017 7:26:23 PM
Subject: FW: Meeting with Kinder Morgan

Ex. 5 - Deliberative Process

Susan

From: Lovell, Will (William)
Sent: Wednesday, December 6, 2017 9:27 AM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: FW: Meeting with Kinder Morgan

Good morning, Susan,

Would you happen to have information on the American Burying Beetle/ESA issue and its impact on the oil and gas sector? I have material on every other topic for the memo to the Administrator.

Thank you,

Will

To: Hull, George[Hull.George@epa.gov]; Senn, John[Senn.John@epa.gov]
From: Bodine, Susan
Sent: Thur 12/7/2017 1:59:04 AM
Subject: CV
spb cv.docx
ATT00001.htm

I found a pdf that I cut and paste from

Sent from my iPad

Begin forwarded message:

From: Susan Bodine <Ex. 6 - Personal Privacy
Date: December 6, 2017 at 8:55:45 PM EST
To: <bodine.susan@epa.gov>

EXPERIENCE

Senior Advisor to the Administrator, U.S. Environmental Protection Agency.

September 2017-December 2017

Chief Counsel, Senate Environment and Public Works Committee

410 Senate Dirksen Office Building Washington, DC 20510

January 2015-September 2017

The Environment and Public Works Committee has jurisdiction over all environmental and fish and wildlife protection laws as well as the Federal Highway Program, the civil works program of the Army Corps of Engineers, and other infrastructure authorities.

Partner, Barnes & Thornburg. 1717 Pennsylvania Ave. N.W., Suite 500 Washington, DC 20006 March 2009-January 2015

Environmental Law and Policy.

Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency.

1200 Pennsylvania Avenue, Washington, DC January 2006-January 2009 (confirmed by the Senate on December 17, 2005).

As an EPA Assistant Administrator, I had twelve staff who reported directly to me. Through them I managed nearly 600 headquarters employees and an annual budget of $1.3 billion to carry out EPA's programs related to brownfields revitalization, oil spill prevention and response, chemical accident prevention and preparedness, underground storage tanks; and emergency response (including Homeland Security); Superfund cleanup, and the management of hazardous waste.

Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, U.S. House of Representatives, Washington, D.C.

Rayburn House Office Building, Washington, DC

February 2001-December 2005: Staff Director and Senior Counsel,

January 1995 – January 2001: Counsel

As a staff director, I managed a six person staff to carry out all oversight and legislative activities relating to water resources issues, including issues related to the control of water pollution, protection of wetlands, the cleanup of contaminated property, water supply, navigation, flood control and the related activities of EPA, the U.S. Army Corps of Engineers, the National Oceanic and Atmospheric Administration, the Natural Resources Conservation Service, and the Tennessee Valley Authority.

Covington & Burling.

1201 Pennsylvania Avenue, Washington, D.C. Associate, August 1988 – January 1995

As an associate, I represented clients involved in Superfund litigation and Clean Water Act permit appeals, counseled clients on compliance with the Resource Conservation and Recovery Act, drafted comments on proposed agency regulations, prepared clients for multi-media inspections, conducted environmental due diligence for real estate and corporate transactions, and drafted environmental contract terms.

ASARCO, Inc.

180 Maiden Lane, NY, NY August 1983-July 1985

Paralegal in the legal department of Fortune 500 company.

EDUCATION:

University of Pennsylvania School of Law

Philadelphia, Pennsylvania□J.D., cum laude (May 1988)

University of Pennsylvania Law Review, Editorial Board (1987-88)

Princeton University

Princeton, New Jersey□A.B, History, cum laude (June 1983)

PROFESSIONAL:

Security Clearances (former):

Top Secret□Sensitive Compartmented Information access

Bar Admissions:

District of Columbia

Commonwealth of Pennsylvania (inactive)

U.S. Court of Appeals for the District of Columbia Circuit

PERSONAL:

Ex. 6 - Personal Privacy

To: Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Tue 11/14/2017 9:35:31 PM
Subject: Fwd: hiring request
OECA Hiring request.pdf
ATT00001.htm

Sent from my iPhone

Begin forwarded message:

From: "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>
To: "Bodine, Susan" <bodine.susan@epa.gov>
Subject: FW: hiring request

FYI.

From: Flynn, Mike
Sent: Monday, November 13, 2017 7:01 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Badalamente, Mark <Badalamente.Mark@epa.gov>; Vizian, Donna <Vizian.Donna@epa.gov>
Subject: hiring request

Larry,

This is in response to your attached request for an exemption to the external hiring freeze. You requested to hire two additional criminal investigators. Given our FTE situation, I am approving you moving forward with 1 of the 2 hires at this time. We will reconsider the 2nd hire based on review of your Strategy for Managing FTE Levels for your office. To allow you to move quickly with the 2nd hire, if approved at a later point, I suggest you go out with an advertisement that allows for multiple selections.

Let me know if you have any questions.

Thanks, Mike

To: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Henry Barnet (Barnet.Henry@epa.gov)[Barnet.Henry@epa.gov]; Mackey, Cyndy[Mackey.Cyndy@epa.gov]
Cc: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Miles, Erin[Miles.Erin@epa.gov]
From: Bodine, Susan
Sent: Fri 11/3/2017 8:31:24 PM
Subject: FW: EOC Spot Report: Region 3, Warehouse Fire in Parkersburg, WV (NRC# 1193930) - Update #8

WV issued an order. Is Region 3 enforcement doing any investigation?

From: Eoc, Epahq
Sent: Tuesday, October 31, 2017 5:22 PM
To: Eoc, Epahq <Eoc.Epahq@epa.gov>
Subject: EOC Spot Report: Region 3, Warehouse Fire in Parkersburg, WV (NRC# 1193930) - Update #8

This report is being sent as a bcc to prevent accidental Reply to All messages.

UNCLASSIFIED//FOR OFFICIAL USE ONLY

EOC Spot Report: Region 3, Warehouse Fire in Parkersburg, WV (NRC# 1193930) - Update #8

U.S. Environmental Protection Agency
Report as of October 31, 2017 at 1700 ET

Overview: On October 22, the Region 3 Duty Officer received a report from the National Response Center for a warehouse fire at the former Ames Plant which had begun on October 21. The caller reported there was an explosion, black smoke, and a blanket of ash. There have been no flare ups since the fire watch began on 10/29. The fire was officially declared extinguished as of noon on October 29. Schools reopened

on October 30. The fire watch period continues through October 31 to address any flare ups. Unified Command met with the building owner to discuss next steps on October 30. Air monitoring results indicated the average total particulates were in the "GOOD" range according to the Air Quality Index ranges.

State, Local and other Federal Agency Actions: The West Virginia Governor declared a State of Emergency on October 23. The West Virginia Department of Environmental Protection (WVDEP) collected a water sample at an outfall at the site and sent the sample to the Ohio River Sanitation Commission (ORSANCO) for analysis. EPA, along with ATSDR, is assisting Wood County with the interpretation of data. ORSANCO is conducting a river survey on October 27 by collecting samples every 20 miles for approximately 100 miles starting at the mouth of the Little Kanawha. WV American Water and Cincinnati Water Works are assisting with analysis. Wood County reported that their air monitoring consultant has demobed from the site. WVDEP issued an order to the property owner to comply with its water discharge permit, to provide a detailed inventory of the burned materials, and to provide detailed inventories from its other sites in West Virginia. The property owner has agreed to do the work as required by WVDEP and place a fence around the site when the fire watch is over. WVDEP's order to the company requires the owner of the property to notify WVDEP within ten days that they have secured a cleanup contractor. WVDEP also ordered the company to implement security measures by 11/1. ATSDR and the WV Division of Health and Human Resources have contacted the Wood County Health Department with an offer to perform Assessment Chemical Exposure Surveys.

EPA Actions: EPA has reached out to ATSDR for the most appropriate contact for Public Health support to review data and to communicate health concerns. The State and County requested the use of EPA's aircraft, ASPECT, on October 26. The first scan of thermal imaging took place around 1:30 AM on October 27 while the plane was in route to the airport. EPA's ASPECT plane conducted one additional overflight on 10/28 and then demobilized from the site. The thermal imagery has been shared with Unified Command. Region 3 is continuing 24-hour air monitoring activities. The air particulate monitoring data has been placed on EPA's website as well as in the ASPECT report. Region 3 will work with the Public Health agencies to coordinate review of remaining data and public health messaging. EPA air sampling is planned for 11/1 to determine the air quality now that the fire is out. EPA has amended the sampling locations to target sensitive populations. EPA will also assist local responders with equipment inspections to determine if equipment is contaminated from firefighting activities.

Media Interest: Moderate.

http://wvpublic.org/post/parkersburg-fire-out-questions-remain#stream/0

http://wvmetronews.com/2017/10/30/with-fire-out-in-parkersburg-investigations-now-go-forward/

The HQ EOC will continue to monitor and provide updates as needed

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Patrick Easter, Senior Watch Officer

U.S. Environmental Protection Agency

Headquarters Emergency Operations Center

1200 Pennsylvania Ave. N.W.

Washington, DC 20004

202-564-3850

mailto:eoc.epahq@epa.gov

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
From: Bodine, Susan
Sent: Sun 9/24/2017 5:04:15 PM
Subject: Fwd: Flint Update Meeting
image001.png
ATT00001.htm
image2017-09-24-121931.pdf
ATT00002.htm

Sent from my iPad

Begin forwarded message:

From: "Grantham, Nancy" <Grantham.Nancy@epa.gov>
Date: September 24, 2017 at 12:25:18 PM EDT
To: "Flynn, Mike" <Flynn.Mike@epa.gov>, "Kaplan, Robert" <kaplan.robert@epa.gov>, "Forsgren, Lee" <Forsgren.Lee@epa.gov>, "Grevatt, Peter" <Grevatt.Peter@epa.gov>, "Shapiro, Mike" <Shapiro.Mike@epa.gov>, "Greenwalt, Sarah" <greenwalt.sarah@epa.gov>, "King, Carol" <King.Carol@epa.gov>, "Pollins, Mark" <Pollins.Mark@epa.gov>, "Denton, Loren" <Denton.Loren@epa.gov>, "Burneson, Eric" <Burneson.Eric@epa.gov>, "Mclain, Jennifer" <Mclain.Jennifer@epa.gov>, "Yamada, Richard (Yujiro)" <yamada.richard@epa.gov>, "Richardson, RobinH" <Richardson.RobinH@epa.gov>, "Klasen, Matthew" <Klasen.Matthew@epa.gov>, "Traylor, Patrick" <traylor.patrick@epa.gov>, "Bodine, Susan" <bodine.susan@epa.gov>
Cc: "Kelley, Jeff" <kelley.jeff@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Subject: RE: Flint Update Meeting

Agenda

1. Letters to City of Flint/MDEQ (attached)

2. Michigan Program Review

3. Order Enforcement

4. Dr. Edwards' Flint Study Press Conference (see below)

5. Messaging to Residents

Below is a screenshot from Marc Edwards' press conference on Sept. 15 showing the drinking water lead level trend.

Nancy Grantham

Office of Public Affairs

US Environmental Protection Agency

202-564-6879 (desk)

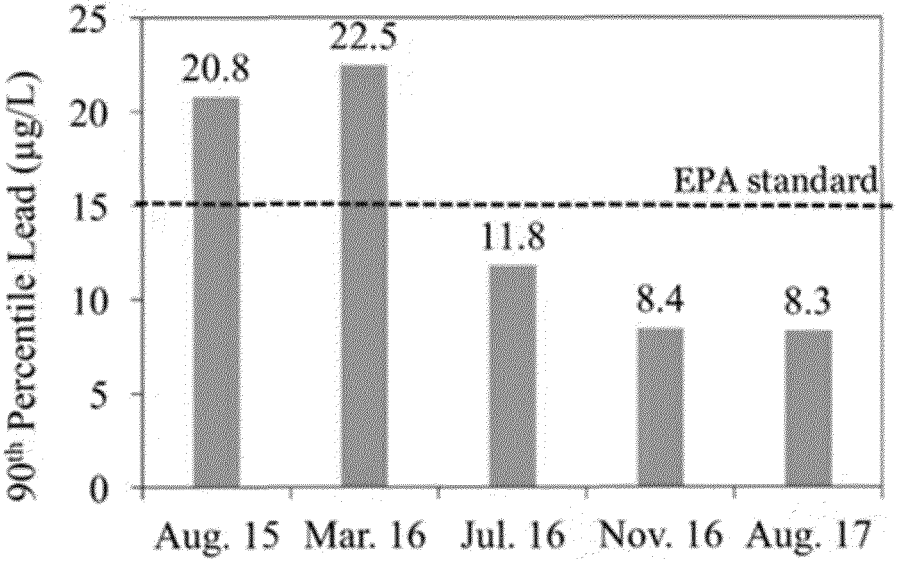
Ex. 6 - Personal Privacy (mobile)

-----Original Appointment-----
From: Flynn, Mike
Sent: Tuesday, September 19, 2017 3:02 PM
To: Flynn, Mike; Kaplan, Robert; Forsgren, Lee; Grevatt, Peter; Shapiro, Mike; Greenwalt, Sarah; King, Carol; Pollins, Mark; Denton, Loren; Grantham, Nancy; Burneson, Eric; Mclain, Jennifer; Yamada, Richard (Yujiro); Richardson, RobinH; Klasen, Matthew; Traylor, Patrick; Bodine, Susan
Cc: Kelley, Jeff; Drinkard, Andrea
Subject: Flint Update Meeting
When: Tuesday, September 26, 2017 11:30 AM-12:15 PM (UTC-05:00) Eastern Time (US & Canada).
Where: WJC-N 3530

Sct: Tamika Burton, 564-4711

Nancy Grantham

First draw lead in August 2017



N=138

To: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Fri 11/17/2017 1:33:56 AM
Subject: FW: EOC Spot Report: Region 8, Discharge from Keystone Pipeline, Britton, SD

Not good

From: Eoc, Epahq
Sent: Thursday, November 16, 2017 6:51 PM
To: Eoc, Epahq <Eoc.Epahq@epa.gov>
Subject: EOC Spot Report: Region 8, Discharge from Keystone Pipeline, Britton, SD

This report is being sent as a bcc to prevent accidental Reply to All messages.

UNCLASSIFIED//FOR OFFICIAL USE ONLY

EOC Spot Report: Region 8, Discharge from Keystone Pipeline, Britton, SD

US Environmental Protection Agency

Report as of November 16, 2017 at 1845 ET

Overview: At approximately 9:15 local time on November 16, 2017, the State of South Dakota reported that TransCanada is responding to an oil spill at the Keystone Pipeline in northeastern South Dakota, approximately 95 miles southwest of West Fargo, ND. TransCanada estimates about 5,000 barrels, which equates to 210,000 gallons of oil, was released. The State has reported that no water is impacted or threated. The pipeline has been shut off from Hardisty, Alberta to Cushing, Oklahoma, and to Wood River and Patoka in Illinois while the southern leg remains open.

State, Local, and other Federal Agency Action: The DHS National Infrastructure Coordinating Center (NICC) reports that the South Dakota Fusion Center and South Dakota Office of Emergency Management have been notified, and are monitoring the situation. It has been reported that the South Dakota Emergency Operations Center is not currently planning to stand up. The release appears to be accidental, but State and Local Law Enforcement are working with TransCanada to determine the cause of the release. The Infrastructure Security and Energy Restoration (ISER) division is coordinating closely with the Department of Transportation (DOT) Pipeline and Hazardous Material Safety Administration (PHMSA), and PHMSA has deployed inspectors to the site.

EPA Actions: The State of South Dakota contacted EPA Region 8 to state that they were not requesting assistance at this time. EPA Region 8 and the EPA HQ EOC continue to monitor this situation.

Media Interest: High

http://www.cnn.com/2017/11/16/us/keystone-pipeline-leak/index.html

https://www.nbcnews.com/news/us-news/keystone-pipeline-closed-through-several-states-after-200-000-gallon-n821606

http://www.foxbusiness.com/features/2017/11/16/transcanada-investigating-keystone-pipeline-leak-in-south-dakota.html

The HQ EOC will continue to monitor and provide updates as needed.

Pete Oh, Senior Watch Officer

U.S Environmental Protection Agency

Headquarters Emergency Operations Center

1200 Pennsylvania Ave

Washington, DC 20004

202-564-3850 (24-hrs)

202-564-8729 (fax)

eoc.epahq@epa.gov

To: Mackey, Cyndy[Mackey.Cyndy@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
Cc: Bailey, Ethel[Bailey.Ethel@epa.gov]; Benitez-Clark, Rowena[Benitez-Clark.Rowena@epa.gov]; Washington, Barbara[Washington.Barbara@epa.gov]; Johnson, Natalie[Johnson.Natalie@epa.gov]; DeLeon, Rafael[Deleon.Rafael@epa.gov]
From: Bodine, Susan
Sent: Thur 11/9/2017 2:20:44 PM
Subject: RE: Material for Wednesday (11/8) Special Account Pre-Brief
Special Accounts - CERCLA 122(b)(3) Statutory Interpretation_11-06-17.docx

What do you think of circulating Manuel's analysis before the meeting ?

From: Mackey, Cyndy
Sent: Tuesday, November 7, 2017 1:53 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>; Bailey, Ethel <Bailey.Ethel@epa.gov>; Benitez-Clark, Rowena <benitez-clark.rowena@epa.gov>; Washington, Barbara <Washington.Barbara@epa.gov>; Johnson, Natalie <Johnson.Natalie@epa.gov>; DeLeon, Rafael <Deleon.Rafael@epa.gov>
Subject: FW: Material for Wednesday (11/8) Special Account Pre-Brief

Larry, Patrick and Susan,

Attached to this e-mail are the materials for tomorrow's pre-brief, in anticipation for Thursday's meeting with OGC.

The meeting materials are:

1. Agenda
2. Background briefing paper on Libby O&M (includes excerpt of settlement language)
3. Background briefing paper on Special Accounts and State Assurances
4. OGC's O&M Briefing Memo
5. OGC's State Assurances Memo with OSRE/OSRTI redline

We'd like to discuss tomorrow which of these documents you'd like to share with OGC, et al.

Also attached is a memo ("Special Accounts – CERCLA 122(b)(3) Statutory Interpretation_11-

Ex. 5 - Attorney Client

can discuss how best to use this memo at the pre-brief tomorrow.

Thanks, and please let me know if you have any questions.

Cyndy Mackey

Director, Office of Site Remediation Enforcement

EPA-Office of Enforcement and Compliance Assurance (Mail Code-2271A)

1200 Pennsylvania Ave., N.W. (Room-WJC 5206) Washington, DC 20460

202 564-8206 (Direct Line)

202 564-5110 (Office Line)

202 591-6184(Office Cell)

This email is for the intended recipient only and may contain material that is privileged and/or confidential. If you believe you have received this email in error, please notify the sender. Thank you

To: Swack, David[Swack.David@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Badalamente, Mark[Badalamente.Mark@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Miles, Erin[Miles.Erin@epa.gov]
From: Bodine, Susan
Sent: Mon 10/30/2017 8:54:50 PM
Subject: RE: SEPW letter for your review

OK here

From: Swack, David
Sent: Monday, October 30, 2017 3:38 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Badalamente, Mark <Badalamente.Mark@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>
Subject: RE: SEPW letter for your review

Would the attached work for folks? Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Bodine, Susan
Sent: Monday, October 30, 2017 3:09 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Badalamente, Mark <Badalamente.Mark@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>
Cc: Swack, David <Swack.David@epa.gov>
Subject: RE: SEPW letter for your review

Agree on Larry's description of priorities.

On the transfer, do you think OCFO would agree to the following?

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Starfield, Lawrence
Sent: Monday, October 30, 2017 3:04 PM
To: Badalamente, Mark <Badalamente.Mark@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>
Subject: RE: SEPW letter for your review

I think that's right -- Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process However, Susan's point is still valid. Can we rephrase as follows:

Ex. 5 - Deliberative Process

On a related point, in describing the priority work, I think Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Larry

This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

From: Badalamente, Mark
Sent: Monday, October 30, 2017 1:47 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>
Subject: RE: SEPW letter for your review

Ex. 5 - Deliberative Process

From: Bodine, Susan
Sent: Monday, October 30, 2017 12:24 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Badalamente, Mark <Badalamente.Mark@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>
Subject: FW: SEPW letter for your review

1. Will you affirm your support for EPA reimbursement of the environmental litigation costs assumed by the DOJ Environment and Natural Resources Division, at levels consistent with the 27 percent share of the budget EPA has historically provided, as Congress finalizes the FY 2018 budget and as EPA prepares its FY 2019 budget request? If not, why not?

Ex. 5 - Deliberative Process

Can we say Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

That does not speak to the Pres Bud --

From: Swack, David
Sent: Monday, October 30, 2017 11:42 AM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Miles, Erin <Miles.Erin@epa.gov>; Badalamente, Mark <Badalamente.Mark@epa.gov>
Subject: FW: SEPW letter for your review

Larry/Susan/Patrick,

Attached is a draft response from OCFO to a letter from Senate Democrats (also attached) regarding funding for Superfund and other Agency programs in FY 18. I shared this with Cyndy as much of the response relates to funding for the DOJ IAG. Much of the proposed response mimics the language from the budget justification, but with some additions. Cyndy provided the following comment:

David

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Let us know if you have other thoughts or comments. OCFO is trying to move this along today as the response is currently overdue. I understand they will be sharing with their political team as well for a final review. Thanks,

David

From: Delmonico, Lisa
Sent: Monday, October 30, 2017 9:53 AM
To: James, Christina <james.christina@epa.gov>; Strickland, Francine <Strickland.Francine@epa.gov>; Swack, David <Swack.David@epa.gov>; Warren, JohnM <Warren.JohnM@epa.gov>
Cc: Ripley, Laura <Ripley.Laura@epa.gov>
Subject: SEPW letter for your review

Hi OECA team,

We received the attached letter signed by several members of congress regarding, among other things, the DOJ funding (or lack thereof) in the 18 CJ. I think this went through OLEM (as it said superfund) and we would like to make sure OECA is ok with the response (also attached). This appears to have been due 10 days ago, so my apologies, but if you could please finalize your review and comments as soon as possible, it would be greatly appreciated!!!

If you need more info or have questions, please let me know.

Thanks,

Lisa

Lisa Delmonico, PMP

Program Analyst

OFCO-OB-TFAA

Delmonico.lisa@epa.gov

202-564-7037

To: Bailey, Ethel[Bailey.Ethel@epa.gov]
Cc: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Mon 11/13/2017 10:36:47 PM
Subject: FW: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration
Sterling_Timeline_20170309.pdf
Congressional Correspondance.pdf

For Thursday's Black Flag meeting.

From: Ringel, Aaron
Sent: Monday, November 13, 2017 5:33 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>; Beck, Nancy <Beck.Nancy@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Wagner, Kenneth <wagner.kenneth@epa.gov>; Schuster, Cindy <Schuster.Cindy@epa.gov>; Holsman, Marianne <Holsman.Marianne@epa.gov>
Cc: Lyons, Troy <lyons.troy@epa.gov>; Shimmin, Kaitlyn <shimmin.kaitlyn@epa.gov>; Rodrick, Christian <rodrick.christian@epa.gov>
Subject: RE: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

All, I wanted to make sure you had the below and attached additional information (timeline of Sterling International's issues/letter to EPA from CMR) from Rep. McMorris Rogers office that were sent to me today in regards to our briefing with her on Thursday morning. Of note, they have just made me aware that she will be bringing Marc Himmelstein, President of National Environmental Strategies, along with her who is the lobbyist for Sterling International.

FROM CMR STAFF:

Joining the first meeting:

Marc Himmelstein, President of National Environmental Strategies.

We recently heard that Black Fly will not have to register their fly trap on FIFRA. Sterling, a business started out of the CEO's own home, complied with EPA's demand that he register his

trap under FIFRA and through that process, lost millions of dollars. We will have the number at the meeting. I've attached the timeline that we've been working this issue and the correspondence with EPA dating back to 2011.

-Aaron

From: Ringel, Aaron
Sent: Monday, November 6, 2017 4:39 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>; Beck, Nancy <beck.nancy@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Ken Wagner (wagner.kenneth@epa.gov) <wagner.kenneth@epa.gov>; Schuster, Cindy <Schuster.Cindy@epa.gov>; Holsman, Marianne <Holsman.Marianne@epa.gov>
Cc: Troy Lyons (lyons.troy@epa.gov) <lyons.troy@epa.gov>; Shimmin, Kaitlyn <shimmin.kaitlyn@epa.gov>; Christian Rodrick (Rodrick.Christian@epa.gov) <Rodrick.Christian@epa.gov>; Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov>
Subject: Rep. McMorris Rogers EPA Meeting Request re: Black Fly Registration

All,

See below email from Conference Chairwoman McMorris Rogers' Chief of Staff requesting a meeting between EPA staff from OECA/OGC/OCSPP and the Congresswoman in regards to a constituent company (Sterling International) and their concerns about the chemical registration process not applying to their competitor Black Fly. After speaking with Ryan, he suggested Region 10 should be included in this as well so I am looping in Ken Wagner from DC as well as Cindy Schuster and Marianne Holsman from R10.

To help facilitate this meeting I would appreciate you letting us know your availability to meet with the Congresswoman on one of the below dates she is available. The meeting would be on the hill and shouldn't take more than 30-45 minutes. If you could respond back ASAP it would be much appreciated, they are looking to get this set up quickly and the first date is Thursday of this week.

•□□□□□□□□ Thursday, November 9 at 11:00am

•□□□□□□□□ Monday, November 13 at 2:00pm

•□□□□□□□□ Tuesday, November 14 at 3:30pm

Best,

Aaron

Aaron E. Ringel

Deputy Associate Administrator

Office of Congressional & Intergovernmental Relations

U.S. Environmental Protection Agency

W: 202.564.4373

Ringel.Aaron@epa.gov

From: Ringel, Aaron [mailto:ringel.aaron@epa.gov]
Sent: Thursday, November 2, 2017 5:42 PM
To: Field, Ian
Cc: Jackson, Ryan; Neill, Andrew; Rodrick, Christian; Lyons, Troy
Subject: Re: Requesting meeting with EPA Team Regarding Black Fly Registration

Hi Ryan and Aaron,

I understand you have been an incredible help to our constituent (Sterling International) as they deal with concerns over their competitor's (Black Fly) compliance with EPA's chemical registration process. Thank you so much!

Despite your help, we just heard EPA will no longer require Black Fly to register their products and comply with the same standards. As you may recall, our constituent's company, Sterling, paid over $2 million complying with these standards. And to make matters worse, after they registered their formula Black Fly was able to copy it.

The Congresswoman's goal is fairness. She has been working on this issue for nearly a decade, dealing with much pushback and delay during the former administration. We appreciate your attention to this matter and would like the chance to learn more about why Black Fly and Sterling International seem to be treated differently.

Could we set up a meeting with the Congresswoman and the following:

- Representative from EPA biopesticides office
- Representative from EPA enforcement and compliance office
- EPA General Counsel
- An EPA political appointee

Is there someone on your team who can help us set this up? We'd like to get something on the books as soon as possible.

Thank you very much,

Ian

Ian Field

Chief of Staff

Congresswoman Cathy McMorris Rodgers (WA-5)

CATHY McMORRIS RODGERS
5TH DISTRICT, WASHINGTON
COMMITTEE:
ENERGY AND COMMERCE
SUBCOMMITTEE ON HEALTH
SUBCOMMITTEE ON ENERGY AND POWER
SUBCOMMITTEE ON
ENVIRONMENT AND ECONOMY

REPUBLICAN CONFERENCE
VICE CHAIR
DEPUTY WHIP

Congress of the United States
House of Representatives

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WHITMAN

September 27, 2011

Mr. Steven Owens
Assistant Administrator
Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency

Dear Administrator Owens:

I wanted to take this opportunity to compliment your Biopesticide and Pollution Prevention staff for a job well done. Recently, I met with one of my constituents, Rod Schneidmiller, President of Sterling International, Inc. I am very proud of this company which is located in my district, as it is a market leader in its industry and proof that American, home-grown businesses, can compete with the best in the world. Sterling International is an active partner in our community, a strong job creator, and continues to produce high quality and innovative products.

Recently, Mr. Schneidmiller has described the process Sterling went through to register its products with your agency. Those products are attractant based outdoor insect traps designed to capture and mitigate flies, yellowjackets, paper wasps, etc. Several years ago Sterling voluntarily approached the EPA to register its products with your agency under FIFRA. More than two decades ago Sterling had received advice in writing from the EPA indicating registration was not required for this class of goods, but Sterling, as a responsible company decided of its own volition to revisit this topic with the EPA.

After a set of initial meetings beginning several years ago Rod and his team worked closely with your agency to obtain registrations for all of Sterling's products so as to be in full compliance with FIFRA. The biopesticide division's staff worked with Sterling to make this transition to full registration a reality. The project spanned several years and involved Sterling spending several million dollars.

Understandably, Rod is proud that Sterling is the only company in its market niche to have all of its products FIFRA compliant. This is an example of a private business working cooperatively with a regulatory agency to produce a positive outcome. According to Rod, your staff has also worked with several states that have had questions about the EPA approved labels for Sterling's products and about the registration process. These questions were answered and I believe that these individuals' efforts were important to maintaining FIFRA's integrity. I offer my special thanks to Michael McDavit and his team.

I certainly hope that I can count on your agency to assure that the same regulatory efforts are used with respect to all products in this niche of the US marketplace. This would assure that Congress' original intent when it enacted FIFRA is faithfully maintained in an even handed way.

Sincerely,

Cathy McMorris Rodgers

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PATTY MURRAY
WASHINGTON

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RULES AND ADMINISTRATION
VETERANS' AFFAIRS

United States Senate

WASHINGTON, DC 20510–4704

December 4, 2014

The Honorable Cynthia Giles
Assistant Administrator
Office of Enforcement and Compliance Assurance
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Assistant Administrator Giles:

I am writing concerning the Environmental Protection Agency's (EPA) investigation of a biopesticide registration violation reported by Sterling International, Inc (Sterling) in August 2012. I appreciate EPA's attention on this matter and I encourage EPA to move forward and give the investigation a thorough review in a timely and judicious manner.

In August 2012, Sterling first alerted EPA to several potentially unregistered biochemical pesticide lures and traps products in the marketplace. In the letter, Sterling requested that EPA look into the issue and provided their own product analysis detailing the active ingredients in each biopesticide product they suspected were not properly registered. After several emails and calls, Sterling met with EPA Pesticides Enforcement staff to discuss this issue. At the June 2013 meeting, EPA indicated that an investigation had begun, in part due to the information provided by Sterling.

The investigation has been ongoing for over a year. As the active investigation continues, I am concerned about the potential for unregistered products to remain in the marketplace. In the interim Sterling, a company in my home state, continues to play by the rules by paying all federal and state fees that apply to their registered products. I am troubled that some of their competitors are avoiding paying these fees.

Thank you for giving this request your full attention. It is my hope that the investigation of this matter can be completed in a thorough and expeditious manner. If you have any questions, I encourage you to contact Denise Dickenson of my staff at (202) 228-6692.

Sincerely,

Patty Murray

Patty Murray
United States Senator

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(360) 696–7797

Website: http://murray.senate.gov
e-mail: http://murray.senate.gov/email

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402 EAST YAKIMA AVENUE
SUITE 420
YAKIMA, WA 98901–2760
(509) 453–7462

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN - 5 2015

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable Patty Murray
United States Senate
Washington, DC 20510

Dear Senator Murray:

Thank you for your letter of December 4, 2014, regarding the Environmental Protection Agency's investigations into biopesticidal products for possible registration violations under the Federal Insecticide, Fungicide, and Rodenticide Act. I appreciate your interest in this matter.

My staff has received the information provided by Sterling International. We share your concerns about unfair marketplace practices. EPA has been and continues to actively investigate these types of products. Since this is a continuing enforcement effort, I cannot comment further on its progress.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Caroline Levine in EPA's Office of Congressional and Intergovernmental Relations at, Levine.Caroline@epa.gov or (202)564-1859.

Sincerely,

Cynthia Giles

Cynthia Giles

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 29 2015

The Honorable Cathy McMorris Rodgers
U.S. House of Representatives
Washington, D.C. 20515

Dear Congresswoman McMorris Rodgers:

As discussed on our May 15, 2015, telephone conversation, I am providing you with an update regarding the concerns raised by Sterling International, Inc. (Sterling) about the sale of unregistered pesticides.

The U.S. Environmental Protection Agency (EPA) continues to investigate Sterling's allegations of non-compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and its registration requirements. Through our investigation, we have learned that many of the products alleged by Sterling to be non-compliant with FIFRA have been pulled from the retail marketplace and are no longer available. Further, two companies subject to Sterling's allegations – Black Flag Brands, Inc. and Wellmark International – have initiated discussions with the Office of Pesticide Programs regarding registration of their products at issue to bring them into compliance with FIFRA.

As I am sure you can appreciate, we cannot discuss the status of the ongoing portion of our investigation regarding other companies; the EPA does not disclose information that may interfere with an investigation or possible settlement negotiations and litigation. The EPA has informed Sterling's representative, Mr. Marc Himmelstein, that our agency continues to investigate Sterling's allegations and once that investigation is complete, we will evaluate if an enforcement action is appropriate.

Again, thank you for your interest in this matter. If you have further questions, please contact me or your staff may contact Raquel Snyder in the EPA's Office of Congressional Intergovernmental Relations at snyder.raquel@epa.gov or (202) 564-9586.

Sincerely,

A. Stanley Meiburg
Acting Deputy Administrator

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CATHY McMORRIS RODGERS
5TH DISTRICT, WASHINGTON

REPUBLICAN CONFERENCE CHAIR

DEPUTY WHIP

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WHITMAN

June 29, 2015

The Honorable A. Stanley Meiburg
Acting Deputy Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Deputy Administrator Meiburg:

Thank you for taking the time to speak with me last month and the subsequent follow-up letter.

As I mentioned during our conversation, I continue to have concerns regarding the Agency's enforcement division's lack of protection for registrants, like Sterling International, Inc. (Sterling). While your willingness to investigate this matter is reassuring, unfortunately, some of the information provided in the follow-up letter is seemingly inconsistent with the facts. In particular, the letter states that "many of the products alleged by Sterling to be non-compliant with FIFRA have been pulled from the retail marketplace and are no longer available." However, I recently received the attached picture depicting a non-registered product being sold alongside Sterling's registered product from a store in Eastern Washington.

I appreciate your attention to this matter. During our recent conversation we discussed finding an opportunity to meet. As such, I would like to request a meeting with you as well as Deputy Assistant Administrator Shari Wilson and Assistant Administrator Jim Jones to further discuss this issue. Thank you for working with Sterling International, Inc. and trust that you will continue to work with them and those in the industry in a constructive manner.

Sincerely,

Cathy McMorris Rodgers
Member of Congress

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 2 7 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable Cathy McMorris Rodgers
U.S. House of Representatives
Washington, D.C. 20515

Dear Congresswoman McMorris Rodgers:

Thank you for your letter of June 29, 2015 to Deputy Administrator Stan Meiburg regarding further concerns raised by Sterling International, Inc. (Sterling) about the sale of unregistered fly attractant pesticides. We appreciate your interest in this matter and want to assure you that we understand the importance of compliance and enforcement in establishing a level playing field for these products.

As mentioned in our letter of May 29, 2015, the U.S. Environmental Protection Agency (EPA) continues to investigate Sterling's allegations of noncompliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) by several companies. As you know, we cannot disclose information that may interfere with an investigation or possible settlement negotiations and litigation. We note, however, that the EPA's Office of Pesticide Programs has registered several of the fly trap products at issue. Although it is possible that some residual product inventory may remain on the shelves, we believe that inventory to be minimal and that those products do not present a significant safety risk to the general public. Our goal is to protect human health and the environment by ensuring pesticide products are in compliance. Our investigation to date has confirmed progress towards that goal. For these reasons, we would like to defer your request for a meeting at this time.

Please allow us to clarify the issue of products alleged as noncompliant with FIFRA that are no longer available and have been "pulled from the retail marketplace." While certain companies that Sterling alleges were in violation have taken steps to bring their products into compliance with FIFRA, it is possible that violative pesticide products remain in the marketplace. Even after companies halt the production, distribution, and sale of non-compliant products and remove them from the distribution facilities under their ownership or control, it is possible that third parties, such as retail stores, will have product remaining on their shelves. EPA regional offices and state agencies routinely conduct marketplace inspections. If they find violative products during these inspections, they can address these products, as appropriate, on a case-by-case basis. When accompanied by details such as date and location, photographs of these products could prove helpful for the agencies conducting these inspections.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Raquel Snyder in the EPA's Office of Congressional Intergovernmental Relations at snyder.raquel@epa.gov or (202) 564-9586.

Sincerely,

Shari Wilson
Deputy Assistant Administrator

CATHY McMORRIS RODGERS
5TH DISTRICT, WASHINGTON

REPUBLICAN CONFERENCE
CHAIR

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COMMITTEE:
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WHITMAN

August 14, 2015

The Honorable A. Stanley Meiburg
Acting Deputy Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Deputy Administrator Meiburg:

While I appreciate Ms. Wilson's reply dated July 27, 2015, I want to renew my request for a meeting with you, Deputy Assistant Administrator Shari Wilson, and Assistant Administrator Jim Jones after Congress resumes the week of September 8th.

It will be easier for me to understand the situation if we can meet face-to-face and have an open discussion of this matter. This will also help me better communicate the facts to my constituents and have a better insight into the type of legislation that may be needed to address situations like this.

Unregistered products continue to appear in the shelves in Spokane Valley, Washington, which is undoubtedly indicative of a much larger problem nationwide. For instance, I have been told that a large retailer sold approximately 600,000 unregistered flytraps last year and they expect to sell upwards of 10% more this year. This action violates EPA regulations and allows these companies to profit from their non-compliance.

My office will be in touch with your office to schedule the meeting. Thank you in advance for your assistance on this matter.

Sincerely,

Cathy McMorris Rodgers
Member of Congress

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT - 6 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable Cathy McMorris Rodgers
U.S. House of Representatives
Washington, D.C. 20515

Dear Congresswoman McMorris Rodgers:

Thank you for your letter of August 14, 2015 to Deputy Administrator Stan Meiburg that renewed your request for a meeting to discuss concerns about sales of unregistered flytraps, including some that have been observed in the state of Washington. We appreciate the information you have provided us to date concerning these unregistered products.

Please be assured the U.S. Environmental Protection Agency (EPA) continues to investigate the allegations raised by your constituent, Sterling International, Inc., of noncompliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) by several companies. As you know, we cannot disclose information that may interfere with an investigation or possible settlement negotiations and litigation. For these reasons, it would be inappropriate to meet at this time. The agency will follow up with you as soon as we have information to share.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Raquel Snyder in the EPA's Office of Congressional Intergovernmental Relations at snyder.raquel@epa.gov or (202) 564-9586.

Sincerely,

Shari Wilson
Deputy Assistant Administrator

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Sterling Timeline

- June, 2009
  Product registered with EPA. (Flytraps – first of several registrations finalized.)

- September 27, 2011
  U.S. Representative Cathy McMorris Rodgers writes Steven Owens, Assistant Administrator for Chemical Safety and Pollution Prevention for USEPA (attached), expressing thanks for the work EPA did with Sterling and the hope that the same regulatory process will be applied to all such products in the U.S. marketplace.

- September, 2012
  Representatives of Sterling (the sole biopesticide registrant in this market segment) notified the program office of copycat products marketed without registration. The matter was referred to the Enforcement Office and Sterling's representatives were told to meet with the appropriate enforcement staff. Requests were immediately sent to Yvette Hellyer and Kim Wilson.

- October, 2012 until June, 2013
  Enforcement staff refused to meet, even though the Sterling representatives stated they had all data supporting the case that violations were occurring.

- June 18, 2013
  After many calls from Chairman Boxer's office, a meeting was held with Yvette Hellyer and Kimberly Wilson. Specific mass spec data showing active ingredients were identified for each product and for each manufacturer that were in violation of the biopesticide registration rules.

- June, 2013 to 2015
  Communications from Senator Murray and Congresswoman Rodgers urging action. Examples:
  - Letter from Senator Patty Murray to Cynthia Giles, AA, Enforcement and Compliance, dated December 4, 2014 (attached);
  - Response from AA Giles to Senator Murray, dated January 5, 2015 (attached).

- May 15, 2015
  Telephone conversation between Congresswoman Rodgers and Acting Deputy Administrator Meiberg.

- May 29, 2015
  Letter from Meiburg to Congresswoman Rodgers (attached), confirming telephone conversation and stating that EPA continues to investigate the situation.

- June 29, 2015
  Letter from Congresswoman Rodgers to Acting Deputy Administrator Meiberg (attached) requesting a meeting, and advising that non-registered products were still being sold (and providing photographic evidence to that affect) despite a follow up letter from EPA stating that "many of the products alleged by Sterling to be non-compliant with FIFRA have been pulled from the retail marketplace and are no longer available."

- July 27, 2015
  Letter from Shari Wilson, Deputy Assistant Administrator, to Congresswoman Rodgers (attached) defering the Congresswoman's request for a meeting with Acting Deputy Administrator Meiberg, and addressing the statement from the May 29, 2015 letter that "many of the products alleged by Sterling to be non-compliant with FIFRA have been pulled from the retail marketplace and are no longer available" as a matter of "residual product inventory".

- August 14, 2015
  Letter from Congresswoman Rodgers to Acting Deputy Administrator Meiberg (attached) renewing her request for a meeting, further explaining that sales of unregistered products at one larger retailer reached approximately 600,000 in 2015 with an expectation of a 10% increase in sales for the next year.

  To Reiterate: One retailer sold 600,000 unregistered flytraps in the 2015 season, with the expectation to sell over 650,000 unregistered flytraps in 2016. These numbers are not indicative of "residual product inventory".

- October 6, 2015
  Letter from Shari Wilson, Deputy Assistant Administrator, to Congresswoman Rodgers (attached) once again refusing a request for a meeting with Acting Deputy Administrator Meiberg.

To: Mackey, Cyndy[Mackey.Cyndy@epa.gov]
Cc: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Karin Leff (Leff.Karin@epa.gov)[Leff.Karin@epa.gov]; Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Tue 10/24/2017 9:36:31 PM
Subject: FW: CERCLA Letter Re. Lake Erie Smelting Corp. Site
EPA CERCLA Letter.pdf

Karin says this is OSRE, not FFEO. Any background?

From: Baptist, Erik
Sent: Tuesday, October 24, 2017 1:57 PM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: FW: CERCLA Letter Re. Lake Erie Smelting Corp. Site

Susan and Patrick:

I received the email below and attachment from the assistant to HUD's Acting General Counsel, Beth Zorc. She would like to speak with us at 1:00 p.m. this Friday to discuss the letter that EPA sent her. Are you available at that time? If so, I will set up a conference call.

Thanks,

Erik Baptist

Senior Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsyvlania Ave., NW

Washington, DC 20460

(202) 564-1689

baptist.erik@epa.gov

From: Gates, Scott L [mailto:Scott.L.Gates@hud.gov]
Sent: Monday, October 23, 2017 1:54 PM
To: Baptist, Erik <baptist.erik@epa.gov>
Subject: CERCLA Letter Re. Lake Erie Smelting Corp. Site

Hi Erik:

My name is Scott Gates, I am Acting General Counsel Beth Zorc's assistant. She asked me to reach out and set up a call on the attached letter. Would you be available for a call this week?

Beth is available between 10:30 AM and 12:30 PM on Wednesday, between 11:30 AM and 1 PM on Thursday, and after 12:30 PM on Friday. Please let me know if you would like to set up a call during any of those times.

Best,

Scott L. Gates

Paralegal Specialist

U.S. Department of Housing and Urban Development

451 7th Street SW Suite 10110

Washington, D.C. 20410

202-402-4498

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NEW YORK 10007-1866

OCT - 6 2017

URGENT LEGAL MATTER
PROMPT REPLY NECESSARY
CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Beth Zorc, Acting General Counsel and Principal Deputy General Counsel
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410-3000

Re: Request for Information Pursuant to 42 U.S.C. §§ 9607(a) and 9604(e) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, relating to the Lake Erie Smelting Corp. Site in Buffalo, New York

Dear Ms. Zorc:

The United States Environmental Protection Agency ("EPA") is charged with responding to releases or threatened releases of hazardous substances, pollutants, and/or contaminants into the environment, and with enforcement responsibilities under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675 ("CERCLA"), also known as the "Superfund" law. For your information, a copy of the Superfund law may be found at www.epa.gov/superfund/action/law/index.htm.

This letter seeks your cooperation in providing information related to the Lake Erie Smelting Corp. Superfund Site (the "Site") located in the City of Buffalo, New York. We encourage you to give this matter your immediate attention and request that you provide a complete and truthful response to the attached set of questions **within 21 calendar days** of your receipt of this letter.

EPA has documented the release or threatened release of hazardous substances, pollutants, or contaminants into the environment at the Site, which is the location of a former lead smelter that occupied approximately 13,000 square feet at the historical address of 29 Superior Street, in the City of Buffalo. Lake Erie Smelting Corp. was a junk yard and lead smelter business that operated at the Site from the 1920's until approximately the late 1950's. The smelter was surrounded by residential properties until the neighborhood was razed and leveled by the City of Buffalo during its period of ownership between 1957 and 1968. In 1968, Towne Gardens

Housing Development Fund Company purchased the property that is included in the Site. It was redeveloped into residential apartment units in the early 1970's. The footprint of the former facility lies north of Clinton Street and west of Jefferson Street, within the Towne Gardens apartment complex which is located at 440 Clinton Street (Tax Map ID: 111.15-1-3). The location of the footprint of the former smelter is now occupied by two residential apartment buildings. Towne Gardens, LLC is the current owner of the Site.

The Site property, which is currently known as 161 Hickory Street and historically known as 23-31 Superior Street, was part of the Ellicott District Redevelopment Project. Past news articles, which are enclosed as Attachment C, about the Ellicott District Redevelopment Project describe the involvement of the U.S. Department of Housing and Urban Development and its predecessor agencies, the U.S. Housing and Home Finance Agency and the Federal Housing Administration, at the Site. In particular, these agencies selected the Ellicott District as a site for redevelopment, paid for significant portions of the costs of acquisition and demolition, and granted various approvals for the project, including approvals necessary to secure financing for and begin construction of the project.

REQUEST FOR INFORMATION

Under Section 104(e)(2) of CERCLA, 42 U.S.C. § 9604(e)(2), EPA has broad information-gathering authority which allows it to require persons to provide information and/or documents relating to materials that have been generated, treated, stored, or disposed of at, or transported to a facility, as well as the nature or extent of a release or threatened release of hazardous substances, pollutants, or contaminants at or from a facility. EPA may also gather information about the ability of a person to pay for or perform a cleanup.

While EPA seeks your cooperation in this investigation, your compliance with the attached Request for Information is required by law. In preparing your response to this Request for Information, please follow the instructions provided in Attachment A.

When you have prepared your response to the Request for Information, please sign and have notarized the enclosed "Certification of Answers to Request for Information," and return that Certification to EPA along with your response. Please note that you may be subject to an enforcement action under Section 104 of CERCLA, 42 U.S.C. § 9604, for, among other things, false, fictitious, or fraudulent statements or representations.

You may consider some of the information EPA is requesting to be confidential. Please be aware that you may not withhold the information on that basis. If you wish EPA to treat all or part of the information confidentially, you must advise EPA of that fact by following the procedures described in the Instructions included in Attachment A, including the required support of the claim of confidentiality.

If you have information about other parties who may have information that may assist EPA in its investigation of the Site, or may be responsible for the material stored or disposed of at the Site, that information should be submitted within the time frame noted above. Please note that if after

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submitting your response you obtain additional or different information concerning the matters addressed by our Request for Information, you must promptly notify EPA and turn over the additional or different information to EPA.

This Information Request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520.

Your response to this Request for Information, which we encourage you to submit electronically, should be sent to the following:

Andrea Leshak, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866
leshak.andrea@epa.gov

And to:

Marissa Truono
U.S. Environmental Protection Agency
2890 Woodbridge Avenue
Building 205, MS-211
Edison, New Jersey 08837
truono.marissa@epa.gov

and

Keith Glenn
U.S. Environmental Protection Agency
2890 Woodbridge Avenue
Building 205, MS-211
Edison, New Jersey 08837
glenn.keith@epa.gov

If you have any questions regarding this letter, or would like to discuss the matter with EPA, you may call or email Ms. Leshak at (212) 637-3197 or leshak.andrea@epa.gov. You may direct inquiries from a non-attorney to Ms. Truono at (732) 321-4460 or truono.marissa@epa.gov. If this letter has been sent to the wrong addressee, please immediately call Ms. Leshak at (212) 637-3197, so that the letter may be redirected to the correct addressee. We appreciate your attention to this matter.

We appreciate and look forward to your prompt response to this matter.

Sincerely yours,

For

Eric J. Wilson
Deputy Director for Enforcement and Homeland Security
Emergency and Remedial Response Division

Enclosures

ATTACHMENT A

INSTRUCTIONS FOR RESPONDING TO REQUEST FOR INFORMATION

DIRECTIONS

1. Answer Every Question Completely. A separate response must be made to each of the questions set forth in this Request for Information. For each question contained in **Attachment B** of this letter, if information responsive to this Request for Information is not in your possession, custody, or control, please identify the person(s) from whom such information may be obtained.

2. Number Each Answer. Precede each answer with the corresponding number of the question and the subpart to which it responds.

3. Provide the Best Information Available. Provide responses to the best of your ability, even if the information sought was never put down in writing or if the written documents are no longer available. You should seek out responsive information from current and former employees and/or agents. Submission of cursory responses when other responsive information is available to you will be considered non-compliance with this Request for Information. Whenever in this Request for Information there is a request to identify a natural person or an entity, state, among other things, the person or entity's full name and present or last known address.

4. Identify Sources of Answers. For each question, identify (see Definitions) all the persons and documents that you relied on in producing your answer.

5. Inability to Answer or Provide Documents. If you are unable to answer a question in a detailed and complete manner or if you are unable to provide any of the information or documents requested, indicate the reason for your inability to do so. If you have reason to believe that there is an individual who may be able to provide more detail or documentation in response to any question, state that person's name and last known address and telephone number and the reason for your belief.

6. Documents. If anything is deleted from a document produced in response to this Request for Information, state the reason for, and the subject matter of, the deletion. If a document is requested but is not available, state the reason for its unavailability.

7. Continuing Obligation to Provide and to Correct Information. If additional information or documents responsive to this Request for Information become known or available to you after you respond to this Request for Information, EPA hereby requests pursuant to Section 104(e) of CERCLA that you supplement your response to EPA. If after

submitting your response, you discover that information you submitted is incorrect, it is necessary that you promptly notify EPA and correct such information.

8. Confidential Information. The information requested herein must be provided even though you may contend that it includes confidential information or trade secrets. You may assert that there is a confidentiality claim covering part or all of the information requested, pursuant to Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. §§ 9604(e)(7)(E) and (F), and 40 C.F.R. Part 2.203(b). To assert such claim of confidentiality, each document must separately address the following points:

   a. the portions of the information alleged to be entitled to confidential treatment;
   b. the period of time for which confidential treatment is desired (e.g., until a certain date, until the occurrence of a specific event, or permanently);
   c. measures taken by you to guard against the undesired disclosure of the information to others;
   d. the extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
   e. pertinent confidentiality determinations, if any, by EPA or other federal agencies, and a copy of any such determinations or reference to them, if available; and
   f. whether you assert that disclosure of the information would be likely to result in substantial harmful effect on a business' competitive position and, if so, the business' explanation of what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects.

   To make a confidentiality claim, all responses and any related documents you assert to be confidential should have "CONFIDENTIAL" marked on them. Confidential portions of otherwise non-confidential documents should be clearly identified. You should indicate a date, if applicable, after which the information need no longer be treated as confidential. Please submit in separate envelopes both a clean and a redacted version of any documents or response for which you make a claim of confidentiality.

   All confidentiality claims are subject to EPA verification. It is important that you satisfactorily show that you have taken reasonable measures to protect the confidentiality of the information and that you intend to continue to do so and that it is not and has not been obtainable by legitimate means without your consent. Information covered by such claim will be disclosed by EPA only to the extent permitted by Section 104(e) of CERCLA. If no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to you.

9. Disclosure to EPA Contractor. Information that you submit in response to this Request for Information may be disclosed by EPA to authorized representatives of the United States, pursuant to 40 C.F.R. Part 2.310(h), even if you assert that all or part of it is confidential business information. Please be advised that EPA may disclose all responses

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to this Request for Information to one or more of its private contractors for the purpose of organizing and/or analyzing the information contained in the responses to this Request for Information. Pursuant to 40 C.F.R. Part 2.310(h), private contractors must sign a contractual agreement that prohibits the disclosure of such information to anyone other than EPA without the prior written approval of each affected business or of an EPA legal office. If you are submitting information that you assert is entitled to treatment as confidential business information, you may comment on this intended disclosure within fourteen (14) days of receiving this Request for Information.

10. Personal Privacy Information. Personnel and medical files and similar files the disclosure of which to the general public may constitute an invasion of privacy should be segregated from your responses, included on separate sheet(s), and marked as "Personal Privacy Information."

11. Objections to Questions. If you have objections to some or all the questions within the Request for Information letter, you are still required to respond to each of the questions.

DEFINITIONS

The following definitions shall apply to the following words insofar as they appear in this Request for Information.

1. The term "arrangement" means every separate contract or other agreement between two or more persons, whether written or oral.

2. The term "documents" includes any written, recorded, computer-generated, visually, or aurally reproduced material of any kind in any medium in your possession, custody, or control or known by you to exist, including originals, all prior drafts, and all non-identical copies.

3. The term "entity" or "entities" refers to persons, individuals, companies, partnerships, or any other type of business association.

4. The term "Facility" shall mean the location of the former lead smelting operations that occupied the historical address of 29 Superior Street, in the City of Buffalo.

5. The term "hazardous substance" shall have the same definition as that contained in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and includes any mixtures of such hazardous substances with any other substances, including mixtures of hazardous substances with petroleum products or other nonhazardous substances. The substances that have been designated as hazardous substances pursuant to Section 102(a) of CERCLA, 42 U.S.C. § 9602(a), (which, in turn, comprise a portion of the substances that

fall within the definition of "hazardous substance" under Section 101(14) of CERCLA) are set forth at 40 C.F.R. Part 302.

6. The term "hazardous waste" shall have the same definition as that contained in Section 1004(5) of the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. § 6903(5).

7. The term "identify" means, with respect to a natural person, to set forth the person's full name, present or last known employer, business address, and business telephone number, as well as the present or last known home address and home telephone number. With respect to a corporation, partnership, or other business entity (including a sole proprietorship), the term "identify" means to provide its full name, address, and any affiliation or contractual relationship it has with the individual and/or Department to whom/which this Request for Information is addressed.

8. The term "industrial waste" shall mean any solid, liquid, or sludge or any mixtures thereof that possess <u>any</u> of the following characteristics:

   a. it contains one or more "hazardous substances" (at any concentration) as defined in Section 101(14) of CERCLA;
   b. it is a "hazardous waste" as defined in Section 1004(5) of RCRA;
   c. it has a pH less than 2.0 or greater than 12.5;
   d. it reacts violently when mixed with water;
   e. it generates toxic gases when mixed with water;
   f. it easily ignites or explodes;
   g. it is an industrial waste product;
   h. it is radioactive;
   i. it is an industrial treatment plant sludge or supernatant;
   j. it is an industrial byproduct having some market value;
   k. it is coolant water or blowdown waste from a coolant system;
   l. it is a spent product that could be reused after rehabilitation; or
   m. it is any material that you have reason to believe would be toxic if either ingested, inhaled, or placed in contact with skin.

9. The term "material" or "materials" means any and all objects, goods, substances, or matter of any kind, including but not limited to wastes.

10. The term "person" shall include any individual, firm, unincorporated association, partnership, corporation, trust, or other entity.

11. The term "pollutant or contaminant" includes, but is not limited to, any element, substance, compound, or mixture, including disease-causing agents.

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12. The term "Site" shall mean the Lake Erie Smelting Site located at 161 Hickory Street and consists of Section 111.15, Block 1, Lot 3 (which contains the property formerly known as 29 Superior Street) in the City of Buffalo and any adjacent areas that may have been affected by contamination from the Site.

13. The term "waste" or "wastes" shall mean and include trash, garbage, refuse, by-products, solid waste, hazardous waste, hazardous substances, and pollutants or contaminants, whether solid, liquid, or sludge, including but not limited to containers for temporary or permanent holding of such wastes.

14. The term "you" or "your" shall mean the addressee of this Request for Information.

15. All terms not defined herein shall have their ordinary meaning, unless such terms are defined in CERCLA or RCRA, in which case the statutory definitions shall apply.

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ATTACHMENT B

REQUEST FOR INFORMATION

1. Please provide copies of the following:

   a. Contract for Capital Grant dated March 28, 1958 as amended on May 21, 1963 (between the City of Buffalo and the federal government);

   b. 1957 U.S. Housing and Home Finance Agency approval of a $9,884,608 grant to the Buffalo City Council;

   c. 1954 U.S. Housing and Home Finance Agency approval of Ellicott District as an official grant reservation;

   d. 1964 Federal Housing Administration approval documents for Urban Properties (a developer for the Ellicott District Redevelopment Project) to secure financing to begin construction;

   e. 1958 Housing and Home Finance Agency notice of approval of acquisition prices on 281 parcels of land in the Ellicott District Redevelopment Project;

   f. 1960 application to Urban Renewal Administration for additional funds for acquisition of property;

   g. 1967 Federal Housing Authority approval documents of Phase II of the redevelopment (owner/sponsor of Phase II is identified as "Ellicott Community Redevelopment Foundation"); and

   h. Documents pertaining to the December 7, 1977 Regulatory Agreement for Limited Distribution Mortgagor Projects, between the Department of Housing and Urban Development and Towne Gardens, LTD.

2. Please describe in detail the roles and responsibilities of the U.S. Department of Housing and Urban Development, the Housing and Home Finance Agency, the Federal Housing Administration, and/or other predecessor agencies of the U.S. Department of Housing and Urban Development (hereinafter, "HUD and/or its predecessors") in the development and implementation of the Ellicott District Redevelopment Project.

3. Please identify any "hands-on" involvement by HUD and/or its predecessors in connection with the Ellicott District Redevelopment Project, including, but not limited to, management of and decisions regarding demolition and construction activities at the Site.

4. Please indicate whether HUD and/or its predecessors conducted or arranged for any other person such as a contractor or engineer to conduct any appraisal or inspection of the Site or to perform an environmental survey or study at the Site prior to it being redeveloped. If so, please provide a copy of all documents which reference any such appraisal, inspection, survey, or study.

5. Please indicate whether HUD and/or its predecessors conducted demolition activities associated with the Lake Erie Smelting Company facility or had alterations of the structures performed. Provide information regarding all demolitions or changes of any kind at the Site (e.g. excavation work and grading), including, but not limited to:

   a. A description of the work that was done at the Site by HUD, its predecessors, or any of their contractors;

   b. The names of any demolition or excavation contractors retained by HUD and/or its predecessors;

   c. The date when the former facility building was demolished and by whom;

   d. A description of what was done with the demolition debris;

   e. A description of any excavation or Site grading activities that may have been conducted by HUD, its predecessors, or their agents in association with or subsequent to demolition activities;

   f. Information relating to whether any soil at the Site was removed or brought in as fill material. If so, identify where the removed soil was disposed of and from where the fill material originated, where the fill was placed at the Property, and identify the individuals involved in or familiar with removing the soil and bringing in the fill material;

   g. Information related to whether any work involved removing any scrap material from the Property. If so, identify the individuals involved in or familiar with removing the scrap material; and

   h. Any documents or contracts pursuant to which the work was done at the Site.

6. Please provide copies of the following plans/drawings for the Ellicott District Redevelopment Project:

   a. Redevelopment Plan dated August 2, 1957 and amended March 21, 1961, July 23, 1963, and October 5, 1971, including all maps and attachments;

   b. Any demolition plans including any revised versions; and

c. Any grading plans or topographic surveys, including any revised versions.

7. Please indicate whether HUD and/or its predecessors conducted any assessments or investigations of hazardous substances or hazardous wastes at the Site, including, but not limited to, soils at the Site. If yes,

   a. Identify any environmental contractors and consultants retained;

   b. Provide the date(s) any and all assessments were performed;

   c. Provide analyses of any samples that were taken during the assessments and/or cleanup, including analyses of contaminated soil; and

   d. Provide copies of any documents issued by the contractors or consultants that relate to the results of sampling, assessment, and recommended remediation at the Site.

8. Please identify and describe all grants, approvals, loans, and mortgages issued by HUD and/or its predecessors in relation to the Ellicott District Redevelopment Project. If not already provided in response to Request #1 above, please provide documentation of such grants, approvals, loans, and mortgages.

9. Please identify any commercial interests held by HUD and/or its predecessors in connection with the Ellicott District Redevelopment Project.

10. If you have reason to believe that there may be persons able to provide a more detailed or complete response to any question contained herein or who may be able to provide additional responsive documents, identify such persons and the additional information or documents that they may have.

11. Please identify each individual who assisted or was consulted by you in the preparation of the response to this Request for Information and specify the question to which such consultation or assistance was provided.

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CERTIFICATION OF ANSWERS TO REQUEST FOR INFORMATION

State of _____

County of _____

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document (response to EPA Request for Information) and all documents submitted herewith, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete, and that all documents submitted herewith are complete and authentic unless otherwise indicated. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. I am also aware that I am under a continuing obligation to supplement my response to EPA's Request for Information if any additional information relevant to the matters addressed in EPA's Request for Information or my response thereto should become known or available to me.

_____
NAME (print or type)

_____
TITLE (print or type)

_____
SIGNATURE

Sworn to before me this

_____day of_____ 2017.

Notary Public

ATTACHMENT C

NEWS ARTICLES REGARDING
THE ELLICOTT DISTRICT REDEVELOPMENT PROJECT

Project Requires More U.S. Funds

The city will need nearly $1-million more in federal funds than anticipated for the Ellicott District Redevelopment project, Executive Director William F. Deuse revealed yesterday at a meeting of the Board of Redevelopment.

A request for the additional funds will have to be made to the Urban Renewal Administration, he said.

Approximately $300,000 more will be needed to complete the acquisition of properties, Deuse reported. The remainder represents a miscalculation in the amount of income to be derived from properties, he explained, because of a speedup in the acquisition and demolition phases.

Following board approval of the acquisition prices for 13 parcels totaling more than $283,000, Deuse reported there is only $230,000 remaining from the original $10.5-million federal capital grant for acquiring properties.

Deuse said the $300,000 or 8 per cent increase over the original estimate is low compared to federal projects in other cities where 25 to 60 per cent increases are normal.

A report was also submitted to the board showing 550 buildings out of 1,037 in the Ellicott project have been demolished.

The board authorized Deuse to seek an amendment to the Ellicott redevelopment plan after receiving a request from the First Shiloh Baptist Church relocation of its building.

The church previously contemplated renovating its present 50-year-old structure at 60 Cedar St. but revised its plans when it learned modernization would cost $223,000 while a new building would cost only $325,000.

Church officials proposed selling the present site to the city for the project and purchasing another one in the east side of Pine between Swan and South Division Sts. The change in plans will require federal approval.

Rift Unhealed

United Fund Criticizes Cancer Society Stand

Conditions set by the Erie County Unit of the American Cancer Society for joining the United Fund yesterday drew sharp criticism from United Fund leaders.

A communication delivered to the press stated that the Society would join the United Fund only on the following conditions:

1. That it be included in the in-plant solicitation and corporate giving.

2. That it be permitted to continue the April educational fund-raising crusade in the residential areas of the city and county.

To Do The Most Good

The letter further stated:

"All American Cancer Society research grants are made and coordinated on a national level with the advice of independent volunteer scientists who comprise the finest medical talents throughout the United States.

"This method avoids duplication of effort, directs funds into research wherever it is being done to do the most good for the most people and engages the most capable researchers available to accomplish the work.

"Obviously, this could not be done by a local committee of physicians or by a local group of laymen with budgetary controls."

No Change, Galvin Says

John M. Galvin, chairman of the United Fund's Allocations Committee, said that one of the major issues at point was the Cancer Society's willingness to join the United Fund in solicitation of gifts from companies and their employes, while at the same time reserving the right to continue the April fund-raising campaign.

"This it seems to us, represents no change from the Society's present practice, and therefore would provide no solution to the problem of multiplicity of campaigns," said Galvin.

"In fact, it would only compound the problem, because the United Fund, through its large volunteer organization, has good relations with business and industry whose employes, quite understandably, would object to being solicited at their homes a few months after the United Fund campaign."

Galvin said that the United Fund would encourage the Cancer Society in its April educational campaign, providing it was not tied in with fund-raising.

Fund Allocation Issue

As to allocation of funds for cancer research, Galvin said that if the Society were a member of United Fund, it would not be deprived of this function.

"The leaders of the United Fund have stated that even if the independent health drives do not join the Fund money for research will be allocated and distributed through an agency of the United Fund.

"We recognize that cancer research and care is a nation wide problem," said Galvin. "We can assure the public that our cancer cause money will be distributed so as to avoid duplication and the most capable researchers available will be sought."

Says Operation Autonomous

Galvin said that old-line agencies which had been in the Community Chest and are now in the United Fund have enjoyed complete autonomy of operation and will continue to do so. New groups in the Fund would have the same autonomy he said.

Harlan J. Swift, chairman of the United Fund stated:

"If, after we offer the Cancer Society adequate funds to carry on its activities in cancer research and education, the Society maintains its present position, then we are prepared to put the same amount of money at work in the same field.

"Once more, for the record, let me say that we are not against the Cancer Society or the cause it represents. We simply disagree with the policy of independent and competitive fund raising."

Stolen Check Alert Issued

Buffalo police last night warned merchants and banks to be on the lookout for anyone passing checks stolen in two recent burglaries in Buffalo and Rochester.

Det. Sgt. William J. McLean, head of the Bureau of Criminal Investigation said checks 448 to 501 drawn on the Bailey-Delavan branch of the Liberty Bank were stolen from the office of the High Hat Beverage Co., 1010 Genesee St., along with a corporate seal.

He also urged merchants to watch for checks from 29701 through 30000 drawn on the Lincoln Rochester Trust Co. They were stolen from the office of Noah's Ark Stores there. The payee listed on the checks is William Rash, Sgt. McLean said.

Hit-Run Auto Injures Child

Sheila Johnson, 8, of 428 Koselie St., was treated at Emergency Hospital for a right foot injury after police said her foot was run over by a hit-run driver at Koselie and Paderewski about 4:30 yesterday afternoon. Police said the car, driven by a Negro woman, was backing when it went over the curb and passed over the girl's foot.

Sheila told police the woman got out of the car, looked at her and then got back in and drove off without saying a word. The car was described as a late model auto with a yellow body and white top.

Mrs. James Goodman displays gasoline tax petition ... an appeal to motorists

Gasoline Dealers Plan Tax Cut Petition Drive

A week-long campaign aimed at seeing that Congress carries through on a promised one-cent reduction in the four-cent federal gasoline tax next June was agreed on yesterday at a meeting of the Buffalo Committee of the New York State Petroleum Council.

The committee met in the Park Lane Restaurant, 33 Gates Cir.

During the campaign from Oct. 1 to 7, motorists will be invited to sign petitions calling to Congress to reduce the four-cent-a-gallon tax as scheduled.

Petitions will be available at gas service stations throughout the seven-county Western New York area, said James S. Mahan Jr., committee chairman.

Calls Justification Weak

"Arguments that high gasoline taxes are necessary for the continuance of the federal road building program do not stand up when it is considered that huge sums collected in automotive taxes never get near a highway," Mahan said.

He claimed 43 per cent of the $4.3-billion collected from motorists each year in federal automotive taxes is diverted to non-highway purposes.

"By signing these petitions," Mahan said, "motorists can strike a blow at excessive tax and help reduce diversion of road user funds."

Mahan said the signed petitions will be shown New York Congressional candidates to let them know how motorists feel about the anticipated reduction in the 10-cent federal-state tax load on gasoline.

Combined federal and state taxes on gasoline cost New York State drivers $378.3-million each year, Mahan said.

Mosher Hails Program To Curb Rabies

Health Commissioner William E. Mosher yesterday termed the countywide rabies control program a success.

Despite the fact that 78 persons were bitten by dogs and other possible carriers of the disease, no cases of rabies occurred in humans, he said.

He said the epidemic was brought under control by the immunization of 15,000 dogs, 3,343 of them at public clinics operated by the Health Department, and by a fox-trapping program which eliminated 697 foxes in the county.

"We should be cautious against the assumption that no more rabies exists," Dr. Mosher warned.

He urged owners of unimmunized dogs to have the animals treated. And he said all dog bites should be reported to the victim's private physician and to the Health Department.

88 Are Advised To See Doctor

Eighty-eight persons were requested to get examinations from their private physicians as the result of 3,601 chest X-rays taken by the Buffalo & Erie County Tuberculosis and Health Assn. at the Erie County Fair last month.

Those notified that their X-rays showed possible chest disease conditions included 22 with cardiac changes, 34 non-TB lung changes, 12 suspicious neoplasm, 17 suspicious TB, one inactive TB and two sarcoid. The association's chest X-ray program is financed through the annual sale of Christmas Seals.

Traffic Toll

	1960	1959
Deaths	25	20
Injuries	2,688	2,258

Figures for city only, complete through 8 yesterday morning.

Court Dissolves Two Marriages

An annulment and a divorce were granted here yesterday in Supreme Court. Neither suit was contested.

The annulment was granted to Mrs. Doris Arnold of 174 Hughes Ave. from Donald Arnold on the grounds he concealed a criminal record when they were married Nov. 28, 1959, in Buffalo. The suit was before Justice Hamilton Ward.

The divorce was granted by Justice Robert E. Noonan to Mrs. Inez M. Allis of 803 Park Ave., Medina, from Albert C. Allis. They were married May 12, 1946.

Vital Statistics—Births more than tripled deaths—418 to 131—in the week ended at noon yesterday, Registrar of Vital Statistics Victor C. Silverstein reported yesterday. Pneumonia caused eight deaths, violence five and accidents two.

KLEINHANS
Downtown Buffalo Thruway Plaza

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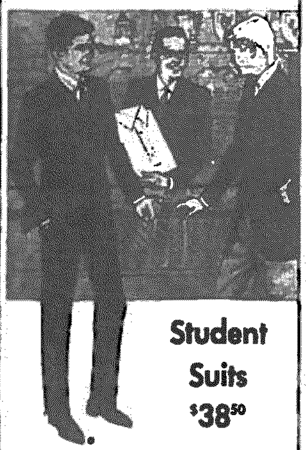

Student Suits $38.50

Fine all wool worsted suits with traditional natural shoulder styling. Notch lapels, 3-button center vested coat. Olive in mixtures and herringbones. Brown in muted stripes. Charcoal gray in muted plaids. Sizes 35 to 42. Also longs and shorts. Student Shop. Street floor, Downtown store.

New Fall Sport Coats. Wool-*Orlon Acrylic Blends. Student Shop. Downtown. Also Thruway Plaza. $25

Wash 'n Wear Slacks. *Orlon Acrylic and Wool. 28 to 36. Student Shop. Downtown. Also Thruway Plaza $11.95

Argyle and Rib Hosiery. Both Stores $1

Repp and Foulard Ties. Both Stores $1.50 to $2.50

*DuPont Trade Mark

KLEINHANS
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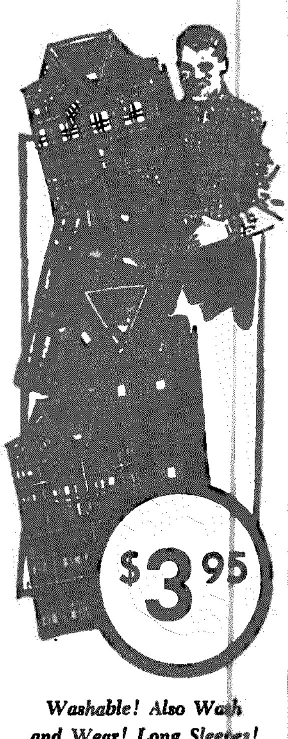
FEATURE VALUE

Sport Shirts in Imported Cotton Flannel



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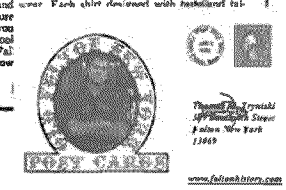

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Open a charge account. Take 90 days to pay. Never any carrying charges.

Palm Beach Company TRIP L AIRE®

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This Palm Beach Suit and Extra Slacks Are Perfect for Leisure, for Business, For Sports!

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Town or country ... you're always at home in *Trip L Aire, a versatile suit with extra trousers. Styled by Palm Beach this suit plus extra color coordinated slacks makes 3 outfits for the price of one. *Trip L Aire is a fine blend of 72% wool and 28% **Orlon acrylic with a luxury finish, yet its rugged good looks wear and wear. See our selection in new exciting colors for Fall. Second floor, Downtown. Also Thruway Plaza.

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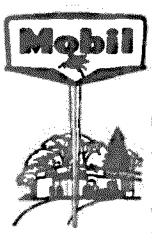
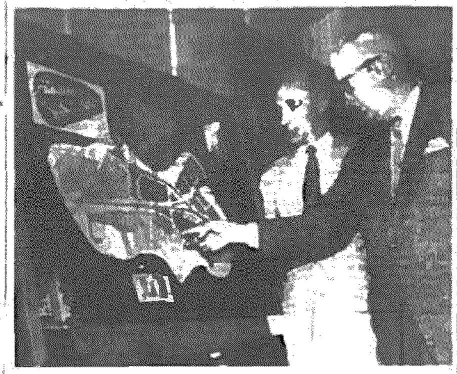


SOCONY MOBIL OIL CO., INC.

Tune in "Tightrope" every Friday night, CBS-TV



C. Franklin Daniels William F. Deane

Washington FHA official discusses redevelopment with local director

Urban Renewal Aid to Be Explained

With demolition crews ready to move into the Ellicott District within a few weeks, area builders, bankers and architects today will get the lowdown on state and federal plans to aid urban renewal.

Officials will explain the plans at the second annual urban renewal clinic today in Hotel Lafayette. Theme of the all-day conference is "Public-Private Partnership, Key to Financing Urban Renewal."

Conference Sponsors

The conference is sponsored by the Buffalo Redevelopment Foundation, the University of Buffalo, the Niagara Frontier Builders Assn. and the Greater Buffalo Board of Realtors.

Building in the Ellicott District will be handled by private interests. The aim of the conference is to explain to them the operations of federal and state programs to finance urban renewal projects.

Keynote Speakers

Here from Washington are C. Franklin Daniels, special assistant for Urban Renewal for the Federal Housing Administrator and Stratford K. McKenrick, zone operations commissioner for the FHA.

They will be keynote speakers at the afternoon session dealing with federal financing programs.

The morning workshop—dealing with state programs—includes William H. Davis, assistant to the commissioner, New York State Division of Housing, and Henry Weiner, mortgage consultant to the commissioner, New York State Division of Housing.

William F. Deane, executive director of the Buffalo Board of Redevelopment, said an objective of the conference is to determine what local builders might participate in the Ellicott plans.

"Before we start demolition," Deane said, "we would like to know what local builders are interested."

The conference will open at 10 this morning with a welcome to about 200 delegates from Dr. Clifford C. Furnas, chancellor of the University of Buffalo.

Mayor Frank A. Sedita and Charles J. Horan, regional administrator of the Housing & Home Finance Agency, will speak at the luncheon.

John R. Bryan, mortgage officer, Liberty Bank of Buffalo, will moderate the morning workshop on state programs and Owen B. Augspurger, secretary of the Redevelopment Foundation, will moderate the afternoon workshop on Federal Programs.

In an urban renewal development yesterday, Horan told Mayor Sedita the city will have less than three months to decide if it can revise downward the plans for the Masten Park Redevelopment project.

Only $2.5-million in federal funds is available, Horan said; the application will be returned here in a few weeks. Then the city will have six weeks to tell the government whether it wants the scope of the project to be cut down or temporarily shelved.

WNY Briefs

NIAGARA FALLS, Oct. 7—More than $22,000,000 in contracts were let on the Niagara power project last month, the State Power Authority announced today. The total now is more than $400-million.

BATAVIA, Oct. 7—Miss Bernice L. Christie of Lockport, secretary to the manager of Veterans Hospital here and a 45-year veteran of U.S. Government service, will retire Oct. 13.

MAYVILLE, Oct. 7—George B. Zaker, 22, of 4404½ 18th St., Niagara Falls, was arrested by FBI agents on stolen car charges today after he was released from Chautauqua County Jail. Zaker, jailed here on a traffic charge, was charged by the FBI with driving a stolen car from Ft. Pierre, S. D. to this state.

OLEAN, Oct. 7—Kenneth B. Keating, barnstorming Republican candidate for U.S. senator, warned here today against "trying to second guess U.S. policy on Formosa and the offshore islands." He said in a speech any sign of disunity would "invite further aggressive moves by the Chinese Communists."

NIAGARA FALLS, Oct. 7—Chairman Theodore DeLorenzo of the City Planning Board predicted today that Niagara Falls will have to campaign for light industry to meet its mounting tax problems caused by the displacement of Niagara Mohawk Power Corp. by the State Power Authority. He pointed out that the city has no more room for heavy industry but will have space created by railroad track removal and residential movement to the suburbs.

SALAMANCA, Oct. 7—Prof. Marian Brumstead, wildlife conservation specialist from Cornell University, will conduct a trout pond management meeting at 1 p.m. Oct. 14 on the Fred Hiling & Son farm in Hinsdale.

PIKE, Oct. 7—Farmer committee arranging the fall breeder calf sale on the Wyoming County Fairgrounds here Oct. 31 expect to have about 400 head of cattle on the auction block.

Strong Quake Noted

BERKELEY, Calif., Oct. 7 (AP)—A strong earthquake believed to have centered in New Guinea was recorded on the University of California seismograph at 7:45 a.m. EST today.

Efforts to End Strikes At 5 GM Plants Continue

Efforts to end strikes by 7,000 Buffalo area auto workers at five General Motors plants continued last night. More contract talks are scheduled today.

Each of the five United Auto Workers locals must negotiate supplemental agreements with the individual plants to clear the way for the unionists to return to their jobs.

Here is a roundup of the local negotiations:

Harrison Radiator Kensington plant—Representatives of management and Local 424 resumed contract talks last night.

Buffalo Plant

Chevrolet Delavan Ave. plant—Local 424 negotiators met with plant officials yesterday morning and are scheduled to meet again at 9 this morning.

Motor Plant

Chevrolet motor plant, Town of Tonawanda—Negotiators for Local 774 and plant management met for four hours yesterday afternoon, recessed for supper and resumed talks at 8 last night.

Chevrolet forge, Town of Tonawanda—The first contract talks between plant officials and Local 846 since the strike began last Thursday are scheduled to start this morning at 10.

Chev Foundry

Chevrolet foundry, Town of Tonawanda—Representatives of Local 1173 and plant management began contract talks yesterday afternoon.

Meanwhile, Walter Sipowicz, president of the UAW Skilled Trades Council, has called a meeting for 8 this morning in the Local 774 Hall, 2939 Niagara St., to discuss problems of the new national agreement. He requested all skilled tradesmen in Locals 774, 846 and 1173 to attend the special session.

Westfield State Farm To Get 2 Chaplains

ALBANY, Oct. 7 (UPI)—Gov. Harriman said today that arrangements have been made to provide sufficient funds for the placement of full time Protestant and Roman Catholic chaplains at Westfield State Farm, a state correctional institution at Bedford Hills, Westchester County.

Harriman made known his decision in a letter to the Rt. Rev. Horace W. B. Donegan of New York, a Protestant bishop, who had written Sept. 19 about the need for a full time rather than part time chaplain service.

Hearing Set On Water Plan

Courier-Express Lockport Bureau

LOCKPORT, Oct. 7—The Niagara County Board of Supervisors tonight set Oct. 20 for a public hearing on a proposed $10.1 million county water system.

Under the plan, rural areas throughout the county with inadequate water systems would be furnished water within one year. A 40-year bond issue would finance construction of the system.

The board earlier voted to advertise for bids on a $410,000 remodeling project at Mt. View General Hospital. The work will convert the former Niagara County tuberculosis sanitorium into a 98-bed facility for a long-term care.

Wiggin to Speak At High School

Weatherman Barney Wiggin will discuss "Weather and the International Geophysical Year" tomorrow evening at 7:30 at Cleveland Hill High School, as part of the school's adult education program.

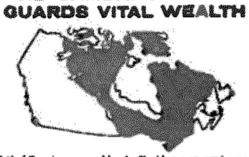
Wiggin will discuss long range forecasting, better ways of controlling the weather and the use of satellites in weather forecasting. This is the second talk in a program devoted to the IGY.

New classes in the adult education program at Cleveland Hill are French on Tuesday, woodworking on Wednesday and typing on Thursday.

Condon Honored

Atty. John W. Condon Jr. has been elected executive secretary of the New York State Police Conference. Condon is a former assistant district attorney of Erie County and attorney for the Erie Club, Buffalo policemen's organization.

PRE-CAMBRIAN SHIELD GUARDS VITAL WEALTH



Half of Canada is covered by the Shield, our country's storehouse and main source of uranium, nickel, iron and gold, and of much of our copper, zinc and lead. Soaring world population and living standards are already pressing for the discovery and development of new Canadian metal reserves—and for the use of equipment to produce and ship ores at low cost, in large volume. If you are interested in doing business in Canada we can help you. For information, write to our Business Development Division, 25 King Street, W., Toronto 1, Canada.

We do not advise regarding investments.

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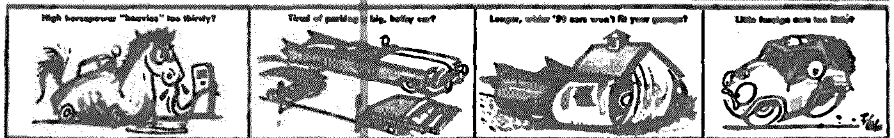
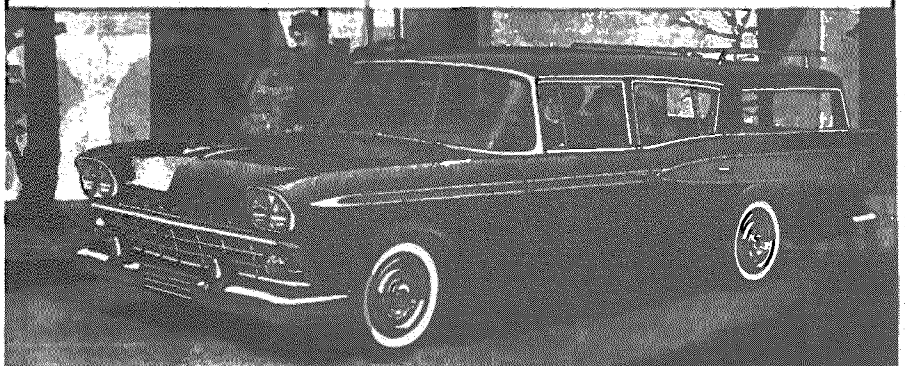


HERE'S RAMBLER '59

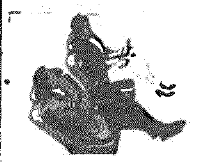
THE COMPACT CAR WITH THE BEST OF BOTH:

BIG CAR ROOM • SMALL CAR ECONOMY

• NEW PERSONALIZED COMFORT • EVEN MORE ECONOMY FOR '59



NEW! 1959 RAMBLER CUSTOM CROSS COUNTRY. Features new beauty, new economy. 108-inch wheelbase. Economy Six or Rebel V-8.

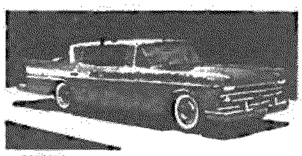


NEW! TALL HUSBAND, TINY WIFE — each has the most comfortable legroom. Sectional sofa front seats glide back and forth individually. Personalized Comfort!

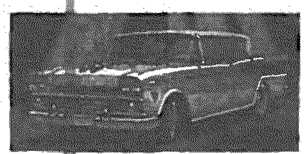
NEW! ADJUSTABLE HEADRESTS. Airliner Reclining Seats now offer new individual adjustable headrests. Here is Personalized Comfort!

HERE'S GOOD NEWS from Rambler, the top car in sales gains. The new 1959 Ramblers on display today, while brand-new in styling, brand-new in exclusive differences, are still trim and compact. Gasoline mileage is even better.

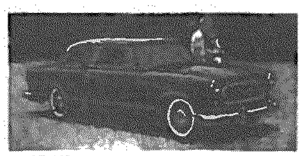
See smart new interiors with room for six big 6-footers. Try Personalized Comfort. Sectional sofa front seats for driver and passenger let each choose the most comfortable legroom. Airliner Reclining Seats offer new adjustable headrests. Try All-Season Air Conditioning, Air-Coil Ride, every pushbutton convenience. Get big car room, small car economy. See the '59 Ramblers today at your Rambler dealer's gala opening display.



NEW! 1959 AMBASSADOR COUNTRY CLUB HARDTOP. Smartest new luxury car. 117-inch wheelbase. 270 HP V-8



NEW! 1959 RAMBLER CUSTOM FOUR-DOOR SEDAN. 108-inch wheelbase. 215 HP Rebel V-8, or Six.



NEW! 1959 RAMBLER AMERICAN CLUB SEDAN. 100-inch wheelbase. Offers automatic transmission, reclining seats.

SEE BRAND-NEW FEATURES—TRY PERSONALIZED COMFORT AT RAMBLER DEALERS TODAY

BUFFALO
ALCENT EBEE, INC., 3411 Bailey Avenue
F. L. PALMER'S NORTH SIDE MOTORS CORP., 1370 Kenmore Ave.
IRI BRARD MOTOR SALES, 164-172 W. Ferry St.
JERGE SALES CO., INC., 1647 Genesee Street
MAIN-TRANSIT MOTORS CO., 15 South Transit Road
ROOT FOR RAMBLERS INC., 1523 Main Street

ANGOLA

FREDONIA

LACKAWANNA
FRANKLIN MOTOR SALES, INC., South Park Ave.

LANCASTER
GEO. JOHNSTON RAMBLER, 5547 Broadway

LOCKPORT
CLARENCE BAILEY, West Ave. at City Line

MEDINA
ZIMMERMAN NASH, INC., 314 E. Center Street

NEWFANE
NEWFANE GARAGE SALES & SERVICE, 7670 Main St.

NIAGARA FALLS
H. J. KANE MOTORS, INC., 1111 Whirlpool Street

NORTH TONAWANDA
RYAN'S MOTOR SALES, 818 Oliver St.

ORCHARD PARK
LAKE MOTORS, 600 North Buffalo St.

PERRY
ROZANSKI MOTORS, 100 North Main St.

SILVER SPRINGS
DON'S GARAGE, 174 North Main St.

WEST SENECA
SEYVERTS MOTOR SALES, 3147 Orchard Park Road

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Approval Soon Predicted Of Masten Park Project

There is strong possibility approval of the Masten Park ... neighborhood renewal plan may be announced by the federal government within a short time, Executive Director ... P. Deane of the Board of Redevelopment said yesterday.

[illegible]

The HHFA did not intend their communication to the city to be a final determination of the issue, ... said. It was in the nature of a query.

If the legal problem cannot be solved, the project can be saved by relocating the boundary lines to exclude the terminal area, he said. Additional information is being sent to the federal attorneys, and a meeting may be held by the mayor to discuss the matter further.

In other action at the Board's meeting, Deane reported that acquisition prices on 231 parcels of land in the Ellicott district redevelopment project have been approved by the HHFA.

An additional 388 have been tentatively approved here by representatives of the federal agency, he said. They are expected to be acted on by the Board in executive session next Tuesday and forwarded to the HHFA for final approval.

Negotiations for acquiring the first group of 231 properties can be started as soon as formal notice of approval is received, Deane said. Demolition of the properties will probably not begin for another six months, he added.

Canal Terminal Clause

[illegible]

THE BETTER HALF — By Bob Barnes

"I can serve him with a grape in his mouth."

Today's Radio and TV

Radio-TV Programs are subject to change without notice

(Color TV programs indicated by (C))

TV	RADIO
SATURDAY MORNING	SATURDAY MORNING
[illegible]	[illegible]
AFTERNOON	AFTERNOON
[illegible]	[illegible]
EVENING	EVENING
[illegible]	[illegible]

Radio Frequencies

AM

[illegible]

FM

[illegible]

Canadian TV

CBLT, Toronto, Ch. 6

[illegible]

CHCH-TV, Hamilton, Ch. 11

[illegible]

Boat Rental Favored For River Patrol

[illegible]

Harry Faller To Be Feted By Associates

Some of the better things of life have happened in the month of July for J. Harry Faller, foreman ...

[illegible]

He has been active in the National Federation of Post Office Clerks and the National Assn. of Postal Supervisors, Local Branch 31.

He also held offices in the Only Post, edited the post magazine and now is serving his second three-year term on the executive board of Voiture 31, ...

Fire Tower's End Asked

Public Works Commissioner Francis J. Downing yesterday asked the Common Council for permission to demolish the Fire Department drill tower at Court St. and the Terrace. He described it as in "dangerous condition."

[illegible]

The tower has not been used for training for at least a year, Downing said he plans to renew his request for a new facility. Although bond funds are available for the project, the Council has been unable to agree on a site.

Cycle Rider Injured

[illegible]

Study of Power Sources Sought

An immediate investigation to determine the possibility of obtaining electric power for the city from new power sources being developed by the New York State Power Authority was called for yesterday by Councilman-at-large Frank J. Gliniak.

In a resolution filed with the Common Council, Gliniak asked that the Council president be authorized to appoint a committee to make the investigation and to consider "ways and means of augmenting the present fight" of the city and county against "unreasonable" rate increases proposed by the Niagara Mohawk Power Corp.

"These rate increases if granted," Gliniak said, "would without doubt make the city of Buffalo and the Niagara Frontier less attractive to industry and business."

Costa Granted Ouster Delay

Federal Judge Harold P. Burke yesterday stayed his own judgment ordering Leonard Costa, Rochester Communist, deported as an alien. Judge Burke ruled earlier this month that Costa is an alien and deportable.

Yesterday, he entered a judgment ordering Costa's deportation. But, filed with the judgment was a stay order continuing Costa in $5,000 bail pending an appeal.

Costa is expected to go before the Second U.S. Circuit Court of Appeals in New York City when it reconvenes in the fall. He will attempt to overturn Judge Burke's ruling he is an alien.

Taxation Study Group Is Named

Council President William B. Lawless yesterday appointed an eight-member citizens committee on local taxation to make a comprehensive study of the ways and means of providing the city with adequate finances.

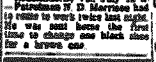
The members, appointed at the direction of a council-approved resolution introduced by Councilman Victor E. Manz, are:

Richard Adams, 702 Elmwood Ave.; Stanley Bajak, 221 Shillers St.; Mrs. Harold P. Graser, 444 Linwood Ave.; David R. Kochery, 236 Middlesex Rd.; Donald Lubick, 185 Claremont Ave.; Charles P. McCabe, 348 Huntington Ave.; Henry J. Osinski, 173 Parkside Ave., and Arthur E. Bardham, 49 Starin Ave. Appointed consultant was Joseph Broderick, 149 Woodward Ave.

Absent-Minded Cop

RICHMOND, Va., July 18 (AP) — Patrolman W. D. Morrison had to return to work twice last night. He was sent home the first time to change one black shoe for a brown one.

ADVERTISEMENT



You gonna hear it so good!

Montana-Linked Liquor Concern Faces Charges

The Niagara Falls beer distributing concern headed by relatives of some of Western New York's Apalachin delegates will face 16 charges at a State Liquor Authority hearing Wednesday.

[illegible]

Radio-TV Notes

Latin Nations Plan New TV Network

By GEORGE A. KOENIG

LATINOVISION — A television network linking both continents of the Western Hemisphere is being planned on a permanent basis. It is designed as a commercial parallel to Europe's Eurovision and will probably start about two years from now.

"Latinovision" as the network will be called, will extend from the U.S.-Mexican border to points as far south as Argentina, into the Caribbean and back into the U.S. and Canada.

Program origination points in Latin America will be at Mexico City, Havana, Caracas, Bogota and Buenos Aires.

While the ... includes the U.S. and Canada, network programming will be basically for the Spanish-speaking countries of both American continents.

TENNIS MATCHES — Two top Buffalo tennis players, Ed Lindsay and ... Ager, will meet two ... champs from Toronto during the local live "Toronto vs. Buffalo Tennis Doubles," to be telecast from 4 to 6 this afternoon on Ch. 2.

SUBSTITUTE GUEST — Rep. Kenneth B. Keating (R-NY) of Rochester, will be the panel guest on the Buffalo Council of World Affairs public service program in its "Ambassador" series at 12:30 tomorrow on Ch. 2. He replaces Soviet Ambassador Mikhail A. Menshikov, who abruptly canceled his appearance here "due to unexpected circumstances."

Rep. Keating

Panel members include William B. Lawless Jr., president of the Common Council of Buffalo, Thomas Cook Brown, chief editorial writer emeritus of the Courier-Express, and Michael F. Ellis Jr., vice president of Ellis Advertising Co., Buffalo. The subject under discussion will be "Anti-Communist Measures at Home and Abroad." Dr. D. Lincoln Harter, director of Information Services, University of Buffalo, will be moderator.

BASEBALL GAMES — Dizzy Dean and Buddy Blattner will describe the action when the St. Louis Cardinals meet the Cincinnati Redlegs at Crosley Field in Cincinnati ... 2:25 this afternoon on Ch. ... The Detroit Tigers and the Boston Red Sox, both involved in the battle for second place in the American League, meet at Fenway Park, Boston, in a game to be telecast at 2 this afternoon on Ch. 17.

TREASURE HUNT — Dick Lawrence, director of programs at WKBW has announced the station will launch a "Treasure Hunt" ... Hourly clues will be broadcast in the search for a $1,000 certificate. That amount has been deposited in the Buffalo Industrial Bank for the lucky finder of the certificate.

WEBR NOTES — Bob Wells, of the "Hi-Teen Show," at 1:30 this afternoon will have as his guests the "Playmates," a vocal group appearing at Glen Casino in Williamsville ... Dinner music at 6:30 tonight on WEBR will include songs by Jane Morgan, Ray Hartley at the piano, and Dave Terry and his orchestra ... Bernie Sandler will be guest emcee of the 7 to 10 "Twilight Dance" at Transitown Plaza. The program has been extended an hour to 10 ... "Night Watch," from midnight to 3 in the morning, has scheduled music by Jill Corey, Andre Previn, Tony Martin and the Montenegro Orchestra.

MEDICAL ROUNDTABLE — The University of Buffalo Medical Round Table at 7 tonight on WEBR and Ch. 4, will discuss "Strabism." Participants will be Drs. Simon Bernard, Charles A. Eustace and Martin A. Angelo. Dr. Charles P. Voltz will be moderator.

CHAMPAGNE MUSIC — The Lennon Sisters, Larry Hooper, Rocky Rockwell and Tiny Little will team up to present "Little Sir Echo" on "The Lawrence Welk Show" at 9 tonight on Ch. 2.

Welk and his music makers are going on a tour of eastern cities, starting July 28. They will present a concert in Buffalo's Memorial Auditorium on Wednesday, July 29.

CROSBY SHOW — A jazz orchestra composed of young performers from many lands will visit the "Bob Crosby Show" at 8 tonight on Ch. 17. The International Youth Jazz Orchestra rocked the recent Newport Jazz Festival. British comedian Max Bygraves will also be featured on the show, along with singers Georgia Gibbs and Jimmie Rodgers.

JAMES RETURNS — Dennis James will return to "Treasure Hunt" beginning Monday, to emcee the quiz show for the final days of Jan Murray's vacation. The show is telecast at 10:30 weekdays on Ch. 17 ... Lisa Charell, fashion reporter on the NBC "Today" program, is in Europe to cover the fall and winter collections in Paris, Rome and Florence. Her findings will be aired on "Today" the morning of the various release dates for this year's fashion news from abroad. "Today" is seen weekday mornings from 7 to 10 on Ch. 17.

LATE MOVIES — Cornel Wilde, Ida Lupino, Richard Widmark and Celeste Holm, will be seen in "Road House" on the "Saturday Playhouse" at 11:30 tonight on Ch. 4 ... "Operation Swing Shift" on Ch. 2 at midnight tonight will present June Havoc and George Raft in "Intrigue." ... "The Million Dollar Movie" at 11:30 tonight on Ch. 17 will be "Hangmen Also Die" starring Brian Donlevy and Walter Brennan.

Stung by Bee, Workman Falls

William Reid, 48, of 1584 Jefferson Ave. ended up in Emergency Hospital yesterday afternoon as the result of a bee sting. Police said Reid was working on a ladder at 444 Parkside Ave. when the bee struck. Reid tumbled from the ladder suffering a fractured right leg.

LOUIS' TV 1245

TONIGHT—from TRANSITOWN PLAZA

W E B R

TWILIGHT DANCE

Bernie Sandler emcee's tonight's fun-filled OUTDOOR DANCE PARTY ... direct from Transitown's big parking lot. Music for adults of all ages ... come on out ...

7 'til 10 p.m.

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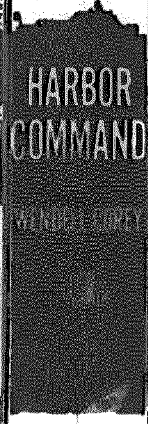
TV

TONIGHT 10:30 P.M.

WGR-TV Channel 2

HARBOR COMMAND

WENDELL COREY



Whirlwind Adventure!

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Day & Night Service

HOWDY NEIGHBORS! I'M SIMON PUREHEART. WON'T YUH JOIN ME TONIGHT IN SOME GOOD DRINKIN' AND LOOKIN' FUN ?

WE'LL HAVE SOME BEER AN' WATCH TH' MOVIE "ROAD HOUSE"

Starring IDA LUPINO, CORNEL WILDE, CELESTE HOLM, RICHARD WIDMARK

TONIGHT 11:30 p.m. WBEN-TV Ch. 4

We Have It!

The Big News in Air Conditioners

WESTINGHOUSE WALL-TO-WALL COOLING

POWER SWEEP OSCILLATING LOUVERS SPREAD COOL AIR EVENLY—WALL-TO-WALL—12 TIMES EVERY MINUTE!

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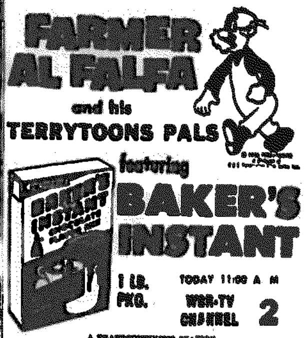

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TODAY 11:00 A. M. WGR-TV CHANNEL 2

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UP TO 33⅓% OFF

BRAND NAMES

STOP • SHOP • SAVE

TV

LATE MOVIE—TONIGHT 11:30

Operation Swing Shift presents "INTRIGUE"

TODAY 1:00-2:30 PM

TV DANCE PARTY with Pat Fagan

and today's special guests—

★ THE PLAYMATES— Roulette recording artists of "Don't Go Home"—Now appearing at Glen Park Casino.

★ MICHAEL ANGELO— New recording artist from Toronto

★ DICK BANKS— Liberty recording artist

WGR-TV CHANNEL 2

A TRANSCONTINENT STATION

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Ellicott Project Start Is Nearing

From Page 1

[illegible]

Than, the model houses remain vacant, several adjacent blocks remain a wasteland and weeds are beginning to poke above the grass around the houses.

[illegible]

Groundbreaking Rites Are Finally Conducted

Several target dates were set for the beginning of construction. A provisional groundbreaking finally was conducted on Oct. 15, and construction equipment was moved to the site a short time later.

[illegible]

Supervisors Cut More From Rath Budget Plan

From Page 1

[illegible]

Friends to Fete Irish

[illegible]

ASTHMA & BRONCHITIS

[illegible]

VICTOR'S

ALL 3 STORES OPEN MONDAY NIGHT 'TIL 9 P. M.

SEE VICTOR'S COLOR AD ON THE BACK PAGE OF THE ROTO GRAVURE SECTION

YOUR CHOICE of LIVING ROOM or SOFA BED LIVING ROOM SUITE

Worth $105 More

CUSHIONED IN FOAM COVERED IN A WONDERFUL SELECTION OF EARLY AMERICAN PRINTS AND TWEEDS

Your Choice of Any One of These 2-Pc. Sets Living Room or Sofa Bed Living Room Suite

COMPARABLE VALUE $248.00

$179

ON EASY TERMS AT ALL 3 STORES

These Inviting Sets are from our Charm Home Colonial Group. Features—Foam seat cushioning and attached foam pillow backs. Solid Maple for arms and wood trim. Kiln-dried hardwood frames and self-covered platform. Your choice of 2-Pc. Living Room Suite or 2-Pc. Sofa Bed Suite . . . in a large selection of Early American Prints and Tweeds . . . with box-pleated skirts. Combine as shown here or pick your favorite to go together. But hurry—at these prices they'll go fast. See Victor's complete selection of Early American furnishings, TOMORROW! You'll be glad you did.

2 BEDS in the SPACE of ONE!

with the smart new SLIDE-A-TRUNDLE

NUTMEG MAPLE

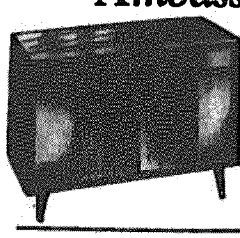
On Finest Hardwood Construction

$119

INCLUDING 2 SPRINGS AND 2 INNERSPRING MATTRESSES

The Finest in Sound at a Low Price

Ambassador



CONSOLE PHONOGRAPH

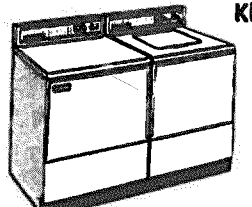
$119

4-Speed record changer, Sapphire needles, Two 6" woofers, two 4" tweeters and Automatic shut-off. 2 Extension jacks. Hand wired chassis. Compact modern styling.

ON EASY TERMS

FOR WHITER CLOTHES AT A LOW, LOW PRICE

KELVINATOR



2-SPEED—2-CYCLE WASHER

$198 With Trade

ON EASY TERMS

ELECTRIC DRYER

$138

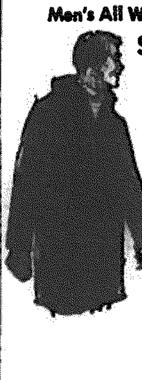
ON EASY TERMS

MEN'S and WOMEN'S CLOTHING—DOWNTOWN STORE ONLY

Men's All Wool Melton

STADIUM COATS

$12.95



Wool Coat for spectator sportsman wear. Breast pocket and 2 big flap pockets. Hood with draw string. Navy or Olive.

M-L-XL

NO MONEY DOWN

MEN'S SLAX

2 Pair $10

Sale

LADIES' SUBURBAN COATS

Regular $30

$25

OUTSTANDING VALUE

Emerson

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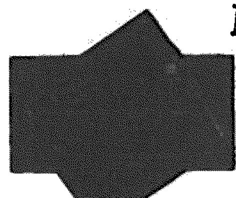

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BUFFALO, N. Y., SUNDAY MORNING, MARCH 9, 1969

Anne Matthews 35
Military 38
Classified 38-52

State's Estimate

Outer Belt Highway Called 8 Years Away

By DALE C. ENGLEN
Courier Express Albany Bureau

ALBANY—Buffalo's so-called outer belt expressway to serve a Lancaster stadium is at least eight years and $90 million away from completion, the State Transportation Dept. has estimated.

In an informal presentation of the huge highway project the department also said that it has [illegible] to incorporate where [illegible] the Niagara Falls Thruway [illegible] into the proposed by the Regional Co.

60-Mile Highway

The local estimate is based on developmental statistics showing procedures that put the end of expressway to actual usage at [illegible] 1977, [illegible] and 63 months per mile. The outer belt would be 60 miles long.

There is no way to determine how much of that 90 million will be federal money and how much will be supplied by the state, a department spokesman in Albany told The Courier-Express.

That is because the highways is part of the federal interstate highway system under which 90 per cent of the funds are supplied by Washington.

Federal Standards

Instead, it would be a state program, built to conform to all federal standards for 10 per cent [illegible].

However the way the federal highway aid system is designed in New York State, the spokesman said there is no real way to tell if the outer belt would be construed as a 10-90 individualistic [illegible] format of whether 100 per cent of the cost would be borne by the state taxpayers.

Federal aid information comes in with a dollar total for highway aid in this coming year and this is then to be distributed by the state through the state aid and then [illegible] for more [illegible] that would be purchased under the 90-10 [illegible] formula. The result is an all state matter.

Actually, the outer belt proposal probably the shortest by weeks. It has been still has been a relatively [illegible] priority designated to meet the Transportation department is for personal trip of suburbs around Buffalo.

State Outlook

The idea for the outer belt [illegible] at the Niagara Falls [illegible] Expressway stems in 1963 [illegible]

The plan then—and now because it hasn't changed to any great extent—would have the expressway follow this general route.

The outer belt would start in the vicinity of the Rainbow Bridge in Niagara Falls and head east-southeast out of the Cataract City on the La Salle extension, then the La Salle extension now under construction in Niagara Falls to the first leg of the 60-mile Beltway.

Coming out of Niagara Falls, the route would cross Niagara Falls Blvd. and Mckeogh Rd.—the general location of the proposed Lancaster expressway being designed to serve the University of Buffalo Amherst Campus.

World Curve South

Just east of a planned interchange with the Lockport expressway the outer belt would begin curving south through East Amherst to pass west of Tonawanda.

Present plans call for the belt to run south from East Amherst through the Tonawanda Indian Reservation, the Tonawanda Thruway interchange and then continue south through Cheektowaga to cross the West Seneca-Elma area where it crosses Rt. 16, Rt. 20 and Rt. 20 come together.

From here outer belt would swing west through West Seneca and the Town of Hamburg to end at Rt. 5 near the Lake Erie Thruway at Mile Strip Rd. near Blasdell. A small segment of the Mile Strip Rd. section already has been built.

A Transportation Dept. spokesman said the department is currently studying the route alignment from Blasdell Milestrip Rd. to the Thruway interchange in Depew and hopes to have a "complete map" on this portion in the near future.

End Hearing Needed

A corridor hearing is designed to let the people have some idea of departmental thinking about where the road maps go and to give the people a chance to convince them where and exceptions.

Following the hearing the department would not start the specific location of the road and then go back for another public hearing. Only after that hearing would the actual design of the Beltway be undertaken.

The spokesman emphasized that "much of the Beltway we have in mind hardly started the location study. It will take at least six months to complete that study which is crucial to stadium traffic and the department is tentatively figuring on having a corridor hearing on that segment sometime in the fall.

3 Years for Design

Design takes about three years, he said, meaning that it would probably be mid-1972 before the actual [illegible]

OUTER BELT
Continued on Page 29

Kenford's Plan Lacks Guarantee

Details Lacking On Tax Revenue

One of the most important of the many calls received this week in Acapulco, Mexico, by vacationing County Executive B. John Tutuska was from Frank C. Ludera, Democratic minority leader of the County Legislature.

Ludera telephoned Tutuska on Friday to learn from Tutuska's own lips whether the Republican executive has an official preview of a stadium location. Ludera also called Tutuska as a courtesy to let him know where Democratic leadership stand on the vexsome Kenford Co. idea for a ready stadium development in the Town of Lancaster.

Republican Tutuska, Ludera said, expressed no set preference on a stadium site, if Kenford threw from the scene. But Tutuska, according to Ludera, believes that the Lancaster site is "suitable."

Guarantee Required From Kenford Group

Ludera told Tutuska however that Lancaster is "not suitable" if there are no guarantees from Kenford that its claim that it actually can and will build new taxable construction worth upwards of $200 million next to the stadium.

Ludera told Tutuska the reason the Democrats voted for the Kenford site was the pre-condition that these negotiations be completed, is that the Democrats want assurance that Kenford's plan is fully attainable the cost of the stadium actually will be carried out.

Ludera told The Courier-Express that the negotiations of the Kenford-Lancaster stadium idea "promise the taxpayers no two ways."

First he explained the Kenford plan promising the development of ready tax revenues to help pay off county bonds sold to finance the stadium is placed before the Legislature.

Opportunity Needed To Check Out Plans

Second by mandating that these negotiations be completed before the county by bound to buy the partial stadium site Kenford has assembled, the legislature gives the legislature time to make sure beforehand that Kenford has the plans and the bank mortgagees to really do what it says it will do.

The Town of Lancaster, Ludera said expressed a similar viewpoint in a statement filed with the legislature by Supervisor Leo Weimer which said Lancaster does not want "just the stadium, alone."

Without these firm guarantees from Kenford to have Lancaster, Ludera said, "it would be better to build the stadium in Amherst or at the Crossroads."

Ludera said he told this to Tutuska. He said the Democrats never had the intention to locate "just the stadium" in Lancaster.

"With this statement, Ludera

KENFORD'S PLAN
Continued on Page 29

Bishop McLaughlin — Max Kraiteria — Frank H. Brown — Msgr. Kulpinski
... plaque presented at college's dinner

Union Head, Mediator Feted

A labor leader and a mediator last Saturday night were presented plaques at the 31st annual graduation dinner of the Diocesan Labor-Management College of the Roman Catholic Diocese of Buffalo held in the Terrace Room of the Statler Hilton Hotel.

The plaque, named for the Most Rev. James A. McNulty, bishop of the diocese, were given to Max Kraiteria, president of the Bakery and Confection Workers International Union of America and Frank H. Brown Regional director of the Federal Mediation and Conciliation Service.

Judge Kane Honored

The silver trays were presented by the Most Rev. Bernard J. McLaughlin auxiliary bishop and diocesan chancellor, who also presented a special award of a gavel to City Court Judge James L. Kane. Judge Kane was president of the Buffalo AFL-CIO Council for nine years until his appointment to the bench.

The Rt. Rev. Msgr. Stanley A. Kulpinski, diocesan director of the college, read citations praising Kraiteria for "devoted and constant service to humanitarian endeavors" and Brown for "steadfast devotion to freedom, democracy, equal rights and equal opportunities."

Msgr. Kulpinski said Judge Kane was recommended for becoming the first Western New York labor leader appointed to a judgeship.

Praises Co-Workers

Kraiteria, who accepted the award "with humility and pride," praised his friends and co-workers for helping him achieve the recognition.

Brown said the Federal Mediation and Conciliation Service is a team and he felt honored and privileged to receive the plaque.

Judge Kane said he would use the gavel he received "as judiciously as I tried to use the gavel during nine years with the labor council."

Bishop McLaughlin, in a brief address, said the three men honored "are the type we should put on a pedestal and emulate in our public and private lives."

"These are men who have made America what it is today by diverse but equally meaningful contributions to the welfare of this nation, and thus enriching us all," the bishop said. "It is men of such public service who have made our country the finest nation in the world."

125 Graduates Attend

Among those attending the dinner were the college's 125 graduates who attended courses given in three locations beginning last October. The graduates represented 153 companies, 118 unions and 151 occupations, Msgr. Kulpinski said.

Leonard C. Feldmann, management editor of The Courier-Express, was toastmaster. He received a Bishop's Plaque from the college in 1966 for consistently fair and balanced coverage of labor relations between labor and management.

Mayor Frank A. Sedita gave welcoming remarks. George T. Schmidt, International vice president of the Bakery Worker's Union, was general chairman of the dinner.

The Rev. Robert J. Williamson, associate director of the Catholic Charities Appeal, gave the invocation, and the Rev. Peter Carter, pastor of all Saints Church, Lackawanna, gave the benediction.

Carlson Calls Arena Session

Erie County Legislators will meet in special session at 9 a.m. Wednesday to consider further the backlash to the proposed for the Lancaster stadium site.

The meeting was called by Chairman Arthur J. Cofford to discuss and take any appropriate action on the Kenford proposal.

Cofford was reported out of town Saturday and unavailable to confirm what the purpose of [illegible]

President Develops Flair

Success of Nixon's Tour Shows in Relaxed Posture

By PETER C. ANDREWS
Courier Express Washington Bureau

THE PRESIDENCY of the United States is apparently a job one can get to the Richard Milhous Nixon, who understudied the position eight years, was defeated in his first attempt to win it in 1960 and succeeded last Nov. 5, seems to be enjoying it more every day.

This is evident from the almost jaunty air he has, especially since his successful European trip. He seems much more at ease and is considerably more relaxed, at least outwardly, than he was when he first took office six weeks ago. The then somewhat mechanical smile and gestures are now replaced with the more spontaneous warmth of a man who has achieved his life's ambition and is obviously enjoying it to the hilt.

TYPICAL OF THE fun the President is getting out of his office was a remark he made at a small reception he gave two weeks ago for the press members who were to accompany him on the European trip. He was talking to a few reporters gathered around him at the party, then, motioning all were without drinks, he said "Come on, fellows, help yourself to some drinks—they are on the house—the White House." The little addendum was said with a tone of discovery and obvious relish.

The President described the briefing sessions he went through the week before his trip as "making me feel a little like Notre Dame preparing for its football schedule — I have to prep for everybody, but everybody also only has to prep for me." Nixon is a man who so far has been given excellent marks for doing his homework. His three press conferences have all been triumphs, with the President directing most of the time to answering reporters' questions from the floor. Despite one or two curve balls thrown him, Nixon hasn't muffed a thing.

SUCCESS
Continued on Page 26

Asks End of Relief

Sedita Raps Penn Central 'Tax Shelter'

Mayor Frank A. Sedita proposed Saturday that railroads be excluded from real estate tax exemption if their net earnings from all sources are double the amount of exemption they would be entitled to under state law.

Sedita said he will urge Gov. Rockefeller and the state legislature to re-examine the provisions of the Airport-and Railroad Relief Act and establish a new criterion for determining whether the relief is "needed or justified."

$1.5 Million Relief

Penn Central is one of the railroads which because of its poor income health, should no longer be granted tax relief, the mayor said. Penn Central is exempted from more than $1.5 million in taxes in Buffalo alone.

The mayor said that last year Penn Central had a net income of more than $80 million while operating under a $500 million "tax shelter."

"Penn Central earnings rose from 23 cents per share in 196[illegible] to almost $4 in 1968," Sedita said. "During this same period its stock rose from $11 per share in 1961 to $55 in 1968."

Other Reserves

"With this great increase in economic health, one might think that the Penn Central would have lost all or part of its tax exemption on the sliding scale formula contained in the statute. That, however, is not the case.

"The reason is that the Penn Central is not only engaged in the transportation business but derives most of its gross income from other sources and subsidiaries, particularly in real estate activities in New York, California, Texas and Florida and its important trailer and container transportation operations.

"This becomes important when we study the formula set forth in the exemption statute because it uses formula the only earnings which are used in determining the exemption factor are those earnings that are associated with transportation income and then that income is related to the replacement costs of the transportation system," Sedita said.

"In actuality the larger revenue not relating to transportation income to the replacement costs of the railroad system. Penn Central is still exempted from the payment of real estate taxes on transportation facilities in New York State."

RAILROAD
Continued on Page 26

Cites Complaints

Black Is Critical Of Ellicott Delays

By GEORGE HALLORAN

Construction delays of the Ellicott Redevelopment Project are stifling housing and commercial developments in other parts of the East Side Ellicott District Councilman Chauncey F. Black said Saturday.

"With this great project, under the control of the Urban Renewal Department, has failed to get started despite a land-breaking ceremony in the area of the William and Jefferson site three months ago.

Notes Complaints

Black said he felt "compelled to speak out against these continued delays" because he has been receiving complaints from his constituents.

"If the rate things are going now, the contractor will have to come back and ask for a time extension for his work, which is exactly what happened in Phase Two of Ellicott," Black said Saturday.

"The federal government, which is willing to provide funds for these programs, will not let the city tear down additional stores and houses until more are built — so until Ellicott is completed we are stuck."

"We need housing very badly in the Ellicott District," Black emphasized, "and there is absolutely no reason why this work can't get under way."

Black said he felt the responsibility for pushing the project at this point rests with the developer, Urban Properties of Pittsburgh, and the general contractor, Winston A. Burnett Construction of New York City.

"The problem is these people are not elected officials and the people don't get back to them," he said.

Reason For Delay

Black said he had been told the reason for the most recent delay was a discrepancy between city specifications and contractor's drawings for pipes.

"The architects, Duncan Hodgson of Toronto, wanted to use smaller sizes on sewer drains and traps than the city will allow," Black said.

Wants Action

Black says if the pipe work is delayed there is no reason why parking lots and other work such as repairing the land around it have been accomplished during the last three months.

"I am calling for immediate action," Black said. "I am sure that the Ellicott project can be completed as soon as possible but because so much preliminary work is at stake.

"The people in the Ellicott District have waited long enough for a decent place to live and decent stores to shop in."

The latest in a series of protests concerning the slight of progress involving Ellicott into north [illegible] tracts will be signed by March 17, and work will be under way by April 1.

Paul Jayes

Student Rebels Aim Discontent At Their Fathers

SOCIOLOGIST LEWIS A. Feuer says that modern rebels don't want to reform society at all, but merely get even with their fathers.

Prof. Feuer, author of the much-discussed "The Conflict of Generations," Basic Books, 534 pages, $12.50, surveyed 34 student movements in Russia, Germany, Japan, the United States and other countries in the 19th and 20th centuries.

He said the insurgency "was the same in practically every country."

"STUDENT MOVEMENTS are the most adversary spirited and alienated the world has seen," he said. "But they are [illegible] because the divisive society results from alienation between [illegible]

"The continuity overlaps in Germany, and adversaries assassination we witnessed these factors are universally true, but because they actually the agents of generational hatred on the largest scale [illegible]

"This generation partakes that [illegible] hatred of older people [illegible] runs through every student movement I studied."

PROF. FEUER SAYS student revolts typically are led "by young men who have had personal problems with their fathers."

It is an interesting theory, and could have certain bearers [illegible]

"Hello, son. How's the boy?"

"Put him up."

"He said a fight?"

"DEFEND YOURSELF, Pop. I'm getting beat you one right on the [illegible]

"But why? What did I do?"

"All this time I thought I failed school and my job so early. Now I've found the true hate-[illegible] target of my pent-up aggressions. You to put 'em up."

"CAN'T WE TALK this over?"

"There's no time for that."

"You'll get an old man with Parkinson's disease [illegible]"

"TO ME, YOU'RE NOT just another old man with bursitis and angina trouble. You are the personification of all my repressed frustration and the object of my hatred, mistrust and [illegible]"

"You'd hit an old man with glasses?"

"Don't you see, Pop? I've got to get this out of my system so I can return to school and channel my alienation, selfless, idealistic drives into the socially constructive channels. Besides, you only wear reading glasses."

"I'LL READ SOMETHING. Here, what's this? 'The Conflict of Generations' by Lewis A. Feuer.'"

"That's the book that opened my eyes, Pop. It says all student movements are counter-productive because they are rooted in 'irrational parricide' [illegible] 'irrational choices' that distorts the movements and overrides the initial altruistic goals."

"Put this, you're gonna bust my in the head! Couldn't you just pocket the book or borrow-reader instead to the family room?"

"Put you up."

"But, we've always been buddies. Remember when you set the garage on fire and I didn't squeal you? Hope will be here, Pop."

"That's true."

"AND WHEN YOU chased off your little sister's boy with my favorite razor? What did I say? 'Ah,' I said, 'it's gonna have to. Age we went to the ball game.'"

"I remember."

"Why, we've always been pals. Even when you put sugar in the gas tank of my new car, and broke the picture window, and all those other things, I didn't even spank you."

"BUT, POP, IF I don't take you, why did I lend the sugar at Yorkson Hall and those down the State University?"

"Don't you see, son? You've always been that way."

"I'M NOT SAYING you were born a bum, Pop. I'm saying that if you'd gone to Harvard instead of Ohio State, you would have the opportunity [illegible]

"Hey, son, Harvard, Ohio State, I'm a bum, Pop. I'm saying that if you'd gone to Harvard instead of Ohio State, you would have the opportunity [illegible]

"Hey, son, Harvard, Ohio State, I'm a bum, Pop. I'm saying that if you'd gone to Harvard instead of Ohio State, you would have the opportunity [illegible]

"Hey, son, Harvard, Ohio State, I'm a bum, Pop. I'm saying that if you'd gone to Harvard instead of Ohio State, you would have the opportunity [illegible]

College Man Really Uses His Head

Painting Student Shows Gym Work Fine Art

BY HARLAN ABBEY

DAVIEL E. McNAMARA, 20, of 175 Highland Ave., Kenmore, often adapts some unusual pictures as he studies his fine arts subjects at University of Buffalo.

After spending some 20 years as a show business gymnast, McNamara still keeps in shape with daily workouts, which taught him how reading while standing on his head or supporting his body with one hand.

His show business career began in a tableau, 15-inspired home at Crown Point, 10 miles south of Plattsburgh. His parents took out the floor of the former missionary's home to one wing and converted it to a gym with a 30-foot high ceiling.

HIS FATHER was coach of all sports at Crown Point Central, but his mother soon encouraged her three children to commentrate on gymnastics and tumbling and a career of entertaining.

"My sister, Michaela, now 28, and I were booked for the Ted Mack amateur show, but I couldn't go on because I was only five years old, and you had to be at least six," he recalled, adding: "Later my sister, brother Michael, and I were on as a unit."

The McNamara Brothers' act ended unexpectedly and shockingly. Michael McNamara, 21 died when he was struck by a car near St. Procopious College, Lisle, Ind., in December, 1967.

"WE WORKED all during the summers with adult show that played county fairs, circuses and rodeos, and we also had a night club act and frequently worked on weekends," Daniel McNamara said.

Michael once appeared on the TV network show "I've Got a Secret." His secret was standing on one finger.

"In our act, I was the "under man," balancing Mike above me. When we started, I weighed about 100 pounds and he weighed only 100. Our last year he weighed 135 and I weighed 155," McNamara said.

"AN 'UNDER MAN' needs to develop strong neck muscles. We started with guide wires holding Mike. Later I got to where I could almost down and turn around underneath him.

"Probably the best stunts were when I balanced on a hanging board and Mike did a handstand on my head while we spun in a circle. On one occasion, I stood on my head and Mike balanced upside down and stood on one hand, which was placed on my neck.

"We'd always hoped to get it down to a double one-handed stand, but we never found the time."

McNAMARA exercises daily to keep himself healthy, but has no thoughts of going back into show business.

"My wife isn't interested in becoming an act, and my daughter, Lawanna Michelle, is just five months old," he said. "But I might do some gymnastics coaching one of these days."

His show business highlights included working at Atlantic City's Steel Pier with Paul Whiteman and the McCoy Sisters, working in Canada with the Ink Spots, and playing in units featuring singers Brenda Lee and Conway Twitty.

EARNING UP to $400 per week for the group and average $1,000 per summer paid McNamara's way through Plattsburgh State College, where he earned a bachelor's degree in education.

He also met his wife the former Orna Wagner of Tel Aviv, Israel at college, and they taught in Plattsburgh schools for three years while she completed her education on a scholarship and earned a master's degree.

"We both taught in Kiryas, N.Y. for a year, and I was director of recreation in Clinton County last summer before we came to Buffalo," he continued.

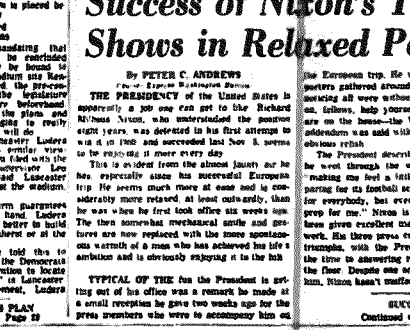
McNAMARA NOW plans to teach art or engage in oil painting or creative photography. He expects to get his fine arts degree in June, and then go on for a master's degree. Mrs. McNamara is teaching English in Kenmore Junior High School.

"Gymnastics is only practice, and if I had to I could probably do all the stunts I used to by breathing my normal exercise every day," McNamara contends. "But marriage and being a parent changes your interests."

HIS AMBITION in show business had been to work with a touring circus in Europe.

"I finally did get overseas when we visited my wife's parents in Israel in 1966," he said, adding:

"We also plan to visit there again this summer. I also have considered living in Israel permanently at some time in the future. With a name like McNamara, that should prove interesting!"



Daniel E. McNamara's unusual study posture
... circus act financed college education

Contract Vote Set Today At Clement

Giving permission to the [illegible] Clement to engage in collective [illegible] will return to work Monday, beginning of a new contract is expected today.

Members of Local 17 Brewery, Soft Drink Workers (AFL-CIO) will meet at 10 a.m. today in the Polish Home Club in Lancaster to vote on the new pact.

Meanwhile negotiations continue between Teamsters Local 264 and the International Association of Machinists & Aerospace Workers (AFL-CIO) where representatives of 55 drivers and mechanics engineers and maintenance personnel at the plant.

Details of the tentative agreement between the company and the presence were not revealed pending today's membership vote. The strike began last Wednesday after workers rejected a previous contract proposal. J. W. Clement employs about 1,200 workers.

Ontario Man Is Recaptured

Courier Express Correspondent

ST. CATHARINES Feb. — Dennis Clarke, 21 of Lincoln Ont., was recaptured by police here Friday after his escape from St. Catharines Detention Home Thursday.

Police said they found Clarke in a private residence here and arrested two persons for harboring a fugitive. They declined to identify the two.

Clarke, facing a charge of breaking and entering, had been transferred from Lincoln County Jail here to the hospital for medical treatment.

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Two Businessmen Take Cautious View of Pact

[illegible] opinion [illegible] the agreement [illegible] Mayor Chester Kowal and the Common Council [illegible] the Ellicott redevelopment project.

[illegible]

[illegible] hope we get started on it right away," he said.

Stanley Arters of [illegible] Lockwood Dr., Town of Tonawanda, immediate past president of the association and now a member of its board, said his personal feeling is one of "cautious optimism."

Proprietor of a [illegible] stand at [illegible] William St., [illegible] added: "We've been disappointed so many times before that we're just going to wait and see this time."

He said an initial development of 180 units in a planned 1,800 represents only a little more than 10 per cent of the total project and is no cause for "great elation. But we're happy to see some moving of the wheels, after all these years."

Spurt in Tourists

BELGRADE (AP)—Yugoslavia was visited by 1.8-million foreign tourists during the first half of this year, an increase of 17 per cent over the same period in [illegible].

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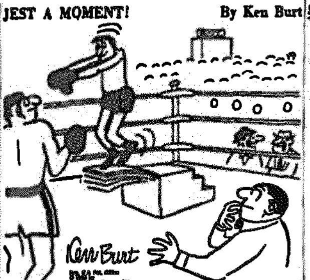
JEST A MOMENT! By Ken Burt



"I think he's going to take a dive."

Bisgeier Has Praise For Kowal Decision

Harry Bisgeier, chairman of the Urban Renewal Board's Advisory Committee, Wednesday night praised Mayor Chester Kowal for statesmanship in accepting First Hartford Realty Corp. as contractor for sales housing in the Ellicott District redevelopment program.

The Mayor's "great accomplishment," Bisgeier said, "will be recorded in the history of Buffalo." The Advisory Committee, distressed over the long deadlock in Ellicott work, was ready to call a compromise meeting, Bisgeier said, but Kowal made this unnecessary by accepting First Hartford, the Common Council's choice.

Bisgeier's committee planned this meeting for today. To it, the chairman and committee members had invited Mayor Kowal, Council President Chester Gorski, Council Majority Leader Stanley Makowski, representatives of First Hartford and of Urban Properties Inc., the construction firm Kowal had favored.

"They've all kissed and made up now, so there's no reason for our meeting," Bisgeier said. "But we intend to remain on the alert because we're anxious to see other redevelopment phases started."

URA Expects No Hitch On Partial Plan

The Urban Renewal Administration often approves portions of redevelopment projects separately, the regional counsel for the URA said Wednesday afternoon.

Consequently, plans for First Hartford Realty Corp.'s development of 180 units of sales housing in the Ellicott District have a good chance for federal approval, providing all documents are in order, legal adviser Melvin Stein told The Courier-Express by telephone from New York City.

Stipulation on 180 Units

He added that any conditions Mayor Chester Kowal has attached to his approval of First Hartford would have no bearing on the URA's approval or rejection of the project.

In agreeing with the Common Council's choice of First Hartford Realty Tuesday night, the Mayor stipulated that no less than 180 units be constructed and that construction begin within 30 days after federal approval and be complete within a year.

"These conditions are strictly between the Council and the Mayor," Stein said. "If the Council agrees and believes such conditions are feasible, there is no reason for us to disapprove."

"If the corporation structure and financial record of First Hartford are sound, we will approve it as the developer," Stein added.

Since 1954

Project Is Haunted By City Haggling

By SUSAN SLEETH

Since the $35-million Ellicott project was conceived in 1954, it has cost millions of dollars in city and federal funds and yielded nothing but the promise of continued complications. Here is what has transpired with Buffalo's first urban renewal project.

LOCATION, VALUE—The 161 acres bounded by Michigan Ave., William St., Jefferson Ave. and Swan St. are known as the Ellicott District. The site, acquired by the city at a cost of over $11-million, originally housed 2,000 families. Since demolition of the 1,800 buildings was completed in 1961, the area has remained a weed-choked, trash-littered wasteland.

The costs of acquisition and demolition were shared, one-third by the city and two-thirds by the Federal government. Construction was estimated in 19[illegible] to run to $[illegible]-million. So far, the Federal government has invested $[illegible]-million in the project. The tax loss alone to the city, from property removed from the tax rolls, has run to more than $[illegible].

AIM OF PROJECT—One of the few buildings in the area is the newly-completed Ellicott Recreation Center and Pool, built at a cost of $[illegible]-million.

The aim of the project is to provide middle-income housing for families whose earnings lift them out of the public housing bracket. Eventually, a non-profit group would own and operate the rental units which would make up the biggest part of the development. (It has been proposed that seven churches in the Ellicott District form the nucleus of the ownership.)

EARLY HISTORY—In 1954, at the request of the newly-formed Board of Redevelopment, the U.S. Housing and Home Finance Agency considered sites for redevelopment, picked the Ellicott District, and approved Ellicott as an official grant reservation.

In 1955, the Common Council approved Ellicott as an official redevelopment area, but residents and property owners in the district protested vigorously and held out for rehabilitation rather than razing.

MORE HASSLES—In 1957, the HHFA announced approval of a $[illegible] grant, which the Council accepted. But the city was now faced with acquisition, relocation of residents and businesses, and demolition. A plan to hire attorneys to act as negotiators for the city was rejected by Democratic Mayor Frank Sedita, and, after controversy, the Law Department handled the acquisition.

Demolition produced another hassle. If the debris could be burned on the site, $[illegible] would be saved. The Council, not unanimously, approved the on-site burning and awarded the $[illegible] contract to Industrial Wrecking Co., Hoboken, N.J., in August, 1959. The work was completed about two years later.

THE MIDDLE STAGES—Local builders could not be interested in the project. An auction set for April 24, 1961, was delayed when two prospective bidders from New York City protested a contract which would require the developer to take title and begin paying taxes immediately, and which asked a 10 per cent down payment.

The contract was changed to allow the developer to take title as each section was developed. A few days before the auction, the Board of Redevelopment eliminated one of the two bidders, Erie Homes Inc. of New York, as not "financially qualified."

Hamilton Co Inc of New York, the only remaining bidder, offered the minimum price, $1,[illegible], set by the Urban Renewal Administration. Delays persisted. Changes in construction plans were made after Republican Mayor Chester Kowal expressed dissatisfaction. Then, in June 1962, the FHA ruled the Hamilton plan infeasible because the rents would be too high to attract tenants.

After further complications, the city, last Aug. 15, ruled the Hamilton contract null and void. At that point it became known that Urban Properties Inc. of Toronto was interested in the project.

SINCE JANUARY—Early in March, Urban Renewal Commissioner James Kavanaugh recommended to the Council that Urban, identified in Buffalo with a friend of Mayor Kowal, be given the project.

During the last half of March, the Council's special committee on Urban Renewal, interviewed five developers approved by the FHA. A committee from the local chapter of the American Institute of Architects, whose opinion was solicited by the Council committee, unanimously recommended Urban Properties.

Urban had no single-family sales houses included in its plans; First Hartford Realty Corp. of Manchester, Conn., another of the five contenders, had no basements. Both said they would change their plans to suit the city.

STENGEL RULING—The special Council committee voted 4-3 to recommend the First Hartford Realty Co. to the full Council.

As if to presage future Council action, the four First Hartford supporters were Democrats. A fifth Democrat voted for Urban.

On May 24, at a special Council meeting called by Mayor Kowal, Corporation Counsel Elmer Stengel declared the councilmen could only approve or disapprove the developer chosen by Kavanaugh and that they could not initiate the action.

This contradicted the Council's understanding of their relationship with the Urban Renewal commissioner; it also contradicted a resolution he signed earlier indicating the Council would select the developer.

COUNCIL VOTES—At the same meeting, the Council voted 10-5 in favor of First Hartford, and repeated this action at another meeting May 28. But the Law Department's ruling was backed up informally by the State Attorney General's Office. Kowal vetoed the two Council actions. The architects reiterated their support of Urban.

Then, in early July, asked by Kavanaugh to confirm a sale to Urban Properties, regional Urban Renewal Director Charles Horan said local agreement on the buyer must be reached before he would review Urban Properties papers.

This prompted Mayor Kowal to declare, "I don't care who develops it" and request Kavanaugh to contact possible developers of sales housing.

KOWAL VETOES—On July 10 the Council again rejected Urban 10-5 and, overriding the two Kowal vetoes of First Hartford, reindorsed First Hartford this time 15-0. But the same day, the Mayor said he would recommend Greater Buffalo Syndicates for the sales portion of the development. That company declared that although there had been some question as to FHA approval of its plans, it actually did have the agency's approval.

On July 16, Urban Renewal Board Chairman Harry Bisgeier named three members to a committee to mediate a compromise between the Mayor, the Council, and the prospective developers.

KAVANAUGH AGAIN—The same day, First Hartford, which had previously insisted on rights to develop all or none of the project, offered to build the sales units and negotiate later for the rental units.

Councilman Delmar Mitchell of the Masten District submitted a resolution to the Council to this effect, despite the fact that Kavanaugh rejected the offer immediately and came out in favor of Greater Buffalo Syndicates.

He said he had been unable to contact First Hartford when the Mayor directed him to contact sales developers. First Hartford said he didn't answer a letter requesting a meeting on the project.

Ellicott Discord All But Forgotten

★ From Page 1

leader of the Common Council, I accept his cooperation wholeheartedly and without reservation. I am hopeful that our cooperative approach to the Ellicott district problem heralds the beginning of greater and happier days . . ." Makowski said.

Respect Courage

Mitchell said " . . . I respect his courage in coming before the Common Council and openly stating his willingness to accept the Common Council's choice of developer. This is the mark of a big man."

The Democratic statements were in contrast to the grumbling at the meeting over the stringent conditions set forth by Kowal, the bulk of the project. The Democrats in the Council favor First Hartford for that phase, too.

Kavanaugh said Wednesday his position in favor of Urban Properties for rental housing is the same. He said it would be impossible to "whimsically" change his mind, after reports from city engineers and the architects' committee favoring Urban.

They require construction of 180 homes, starting 30 days after the contract signing with completion in one year.

Neil H. Ellis, president of First Hartford, also was unhappy about the conditions when contacted by a Courier-Express reporter Tuesday night.

By Wednesday, however, he had changed his position and said:

"Naturally, we are delighted to be entrusted with this job and will do all within our power to justify the decision on the part of all those who were responsible for our being selected."

Kowal and his aides will meet with representatives of First Hartford at 3 Friday afternoon to discuss sale of the land.

The mayor, Ellis and other officials of the firm will meet with him and Kavanaugh.

Property Details

They will begin working out details of the disposition of the property earmarked for sales.

The portion of the project planned for single family homes for sale is bounded by Michigan, South Division, Jefferson and Swan.

Still to be resolved, however, is the choice of a developer for the rental housing, which comprises

Firm Abandons Ellicott Effort

Greater Buffalo Syndicates Inc. Wednesday withdrew from further consideration as a sales housing developer in the Ellicott District.

E. Alan Nordstrom, financial vice president, said the firm has doubts about the plans for construction of First Hartford Realty Corp. being completed. In any event, Nordstrom said, the Buffalo firm is no longer interested in the development.

Ostrander, Retired Works Official, Dies

SCHUYLERVILLE (AP)—Elbert L. Ostrander, 78, retired superintendent of operation and maintenance in the State Public Works Dept., died Wednesday at his home in this Saratoga County village.

Ostrander went to work for the state in 1908 after his graduation from Rensselaer Polytechnic Institute. He was named to the superintendency in 1944 and held the post until his retirement in 1957. He was widely known as a pioneer in highway-maintenance techniques.

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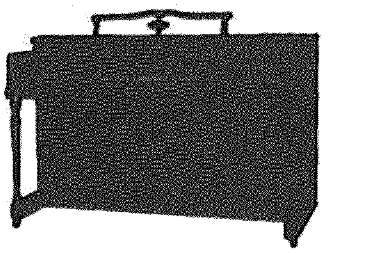

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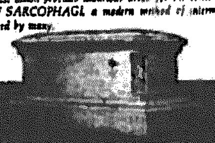

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[illegible]

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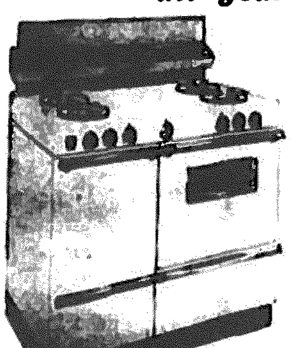

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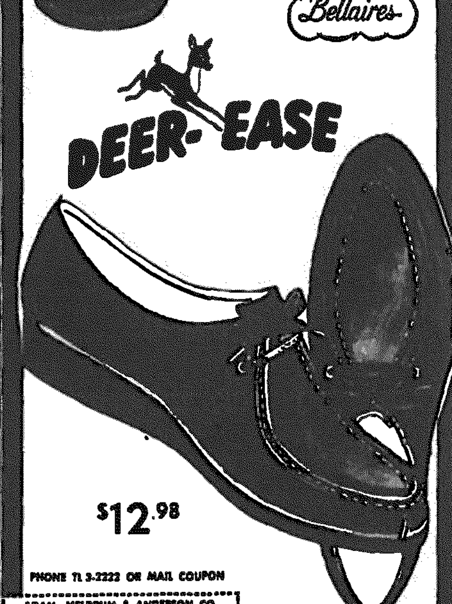

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Editorials 2
Theaters 5-8

BUFFALO Courier-EXPRESS

"Western New York's Greatest Newspaper"

BUFFALO 5, N. Y., SUNDAY MORNING, APRIL 28, 1963 18

Travel-Resorts 8-11
Homes-Gardens 12-19

In Land Taxes

Ellicott Job Costs Buffalo $800,000

By [illegible]

Buffalo's tax loss on the [illegible] ... totals more than [illegible], a study of tax records indicates.

[illegible]

FHA has not made public any [illegible] ...

10 per cent [illegible]

They have [illegible], however, that the [illegible] would produce [illegible] 10 per cent more taxes than the old buildings did before [illegible].

The Common Council, currently studying proposals from developers, has [illegible] to say about the price paid by the land. This figure, set by the Urban Renewal Administration, is [illegible] per square foot for residential and [illegible] per square foot for commercial. It totals [illegible].

"Negotiated Sale" Proposed

The Council Tuesday will consider a proposal setting up a "negotiated sale" for the land, with no bidding on price. Under that method, the approved developer gets the project, subject to a public hearing at which some other bidders and interested parties can raise objections and try to change the Council's mind.

A special committee of members of the Buffalo-Western New York Chapter, American Institute of Architects, is reviewing plans submitted. The Council hopes to get the report by May 18.

They say the project must be [illegible] by the "income" approach, that is, a certain amount of the income from rents is earmarked for taxes. That method must be used, the FHA says, as [illegible] the "conservation [illegible]" method.

Cops Launch Hunt

Hit-Run Car Kills Man; Chase Fails

[illegible]

Purdy St. Man Injured in Crash

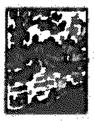
[illegible]

Traffic Toll

Deaths ... Injured ... [illegible]

SAFETY BELTS SAVE LIVES ... LIKE THESE.

By Bill Lamale



Barber Builds Wayside Shrine Next to Shop

[illegible]

... a bird bath and a border of flowers.

DESIGN—[illegible]

DEDICATION—On Sept. 15, 1951, Joe's shrine was dedicated. [illegible]

"My shrine is for all," Joe said.

[illegible]

An altar boy in 1910

Seton Hall graduate in 1921 — Ordained in 1923

Photos chronicle the life of Buffalo's 10th Bishop

Buffalo's Bishop in 1963

New Bishop Called Patient, Mild Man

By JAMES R. CLEARY

"He has a loving disposition which never changes, be it day or night, whether he's home or away."

With those words Miss Mary C. (Mae) McNulty, of Montclair, N. J., characterized her brother, the Most Rev. James A. McNulty, who will be installed as 10th bishop of Buffalo Wednesday after a mammoth reception for him at the airport on Tuesday.

In a recent interview at the McNulty home, in Montclair, five miles from Paterson, Miss McNulty told a Courier-Express representative about her bishop-brother.

She said it was difficult to single out what she considered his outstanding attribute because of his many virtues.

"But I think most persons would think first of his patience, which is remarkable," she added." And everyone appreciates his very mild manner, and admires the keen interest he takes in so many things."

Miss McNulty provided The Courier-Express with photographs of the bishop when he was an altar boy at Immaculate Conception Church there in 1910, on his graduation from Seton Hall University, South Orange, N.J., in 1921 and his ordination in Belgium in 1925.

Late Brother Headed Seton Hall University

She recalled that Bishop McNulty and another brother, the Rt. Rev. Msgr. John L. McNulty, who was president of Seton Hall when he died in [illegible], were inseparable companions.

Although Msgr. John was 18 months older than Bishop James, they served together as altar boys, graduated together and were ordained in the same class.

The McNulty priests celebrated their first Solemn High Masses in Montclair, on the same day in 1925. They jointly observed their 30th year as priests in 1955 in Paterson.

Bishop McNulty, 63, was born in New York City, one of six children. The family moved to Montclair when he was one.

"The bishop is happy about going to Buffalo," Miss McNulty said, adding: "And of course we share all his happiness."

The bishop is resting this weekend at the McNulty home where a brother, Michael P., a self-employed dairyman, also lives. He is single.

Also residing at the home are two orphaned nephews of Bishop McNulty. They are Michael L. Tuite, 19, and John B. Tuite, 18, sons of the late Mr. and Mrs. Leon Tuite. Their mother, nee Anne McNulty, was a sister of the bishop.

Nephews to Accompany Bishop on Trip Here

The nephews will be the bishop's only relatives accompanying him here Tuesday on American Airlines Flight No. 407, leaving Newark Airport at 12:15 p.m. and arriving at Greater Buffalo International Airport at 1:21 p.m. A second section flight will bring 80 more laity.

Other relatives of the bishop will come to Buffalo by train or automobile.

Four New Jersey prelates will be among 71 clergy and lay passengers on the bishop's plane. The prelates are the Most Rev. Celestine J. Damiano, archbishop-bishop of Camden, N.J., a former Western New York parish priest; the Most Rev. Martin W. Stanton, an auxiliary bishop of Newark; the Most Rev. George W. Ahr, bishop of Trenton, and the Most Rev. John J. Dougherty, another Newark auxiliary.

Miss McNulty and her brother, Michael, will arrive at the Erie-Lackawanna Babcock St. station at 8 Tuesday night on the E-L Limited No. 1 from Newark with clergy and laymen from New Jersey.

The only prelate aboard the train will be the Most Rev. Thomas A. Boland, archbishop of Newark and metropolitan of the New Jersey See. He was the second of Paterson's bishops, Bishop McNulty being the third.

Another brother of the bishop, William J. McNulty, a druggist, of Lake Mohawk, N.J., will drive to Buffalo with his wife and two daughters, Miss Frances McNulty, a junior at St. Elizabeth Convent, St. Elizabeth, N.J., and Miss Joan McNulty, a student at St. Joseph's Hospital School of Nursing, Paterson.

William J. McNulty Jr., also a druggist, will drive to Buffalo as will Mr. and Mrs. John

BISHOP
Continued on Page Four

Bishop to Celebrate Mass at Niagara U.

Courier-Express Niagara Falls Bureau

NIAGARA FALLS—The Most Rev. James A. McNulty, will pay his first official visit to Niagara County at 10:30 a.m. Wednesday, May 8, when he will celebrate a Solemn High Mass at Niagara University.

The Mass will open a day-long celebration on campus in memory of the Blessed Elizabeth Ann Bayley Seton, first U.S. native to be beatified. Bishop McNulty's visit will be one week after his installation as 10th prelate of the Roman Catholic Diocese of Buffalo.

Fire Ruins Interior Of Warehouse

Jamestown Scene of Blaze

Courier-Express Jamestown Bureau

JAMESTOWN — The interior of the Chautauqua Storage & Transfer Co. warehouse at 929 Monroe St. was destroyed by a general-alarm fire here Saturday night. No estimate of the loss was made.

All six of the city's firefighting companies found the 140 by 120 feet, one-story brick building engulfed in flames when they responded shortly before 7 in the evening. Flames raged out of control for nearly 20 minutes.

All off-duty firemen were recalled to duty to man three reserve rigs. No other alarms were sounded during their tour of duty. The off-duty men were relieved shortly before 9 p.m., when all but two of the responding companies reported back from the fire.

Firemen from the two companies were still at the scene early today as debris rekindled.

The first alarm was sounded by an attendant of a gasoline service station who reported flames shooting through the roof.

Loyalty Day Parade Today

Buffalo's 14th annual Loyalty Day parade will begin at 2 this afternoon at Main and Lower Ter. with marchers proceeding north in Main to North St.

The reviewing stand will be at Main and Genesee. The parade is sponsored by the Erie County Council, Veterans of Foreign Wars. Downtown buses will be rerouted during the parade.

Rocky OKs Slum Law Exemption

Buffalo Gets Extension

Courier-Express Albany Bureau

ALBANY — Gov. Rockefeller Saturday announced, without comment, the signing of a controversial bill extending until July 1, 1964 the City of Buffalo's powers to grant exemptions from the state antislum laws.

The former exemption would have expired this July 1.

The amended law allows the city, with the approval of fire, health and buildings authorities, to award to landlords the right to operate housing which does not strictly conform to the State Multiple Dwelling Law.

The dwelling code sets minimum standards of health, sanitation, ventilation, fire protection and occupancy provisions in frame structures containing three or more dwelling units.

This is believed to be the seventh time since 1949 that a governor has signed a bill extending the city's variance powers.

Lack of Funds Reason

Four city administrations of both parties have asked for and received such extensions on grounds that their governments lacked funds with which to enforce the law.

About 18,698 units in frame houses, chiefly in the Ellicott, Masten and Niagara Districts of Buffalo are covered in the law. But so far, less than 2,3[illegible] of them have been issued certificates of compliance.

In 1959, when the city was under the Democratic administration of then Mayor Frank A. Sedita, Gov. Rockefeller in signing a similar bill, issued a

Continued on Page Four
ROCKY OKs

NMP Order Foreseen

WNY Nuclear Power Plant Contemplated

By PETER C. ANDREWS
Courier-Express Financial Editor

The Niagara Mohawk Power Corp. is expected to place an order within the next year for a nuclear-fueled power plant to be situated in Western New York.

The cost of the plant, which would generate about 500,000 kilowatts, or 150,000 more kilowatts than the present output of the Huntley steam generating plant would be in the neighborhood of $100-million. It would go into operation in the fall of 1968.

It is understood from reliable sources that NMP officials are making "very serious studies" of the project. The company is a member of the Empire State Atomic Development Associates, an organization composed of seven privately owned power companies in New York State.

NMP is the odds on favorite to be the leader in the purchase of a nuclear plant among the group. There is some possibility some other member, such as the New York State Electric & Gas Corp. will be a partner in the purchase, but Niagara Mohawk with its much larger size is expected to be the leader in the deal, if not the sole owner.

The cost of electricity produced by nuclear-fueled plants is expected to be fully competitive with or even lower than that of conventionally produced electricity.

In order for the power plant to be completed and operating in time to meet anticipated needs, the purchase order must be made within the next 12 months and the basic decision to purchase must be made this summer. It takes about six months to prepare specifications, receive bids and negotiate contracts.

Much Time Required

Once the reactor type is selected—and there are numerous types to choose from—design, engineering, construction and installation will take until 1968. Manufacture of the fuel elements alone may take as long as two years, depending on the type used.

In spite of the present surplus of power on the Niagara Frontier, this area is considered highly probable as the site of the new plant since it has the heaviest demand in the entire Niagara Mohawk system.

NMP is understood to own or have options on several sites that would be suitable for such a plant. One such site is understood to be in the Olcott area.

As a general rule, nuclear plants are not situated near centers of heavy population.

Although radioactive materials are used, nuclear plants have established a remarkable safety record. The atomic industry is reported to have the best safety record in industry, the second safest being the garment industry.

Demand Growing

Because of the rapid growth of demand for power in this area, Niagara Mohawk will put back in service four 100,000 kilowatt generators, now in "mothballs," sometime next fall.

The primary interest of the current ESADA program is to sponsor the development of better fuels. As the most recent report of ESADA states: "ESADA's current development program is largely fuel oriented and thus recognizes the importance of capitalizing to the maximum possible extent on the intrinsic advantage of atomic power, which is its potential for extremely low fuel costs."

Seek to Cut Cost

The threat of atomic power already has influenced fossile fuel producers to start a drive to lower the cost of coal transportation by developing coal-slurry pipeline and unitized-train delivery techniques.

In some areas, including Western New York, transportation charges make up half the cost of coal.

During Area Tour

Keating Presses Cuba Troop Issue

By RAY HERMAN
Courier-Express Staff Reporter

NIAGARA FALLS — Sen. Kenneth B. Keating (R-NY) refused Saturday to take issue with President Kennedy on Russian troop strength in Cuba. However, he asserted that "regardless if there are 12,000, 13,000 or 17,000 troops there, it is still 12,000, 13,000 or 17,000 too many."

And as long as Soviet troops and military equipment remain on Fidel Castro's Communist-oriented island, he added, there is no possibility of Castro being overthrown by an internal revolution.

The Rochester Republican, who has been Kennedy's principal Cuban critic, made a whirlwind tour of Niagara County Saturday after a Niagara GOP delegation headed by County Chairman Edmund H. Brown met him at Greater Buffalo International Airport. The senator stayed overnight in Buffalo and is scheduled to depart for New York City this morning.

During an early-afternoon press conference at the Hotel Niagara here, Keating stressed that while he didn't want to get into a numbers dispute with Kennedy, the significant thing is that "functional" Russian weapons and units have not substantially changed in strength since last December. The type of weapons used by functional units, he said, include tanks, trucks and antiaircraft weapons.

Favors Ban on Trading

He again urged the adoption of his 14-point program to eliminate Soviet troops and equipment. The plan includes cutting off all nonmilitary U.S. aid to any country trading with Cuba. Keating emphasized, however, that "I've always been opposed to the invasion of Cuba ... and I'm opposed to it today."

The senator refused to discuss any military action against Cuba "until such time as we've exhausted all other facets."

He said if his program did not eliminate the Russian troops and equipment, the administration should consider the reinstitution of quarantine on all ships to Cuba.

In a speech Saturday night before the [illegible] Club of the [illegible] Restaurant here, Keating had some harsh words for Democrats who criticize Republicans for [illegible]

KEATING PRESSES
Continued on Page Four

State Asked to Put Off Meat Check Curtailment

President Raymond G. Green of the Health Inspectors Unit of the Civil Service Employes Assn. here said Saturday he has asked Commissioner Don J. Wickham of the State Agriculture Dept. to delay the planned curtailment of the state meat inspection program until June 1, to give the Erie County Health Dept. time to set up its own meat inspection program.

[illegible]

... serving functions from one level of government to another."

[illegible]

GOP Decreed Cut Last Fall—Green

[illegible]

By Renting From City Hall

Albany Facelift to Be 'Pay-as-You-Go'

By DOUGLAS TURNER
Courier-Express Albany Bureau

ALBANY—The elaborate plans to beautify the capital city and obligate the state for up to $200-million over a 40-year period can be launched almost by the stroke of a pen.

In a little-publicized bill approved by the 1963 Legislature and signed by Gov. Rockefeller, the state government placed in the hands of the City of Albany the responsibility for selling its bonds for the proposed complex of state offices.

By this means, the state can keep the cost of the project out of the budget as a capital construction item and maintain the appearance of pay-as-you-go.

CITY BORROWING — For, in a technical sense, the city will borrow the money—outside its constitutional debt limit—to pay for the buildings.

But all costs for the project, including a 40-story state office building must ultimately be borne by the state. Payments won't be listed as debt service on state bonds, rather, as "rentals."

These rentals, like other state costs, will be paid out of general tax revenues of the state.

MORE COSTLY—State credit, which has an "AAA" rating, will not be tampered with. Instead, the less attractive "A" rating of Albany will be used.

This means that the city bonds sold to finance the project will sell at from .5 per cent to a full one per cent higher than state bonds, and, possibly, increase the total interest cost of the project from 30 to 40 per cent.

Because the city's and not the state's credit will be used the state's ultimate burden for the project could be increased $60-million to $80-million.

An architect's conception of the south terminus of the Mall in Albany ... at left center is the 125-foot high Arch of Freedom

COST NOT TOLD — Almost from any announcement of the project Tuesday was an estimate of how much it will cost. But a representative of Gov. Rockefeller's office indicated the bonds price tag was $200-million.

One state budget expert said "I think the $200-million is low."

Also absent was any precise breakdown of the state's [illegible] ...

[illegible]

ALBANY FACELIFT
Continued on Page Four

Courier BUFFALO EXPRESS
FRIDAY, JULY 31, 1964

Daily "Must"—Regular reading of The Courier-Express keeps you well informed. Try it and see! TL 2-6255.

Old AM&A Store

Razing May Start This Year

By DOUGLAS TURNER

[illegible] Erie County Savings Bank, the store operators plan to be business at [illegible] November 1964 or January 1965, depending upon the terms of their agreements.

One of the best known stores in this section is Bowman's Army and Navy Store at 10 W. Eagle. Harold Clark, owner, said:

"We want to stay Downtown. I've made up my mind that when I see a good spot I'll take it. The Downtown area is still the hub of the business section."

The Regal Shoe Shop at Main and Eagle, part of a group of shoe stores owned by Edwin Shoe Co. of St. Louis, Mo., also is looking for a new Downtown location.

[illegible] The Bilsky Shoe Store, also part of a group, plans on having 4,000 square feet of space in the new Downtown area and is negotiating lease details.

Among other firms saying they wished to stay are the Wallens Liquor Store and the New York Hat Shop both in the area to be occupied by the new bank. Manford W. Bilsky, owner of the Harry Bilsky clothing store, said his plans haven't been made. His store has been in the block since the turn of the century.

City Parking Report Due In September

Wilbur Smith & Associates of New Haven, Conn., the city's parking consultant, is expected to complete its report on a survey of parking needs in downtown Buffalo in early September.

Charles R. Turner, Board of Parking chairman, said Thursday the report should be received here about Sept. 15.

The survey was made under a $8,000 grant from the Greater Buffalo Development Foundation in connection with plans for the downtown renewal program in an area between Main and Pearl from the Liberty National Bank & Trust Co. property south to Eagle St.

Turned Key Factor

In offering the grant to the Board of Parking last April 17, H. Roswell Roberts, downtown development co-ordinator for the Foundation, described parking facilities as a key factor in downtown development plans.

He stressed that the Foundation sought only a study at that point and was not proposing a specific parking plan. The figure of 1,250 parking spaces has been mentioned as a possibility.

Turner was quoted as saying at the April meeting, when the Board accepted the grant, that the study would take in "all kinds of parking" and would not be limited to underground facilities.

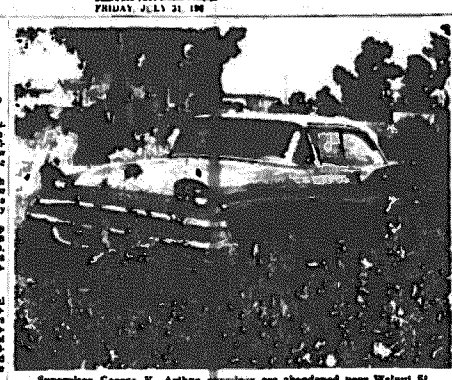
Last month Turner stressed that the parking study would not involve Mayor Clyde Steffen's proposal for underground parking beneath Lafayette and Niagara Sq. and Court St.

Negro Mothers, Kowal to Meet

A group of about 100 Negro mothers will meet with Mayor Kowal at 11 this morning to discuss "the elementary situation here."

Mrs. Verby Dixon, first vice president of the Community Mothers Assn., said "I feel mothers are much closer to the basic problems affecting the Kilbert, Fruit Belt and Masten areas than those persons with whom the mayor has recently held discussions."

Mrs. Dixon said her group feels it is best qualified to discuss school problems, especially those concerning the new Southern Junior High, which will be opened in September.



Supervisor George K. Arthur examines car abandoned near Walnut St. he wants clean-up action

Ellicott Cleanup Demand Renewed

Supervisor George K. Arthur of the 5th Ward renewed his protest to the Common Council Thursday over the "unsightly conditions" of the Ellicott redevelopment area and backed it up with petitions bearing more than 1,000 signatures demanding action.

Arthur recalled that he had written to the Council last May 7 on the subject. He declared:

"Gentlemen, to date the weeds, garbage, refuse and automobile wrecks in their same condition exist."

He said the petitions are being filed now "in the hopes that the area will be cleaned up before the Council reconvenes Sept. 8. He added:

"If not by then, I am planning to call a meeting of the business men and residents of the area to plan our own action to overhaul the city failure to live up to its promises and intend to get some action."

He noted that a "test" was conducted July 18 to determine the cost of cleaning up the area. But he added:

"It was found to be too costly and that plans are now to put one man in there to clean it up. It will take one man one year to clean it up. It not longer."

"If the Power Authority problem can be settled in a hurry, I cannot see why we must wait years and years just to get some weeds cut down."

He noted that the Power Authority has proposed to solve the problem. Trans-Lux Corp. attorney for the Ellicott Community Redevelopment Foundation Inc.—the non-profit community group which will take over operation of the project—suggested that the Foundation be permitted under a different section of the state law.

He pointed out that if the group could be incorporated it would then be eligible to ask the Common Council to grant the exemptions on the project. The Council would be permitted to do so under the state's Redevelopment Corporation Act.

The exemptions will be asked at today's meeting to agree to grant the exemption. If a right three-fourths majority of the Common Council is obtained by the Federal Housing Administration.

Regional FHA Administrator John Mahoney, who took part in Thursday's meeting, said that such a notice of intent would permit his office to go ahead with the preparation of approval documents necessary for Urban Properties to secure financing to begin construction.

Mahoney also gave his word that if Urban Properties submits the necessary documents to meet Tuesday—as Baskin promised to do—the FHA would give top priority to the work. Mahoney said he is confident that the mortgage insurance commitment could be issued by Sept. 7.

If this deadline is met, Baskin said, the remaining necessary arrangements could be completed by Oct. 7 and he added:

"We can start construction the next day."

However, Baskin hinted strongly that if his concern is not able to start construction this fall. "We'll be out of the picture."

He said that the financial plans for the project were prepared by Urban Properties on the basis of construction costs of several months ago. "We have no control over these costs and they have gone up," he declared, adding:

"If another construction season goes by and we can't start until next year the costs may not be predictable."

Tax Big Obstacle

'Ifs' Govern Ellicott Construction

Construction of apartments in the Ellicott redevelopment project can begin Oct. 8, if

The "if" involves many things, but Seymour Baskin, secretary of Urban Properties Inc. which has the contract to build the rental units, summed it up this way Thursday after nearly four hours of discussion:

"If everybody does their job perfectly."

The first "if" will be tackled at 1 this afternoon when Mayor Kowal meets with members of the Common Council in an effort to secure advance approval for the granting of tax exemptions to the project.

At Thursday's session, the city's Board of Assessors made it clear that it cannot—in its best judgment—place assessments on the project before the beginning of the year, unless the Council has established.

Suggests Reincorporation

Spokesmen for Urban Properties made it equally clear that they cannot proceed if the taxes on the project amount to more than what would be required by an assessment of $2,000.

When it became obvious there was no further room for negotiation on the assessments, Atty. Wilbur P. Fitzgerald proposed a way to solve the problem. Trans-Lux Corp. attorney for the Ellicott Community Redevelopment Foundation Inc.—the non-profit community group which will take over operation of the project—suggested that the Foundation be reincorporated under a different section of the state law.

He pointed out that if the group could be reincorporated it would then be eligible to ask the Common Council to grant the exemptions on the project. The Council would be permitted to do so under the state's Redevelopment Corporation Act.

The exemptions will be asked at today's meeting to agree to grant the exemption. If a right three-fourths majority of the Common Council is obtained by the Federal Housing Administration.

Regional FHA Administrator John Mahoney, who took part in Thursday's meeting, said that such a notice of intent would permit his office to go ahead with the preparation of approval documents necessary for Urban Properties to secure financing to begin construction.

Most Police, Firemen Under Social Security

A House-approved bill calling for inclusion of policemen and firemen under Social Security would have little effect on the city.

Most policemen and firefighters here have been covered by Social Security since 1956 when they were given the opportunity to join federal and state enabling legislation.

At that time most of them came under the program by a retroactive vote effective to March 15, 1955, which enabled older members to become eligible for immediate retirement benefits. The retroactive social security tax then amounted to about $150 for patrolmen.

Since 1956 Social Security has been opened three time to those members who originally elected to remain outside of the program, and some took advantage of the chance to come under it at those times.

At present about 522 city firefighters still are outside of the program. In addition to "relatively few" patrolmen.

With or without Social Security, virtually all city policemen and firemen participate in and are covered by the New York State Employees Retirement System, which covers state and city pension plans in 1964. A few stalwarts still are under the city pension plan.

The House vote Wednesday to extend benefits under Social Security to $1.5-billion and to extend coverage to additional millions of persons, including self-employed physicians as well as police and firemen.

Increased benefits would be financed by raising the payroll tax rate from 3.625 per cent to 3.5 per cent, and by increasing yearly taxable income from the first $4,800 to the first $5,600. The measure now goes before the Senate.

It advanced and signed into law by the President. The bill presumably would require those Buffalo policemen and firefighters still outside the program to come under it.

Vandals Sought

Headstones Smashed, Monuments Toppled

A new outbreak of cemetery vandalism was under investigation Thursday night by Buffalo police.

Picture on Picture Page

Following the desecration of graves of the St. Francis Xavier Cemetery, 2505 Niagara St.

More than 50 headstones and monuments were overturned and at least a dozen smashed Wednesday night or early Thursday morning.

Damage to the peaceful graveyard overlooking the Niagara River was estimated at "many thousands." The St. Rev. Msgr. Albert J. Hoffmeyer, pastor of St. Francis Xavier Church, 137 East St., noted that many of the damaged monuments were quite old, and would be difficult, if not impossible to replace.

Many graves in the cemetery date back to the mid-1800's. The area borders on Riverside Park, and is surrounded by a fence but was lacking.

It is believed the vandals may have climbed the fence to gain access to the graveyard from the park. They then cut a swath of destruction through the southern side of the area, toppling stones 4-6 feet high and weighing hundreds of pounds.

Msgr. Hoffmeyer said that the cemetery is open daily from dawn until 4:30 in the afternoon, and that the main gate is locked nightly. A side pedestrian gate is left unlocked, however.

Buffalo police Thursday cordoned the area to an effort to locate persons with knowledge of the crime. Msgr. Hoffmeyer disclosed that the cemetery had been the scene of a smashing of stones and vandalism ago in a "few years" and that five or six stones were knocked over.

Church officials notice Wednesday charged the area again with felonious malicious mischief and desecration of a sacred place as a result of a similar wave of vandalism the weekend in the Mt. Calvary Cemetery. A fifth youth was released by Family Court because of age.

The boys are now awaiting grand jury action. There were no new arrests in the case Thursday, but police have indicated some may be forthcoming.

Grimm to Attend Meet

GOP Unity in State Campaign Expected

By RAY HERMAN

The county Republican organizations are expected to patch up their differences, temporarily at least, in order to rally behind the party's national election ticket.

As a starter, GOP County Chairman Robert W. Grimm Thursday disclosed that he is planning to attend an Albany strategy conference next Thursday which will set up a state delegation committee for presidential candidate Barry M. Goldwater and his running mate, Rep. William E. Miller.

The same meeting, which will include the state's GOP county chairmen, was called by State Chairman Fred A. Young.

Grimm's participation in the meeting is significant for a number of reasons:

As an outgrowth of the bitter-and-bad local GOP power struggle between Grimm and State Sen. Walter J. Mahoney, county chairman, although he is an at-large member of Young's GOP State Committee, has steered clear of committee meetings for more than a year. Grimm and others have felt that Young has been overzealous in the senator in the local fight.

Wants Unified Front

Now, however, Grimm has let it be known that despite bitter state GOP organizational differences, a unified front should be in evidence this fall in support of the Goldwater-Miller ticket. Incidentally, similar sentiments have been expressed publicly in recent days by Mayor Clarence Kowal, Edward Grimm ally in the local party right.

Grimm's support of the conservative-leaning national GOP ticket comes under the heading of arms because in the GOP political spectrum, Grimm probably could be classified as a party moderate. The U.S. Sen. Kenneth B. Keating who has refused to endorse Goldwater's candidacy.

With the prospect of Grimm's local organization and Young's state organization working shoulder to shoulder for the national ticket, there is bound to be speculation on whether normal political relations can be restored between the two organizations particularly in patronage matters. Since the inception of the Grimm-Mahoney dispute Albany has bypassed the local organization in favor of Mahoney in connection with brokering state appointments here.

Grimm, however, received Thursday in Rah Ah Albany visit last week with prospects that the local and state organizations may resume a normal patronage arrangement.

"I just think that as Republicans we should all support the national ticket," he observed.

However, the fact that Grimm's delegates at the recent GOP national convention suggested fully with Gov. Rockefeller certainly would appear to have compelled Grimm's position with the GOP state leadership. The large convention delegation supported the Governor on the first presidential ballot and backed Rockefeller's position on the GOP platform in both instances. A local defection would have been very embarrassing to Rockefeller.

Meanwhile, Mahoney supporters here are still hopeful that they will get a second chance to control Grimm as GOP county leader. Seven weeks ago Mahoney's choice for the county chairmanship, Thomas W. Ryan, was defeated by Grimm at the party's biennial organization meeting.

The Mahoney forces, however, had the mandate to name committeemen among other things that the meeting should be voided on procedural grounds. Yesterday in the litigation in new courtroom and the matter is before Supreme Court Justice Carlton A. Fisher.

Sentence in Cat Case Suspended

Peter Gibbs, 20, of Hotel Manhoes, defendant in a cat case on two charges placed by an SPCA agent, was given a six-month suspended penitentiary sentence and placed on indefinite probation Thursday by City Judge Joseph [illegible] Bellows.

Gibbs, who alleged SPCA Agent Alli knocked a cat out of a tree with a hard pair on E. Utica near Main last June 21, was charged by Alli with third-degree assault and interfering with the agent in the performance of his duties. The cat was seriously injured and had to be put to death.

The defendant was found guilty of both counts after trial June 30. Sentence was on the assault charge. Sentencing is suspended for local organization in favor of Mahoney on the second count.

BERGER'S THRUWAY PLAZA STORE
OPENS AT NOON TODAY
DUE TO INVENTORY
Shop Thruway Noon 'til 9 p.m. Today
Downtown Open 10 to 5:15, Sheridan 9:30 to 9

FINAL REDUCTIONS

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Herbert Levine . . . I. Miller . . . Mr. J . . . Margaret-Jerrold . . .
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11.90 to 13.90
LITTLE HEELS and FLATS
Amalfi . . . Caressa . . . Miss Berger . . . Capezio . . . Vanelli . . . Bandolino
. . . Lupino . . . California-Cobblers . . . Old Main Trotters

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BERGER'S

FREE PARKING 2 hours in for obtaining Berger's or at Mohawk and Huron Ramps with purchase of $5 or more

Mahoney Rich Industrial

2 Big Stores Optimistic on Renewal

By JOHN HUGHES

[illegible] Eagle St. is the removal [illegible] to be occupied by Erie County Savings Bank, the store operators plan to be business at [illegible] November 1964 or January 1965, depending upon the terms of their agreements.

One of the best known stores in this section is Bowman's Army and Navy Store at 10 W. Eagle. Harold Clark, owner, said:

"We want to stay Downtown. I've made up my mind that when I see a good spot I'll take it. The Downtown area is still the hub of the business section."

The Regal Shoe Shop at Main and Eagle, part of a group of shoe stores owned by Edwin Shoe Co. of St. Louis, Mo., also is looking for a new Downtown location.

The Bilsky Shoe Store, also part of a group, plans on having 4,000 square feet of space in the new Downtown area and is negotiating lease details.

Among other firms saying they wished to stay are the Wallens Liquor Store and the New York Hat Shop both in the area to be occupied by the new bank. Manford W. Bilsky, owner of the Harry Bilsky clothing store, said his plans haven't been made. His store has been in the block since the turn of the century.

Buffalo Trio Accused Of Having Loot

What's Doing?

Tonawanda Children To Sing at Fair

Payments Expected By City Treasurer

College Names Knight

Buffalo Trio Accused Of Having Loot

Tonawanda Children To Sing at Fair

Payments Expected By City Treasurer

College Names Knight

By FHA Officer

Ellicott Housing Start This Year Is Predicted

[illegible]

Mayton, who has been working with the Council on the project, assured his audience that "the history of the Ellicott District won't be repeated again."

[illegible]

Questioned About Center

[illegible]

Best Hotel Value in town

Comfort, yes-fully air conditioned and completely modern. Conveniences, too—you're right in the heart of New York's show and shopping districts. Rates? Surprisingly moderate ... the best hotel value in town. Write direct or see your travel agent.

hotel VICTORIA

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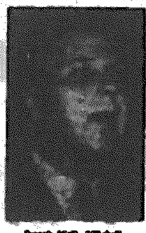
New York • CI [illegible]



Joseph [illegible] Mitchell

Jury Reports Deadlock In Mitchell Case

NEW YORK (UPI)—A jury trying [illegible] City Manager Joseph [illegible] Mitchell on charges of conspiracy and bribery reported [illegible] it was deadlocked. [illegible] ordered it to go back and try again.

Supreme Court Justice Joseph A. Sarafite was visibly surprised when the 11 men and one woman jury reported after six hours of deliberation that it could not agree on a verdict.

"You cannot agree," he said. "This trial started five weeks ago—in comparison you have been deliberating only a short time.

"I'm sure you all understand that the purpose is to terminate a trial and not prolong it. You must reach a verdict. You should deliberate fully and conscientiously," the judge said.

Mitchell, 41, and Lawrence J. DeMisel Jr., [illegible], a co-defendant, are accused of demanding and accepting $[illegible] in return for a real estate favor.

Sarafite told the jury that he was making arrangements for their dinner and directed them to return from eating and get back to work deliberating the case.

The jury got the case at 11:07 a.m. (EST) after Sarafite had delivered a two-hour charge.

Coat Leads To Arrest Of Suspect

[illegible]

Det. Sgt. Charles A. Quinn, head of the Bids and Burglary Squad, [illegible] McClumb [illegible] a coat found in the [illegible] was traced to him. Patrolmen Florian A. Sullivan and Salvatore Pace [illegible] the trailer firm's building.

The man fled before police reached a rear door. Police said the spindle had been knocked off the safe and a hole had been drilled in the side.

Patrolman Sullivan suffered a cut wrist on broken glass when he entered the building in an effort to catch the intruders. Sullivan continued on the case and assisted in the arrest of McClumb.

Sgt. Quinn reported that McClumb admitted entering the building, but denied having an accomplice.

Building Job Bids Opened

Bids for construction of a new police station were opened Monday night by the Amherst Town Board. Apparent low bids totaled $[illegible]. Apparent low bidders were:

General construction, Arrigo & Corlando Inc., 1[illegible] [illegible] Ave., $[illegible]; electric, Weydman Electric Inc., 1[illegible] [illegible] Ave., Town of Tonawanda; plumbing, Samuel Inc., [illegible] S. Creek Rd., Hamburg; $[illegible], and heating and ventilating, R. J. Moran & Sons, [illegible] Dewitt St., $[illegible].

The Town Board last fall approved a $[illegible] bond issue for construction costs.

Councilman Chester R. Hardt said contracts will be awarded next Monday. Construction is scheduled to be started in two to three weeks and to be completed by Nov. 1.

To House Other Services

The two-story brick structure will house not only the [illegible]-man police force but the central fire dispatch office and the town court. All are now located in the Village Hall.

Amherst and the Village of Williamsville shared the $[illegible] cost of the site just west of the Amherst Library on Main St., Williamsville.

SOCIAL — The Holy Name Society and Ushers' Club of Immaculate Conception Roman Catholic Church will hold its first annual scholarship fund social Saturday evening in the elementary school hall, Edward and Elmwood. All proceeds will go toward scholarships.

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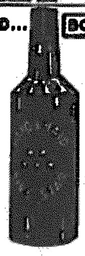
DON'T BE VAGUE...ASK FOR HAIG & HAIG



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HOW GOOD IS PLYMOUTH'S NEW WARRANTY?

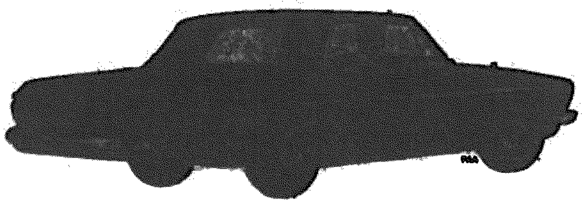
*Facts about our 5-year or 50,000-mile warranty**

DOES IT INCLUDE THE COST OF LABOR?
Yes. There is absolutely no charge for labor and parts. For the entire life of the warranty, should any defect in material or workmanship occur on the parts covered by the warranty, it will not cost you one cent to have it corrected.

DOES IT COVER EXPENSIVE PARTS?
Absolutely! It covers the major power train components—the engine block and its internal parts, the automatic transmission and its internal parts, the rear axle—parts that would cost plenty to replace or repair.

IS IT TRANSFERABLE WHEN YOU SELL THE CAR?
Yes. As long as the car has been serviced at reasonable intervals according to the Plymouth-Valiant Certified Car Care schedules, the warranty can be passed on to the new owner. Think what that will mean to resale value of your car!

MUST YOU SPEND MORE FOR MAINTENANCE?
No. All that is required is the normal care that most car owners would usually give their car. Only one chassis lubrication is required for the entire life of the warranty. Other maintenance consists of inspections at reasonable intervals.



*[illegible]

See your Buffalo Area Plymouth-Valiant Dealer

Hengerer's

• [illegible] • BUFFALO

It's an open and shut case of fashion in our designer

WHITE PATENTS

Cool your heels in a sling-back pump! Pick perfholes for easy, breezy beauty! Or run for cover in closed-toe, closed-heel shoes. In any case, play it cool in bright, white patent ... perfect with summer costumes ... terrific with tan ... wickedly allluring with a high-fashion tinted stocking!

Andrew Geller's white patents

26.95

little heel Gamins in white patent

19.98

A. [illegible] white patent or white Kabuki silk [illegible] in gold.
B. [illegible] white patent.
C. [illegible] white patent.
D. [illegible] open-backed patent.
E. Venus: slim beauty.
F. [illegible] suave footwork.

OURS ALONE
SHOE SALON, HENGERER'S SECOND FLOOR—Also Hengerer's Amherst

To: Hull, George[Hull.George@epa.gov]; Senn, John[Senn.John@epa.gov]
From: Bodine, Susan
Sent: Thur 12/7/2017 1:19:14 AM
Subject: Fwd: Issue Memos/Talkers Needed for 12/7 E&C Hearing
Enforcement talking points.docx
ATT00001.htm

See attachment

Sent from my iPad

Begin forwarded message:

From: "Bodine, Susan" <bodine.susan@epa.gov>
To: "Lyons, Troy" <lyons.troy@epa.gov>, "Ringel, Aaron" <ringel.aaron@epa.gov>
Cc: "Rodrick, Christian" <rodrick.christian@epa.gov>, "Bowman, Liz" <Bowman.Liz@epa.gov>, "Patrick Traylor (traylor.patrick@epa.gov)" <traylor.patrick@epa.gov>
Subject: RE: Issue Memos/Talkers Needed for 12/7 E&C Hearing

Attached are talking points and press releases for the individual cases discussed in the talkers (for additional background).

From: Ringel, Aaron
Sent: Monday, November 27, 2017 3:47 PM
To: Forsgren, Lee <Forsgren.Lee@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Brown, Byron <brown.byron@epa.gov>; Yamada, Richard (Yujiro) <yamada.richard@epa.gov>
Cc: Lyons, Troy <lyons.troy@epa.gov>; Rodrick, Christian <rodrick.christian@epa.gov>
Subject: FW: Issue Memos/Talkers Needed for 12/7 E&C Hearing

Lee/Sarah/Susan/Patrick/Byron/Richard, just wanted to circle back around with you

all on the memos/talkers needed for the Administrator's briefing binder. Below are the ones that are outstanding, is it possible to get these by tomorrow?

Thanks,

aron

From: Ringel, A

Sent: Monday, November 20, 2017 12:34 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Yamada, Richard (Yujiro) <yamada.richard@epa.gov>; Kelly, Albert <kelly.albert@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Beck, Nancy <Beck.Nancy@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Lyons, Troy <lyons.troy@epa.gov>; Shimmin, Kaitlyn <shimmin.kaitlyn@epa.gov>; Rodrick, Christian <rodrick.christian@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>; Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: Issue Memos/Talkers Needed for 12/7 E&C Hearing
Importance: High

File As: Deane, Michael
E-mail: michael@nawc.com
Display As (E-mail): Michael Deane (michael@nawc.com)
First: Michael
Family: Deane

To: Bailey, Ethel[Bailey.Ethel@epa.gov]; Rowena Benitez-Clark (Benitez-Clark.Rowena@epa.gov)[Benitez-Clark.Rowena@epa.gov]; Miles, Erin[Miles.Erin@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]
Cc: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Mon 11/13/2017 10:34:12 PM
Subject: WH meeting tomorrow morning

Patrick and I will be leaving at 9:10 to go to the WH for a 9:30-10:30 meeting. Back before 11 am. So won't be there for the daily general or the FTE meeting.

Susan

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Fri 10/6/2017 12:28:02 AM
Subject: Fwd: Emergency Administrative Order issued to Crow Tribe
EAO Crow Tribe Oct 2017.pdf
ATT00001.htm

Ex. 5 - Deliberative Process ?

Sent from my iPhone

Begin forwarded message:

From: "Theis, Joseph" <Theis.Joseph@epa.gov>
To: "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>
Cc: "Kelley, Rosemarie" <Kelley.Rosemarie@epa.gov>, "Pollins, Mark" <Pollins.Mark@epa.gov>, "King, Carol" <King.Carol@epa.gov>, "Porter, Amy" <Porter.Amy@epa.gov>, "OKeefe, Susan" <OKeefe.Susan@epa.gov>, "Bodine, Susan" <bodine.susan@epa.gov>, "Traylor, Patrick" <traylor.patrick@epa.gov>
Subject: Fwd: Emergency Administrative Order issued to Crow Tribe

Larry,
Attached FYI is an emergency order issued earlier this evening to the Crow Tribe to address potential contamination to their drinking water system caused by recent extensive damage from vandalism. Region 8 coordinated in advance with WED and XPS and we understand that the Region contacted the Tribal Chairman this afternoon prio to issuance of the order. Let us know if you have any questions.
- Joe

Sent from my iPhone

Begin forwarded message:

From: "Cantor, Tiffany" <Cantor.Tiffany@epa.gov>
To: "Pollins, Mark" <Pollins.Mark@epa.gov>, "Theis, Joseph" <Theis.Joseph@epa.gov>, "Bahk, Benjamin" <Bahk.Benjamin@epa.gov>, "Denton, Loren" <Denton.Loren@epa.gov>, "King, Carol" <King.Carol@epa.gov>, "OKeefe, Susan" <OKeefe.Susan@epa.gov>
Cc: "Palomares, Art" <Palomares.Art@epa.gov>, "Opekar, Kimberly" <Opekar.Kimberly@epa.gov>
Subject: Emergency Administrative Order issued to Crow Tribe

Good Evening Everyone,

Attached is the Emergency Administrative Order issued today. If you have any questions, please let me know.

Thanks!

Tiffany

****

Tiffany Cantor

SDWA Enforcement Unit Supervisor

Water Technical Enforcement Program

1595 Wynkoop St. (8ENF-W-SDW)

Denver, CO 80202

Phone: 303-312-6521

****

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region08

2017 OCT -5 PM 3:42

FILED
EPA REGION VIII
HEARING CLERK

Ref: 8ENF-W-SDW

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Alvin Not Afraid, Jr., Chairman
Crow Tribe
P.O. Box 159
Crow Agency, Montana 59022

Ms. Dayle Felicia, Director
Apsáalooke Water and Waste Water Authority
P.O. Box 520
Crow Agency, Montana 59022

Re: Emergency Administrative Order under Section 1431 of the Safe Drinking Water Act, Crow Agency (TP02) Public Water System, PWS ID# 083090011, Docket No. **SDWA-08-2018-0001**

Dear Chairman Not Afraid and Ms. Felicia :

Enclosed is an Emergency Administrative Order (Order) issued by the U.S. Environmental Protection Agency (EPA) to the Apsáalooke Water and Waste Water Authority (AWWWA) and the Crow Tribe (Tribe) pursuant to section 1431 of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300i, in response to conditions at the Crow Agency Public Water System (System) that may present an imminent and substantial endangerment to human health. The Order sets forth the actions the AWWWA and the Tribe must take to ensure that the people served by the System are provided with safe drinking water.

On October 4, 2017, EPA was notified that that the System was vandalized, causing extensive damage to the System's water treatment plant. Damage included destruction of the gas chlorination system, the SCADA system, and chemical plant feed components. It is unknown if other actions such as intentional contamination of the water in the clarifier and clearwell also occurred. The plant was running when the vandalism was discovered, and it is unknown how much, if any, contaminated water was sent to the distribution system. Therefore, the consumers of the water have the potential to be exposed to unknown contaminants, which may present an imminent and substantial endangerment to human health.

The enclosed Order sets forth the actions AWWWA and the Tribe must take to address the current emergency situation, including notifying the affected public of the situation described in the Order, distributing a Do Not Use advisory, and sampling the drinking water for chemical, radiological and bacteriological contaminants.

Additionally, EPA encourages you to perform a security assessment, considering such things as fencing, locks on doors and fencing, routine patrols by security personnel, and surveillance.

This Order is intended to help you provide safe drinking water to your community. If your staff has technical questions, they may contact Olive Hofstader at (800) 227-8917, extension 6467, or (303) 312-6467 or by email at hofstader.olive@epa.gov. If you are represented by an attorney or have legal questions, please contact Amy Swanson, Enforcement Attorney, at (800) 227-8917, extension 6906, or at (303) 312-6906 or by email at swanson.amy@epa.gov.

Sincerely,

for Arturo Palomares, Director
Water Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

cc: Ms. Connie Howe, Environmental Director
Mr. Dennis Bear Dont Walk, Attorney
Mr. Gerald Pease, Public Works Cabinet Head

Ms. Melissa Haniewicz, Regional Hearing Clerk
U.S. EPA Region 8

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2017 OCT -5 PM 3:42

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF	)	
	)	Docket No. ~~SDWA-08-2018-0001~~
Apsáalooke Water and Waste Water Authority, Operator, and The Crow Tribe, Owner,	)	
	)	**EMERGENCY ADMINISTRATIVE ORDER**
Crow Agency (TP02) Public Water Supply, PWS ID # 083090011,	)	
	)	Proceeding under section 1431(a) of the Safe Drinking Water Act
Respondents.	)	

AUTHORITY AND FINDINGS

1. This Emergency Administrative Order (Order) is issued by the Environmental Protection Agency (EPA) pursuant to the authority of section 1431(a) of the Safe Drinking Water Act (Act), 42 U.S.C. § 300i(a). The undersigned officials have been properly delegated this authority.

2. Failure to comply with this Order may result in civil penalties of up to $22,906 per day. 42 U.S.C. § 300i(b); 40 C.F.R. part 19; 82 Fed. Reg. 3633 (January 12, 2017).

3. The EPA may issue an order pursuant to section 1431(a) of the Act, 42 U.S.C. § 300i(a), upon receipt of information that that there is an intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals, which may present an imminent and substantial endangerment to the health of persons, and appropriate State or local authorities have not acted, or do not have the authority to act, to protect human health.

4. The EPA has primary enforcement responsibility for the Act's public water supply protection program on the Crow Reservation. No other governmental authority has applied for and been approved to administer the program on the Reservation.

5. The Apsáalooke Water and Waste Water Authority (AWWWA) is a tribal agency organized under the laws of the Crow Tribe and is therefore a "person" as that term is defined in the Act and its implementing regulations. 42 U.S.C. § 300f(12); 40 C.F.R. § 141.2.

6. The Crow Tribe is a federally recognized tribe and is therefore a "person" as that term is defined in the Act. 42 U.S.C. § 300f(10), (12), (14).

7. Respondents AWWWA and the Crow Tribe own and/or operate the the Crow Agency (TP02) Public Water System (System) located near Crow Agency, Montana, that provides water to the public for human consumption.

8. The System is supplied by surface water from the Little Big Horn River, which serves 1300 users through 406 service connections.

9. Systems that have at least 15 service connections or regularly serve at least 25 people per day at least 60 days per year are "public water systems" as defined in section 1401(4) of the Act, 42 U.S.C. § 300f(4), and therefore, are subject to the requirements of the Act and the National Primary Drinking Water Regulations (NPDWR) at 40 C.F.R. part 141.

10. The EPA has determined that conditions exist at the System that may present an imminent and substantial endangerment to the health of persons. On October 4, 2017, EPA was notified that at approximately 8:00 a.m. an operator discovered that the System had been vandalized. Damage included destruction of the gas chlorination system, the SCADA system, and chemical plant feed components. It us unknown if other actions such as intentional contamination of the water in the clarifier and clearwell also occurred. The plant was running when the vandalism was discovered, and it is unknown how much, if any, contaminated water was sent out to distribution. Therefore, the consumers of the water have the potential to be exposed to unknown contaminants which may present an imminent and substantial endangerment to human health.

11. Before issuing this Order, the EPA consulted with the AWWWA, the Tribe, the System operator, and other governmental authorities to confirm the facts, and has determined that this Order is necessary to protect human health.

ORDER

INTENT TO COMPLY

12. Within 24 hours of receipt of this Order, Respondents must notify the EPA in writing of their intent to comply with the terms of this Order. Notification by email to the EPA point of contact identified below is acceptable.

PUBLIC NOTICE

13. Within 24 hours of receipt of this Order, Respondents must notify the public in the affected area of the situation described in this Order and distribute the Do Not Use public notice provided by the EPA on October 4, 2017. The notice must be distributed door-to-door as well as posting it in conspicuous locations and announced on the local radio station. Respondents must submit a copy of the notice to the EPA within 24 hours of its distribution. Respondents must continue providing the public notice until the EPA provides written notification to discontinue.

ALTERNATE WATER SUPPLY

14. Upon receipt of this Order, Respondents shall notify the public that an alternate potable water supply is available. Respondents shall provide at least two liters of potable water daily per person at a central location that is accessible to all persons served by the System. Respondents may also opt to provide an alternate water supply that is either 1) provided by a licensed water distributor, 2) purchased bottled water, or 3) provided by another public water system that meets the requirements of the NPDWRs. The alternate water supply shall be made available at no cost to all users of the System as needed for drinking and cooking until water service is restored to affected users of the System.

EMERGENCY SAMPLING

15. Respondents shall conduct emergency sampling for unidentified chemical and radiological contaminants and deliver the special purpose samples to the Montana State Lab for analysis on October 5, 2017. The required sampling locations are the clearwell in the water plant and the local elementary school.

16. Respondent shall collect two special purpose samples from the clearwell and the local elementary school to be analyzed for total coliform and *E.coli.*

17. Respondents shall submit to EPA the results of all samples immediately upon receipt of the lab analyses.

18. The EPA may require Respondents to increase sampling at any time while this Order is in effect.

COMPLIANCE AND CORRECTIVE MEASURES

19. Respondents must conduct a complete assessment of damage to the water plant (including, but not limited to, all filtration equipment, electrical components, telemetry components and computer, and disinfection components).

20. The completed damage assessment must be submitted to the EPA within 15 days and must describe damage detected and repairs necessary to return the water plant to operation in compliance with drinking water regulations.

21. Within 30 days of the effective date of this Order, Respondents shall provide the EPA with a plan and schedule that outlines actions taken or to be taken based on the damage assessment. The plan shall include proposed system modifications, estimated costs of modifications, and a schedule for completion of the project. The proposed schedule shall include specific milestone dates and a final completion date. The schedule must be approved by the EPA before construction or modifications may commence.

22. The schedule required by paragraph 21, above, will be incorporated into this Order as an enforceable requirement upon written approval by the EPA. If implementation of the plan fails to return the plant to operation in compliance with the drinking water regulations, the EPA may order further steps.

23. Respondent shall not send water from plant TP02 until completion of all repairs and written approval by EPA.

NOTIFY EPA OF SITUATIONS WITH POTENTIAL ADVERSE EFFECTS TO PUBLIC HEALTH

24. Respondents must notify EPA within 24 hours after learning of a violation or situation with the potential to have serious adverse effects on human health as a result of short-term exposure to contaminants. 40 C.F.R. § 141.202(b)(2).

REPORTING

25. Respondents must submit all monitoring and reporting required above to the EPA by telephone and email or fax within 24 hours of receiving the results. These reports should also include daily updates on the System's status and progress towards restoring normal water service.

26. The point of contact for all communication with EPA in this matter is:

Olive Hofstader
E-mail: Hofstader.olive@epa.gov
Telephone: (800)227-8917, ext. 6467, or (303) 312-6467
Fax: (303) 312-7518

27. This Order does not affect any legal requirement or EPA's legal enforcement options in this matter. This Order constitutes final agency action. Under section 1448(a) of the SDWA, 42 U.S.C. 300j-7(a), Respondents may seek federal judicial review of SDWA section 1431 emergency orders.

Issued and effective this 5th day of October, 2017.

James H. Eppers, Supervisory Attorney
Legal Enforcement Program
Regulatory Enforcement Unit
Office of Enforcement, Compliance
and Environmental Justice

For Arturo Palomares, Director
Water Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

File As: Deane, Michael
E-mail: michael@nawc.com
First: Michael
Family: Deane

To: Senn, John[Senn.John@epa.gov]; Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Mon 10/30/2017 8:49:33 PM
Subject: FW: Draft Materials for Today's Press Call Prep Session
OAAG-#81608-v2-PDC_Web_Sheet_10-29-vas review.docx
OAAG-#81607-v2-PDC_--_Press_Release_10-29-vas review.docx

The fact sheet **Ex. 5 - Deliberative Process**

From: Sorrell, Virginia
Sent: Monday, October 30, 2017 4:45 PM
To: Senn, John <Senn.John@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Chapman, Apple <Chapman.Apple@epa.gov>; Thompson, Christopher <Thompson.Christopher@epa.gov>; Portmess, Jessica <Portmess.Jessica@epa.gov>; Parrish, Robert <Parrish.Robert@epa.gov>; Fried, Gregory <Fried.Gregory@epa.gov>; Mutter, Andrew <mutter.andrew@epa.gov>; Sullivan, Tim <Sullivan.Tim@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Subject: RE: Draft Materials for Today's Press Call Prep Session

Hi John,

Just a couple of edits on the settlement page and press release. I believe Jess just passed along a couple of edits on the Q&As, and I didn't have any additional changes there.

Thanks,

Ginny

Virginia Sorrell

Air Enforcement Division

Office of Civil Enforcement

U.S. Environmental Protection Agency

Phone: 303-312-6669

This email, including attachments, may contain material that is confidential, privileged, and/or attorney work product.

From: Senn, John
Sent: Monday, October 30, 2017 10:43 AM
To: Traylor, Patrick <traylor.patrick@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Chapman, Apple <Chapman.Apple@epa.gov>; Thompson, Christopher <Thompson.Christopher@epa.gov>; Portmess, Jessica <Portmess.Jessica@epa.gov>; Sorrell, Virginia <Sorrell.Virginia@epa.gov>; Parrish, Robert <Parrish.Robert@epa.gov>; Fried, Gregory <Fried.Gregory@epa.gov>; Mutter, Andrew <mutter.andrew@epa.gov>; Sullivan, Tim <Sullivan.Tim@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Subject: FW: Draft Materials for Today's Press Call Prep Session

I think everyone has these materials already, but sharing what I just got from DOJ comms.

From: Abueg, Mark (OPA) [mailto:Mark.Abueg@usdoj.gov]
Sent: Monday, October 30, 2017 12:39 PM
To: bruce.gelber@usdoj.gov; Snow, Corinne (ENRD) <Corinne.Snow@usdoj.gov>; Mariani, Tom (ENRD) <Tom.Mariani@usdoj.gov>; Wardzinski, Karen (ENRD) <Karen.Wardzinski@usdoj.gov>; Douglas, Nathaniel (ENRD) <Nathaniel.Douglas@usdoj.gov>; Brook, Bob (ENRD) <Bob.Brook@usdoj.gov>; Elmer, Mark (ENRD) <Mark.Elmer@usdoj.gov>; karen.dworkin@usdoj.gov; Thomas.Carroll@USDOJ.GOV; steven.shermer@usdoj.gov; Collier, Andrew (ENRD) <Andrew.Collier@usdoj.gov>; Ellsworth, Jonathan (ENRD) <Jonathan.Ellsworth@usdoj.gov>; Harris, Deborah (ENRD) <Deborah.Harris@usdoj.gov>; Poux, Joseph (ENRD) <Joseph.Poux@usdoj.gov>; Vaden, Christopher (ENRD) <Christopher.Vaden@usdoj.gov>; Grishaw, Letitia (ENRD) <Letitia.Grishaw@usdoj.gov>; Harvey, Judy (ENRD) <Judith.Harvey@usdoj.gov>
Cc: Edwards, Jeremy M. (OPA) <Jeremy.M.Edwards@usdoj.gov>; Richards, Katy Jo. (OPA) <Katy.Jo.Richards@usdoj.gov>
Subject: Draft Materials for Today's Press Call Prep Session

All,

For today's prep session, attached you will find the latest versions (still in draft mode) of the following material:

- PDC
  - Press Release
  - Q&As
  - Web Sheet
- ExxonMobil
  - Press Release
  - Q&As
  - Web Sheet

I've also attached a potential Press Call Timeline that we can discuss during the call.

Best,

Mark

Mark Abueg
Public Affairs Specialist
U.S. Department of Justice
Office of Public Affairs

Office: (202) 353-6836
Cell: (202) 353-5132
Email: mark.abueg@usdoj.gov
Website: www.justice.gov

To: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]
From: Bodine, Susan
Sent: Thur 11/9/2017 2:00:32 PM
Subject: RE: Black Flag CBI

I will delete.

But next week we need to know what we can tell the Congresswoman. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Kelley, Rosemarie
Sent: Wednesday, November 8, 2017 6:57 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>
Subject: Black Flag CBI

Susan, Patrick and Larry –

Ex. 5 - Attorney Client

Rosemarie

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Bodine, Susan
Sent: Sun 10/22/2017 1:36:12 PM
Subject: RIN case more
1. Information.pdf
ATT00001.htm

Ex. 5 - Deliberative Process

Sent from my iPhone

Begin forwarded message:

From: "Shiffman, Cari" <Shiffman.Cari@epa.gov>
To: "Bodine, Susan" <bodine.susan@epa.gov>, "Fisher, Mike" <Fisher.Mike@epa.gov>
Cc: "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>, "Barnet, Henry" <Barnet.Henry@epa.gov>, "Traylor, Patrick" <traylor.patrick@epa.gov>, "Senn, John" <Senn.John@epa.gov>
Subject: RE: question

Susan,

Ex. 7(a)

Thanks,

Cari Shiffman, Special Assistant

U.S. Environmental Protection Agency

Office of Enforcement and Compliance Assurance

Office: (202) 564-2898 | Mobile: (202) 823-3277

From: Bodine, Susan
Sent: Friday, October 20, 2017 2:06 PM
To: Fisher, Mike <Fisher.Mike@epa.gov>
Cc: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Barnet, Henry <Barnet.Henry@epa.gov>; Shiffman, Cari <Shiffman.Cari@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Subject: question
Importance: High

Mike,

Ex. 5 - Deliberative Process

From the environmental crimes activity report:

Ex. 7(a)

Ex. 7(a)

Ex. 7(a)