To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]
Cc: Ann Campbell[Campbell.Ann@epa.gov]
From: Downing, Donna
Sent: Fri 3/17/2017 4:54:54 PM
Subject: RESEND OF FINAL DOCUMENTS -- All Materials for the Monday briefing for the Administrator on WOTUS-2
WOTUS2 briefing paper 3-16-17.docx
Attachment 1 Rule Timeline short v4.xlsx
Attachment 2 Options for Scalia test v1.docx
wotus 2 Legal Considerations draft 3-17.docx
Attachment 4 WOTUS2 Effects on Other Programs.docx

Hi everybody –

FYI, here's a sending of the final-final. **Deliberative Process / Ex. 5** **Deliberative Process / Ex. 5** Other documents are unchanged. With the exception of attachment 3 which isn't there yet, these documents also are on the Sharepoint site.

Any questions? Feel free to give me a call. Thanks!

Donna

From: Downing, Donna
Sent: Friday, March 17, 2017 12:52 PM
To: Ann Campbell <Campbell.Ann@epa.gov>
Subject: FOR FORWARDING -- All Materials for the Monday briefing for the Administrator on WOTUS-2

To: Ann Campbell[Campbell.Ann@epa.gov]
From: Downing, Donna
Sent: Fri 3/17/2017 4:52:06 PM
Subject: FOR FORWARDING -- All Materials for the Monday briefing for the Administrator on WOTUS-2

WOTUS2 briefing paper 3-16-17.docx
Attachment 1 Rule Timeline short v4.xlsx
Attachment 2 Options for Scalia test v1.docx
wotus 2 Legal Considerations draft 3-17.docx
Attachment 4 WOTUS2 Effects on Other Programs.docx

To: Kwok, Rose[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Fri 3/17/2017 2:21:18 PM
Subject: RE: As requested: fact sheet on state "no more stringent than" provisions and other limitations

Thanks Rose. I also sent a link.

Can you talk for a few minutes about how we're managing next week, so I'm well-prepared for talking with Mindy? If so, what's a good number?

Donna

From: Kwok, Rose
Sent: Friday, March 17, 2017 10:20 AM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: Re: As requested: fact sheet on state "no more stringent than" provisions and other limitations

Here's the link to the full report: https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf

I also found this from a quick Google: http://www.ncsl.org/research/environment-and-natural-resources/state-agency-authority-to-adopt-more-stringent-environmental-standards.aspx

Sent from my iPhone

On Mar 17, 2017, at 10:17 AM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:

> Thanks Donna for the quick response! Do you have a copy or link to the ELI report you could send me?

Steven Neugeboren

Associate General Counsel

Water Law Office

Environmental Protection Agency

202-564-5488

From: Downing, Donna
Sent: Friday, March 17, 2017 10:16 AM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: As requested: fact sheet on state "no more stringent than" provisions and other limitations

Hi folks:

Attached please find a short fact sheet summary of the May 2013 ELI study, "State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act." This is the source of our "no more stringent than" statistics occasionally mentioned. The report is based on information collected through December 2012.

Donna

From: Neugeboren, Steven
Sent: Friday, March 17, 2017 12:21 AM
To: Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: WOTUS-2 Briefing Materials

Some last input of the day from me.

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Nite.

Steven Neugeboren

Associate General Counsel

Water Law Office

Environmental Protection Agency

202-564-5488

From: Downing, Donna
Sent: Thursday, March 16, 2017 5:58 PM
To: Campbell, Ann <Campbell.Ann@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: WOTUS-2 Briefing Materials

Hi Ann –

Attached please find the current version of the WOTUS-2 draft materials for the Administrator's briefing on Monday. The attachments include:

- Briefing one-pager
- Attachment 1: Timeline
- Attachment 2: Options
- Attachment 4: Impacts to CWA Programs

Deliberative Process / Ex. 5

Here's a link to the Sharepoint folder where these attached documents reside in case Steve or others want to continue editing:
https://usepa.sharepoint.com/sites/OW_Work/wus/2017/_layouts/15/guestaccess.aspx?guestaccesstoken=QZV

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Fri 3/17/2017 1:39:58 PM
Subject: RE: ELI no more stringent than

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Friday, March 17, 2017 9:10 AM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Goodin, John <Goodin.John@epa.gov>
Subject: RE: ELI no more stringent than

Deliberative Process / Ex. 5

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

From: Christensen, Damaris
Sent: Friday, March 17, 2017 8:58 AM
To: Downing, Donna <Downing.Donna@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: ELI no more stringent than

Deliberative Process / Ex. 5

To: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Fri 3/17/2017 1:38:53 PM
Subject: RE: WOTUS-2 Briefing Materials

Do you have Rachel's phone number(s)? Have to call her about People Plus asap. Thanks!

Donna

From: Christensen, Damaris
Sent: Friday, March 17, 2017 9:27 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: Re: WOTUS-2 Briefing Materials

You already did one in 2014 but I can't find in my phone (on the way back from daycare)!

Sent from my iPhone

On Mar 17, 2017, at 8:52 AM, Downing, Donna <Downing.Donna@epa.gov> wrote:

Deliberative Process / Ex. 5

Donna

From: Eisenberg, Mindy
Sent: Friday, March 17, 2017 8:52 AM
To: Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: WOTUS-2 Briefing Materials

I'm reviewing the documents in sharepoint right now.

Thanks!

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Goodin, John
Sent: Friday, March 17, 2017 7:46 AM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: Re: WOTUS-2 Briefing Materials

Thanks for the late night dedication, Steve! Very helpful comments. Her are a few quick reactions...

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

John

Sent from my iPhone

On Mar 17, 2017, at 12:20 AM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:

Some last input of the day from me.

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Nite.

Steven Neugeboren

Associate General Counsel

Water Law Office

Environmental Protection Agency

202-564-5488

From: Downing, Donna
Sent: Thursday, March 16, 2017 5:58 PM
To: Campbell, Ann <Campbell.Ann@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling,

Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: WOTUS-2 Briefing Materials

Hi Ann –

Attached please find the current version of the WOTUS-2 draft materials for the Administrator's briefing on Monday. The attachments include:

- Briefing one-pager
- Attachment 1: Timeline
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Deliberative Process / Ex. 5

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Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Fri 3/17/2017 1:36:08 PM
Subject: RE: WOTUS-2 Briefing Materials

I know and have it, but it answered somewhat different questions. I'm re-doing…

From: Christensen, Damaris
Sent: Friday, March 17, 2017 9:27 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: Re: WOTUS-2 Briefing Materials

You already did one in 2014 but I can't find in my phone (on the way back from daycare)!

Sent from my iPhone

On Mar 17, 2017, at 8:52 AM, Downing, Donna <Downing.Donna@epa.gov> wrote:

Deliberative Process / Ex. 5

Donna

From: Eisenberg, Mindy
Sent: Friday, March 17, 2017 8:52 AM
To: Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: WOTUS-2 Briefing Materials

I'm reviewing the documents in sharepoint right now.

Thanks!

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

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Sent: Friday, March 17, 2017 7:46 AM
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Cc: Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: Re: WOTUS-2 Briefing Materials

Thanks for the late night dedication, Steve! Very helpful comments. Her are a few quick reactions...

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks again for the great work

John

Sent from my iPhone

On Mar 17, 2017, at 12:20 AM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:

Some last input of the day from me.

First a few suggestions and requests, then a description of my comments on two

documents I reviewed tonight – the options paper and other programs docs.

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Nite.

Steven Neugeboren

Associate General Counsel

Water Law Office

Environmental Protection Agency

202-564-5488

From: Downing, Donna
Sent: Thursday, March 16, 2017 5:58 PM
To: Campbell, Ann <Campbell.Ann@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: WOTUS-2 Briefing Materials

Hi Ann –

Attached please find the current version of the WOTUS-2 draft materials for the Administrator's briefing on Monday. The attachments include:

- Briefing one-pager
- Attachment 1: Timeline
- Attachment 2: Options
- Attachment 4: Impacts to CWA Programs

Deliberative Process / Ex. 5

Here's a link to the Sharepoint folder where these attached documents reside in case Steve or others want to continue editing:
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Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Ann Campbell[Campbell.Ann@epa.gov]
Cc: Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]
From: Downing, Donna
Sent: Thur 3/16/2017 9:58:22 PM
Subject: WOTUS-2 Briefing Materials
Attachment 4 WOTUS2 Effects on Other Programs.docx
Attachment 2 Options for Scalia test v1.docx
WOTUS2 briefing paper 3-16-17.docx
Attachment 1 Rule Timeline short v4.xlsx

Hi Ann –

Deliberative Process / Ex. 5

n=QZW5

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Thur 3/16/2017 8:59:03 PM
Subject: FW: CMS New Assignment - Yvonne Smothers - AX-17-000-6257
AX- 17-000-6257 Goeser.pdf

Forwarded per your request! With thanks.

Donna

-----Original Message-----
From: Brown, Sineta
Sent: Thursday, March 16, 2017 4:43 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: FW: CMS New Assignment - Yvonne Smothers - AX-17-000-6257

Donna,

Attached is a control from Greg Goeser Re: Please help restore the Clean Water Rule. The due date for this control is March 31, 2017 and it is for Mindy's Signature. If you have any questions, feel free to stop by, give me a call or send me and email message.

Thank you.

Sineta Brown
Program Analyst
Office of Wetlands Oceans and Watersheds Wetlands Division
202-564-3666

-----Original Message-----
From: cmsadmin@epa.gov [mailto:cmsadmin@epa.gov]
Sent: Thursday, March 16, 2017 1:55 PM
To: Goodin, John <Goodin.John@epa.gov>; Hunter, Christopher <Hunter.Christopher@epa.gov>; Miller, Clay <Miller.Clay@epa.gov>; Brown, Sineta <Brown.Sineta@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: CMS New Assignment - Yvonne Smothers - AX-17-000-6257

Control AX-17-000-6257 has been assigned to your office on 3/16/17 1:54 PM by Yvonne Smothers. Please go to the CMS webpage to view the details of the control.

Summary Information -
Control Number: AX-17-000-6257
Control Subject: DRF - Please help restore the Clean Water Rule
From: Goeser, Greg J.

Note: This Email was automatically generated. Please do not attempt to respond to it. You can access this control at https://cms.epa.gov/cms. Questions or comments concerning CMS should be directed to CMS Support at 202-564-4985 or CMS Information@epa.gov.

To: Hurld, Kathy[Hurld.Kathy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: McDavit, Michael W.[Mcdavit.Michael@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Thur 3/16/2017 6:23:44 PM
Subject: RE: URGENT ACTION: FW: ECOS Questions for Administrator call - OW
TPs for Administrator at ACWA v1.docx

Deliberative Process / Ex. 5

Donna

From: Hurld, Kathy
Sent: Thursday, March 16, 2017 10:45 AM
To: Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>
Subject: RE: URGENT ACTION: FW: ECOS Questions for Administrator call - OW

Deliberative Process / Ex. 5

From: Goodin, John
Sent: Thursday, March 16, 2017 10:00 AM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>
Subject: URGENT ACTION: FW: ECOS Questions for Administrator call - OW

Deliberative Process / Ex. 5

Thanks

John

From: Campbell, Ann
Sent: Thursday, March 16, 2017 9:31 AM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Nandi, Romell <Nandi.Romell@epa.gov>
Subject: Re: ECOS Questions for Administrator call - OW

Deliberative Process / Ex. 5

On Mar 16, 2017, at 8:59 AM, Goodin, John <Goodin.John@epa.gov> wrote:

Deliberative Process / Ex. 5

Thanks

John

Sent from my iPhone

Begin forwarded message:

From: "Sawyers, Andrew" <Sawyers.Andrew@epa.gov>
Date: March 16, 2017 at 8:37:42 AM EDT
To: "Grevatt, Peter" <Grevatt.Peter@epa.gov>, "Thompkins, Anita" <Thompkins.Anita@epa.gov>, "Goodin, John" <Goodin.John@epa.gov>
Cc: "Mclain, Jennifer" <Mclain.Jennifer@epa.gov>, "Shapiro, Mike" <Shapiro.Mike@epa.gov>, "Campbell, Ann" <Campbell.Ann@epa.gov>, "Best-Wong, Benita" <Best-Wong.Benita@epa.gov>, "Stein, Raffael" <Stein.Raffael@epa.gov>, "Gueriguian, Leo" <Gueriguian.Leo@epa.gov>, "Nagle, Deborah" <Nagle.Deborah@epa.gov>
Subject: RE: ECOS Questions for Administrator call - OW

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Grevatt, Peter
Sent: Thursday, March 16, 2017 7:38 AM
To: Sawyers, Andrew <Sawyers.Andrew@epa.gov>; Thompkins, Anita <Thompkins.Anita@epa.gov>; Goodin, John <Goodin.John@epa.gov>
Cc: Mclain, Jennifer <Mclain.Jennifer@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>
Subject: Fwd: ECOS Questions for Administrator call - OW

Deliberative Process / Ex. 5

Sent from my iPhone

Begin forwarded message:

From: "Barbery, Andrea" <Barbery.Andrea@epa.gov>
Date: March 15, 2017 at 5:54:29 PM EDT
To: "Shapiro, Mike" <Shapiro.Mike@epa.gov>, "Grevatt, Peter" <Grevatt.Peter@epa.gov>
Cc: "Richardson, RobinH" <Richardson.RobinH@epa.gov>, "Campbell, Ann" <Campbell.Ann@epa.gov>, "Thomas, Latosha" <Thomas.Latosha@epa.gov>, "Cheatham-Strickland, Latonia" <Cheatham-Strickland.Latonia@epa.gov>
Subject: ECOS Questions for Administrator call - OW

Hi Mike and Peter,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks,

Andrea Barbery

Office of Intergovernmental Relations

U.S. Environmental Protection Agency

202-564-1397

Deliberative Process / Ex. 5

From: Konkus, John
Sent: Wednesday, March 15, 2017 2:54 PM
To: Barbery, Andrea <Barbery.Andrea@epa.gov>
Cc: Richardson, RobinH <Richardson.RobinH@epa.gov>; Bangerter, Layne <bangerter.layne@epa.gov>; Ferguson, Lincoln <ferguson.lincoln@epa.gov>
Subject: RE: ECOS Questions for Tues. Mar. 21

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Barbery, Andrea
Sent: Wednesday, March 15, 2017 2:42 PM
To: Konkus, John <konkus.john@epa.gov>
Cc: Richardson, RobinH <Richardson.RobinH@epa.gov>; Bangerter, Layne <bangerter.layne@epa.gov>
Subject: ECOS Questions for Tues. Mar. 21

Hi John,

A pleasure to meet you today!

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks,

Andrea Barbery (ECOS liaison)

Office of Intergovernmental Relations

U.S. Environmental Protection Agency

202-564-1397

To: Rose Kwok[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Thur 3/16/2017 4:24:09 PM
Subject: Emailing: Suboptions for Scalia test v1.docx
Suboptions for Scalia test v1.docx

Your message is ready to be sent with the following file or link attachments:

Suboptions for Scalia test v1.docx

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]; Bennett, Brittany[bennett.brittany@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Ann Campbell[Campbell.Ann@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]
From: Downing, Donna
Sent: Tue 3/14/2017 10:06:26 PM
Subject: For consideration -- One-page table summarizing the 3-option briefing paper
WOTUS2_briefingTableShort - clean.docx

Hi everybody –

Deliberative Process / Ex. 5

Enthusiastic thanks to Dan, who developed this helpful format.

Donna

Sharepoint link:

Nonresponsive Internal URL/ Ex. 6

To: Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Tue 3/14/2017 4:07:53 PM
Subject: FW: For 11am meeting -- some edits to briefing paper shown in redline
WOTUS2_briefingTable.docx

From: Auerbach, Daniel
Sent: Tuesday, March 14, 2017 11:47 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: Re: For 11am meeting -- some edits to briefing paper shown in redline

---

From: Downing, Donna
Sent: Tuesday, March 14, 2017 10:47 AM
To: Jensen, Stacey M CIV USARMY HQDA (US); Moyer, Jennifer A CIV USARMY CEHQ (US); David.F.Dale@usace.army.mil; Christensen, Damaris; Kwok, Rose; Auerbach, Daniel; Bennett, Brittany; Goodin, John; Hewitt, Julie; Kupchan, Simma; Wehling, Carrie; Keating, Jim; Frazer, Brian; Wilson, John Maxwell (Max) CIV USARMY CEHQ (US; Campbell, Ann; Eisenberg, Mindy; Doley, Todd; Bahk, Benjamin; Cherry, Andrew; Stokely, Peter; Theis, Joseph; Pollins, Mark
Subject: For 11am meeting -- some edits to briefing paper shown in redline

DELIBERATIVE PROCESS; CONFIDENTIAL

Hi everybody –

Attached is a copy of the briefing paper, with a couple of edits to the document sent last night shown in redline/strikeout. We'll be discussing this at the 11am meeting.

Talk to you soon!

Donna

Donna Downing
Acting Chief, Wetlands and Aquatic Resources Regulatory Branch
Office of Wetlands, Oceans & Watersheds
U.S. Environmental Protection Agency
ph: (202) 566-1367
downing.donna@epa.gov

USPS Address:
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Delivery Address:
1301 Constitution Avenue, NW, room 7214-D
Washington, DC 20004

To: Hewitt, Julie[Hewitt.Julie@epa.gov]; Keating, Jim[Keating.Jim@epa.gov]; Brian Frazer[Frazer.Brian@epa.gov]; Doley, Todd[doley.todd@epa.gov]; Bahk, Benjamin[Bahk.Benjamin@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Tue 3/14/2017 12:01:26 AM
Subject: FYI -- latest draft WOTUS-2 briefing paper with sub-option considerations
WOTUS2 briefing paper 3.13.17 - clean (002).docx
Table for Options 3-8-2017 v4.docx

Hi folk:

Deliberative Process / Ex. 5

Donna

From: Downing, Donna
Sent: Monday, March 13, 2017 7:48 PM
To: Shapiro, Mike <Shapiro.Mike@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Rose Kwok <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Ann Campbell <Campbell.Ann@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Karyn Wendelowski <wendelowski.karyn@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>
Subject: As requested: latest draft WOTUS-2 briefing paper with sub-option considerations

Hi Mike:

Attached please find the latest draft briefing paper on WOTUS-2, reflecting additional discussion on sub-options and their considerations. This reflects a collaboration between

Deliberative Process / Ex. 5

Have a good evening, and a manageable bit of weather!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Shapiro, Mike[Shapiro.Mike@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Ann Campbell[Campbell.Ann@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]; Bennett, Brittany[bennett.brittany@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]
From: Downing, Donna
Sent: Mon 3/13/2017 11:48:00 PM
Subject: As requested: latest draft WOTUS-2 briefing paper with sub-option considerations
WOTUS2 briefing paper 3.13.17 - clean (002).docx
Table for Options 3-8-2017 v4.docx

Hi Mike:

Deliberative Process / Ex. 5

Have a good evening, and a manageable bit of weather!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Kupchan, Simma[Kupchan.Simma@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Mon 3/13/2017 8:56:28 PM
Subject: FW: USACE Comments on CWA Rulemaking Options Paper
Corps Technical Comments_Table for Options 2017 13 March 2017.docx
USACE Counsel Comments on EPA WOTUS Options Paper 13 MAR 2017.docx

-----Original Message-----
From: Moyer, Jennifer A CIV USARMY CEHQ (US) [mailto:Jennifer.A.Moyer@usace.army.mil]
Sent: Monday, March 13, 2017 4:54 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Campbell, Ann <Campbell.Ann@epa.gov>; Goodin, John <Goodin.John@epa.gov>; David.F.Dale@usace.army.mil; Cooper, David R SES USARMY CEHQ (US) <David.R.Cooper@usace.army.mil>; Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: USACE Comments on CWA Rulemaking Options Paper

Hi Donna,

Deliberative Process / Ex. 5

Jennifer

Jennifer Moyer
Chief, Regulatory Program
Headquarters, U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314
202-761-4598 (office)
703-589-5746 (mobile)

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]
Cc: Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Thur 3/9/2017 6:26:45 PM
Subject: As requested: an annotated agenda with TPs and additional background
Annotations to AGENDA - EPA Army Corps Discussion Jurisdiction Rule MAR 09 2017.docx

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks, folks!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Ann Campbell[Campbell.Ann@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]
From: Downing, Donna
Sent: Thur 3/9/2017 6:09:14 PM
Subject: Staffing and issue document for Mike's 3:30pm meeting with Army Corps
Proposed Team and issue planning.docx

Hi Ann:

Attached is a proposed staffing plan, which includes some brainstorming on key issues and moving pieces. This is intended as support for the 3:30 meeting with the Army Corps. The attachment reflects very quick review by John and Mindy.

Thanks!

Donna

Donna Downing
Acting Chief, Wetlands and Aquatic Resources Regulatory Branch
Office of Wetlands, Oceans & Watersheds
U.S. Environmental Protection Agency
ph: (202) 566-1367
downing.donna@epa.gov

USPS Address:
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Delivery Address:
1301 Constitution Avenue, NW, room 7214-D
Washington, DC 20004

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]
Cc: Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Bennett, Brittany[bennett.brittany@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]
From: Downing, Donna
Sent: Thur 3/9/2017 5:37:14 PM
Subject: For QUICK review & editing -- Staffing and master list/moving pieces
Proposed Team and issue planning.docx

Hi Mindy and John –

Am sending the attached to both of you at the same time because of the short timeframe.

Attached is a staffing proposal and brainstormed list of key issues and moving pieces. The attachment is intended to inform Mike's meeting this afternoon at 3:30 with the Army Corps. It reflects input from the JD Teamsters, including Rose, Damaris, Brittany, and Dan (thanks!)

I'm in a position to revise the document per your edits up until about 1:50, after which I'm meeting with the Wetlands Regional Managers until 3. I presume we'd like to get this to Mike before then. So … comments welcome, including from the JD Teamsters. Thanks!

I'll turn to annotating the meeting agenda, as requested. Stay tuned for that.

Donna Downing
Acting Chief, Wetlands and Aquatic Resources Regulatory Branch
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downing.donna@epa.gov

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Washington, DC 20460

Delivery Address:
1301 Constitution Avenue, NW, room 7214-D
Washington, DC 20004

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Thur 3/9/2017 2:06:07 PM
Subject: RE: Table for Options 3-8-2017 dc.docx
Table for Options 3-8-2017 dc & dd.docx

Deliberative Process / Ex. 5

From: Christensen, Damaris
Sent: Wednesday, March 08, 2017 10:17 PM
To: Downing, Donna <Downing.Donna@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>
Subject: Table for Options 3-8-2017 dc.docx

Deliberative Process / Ex. 5

D

To: Kwok, Rose[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Wed 3/8/2017 2:19:31 PM
Subject: RE: For quick review: Draft TPs on WOTUS-2 for Mike's Wednesday afternoon teleconference with the WAter Division Directors

Thanks, Rose! Deliberative Process / Ex. 5

Donna

From: Kwok, Rose
Sent: Wednesday, March 08, 2017 8:43 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: For quick review: Draft TPs on WOTUS-2 for Mike's Wednesday afternoon teleconference with the WAter Division Directors

Deliberative Process / Ex. 5

From: Eisenberg, Mindy
Sent: Wednesday, March 08, 2017 8:37 AM
To: Donna Downing Personal Email / Ex. 6 >; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: For quick review: Draft TPs on WOTUS-2 for Mike's Wednesday afternoon teleconference with the WAter Division Directors

Thanks so much Donna. **Deliberative Process / Ex. 5**

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Donna Downing [mailto:donnadowning1@verizon.net]
Sent: Tuesday, March 07, 2017 11:22 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>
Subject: For quick review: Draft TPs on WOTUS-2 for Mike's Wednesday afternoon teleconference with the WAter Division Directors

Hi Mindy, Rose, and Damaris –

Deliberative Process / Ex. 5

Thanks for any thoughts you may have. See you tomorrow!

Donna

TALKING POINTS FOR TALKING WITH THE WATER DIVISION DIRECTORS

ABOUT THE WOTUS-2 RULEMAKING

3/7/17

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Questions?

To: Goodin, John[Goodin.John@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Wed 3/8/2017 2:18:53 PM
Subject: For quick review: TPs for Mike S's use when talking to the WDDs re: WOTUS-2
TPs for conversation with WDDs on WOTUS-2 v1.docx

Hi John:

Deliberative Process / Ex. 5

Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Personal Address / Ex. 6
From: Downing, Donna
Sent: Tue 3/7/2017 11:11:13 PM
Subject: Emailing: Rulemaking steps and timelines v1.docx
Rulemaking steps and timelines v1.docx

Your message is ready to be sent with the following file or link attachments:

Rulemaking steps and timelines v1.docx

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

To: Personal Address / Ex. 6
From:
Sent: Tue 3/7/2017 11:10:18 PM
Subject: Emailing: 2017 Rulemaking topline TPs v2.docx
2017 Rulemaking topline TPs v2.docx

Your message is ready to be sent with the following file or link attachments:

2017 Rulemaking topline TPs v2.docx

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

To: Nickerson, William[Nickerson.William@epa.gov]
From: Downing, Donna
Sent: Tue 3/7/2017 11:05:52 PM
Subject: FW: For review: Draft 1-pager on the re-do of the WOTUS rule
WOTUS2 briefing paper with OGC changes.docx

As promised…

Donna

From: Neugeboren, Steven
Sent: Tuesday, March 07, 2017 2:43 PM
To: Downing, Donna <Downing.Donna@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>
Subject: RE: For review: Draft 1-pager on the re-do of the WOTUS rule

Our comments. Redline/strikeout would have been confusing so it's clean. I think the

Attorney Client / Ex. 5

Steven Neugeboren

Associate General Counsel

Water Law Office

Environmental Protection Agency

202-564-5488

From: Downing, Donna
Sent: Monday, March 06, 2017 7:44 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>
Subject: For review: Draft 1-pager on the re-do of the WOTUS rule

Hi everybody:

Deliberative Process / Ex. 5

Please send me suggested edits and other thoughts by 1pm tomorrow (ideally in redline/strikeout)(no penalty for being early!). I'll work with Mindy and John to harmonize input and turn around a revised draft by mid-afternoon tomorrow.

Thanks!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

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Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Ann Campbell[Campbell.Ann@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Bennett, Brittany[bennett.brittany@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]
Cc: Nickerson, William[Nickerson.William@epa.gov]
From: Downing, Donna
Sent: Tue 3/7/2017 8:17:13 PM
Subject: FW: For review: Draft 1-pager on the re-do of the WOTUS rule
WOTUS2 next steps v3 bn.docx

Deliberative Process / Ex. 5

Donna

From: Nickerson, William
Sent: Tuesday, March 07, 2017 1:13 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: For review: Draft 1-pager on the re-do of the WOTUS rule

Suggestions attached.

From: Downing, Donna
Sent: Monday, March 06, 2017 7:44 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>

Subject: For review: Draft 1-pager on the re-do of the WOTUS rule

Hi everybody:

ons,

As

Deliberative Process / Ex. 5

Thanks!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Brown, Sineta[Brown.Sineta@epa.gov]
Cc: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Tue 3/7/2017 6:16:52 PM
Subject: FW: CMS New Assignment - Yvonne Smothers - AX-17-000-4991
Martin AX-17-000-5060.docx
Nally AX-17-000-1991.docx

Hi Sineta:

Deliberative Process / Ex. 5

Thanks, ma'am!

Donna

-----Original Message-----
From: Christensen, Damaris
Sent: Friday, March 03, 2017 9:43 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Brown, Sineta <Brown.Sineta@epa.gov>
Subject: RE: CMS New Assignment - Yvonne Smothers - AX-17-000-4991

Deliberative Process / Ex. 5

Damaris

-----Original Message-----
From: Downing, Donna
Sent: Friday, March 03, 2017 2:46 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: FW: CMS New Assignment - Yvonne Smothers - AX-17-000-4991

Hi Damaris --

Deliberative Process / Ex. 5

Thanks!

Donna

-----Original Message-----
From: Brown, Sineta
Sent: Wednesday, March 01, 2017 11:44 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: FW: CMS New Assignment - Yvonne Smothers - AX-17-000-4991

Good Morning Donna,

Deliberative Process / Ex. 5

Thank you.

Sineta Brown
Program Analyst
Office of Wetlands Oceans and Watersheds Wetlands Division
202-564-3666

-----Original Message-----
From: cmsadmin@epa.gov [mailto:cmsadmin@epa.gov]
Sent: Wednesday, March 01, 2017 10:40 AM
To: Goodin, John <Goodin.John@epa.gov>; Hunter, Christopher <Hunter.Christopher@epa.gov>; Miller, Clay <Miller.Clay@epa.gov>; Brown, Sineta <Brown.Sineta@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: CMS New Assignment - Yvonne Smothers - AX-17-000-4991

Control AX-17-000-4991 has been assigned to your office on 3/1/17 10:39 AM by Yvonne Smothers. Please go to the CMS webpage to view the details of the control.

Summary Information -
Control Number: AX-17-000-4991
Control Subject: Waters of the United States
From: Nally, Joseph L.

Note: This Email was automatically generated. Please do not attempt to respond to it. You can access this control at https://cms.epa.gov/cms. Questions or comments concerning CMS should be directed to CMS Support at 202-564-4985 or CMS Information@epa.gov.

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Bennett, Brittany[bennett.brittany@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Ann Campbell[Campbell.Ann@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]
From: Downing, Donna
Sent: Tue 3/7/2017 12:44:22 AM
Subject: For review: Draft 1-pager on the re-do of the WOTUS rule
WOTUS2 next steps v3.docx

Hi everybody:

At today's meeting we had a broad discussion on how best to present in a one-pager the options, timeline implications, and other issues associated with a re-do of the WOTUS regulatory definition. Attached please find a first draft that hopefully reflects much of that discussion. As suggested at the meeting, let's collectively review and suggest how best to turn this draft into what we need for briefing the Administrator and others.

Please send me suggested edits and other thoughts by 1pm tomorrow (ideally in redline/strikeout)(no penalty for being early!). I'll work with Mindy and John to harmonize input and turn around a revised draft by mid-afternoon tomorrow.

Thanks!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Rose Kwok[Kwok.Rose@epa.gov]; Bennett, Brittany[bennett.brittany@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]
Cc: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Mon 3/6/2017 11:02:11 PM
Subject: FW: For quick review: rough first draft of Topline Message Redux
rough rev WOTUS2 next steps v2.docx

As discussed, here's what I'll be working on for the next bit. My plans are to tinker with it some, then send it out tonight for broader group review – and undoubtedly editing – with a new version for consideration midday tomorrow. If you'd like to chime in now, terrific. If you'd prefer to wait for the next iteration, that's fine too. Either are appreciated.

Thanks!

Donna

From: Goodin, John
Sent: Monday, March 06, 2017 5:36 PM
To: Downing, Donna <Downing.Donna@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: RE: For quick review: rough first draft of Topline Message Redux

Thanks, Donna. I think the option versions reflect our conversation. I think we need to put in parallel sub-bullets under each that reflect the key types of implications we heard. Plus describe the status quo up front? I made a brief stab at what that could look like, lacking your artful wording and details. If you fill this out a bit it should be ready to go out to the group you noted with an invitation to further comment on our first cut.

Thanks!

John

From: Downing, Donna
Sent: Monday, March 06, 2017 4:31 PM

To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: For quick review: rough first draft of Topline Message Redux

Hi John and Mindy:

Attached please find a first rough draft of the repurposed "topline messages," intended to reflect today's wide-ranging discussion. Damaris made the first draft, which I've somewhat tweaked for tone as requested in today's meeting.

My JD Teamsters and I are meeting from 4:30 to 5:30, so I'll be able to turn back to this at 5:30. Comments, suggestions, inspirations, and rewrites all welcome! The goal is to circulate a draft to meeting attendees by COB today (us folk, plus Greg, Steve N., Carrie W., Karyn W., Simma K., Benita, Mike).

Thanks in advance for your comments, and a warm repeated thanks to Damaris who kept this moving while I was in meetings.

Donna

Donna Downing

Jurisdiction Team Leader

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Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]
Cc: Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Mon 3/6/2017 4:03:15 AM
Subject: For quick review Monday morning: draft "topline messages" regarding the rulemaking
Rule Timeline short v2.xlsx
2017 Rulemaking topline TPs v2.docx

Hi JD Teamsters (with a cc to John, and Mindy):

Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

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Deliberative Process / Ex. 5

See you tomorrow!

Donna

Donna Downing

Jurisdiction Team Leader

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downing.donna@epa.gov

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Washington, DC 20004

To: Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Auerbach, Daniel[Auerbach.Daniel@epa.gov]
From: Downing, Donna
Sent: Fri 3/3/2017 8:14:35 PM
Subject: For your input-- Comparison of key bills amending the CWA's definition of "waters of the US"
Table comparison S.1140 and S.980 defining waters of US v2 with implications.docx

Hi Rose, Damaris, and Dan:

Attached is a version of the table comparing two bills addressing waters of the US.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks for whatever thoughts you might have!

Donna

From: Downing, Donna
Sent: Friday, January 27, 2017 2:37 PM
To: Auerbach, Daniel <Auerbach.Daniel@epa.gov>
Cc: Able, Tony <Able.Tony@epa.gov>; Evans, David <Evans.David@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Re: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Donna

On Jan 27, 2017, at 1:53 PM, Auerbach, Daniel <Auerbach.Daniel@epa.gov> wrote:

Deliberative Process / Ex. 5

From: Able, Tony
Sent: Friday, January 27, 2017 12:49 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Evans, David <Evans.David@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: RE: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"

Answers/suggestions. I'm copying Mindy

Tony Able, Acting Chief

Wetlands and Aquatic Resources Regulatory Branch

Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

202 566 0375 (Phone)

404 821 9066 (Cell)

From: Downing, Donna
Sent: Friday, January 27, 2017 11:00 AM
To: Able, Tony <Able.Tony@epa.gov>
Cc: Evans, David <Evans.David@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>
Subject: RE: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"

Hi Tony:

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Donna

Deliberative Process / Ex. 5

From: Able, Tony
Sent: Friday, January 27, 2017 10:18 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Evans, David <Evans.David@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>
Subject: RE: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"

Deliberative Process / Ex. 5

Tony Able, Acting Chief

Wetlands and Aquatic Resources Regulatory Branch

Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

202 566 0375 (Phone)

404 821 9066 (Cell)

From: Downing, Donna
Sent: Tuesday, January 24, 2017 12:35 PM
To: Able, Tony <Able.Tony@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Evans, David <Evans.David@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>
Subject: FYI -- Comparison of key bills amending the CWA's definition of "waters of the US"

Hi Tony, John, and Mindy –

During his confirmation hearing, I understand Administrator-Designee Pruitt indicated support for amending the Clean Water Act to define "navigable waters" or "waters of the US." **Deliberative Process / Ex. 5**

Attached please find a draft table summarizing two bills introduced in the last Congress:

•□□□□□□□ S.980, "Defense of Environment and Private Property Act" introduced by Senator Paul, and

•□□□□□□□ S. 1140 as amended, "Federal Water Quality Protection Act," introduced by Senator Barrasso.

Neither bill has been reintroduced in the 115th Congress yet. Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Please let me know if you have any suggested edits or questions. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

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downing.donna@epa.gov

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Washington, DC 20460

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Washington, DC 20004

To: Wood, Robert[Wood.Robert@epa.gov]
From: Downing, Donna
Sent: Thur 3/2/2017 5:07:14 PM
Subject: RE: FYI: GOP bill limits federal jurisdiction of navigable waters

Deliberative Process / Ex. 5

Donna

From: Wood, Robert
Sent: Thursday, March 02, 2017 9:33 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: Re: FYI: GOP bill limits federal jurisdiction of navigable waters

Deliberative Process / Ex. 5

Robert Wood

Director

Engineering and Analysis Division

U.S. EPA, Office of Water

w) 202-566-1822

c) 202-329-8053

wood.robert@epa.gov

Sent from my iPhone (please excuse typos)

On Mar 2, 2017, at 9:19 AM, Downing, Donna <Downing.Donna@epa.gov> wrote:

Deliberative Process / Ex. 5

How's life on your end?

Donna

Sent from my iPhone

On Mar 2, 2017, at 8:57 AM, Wood, Robert <Wood.Robert@epa.gov> wrote:

Hi Donna,

Deliberative Process / Ex. 5

Hope you are well.

Rob

Robert K. Wood, Director

Engineering and Analysis Division

U.S. EPA Office of Water

202-566-1822

From: Christensen, Christina
Sent: Thursday, March 02, 2017 7:33 AM
To: OST-EVERYONE <OSTEVERYONE@epa.gov>
Subject: FYI: GOP bill limits federal jurisdiction of navigable waters

FYI --

GOP bill limits federal jurisdiction of navigable waters

Ariel Wittenberg, E&E News reporter

Published: Thursday, March 2, 2017

Rep. Mac Thornberry (R-Texas) is hoping to quiet the debate over how far federal jurisdiction reaches under the Clean Water Act, filing a bill yesterday to amend the 1972 law to provide more clarity.

The "Federal Regulatory Certainty for Water Act" (H.R. 1261) would define the term "navigable waters of the U.S." under the Clean Water Act.

Until now, it has been up to U.S. EPA and the Army Corps of Engineers to define the term, which is not defined under the current law.

The topic has been hotly debated in recent years, with the Obama administration issuing its Clean Water Rule, also known as the Waters of the U.S., or WOTUS, rule, in an effort to clarify federal jurisdiction for wetlands and small waterways.

WOTUS was strongly opposed by farmers, land developers and energy companies for what they called federal overreach. Its implementation has been stayed by the courts pending litigation, and President Trump signed an executive order Tuesday directing EPA and the Army Corps to review and possibly rescind or replace the rule.

Advertisement

Thornberry's bill is an apparent direct response to WOTUS, specifically exempting many of the waterways the regulation would have included under federal jurisdiction.

His legislation would define "navigable waters" as waters that are either "navigable in fact" or

those that have a permanent or continuously flowing bodies of water that form streams, rivers, lakes and oceans "that are connected to waters that are navigable in fact."

The bill also explicitly excludes waters "that do not physically abut" actually navigable waters through a surface water connection.

"Folks who live and work in our part of Texas, especially the farmers and ranchers, understand the importance of clean water and work hard to be good stewards of the land. This bill will help protect the personal property and water rights that are so fundamental to the American way of life, a family's business, and many people's livelihoods," Thornberry said in a statement.

The legislation would also exclude wetlands, playa lakes, prairie potholes, wet meadows, wet prairies and vernal pools, which were not covered by the Clean Water Act for the past decade and a half until the Obama administration decided in WOTUS that they should be considered for inclusion on a case-by-case basis. WOTUS also would have allowed those water features to be considered as a system, something Thornberry's bill would explicitly prohibit.

In Trump's executive order, he directs EPA and the Army Corps to consider whether a 2006 Supreme Court opinion written by late Justice Antonin Scalia should be used to decide which wetlands and streams are protected under the Clean Water Act.

Doing so would mark a significant change in the government's legal strategy for deciding federal jurisdiction, since both the George W. Bush and Obama administrations instead relied on an opinion by Justice Anthony Kennedy in that same case, *Rapanos v. United States*.

In a 4-1-4 vote, five justices ruled against EPA but split on which approach to use to define government jurisdiction, with Scalia's opinion for the four conservative justices being more limiting than Kennedy's stand-alone opinion.

Scalia, who died last year, argued that the Clean Water Act only applied to "navigable waters" connected by a surface flow at least part of the year. Kennedy said waters must have a "significant nexus" to actually navigable rivers and seas, which could include biological or chemical connections.

Thornberry's bill, however, would potentially be a more limiting definition of "navigable waters of the U.S." than Scalia's opinion.

Not only does Thornberry's bill explicitly exclude wetlands from federal jurisdiction but also excludes tributaries "through which water flows intermittently or ephemerally."

Scalia's opinion on intermittent streams has been subject to much debate in lower courts. While he argued in the body of his opinion that only "relatively permanent standing or continuously flowing bodies of water" should be protected by federal jurisdiction, he wrote in a footnote that his opinion did "not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months."

Given the legal uncertainty, bills have been introduced on the issue in each of the past eight congressional sessions, but the legislation has never been signed into law.

Twitter: @arielwittenberg Email: awittenberg@eenews.net

****

Christina Christensen

Special Assistant to the Office Director (On Detail)

Office of Science and Technology

(202) 566-0537

To: Wood, Robert[Wood.Robert@epa.gov]
From: Downing, Donna
Sent: Thur 3/2/2017 2:19:08 PM
Subject: Re: FYI: GOP bill limits federal jurisdiction of navigable waters

Deliberative Process / Ex. 5

How's life on your end?

Donna

Sent from my iPhone

On Mar 2, 2017, at 8:57 AM, Wood, Robert <Wood.Robert@epa.gov> wrote:

Hi Donna,

Deliberative Process / Ex. 5

Hope you are well.

Rob

Robert K. Wood, Director

Engineering and Analysis Division

U.S. EPA Office of Water

202-566-1822

From: Christensen, Christina
Sent: Thursday, March 02, 2017 7:33 AM
To: OST-EVERYONE <OSTEVERYONE@epa.gov>
Subject: FYI: GOP bill limits federal jurisdiction of navigable waters

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Ariel Wittenberg, E&E News reporter

Published: Thursday, March 2, 2017

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Advertisement

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Given the legal uncertainty, bills have been introduced on the issue in each of the past eight congressional sessions, but the legislation has never been signed into law.

Twitter: @arielwittenberg Email: awittenberg@eenews.net

****

Christina Christensen

Special Assistant to the Office Director (On Detail)

Office of Science and Technology

(202) 566-0537

To: Goodin, John[Goodin.John@epa.gov]
From: Downing, Donna
Sent: Wed 3/1/2017 10:18:13 PM
Subject: FW: For discussion at Th 10am Wetlands General meeting: draft schedule for revised "waters of the US" proposed reg to OMB
Rulemaking steps and timelines v1.docx
Rule Timeline short v1.xlsx

Hey John –

Deliberative Process / Ex. 5

Have a great evening.

Donna

From: Downing, Donna
Sent: Wednesday, March 01, 2017 5:13 PM
To: Shapiro, Mike <Shapiro.Mike@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Loop, Travis <Loop.Travis@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Rose Kwok <Kwok.Rose@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Karyn Wendelowski <wendelowski.karyn@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Ann Campbell <Campbell.Ann@epa.gov>; Orvin, Chris <Orvin.Chris@epa.gov>; FertikEdgerton, Rachel <FertikEdgerton.Rachel@epa.gov>; Frithsen, Jeff <Frithsen.Jeff@epa.gov>; Nickerson, William <Nickerson.William@epa.gov>
Cc: McDavit, Michael W. <Mcdavit.Michael@epa.gov>
Subject: For discussion at Th 10am Wetlands General meeting: draft schedule for revised "waters of the US" proposed reg to OMB

Hi everybody:

A
'V

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

See you tomorrow!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

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downing.donna@epa.gov

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Delivery Address:

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Washington, DC 20004

To: Shapiro, Mike[Shapiro.Mike@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Loop, Travis[Loop.Travis@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Ann Campbell[Campbell.Ann@epa.gov]; Orvin, Chris[Orvin.Chris@epa.gov]; FertikEdgerton, Rachel[FertikEdgerton.Rachel@epa.gov]; Frithsen, Jeff[Frithsen.Jeff@epa.gov]; Nickerson, William[Nickerson.William@epa.gov]
Cc: McDavit, Michael W.[Mcdavit.Michael@epa.gov]
From: Downing, Donna
Sent: Wed 3/1/2017 10:13:25 PM
Subject: For discussion at Th 10am Wetlands General meeting: draft schedule for revised "waters of the US" proposed reg to OMB
Rulemaking steps and timelines v1.docx
Rule Timeline short v1.xlsx

Hi everybody:

Deliberative Process / Ex. 5

See you tomorrow!

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Tue 2/14/2017 4:14:13 PM
Subject: RE: can you send me or put on sharepoint your TPs version of the CWR ppt?
Powerpoint w Notes -- Transition briefing Clean Water Rule v4.pptx

I'm attaching the "notes" version, which I've just updated to reflect the on-the-fly modifications. Hope this helps! Give a call if you have any questions. Thanks!

Donna

From: Christensen, Damaris
Sent: Tuesday, February 14, 2017 10:47 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: can you send me or put on sharepoint your TPs version of the CWR ppt?

Or is it already on sharepoint?

Tue Mar 14 10:13:41 EDT 2017
Hope.Brian@epamail.epa.gov
FW: PLEASE HELP!!!
To: Non-responsive Internal/Administrative Email Address/Ex.6

For the Daily Reading File

From: Greg Goeser Personal Email / Ex. 6
Sent: Monday, March 13, 2017 11:13 PM
To: Pruitt, Scott <Pruitt.Scott@epa.gov>
Subject: PLEASE HELP!!!

Dear Mr. Pruitt,

Congratulations on your appointment! I've followed your career and I've waited for decades for a common sense leader of the EPA! I'm contacting you directly, because I have no confidence/trust in the St. Paul District. I know your plate is overflowing, so I'll make this as brief as possible.

I'm an international exploration geologist by education, and in my heart. To stay close to my daughters (make sure they were on the right path), I've limited my overseas travel. Because there are limited exploration opportunities in Minnesota (I was one of two geologists who started the PolyMet Cu/Ni project in northern MN in 1998), in 2000, to work in the field and make ends meet, I began doing environmental work. As an exploration geologist, much of my work was cleaning up mining districts after the Soviets, Chinese, and other destructive entities. Since then, I've probably, quietly conducted more wetland delineations than anyone in State history. I've delineated thousands of individual wetlands, thus protecting hundreds of thousands of acres. I love the environment/field and would rather be clinging to the side of a mountain or whacking my way through a jungle, than sitting in a nice safe office.

Prior to the Obama administration, wetland regulations were strict, yet fair. The regulations were basic and relatively easy (for me) to follow. The Wetland Banking system allowed for farmers and developers to replace wetlands, usually at a 2:1 ratio. The EPA/Army Corps were seldom heard from, and were only involved in "navigable waters". The major over-regulating agency was the Minnesota Board of Water and Soil Resources (BWSR).

Since Obama's executive orders, namely the Clean Water Rule (I've attached two short fact sheets), the Corps has claimed jurisdiction over every drop of water on the planet. The local/state regulators have lost any say in all wetland matters. Because they rely on/fight over Federal funding, the local/state regulators, especially BWSR, have become cowardly minions of the Corps. The current Corps requirements for delineations, replacement plans, and wetland banking are so contorted, confusing, and contradictory, that no one has a clue on how to proceed. Now, projects which could be resolved in days, are stretched out for years and then often rejected. The wetland banking system has been destroyed and only the ultra rich, politically-connected, and large corporations can afford to conduct wetland projects. The Corps, with the help of BWSR, have nearly shutdown development and agricultural improvement. The local economies have lost $millions. The cumulative negative effects on the national economy have to be in the $billions. At the same time, the Corps, which is incompetent and has constant turnover, keeps hiring additional political (leftist) "regulators". To top it all, as you well know, the activist EPA/Corps has done more damage than good to the environment: toxic mine waste accidentally dumped into rivers. Having worked and lived in communist hellholes such as Nicaragua and Mongolia, I've never seen a more mismanaged, self-destructive, and fraudulent organization and set of rules as the EPA/Corps and the CWR (and Obamacare). This is insanity!

Please restore the EPA and Army Corps to the organizations that I once admired! Please cut the staff numbers and funding (to the agencies and their state-level surrogates) and refocus their sphere of influence to navigable waters. Please help save the country that I love so much!!!

Sincerely,

Greg J. Goeser

Exploration Geologist/Environmental Scientist

Personal Address / Ex. 6

Personal Phone / Ex. 6

FACTSHEET

CLEAN WATER RULE

#CleanWaterRules www.epa.gov/cleanwaterrule

WHY CLEAN WATER IS IMPORTANT

Clean water is vital to our health, communities, and economy. We need clean water upstream to have healthy communities downstream. The health of rivers, lakes, bays, and coastal waters depend on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities by trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitat for fish and wildlife. People depend on clean water for their health: About 117 million Americans -- one in three people – get drinking water from streams that were vulnerable to pollution before the Clean Water Rule. Our cherished way of life depends on clean water: healthy ecosystems provide wildlife habitat and places to fish, paddle, surf, and swim. Our economy depends on clean water: manufacturing, farming, tourism, recreation, energy production, and other economic sectors need clean water to function and flourish.

WHAT IS THE CLEAN WATER RULE

Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. The Clean Water Rule protects streams and wetlands that are scientifically shown to have the greatest impact on downstream water quality and form the foundation of our nation's water resources. EPA and the U.S. Army are ensuring that waters protected under the Clean Water Act are more precisely defined, more predictable, easier for businesses and industry to understand, and consistent with the law and the latest science. The Clean Water Rule:

> The Clean Water Act protects the nation's waters. A Clean Water Act permit is only needed if these waters are going to be polluted or destroyed.

- **Clearly defines and protects tributaries that impact the health of downstream waters**. The Clean Water Act protects navigable waterways and their tributaries. The rule says that a tributary must show physical features of flowing water – a bed, bank, and ordinary high water mark – to warrant protection. The rule provides protection for headwaters that have these features and science shows can have a significant connection to downstream waters.
- **Provides certainty in how far safeguards extend to nearby waters.** The rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters. The rule sets boundaries on covering nearby waters for the first time that are physical and measurable.
- **Protects the nation's regional water treasures.** Science shows that specific water features can function like a system and impact the health of downstream waters. The rule protects prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they impact downstream waters.
- **Focuses on streams, not ditches.** The rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered.
- **Maintains the status of waters within Municipal Separate Storm Sewer Systems.** The rule does not change how those waters are treated and encourages the use of green infrastructure.

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- **Reduces the use of case-specific analysis of waters.** Previously, almost any water could be put through a lengthy case-specific analysis, even if it would not be subject to the Clean Water Act. The rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features.

The rule protects clean water without getting in the way of farming, ranching, and forestry. Farms across America depend on clean and reliable water for livestock, crops, and irrigation. Activities like planting, harvesting, and moving livestock have long been exempt from Clean Water Act regulation, and the Clean Water Rule doesn't change that. The Clean Water Rule provides greater clarity and certainty to farmers and does not add any new requirements or economic burden on agriculture.

The rule only protects waters that have historically been covered by the Clean Water Act. It does not interfere with or change private property rights, or address land use. It does not regulate most ditches or regulate groundwater, shallow subsurface flows or tile drains. It does not change policy on irrigation or water transfers. It does not apply to rills, gullies, or erosional features.

Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Isolated or "Other" Waters	Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

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ED_001271_00113268-00005 FOIA 2020-001799-0001982

The Clean Water Rule FACT CHECK

#CleanWaterRules www.epa.gov/cleanwaterrule

The Clean Water Rule only protects the types of waters that historically have been covered under the Clean Water Act. The rule does not create any new permitting requirements for agriculture and maintains all previous exemptions and exclusions.It does not regulate most ditches and does not regulate groundwater, shallow subsurface flows, or tile drains. It does not make changes to current policies on irrigation or water transfers or apply to erosion in a field. The Clean Water Rule protects waters from pollution and destruction – it does not regulate land use or affect private property rights. These statements are supported by the text of the rule and its preamble.

A Clean Water Act permit is only needed if a protected water is going to be polluted or destroyed.

FACT: THE CLEAN WATER RULE DOES NOT REGULATE MOST DITCHES

Rule Text § 230.3(s)(2)(iii): "The following are not 'waters of the United States… the following ditches: (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary. (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands. (C) Ditches that do not flow, either directly or through another water, into [a traditional navigable water, interstate water, or the territorial seas.]"
Preamble page 169: "Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE EXEMPTIONS FOR AGRICULTURE

Preamble page 8: "Congress has exempted certain discharges, and the rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of "waters of the United States" to make it clear that this rule does not add any additional permitting requirements on agriculture."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE EROSIONAL FEATURES

Rule Text § 230.3(s)(2)(iv)(F): "The following are not 'waters of the United States' . . . erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary . . . ."
Preamble page 175: "While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE GROUNDWATER

Rule Text § 230.3(s)(2)(v): "The following are not 'waters of the United States… groundwater, including groundwater drained through subsurface drainage systems."
Preamble page 176: "The agencies include an exclusion for groundwater, including groundwater drained through subsurface drainage systems."

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FACT: THE CLEAN WATER RULE DOES NOT REGULATE FARM PONDS

Rule Text § 230.3(s)(2)(iv)(B): "The following are not 'waters of the United States… Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds . . . ."
Preamble page 173: "In the exclusion for artificial lakes or ponds, the agencies have removed language regarding 'use' of the ponds, including the term 'exclusively.' . . . [T]he agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes . . .."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE LAND USE

Preamble page 8: "The rule also does not regulate … land use."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON IRRIGATION

Rule text § 230.3(s)(2)(iv)(A): "The following are not 'waters of the United States… artificially irrigated areas that would revert to dry land should application of water to that area cease . . . ."
Rule text § 230.3(s)(2)(iv)(B): "The following are not 'waters of the United States . . . Artificial constructed lakes and ponds created in dry land such as . . . irrigation ponds . . . ."
Preamble page 8: "The rule also does not . . . affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture . . . ."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE PUDDLES

Rule Text § 230.3(s)(2)(iv)(G): "The following are not 'waters of the United States… puddles."
Preamble page 176: "The final rule adds an exclusion for puddles . . . . Numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON STORMWATER

Rule text § 230.3(s)(2)(vi): "The following are not 'waters of the United States… stormwater control features constructed to convey, treat, or store stormwater that are created in dry land."
Preamble page 177: "This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems . . . . The agencies' longstanding practice is to view stormwater control features that are not built in 'waters of the United States' as non-jurisdictional."

FACT: THE CLEAN WATER RULE DOES NOT REGULATE WATER IN TILE DRAINS

Rule Text § 230.3(s)(2)(v): "The following are not 'waters of the United States… groundwater, including groundwater drained through subsurface drainage systems."

FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON WATER TRANSFERS

Preamble page 8: "The rule also does not … affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for… water transfers."

MORE INFORMATION AT WWW.EPA.GOV/CLEANWATERRULE

ED_001271_00113268-00007 FOIA 2020-001799-0001984

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Thur 2/9/2017 1:37:56 AM
Subject: FW: For consideration: my TPs for the CWR transition briefing
Powerpoint w Notes -- Transition briefing Clean Water Rule v4.pptx

FYI

From: Downing, Donna
Sent: Wednesday, February 08, 2017 8:35 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>
Cc: Able, Tony <Able.Tony@epa.gov>; donnadowning@post.harvard.edu
Subject: For consideration: my TPs for the CWR transition briefing

Hi John and Mindy:

Deliberative Process / Ex. 5

I've also printed ten copies of the Powerpoint as full slides, five as two-to-a-page, 15 copies of the summary table as a stand-alone, and two copies of the notes pages. Because it wasn't a rush job, the printer of course performed perfectly.

Personal Matters / Ex. 6 Good night!

See you tomorrow.

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

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Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Wed 2/8/2017 10:53:20 PM
Subject: FW: For review -- revised transition briefing powerpoint on CWR and WOTUS
Powerpoint -- Transition briefing Clean Water Rule v4.pptx

Deliberative Process / Ex. 5

Donna

From: Downing, Donna
Sent: Wednesday, February 08, 2017 5:45 PM
To: Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: For review -- revised transition briefing powerpoint on CWR and WOTUS

Is attached, per OW and other comments via John. Will bring by 2-per-page hardcopies in case you like to review that way.

Now, onto talking points!

Donna

Deliberative Process / Ex. 5

Donna Downing

Jurisdiction Team Leader

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Washington, DC 20004

To: Goodin, John[Goodin.John@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Wed 2/8/2017 10:45:00 PM
Subject: For review -- revised transition briefing powerpoint on CWR and WOTUS
Powerpoint -- Transition briefing Clean Water Rule v4.pptx

Is attached, per OW and other comments via John. Will bring by 2-per-page hardcopies in case you like to review that way.

Now, onto talking points!

Donna

Deliberative Process / Ex. 5

Donna Downing

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To: Nandi, Romell[Nandi.Romell@epa.gov]
Cc: Able, Tony[Able.Tony@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Wed 2/8/2017 5:33:48 PM
Subject: As requested: final draft powerpoint for "waters of the US" briefing on Thursday, reflecting OGC review
Powerpoint -- Transition briefing Clean Water Rule v3.pptx

Hi Romell:

Deliberative Process / Ex. 5

Please let me know if you have any questions or suggestions. Thanks!

Donna

From: Nandi, Romell
Sent: Wednesday, February 08, 2017 12:18 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Able, Tony <Able.Tony@epa.gov>
Subject: RE: For review & forwarding: draft powerpoint for "waters of the US" briefing on Thursday

Donna –

Deliberative Process / Ex. 5

Romell

(202) 503-8645

From: Downing, Donna
Sent: Tuesday, February 07, 2017 5:13 PM
To: Nandi, Romell <Nandi.Romell@epa.gov>
Cc: Able, Tony <Able.Tony@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: For review & forwarding: draft powerpoint for "waters of the US" briefing on Thursday

Hi Romell (with a cc to the usuals):

Attached please find the draft powerpoint on waters of the United States and the Clean Water Rule, for use at the briefing this Thursday. Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

If reviewers have any comments or suggestions, please let me know asap. Thanks!

Donna

Donna Downing

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To: Kwok, Rose[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Tue 2/7/2017 11:12:21 PM
Subject: RE: For review & forwarding: draft powerpoint for "waters of the US" briefing on Thursday

Thanks, Rose! I'll make these edits as I incorporate whatever other edits come in tomorrow morning from OGC (the "joy" of having the pen!). You're quite right on Deliberative Process / Ex. 5

Donna
PS printing this email as an editing checklist!

From: Kwok, Rose
Sent: Tuesday, February 07, 2017 5:26 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: For review & forwarding: draft powerpoint for "waters of the US" briefing on Thursday

Donna – Deliberative Process / Ex. 5 et.

Deliberative Process / Ex. 5

From: Downing, Donna
Sent: Tuesday, February 07, 2017 5:13 PM
To: Nandi, Romell <Nandi.Romell@epa.gov>
Cc: Able, Tony <Able.Tony@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: For review & forwarding: draft powerpoint for "waters of the US" briefing on Thursday

Hi Romell (with a cc to the usuals):

Attached please find the draft powerpoint on waters of the United States and the Clean Water Rule, for use at the briefing this Thursday. Could you please forward it to OW? The attached reflects input from John, Mindy, Damaris, and Rose (thanks, folks!)

If reviewers have any comments or suggestions, please let me know asap. Thanks!

Donna

Donna Downing
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To: Nandi, Romell[Nandi.Romell@epa.gov]
Cc: Able, Tony[Able.Tony@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Ann Campbell[Campbell.Ann@epa.gov]
From: Downing, Donna
Sent: Tue 2/7/2017 10:12:44 PM
Subject: For review & forwarding: draft powerpoint for "waters of the US" briefing on Thursday
Powerpoint -- Transition briefing Clean Water Rule v2.pptx

Hi Romell (with a cc to the usuals):

Attached please find the draft powerpoint on waters of the United States and the Clean Water Rule for use at the briefing this Thursday.

Deliberative Process / Ex. 5

If reviewers have any comments or suggestions, please let me know asap. Thanks!

Donna

Donna Downing

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To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Able, Tony[Able.Tony@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Tue 2/7/2017 8:43:17 PM
Subject: RE: For quick review: draft powerpoint for Thursday's Waters of the US briefing

Thanks, Damaris, for your input and formatting. I just got some additional suggestions from Mindy and John. I'll will make the latest suggested revisions to the version you've sent.

Thanks also for background on the appendices slides. Do you think we should keep them? (they raise some issues for me, such as "

Deliberative Process / Ex. 5

Stay tuned for the next edition!

Donna

From: Christensen, Damaris
Sent: Tuesday, February 07, 2017 2:16 PM
To: Downing, Donna <Downing.Donna@epa.gov>; Able, Tony <Able.Tony@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>
Subject: RE: For quick review: draft powerpoint for Thursday's Waters of the US briefing

I made a few changes, mostly Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

From: Downing, Donna
Sent: Tuesday, February 07, 2017 1:09 PM
To: Able, Tony <Able.Tony@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: For quick review: draft powerpoint for Thursday's Waters of the US briefing

Hi Tony, Mindy, John, Damaris, and Rose:

Attached is a draft powerpoint presentation on "waters of the US," for use at Thursday's transition team briefing. As you requested, John, it focuses Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Some of the themes the powerpoint is trying to strike include:

Deliberative Process / Ex. 5

I understand Mike S. and others in OW would like the draft powerpoint for their review asap. So, if you have comments/edits/improvements/recommendations, they'll be particularly helpful if received by 4pm today (sorry for the

turnaround!)

Thanks in advance for your help.

Donna

Donna Downing
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To: Able, Tony[Able.Tony@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Tue 2/7/2017 6:09:07 PM
Subject: For quick review: draft powerpoint for Thursday's Waters of the US briefing
POWERPOINT Transition briefing Clean Water Rule v1.pptx

Hi Tony, Mindy, John, Damaris, and Rose:

Attached is a draft powerpoint presentation on "waters of the US," for use at Thursday's transition team briefing.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Some of the themes the powerpoint is trying to strike include:

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks in advance for your help.

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

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Washington, DC 20004

To: Personal Address / Ex. 6
From: Downing, Donna
Sent: Tue 2/7/2017 12:25:10 AM
Subject: Emailing: Outline -- CWR presentation to transition team v1.docx
Outline -- CWR presentation to transition team v1.docx

Your message is ready to be sent with the following file or link attachments:

Outline -- CWR presentation to transition team v1.docx

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

“Waters of the United States” and the Clean Water Rule

February 9, 2017

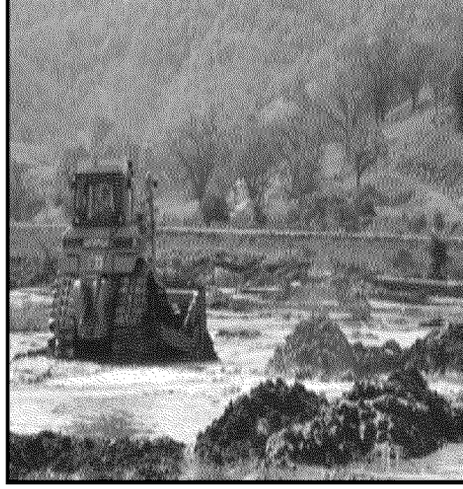
Overview of Presentation

- Waters of the US in broad context
  - CWA
  - Section 404
  - Longstanding regulations
  - Legal challenges
- The Clean Water Rule
  - Scientific basis
  - Rulemaking process
  - Content of CWR
  - Ongoing legal challenges

"Waters of the US" in Broad Context

- "Waters of the US" (WUS) is a threshold term under the Clean Water Act (CWA)
- All CWA programs address "navigable waters," defined in the statute as "waters of the United States including the territorial seas"
  - CWA did not define WUS; Congress left to agencies
- EPA and the Army Corps have defined WUS by regulation since the 1970s. The regulatory definition in place before the CWR dates to the mid 1980s
- Two U.S. Supreme Court decisions since that 1980s regulatory definition did not invalidate the definition, but shaped its implementation

WUS and Section 404



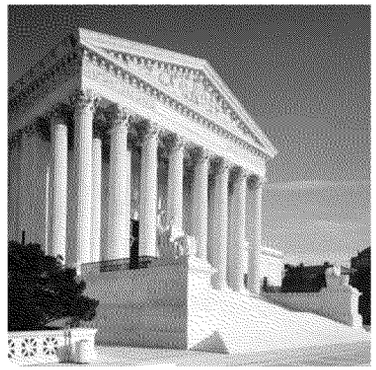
- Same definition of WUS applies to section 404 and other CWA programs
- Section 404 addresses the discharge of dredged or fill material into WUS
- Since 1972 the Army Corps and EPA have jointly implemented the program to significantly reduce the ongoing loss of wetlands and streams, while authorizing tens of thousands of dredged/fill activities annually
  - Congress tasked the Army Corps with operating the 404 permit program and EPA with developing the environmental review criteria under which permits would be evaluated
  - EPA and the Army Corps have jointly developed the definition of WUS, while EPA has the final policy responsibility for its scope

WUS and Section 404, continued

- The Army Corps makes the vast majority of jurisdictional determinations (JDs)
  - This is in part why WUS issues so often arise in the section 404 context
  - However, court decisions about the scope of WUS also have involved the section 402 NPDES and section 311 oil spill clean-up programs
- Even if dredge/fill discharges are into a WUS, a 404 permit might not be required if activity is excluded under 404(f)
  - For example, discharges associated with ongoing farming activities such as plowing, seeding, and cultivation typically do not need a 404 permit.

Mid-1980s Regulatory Definition of WUS

- This is the **definition in use today** during ongoing litigation over the Clean Water Rule
- **Many, but not all, waters are considered to be WUS**:
  - Waters used/historically used/susceptible to use in interstate commerce
  - Interstate waters and wetlands
  - All other waters … the use, degradation, or destruction of which could affect interstate commerce
  - Impoundments of WUS
  - Tributaries of above waters
  - Territorial seas
  - Wetlands adjacent to above waters
  - Excludes: prior converted cropland, waste treatment systems



The Supremes Weigh In

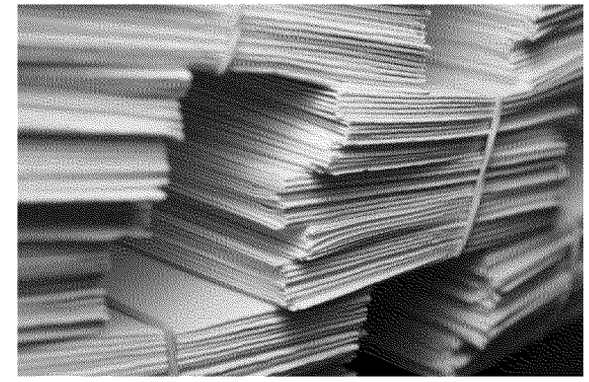
- ***Riverside Bayview*** (1985): Adjacent wetlands are properly part of WUS
- ***SWANCC*** (2001): Presence of migratory birds by itself not enough to make Isolated waters WUS
- ***Rapanos*** (2006): Tributaries, adjacent wetlands. Split decision on what WUS includes
  - Scalia: "Relatively permanent" or at least seasonal waters; wetlands with a "continuous surface connection"
  - Kennedy: Waters with a "significant nexus" affecting physical, chemical, or biological integrity of downstream waters
  - All: WUS includes more than just waters that are navigable

Legal Challenges Posed By *Rapanos*

- *Rapanos* has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinion.
  - These cases arise in more than 2/3 of all U.S. states
  - U.S. position: water jurisdictional if meets <u>either</u> the Kennedy or Scalia standards

- U.S. Circuit Courts of Appeal are split regarding what standard
  - Most hold either Kennedy or Scalia standard can be used
  - One held Kennedy standard only
  - None say Scalia standard only

- Supreme Court has rejected all petitions for review



Why Did the Agencies Develop the Clean Water Rule (CWR)?

- The Supreme Court did not invalidate the 1980s definition of WUS, but discussed its limitations and implications
- Many were confused how to implemented the unchanged definition in light of the Supreme Court decisions
- For more than a decade, EPA and the Army Corps received requests for rulemaking to provide clarity
  - Bipartisan Members of Congress, state and local officials, industry, agriculture, environmental and conservation groups, scientists, builders and developers, and the public

Why Did the Agencies Develop the CWR?

- The agencies wished to clarify protection for streams and wetlands that form the foundation of our nation's water resources. They feed the rivers, lakes and coastal waters that our health and economy depend on.
  - **People depend on clean water for their health:** About 117 million Americans get drinking water from streams that were vulnerable to pollution after *Rapanos*
  - **Our economy depends on clean water:** manufacturing, farming, tourism, recreation, energy production and other major economic sectors need clean water to function and flourish
  - **Our cherished way of life depends on clean water:** healthy ecosystems provide wildlife habitat and places to fish, paddle, and swim

What was the scientific basis for the CWR?

- The agencies' interpretation of the CWA's scope in the rule is guided by the best available peer-reviewed science – particularly as that science informs the determinations as to which waters have a "significant nexus" with traditional navigable waters (TNWs), interstate waters, or the territorial seas
  - Includes the Science Report summarizing more than 1,200 peer-reviewed, published scientific studies which showed that small streams and wetlands play an important role in the health of larger downstream waterways like rivers and lakes
- The Technical Support Document utilizes the Science Report and the articles it cites, as well as additional scientific literature to provide the scientific support for the rule
- The Science Advisory Board commented on both the Science Report and the proposed rule, concluding that much of the proposed rule was supported by available science

SAB Conclusions on the Proposed CWR

- SAB concluded that science **supports the conclusion** that the types of water bodies identified as "waters of the United States" in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters

- Though SAB was supportive of much of the rule, some of their comments **suggested that the proposed rule could go further** in terms of waters that could be considered tributaries and went too far regarding exclusions
  - Advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks
  - Exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification
  - There is a lack of scientific knowledge to determine whether ditches should be categorically excluded

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What process was used to develop the CWR?

- Proposed rule subject to public comment May 2014
  - Received 1.1 million comments, about 20,000 unique, in a 207-day comment period
  - Over 400 stakeholder meetings
  - Interagency review
- Final rule published June 29, 2015
  - Final ORD science synthesis provided much of the technical basis for the rule
- Sixth Circuit stayed the CWR nationwide pending outcome of litigation
  - Agencies using the mid-1980s definition during the stay

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What process was used to develop the CWR?

- **Economic analysis** concluded CWR results in indirect net benefits, informed by comments on proposed rule and other data.
- Agencies held two in-person meetings with **small entity** representatives to discuss their thoughts on how to define WUS. Their input in reflected in the CWR and summarized in a report
- Agencies consulted with **state, tribal, and local officials** throughout the process. The CWR reflects their input, which also is summarized in a report
- For example, held in-person meetings and teleconferences with organizations of elected state/tribal/local officials, following up with numerous additional calls and meetings
- Held a series of meetings with the Local Government Advisory Committee

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What Does the CWR Establish?

- Bright line: Waters that are WUS
  - Verbatim of 1980s rule: Traditional navigable waters, territorial seas, interstate waters, impoundments of WUS
  - Tributaries, adjacent waters: in 1980s rule but with further definitions
    - Tributary: For first time, CWR defines "tributary" as water with "bed and banks" and an "ordinary high water mark" that contribute flow to a traditional navigable water, interstate water, or territorial sea
    - Adjacent: Existing regulations define "adjacent" as "bordering, contiguous, or neighboring." CWR defines and limits "neighboring" for the first time using floodplain and distance concepts. CWR applies adjacency to all waters, not just wetlands, thereby clarifying status of ponds and lakes adjacent to jurisdictional water.
    - Agriculture: CWR does not consider waters "adjacent" that are being used for normal farming, ranching, or forestry activities
- Case-by-Case
  - Waters within certain distances, on a floodplain, or similarly situated, need a significant nexus to be jurisdictional

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What Does the CWR Establish?

- **Bright line: waters that are <u>not WUS</u>**
  - Existing exclusions for prior converted cropland, waste treatment systems
  - New exclusions reflecting public input, such as stormwater management and water recycling systems built in uplands
  - Exclusions for certain ditches, newly added to the regulations
    - Ditches not constructed in streams and that flow only when it rains
    - Ditches not constructed in streams and that have intermittent flow, that do not drain wetlands
    - Ditches not connected to the tributary system
  - Exclusions reflecting longstanding practice, newly added to the regulations, such as irrigated areas that would revert to dry land if irrigation ceased, and farm ponds and other artificial lakes or ponds

Additional information on CWR in Appendix