

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

#### WATERS OF THE UNITED STATES

Mr. CARDIN. I was listening to my colleagues on the other side of the aisle talk about the proposed rule for the waters of the United States, and I am somewhat curious as to where they get a lot of their information because if they read the proposed rule—and I point out that this is a proposed rule—it specifically excludes from waters of the United States certain ditches, wastewater treatment plants, ponds, et cetera. I am going to get into the specifics. But if you listen to their points on the floor, you would think all ditches are covered under the proposed rule—which is now subject to comment—and that is not the case.

I would urge those who are interested to please read the proposed rule and determine for yourself the fact that it does not include many of the examples given by the opponents in clarifying the waters of the United States.

Last week I had a roundtable discussion with a group of scientists and concerned citizens dealing with the progress we have made in the Chesapeake Bay. The Chesapeake Bay is critically important—not to just those who live in the watershed; it is the largest estuary in our hemisphere. There is more coastline on the Chesapeake Bay than on the entire west coast of the United States. It is a national treasure and has been declared that by many Presidents. It is iconic to Maryland and supports a diversity of aquatic life which is important to our lives and to our economy. Mr. President, \$1 trillion of our economy is based on the Chesapeake Bay.

Starting in the 1980s, we recognized that we had a responsibility to do what we could to preserve and clean up the quality of the water within the Chesapeake Bay. Starting with Maryland, Pennsylvania, Virginia, and now expanding to Delaware, West Virginia, New York, the District of Columbia, and the Federal Government, we have a Chesapeake Bay agreement. The most recent, the fourth one, was recently signed. It recognizes that we have a real challenge to deal with the quality of the water in the bay.

We have asked our farmers to do more, and we have provided help to them in the farm bill for conservation practices. We have asked developers to do more by preserving more pervious surfaces and dealing with the loss of acreage of forest land. We have asked local governments to do more as far as dealing with wastewater treatment facility commitments. We have had a partnership between the government and private sectors. All stakeholders are involved because we believe we all have responsibilities. We are not asking one segment to do it alone. All of us are working together.

But, quite frankly, the regulation of the waters of the United States di-

rectly affects the success we are going to have in cleaning the Chesapeake Bay. So the issue we are talking about with the waters of the United States and clarifying that has a direct impact.

I might also tell you that climate change has a direct impact. Those of us who live in the watershed area, yes, we can do our responsibility for reducing our carbon footprint, but we need to get our country engaged in reducing our carbon footprint. We need to do that for many reasons—we need to do that for public health; we need to do that for national security.

Let me remind my colleagues that the Naval Academy, the Aberdeen Proving Ground, Pax River—all critically important to our national defense—are located on our coasts in Maryland and are subjected now to more flooding as a result of sea level increases which, in part, are the result of our activities with climate change. All we ask is that we follow the science.

Let me talk for a moment about waters of the United States because I heard what my colleague said. I have to take us back to 2001 when the Supreme Court issued two decisions concerning the navigable waters and the waters of the United States and added confusion. What this administration is trying to do, what we are trying to do is restore the authority that we all thought was in the law before the two Supreme Court decisions. That is all we are doing—trying to go back to what everyone understood were the regulations of the waters of the United States because the freshwater supply coming into the Chesapeake Bay is critically important to the health of the Chesapeake Bay. So if water goes into the streams, it goes into the bay, and that is of concern to us, and that needs to be regulated under the Clean Water Act.

I will quote from the preamble of the proposed regulation that has been submitted. The preamble says:

The SWANCC and Rapanos decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public and results in significant resources being allocated to these determinations by federal and state regulators.

That is why we had this proposed rule—to clarify the law that gives certainty. How many times have I heard from my constituents: Let us know what the rules are so that we can do our business. That is exactly what this proposed rule is all about.

The National Farmers Union issued this statement:

NFU has long advocated for increased certainty surrounding Clean Water Act requirements for family farmers and ranchers in the wake of complicating Supreme Court decisions. Today's draft rule clarifies Clean Water Act jurisdiction, maintains existing agricultural exemptions and adds new exemptions, and encourages enrollment in U.S. Department of Agriculture conservation programs.

That is their quote. The reason that is—there are 56 conservation practices that are specifically exempt from this regulation, so if farmers are participating in these conservation practices, they don't have to worry about the issues to which some of my colleagues referred.

Let me quote from the proposed regulation itself. The regulation says that the following are not waters of the United States: waste treatment systems, including treatment ponds or lagoons; prior converted cropland; ditches that are excavated, and it gives certain conditions; ditches that do not contribute flow, either directly or through another water, to the waters of the United States, so we have exempted ditches; certain artificially irrigated areas are exempted; artificial lakes or ponds created by excavating and/or diking dry land; artificial reflecting pools or swimming pools created by excavating and/or diking dry land; small ornamental waters created by excavating and/or diking dry land; water-filled depressions; groundwater, including groundwater drained through subsurface drainage systems; and gullies and rills and non-wetland swales.

If you listen to my colleagues, they would tell you that if, as a farmer, you have a ditch on your property that is just on your property, that you are using for irrigation on your property, it would be subject to this regulation. It would not be. It is specifically exempt.

Here is the point.

Mr. HOEVEN. Would the Senator yield?

Mr. CARDIN. Let me finish my point.

Here is the point. This is a proposed regulation. So if you think further clarification is needed, there is an extended comment period. If you think we need to make further clarifications on issues—what we are trying to get at are practices that affect water that will go into our streams and rivers and in my case end up in the Chesapeake Bay watershed, which in trying to clean up the bay we have to deal with.

The success of the Chesapeake Bay Program is that all stakeholders are involved. We use the best science. We need everyone doing their fair share. Therefore, if your activities contribute to water flowing into the Chesapeake Bay watershed through our streams and rivers, yes, you are regulated under the Clean Water Act. But if you have a self-contained ditch that is not involved in that and are using it for irrigation, absolutely not. If you participate in the conservation programs, you don't have to worry about a new set of regulations. That is what this does.

Our true leader on this has been Senator WHITEHOUSE. I thank him very much on the climate change issues, on the environmental issues. He has been on the floor every day.

I want to make sure my colleagues have a chance to express their views on this issue. It is critically important.

I yield for my colleague from Rhode Island.

Mr. HOEVEN. I would ask, would the Senator yield for a question?

Mr. WHITEHOUSE. I would be pleased to yield for a question, but let me make one point first.

I think it is not insignificant that each Senator who spoke against this proposed regulation hails from a landlocked State. Coastal States such as Maryland and Rhode Island have quite a different perspective because we have bays—in Senator CARDIN's case, the Chesapeake Bay; in my case, Narragansett Bay.

You don't have to look much farther than the Gulf Coast to see an example of what happens when landlocked States up the river overload flowing waters with chemicals, such as nitrogen and phosphorus, that have a beneficial use as fertilizer in those landlocked, upland States, but when they run off and come down into smaller tributaries and end up in the mighty Mississippi River and stream down through the middle of our great country and out into the Gulf of Mexico, they create, literally, dead zones in which nothing lives because the water has become anaerobic, meaning it does not carry enough oxygen to support life. Some of these can be vast dead zones, and very often they result in fish kills and crab kills because the species don't have a chance to get out of the way. Suddenly, they are strangling, they are suffocating in their own waters. That is not something we can overlook.

I am willing to listen to my colleagues with upland, landlocked agricultural States tell me how important it is that they be able to load up with fertilizer, grow their crops, and do all of those things. I appreciate and understand that point of view. That is not the only point of view. There are sister States for which that creates a real problem, and it is not fair to come to this conversation and assume that we have nothing to say, that our coasts have no stake in these decisions, and that there is only one side to this argument; that is, how much stuff you can dump out on your agricultural properties. That isn't fair, it isn't accurate, it is not scientific, and it is not good for our country. I think we need to have a good debate in which the coastal States and their imperatives and their perils are also part of the equation.

I yield for Senator HOEVEN's question.

I ask that the time used for Senator HOEVEN's question be charged against Republican time.

Mr. HOEVEN. I thank the Senator from Maryland and the Senator from Rhode Island for coming to the floor and making exactly the type of point I am making.

Thank you for being here. This is the debate we should have, and it should be vigorous, as it is. We should have all Members, whether they are from a coastal State or an inland State, and we should debate every aspect of this

proposed rule. This is important to them. This is something that affects American people regardless of what State they live in. We should have this debate, and then we should vote on this issue.

Mr. WHITEHOUSE. I yielded to the Senator for a question.

Mr. HOEVEN. My question to you is, very simply, first, EPA, in order to provide exemptions, has to maintain that they have jurisdiction in all these areas. That is the very point I am making to the point made by the Senator from Maryland. EPA is now deciding where they have jurisdiction and where they don't. We are not. And they are doing it far beyond the scope of the Supreme Court's rule.

So my question is, if they can decide where they are going to give exemptions, how can you say they are not exerting jurisdiction?

To the good Senator from Rhode Island, every downstream State can allege the issue you made in your earlier point. I understand that. But to both of you, my point is, let's have this debate and then let's vote on behalf of the American people. Would the Senators agree that is what we should be doing in this body?

Mr. WHITEHOUSE. Reclaiming the floor, let me say that—first, a little bit of history as to how we got here because I think that bears very much on the Senator's questions. We had quite a clear set of regulations under the Clean Water Act. Most everybody understood them. There was a standard operating practice that had developed, and into that relatively stable situation came these two Supreme Court decisions that Senator CARDIN referred to, and they cast a constitutional and statutory pall over the scope of the EPA's authority for nonnavigable waters. But—and the Supreme Court gets to do this if they want—they provided very little clarity. So there was vast uncertainty about what was going on now in the wake of these decisions.

So Members of Congress, businesses, agricultural groups, environmental groups, and many other stakeholders asked for this rulemaking. They asked for this rulemaking so that the administrative agency that was going to enforce these provisions could be given the first cut at figuring out how they apply. That is what they did in this rulemaking. They answered the call that came from Congress, agricultural interests, environmental interests, and they came up with a proposed rule. The rule preserves and reiterates all of the current water exemptions and exclusions that preexisted, and it adds even new clarification that excludes certain water features—as Senator CARDIN pointed out—and excludes them outright.

This is the clarification that Congress asked for. This is the clarification that agricultural and environmental interests asked for. And I would submit to my friend Senator HOEVEN that if he doesn't like this result, he

should wait until there is actually a result, participate in the administrative process, and let the EPA know what his feelings are.

If they come out with a final rule—this is just a proposed rule—that he finds intolerable for his landlocked upland agricultural interests, then we will have that debate and we will have an actual rule to argue about. But while he has an open invitation from EPA that says, let me know what your thoughts are and we will consider changing our rule, we shouldn't trump that process. They are the experts in this type of enforcement. We are going to hand it back to them, anyway, because we legislate very broadly.

So let's let them do the process. Let's let them come up with the rule, and then I am ready for this debate all day long. But don't forget our coastal States. Don't forget our bays.

Mr. CARDIN. If the Senator will yield for one moment, I also want Senator HOEVEN to understand the history.

Shortly after the Supreme Court decision many of us filed because there needed to be clarification. We had urged Congress to do that. But it was opposition from the Republicans that prevented us from considering that legislation. They blocked us from considering a congressional clarification as to the Supreme Court decision, and now we are faced with a situation in which the administration is doing what it must do; that is, to provide, under its own authority, where it can act, clarification that it so desperately needed.

As Senator WHITEHOUSE has said, what this regulation is about is clarifying the confusion by the Supreme Court decision as to what is regulated or not. As a result, landowners don't know whether they can do this or not. They don't know. That is the worst of all worlds, when you don't have certainty as to how you need to act, and that does cause speculation that in many cases is not true. But they don't know what the rules are.

So, quite frankly, what the administration rule is patterned after is a lot of discussion we had in the Congress of the United States shortly after the Supreme Court decision as to trying to codify the practice before the Supreme Court decision. There didn't seem to be a lot of people upset with the manner in which the EPA was regulating the waters of the United States prior to the two Supreme Court decisions in 2001. That is what the regulation is aimed at—getting us to before the point of the Supreme Court decision and where Congress was trying to legislate but blocked by Republicans shortly after the decision.

I think Senator WHITEHOUSE is exactly right. What we should be doing now if we have concerns is expressing them. First, it might be helpful to read the regulation and see what is in it and what is not in it, what is regulated and what is not regulated. If there are things in here we think are wrong, that

is what a comment period is about. Let's wait until we get the final regulation and then, yes, we will have a debate, I am sure, at that time, which is appropriate, and then we can debate exactly what the regulation says.

Mr. WHITEHOUSE. May I ask the Senator from Maryland to comment on another point.

We are having a conversation right here and right now on the floor about a specific EPA regulation. But those of us who are here on the floor a lot and those of us who pay attention to these issues can't not see this conversation in the context of a larger conversation that is taking place in the Senate. That causes me to inquire: When will a Republican come to the floor and ever support EPA on anything? When will that happen?

I was just speaking in the House at a hearing, and Representative ELIJAH CUMMINGS, the ranking member of the committee that I was testifying before, pointed out that they were coming up on the House Republicans' 500th vote attacking the environment in the House. Now, we know they have tried to repeal ObamaCare 50-plus times—but 500 attacking environmental regulations? I can't not see this in that larger context of a party that has simply thrown over its proud environmental history and just consistently takes the position of the polluter almost as a reflex.

Mr. CARDIN. Senator WHITEHOUSE is exactly right. We were together in the hearing in the Environment and Public Works Committee, where we had many previous administrators from the Environmental Protection Agency. There were those who served under Democratic administrations and Republican administrations.

Mr. WHITEHOUSE. If I remember correctly, we had four from Republican administrations.

Mr. CARDIN. Four from Republican administrations—and as was pointed out in the hearing where we were talking about the Clean Air Act, it was passed by bipartisan support in Congress and signed into law by President Nixon, and it was a proud moment.

We have done many analyses that show the regulations issued under clean water and clean air pay back dividends far in excess of compliance costs, such as 40 to 1. There are people who can breathe and not have to worry about an asthma attack because we have clean air. There are those who don't get sick because of pathogens that may be in our drinking water or people getting sick just bathing on our shores. We reduced that, and the number of premature deaths we have eliminated.

The public health benefit of the Clean Water Act and Clean Air Act pays back multiple dividends to people of this country, and that is why this has never been a partisan issue. Quite frankly, the Chesapeake Bay Program—the partnership—has never been a partisan issue in Maryland.

Some of our strongest benefactors—the people who have caused us to have this type of unity—have been Republican leaders in our State, along with Democratic leaders. We don't even know the party it ought to be. This has been a public calling because we know the seriousness of the issue.

The Environmental Protection Agency has a long history of nonpartisan activities in order to protect the public health of the people of this country, and it is extremely disappointing that there is no cooperation at all.

Mr. WHITEHOUSE. It is an anomaly. It is a historical anomaly that the present-day Republican party finds itself in this position where they will only come to the floor to attack and try to discredit the EPA. The only time they come to talk about the EPA is to oppose what the EPA is doing. They will never come to the floor and admit climate change is real and we should do something about it. They will never do that. The position that is articulated most frequently on this floor is the position that climate change is a hoax. Even young Republicans think that idea is preposterous, but that is as far as we get in trying to have a conversation on that issue. The other side has just gone dark on dealing with climate change. They simply won't discuss it or they send out as their champions the people who claim it is not real. That makes things a little bit awkward. And always—always—where there are two sides of the ledger, they look just at the one side. They look just at the polluters' side. They look just at the upland farmers and their nitrogen and their phosphorus, and they won't look at what that means to our coastal bays and coasts and harbors. They look only at the money that a polluter has to spend to clean up their powerplant, and they don't look at the savings to the rest of the public from that cleaned-up powerplant.

Senator CARDIN mentioned the savings from the Clean Air Act and the Clean Water Act. I can be specific about the Clean Air Act savings. It is \$30 in value to all regular American families for every \$1 the polluters had to spend to clean up their act. So for every \$1 spent by polluters to clean up their act, it paid \$30 in benefit to the American public. Yet they will only look at the \$1. They never talk about the rest. They have blinders on that oblige them only to consider the point of view of the polluters. I never hear anything else.

I urge and I challenge my colleagues to get out of that trap. The American people are not with you on this. You are wrong on the science. This general attack on the environment at this stage in our history will stain the party's brand if it is not corrected. They have got to come back and join the debate on a platform of fact and in a context of willingness to look at both sides of the ledger.

Madam President, I see colleagues on the floor who I am sure seek time, so I will yield the floor.

The PRESIDING OFFICER (Ms. BALDWIN). Senator from Virginia.

#### IRAQ

Mr. KAINÉ. Madam President, I rise to discuss the current crisis in Iraq. In particular, I wish to discuss an important question: Would Congress need to approve any U.S. military combat action in Iraq?

Last week, the President summoned congressional leadership to the White House to discuss the deteriorating situation in Iraq and a potential U.S. response. Press reports of the meeting had Members quoting the President as saying he had all necessary authority for military action already, and some accounts had the congressional leaders also agreeing that the President had necessary authority.

I do not believe this President—or any President—has the ability without congressional approval to initiate military action in Iraq or anywhere else, except in the case of an emergency posing an imminent threat to the United States or its citizens.

I also assert that the current crisis in Iraq, while serious and posing the possibility of a long-term threat to the United States, is not the kind of conflict where the President can or should act unilaterally. If the United States is to contemplate military action in Iraq, the President must seek congressional authorization.

Let me point out that the White House has been in significant consultation with congressional leadership and Members in the past weeks, and that consultation is important and it is appreciated. But it is not the same thing as seeking congressional authority. That has yet to be done, and it must be done if the United States intends to engage in any combat activity in Iraq.

A word about the law. The Framers of the Constitution had a clear understanding regarding decisions about war. Congress must act to initiate war. A war, once initiated, is then managed by the President as Commander in Chief.

The principal drafter of the Constitution, Virginian James Madison, often explained why the allocation of power was drawn in this way.

The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war to the Legislature.

The Framers did understand that a President must be able to act in an emergency to protect the United States or its citizens even prior to congressional approval. That is especially the case in the day when Members of Congress, upon the recess, would ride horses back to Vermont or wherever they lived. The President had to be able to act if the United States or an