

Testimony of William W. Buzbee

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Agency and Army Corps of Engineers “Waters of the United

States” Proposed Regulations as Published in the Federal Register

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My name is William Buzbee. I am a Professor of Law at Emory University School of Law, where I am director of Emory's Environmental and Natural Resources Law Program. I am about to move to Washington where this summer I will be joining the faculty at the Georgetown University Law Center. I am also a member-scholar of the not-for-profit regulatory policy think-tank the Center for Progressive Reform.

I am pleased to accept this Committee's invitation to testify regarding the new proposed "waters of the United States" regulations published in the Federal Register by the Army Corps of Engineers (the Army Corps) and the United States Environmental Protection Agency (EPA) on April 21, 2014. As a professor asked to testify due to my expertise, not as a partisan, representative of any organization, I will seek to provide context leading to these proposed regulations, comment on the choices made by EPA and the Army Corps, and assess the legality and logic of the proposed regulations.

My background and past involvement with the "waters of the United States" question:

This is not my first involvement with the question of what is protected as a "water of the United States" under the CWA. As a result of my work on environmental law and federalism, I served as co-counsel for an unusual bipartisan amicus brief filed in *United States v. Rapanos*, 547 U.S.715 (2006) (*Rapanos*). This brief was filed on behalf of a bipartisan group of four former Administrators of the United States Environmental Protection Agency (EPA). Those former US EPA Administrators included Russell Train, who served under Presidents Nixon and Ford, Douglas Costle, who served under President Carter, William Reilly, who served under the first President Bush, and Carol Browner, who served under President Clinton. Despite their different party backgrounds and years of service, all four shared the same views about the importance of retaining longstanding protections of America's waters. This bipartisan EPA Administrators' brief was aligned in *Rapanos* with the George W. Bush Administration's arguments before the Supreme Court, several dozen states, many local governments, and an array of environmental groups as well as hunting and fishing interests. All asked the Supreme Court to uphold longstanding regulatory and statutory interpretations regarding what is protected as a "water of the United States," emphasizing the centrality of the "waters" determination to all of the Clean Water Act. After all, although this question of what are protected "waters" is often discussed with a focus on wetlands and tributaries and especially dredging and filling restrictions long set by Section 404 of the Clean Water Act, the "waters" issue is the key jurisdictional hook for virtually all of the Clean Water Act. This includes, among other things, direct pollution industrial discharges under Section 402 of the Clean Water Act and its National Pollutant Discharge Elimination System (NPDES) program, as well as oil spill and water quality components of the Act.

After the Court's splintered and confusing ruling in *Rapanos*, I testified during the summer of 2006 before the Fisheries, Wildlife, and Water subcommittee of the United States Senate

Committee on Environment and Public Works about the implications of the *Rapanos* decision. Shortly thereafter, I testified at a December 2007 hearing of the Senate Committee on Environment and Public Works, also discussing the implications of these cases and regulatory and judicial developments since *Rapanos*. I also testified in 2008 at a House hearing held by the Committee on Transportation and Infrastructure regarding a proposed bill referred to as the Clean Water Restoration Act.

Earlier in my legal career, I counseled industry, municipalities and governmental authorities, states and environmental groups about environmental law, pollution control, and land use issues under all of the major federal environmental laws, as well as state and local laws. As a scholar, I have written extensively about related issues, with a special focus in recent years on regulatory federalism, especially environmental laws and their frequent reliance on overlapping federal, state and local environmental roles. I have published books with Cornell and Cambridge University Presses, and Wolters Kluwer/Aspen. My publications have appeared in *Stanford Law Review*, *Cornell Law Review*, *NYU Law Review*, *Michigan Law Review*, *University of Pennsylvania Law Review*, and in an array of other journals and books. I have taught at Emory since 1993, but also visited at Columbia, Cornell, Georgetown and Illinois Law Schools. As mentioned above, I will be leaving Emory for Georgetown University Law Center in a few months.

The purpose and logic of the new “waters” proposed regulations, in brief:

These proposed regulations and a massive accompanying science report referenced and summarized in the Federal Register notice are an attempt to reduce uncertainties created by three Supreme Court decisions bearing on what sorts of "waters" can be federally protected under the Clean Water Act. The two most important recent cases are the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) and *United States v. Rapanos*, 547 U.S.715 (2006) (*Rapanos*). Judicial and regulatory treatments of these cases and the earlier related decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), have resulted in an increasingly confused body of law, creating both regulatory uncertainty and occasionally bold new assertions about reduced protections for previously jurisdictional "waters of the United States." These cases, and resulting confusion, have increased regulatory transaction costs for everyone and reduced the protections afforded to America's waters. The proposed 2014 "waters" regulations are a logical and legally well justified means to bring clarity to the law and, to the extent permissible under the Supreme Court's recent decisions, restore protections long provided to America's waters during three decades of bipartisan agreement about when and why various sorts of waters should be protected. If finalized, they should greatly reduce legal uncertainty, regulatory skirmishing, and attendant litigation resulting from the uncertain intersection of these three important cases.

I will make five main points in this testimony:

First, I will explain very briefly how the question of what "waters" are protected matters not just for wetlands and tributary protections, but for industrial discharges of pollution. Furthermore,

the various types of waters protected perform many functions of importance to businesses and governments at all levels. Business, health, recreational, and environmental interests are all at stake here. Surely this Committee will hear from some business interests arguing against the proposal of the Army Corps and EPA, but business interests are undoubtedly on both sides of this issue, with hunting, fishing, boating, recreation, and tourism linked businesses especially dependent on protection of America's waters. And because pollution and filling of America's waters threaten low cost but high value wetlands functions and water used for agricultural purposes and for drinking water, and also water quality in drought prone areas, the despoiling or filling of America's waters would be immensely costly.

Second, I will show how the regulatory choices reflected in these regulations are responsive to Supreme Court law and also the views of a majority of the Supreme Court, at least when it last addressed related questions.

Third, these proposed regulations reveal that EPA and Army Corps have responded to criticisms of supposed limitless claims of federal power by retaining and solidifying exemptions.

Fourth, and perhaps most importantly, the regulations link a massive survey of peer reviewed science of waters' functions with a tiered and nuanced approach. This approach answers criticism that the federal government is going too far and protecting areas of no value relevant to the Clean Water Act. If critics can find flaws in the science or proposed regulatory categories, they can and should produce their own contrary support and call for correction in the now ongoing notice and comment regulatory process.

Lastly, in the initial heated attacks on these proposed regulations, critics failed to note and credit a major change that removes the most expansive and least water-linked historic grounds for federal claims of jurisdiction. For decades, federal jurisdiction has existed for "other waters" of various sorts merely upon several sorts of showing that the harming activity or uses of the waters were linked to industry or commerce. This was, in effect, a commerce-linked sweep up provision. The new proposed regulations delete these longstanding grounds for protection, and if finalized would now link Clean Water Act jurisdiction to what the best peer reviewed science indicates deserves protection.

Point I : The extent of federally protected waters matters to far more than just wetlands regulation and explains the longstanding federal bipartisan consensus

The question of what "waters" are federally protected is not a matter that only concerns allegedly marginal waters that, as often presented by critics of the longstanding protective consensus, look more like land or involve the outermost reaches of wetlands protection. The question of what are protected "waters of the United States" concerns the very linchpin of federal Clean Water Act jurisdiction. It does indeed supply the hook for Section 404 "dredge and fill" coverage, but also provides the jurisdictional prerequisite for Section 402's requirement of permits for industrial pollution discharges under the National Pollution Discharge Elimination System (or NPDES). It also underpins efforts to protect water quality, protect drinking water, provide habitat, and buffer against storm surges and flooding. Furthermore, since the 1970s and still today on the Supreme

Court, the longstanding consensus has been to protect far more than just waters used in the literal sense for shipping-linked navigation. The Clean Water Act has been one of America's great success stories, helping to restore many of America's rivers from highly polluted conditions to water that often now is clean enough for fishing, recreation, and even drinking water. The Act also greatly reduced the pre-Clean Water Act tendency to see wetlands as worthless and appropriate for filling. Nevertheless, many parts of the country still suffer from degraded water quality, and threats to wetlands and tributaries still arise. Everyone may share a common interest in protecting water quality and wetlands' hugely valuable functioning. Nevertheless, the ability to pollute with impunity or convert for private gain a tributary or wetland into land for development or other commercial use can generate private wealth, even if others downstream are economic losers. Hence, despite a broad consensus that America's rivers, tributaries and wetlands should be protected, clashes over particular applications of the law are a near constant.

Until the 2001 Supreme Court *SWANCC* case, the law and underlying regulations reflected a stable bipartisan consensus of almost thirty years that protection of America's waters through stable Part 328 regulations was good policy. However, *SWANCC* and the 2006 *Rapanos* case unsettled that longstanding bipartisan consensus, breeding legal uncertainty that the new Army Corps and EPA regulations seek to address. As suggested by a majority of Supreme Court justices in *Rapanos*, new regulations responding to these two cases and linking what are protected "waters" to sound science could reduce such uncertainty, both protecting waters that matter and reducing regulatory uncertainty that benefits no one.

Point II: The new proposed "waters of the United States" regulations are an appropriate response to the Supreme Court's recent cases:

Although both *SWANCC* and *Rapanos* unsettled the longstanding protective and bipartisan consensus about what "waters" were federally protected, both cases created considerable legal uncertainty that has led now to over a decade of disagreement and skirmishing before Congress, agencies, and the courts. However, a six justice majority in *Rapanos* embraced the role of expert regulation to clarify the appropriate line between land and water. This included Chief Justice Roberts, who bemoaned the lack of responsive clarifying regulations post-*SWANCC*, and Justice Kennedy, who penned a swing vote opinion that is widely viewed as the most authoritative *Rapanos* opinion. Justice Kennedy fleshed out how a "significant nexus" needs to be shown to federally protect some waters whose linkages to navigable waters and functioning makes them of possibly marginal importance; "alone or in combination," the relationship with navigable waters much be more than "speculative or insubstantial." *Rapanos*, 547 U.S. at 780. Justice Kennedy explicitly recognized that many questions about what sorts of waters deserve protection could be addressed via categories set forth by regulation, although he also appeared to call for case-by-case determinations in other settings. The four dissenters, all of whom joined an opinion by Justice Stevens, would have affirmed the regulators' judgments attacked in *Rapanos*; they emphasized the importance of judicial deference to expert regulatory judgments about what

waters should be protected. Thus, along with Chief Justice Roberts and Justice Kennedy, six justices embraced an ongoing role for regulation to bring clarity to the law. In addition, an earlier unanimous Supreme Court in *Riverside Bayview Homes* embraced deference to regulatory judgments about where to draw the line between land and water. There undoubtedly remains legitimate room for regulations to bring greater clarity to this body of law.

The proposed regulations at issue in today's hearing respond directly and reasonably to these Supreme Court calls. They protect some waters by category, basing that judgment on a comprehensive review of peer reviewed science about the linkages, value and functions of such categories of waters. Some other types of waters are identified as possibly falling under federal jurisdiction, but the jurisdictional determination has to follow a water site-specific review to see if a "significant nexus" exists adequate to justify federal protection. Furthermore, the proposed regulations offer additional guidance about what "significant nexus" analysis should consider, building on Justice Kennedy's *Rapanos* language and providing additional guidance for what regulators and those seeking a jurisdictional determination should consider.

Hence, by protecting some waters by category and others on a case-by-case basis if satisfying "significant nexus" analysis, and in all instances hinging such regulatory judgments to a comprehensive survey of peer reviewed science, the Army Corps and EPA have respected Supreme Court edicts and signals. Furthermore, these proposed regulations also show fealty to the Clean Water Act's explicit goal of protecting the "chemical, physical, and biological integrity" of America's waters by reducing pollution discharges and requiring permits before discharging any pollutants into such waters, whether in the form of industrial pollution or fill.

Point III: The proposed regulations make explicit several categories of activities or waters not subject to federal jurisdiction

A persistent refrain in recent years and regarding the proposed regulations under discussion today is that the jurisdiction being claimed borders on the limitless. This is most evidently erroneous in the proposal's creation of both categorically protected waters and others that must be assessed on a case-by-case basis. However, the proposed regulations go further, in new Section 328.3(b) making explicit that several types of otherwise potentially debatable waters are not "waters of the United States." These include (with additional more precise language): waste treatment systems; prior converted cropland; several sorts of ditches that are upland or do not contribute flow to otherwise regulated waters; and several types of "features" such as artificially irrigated areas that would revert to upland without irrigation water, artificial lakes, ponds, pools and ornamental waters, construction-linked water-filled depressions, groundwater, and gullies, rills and non-wetland swales. Several of these exemptions appear to be in direct answer to criticisms in court briefs and congressional testimony that federal jurisdiction has bordered on the limitless.

Point IV: The proposed regulations' link to a massive survey of peer-reviewed science about waters' connectivity, values and function answers responds to the most prevalent criticism of "waters" federal jurisdiction and puts all on notice

Over the past decade, a common claim of critics of federal jurisdiction has been that waters—or sometimes lands—can and are claimed to be protected for no reason relevant to the Clean Water Act's purposes. And on this issue and in other battles over regulation, critics have called for “sound science” and “peer reviewed” science to underpin regulatory judgments. The Army Corps and EPA have taken this to heart, for the first time pulling together a massive survey of peer reviewed publications about the connectivity, values, and functions of various types of waters. This report is, I believe, under review by the Science Advisory Board, and also has been made public for review and comment. In addition, the Corps and EPA in their proposed regulation's Federal Register notice explain how they interpret this report and the science in deciding what types of waters are categorically protected, subject case-by-case to “significant nexus” analysis, or not protected.

I am unclear what action, if any, this Committee might choose to take about these proposed regulations, but this pending notice and comment process and public vetting of the accompanying science report are providing a valuable open, transparent, and judicially challengeable process. If critics can point to flaws and identify better peer reviewed published science, they now have such an opportunity.

Point V: The Army Corps and EPA in the proposed regulations have deleted the longstanding "other waters" commerce-linked sweep-up provision, thereby linking protections to science and limiting federal power

In the proposed regulations, a longstanding additional grounds for federal jurisdiction has been deleted. This provision, the former Section 328.3(3) “other waters” paragraphs, provided federal jurisdiction to protect over a dozen sorts of waters upon a showing that their “use, degradation or destruction . . . could affect interstate or foreign commerce” or be used by “interstate or foreign travelers” for “recreational or other purposes,” for fishing-linked commerce, or for “industrial purposes by industries in interstate commerce.” This provision basically identified types of waters but made them protectable based on their commerce-linked uses or values. This regulation was consistent with longstanding understandings of the 1972 Clean Water Act amendments and the congressionally intended reach of federal power. However, both the *SWANCC* and *Rapanos* decisions raised questions about whether Clean Water Act jurisdiction could focus on a water's commercial or industrial uses or the impacts of a water's degradation without regard to the water's functions or links to navigable waters.

I will not here opine on whether this section's deletion was legally necessary or prudent. I will, however, note that the Corps and EPA have decided to answer critics and eliminate uncertainty by deleting this section in favor of now linking *all* jurisdictional “waters of the United States”

determinations to what the science shows. Since most pollution and filling activity is undoubtedly commercial and industrial in nature, and little today is not linked to interstate commerce, this regulatory deletion is a potentially significant concession. Again, the proposed regulations choose to link regulation to peer reviewed science and cut back on the broadest possible grounds for jurisdiction.

Conclusion

The legal uncertainty of recent years has benefitted no one. For those concerned about protection of America's waters, regulatory uncertainty has led to regulatory forbearance and some problematic or erroneous regulatory and judicial decisions leaving important waters unprotected. For those needing to make business decisions, regulatory uncertainty has also raised costs. By linking the "waters of the United States" question to peer reviewed science and clarifying which waters are subject to categorical or case-by-case protection and revealing the reasons for such judgments, the Corps and EPA have moved the law in the direction of certainty and clarity. Undoubtedly some will not like where they have chosen to draw their lines, but this is an area calling for difficult, expert regulatory judgments. There was a reason for the thirty years of bipartisan consensus in favor of broadly protecting America's waters. These proposed regulations, if finalized in a similar form, could perhaps once again bring clarity and stability to the law, while also respecting the protective mandates of the Clean Water Act.