



MAY 24, 2016

EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL – IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES

UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FOURTEENTH CONGRESS, SECOND SESSION

HEARING CONTENTS:

MAJORITY STATEMENT

Senator Jim Inhofe [\[view pdf\]](#)

WITNESS STATEMENTS

Don Parrish [\[view pdf\]](#)

Senior Director, Regulatory Relations, American Farm Bureau Federation

Damien Schiff [\[view pdf\]](#)

Principal Attorney, Pacific Legal Foundation

Valerie L. Wilkinson [\[view pdf\]](#)

Chief Financial Officer, EGS Companies, on behalf of National Association of Homebuilders

William W. Buzbee [\[view pdf\]](#)

Professor of Law, Georgetown University Law Center

Scott Kovarovics [\[view pdf\]](#)

Executive Director, Izaak Walton League of America

AVAILABLE WEBCAST(S)*:

[\[Watch Full Hearing\]](#)

COMPILED FROM:

- <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>

** Please note: Any external links included in this compilation were functional at its creation but are not maintained thereafter.*

Opening Statement – Senator Inhofe
Subcommittee Hearing – February 9, 2016
**“Federal Interactions with State Management of Fish and
Wildlife”**

We meet today to discuss the federal government’s encroachment on state rights to manage fish and wildlife populations. The North American Model of Wildlife Conservation dictates that fish and wildlife are for the non-commercial use of citizens and should be managed in a way that ensures they are available at the optimum population levels indefinitely. There is certainly a role for both the states and the federal government in this process.

In recent years, however, the federal government has expanded its role in both managing populations, and dictating how states should manage populations. Not only do states fund much of their conservation and management programs through local excise taxes, but they also have more on-the-ground expertise about local populations. Therefore, states should have a significant role in working with the federal government and the private sector to ensure the most sensible fish and wildlife management programs are adopted and implemented.

In Oklahoma, we have worked together with local landowners, businesses, and state agencies to develop a plan for the conservation of the lesser prairie chicken. The Five State Plan has worked. In fact, estimates show that population numbers for the lesser prairie chicken climbed by almost 25% between 2014 and 2015. This is just one of many examples of the strength and success of state management plans, when given the opportunity to thrive.

This hearing today explores the need to re-balance the relationship between federal and state governments. More directly, states must have more control over their fish and wildlife populations. I thank Senator Sullivan for holding this hearing today and I look forward to the testimony of our witnesses.

TESTIMONY SUBMITTED FOR THE RECORD

**TO THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE**

**“EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL –
IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES”**

MAY 24, 2016

**Prepared By:
Jody Gallaway
California Farm Bureau Member and
President and Senior Regulatory Biologist
Gallaway Enterprises**

INTRODUCTION

I appreciate the opportunity to provide testimony for the record about the problems my clients are facing with agency interpretations of farming exemptions and how the final Clean Water Rule (WOTUS) will exacerbate a serious challenge facing farmers. I am Jody Gallaway, President and Senior Regulatory Biologist at Gallaway Enterprises, an environmental consulting firm I founded in 1998 to navigate the Clean Water Act (CWA) permitting process for private citizens, farmers, builders, and local, federal, and state agencies throughout California. I am here as a California Farm Bureau member. I was raised on an olive and hay ranch in northern California and raise a commodity myself, which is a unique background among environmental consultants who provide CWA services. Our company’s guiding philosophy is to let science make decisions and not allow ourselves to be advocates for our clients. We take very seriously our obligation to base environmental analysis on science, effectively balancing both environmental ethics with practical development solutions. I work directly with the U.S. Army Corps of Engineers (Corps) on CWA permits and have taken a serious interest in both Corps’ and the Environmental Protection Agency’s (EPA) proposed final Clean Water Rule, also known as the waters of the United States rule (WOTUS).

I will explain how the CWA is being abused by regulators to thwart, interrupt, and challenge existing farming operations. I will share my expert opinion on how the new WOTUS rule could be used to further these assaults. I will offer suggestions to alleviate the attack on agriculture.

It was a difficult decision for me to provide testimony to this committee. I hesitated to put my name, company, and twelve employees at risk because our work depends on maintaining a professional relationship with California-based Corps staff in the Sacramento, Redding, and San Francisco offices. I am concerned that my decision to provide testimony could result in retribution from Corps regulators resulting in even greater delays on our permitting and delineation review projects.

However, the encouragement of my employees and clients empowered me to provide this testimony today. Our collective frustration, concern, and the challenges we face are at the highest I can remember at any time over the last 15 years.

While the WOTUS rule was created by two agencies, I believe the EPA is completely disconnected from the Corps' implementation on-the-ground. EPA claims that the rule helps agriculture by creating certainty, improving the permitting process. It also claims the regulations do not create an economic burden but the practical implications are that the new rule gives both EPA and the Corps broad latitude and seemingly limitless discretion to regulate. In many cases, Corps regulators are literally a law unto themselves with no accountability. As I will discuss further, many have varying, arbitrary interpretations of the congressionally authorized "normal farming exemptions." These exemptions include plowing, changing from one crop type to another, what constitutes a ditch and a puddle, and "indirect" flows to a tributary. Perhaps most frustrating is the regulators' unbounded discretion to regulate based on their interpretation of the term the ordinary high water mark.

The EPA requires farmers to obtain a CWA permit when farming practices fail to meet the narrowly defined exemptions. From my firsthand experience, the complexity and high cost make

it nearly impossible for a farm to secure a CWA permit in California.

For all permits, the applicant needs to conduct a formal delineation of WOTUS... Using the draft delineation, the applicant would determine the level of impact associated with the agricultural project. From here, the applicant must seek a jurisdictional determination (JD) or apply for a permit. The level of impact dictates the type of permit for which the farmer may apply. I will explain this process in more detail later in this testimony.

Historically, when I and other consultants had a different interpretation of a regulator's site specific WOTUS jurisdictional determination, we worked out differences in a professional, respectful manner to arrive at science-based solutions. Over the last few years, the atmosphere of professionalism, collaboration, and compromise has deteriorated. I have great appreciation for the Corps' role and there are many great, passionate regulators working for the Corps. However, individual personalities can sometime make it extremely difficult to maintain professional working relationships when individual regulator interpretations lead to disagreement over implementation of agency guidance and protocol. Such disagreements often result in substantial and very costly project delays.

Early last year, it became apparent that regulators in our area were jumping the gun and implementing the proposed WOTUS rule before it became final in August 2015. One of the first impacts was a significant expansion of jurisdiction. I saw it when the Corps started automatically regulating additional features not historically hydrologically connected. Specifically, for the first time, Corps regulators expanded jurisdiction to features that could not be seen on the ground with the human eye. Our clients, who were in various planning stages of agricultural, development, and infrastructure projects, were concerned, confused, and deeply frustrated. In one case a regulator required that we indicate hydrological connections by drawing arrows on a delineation map and indicating that sheet flow connected waters. The Corps does not regulate sheet flow or subsurface flow. When we refused the result was two months delay and eventually the applicant withdrew his JD request.

My clients typically experience a delay of 3-4 months before a Corps regulator will even acknowledge receipt of a permit application or request for a jurisdictional determination (JD). It is common practice for a JD request to take more than twelve months to complete. More often than not, our clients are so discouraged by the Corps' lack of progress and inconsistencies that they withdraw their JD requests.

Recently, many of our projects were delayed because Corps staff said they were waiting on implementation guidance from the EPA and others told us it was "too dry" and that our project should wait until it rained again. Needless to say, some of our projects are still delayed.

Regarding projects that were moving forward, jurisdictional interpretations were inconsistent. We have seen individual regulators on the same project make ordinary high water mark determinations that vary by more than 50 feet which can significantly impact a project.¹ As a professional wetland delineator with over 15 years' experience it is challenging, if not downright scary, to give my clients advice on the nature, location, and extent of jurisdictional features, given the wide disparity of individual regulator interpretations of CWA jurisdiction.

The evolving, inconsistent, and unreasonable positions Corps regulators take on many issues has drastically reduced collaboration and coordination. Several years ago, the Corps would be consulted on projects, methodology, and process. Now, many consultants, professionals, agencies, farmers, and developers view the Corps with a sense of fear and are unwilling to discuss projects with them or seek clarification or advice since it's common for Corps staff to launch investigations into applicants, especially farmers, when they approach the Corps for assistance.

The Corps uses classified aerial photography, LIDAR images, and other resources that are not publicly available to track farming activities and interpret the potential for Waters to occur. In one recent situation, we needed to have aerial photos de-classified in order to understand what the Corps was claiming to be Waters. The WOTUS rule allows regulators broad authority to

¹ Inconsistent ordinary high water mark findings by regulators is nothing new. See "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO Report, February 2004, available at: <http://www.gao.gov/new.items/d04297.pdf>.

make Waters determinations based on aerial photo interpretation rather than with field data. On one recent project a Corps regulator insisted that we map a large feature as a wetland because, based on her interpretation of an aerial photo, the feature looked like a wetland. It was in fact exposed lava rock, we refused, resulting in additional field reviews and delays.

On two projects in 2015, applicants spent tens of thousands of dollars to identify and map waters of the U.S. for the express purpose of developing an agriculture project to avoid any impacts. Both applicants submitted the delineation to the Corps seeking a jurisdictional determination. They stated their intent to develop portions of their properties into agricultural operations in such a manner as to completely avoid waters of the U.S. In both cases, the Corps threatened to pursue violations for activities that occurred on their farms related to road building and construction of stock ponds, even when those activities took place years before the farmer owned the property.

The new WOTUS rule will be worse. It provides the Corps with the ability to use historical aerial photographs dating back to an undetermined period of time to determine jurisdictional waters and evaluate agricultural activities and farming practices. This is happening now during the murky pre-rule phase even as 6th Circuit Court of Appeals has a stay on the rule. Regardless, the final WOTUS rule legitimizes this approach. The WOTUS rule uses previously undefined terminology, adds malleable terms like “floodplain”, and lays out methods for individual regulators to determine jurisdiction over features that can’t be seen on the ground or that may have existed in a historic context. The WOTUS rule contains significant internal inconsistencies with regards to Corps jurisdiction of subsurface flows, on page 37090 it claims that subsurface flows are not WOTUS and on page 37081 subsurface flows can be used to assert jurisdiction. The following is an excerpt taken from the WOTUS rule that demonstrates the lack of clarity, and provides ample opportunities for vast interpretation.

“When determining the outer distance threshold for an “adjacent water” the line is drawn perpendicular to the ordinary highwater mark or high tide line of the traditional navigable water, interstate water, territorial seas, impoundment, or cover tributary and extended landward from that point. If there are breaks in the ordinary highwater mark, the line should be extrapolated from the point where the ordinary high water mark is observed on the downstream side to the point where the ordinary

high water mark is lost on the upstream side. Therefore, waters may meet the definition of neighboring even where, for example, a tributary temporarily flows underground.” [37081]

Given the incredible variation and interpretation of existing protocol, manuals, and guidance documents, I can only imagine how landowners, consultants, and regulators will map these invisible points on the landscape and where they will draw the lines that define jurisdictional features.

EXEMPTIONS AND EXCEPTIONS TO NORMAL FARMING PRACTICES

A Corps district office Clean Water Act Exemptions page² shows the very confusing “exceptions to the exemptions,” which outlines some of the exceptions to the normal farming exemption. Some of these exceptions are extremely difficult to understand for the layman.

With vague definitions of, for example, what triggers the recapture provision, coupled with the uncertainty of what is an exempt farming practice; it is difficult even for me as a scientist to provide advice to landowners. My answer may be correct today but wrong tomorrow depending on which regulator is reviewing the information.

The Sacramento District handout offers the following disclaimer:

“A permit would NOT be required under Section 404 of the Clean Water Act if the activity would NOT result in the discharge of fill material into waters of the US. Please contact your local district office for a determination on whether your activity is exempt under Section 404(f) of the Clean Water Act.”

² <http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx>

The disclaimer above is both hilarious and terrifying. The Corps suggests that landowners and farmers contact the Corps so that they can determine if their farming activities are exempt, that the activities meet their definition of “normal and on-going”. However, most regulators have no experience in evaluating farm practices, activities, and crop rotation decisions based on market conditions. The Corps has developed so many exceptions to the exemptions that it is difficult to determine what individual regulators consider discharge or what activities are exempt. I will review some of those here:

Plowing

Corps regulations provide that “plowing” (defined as “all forms of primary tillage . . . for the breaking up, cutting, turning over, or stirring of the soil to prepare it for the planting of crops”) “will never involve a discharge of dredged or fill material.” (33 C.F.R. 323.4 (a).)

Yet, notwithstanding the regulations stating otherwise, senior wetland specialists at the Sacramento and Redding District have informed our staff that all plowing, even disking for the purpose of creating firebreaks, results in a discharge into waters of the U.S. and that the Corps selectively enforces this interpretation.

The Corps selectively enforces this interpretation but with varying enforcement mechanisms. In one case, the Corps ordered a farmer to cease and desist farming property. In another case, the Corps issued the landowner a Letter of Inquiry. Here the Corps suspected that the landowner’s activities violated the CWA. The letter informed the landowner that the Corps has initiated an investigation into their activities and demands that the landowner answer a variety of questions within 30 days or face legal proceedings.

I have another client that plowed his fields in the same manner as he had over the last fifteen years and planted a cover crop to improve range forage for cattle. He received a letter from the Corps informing him that the Corps had issued an investigation into his activities. I had another client who plowed and planted a wheat crop. The physical manipulation to the land was identical on both farms. Both properties contained vernal pools, swales, and seasonal wetlands and both

were plowed and planted with a crop. In the ongoing case, the Corps took the position that plowing and planting a wheat crop resulted in a discharge into waters of the U.S. In the other example the Corps determined:

“The discharges of dredged or fill material were associated with disking and replanting pasture grasses and are part of an established and on-going normal ranching operation conducted in acceptance with Conservation Practice standard number 512. As such, in accordance the March 25, 2014 Interpretive Rule, the discharges do not require a permit under Section 404 of the Clean Water Act (CWA), provided they do not convert an area of waters of the US to a new use and impair the flow or circulation of waters of the US or reduce the reach of the waters of the US. As recently explained in the Interpretive Rule, activities that are planned, designed, and constructed in accordance with one or more of the 56 specific Natural Resource Conservation Service (NRCS) national conservation practice standards are considered exempt under CWA section 404(f)(1)(A) and a section 404 permit is not required.” (August 27, 2014, SPK-2014-00183)

It’s interesting to note that in one instance, the Corps viewed plowing and planting as a discharge into waters of the U.S., but determined the same activity was exempt in another. This is despite the plain language in the CWA regulations that state “plowing” “will never involve a discharge of dredged or fill material” (33 C.F.R. 323.4 (a)), many regulators in the Sacramento and Redding office act otherwise.

Puddles

Across much of northern California, the Corps still asserts jurisdiction over isolated waters. Regulators in our region have required delineators to map puddles in dirt roads, tire ruts, and depressions in gravel parking lots as waters of the U.S., claiming they provide habitat for endangered species. Any objections based on protocol and regulations results in serious delays in

processing permits and jurisdictional determinations. There is nothing in the final WOTUS rule that limits regulators from continuing to take jurisdiction of small impressions occurring in roads, fields, and parking areas if they can demonstrate that they might have historically been present at some undetermined time in the past, are hydrologically linked, or in northern California are “vernal pools.” This is despite the EPA’s claims that puddles are now exempt. Without a definition of a puddle, which the final rule fails to adequately define, the Corps will continue to take this rigid interpretation of what is and what is not jurisdictional under the CWA.

Changes in Crop Types

There was a time not long ago when the Corps did not view changing crop types as changes in “land use.” Additionally, the agency recognized that fallowing fields for various time intervals was considered a normal farming practice. However, that is no longer the case. My office has recently experienced the Sacramento and Redding Districts eroding the longstanding normal farming exemption, leading to legitimate concern among members of the agricultural community that exemptions as clearly written in CWA § 404(f) are no longer applicable in our region.

During the now five-year long Western drought, farmers have needed to use their land to change from one commodity to another. As farmers seek guidance from the Corps, I have had experiences where the Sacramento District senior staff have informed us and our clients that when a crop is changed from alfalfa hay farming to cattle grazing and back to alfalfa hay farming, this change constitutes a change in “land use” therefore, the landowner should seek a permit from the Corps for any activities that constitute a discharge of fill into wetlands that may have formed during the cattle grazing operation or for any wetlands that may have been present before the original alfalfa operation. In another case, we have a client who changed from rice farming to walnut orchards and was issued a letter by the Corps informing him that the Corps had opened an investigation into his activities to determine if his farming operation required CWA § 404 authorization.

Most landowners possess detailed historical records indicating participation in U.S. Department of Agriculture (USDA) benefit programs, historic Natural Resource Conservation Service (NRCS) wheat allotments, and wetland determinations performed by NRCS staff. My

experience is the Corps demands CWA permits when the farmer switches crops. Unbeknownst to landowners, the Corps views a change from one crop type (such as an irrigated row crop, rice, wheat field, or grazing, etc.) to an orchard as a “land use” change going from temporary to permanent crops. Our reality is the Corps now demands permits for exempt actions. Through their regulatory authority Corps regulators can tell farmers which crops can be grown and where. California’s current drought conditions, advancements in irrigation techniques, and market conditions have led many landowners to change from one agriculture crop type to another.

Sadly, landowners who trust their government to work for them often proceed with normal agricultural practices with guidance and advice from USDA, only to find themselves under investigation by the Corps for activities that the Corps feels may have violated the CWA. Often these landowners are completely unaware and thought that they had completed due diligence by seeking advice and guidance from another federal agency. They often seek our services to assist them with demonstrating that their activities did not result in unauthorized fills in order to prevent incurring significant fees and delays in farming operations. In some cases, landowners have lost the ability to utilize their land because the Corps merely suspects that a violation has occurred. This comes at great financial and even emotional cost to landowners.

With the final rule, the only thing certain is how uncertain it is.

COMPLEX PERMITTING AND DELINEATION

Many landowners in California are spending significant resources to try to determine the extent of waters of the U.S. on their land and are very concerned about the ability to continue farming and ranching activities. In these cases, as mentioned previously, we are retained to perform a delineation of waters of the U.S.

There are two types of jurisdictional determinations: approved and preliminary. The Corps should attempt to process a JD request in 60 days³. In reality, it often takes 12 months or longer

³ US Army Corps of Engineers, Regulatory Guidance Letter, No. 08-02, June 26, 2008: Jurisdictional Determinations

for the Corps to process a JD request and may take more than 18 months if the applicant requests an approved JD. In many situations, we perform delineations in spring months and submit it to the Corps. After receipt of the delineation, the delineation typically sits at the Corps office for months waiting to be assigned to a regulator. Frequently the Corps staff informs us that they want to wait for the rainy season before they go out into the field to verify a delineation, which typically results in a year-long process to receive a JD. It is routine for Corps staff to request clarification or have questions, but depending on the staff regulator assigned to the project, it could be minor remapping or unreasonable requests for remapping based on no field data, just a regulator's interpretation of an aerial photograph.

While the focus of the hearing is on the new WOTUS rule, it is important to highlight how the Corps has evolved over recent years, even during pre-rule times, as it can provide a strong indication of where things are headed under the current rule.

In one case, we submitted a delineation of Waters of the US to the Corps in 2013 and requested a JD. The regulator acknowledged receipt of the delineation and then proceeded to do nothing on the project for two years. When we expressed frustration, the regulator was reassigned. A new regulator informed us that he could not accept our delineation because we did not include an ordinary high water mark (OHWM) data sheet. There is no requirement to supply this data when requesting a JD. The Chief of the Sacramento office acknowledged that acceptance of delineation is not predicated on receipt of ordinary high water mark data sheets, but even this acknowledgment was not able to move the regulator. Individual regulators are given the ability and authority to request almost anything they want and landowners have no recourse. At significant cost we went back to the project site and collected the ordinary high water mark data and submitted it to the Corps. The Corps regulator, without having collected any field data, summarily informed us that we were wrong and he wanted the OHWM reflected at a different elevation on the map based on his interpretation of an aerial photograph. When we asked to review the photograph he was using to make this determination we were told that the photograph was classified/proprietary information and we were not able to view it, but were required to map the feature at whatever elevation he wanted or risk significant processing delays. The following week the regulator was reassigned and a new regulator wanted additional data. We finally

resolved all issues on this thirteen acre site, but it took more than 2 years at a \$18,000 additional cost to the project (cost includes consulting fees and additional mitigation).

Unfortunately, this is all-too common. Most applicants cannot wait 12 months or 2 years for the Corps to give their blessing on delineation so they conduct the studies and file the report hoping that the conclusions of their consultant are correct. Unfortunately, given the Corps' inconsistent application of the CWA and protocols, their authority to demand almost anything, and make findings that are incompatible with field data – it's almost a forgone conclusion that delineations will be considered wrong in some way. Again this is very unsettling for landowners who are trying to comply with the plethora of rules that affect their ability to conduct traditionally lawful farming activities on their land.

PERMIT OPTIONS

If a landowner needs a Corps permit for an agricultural project or any activity there are several types of permits and/or permitting processes that may apply. The type of permit needed largely depends on the amount of discharge or fill material anticipated by the activity. Here is where the new WOTUS rule's expansion of federal jurisdiction affects landowners and will cause a significant financial burden. Slight increases in the amount of waters of the US at the project level can trigger the need for a general permit or a very rigorous individual permit, which can cost hundreds of thousands of dollars and effectively stop an agricultural project. To illustrate the difficulty to secure a permit, I offer the process below:

There are 3 types of permits applicable for agricultural projects. For all permits the applicant needs to conduct a formal delineation or JD of waters of the U.S. pursuant to Corps criteria. The applicant must then determine the level of impact or the size of the waters of the US associated with the agricultural project. The amount of waters of the US impacted dictates what type of permit the applicant can apply for. In all permitting scenarios the applicant must include a mitigation proposal demonstrating where and how mitigation will occur. Mitigation involves the use of an agency approved mitigation bank or applicant sponsored mitigation project, or use of an in-lieu fund. Mitigation costs depending on the type of resource impacted varies widely. If a

project site is not serviced by a mitigation bank then the applicant must propose an applicant sponsored mitigation project or participate in an in-lieu program. Mitigation ratios when participating in these types of mitigation projects are increased and can be anywhere from two to five acres for each acre⁴ affected by the proposed project. The permittee must comply with all other federal laws before they can be issued a permit. In most instances, those laws are Section 106 of the National Historic Preservation Act (NHPA) and Section 7 of the federal Endangered Species Act (ESA).

For ESA compliance, the applicant needs to submit with their CWA application biological reports or an evaluation that discusses the presence or absence of species listed under the federal ESA. If species are present and will be directly or indirectly impacted then the applicant is required to submit a Biological Assessment for the purposes of assisting the Corps with ESA Section 7 consultation. The applicant must determine how and where they will mitigate for all impacts to federal listed species or critical habitat.

The applicant also needs to submit a NHPA Section 106 compliant Cultural and Historic Properties Report to demonstrate that no cultural or historic properties would be impacted by the agricultural project. Part of this process involves consultation with Native American tribes. A concern for agricultural projects is that buildings, bridges, and water conveyance structures over 50 years old can often become eligible for listing as a historical resource. Areas or structures within a project site that are listed or are eligible for listing must be avoided or mitigated.

The Corps Chief in the Sacramento Regulatory office informed us that for an agricultural project that involves conversion of land for agricultural operations that require a Corps permit and compliance with CWA § 404(b)(1), the range of potential off-site alternatives could include anywhere in the State that the crop grows. Therefore, if someone was purchasing land to expand their agricultural operations the EPA/Corps could require that the applicant evaluate all possible lands that are currently under cultivation or range lands suitable for the proposed agricultural operation across the entire State of California. The applicant must demonstrate that the proposed project is the Least Environmentally Damaging Practicable Alternative (LEDPA) by answering

⁴ Mitigation ratios can be much higher in other parts of the nation.

the following question, “Is, or was there, an alternative site that could be acquired to accommodate the project and achieve the basic project purpose that would result in fewer impacts to waters of the US? When the entire State is the back-drop for an off-site alternatives analysis, the answer, by design, is almost always yes. Given this almost insurmountable hurdle for an agricultural project, to my knowledge, there have been no individual permits issued for an agricultural project in California, (excluding those affecting two acres or less, issued under RGL 95-01⁵).

For quick reference the following table includes a summary of the permit thresholds for an agricultural permit process and the associated average cost for each.

Type of Permit	Impact Threshold		404(b)(1) Alternatives Analysis Required	Costs (national average based on Sunding 2011, not including mitigation, project designs, entitlement)
	Acres	Linear		
Nationwide (NWP 40)	½ or less	300 feet or less		\$35,940
Letter of Permission (LOP)	1 or less	500 or less	yes	\$337,577
Individual Permit (IP) under RGL 95-01	2 or less		yes	Only applies when building a barn, home, or agricultural building. \$150,000
IP	1.1 or more	501 or more	yes	\$337,577

In our field work, we have applied the WOTUS rule definitions and found that the new definition will increase the number and extent of jurisdictional waters on most projects. The increase in

⁵ U.S. Army Corps of Engineers. Regulatory Guidance Letter 95-01. Guidance on Individual Permit Flexibility for Small Landowners. March 31, 1995.

jurisdictional waters generally comes from the inclusion of tributaries, as well as those features not hydrologically connected. Small changes in the amount of jurisdictional features at the project level do and will have significant implications on cost and processing timelines. In my view, this is the primary disconnect between government regulators and the regulated public. Many EPA and Corps officials agree that federal jurisdiction will increase, but both fail to honestly acknowledge the impacts that this increase will have in the ability of property owners to remain compliant. In 2011⁶ dollars, the nationwide average to prepare a nationwide permit application was \$35,940. The nationwide permit, as demonstrated in the graph above, only applies to very small projects. For individual permits that are large enough to accommodate even small farms, the cost average is \$337,577. Costs would remain the same for an LOP IP as the only difference is that the federal noticing process is eliminated, which does not affect costs.

Though times have changed, even back in 2002, the Corps asserted that it takes 127 days for a decision on an individual permit and 16 days to receive a decision on a nationwide permit. When recording permit decision times, the Corps only counts the time from the date that it deems an application complete. For a nationwide permit the majority of time is spent responding to the Corps' requests for additional information regarding the impacts assessment, delineation, and making changes to the delineation map. For an individual permit, Corps regulators have broad authority to request redesigns of the project, the site plans, demand the additional review of on-site and off-site alternatives, require additional technical studies, and require additional cost evaluations; almost anything they feel might assist them with a permit decision. As a result, Sunding and Zilberman in 2002⁷ determined that nationwide permits took an average of 313 days to obtain. Individual permits took an average of 788 days of which 405 days elapsed after the application was submitted to the Corps office. It's my experience that in California the cost and timeframes are much longer.

⁶ Sunding, David. July 26, 2011. Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction. Exhibit 11. Comments submitted by Waters Advocacy Coalition, et. al in Response to

⁷ Sunding, D. and Zilberman D., "The Economics of the Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," *Natural Resources Journal*, vol. 42, Winter 202, pp. 59-74.

Depending on the type of project, costs of delay can be significant. Sunding and Zilberman (2011) estimated that, assuming a 20 percent discount rate, delays lasting 6 months could result in a loss of \$47,000 per acre and a delay of a year could result in loss of over \$90,000 per acre.

CLOSING STATEMENT

I have shared several examples of how the Corps is severely limiting farming and ranching in California. I could have shared many more. Most of my clients wish to remain unnamed because there is an overriding fear of the Corps. A few have come out publicly, facing the risk that the Corps could end their business, simply because they have sensed the injustice and don't want others to suffer a similar fate. Similarly, I have put my name and company on the line, which I hope will not affect my day-to-day work with regulators.

I work with landowners on a daily basis to help them remain compliant with the CWA. As I have described, the permitting process is expensive, lengthy, and lacks predictability. Nationwide Permit number 40 (NWP 40) is established for agricultural activities; however the impact thresholds are too narrow to provide much utilitarian function for farmers⁸. The nationwide permits are currently being reissued and I urge Congress to allow NWP 40 to increase allowable discharge to 5 acres and have no linear threshold for impacts to drainages, ditches, and ephemeral streams (similar to the threshold standards giving to linear transportation projects, NWP 14). Removing the linear threshold would provide significant relief to farmers especially given the vague and confusing language in the WOTUS rule regarding the potential jurisdiction of features that no longer exist, man-made ditches, and ditches that convey water for meniscal amounts of time.

The EPA's claim that the new rule will not create an economic burden and will streamline the permitting process is not true. There is no question that the permitting process for agricultural projects should be streamlined. It seems logically contrary to expand federal jurisdiction of

⁸ NWP 40 discharge and fill limitations: The discharge must not cause the loss of greater than ½ acre of non-tidal waters of the US, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse impacts.

waters of the U.S., as I have demonstrated this rule does, while maintaining or continuing to erode narrow permit thresholds and then have the EPA claim that *“it will not add an economic burden on agriculture.”* It’s my experience that the EPA can make such a claim because they are disconnected from how things actually work on the ground at the project and individual regulator level.

Additionally, the EPA’s claim that the new rule brings certainty is blatantly false. There is extreme uncertainty in the new definitions. And unfortunately, there is no fallback position because the previous definitions were unclear and, as demonstrated, interpreted in vastly different ways by different regulators within the same regulatory agency.

The agencies and the courts have so far tried and failed to bring certainty to America’s farmers and ranchers. What needs to happen is for the Congress to step in and help create that certainty. There should be clearer definitions, an easier permitting process, minimal cost to the farmer, and better interagency communication between EPA, Corps, and USDA. Farmers and ranchers shouldn’t feel that the U.S. Army has militarized farming and ranching, treating them as an enemy of the United States. I hope for a day when the agency can be trusted again and work in good faith with farmers and ranchers who produce the food and fiber upon which our nation and the globe depends.

I hope I have shed some light on this issue. I appreciate the opportunity to testify and look forward to your questions.

Environmental Laboratory 1987. U.S. Army Corps of Engineers wetlands delineation manual. (Technical Report Y-87-1). U.S. Army Waterways Experiment Station. Vicksburg, MS.

Hooper, Demar. 2016. “Corps Regulation of Central Valley Farmers.” National Wetlands Newsletter. The Environmental Law Institute. Vol 38, No. 2 March/April 2016.

Hopper, Reed M and Miller, Mark. 2015. "Waters of the United States: A Case Study in Government Abuse." The James Madison Institute: Backgrounder. No. 76/August 2015.

Sunding, D. and Zilberman D., "The Economics of the Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," *Natural Resources Journal*, vol. 42, Winter 202, pp. 59-74.

Sunding, David. July 26, 2011. Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction. Exhibit 11. Comments submitted by Waters Advocacy Coalition, et. al in Response to the Environmental Protection Agency's and US Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act EPA-HQ-OW-2011-0409.

U.S. Army Corps of Engineers. 2012. "Definition of Waters of the U.S." Title 33 CFR Chapter 2 Section 328.3.

U.S. Army Corps of Engineers. 2008. Regional supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region. J.S. Wakeley, R.W. Lichvar, and C.V. Noble, ed. ERDC/EL TR-06-16. Vicksburg, MS: U.S. Army Engineer Research and Development Center, Environmental Laboratory.

U.S. Army Corps of Engineers, South Pacific Division. 2001. Final summary report: Guidelines for jurisdictional determinations for water of the United States in the arid Southwest. San Francisco, CA: U.S. Army Corps of Engineers, South Pacific Division.
(<http://www.spl.usace.army.mil/regulatory/lad.htm>).

May 24, 2016

Hearing on *Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States*

Senate Committee on Environment and Public Works

Subcommittee on Fisheries, Water, and Wildlife

Statement by:

Damien Schiff

Principal Attorney

Pacific Legal Foundation

Sacramento, California

Introduction

The Clean Water Act¹ is one of the most powerful and far-reaching federal environmental laws. The statute, jointly administered by the United States Environmental Protection Agency and United States Army Corps of Engineers, generally prohibits the unpermitted discharge of pollutants into the “waters of the United States.”² Whether those waters include some, or most, or all streams, creeks, ponds, and wetlands in the nation is a question that for decades has fueled controversy among property owners, the agencies, and the courts. The controversy has intensified over the last decade, following *Rapanos v. United States*,³ the United States Supreme Court’s latest (and fractured) decision interpreting the Act’s scope. Recently, attention has centered on the agencies’ new rule-making, which purports to construe “waters of the United States” in light of *Rapanos*.⁴

In this testimony, rather than focusing on the so-called WOTUS rule, I would like to draw attention instead to a few post-*Rapanos* decisions, as well as several ongoing cases. These litigation examples demonstrate the extravagance with which the EPA and the Corps view their authority. They also reveal that the agencies’ fondness for such power extends well beyond the particular issues raised in their WOTUS rule-making.⁵

¹ 33 U.S.C. §§ 1251-1388. The Act’s formal title is the Federal Water Pollution Control Act Amendments of 1972. See Pub. L. No. 92-500, § 1, 86 Stat. 816, 816 (Oct. 18, 1972).

² See 33 U.S.C. § 1311(a).

³ 547 U.S. 715 (2006).

⁴ See 80 Fed. Reg. 37,054 (June 29, 2015).

⁵ In each of these cases, Pacific Legal Foundation attorneys served as counsel of record for the property owners.

Is Frozen Ground among the “Waters of the United States”?

Permafrost covers a vast expanse of Alaska’s territory.⁶ By definition, this land is permanently frozen. Nevertheless, the Corps believes that it can regulate permafrost as “waters of the United States.” A recently filed lawsuit challenges that doubtful proposition.

The Schok family runs a small business in North Pole, Alaska. The company specializes in pipe fabrication, insulation, and related services for companies developing the North Slope oil fields. It has outgrown its current location, and wants to expand to a neighboring location which the firm has acquired. The Corps, however, has asserted jurisdiction over the property’s approximately 200 acres of permafrost.

For several decades, the Corps has interpreted the Clean Water Act to reach at least some “wetlands.”⁷ The agency defines wetlands to include “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁸ Determining whether a site contains wetlands can be very difficult. For that reason, the Corps in 1987 published a manual to assist the public and local Corps officials in making wetland delineations.⁹ Shortly thereafter, the Corps and other federal agencies published another manual that—not surprisingly—dramatically expanded the definition of wetlands.

The ensuing controversy moved Congress to rein in the Corps. In the Energy and Water Development Appropriations Act of 1993, Congress mandated that the agency use the 1987 manual exclusively for wetlands delineations until “a final wetland delineation manual is adopted.”¹⁰ Since then, the Corps has chosen not to follow Congress’ direction. Instead, it has issued regional “supplements” to the 1987 manual. These supplements—which by themselves are not “final wetland delineation manual[s]”—provide region-specific criteria for wetland delineation that purportedly supersede anything to the contrary in the 1987 manual.

Consistent with this practice, the Corps promulgated in 2007 an Alaska Supplement to the 1987 manual.¹¹ The Alaska Supplement uses a relaxed standard to determine the dates of the “growing season,” an important factor in identifying wetlands. According to the Alaska Supplement, the growing season is determined with reference to “vegetation green-up,

⁶ Permafrost comprises about 80% of the state. Torre Jorgenson, *et al.*, Permafrost Characteristics of Alaska, *available at* http://permafrost.gi.alaska.edu/sites/default/files/AlaskaPermafrostMap_Front_Dec2008_Jorgenson_etal_2008.pdf (last visited May 20, 2016).

⁷ See 33 C.F.R. § 328.3(a)(6) (2015); *id.* § 328.3(a)(7) (2014).

⁸ *Id.* § 328.3(c)(4) (2015); *id.* § 328.3(b) (2014).

⁹ Corps of Eng’rs, Wetlands Delineation Manual (1987), *available at* <http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf> (last visited May 20, 2016).

¹⁰ Pub. L. No. 102-377, 106 Stat. 1315, 1324 (Oct. 2, 1992).

¹¹ U.S. Army Corps of Eng’rs, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (Sept. 2007), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/erdc-el_tr-07-24.pdf (last visited May 20, 2016).

growth, and maintenance as an indicator of biological activity occurring both above and below ground.”¹² In contrast, the 1987 manual defines the growing season to be that “portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5°C).”¹³

The critical reason for the Alaska Supplement’s divergence from the 1987 manual is to enable federal regulation of permafrost. Under the 1987 manual, permafrost would never qualify as a wetland because permafrost never reaches the required above-freezing soil temperature. In contrast, under the Alaska Supplement’s easy standard for the growing season, permafrost can be considered a wetland.

After the Corps asserted jurisdiction over their property, the Schok family filed suit in federal district court. In *Tin Cup, LLC v. United States Army Corps of Engineers*,¹⁴ they argue that the Corps has no jurisdiction over their property’s permafrost because it does not qualify as a wetland under the Corps’ 1987 wetlands manual.

The family’s dispute with the Corps is not just academic. Whether permafrost can be regulated under the Clean Water Act is an issue of keen importance to all Alaskans, as it will affect the extent to which the Corps and EPA can use the Act as a federal land-use ordinance. These agencies have long sought that improper end, a fact recognized by the late Supreme Court Justice Antonin Scalia. In his plurality opinion in *Rapanos*,¹⁵ Justice Scalia criticized the agencies’ claimed power to regulate “storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years.”¹⁶ He justly called this “an immense expansion of federal regulation of land use” that “would befit a local zoning board.”¹⁷

Not only is federal regulation of permafrost legally untenable, it is scientifically questionable. EPA and the Corps seek to regulate wetlands in part because they can filter pollutants, regulate storm flows, and provide other water quality benefits. But permafrost can do little of this; because it is frozen, it functions largely like dry land.

Beyond permafrost, the Schok family’s case raises an important issue of democratic governance. Should a federal agency be allowed to deviate from its published, nationally applicable rules just to expand its power? Does it make any sense that a piece of turf may qualify as a wetland in Mississippi but not in California? To preserve individual liberty, it is essential that the government play by the rules consistently. Allowing federal agencies to make regional “exceptions” to their regulations raises a dangerous, freedom-threatening precedent.

¹² *Id.* at 48.

¹³ 1987 Wetlands Manual at A5.

¹⁴ No. 4:16-cv-00016-TMB (D. Alaska compl. filed May 2, 2016).

¹⁵ 547 U.S. 715 (2006).

¹⁶ *Id.* at 722 (plurality op.).

¹⁷ *Id.* at 738.

Are Normal Farming Practices Exempt from the Clean Water Act?

The Clean Water Act provides important jurisdictional exemptions for some discharges of dredged and fill material.¹⁸ Included among them is the exemption for “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.”¹⁹ The purpose of this exemption is to ensure that everyday farming activities do not come within the Clean Water Act’s onerous reach.

Unfortunately, the Corps has not taken Congress’ lead but instead has treated the normal farming exemption extremely narrowly. A case in point is *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*.²⁰ In 2012, Duarte Nursery purchased approximately 2,000 acres of farmland in Tehama County, California. Shortly thereafter, it sold about 1,500 acres, retaining about 450 acres. The land traditionally has been farmed and grazed, and is zoned for agricultural use. After purchasing the property, Duarte Nursery directed that the land be planted with a winter wheat crop. To that end, the property was chisel-plowed to a shallow depth (most areas substantially less than 12 inches). Nevertheless, the Corps issued Duarte Nursery a cease and desist order, contending that its plowing constituted an illegal discharge of pollutants. The agency has persisted in that view, notwithstanding the failure of a ten-day, extensive, onsite examination to reveal any wetland that was destroyed as a result of the plowing. Indeed, after Duarte Nursery filed suit to challenge the Corps’ cease and desist order, the agency filed its own counterclaim seeking civil penalties and other relief against Duarte Nursery.

The Corps’ allegation that Duarte Nursery violated the Clean Water Act requires the agency to adhere to a number of legally shaky conclusions. First, that a plow can be considered a “point source” for pollutants. Second, that soil on farmland can be considered a “pollutant.” Third, that simply moving around soil within a wetland on farmland constitutes the “addition” of a pollutant. And fourth, that tillage of farmland is not a normal farming practice. In short, if what Duarte Nursery has done qualifies as a discharge of pollutants, then no farmer in this country is safe from the threat of Clean Water Act liability.

Improving the Environment, but Incurring the Wrath of EPA

Another important Clean Water Act exemption applies to discharges connected with the construction of farm and stock ponds.²¹ Not surprisingly, the agencies have taken an exceedingly narrow view of the exemption’s scope. And, just as in *Duarte Nursery*, the agencies are prepared to impose that narrow view backed by the full enforcement power of the federal government.

A case in point is Andy Johnson’s battle with EPA to maintain a stock pond. Johnson owns an eight-acre parcel in Fort Bridger, Wyoming. The property contains both his home and

¹⁸ See 33 U.S.C. § 1344(f)(1)(A)-(F).

¹⁹ *Id.* § 1344(f)(1)(A).

²⁰ No. 2:13-cv-02095-KJM-DAD (E.D. Cal. compl. filed Oct. 10, 2013).

²¹ See 33 U.S.C. § 1344(f)(1)(C).

surrounding land which he uses to raise various farm animals, including horses and cattle. The property is located in a rural area primarily made up of farm and ranch land. A small stream—Six Mile Creek—crosses the property. The water that runs through this stream is return flow from agricultural runoff. Prior to Johnson’s work on the property, the area along this stream contained no wetlands, riparian vegetation, or any significant wildlife or fisheries habitat. Six Mile Creek ultimately empties into a controlled irrigation canal and reservoir, and the water is diverted for agricultural use. Historically, the stretch of the creek that crosses Johnson’s property has been used to water livestock, both his and prior owners’. However, the stream did not provide a sufficiently reliable and safe source of water. In particular, the steep incline down to the water during winter and periods of low flow created a risk of injury for the animals.

In order to provide more reliable and safe access to drinking water for these animals, Johnson applied for a stock pond permit from the State of Wyoming. During the permit application process, Johnson consulted with state officials regarding how best to construct the stock pond. Together they came up with ways both to minimize any of the pond’s incidental impacts on the environment, and to maximize the pond’s incidental benefits. After having obtained the permit, Johnson constructed the stock pond.

In September, 2012, the Corps contacted Johnson to investigate whether his stock pond violates the Clean Water Act. Johnson explained that he built his pond intending it to be environmentally beneficial, including as habitat for fish. Nevertheless, in January, 2014, EPA issued a compliance order against Johnson, asserting that Johnson violated the Clean Water Act by constructing the pond.²² The compliance order required Johnson to conduct restoration and mitigation activities and hire a stream or wetland restoration expert to prepare a plan to do so. It gave authority to EPA, the Corps, and the U.S. Fish and Wildlife Service, and any of their contractors, to access Johnson’s private property to inspect and monitor it. The order also threatened substantial civil penalties should Johnson not comply.²³

The agencies pursued this severe course of enforcement notwithstanding clear evidence that the stock pond’s construction produced many environmental benefits. These include the creation of wetlands, riparian vegetation areas, and habitat for migratory birds, fish, and wildlife. The pond also allows sediment and other suspended particles to settle before the now-cleaner water continues flowing downstream.

EPA ignored all of this and argued that Johnson’s actions fell outside the stock pond exception. The reason? Because Johnson was allegedly motivated by a desire to create a mere ornamental “fixture” for the aesthetic pleasure of himself and his family. Of course, that conclusion entirely ignored not just the valuable environmental benefits that the pond produces, but also the fact that the pond provides a high-quality water sources for Johnson’s livestock and horses.

²² The Clean Water Act authorizes EPA to issue a compliance order “[w]henver on the basis of any information available,” the agency has determined that an individual has violated the Act. 33 U.S.C. § 1319(a)(3).

²³ Currently, EPA may assess civil penalties of up to \$37,500 per day for compliance order violations. *Sackett v. EPA*, 132 S. Ct. 1367, 1370 n.1 (2012).

Johnson sued EPA to challenge the agency's compliance order.²⁴ Thankfully, the agency agreed to a reasonable settlement.²⁵ Under that settlement, Johnson will pay no fine and will need no federal permit to maintain the pond. But EPA has not definitively abandoned its miserly interpretation of the stock pond exemption. And farmers can be sure that the agency will seek to impose that interpretation on hapless landowners.

A Dry Arroyo Is Among the "Water of the United States"?

The last time the Supreme Court addressed the scope of the Clean Water Act was *Rapanos*. In that case, a divided court struck down the "hydrological connection" theory, by which EPA and the Corps would regulate any wet area in the nation so long as a drop of water could flow from that spot to a downstream navigable water. Justice Scalia, writing for a plurality, chided the agencies for such an extravagant interpretation, which would lead to the regulation of "washes and arroyos" located "in the middle of a desert."²⁶ Notwithstanding this strong rebuke, the Corps proceeded to assert de facto the same broad interpretation of its regulatory power. One of the Corps' victims was the Smith family of Santa Fe, New Mexico.

Peter and Frankie Smith own an approximately 20-acre parcel in Santa Fe. They purchased the property for their retirement, investing their life savings to build their dream home. A dry creek bed, or arroyo, runs across the property. Water only flows in the arroyo during and immediately after major storms (which occur only about three times per year). Within a half hour after these storms, the water in the arroyo either evaporates or is absorbed into the porous ground. The nearest navigable water is the Rio Grande, which is located approximately 25 miles away.

Before the Smiths purchased the property, prior owners or unknown persons had used the arroyo as a place to dump trash. Also, many trees on the property and in the arroyo had died from a pine beetle infestation and posed a fire hazard. To remove the trash and dead trees, the Smiths smoothed out the ground in the bottom of the arroyo so they could safely use a truck and tractor. During their clean-up, they did not introduce any new fill material or dirt into the arroyo.

In May, 2011, Corps officials visited and inspected the property without the Smiths' knowledge or permission. Following that visit, the Corps issued the Smiths a "Notice of Violation," contending that they had violated the Clean Water Act. The Notice explained that the Smiths' efforts to clean out their arroyo resulted in the discharge of pollutants into navigable waters. Jurisdiction over the arroyo existed, the Notice alleged, because sediment and fertilizer collected in stormwater *could* flow through the arroyo into the Rio Grande.

In December, 2012, the Smiths sued the Corps, alleging that the agency lacked jurisdiction over their arroyo.²⁷ The lawsuit explained that the basis for the Corps' jurisdiction—pollutants could end up in the Rio Grande—was just a reformulated version of the "hydrological connection"

²⁴ Johnson v. U.S. EPA, No. 2:15-cv-00147-SWS (D. Wyo. compl. filed Aug. 27, 2015).

²⁵ Consent Decree (filed May 9, 2016).

²⁶ Rapanos v. United States, 547 U.S. 715, 727 (2006) (plurality op.).

²⁷ Smith v. U.S. Army Corps of Eng'rs, No. 2:12-cv-01282 (D.N.M. compl. filed Dec. 11, 2012).

theory that the Supreme Court in *Rapanos* had rejected. Just three months later, the Corps changed its position to conclude that the Smiths' arroyo was not jurisdictional.²⁸ The Corps' shift in position remedied the Smiths' injuries, but other property owners may not be so lucky.

An Intent Component to the Prior Converted Croplands Exception?

In an effort to harmonize its wetland practice with those of other federal agencies, the Corps in 1993 amended its regulations to provide that "prior converted cropland" was exempt from Clean Water Act regulation.²⁹ Such cropland are formerly wetland areas that, on account of farming activities occurring prior to 1986, no longer satisfy the Corps' wetlands definition.³⁰ However, beginning in the 2000s, the Corps issued and utilized a series of policy changes without the benefit of notice-and-comments and without following proper rule-making requirements.³¹ According to these pronouncements, prior converted cropland would cease to enjoy the exemption if the use of that cropland shifted to non-agricultural activities.³² This was a substantial shift from the Corps' prior view that a prior converted cropland determination "is made regardless of the types of impacts of the activities that may occur in those areas."³³ In 2010, a federal district court in Florida ruled that the Corps could not enforce this shift in interpretation without new rule-making, accompanied by notice to the public and an opportunity for interested parties to comment on the proposed policy change.³⁴ Yet, despite this ruling, the Corps continues to enforce this "underground" rule in other parts of the country.

Those other parts include Louisiana. The Belle Company owns a parcel of land in Assumption Parish, Louisiana, which has been used for agriculture since at least the 1960s. In 1991, the Corps informed Belle that its property was exempt prior converted croplands.³⁵ In 2009, the company sought a permit to convert its property into a solid waste landfill. The Corps then asserted Clean Water Act jurisdiction, relying on the agency's new interpretation of the prior converted croplands exception.³⁶ The company filed suit, but lost on procedural grounds in the lower courts.³⁷ A request for review in the United States Supreme Court is pending.³⁸

²⁸ See Notice of Dismissal Without Prejudice (filed Mar. 8, 2013).

²⁹ 58 Fed. Reg. 45,008, 45,031-32 (Aug. 25, 1993). See 33 C.F.R. § 328.3(b)(2) (2015); *id.* § 328.3(a)(8) (2014).

³⁰ The exemption makes the Corps' and EPA's practice consistent with that of the Department of Agriculture's "Swampbuster" program. Under that program, eligibility for government contract payments, insurance premiums, and loans will be revoked if farming practices result in the conversion of a wetland. See 16 U.S.C. § 3821. An area is not considered a wetland if the conversion occurred prior to December 23, 1985. See *id.* § 3822(b).

³¹ See *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1276 (S.D. Fla. 2010).

³² See *id.* at 1282 ("[B]efore the Stockton Rules, prior converted cropland that was shifted to non-agricultural use was treated as exempt. Following the Stockton Rules, the opposite was true.").

³³ 58 Fed. Reg. at 45,034.

³⁴ *Id.* at 1284.

³⁵ *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 386 (5th Cir. 2014).

³⁶ *Id.* at 387.

³⁷ See *id.* at 397.

The *Belle* case is a troubling example of the Corps' unfairly narrow interpretation of exemptions to Clean Water Act jurisdiction. What is worse, it reflects the Corps' disdain for fundamental administrative protections like notice-and-comment.

A Modest Home-Building Project Threatens the Environment?

In 2004, Mike and Chantell Sackett purchased an approximately half-acre lot in a built-out subdivision near Priest Lake, Idaho. The Sacketts bought the property to build their family home. The site is bounded to the east and west by developed lots, and to the north and south by county roads. Between the site and Priest Lake is a row of developed lots.

In May, 2007, the Sacketts prepared for building by removing unsuitable material and placing sand and gravel on the site to create a stable grade. Shortly thereafter, officers of the EPA came to the site and announced their opinion that the property contained wetlands that were subject to regulation under the Clean Water Act. These officials directed the Sacketts' work crew to cease work until a Corps permit for the work was produced. The Sacketts had never been advised to seek such a permit, but they did obtain all of the necessary Bonner County permits to build their home. For months, the Sacketts sought an explanation from the Corps and EPA as to the factual basis on which the agencies claimed that the Act covered the property. Despite assurances from EPA and Corps staff that this explanation would be provided, it never came.

Instead, what did arrive, in November, 2007, was a compliance order from EPA. The order found that the property contains wetlands subject to federal regulation under the Act, and threatened the Sacketts with fines of up to tens of thousands of dollars per day unless they restored the site, fenced it off for three years, and built their home elsewhere. The Sacketts sued EPA in April, 2008.³⁹ Remarkably, as the Sacketts later learned when EPA produced the administrative record, neither the Corps nor EPA had performed a jurisdictional determination prior to issuing the November, 2007, order. Moreover, neither agency had ever requested the Sacketts' permission in writing to perform one on the property, requested in writing that the Sacketts perform one, sought an administrative warrant that would have allowed EPA to perform a jurisdictional determination on the property, or provided a written statement of the basis for its jurisdiction under the Act, despite repeated requests from the Sacketts. In short, EPA's compliance order was supported by no data sheets, no methodology for observing the site or collecting data, no sample collections, and no analysis of any data whatsoever. Nevertheless, EPA still maintains, after over eight years of litigation (and counting), that it has adequate evidence to conclude that the Sacketts' property contains wetlands.

³⁸ Kent Recycling Servs., LLC v. U.S. Army Corps of Eng'rs, No. 14-493.

³⁹ Sackett v. U.S. EPA, No. 2:08-cv-00185-EJL (D. Idaho filed April 28, 2008).

Conclusion

The controversy over the WOTUS rule underscores that the Clean Water Act is a potent law the strength of which stirs its advocates and foes alike.⁴⁰ But regardless of that rule's fate,⁴¹ EPA's and the Corps' administration of the Clean Water Act will continue to raise serious issues of agency overreach. The preceding cases unfortunately reveal these agencies' too frequent practice of allowing a misguided zeal for the environment to override commonsense enforcement principles, as well as statutory and regulatory backstops designed to prevent agency aggression. Understanding that these problems are not exclusive to the WOTUS rule should help policy makers in their effort to strike an appropriate balance between environmental protection and the rights of landowners and citizens.

⁴⁰ See Michael Campbell, *Waters Protected by the Clean Water Act: Cutting through the Rhetoric on the Proposed Rule*, 44 *Envtl. L. Rep. News & Analysis* 10,559 (July 2014).

⁴¹ See *In re EPA*, 803 F.3d 804 (6th Cir. 2015) (staying enforcement of the rule).

**Testimony of Valerie Wilkinson,
Vice President and Chief Financial Officer,
The ESG Companies**

Before the Senate Subcommittee on Fisheries, Water and Wildlife

**Hearing on “Erosion of Exemptions and Expansion of Federal Control- Implementation of
the Definition of “Waters of the United States””**

May 24, 2016

Chairman Sullivan, Ranking Member Whitehouse, members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders, I appreciate the opportunity to testify today. My name is Valerie Wilkinson, and I am a Vice President and the Chief Financial Officer of The ESG Companies. The ESG Companies is a group of family owned development, building, management and entrepreneurial companies based in Virginia Beach, Virginia. Our companies evolved from a small electrical contracting company started by our founder, Edward Garcia, after returning from serving in the Navy in the Pacific during World War II, and we have been providing strong, sustainable communities ever since.

I commend the subcommittee’s desire to highlight the pitfalls of the current regulatory regime, and I appreciate the opportunity to tell our story. Our quest to obtain a federal wetland permit for our building project has spanned over 25 years. Throughout every step of the process, the rules have changed and new requirements have been added. Unfortunately, the land we acquired almost three decades ago still lays undeveloped and we continue to be held hostage by the federal government. After spending thirty years and over \$4.5 million dollars in pursuit of the required permit, we still are not even close to obtaining a federal 404 CWA permit for our project.

Recognizing and supporting the need for a clean environment and the benefits that it brings to our nation’s communities, home builders and land developers have a vested interest in preserving and protecting our nation’s water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and improving the quality of our lives. Our nation’s home builders build neighborhoods, create jobs, strengthen economic growth, and help create thriving communities while maintaining, protecting, and enhancing our natural resources, including our lakes, rivers, ponds, and streams. We foster the American dream of home ownership. Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetland permits to complete their projects. What is most important to these compliance efforts is a regulatory scheme and permitting process that is consistent, predictable, timely, and focused on protecting true aquatic resources.

The home building community knows all too well the frustration of a broken permitting process. Over the years, the federal government has expanded the scope of their regulatory authority and have frequently changed the requirements needed to obtain a federal wetland permit. These changes have made the permitting process virtually impossible to navigate and have caused many land use projects to come to a grinding halt, putting more people on the unemployment rolls. It is impossible for home builders and developers to support the needs of our community under an ever-changing regulatory system. With property rights being jeopardized by federal regulatory overreach, it is increasingly more difficult to attract new companies into our industry. Unfortunately, our company has fallen victim to this broken system.

Our story begins in the mid-1980's when The ESG Companies began to acquire parcels of land in order to develop a mixed-use community in Chesapeake, Virginia. Our mission was to address the anticipated population growth and housing demand after forecasters announced that 8,000 new jobs would be created in the Chesapeake area. The proposed project consisted of a multi-use community comprising retail, office, multi-family, single family and town homes with recreational amenities. Multiple parcels of land were consolidated into the Centerville Properties, a 428 acre development with a total investment in the project today, including land and carrying costs, of over \$40 million.

In 1989, after obtaining required zoning approvals from the City of Chesapeake, The ESG Companies began clearing the land to develop Centerville Properties. Almost immediately, the U.S. Army Corps of Engineers (the Corps) asserted that jurisdictional wetlands, which were subject to CWA protections, appeared to be present on the property. They issued a Cease and Desist Order to halt "any and all filling activities on or adjacent to the waters and wetlands located on the property" until a wetland delineation could be completed. This action was surprising because prior to this time, we, along with many builders like us, had been developing properties like this all over the region, and the Corps had never asserted jurisdiction over similarly situated seasonally wet, non-tidal forested land. Even while the Corps put us through this rigorous regulatory obstacle course, adjacent properties with similar soils, hydrology and vegetation characteristics had been developed without permits.

The Corps asserted jurisdiction over our property by using their newly expanded jurisdictional authority to regulate wetlands as "waters of the United States." The landmark Supreme Court decision, *United States v. Riverside Bayview Homes, Inc.*¹ solidified the Corps' authority to regulate wetlands adjacent to navigable waters. The Court decided that wetlands which "actually abut on a navigable waterway" are "adjacent" and subject to CWA authority.² While our property does not directly "abut" a navigable water and is connected only by a historical drainage ditch, the Corps claimed that there was a subterranean connection to a jurisdictional water due to the fact that our soil was seasonally saturated to the surface.

While we did not agree with the decision that we were subject to federal jurisdiction, we clearly understood that the rules had dramatically changed. Therefore, we immediately hired highly

¹ 474 U.S. 121 (1985).

² *Riverside Bayview*, 474 U.S. at 135.

qualified and esteemed environmental consultants, Dr. Hilburn Hillstead, a biologist and environmental scientist with Law Environmental and a former official with U.S. Fish and Wildlife Service (USFWS), and Dr. Wayne Skaggs, a soil scientist and then professor at the University of North Carolina and member of the Soils Committee of the National Academy of Sciences to assist us with the wetland delineation and permitting process. From 1990 to 1995, our consultants attempted to work with local Corps officials to resolve any issues and clear a path that would allow our project to break ground. Surprisingly, Corp staff steadfastly refused to consider hydrology studies performed by Dr. Skaggs showing that the soil on site was not saturated to the surface by capillary fringe due to free standing water 12” below the surface. The Corp responded that it did not dispute Dr. Skaggs’ findings, however its definition of surface is the “A” horizon within the root zone 12” below the top of the soil. Regrettably, the delineation took years to complete because at the time there was considerable confusion among Corps staff as to whether they should use the 1987 or the 1989 delineation manual to determine the existence of wetlands. Even though the 1989 delineation manual had been expressly disallowed by Congress in the Fiscal Year 1993 Appropriations bill,³ Corps field officials still used it to complete their field assessments on our project.

Prior to 1998, mechanized land clearing and excavating in wetlands to prepare the land for development was prohibited by a Corps rule. However, the D.C. Circuit Court of Appeals overturned the rule prohibiting these actions in 1998.⁴ In July 1999, after the Court ruling, Tri City Properties, LLC (Tri City), one of The ESG Companies, obtained an erosion and sediment control and water discharge permit and moved forward with clearing and excavating the land under the supervision of lawyer and environmental specialist, William Ellis.

As it has always been our intention to be in full compliance with federal regulation, we notified the Environmental Protection Agency (EPA) and Corps prior to initiating the action and took videotapes of the work as it was undertaken. These video tapes were then provided to the EPA. The ditching was accomplished by excavating and loading the material directly onto trucks and hauling it to an offsite location under the supervision of an engineer. At no point was dredged or fill material re-deposited on the land. Yet, in May 2000, the EPA issued an Administrative Order for compliance, one of over 20 they issued that day in our general area, stating that illegal discharges, “if any,” must cease immediately and a new wetland delineation must be completed. No illegal activity took place on our property. However, later that year the Commonwealth of Virginia adopted a new regulation that required a permit to excavate in wetlands. Therefore, to comply with this new state regulation, we filed an application with the Virginia Department of Environmental Quality (VADEQ) to continue excavating the land. In addition, we retained the services of Environmental Specialty Group headed by Julie Steele, a former Corps Norfolk District regulatory branch Section Chief as well as Dr. W. Thomas Straw, a hydrogeologist and currently Professor Emeritus of Geosciences at Indiana University. These specialists have extensive expertise in environmental geology and wetlands hydrology and worked to develop a

³ Energy and Water Development Appropriation Act of 1993, P.L. 102-377, 106 Stat. 1315, 1992

⁴ *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

new wetland delineation as requested by EPA through their Administrative Order for compliance.

After obtaining yet another wetland delineation and 15 years since we had first started assembling the property for development, we were prepared to apply for our wetland permit. VADEQ and the Corps have joint permitting authority over the Commonwealth's wetlands. The expressed purpose of Virginia's statutory scheme was to provide a one-stop shop and prevent land owners from having to go through duplicative permit approvals. It is important to note that Virginia's wetlands regulations mirror the CWA section 404(b)(1) requirements. Since they use the same criteria and methodology, the state and the federal government should not differ in their regulatory assessments of our project. Unfortunately, coordination was not what we experienced, and our project only illustrates the disconnect between state and federal permitting partners.

In late 2000, we sent our new wetland delineation to the VADEQ to begin the permitting process. Our environmental consultant certified that the site contained 253.5 acres of palustrine, forested wetlands and 174.7 acres of upland. The VADEQ made multiple requests over an 8-month period that the Corps confirm the delineation; however, the Corps refused to participate, citing the outstanding Administrative Order. Therefore, Dr. Ellen Gilinsky, then VADEQ's Director of the Water Quality Programs Division who currently serves as a Senior Advisor to the EPA's Office of Water, and her colleague, Dave Davis, personally confirmed the wetland delineation we provided by performing their own field assessment of the property. Dr. Gilinsky and Mr. Davis invited Corps officials to accompany them on their field review so Corps staff could observe the wetland boundaries on the property. Corps staff attended but left without comment. The VADEQ confirmed the wetland delineation, showing 174.7 acres of uplands and 144.6 acres of wetland impacts, and the state permit process moved forward.

In late 2001, in an effort to find a mutually beneficial and expedient resolution to the outstanding Administrative Order, representatives from Tri City and their legal counsel, Robert Dreher, who now serves as the Associate Director of USFWS, met at EPA's Philadelphia offices with key EPA officials as well as a representative from the Environmental Defense Section of the U.S. Department of Justice (DOJ). Tri City proposed a settlement through a Consent Decree which included significant mitigation and preservation that the DOJ official believed it was in everyone's best interest, and EPA representatives agreed, with the caveat that they would need concurrence from the Corps to finalize the agreement. We were later notified that the Corps did not concur and would require a CWA404 permit for any development to proceed.

As required by Virginia state law, VADEQ opened a notice and comment period and held two public hearings on our project. During this time, we continued to communicate with VADEQ and interested parties to respond to any and all concerns regarding the impact of the project. In an effort to move the project ahead, we agreed to make a number of significant changes to our development plans to lessen the number of wetlands impacted. The revised project allowed us to avoid over 100 acres of wetlands and required us to offset our impacts by creating 290 acres of wetlands offsite by restoring wetland function on prior converted cropland. This amounts to two acres of restored wetlands for every one acre impacted. We also agreed to contribute 145 acres of wetlands on the adjoining property as a conservation buffer. As a result of these new

development, mitigation and preservation plans, VADEQ concluded that the project met the requirements of **no net loss** of wetland acreage and functions. In addition, Tri City agreed to install state-of-the-art stormwater ponds and filtration features such as wetlands benches, bioretention areas, and grassy swales in order to reduce erosion and improve water quality. At our final public hearing, VADEQ acknowledged that the permit contemplated more protective measures than typically required. Once again, VADEQ attempted to share our new project plans with the Corps, only to be rebuffed. At this point it had become painstakingly clear that the Corps did not want to participate in any review of our project.

On November 21, 2003, almost twenty years after obtaining the property, the Virginia State Water Control Board approved and VADEQ issued a Virginia Water Protection Permit, allowing Tri City to impact 144.6 acres of wetlands. The permit, which expires in 2018, included the negotiated wetland conservation requirements as well as numerous other conditions relating to wildlife preservation, erosion and sediment controls and construction procedures. Shortly after the issuance of the permit, VADEQ Director Bob Burnley praised our project, in an official VADEQ publication, as “an excellent example of the success of Virginia’s wetland protection program” due to the extensive restoration, preservations and minimization requirements. Our project was being used as the prime example of how development can occur with sound environmental protections.

On two occasions, the Virginia judicial system defended our State permit against legal challenges. The Chesapeake Bay Foundation (CFB) opposed the issuance of the permit in *Chesapeake Bay Foundation v. Commonwealth of Virginia*. The Circuit Court of the City of Richmond ruled in our favor by upholding the permit.⁵ The CBF appealed the decision only to lose again when the Virginia Court of Appeals issued a final ruling upholding the validity of the permit on April, 22, 2014.⁶ Our state permit still remains in full force and effect, but only for another 30 months.

While we still needed formal CWA section 404 approval from the Corps, we felt we had overcome the most challenging obstacle of securing the wetland permit from the Commonwealth. After all, Virginia and the Corps have joint permitting authority, and the Virginia regulations enacted the CWA 404 regulations verbatim. The Corps issued the first public notice on the property based on the VADEQ confirmed impacts in 2005, and Tri City provided responses to all public comments including those made by the EPA, the U.S. Fish and Wildlife Service and the cities of Virginia Beach and Chesapeake, as well as various environmental groups and individual citizens. The Corps then requested a significant volume of new and updated information which we also provided; however, it took approximately 1 year to receive a response from the Corps related to our submissions.

The Corps subsequently concluded that the VADEQ-approved wetland delineation, which was the basis of our approved state permit, was not accurate. This is the same wetland delineation that the VADEQ asked the Corps to confirm three years earlier. With disregard to the VADEQ’s

⁵ Chesapeake Bay Found., Inc. v. Com., ex rel. Virginia State Water Control Bd., No. 1897-12-2, 2014 WL 1593323, at *4 (Va. Ct. App. Apr. 22, 2014).

⁶ Id. at *16.

regulators and their expertise, the Corps performed a new wetland delineation in 2007 that added 36.7 acres of wetlands to the project for a new total of 181.3 acres impacted. Contrary to the well-documented delineation that was performed by our environmental consultants and VADEQ, the basis of the Corps delineation is rather vague and, in some instances, a stretch. For example, the Corps relied on observations of “ponding water and blackened leaves in designated areas” as primary indicators of hydrology during their site visit. Due to the increase in wetlands impact per their confirmation, the Corps required that the project go through a second public notice process. Tri City again provided responses to all public comments.

In response to the Corps’ delineation, we quickly worked to amend our project proposal and offered a number of options to reduce our environmental impact. One of the proposals we offered reduced wetland impacts from 181 acres to 80 acres with onsite 1:1 mitigation. We also worked through the Corps’ Least Environmentally Damaging Practicable Alternatives (LEDPA) analysis and considered the Corps impractical suggestion that we move our project to 90 acres of uplands on nearby Elbow Road. However, there were many complications with the Corps’ LEDPA. First, the 90 acres is located along a narrow winding and dangerous section of road that could not support the main ingress and egress of a mixed-use development without millions of dollars of offsite infrastructure and road improvements that would have made the project financially infeasible. Second, the City of Chesapeake zoning laws prohibited us from moving the project to that area. In an attempt to overcome this obstacle, the Corps unsuccessfully tried to pressure city officials to waive current zoning restrictions and related proffers to allow the result it desired. Finally, as it is Congress’ policy to “recognize, preserve and protect” the rights of the states to “plan the development and use...of land,” the Corps has no authority to determine where a project should be built.⁷ This action is an excellent example of the federal government’s intrusion on local land use.

Three years after our permit request was filed with the Corps and 8 years after we had initiated the joint permitting process with the VADEQ, the Corps denied our request for a federal wetland permit. The Corps believed that we had failed to prove that the 90 acres of uplands on Elbow Road could not be developed and stated that we had not met the requirements of the LEDPA. The Corps also claimed that we did not adequately respond to requests for information even though we had filed all requested information, including offsite analysis of numerous sites, extensive analysis of 17 onsite alternatives, and detailed responses to two rounds of public comments.

In an effort to avoid litigation challenging the denied permit and to salvage at least part of our investment, we modified our project yet again. The significantly reduced plan allowed development on 61 acres, impacting 29.8 acres of wetlands. In 2009, the Corps accepted this proposal as a modification of the previously denied permit and reopened the 2005 application. The Corps issued their third public notice on our project with its modified scope and impact and Tri City again provided responses to all public comments.

⁷ 33 U.S.C. § 1251(b).

As soon as we started to gain ground, the Corps issued a new regional supplement manual for field staff to use in making wetland delineations.⁸ These changes expand the limits of wetlands into land that was formerly delineated by the Corps as uplands. This change specifically affected the Tri City property at Centerville. Two of the secondary indicators of hydrology were changed to primary indicators and used to expand the test for identifying wetlands. This change alone shifted very large areas from uplands to wetlands. The rules changed again in the midst of the process and the Corps applied these changes to our pending project application. In essence, we were forced to start over with new rules. We were now required to go through a public notice for a fourth time based on the increased impacts, moving us even farther away from securing our permit. In fact, just this past week, more than 60 days since the publication of our last notice, we received another 7-page request from the Corps for new and updated information on our project. It appears that we will be perpetually subject to vacillating circumstances.

Over the last eight years since the original permit denial, we have diligently continued to work with the Corps in an attempt to obtain a federal wetland permit. For us, these years have been spent responding to the Corps' constant requests for additional information, studies, and data. When we responded with the requested information and data, we were often met with follow-up requests to reformat the information in a painstakingly specific way. Indeed, the numerous reformatting requests appeared to be nothing other than an intentional stalling mechanism, as we swiftly complied with every request only to be faced with another. We had to hire additional environmental consultants to conduct more wetland delineations and wetland functional assessments, and even hired consultants suggested by the Corps. In addition, the Corps staff assigned to our project continually changed over the years and we struggled to keep them appropriately educated on our project. Over the years we have had dozens of field visits from Corps and EPA staff in order to survey and assess the land. We have complied every step of the way.

Since 1988, the Corps has successfully prevented Tri City from developing the land and in 2018, the 15 year permit that VADEQ approved will expire. The results of our 27-year effort to obtain required permits for the development of our property are contained in approximately 55 file boxes of records of submissions, correspondence, maps, scientific analysis and data collection related to this project and our pursuit of the required permits. In fact, if we laid the papers end to end, they would stretch over 30 miles, the distance from the U.S. Capitol to Dulles airport. It is hard to keep going when the continual requests and delays seem designed to further protract the process and frustrate our ability to ever reach a resolution and run out the clock on our state permit.

While we remain deflated by the status of our permit application, we are fearful that the worst is yet to come. The EPA and Corps are working to change the rules again with a regulation that would redefine the scope of waters protected under the CWA. They are trying to accomplish this by adding new terms, definitions, and interpretations of federal authority over private property that are more subjective and provide them with greater discretionary latitude. The Tri City

⁸ "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)." U.S. Army Corps of Engineers. November 2010.

project serves as a perfect example of the frustration with the ongoing uncertainty over the scope of CWA jurisdiction. Unfortunately, the rule falls well short of providing the clarity and certainty sought by the regulated community. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. It is so convoluted that even professional wetland consultants with decades of experience will struggle to determine what is jurisdictional.

The EPA and Corps must stop expanding their authority over private property and improve the CWA's implementation by removing redundancy. They must also provide a practicable and transparent permitting system with the goal of improving compliance while protecting the aquatic environment. This rule completely fails to achieve any of these goals. Thankfully, the Sixth Circuit Court of Appeals has currently intervened and prevented this rule from being implemented. This rule will only serve as an additional obstacle that will prevent ours and many other projects from moving forward.

Our current project proposal totals 53.8 acres, a 233-acre reduction from the original development proposal. If constructed, the project will benefit the City and the public in the form of increased employment opportunities, increased property tax revenue estimated at well over \$1.1 million per year, sales and use tax revenues, proffers for a school site, and increased public amenities. For over thirty years we have complied with every request, modified our building plans, and created an extremely aggressive conservation plan to combat environmental impacts. It is difficult to say what else we can do to move this project forward. Most businesses do not have the time, money and fortitude to engage in these lengthy fights and are forced to abandon such projects. We believe this is the Corps main objective. We are fortunate to have the means to stay in this fight, and our Chairman, Edward Garcia, now 90, is dismayed that the very liberties and fairness that he and his three brothers fought for during WWII are now being eroded by an overzealous regulatory bureaucracy. Eddie is not about to step away from this fight because he understands how important it is not only for our project but for all landowners. While the project remains at a standstill and we still have no clear end in sight, I hope that our story can be used to advance positive reforms to repair our broken regulatory system.

Testimony of William W. Buzbee
Professor of Law
Georgetown University Law Center
600 New Jersey Avenue, N.W. Washington D.C. 20001
email: wwb11@law.georgetown.edu
office phone: 202 661 6536

Before the United States Senate
Subcommittee on Fisheries, Water, and Wildlife
Of the
Committee on Environment and Public Works
Hearing on “Erosion of Expectations and Expansion of Federal Control—
Implementation of the Definition of Waters of the United States”
May 24, 2016, 2:30 p.m.
Room 406, Dirksen Senate Office Building

My name is William Buzbee. I am a Professor of Law at 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 your hearing subject, entitled "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States." I will focus in my testimony on the finalized "waters of the United States" regulations (hereinafter the "Clean Water Rule") published in the Federal Register by the Army Corps of Engineers (the Army Corps) and the United States Environmental Protection Agency (EPA) in the Federal Register on June 29, 2015, at 80 Federal Register 37,054.

As a professor asked to testify due to my expertise, not as a partisan or representative of any organization, I will seek to provide context leading to these regulations, comment on the choices made by EPA and the Army Corps, and assess the legality and logic of the Rule. Given the hearing's title and my review of some recent related past hearings and claims about the legality and substance of this rule, I will especially focus upon claims of regulatory overreach and expansion. As I state below in more detail, I believe that these claims are legally and factually erroneous, misunderstanding the regulatory background and Supreme Court decisions, omitting key elements of the actual Clean Water Rule, and mistakenly claiming limitless regulatory overreach under a statute and regulation that actually now protects less and provides more clarity than under the law as it stood during the term of President Ronald Reagan.

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

This is not my first involvement with the question of what are protected as "waters of the United States" under the CWA. I have been involved in past related Supreme Court litigation and legislative hearings.

As a result of my work on environmental law and federalism, I served as co-counsel for an unusual bipartisan amicus brief filed in the *Rapanos* case. 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 had served under Presidents Nixon, Ford, Carter, the first President Bush, and President Clinton. Despite their different party backgrounds and years of service, all four agreed on the importance of retaining longstanding regulations protecting America's waters. This bipartisan EPA Administrators' brief was also 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.

This substantial, bipartisan coalition, including the Bush Administration, all asked the Supreme Court to uphold longstanding regulatory and statutory interpretations regarding what is protected as "waters 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.

Since the Court's splintered and confusing ruling in *Rapanos*, I testified in House and Senate hearings on implications, potential fixes, and regulatory responses in 2006, 2007, 2008, 2014 and 2015. I have continued to follow developments regarding this rule and body of law.

Earlier in my legal career, I counseled industry, municipalities, 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*, *Harvard Environmental Law Review*, and in an array of other journals and books. In addition to teaching at Georgetown, I previously taught at Emory

University and have been a visiting professor at Columbia, Cornell, Georgetown and Illinois Law Schools and taught and lectured in Europe and Asia.

My testimony, in brief:

The Clean Water Rule and the massive accompanying science report referenced and summarized in the Federal Register and now generally known as the “Connectivity Report” 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. Furthermore, the Clean Water Rule and Connectivity Report are directly responsive to the pleas and rulings of a majority of US Supreme Court justices. Far from being illegal, they are directly responsive to Supreme Court law and well grounded in peer-reviewed science and the long enduring Clean Water Act.

I will make six 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. And America’s fisheries—a focus of this Committee---are hugely dependent on protection of rivers, tributaries, wetlands, and the sorts of waters and related ecological and economic functions addressed by the final Clean Water Rule. Business interests are undoubtedly on both sides of this issue, but hunting, fishing, boating, recreation, and tourism-linked businesses are 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 waters 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 in terms of resulting harms. In addition, state and local governments are also on both sides of this issue. Degraded water quality can lead to costly obligations for state and local governments.

Of great importance, legislators and other critics make both a scientific and legal error when they assume that periodically dry areas cannot be worth protecting as a water of the United States. No majority of the Supreme Court has ever so held, and the science contradicts this view. After all, much of the United States is often dry if not suffering from drought; when waters do flow, those

channeling and connecting geographic features are of critical importance and require protection against pollutant discharges that will degrade precious and scarce water.

Second, I will show how the regulatory choices reflected in the Clean Water Rule are responsive to Supreme Court law and also the views of a majority of the Supreme Court that regulations on this issue are needed and appropriate. EPA and the Army Corps provided lengthy and well-grounded legal explanations for the Clean Water Rule at every stage of the regulatory process.

Third, the Clean Water Rule and massive regulatory preamble in the Federal Register and accompanying documentation reveal that EPA and Army Corps engaged in extensive outreach and responded to criticisms of supposed limitless claims of federal power by retaining and solidifying exemptions.

Fourth, in attacks on the Clean Water Rule, critics seem consistently to fail to note and credit a major change that removes the most expansive and least water-linked historic grounds for federal claims of jurisdiction. The Clean Water Rule deleted longstanding federal power to regulate "other waters" based on 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. Instead, the Clean Water Rule, as now amended, links Clean Water Act jurisdiction to what the best peer-reviewed science indicates deserves protection. This science-based effort should be applauded, even in a time of partisan acrimony.

Fifth, the Clean Water Rule is directly linked to and tailored in light of the Connectivity Report, a massive survey of peer-reviewed science regarding waters' functions. 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 had found flaws in the science or proposed regulatory categories, they surely were required to participate in the notice and comment process and support their contrary views with hard science and firm data, not conclusory tales.

Sixth, past hearings and public comments about this rule at times reveal a fundamental confusion. For liability and permit obligations to arise under CWA in connection with farming and other typical land and water uses, a discharge of pollutants must be involved. Basically, neither ordinary farming activities nor basic uses of lands, wetlands, and other covered waters are prohibited. It is the act of discharging pollutants subject to Section 402 or Section 404

permits that typically creates permitting obligations. (Oil spill prevention obligations are subject to their own separate measures that are not relevant here.) Hence, many activities are non-events under the CWA, and most actions that are covered are subject to permits that typically constrain but allow activities. To be subject to liability, there generally must be a discharge of pollutants into or filling of a protected water without a required permit or in violation of a permit.

Point I : The extent of federally protected waters matters to far more than just wetlands regulation and explains the longstanding protective 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 that, in accordance with the Clean Water Act, protects wetlands. It 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). These provisions support 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 that the Clean Water Act protects far more than just waters used in the literal sense for shipping-linked navigation. That is simply not the law.

It is critical to remember that 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.

Many of the countries we compete with for talent and business vitality suffer from a hugely degraded environment. Our cleaner environment is a major comparative advantage in the increasingly globalized economy. After-the-fact efforts to clean polluted waters are costly, and harms to health, business, governmental, and recreation interests when a water is polluted can be vast. Especially in states and regions with a fisheries industry and large hunting and fishing

constituencies and linked businesses, the rivers, tributaries, and wetlands that are at the heart of the protections of the Clean Water Rule provide vast value.

Despite the great progress in improving United States water quality, many parts of the country still suffer from degraded water quality, and threats to wetlands and tributaries still arise. Everyone shares a common interest in protecting water quality and wetlands' hugely valuable functioning. Nevertheless, individuals may see business advantage in being able to pollute with impunity or convert for private gain a tributary or wetland into land for development or other commercial use, 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. All environmental protection laws, by their very nature, ask for a degree of restraint, forbearance, and attention to shared interests and resources. Congress, and under the Clean Water Act EPA and the Army Corps, play a critical role in protecting our critically important and shared water resources. That the Clean Water Act is one of America's great success stories, and a success with bipartisan roots, should not be forgotten.

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

Protecting jurisdictional waters was an area of bipartisan consensus and regulatory consistency right through the recent Bush Administration. Until the 2001 Supreme Court *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) decision, the law and underlying regulations reflected a stable bipartisan consensus of almost thirty years that protection of America's waters was good policy. A unanimous Court deferred to agency line-drawing about what sorts of waters deserved protection in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). However, *SWANCC* and then *United States v. Rapanos*, 547 U.S.715 (2006) (*Rapanos*) unsettled that longstanding bipartisan consensus, breeding legal uncertainty that the new Army Corps and EPA regulations seek to address.

Greater regulatory clarity and explicit reference to the relevant best science together reduce regulatory uncertainty, both protecting waters that matter and reducing regulatory uncertainty and costs that benefit no one.

That EPA and the Army Corps could or should issue new clarifying regulations on “waters” was explicitly embraced by a majority of Supreme Court justices in *Rapanos* and is consistent with forty years of CWA understandings. The act of rulemaking is in no way illegitimate. 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 must 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. 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. They also agreed that both the sorts of waters that would be protected under Justice Kennedy’s opinion and under Justice Scalia’s plurality opinion fall within the reach of the Clean Water Act.

Thus, 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 *SWANCC* decision did not constitutionally toss away the heart of the Clean Water Act. It merely addressed a regulatory interpretation that it viewed as outside the permissible bounds of the statute, stating that protection of isolated waters due to their use by migratory birds went beyond the bounds of statute’s language. It explicitly did not state some new constitutional boundary, but read the statute to avoid having to engage such a question.

The Clean Water Rule responds directly and reasonably to these Supreme Court calls. It protects 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. The Rule and the Federal Register preamble discussion 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 by linking the rule’s approach to the Connectivity Report, a comprehensive survey of peer-reviewed science, the Army Corps and EPA respected Supreme Court edicts and signals. Furthermore, the Clean Water Rule is consistent with the Clean Water Act’s explicit textually stated 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.

When reviewing recent hearings and statement about the Waters Rule, I noted occasional claims that EPA and the Army Corps somehow failed to provide legal analysis to explain their understanding of the law and legal basis for the rule. I don’t know the source of this erroneous view, but ever since the Supreme Court in the 1980s embraced what is known as judicial “hard look review” of high stakes regulations, agencies have been careful to provide in-depth legal explanations for their actions and also responses to salient criticisms. If anything, when proposing and then finalizing the Clean Water Rule, EPA and the Army Corps provided unusually lengthy and numerous legal analyses to justify their actions. When the agencies proposed the rule, the proposal published in the Federal Register contained a lengthy appendix entitled “Legal Analysis.”¹ Similarly, when they finalized the rule, the agencies published an enormous response to comment document. In addition to responding to legal claims throughout that document, there is an entire chapter dedicated to Legal Analysis.² Moreover, the Technical Support Document published with the final rule has a large section entitled “Statute, Regulations

¹ See analysis starting at p. 22,252 of <https://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf>.

² See https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

and Caselaw: Legal Issues.” This provides yet more lengthy and detailed legal analysis.³ Whatever one’s views about the Clean Water Rule, it did not emerge out of nowhere and the agencies certainly provided a massive body of explanatory legal material.

Point III: The Clean Water Rule makes newly explicit several categories of activities or waters not subject to federal jurisdiction

A persistent refrain regarding the Clean Water Rule and in litigation over the Clean Water Act is that federal jurisdiction being claimed borders on the limitless. Based on this Senate hearing’s title, I expect that the Committee will again state or hear similar concerns. I believe that claims that the Clean Water Rule expands on federal jurisdiction are incorrect. Based on my review of the Rule and preceding law, it protects fewer water than provided under the law as it stood during the Reagan Administration. The Rule partly restores to protection some waters that were in regulatory limbo since the *SWANCC* decision, mainly due to regulatory forbearance and avoidance of litigation over disputed jurisdictional determinations. This claim of limitless federal power is most evidently erroneous in light of the Rule’s creation of categorically protected waters, others that must be assessed on a case-by-case basis, and explicit distance-based exclusions from federal jurisdiction.

However, the error of claims of limitless jurisdiction and overreach is also readily apparent when we examine new regulatory sections and definitions that, as now amended, make explicit that several types of otherwise potentially debatable waters are not “waters of the United States.” These include (with additional more precise language not quoted in full here): wastewater structures of several types; 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, puddles, 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

³ See https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf.

jurisdiction has bordered on the limitless. Of huge importance, elimination of the commerce-based sweep up grounds for jurisdiction shifts federal power from a potential focus just on the presence of commercial activity to a focus on peer-reviewed science about the functions of America's waters. I turn to that provision now.

Point IV: The Army Corps and EPA in the Clean Water Rule deleted the longstanding "other waters" commerce-linked sweep-up provision, instead basing federal jurisdiction on science and thereby limiting federal power

Critics of the Clean Water Rule have virtually ignored a vast legal change that I would have expected to garner applause from critics of broad federal jurisdiction. EPA and the Army Corps deleted the longstanding additional commerce-based sweep-up grounds for federal jurisdiction. This provision, the former Section 328.3(a)(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 just 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. It was clearly crafted to mesh Clean Water Act jurisdiction with the reach of federal power under the Commerce Clause of the U.S. Constitution. 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. In the Clean Water Rule, EPA and the Army Corps opted to avoid dispute, deleting this longstanding grounds for jurisdiction and relying instead on peer-reviewed science about how and why waters should be protected.

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 answered critics and eliminated uncertainty by deleting this section in favor of linking jurisdictional "waters of the United States" determinations to what the science shows, as applied to the particular sites and activities at issue. 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 significant concession and reduction in federal power. Again, the final Clean Water Rule instead links federal jurisdiction to peer-reviewed science, cutting back on a provision in place for decades that provided the broadest possible grounds for jurisdiction.

Point V. The Clean Water Rule links to a massive survey of peer-reviewed science about waters' connectivity, values and function and thereby 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 in Congress, in the courts, and in the academy have called for “sound science” and “peer-reviewed” science to underpin regulatory judgments. The Army Corps and EPA took 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 was released in draft form, reviewed by the Science Advisory Board, and made public for review and comment. On January 15, 2015, EPA announced in the Federal Register release of a final version of this report. In addition, the Corps and EPA in the Clean Water Rule Federal Register preamble explain how they interpret this report and the science in deciding what types of waters are categorically protected, subject to case-by-case “significant nexus” analysis, or not protected.

This sort of notice and comment process and public vetting of the accompanying science report, with the overt linkages to the “waters of the United States” rule, provided an exemplary science-based, open, transparent, and judicially challengeable process. I'm unaware of any powerful criticisms against the Connectivity Report; considering its massive survey of all peer-reviewed science, criticism would certainly be difficult.

Point VI: Because an unpermitted discharge of a pollutant is a central prerequisite for Clean Water Act liability, not ordinary uses of lands and waters, surprise liability should be rare

Both in past legislative hearings and in many statements about this rule, critics have asserted that virtually everything farmers and others do in lands near waters and around or in supposed waters

will now create indeterminate liability or trigger legal prohibitions. These claims seem to be rooted in a misunderstanding of the CWA. Apart from some provisions applicable to oil spill planning that require preventive planning, permitting obligations and linked liabilities under the CWA only arise when a person will be discharging pollutants from a point source into a jurisdictional water. Section 402 industrial discharges and Section 404 “dredge and fill” permits are most relevant here.

Most ordinary agricultural activities and other uses of lands and waters simply do not constitute covered discharges. First, as mentioned above, there are explicit statutory as well as regulatory carveouts, especially for categories of agricultural activity. In addition, assorted “nationwide” or “general” permits create presumptive permission for many categories of activities often undertaken around waters. And not everything is a point source; many sorts of pollutant flows, especially connected to agriculture or flowing across lands or roads, are nonpoint sources and not reached by the CWA. It is when someone decides to dump pollutants or destroy a water, yet without a permit, that legal liability arises. (Again, oil spill prevention is subject to different additional obligations.) But often such discharges will be subject to permitting and hence escape liability.

Thus, it is important to keep in mind that it is the *unpermitted discharge of pollutants from a point source into a jurisdictional water* that gives rise to concerns. Furthermore, it is extraordinarily rare that unintentional or even clearly illegal intended conduct gives rise to liability; citizens seeking to enforce the law have to give notice so there is an opportunity for cure, and government enforcers also typically try to head off trouble by telling potential law violators of their concerns. When a question arises about whether a water is jurisdictional, the Army Corps has long had a non-mandatory process for providing regulatory guidance, further reducing risks of surprise regulatory liability. Basically, liability does not come out of the blue, but requires several stages of intentional conduct and often something approaching willful disregard of the law.

Conclusion

The legal uncertainty of recent years about what are protected federal waters has benefitted no one. For those concerned about protection of America's waters, regulatory uncertainty has led to regulatory forbearance, problematic or erroneous regulatory and judicial decisions, and increased regulatory costs. By now 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. 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. The new Clean Water Rule should bring clarity and stability to the law, while also respecting Supreme Court precedent and the protective mandates of the Clean Water Act. Little is bipartisan these days, but protection of America's waters is surely valued on both sides of the aisle and embraced broadly at the federal, state, and local level. Businesses and citizens depend on protection of America's waters. Our abundant and protected waters, especially high quality waters, offer a major economic advantage for the United States; many of our international competitors are despoiling their air and waters or suffer from chronic water shortages exacerbated by pollution. I hope that this Committee and others will avoid criticisms rooted in misunderstandings about the law and content of the new Clean Water Rule. It deserves support and will bring new clarity to the law.



THE IZAAK WALTON LEAGUE OF AMERICA

**Testimony of Scott Kovarovics
Executive Director, Izaak Walton League of America**

**Subcommittee on Fisheries, Water and Wildlife
Committee on Environment and Public Works
United States Senate**

May 24, 2016

Chairman Sullivan, Senator Whitehouse, and members of the Subcommittee, I greatly appreciate the opportunity to testify today concerning the Clean Water Rule issued by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency (EPA).

I serve as Executive Director of the Izaak Walton League of America. I am honored to be here to share the perspective of the League and the much broader community of Americans who enjoy hunting, angling and outdoor recreation. The Izaak Walton League was founded more than 90 years ago by anglers, hunters and others who were concerned about the negative impacts of water pollution and unlimited development on outdoor recreation – especially fishing – and the health of fish, wildlife and other natural resources. The founders of our organization understood that clean water and healthy wetlands are essential to robust populations of fish, ducks and other wildlife and successful days in the field.

Today, the League's 43,000 members are leading efforts locally to conserve and restore habitat and monitor and improve water quality. These members also enjoy hunting, angling, recreational shooting sports, boating and myriad other outdoor recreation activities. And like League members before them, they understand that healthy natural resources, including water and wetlands, provide the foundation for the outdoor traditions they and tens of millions of other Americans enjoy every year.

Healthy Streams and Wetlands Are Vital to Hunting and Angling, Communities and the Outdoor Recreation Economy

Ensuring the nation's streams, wetlands and other waters are healthy is vitally important to Americans who hunt and fish, for communities nationwide and for the outdoor recreation economy.

Wetlands and streams provide vital habitat for fish, ducks and other wildlife. For example, the prairie pothole wetlands throughout the northern plains and southern Canada support 50 percent of the North American duck population in an average year and as much as 70 percent when water and prairie grasses are abundant. A wide array of duck species depend on these wetlands for breeding, nesting and rearing young. Ducks that hatch and grow to adulthood in these wetlands are harvested throughout the United States every fall. In addition, headwaters and other small streams are vital to cold water fish. These waters provide essential spawning habitat for

trout, salmon and other fish and are then essential to supporting these fish throughout their lifecycles.

However, following two confusing U.S. Supreme Court decisions (*SWANCC* in 2001 and *Rapanos* in 2006) and subsequent agency guidance, many streams and wetlands are increasingly at risk of being polluted or drained and filled. According to EPA, the types of streams that flow to public drinking water supplies for more than 117 million Americans are at increased risk of pollution. Wetlands are not only at greater risk, the nation is losing natural wetlands at a growing rate. In the most current *Status and Trends of Wetlands* report, the U.S. Fish and Wildlife Service concludes the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions – compared with the previous assessment period (1998-2004). This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago.

Each year, nearly 47 million Americans head into the field to hunt or fish. These are not simply traditions or hobbies – they are fundamental components of our nation’s economy. The money sportsmen and women spend benefits major manufacturing industries and small businesses in communities across the country. These expenditures directly and indirectly support more than 1.5 million American jobs and ripple through the economy to the tune of more than \$200 billion per year. Many other forms of outdoor recreation also depend on clean water and a healthy environment. According to the Outdoor Industry Association, boating – including canoeing and kayaking – had a total economic impact of \$206 billion in 2012, supporting 1.5 million additional jobs in this country.

In addition to providing critical habitat for fish and wildlife and directly supporting hunting and angling, wetlands also provide a host of other benefits to people and communities across the country. Natural wetlands are arguably the most cost-effective protection against flooding for communities large and small. According to the National Weather Service, the 30-year average for flood damage is \$8.2 billion annually. Conserving wetlands is a fiscally prudent alternative to building higher levees and concrete storm walls and armoring every stream bank with rip-rap.

The Clean Water Rule is Balanced, Science-based and Limited in Scope

The Clean Water Rule adopted by the Army Corps and EPA in 2015 is science-based, limited and more specifically identifies waters that are – and are not – covered by the Clean Water Act. The final rule represents a scientifically and legally sound definition of covered waters that:

- **Narrows the historic scope of the Clean Water Act jurisdiction**, excluding protections for some wetlands and other waters that were protected under the Act before 2001.
- **Clearly defines the limits of tributaries** through physical features, including bed, bank and ordinary high water mark, and distinguishes tributaries from dryland ditches and erosional features.
- **Draws bright line physical and measureable boundaries on covering adjacent and nearby waters.**
- **Preserves and enhances existing exemptions for farming, ranching, forestry and other land uses.**

Hunting, angling and conservation groups, including the League, strongly support the final rule. It is also supported by businesses and industries that depend on clean water and a healthy environment. The following quotations highlight some of that support:

“The clean water rule is good for our business, which depends on clean, fishable water. Improving the quality of fishing in America translates directly to our bottom line, to the numbers of employees we hire right here in America, and to the health of our brick-and-mortar stores all over the country.”

— *Dave Perkins, executive vice chairman of The Orvis Company, America’s longest continually-operating fly fishing business, with 66 retail stores and 10 outlets in the United States and approximately 1,700 employees*

“This important final rule provides clarity on protections for the lifeblood of many of our country’s prized fisheries. The health of these headwaters sets the tone for all waters downstream and creates the backbone of our nation’s water resources. If we as a nation fail to protect our headwater streams and wetlands, we could jeopardize the economy of the hunting and fishing industry and put millions of people out of work.”

— *Benjamin Bulis, president of the American Fly Fishing Trade Association, the sole trade organization for the fly fishing industry*

“Our brewery and our communities depend on clean water. Beer is, after all, over 90 percent water, and if something happens to our source water, the negative effect on our business is almost unthinkable . . . We all rely on responsible regulations that limit pollution and protect water at its source. Over the past 23 years, we’ve learned that when smart regulation and clean water exist for all, business thrives.”

— *Andrew Lemley, government affairs representative, New Belgium Brewing*

“The EPA’s rule gives the business community more confidence that clean water sources, including streams and wetlands, are protected, and removes uncertainty surrounding the agency’s authority to protect our waterways. This is good for the economy, and vital for businesses that rely on clean water for their success.”

— *Richard Eidlin, vice president of policy and campaigns, American Sustainable Business Council, which represents 250,000 businesses and 325,000 entrepreneurs, executives, managers, and investors*

Exemptions from the Clean Water Act are Maintained and Enhanced by the Clean Water Rule

Since 1977, the Clean Water Act has included a number of exemptions from the section 404 dredge and fill permit process for discharges associated with farming, construction, mining and other activities. For example, the discharge of dredge or fill material “from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices” (section 404(f)(1)(A)) is generally exempt from permitting. Other provisions exempt “construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches” (section 404(f)(1)(C)); “construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters” (section 404(f)(1)(D)); and “construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment . . .” (Section 404(f)(1)(E)). These exemptions do not apply to activities that would bring waters of the United States into

uses for which they had not previously been used or where the flow or circulation of such waters would be reduced.

Under the plain language of the Clean Water Act, discharges associated with a broad range of activities are already exempt – and have been for nearly 30 years. These statutory exemptions can only be modified by Congress; federal agencies cannot alter them and are bound by law to follow them. The final rule in no way limits or alters these exemptions.

Moreover, in an effort to provide even more clarity and certainty about the types of waters covered by the Clean Water Act, the final rule maintains existing regulatory exemptions and – for the first time in regulation – explicitly excludes specific types of waters from the definition of “waters of the United States.” **The following are among the types of waters that are excluded from the regulatory definition:**

- Waste treatment systems.
- Prior converted cropland.
- Many drainage ditches provided they are not excavated in a tributary.
- Artificially irrigated areas that would revert to dry land if irrigation ceased.
- Artificial, constructed lakes and ponds created in dry land, including farm and stock ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds or cooling ponds.
- Artificial reflecting pools or swimming pools created in dry land.
- Small ornamental waters.
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining sand or gravel that may fill with water.
- Erosional features, including gullies, rills and other ephemeral features.
- Puddles.
- Groundwater, including groundwater drained through subsurface drainage systems.

When considered in context with the existing statutory exemptions for certain discharges, the final rule more clearly defines the waters **not covered** by the Clean Water Act and incorporates exemptions that had previously not been in regulation. For instance, the rule – in response to comments – adopts an exclusion for certain storm water control features such as green infrastructure installations constructed in dry land.

Conserving and protecting streams, wetlands and other waters is essential to Americans who hunt, fish and enjoy a wide array of other outdoor recreation. These activities depend on clean water and healthy habitat, including wetlands. And these activities are more than traditions or hobbies – they fuel the outdoor recreation economy, which totals hundreds of billions of dollars annually and supports millions of American jobs.

The Clean Water Rule is vitally important to safeguarding our nation’s water resources, hunting and angling traditions, and the outdoor recreation economy. The final rule provides more clarity about the waters that are – and are not – covered by the Clean Water Act. The rule is based on overwhelming science and common-sense. And it responds to common calls from Supreme Court justices, industry and land owners to clarify agency regulations.

I appreciate the opportunity to testify and would be happy to answer any questions.