**Testimony of William W. Buzbee**
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**Before the United States House of Representatives**
**Subcommittee on Water, Power, and Oceans**
**Of the**
**Committee on Natural Resources**
**Hearing on "Proposed Federal Water Grabs and Their Potential Impacts on States, Water Users, and Landowners"**
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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 "Proposed Federal Water Grabs and Their Potential Impacts on States, Water Users, and Landowners." I will focus in my testimony on the new proposed "waters of the United States" regulations published in the Federal Register by the Army Corps of Engineers (the Army Corps) and the United States Environmental Protection Agency (EPA) on April 21, 2014. As a professor asked to testify due to my expertise, not as a partisan or representative of any organization, I will seek to provide context leading to these proposed regulations, comment on the choices made by EPA and the Army Corps, and assess the legality and logic of the proposed regulations. Because these regulations are now nearing the end of a lengthy notice and comment process, undergoing review now by the Office of Management and Budget's Office of Information and Regulatory Affairs, I will also briefly comment on why, at this point, allowing EPA and the Army Corps to finish this participatory and judicially scrutinized process makes sense.

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

This is not my first involvement with the question of what is protected as a "water of the United States" under the CWA. 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 *United States v. Rapanos*, 547 U.S.715 (2006) (*Rapanos).* This brief was filed on behalf of a bipartisan group of four former Administrators of the United States Environmental Protection Agency (EPA). Those former US EPA Administrators 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 a "water of the United States," emphasizing the centrality of the "waters" determination to all of the Clean Water Act. After all, although this question of what are protected "waters" is often discussed with a focus on wetlands and tributaries and especially dredging and filling restrictions long set by Section 404 of the Clean Water Act, the "waters" issue is the key jurisdictional hook for virtually all of the Clean Water Act. This includes, among other things, direct pollution industrial discharges under Section 402 of the Clean Water Act and its National Pollutant Discharge Elimination System (NPDES) program, as well as oil spill and water quality components of the Act.

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, and 2014. I have continued to follow developments on this proposed rule and body of law.

Earlier in my legal career, I counseled industry, municipalities and governmental authorities, states and environmental groups about environmental law, pollution control, and land use issues under all of the major federal environmental laws, as well as state and local laws. As a scholar, I have written extensively about related issues, with a special focus in recent years on regulatory federalism, especially environmental laws and their frequent reliance on overlapping federal, state and local environmental roles. I have published books with Cornell and Cambridge University Presses, and Wolters Kluwer/Aspen. My publications have appeared in *Stanford Law Review, Cornell Law Review, NYU Law Review, Michigan Law Review, University of Pennsylvania Law Review, 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.

*My testimony, in brief:*

These proposed regulations and a massive accompanying science report referenced and summarized in the Federal Register notice—and that science report has now been finalized-- 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 proposed rule and science report are directly responsive to the pleas and rulings of a majority of US Supreme Court justices.

I will make seven main points in this testimony:

First, I will explain very briefly how the question of what "waters" are protected matters not just for wetlands and tributary protections, but for industrial discharges of pollution. Furthermore, the various types of waters protected perform many functions of importance to businesses and governments at all levels. Business, health, recreational, and environmental interests are all at stake here. Surely this Committee will hear from some business interests arguing against the proposal of the Army Corps and EPA, but business interests are undoubtedly on both sides of this issue, with hunting, fishing, boating, recreation, and tourism linked businesses especially dependent on protection of America's waters. And because pollution and filling of America's waters threaten low cost but high value wetlands functions and 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 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 these regulations 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.

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

Fourth, the regulations link a massive survey of peer reviewed science of waters' functions with a tiered and nuanced approach. This approach answers criticism that the federal government is going too far and protecting areas of no value relevant to the Clean Water Act. If critics have found flaws in the science or proposed regulatory categories, they surely have participated in this notice and comment process and called for adjustments in the final rule.

Fifth, in the initial heated attacks on these proposed regulations, critics failed to note and credit a major change that removes the most expansive and least water-linked historic grounds for federal claims of jurisdiction. The proposed regulation deleted 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 proposed rule 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.

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. If someone discharges pollutants into or destroys a protected water without a required permit or in violation of a permit, then liability arises.

Seventh, and lastly, I will discuss the implications of where this proposed rule stands in the regulatory process. Because it is near final, EPA, the Army Corps, and many thousands of

people and organizations have expended vast resources on this rule. We all should wait and see how EPA and the Corps have addressed the many comments and concerns, whether supportive or critical.

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

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

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.

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 CWA EPA and the Army Corps, play a critical role in protecting our critically important and shared water resources. That the CWA is one of America's great success stories, and a success with bipartisan roots, should not be forgotten.

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

Protecting jurisdictional waters was an area of bipartisan consensus 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 through stable Part 328 regulations 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 could reduce such uncertainty, both protecting waters that matter and reducing regulatory uncertainty and costs that benefit no one.

Issuing 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.

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

Hence, by protecting some waters by category and others on a case-by-case basis if satisfying "significant nexus" analysis, and in all instances linking such regulatory judgments to a comprehensive survey of peer reviewed science, the Army Corps and EPA have respected Supreme Court edicts and signals. Furthermore, these proposed regulations also show fealty to the Clean Water Act's explicit 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.

I am aware that the proposed regulations have been much criticized by some for how they deal with some categories of tributaries and ditches, with claims that they go too far in light of common agricultural practices or common road or railroad features, for example. EPA and the Corps have had to review such comments and have surely also consulted with other relevant departments and agencies. Comments from EPA indicate that responsive changes on some of these issues are likely. If, as critics claim, EPA and the Corps ignore science or salient and accurate comments and criticisms, the final rule will be legally vulnerable and will either be challenged in court or possibly subject to petitions for regulatory correction. But maybe those comments are overblown, or have been heard and led to regulatory improvements. We should know soon.

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

A persistent refrain in recent years and regarding the proposed regulations under discussion today is that the jurisdiction being claimed borders on the limitless. Today's hearing, with its "federal water grabs" title, evidently reflects similar concerns. Federal jurisdiction under this law has long been expansive, but the proposed rule did not, in fact, expand on federal jurisdiction. This claim of limitless federal power is most evidently erroneous in light of the proposal's creation of both categorically protected waters and others that must be assessed on a case-by-case basis.

However, the proposed regulations go further, in new Section 328.3(b) making explicit that several types of otherwise potentially debatable waters are not "waters of the United States." These include (with additional more precise language): waste treatment systems; prior converted cropland; several sorts of ditches that are upland or do not contribute flow to otherwise regulated waters; and several types of "features" such as artificially irrigated areas that would revert to upland without irrigation water, artificial lakes, ponds, pools and ornamental waters, construction-linked water-filled depressions, groundwater, and gullies, rills and non-wetland swales. Several of these exemptions appear to be in direct answer to criticisms in court briefs and congressional testimony that federal jurisdiction has bordered on the limitless.

Point IV: *The proposed regulations' link to a massive survey of peer-reviewed science about waters' connectivity, values and function 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, the courts, and in the academy have called for "sound science" and "peer reviewed" science to underpin regulatory judgments. The Army Corps and EPA have taken this to heart, for the first time pulling together a massive survey of peer reviewed publications about the connectivity, values, and functions of various types of waters. This report was last year released in draft form, reviewed by the Science Advisory Board, and was 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 their proposed regulation's Federal Register notice explained how they interpreted this report and the science in deciding what types of waters are categorically protected, subject case-by-case to "significant nexus" analysis, or not protected.

This sort of notice and comment process and public vetting of the accompanying science report, with the overt linkages to the proposed "waters of the United States" rule, have provided a valuable open, transparent, and judicially challengeable process. Supporters and critics have now had an opportunity to critique this report. We will soon be able to assess if the final rule is fairly based on the overwhelming peer reviewed science that confirms the functional importance of many types of waters.

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

In the proposed regulations, a longstanding additional grounds for federal jurisdiction has been deleted. This provision, the former Section 328.3(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 on their commerce-linked uses or values. This regulation was consistent with longstanding understandings of the 1972 Clean Water Act amendments and the congressionally intended reach of federal power. However, both the *SWANCC* and *Rapanos* decisions raised questions about whether Clean Water Act jurisdiction could focus on a water's commercial or industrial uses or the impacts of a water's degradation without regard to the water's functions or links to navigable waters.

I will not here opine on whether this section's deletion was legally necessary or prudent. I will, however, note that the Corps and EPA answered critics and eliminated uncertainty by deleting this section in favor of linking *all* 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 proposed regulations link regulation to peer reviewed science and cut back on the broadest possible grounds for jurisdiction.

Point VII: *An Unpermitted Discharge of a Pollutant is a Central Prerequisite for CWA Liability, Not Ordinary Uses of Lands and Waters*

Both in past legislative hearings and in many statements about this proposed 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 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 some categories of activities. 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. So 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. 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.

Point VII: *The Notice and Comment Process Should Run Its Course So All Can Assess the Actual Final Regulation*

A high stakes regulatory action like the "waters of the United States" rule triggers vast investments of time and resources by private and public actors. Congress should let this process come to a regulatory conclusion.

EPA and the Corps have participated in hundreds of public sessions around the country about this proposal. Many thousands of hours have been spent on this rule by a vast array of interested actors, including months of surely painstaking review by EPA and the Army Corps, and now by OIRA, which tends to look at proposed rules with an eye to efficiency goals, through cost-benefit analysis, and in coordinating among sometimes clashing parts of the executive branch. During such a notice and comment process, the executive branch has to comport itself with a vast body of administrative law that the courts police; agencies need to read comments, respond to salient criticisms, and justify the final regulatory choices in light of statutory language, court decisions, and relevant science and facts. If an agency violates any of these obligations, courts can and do step in and reject the agency's action. Or, sometimes, a flaw that is found and pointed out by critics will lead an agency to make further revisions, sometimes with yet another more focused notice and comment process. All of us—whether in or outside government—must be stewards of limited private and taxpayer resources. To try to block a new rule without seeing what it actually looks like in its final form is both unnecessary and threatens just such waste. If the final

rule is deeply flawed in its final form, then corrective actions can be sought in Congress, with the agencies again, or in the courts. And if it is a sound and responsive document, then much of the criticism may abate. America will benefit if important waters are again protected, and all will benefit from less regulatory uncertainty. At a minimum, the array of supportive and opposed constituencies will likely change when the final rule's choices are disclosed. I hope that Congress will let this regulation run its course.

*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. These proposed regulations, if finalized in a substantially similar form but with explanations and changes addressing concerns voiced during the process, could once again bring clarity and stability to the law, while also respecting the protective mandates of the Clean Water Act. We are nearing the end of lengthy, intensive, and contentious regulatory process. I hope that Congress will allow the process to reach its conclusion so we can all assess the legality and wisdom of the newly released final rule. 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. Certainly no one can be against the protection of America's invaluable water resources. Let's see if the final rule will deserve broad support.