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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

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Introduction

The Clean Water Act[1] 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,

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[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.

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[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 Nursey 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]henever 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]

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[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).