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This Article reviews the troubled history of the "Waters of the United States" Rule of the Clean Water Act, and analyzes how its newest incarnation harnesses a surprising point of convergence between the conflicting Supreme Court interpretations in Rapanos v. United States that necessitated its development. While debate over the federalism implications of the Rule rages on, the framework it creates from the multiple Rapanos opinions suggests that the path forward hinges less on the substantive rule of jurisdiction and more on the regulatory architecture of presumptions, default rules, and burden shifting. Splitting the difference between competing judicial approaches, the new Rule alternates presumptions in favor of and against federal regulation in different hydrological contexts to appropriately support competing regulatory goals. By capitalizing on an elusive thread of continuity among seemingly irreconcilable judicial viewpoints, the new Rule may win safe passage through the next round of judicial review.

Make My Day! *Dirty Harry* and Final Agency Action 313
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Historically, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have attempted to obtain compliance with their view of their jurisdiction under the Clean Water Act by issuing compliance orders, cease-and-desist orders, or jurisdictional determinations to landowners. When landowners disagree with the government's view, they have attempted to obtain

judicial review of those agency actions, but the agencies have maintained that no review is available because the action is not "final agency action" under the Administrative Procedure Act (APA). In *Sackett v. U.S. Environmental Protection Agency* the Supreme Court unanimously rejected EPA's attempt to avoid review of a compliance order, and currently before the Supreme Court is *U.S. Army Corps of Engineers v. Hawkes Co.* in which the Corps is making the same argument regarding its jurisdictional determinations. This Article will explain how and why the Supreme Court should similarly reject the Corps' argument, but it will also suggest that this case presents a perfect opportunity for the Court to clarify what is necessary to constitute final agency action subject to judicial review under the APA more generally.

(Ground)Waters of the United States: Unlawfully Excluding Tributary Groundwater from Clean Water Act Jurisdiction 333
Michael C. Blumm & Steven M. Thiel

The controversial 2015 federal rule defining "waters of the United States"—the jurisdictional determinant for regulation under the Clean Water Act (CWA), now the subject of numerous lawsuits—has been attacked largely for its alleged federal overreaching. Actually, the rule is underinclusive, for it categorically exempted all groundwater from CWA regulation. We think this exclusion conflicts with the purposes, terms, and judicial interpretations of the statute—including those of the Supreme Court—all of which have consistently interpreted the jurisdictional scope of the statute on the basis of a "significant effects" test, not an unscientific pronouncement based on administrative convenience. We explain the case for inclusion of tributary groundwater in this Article, even though the impending litigation over the rule is unlikely to address the issue.

A Bright Line Mistake: How EPA Bungled the Clean Water Rule 379
Patrick Parenteau

In the final Clean Water Rule, the Environmental Protection Agency (EPA) and the Department of the Army established, for the first time in the history of the Clean Water Act (CWA), a "bright line" rule excluding all lakes, ponds, and wetlands lying more than 4,000 feet from the ordinary high water mark or mean high tide line of jurisdictional waters. This artificial boundary was adopted over the strenuous objections of the Army Corps of Engineers, in contravention of the advice of EPA's Science Advisory Board, without preparing an environmental impact statement to consider the potentially significant consequences for aquatic resources, and without any opportunity for public comment. All of these issues and more have been raised in the litigation challenging the legality of the rule. There is a high likelihood that the courts will strike down the rule on the ground that the 4,000-foot line is arbitrary for both procedural and substantive reasons. Procedurally, the line is not the "logical outgrowth" of the rulemaking process and was adopted in violation of the National Environmental Policy Act (NEPA). Substantively, the line lacks any scientific support and is not required by any of the Supreme Court decisions interpreting

the jurisdictional scope of the CWA. EPA would be well advised to concede error on this point and request a voluntary remand to fix the rule before even greater damage is done.

Normal Farming and Adjacency: A Last Minute Gift for the Farm Bureau? 395
Craig N. Johnston & Gerald Torres

In this Article, we argue that, in their new Clean Water Rule, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers illegally precluded waters being used by agricultural interests from being deemed "adjacent" to other jurisdictional waters under the Clean Water Act (CWA). In so doing, the Agencies deny these waters the benefit of a conclusive presumption that they are themselves jurisdictional waters. Instead, in order to establish jurisdiction it is incumbent on the Government to show that these agricultural waters have a significant nexus with core jurisdictional waters, regardless of their proximity to those waters. This dynamic illegally injects into the statute the idea that the jurisdictional status of a water may depend on the use to which it is put. Further, such treatment of agricultural waters is inconsistent with the more limited favorable treatment that agricultural interests already receive under section 404(f) of the CWA.

Ditching Our Innocence: The Clean Water Act in the Age of the Anthropocene 415
Rachael Salcido & Karrigan Börk

Humanity has entered the Age of the Anthropocene, a geologic era marked by the emergence of human activity as the single most dominant influence on Earth's environment. Every ecosystem shows signs of anthropogenic influence, and the environments we experience everyday are often shaped almost entirely by human actions and decisions. The new discipline of reconciliation ecology recognizes this reality and suggests that we must manage the new habitats we create in order to protect species diversity and ecosystem services. But the 2015 rule defining the jurisdiction of the Clean Water Act explicitly excludes many manmade environments, including many artificial lakes, farm ponds, reflecting pools, and most ditches, treating these landscape features as faux nature somehow unworthy of protection. This treatment is a marked departure from past Environmental Protection Agency and U.S. Army Corps of Engineers practices, which allowed for consideration of such places on a case-by-case basis. This departure finds no support in the Supreme Court precedent leading up to the new rule and seems to be based entirely on a shortsighted view of these places as somehow unimportant to protecting the waters of the United States. Based on the law and science surrounding ditches, we conclude that such places merit protection under the Clean Water Act.