

THE CLEAN WATER RULE: NOT DEAD YET

BY

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After one of the most extensive and controversial rulemakings in the history of the Clean Water Act (CWA), featuring over four hundred stakeholder meetings and over a million comments, the Obama Administration adopted the Clean Water Rule (aka “WOTUS”) in May 2015. The stated purpose of the rule is to clarify the scope of the term “waters of the United States” consistent with the CWA, Supreme Court precedent, and science. This “clarification” was made necessary by the Supreme Court’s muddled decisions in SWANCC (2001) and Rapanos (2006). Attempts to clarify matters through guidance documents issued in 2003 and 2008 were roundly criticized. Attempts to obtain a legislative solution failed to produce results. And so it fell to the agencies—the Environmental Protection Agency and the Army Corps of Engineers—to bite the bullet and promulgate a new rule that was fated to satisfy no one.

The scientific basis for the rule rests on a comprehensive, peer-reviewed synthesis of over 1,200 studies analyzing the interconnectedness of tributaries, wetlands, and other waters to downstream navigable waters, and effects of these connections on the chemical, physical, and biological integrity of the nation’s major waterways. The legal basis for the rule rests in large part on the “significant nexus” test articulated by Justice Anthony Kennedy in his concurring opinion in Rapanos.

For the first time the rule defines key terms such as “tributary” and “adjacent waters.” It creates three categories of waters: those that are deemed jurisdictional by rule; those that are categorically excluded; and those that require a case-by-case significant nexus determination. The net effect of the rule is to reduce the historic scope of the CWA as interpreted by the agencies and the lower courts in exchange for creating some “bright line” test limiting federal jurisdiction in response to the concerns raised by the Supreme Court in SWANCC and Rapanos.

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The Trump Administration wants to kill the rule and replace it with one modeled on the late Justice Scalia's plurality opinion in Rapanos. Scalia's test would limit waters of the United States to "relatively permanent" water bodies and wetlands with a "continuous surface connection." According to data in the rulemaking record this would result in a reduction of as much as 60% of the tributaries and wetlands historically covered by the CWA. Led by Administrator Scott Pruitt, the Administration has launched a three-pronged attack on the Clean Water Rule that seeks to delay, rescind, and eventually replace it.

This Article will argue that repealing and replacing the Clean Water Rule with one modeled on the Scalia test is not supported by the text, purpose, history, or cooperative federalism policies of the CWA. Nine circuit courts have struggled to make sense of the splintered decision in Rapanos. None have concluded that Scalia's test is controlling. All of them have looked to Kennedy's significant nexus test as the primary test for determining federal jurisdiction.

The Clean Water Rule struck an eminently reasonable balance between the CWA's goals of restoring and maintaining water quality while respecting the primacy of state control over land and water resources. Adoption of the Scalia test would reverse over four decades of progress improving the quality of the nation's waters. It is too soon to tell whether the Trump Administration's misguided attempt to scrap the rule will succeed. Years of litigation lie ahead before the issue makes its way back to a Supreme Court that may look very different from the one that decided Rapanos.

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I. BACKGROUND

The “Clean Water Rule: Definition of Waters of the United States” (dubbed “WOTUS” by its opponents) was published in the Federal Register on June 29, 2015, and became effective August 28, 2015.¹ The final rule followed an extensive multi-year, joint rulemaking conducted by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) that featured a comprehensive, peer-reviewed scientific study of the interconnected nature of aquatic ecosystems and the vital importance of headwater streams and wetlands to the biological health and countless beneficial uses of the nation’s major rivers, lakes, and estuaries.² It followed over four hundred meetings with state and local officials, tribes, small businesses, farmers, conservationists, and other stakeholders across the country.³ It generated over one million public comments, the bulk of which supported the rule.⁴ It was by all accounts one of the most extensive rulemakings ever undertaken under the Clean Water Act⁵ (CWA).

It was also one of the most controversial environmental rules adopted during the Obama Administration, with opposition coming from dozens of states (mostly “red”) and powerful political forces such as the Chamber of Commerce, American Farm Bureau Federation, and National Association of Manufacturers.⁶ It ignited an explosion of litigation that still rages.⁷

¹ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401). Documents related to the rule on the United States Environmental Protection Agency (EPA) website include an economic analysis of the Clean Water Rule and a technical support document. See *Waters of the United States (WOTUS) Rulemaking*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/U44M-SBNV> (last updated Feb. 6, 2018).

² See generally Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, 80 Fed. Reg. 2100 (Jan. 15, 2015). The report reviews more than 1,200 peer-reviewed publications and summarizes “current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters.” *Id.* at 2100; see U.S. ENVTL. PROT. AGENCY, EPA/600/R-14/475F, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE ES-2 (2015) [hereinafter SCIENCE REPORT].

³ Gina McCarthy & Jo-Ellen Darcy, *Your Input Is Shaping the Clean Water Rule*, U.S. ENVTL. PROTECTION AGENCY: BLOG (Apr. 6, 2015), <https://perma.cc/7DKT-JJZM>.

⁴ *Id.*; see also U.S. ENVTL. PROT. AGENCY, CLEAN WATER RULE COMMENT COMPENDIUM MASS MAILING CAMPAIGNS 2 (2015), <https://perma.cc/B8PG-B6SJ> (“The overwhelming majority (90%) of the mass mailing campaign commenters expressed support for the proposed rule.”). A poll conducted by Hart Research Associates and funded by the League of Conservation Voters found that 80% of respondents support the rule, including a majority of republicans, independents, and democrats. Letter from Geoff Garin, Hart Research Assocs., to League of Conservation Voters (May 18, 2015), <https://perma.cc/WFZ5-BJ63>.

⁵ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

⁶ Jenny Hopkinson, *Obama’s Water War*, POLITICO (May 27, 2015), <https://perma.cc/9DZR-J6BE>.

⁷ Sixteen separate lawsuits were filed on behalf of ninety-odd parties in thirteen different U.S. district courts. Because of uncertainty about which court has jurisdiction to review the rule, petitions for review were also filed in eight U.S. courts of appeals. See CLAUDIA COPELAND,

Within days of its publication, a group of states rushed to the federal courthouse in Fargo, North Dakota and obtained a preliminary injunction barring implementation of the rule in thirteen states.⁸ Weeks later, the United States Court of Appeals for the Sixth Circuit issued a nationwide stay of the rule pending the outcome of multiple challenges, from those who say the rule is a stark example of federal overreach to those who say it represents an unlawful giveaway of federal authority.⁹ However, on January 22, 2018, the Supreme Court reversed the Sixth Circuit in *National Ass'n of Manufacturers v. Department of Defense*¹⁰ (*NAM v. DOD*) ruling that challenges to the clean water rule must be brought in the district courts under the Administrative Procedure Act¹¹ (APA) rather than in the courts of appeals under section 509(b) of the CWA.¹² On February 28, 2018, the Sixth Circuit lifted the stay.¹³ Normally, this would mean that the 2015 rule would immediately become effective within the thirty-seven states not subject to the preliminary injunction issued by the North Dakota court. However, as discussed below, the Trump Administration has attempted to delay the rule for two years to give it time to repeal and replace it.

II. ENTER THE TRUMP ADMINISTRATION

One of the most outspoken critics of the rule is none other than President Donald J. Trump, who made good on his campaign promise to axe the rule by issuing Executive Order 13778 directing EPA and the Corps to review the 2015 rule and “publish for notice and comment proposed rules rescinding or revising” the rule.¹⁴ The Executive Order also directs the agencies to “consider interpreting the term ‘navigable waters’ . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*.”¹⁵ In brief, that opinion would limit the jurisdiction of the CWA to “relatively permanent, standing or continuously flowing bodies of water,” and to wetlands with a “continuous surface connection” to such relatively permanent waters.¹⁶ If adopted this novel, unscientific, judge-made definition would radically reduce the historic reach of the CWA and severely

CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 14–15 (2017), <https://perma.cc/WZ58-4GT3>; Christopher D. Thomas, *Judicial Challenges to the Clean Water Rule: A Brief and Relatively Painless Guide for the Procrastinator*, A.B.A. SEC. ENV’T ENERGY & RESOURCES, Mar./Apr. 2016, at 4, 5.

⁸ North Dakota v. U.S. Env’tl. Prot. Agency, 127 F. Supp. 3d 1047, 1051, 1060 (D.N.D. 2015); see COPELAND, *supra* note 7, at 15 n.33.

⁹ *In re Env’tl. Prot. Agency*, 803 F.3d 804 (6th Cir. 2015), *rev’d sub. nom.* Nat’l Ass’n of Mfrs. v. Dep’t of Def., 138 S. Ct. 617 (2018).

¹⁰ 138 S. Ct. 617 (2018).

¹¹ 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

¹² *NAM v. DOD*, 138 S. Ct. at 624 (“The WOTUS Rule falls outside the ambit of § 1369(b)(1), and any challenges to the Rule therefore must be filed in federal district courts.”).

¹³ Ariel Wittenberg, *6th Circuit Lifts WOTUS Stay as Fight over Delay Heats Up*, E&E NEWS: GREENWIRE (Feb. 28, 2018), <https://perma.cc/XYL9-9YEJ>.

¹⁴ Exec. Order No. 13,778, 82 Fed. Reg. 12,497, 12,497 (Mar. 3, 2017).

¹⁵ 547 U.S. 715 (2006); Exec. Order No. 13,778, 82 Fed. Reg. at 12,497.

¹⁶ *Rapanos*, 547 U.S. at 739, 757 (Scalia, J., plurality).

compromise the statutory objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁷

To implement Executive Order 13778, the agencies settled on a two-step strategy involving two separate rulemakings. In step one, on July 27, 2017, the agencies proposed a rule¹⁸ to rescind the 2015 rule and “recodify” the previous 1986 rule.¹⁹ The preamble states that the purpose of the proposed rule is to “re-codify the exact same regulatory text that existed prior to the 2015 [Clean Water Rule], which reflects the current legal regime under which the agencies are operating.”²⁰

In step two, the agencies propose to develop a replacement rule starting with a “public outreach” effort to solicit comments from stakeholders on how a replacement rule should be crafted.²¹ As part of this “outreach,” Administrator Pruitt appears in a video produced by the National Cattlemen’s Beef Association soliciting support for his efforts to repeal and replace the Clean Water Rule.²² In the video, Pruitt says, “The Obama administration reimagined their authority over the Clean Water Act and defined a water of the United States as being a puddle, a dry creek bed and ephemeral drainage ditches all across this country, which created great uncertainty, as you might imagine.”²³ In fact, as will be discussed in more detail, the Clean Water Rule did no such thing. It explicitly excludes “puddles,” and it also specifies that dry creek beds that do not have a bed, bank, and high water mark, and ephemeral ditches that “flow only after precipitation” are excluded.²⁴

To further complicate things, the agencies issued a rule on February 6, 2018, proposing to add an “applicability date” to the 2015 rule delaying compliance until November 22, 2019.²⁵ In an attempt to justify this unusual and likely illegal move, the agencies said, “The *Code of Federal Regulations* text does not include an applicability date; therefore . . . the agencies are

¹⁷ CWA, 33 U.S.C. § 1251(a) (2012).

¹⁸ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

¹⁹ See 40 C.F.R. § 230.3(s) (1987).

²⁰ See Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,900.

²¹ *Waters of the United States (WOTUS) Rulemaking*, *supra* note 1.

²² Ariel Wittenberg, *Pruitt Stars in Industry Video Promoting WOTUS Repeal*, E&E NEWS: GREENWIRE (Aug. 21, 2017), <https://perma.cc/Y43F-MHHZ>.

²³ *Id.*

²⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,058 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401). The preamble to the final rule states: “The following features are not ‘waters of the United States’: . . . Puddles.” *Id.* at 37,098. The rule excludes ditches with “ephemeral” flow except where a ditch is excavated in or relocates a covered tributary. *Id.* “The rule definition of ‘tributary’ requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark.” *Id.* at 37,079.

²⁵ Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5201 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

amending the text of the *Code of Federal Regulations* to add an applicability date.”²⁶ Pruitt tried a similar gambit with a Clean Air Act²⁷ rule regulating methane emissions from the oil and gas industry. The United States Court of Appeals for the District of Columbia Circuit struck it down in *Clean Air Council v. Pruitt*,²⁸ ruling that the APA prohibits agencies from staying compliance with rules that have already become effective.²⁹ The “applicability date” rule has been challenged by the New York Attorney General and by several environmental organizations.³⁰

The purpose of these machinations seems to be threefold: to move as quickly as possible to delay and repeal the 2015 rule, to moot the ongoing litigation, and to buy time to develop a replacement rule along the lines of the plurality opinion in *Rapanos*. It is not at all clear that the Trump Administration will succeed with this strategy. First, the “step one rule” rescinding the 2015 rule will be a final agency action subject to judicial review as soon as it is published in the Federal Register, and as I have pointed out elsewhere,³¹ it is unlikely to survive scrutiny under the *State Farm Mutual*³² doctrine requiring a “reasoned explanation” for summarily rescinding a rule that was based on an extensive administrative record and a large body of supportive case law.³³ Second, in light of the Supreme Court ruling in *NAM v. DOD*, challenges to the 2015 rule and the attempts to delay, rescind, and replace it lie in the district courts under the APA and not in the courts of appeals under the CWA.³⁴ Barring a nationwide injunction to replace the Sixth Circuit stay that has been lifted, the 2015 rule would be in effect in most of the country.³⁵ Finally, the gambit of delaying the 2015 rule by establishing a new “applicability date” of 2019 is not likely to survive judicial scrutiny.

²⁶ *Id.*

²⁷ 42 U.S.C. §§ 7401–7671q (2012).

²⁸ 862 F.3d 1 (D.C. Cir. 2017).

²⁹ *Id.* at 14 (striking down EPA’s attempt to stay compliance with the rule regulating methane emissions from new oil and gas wells); see also *California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (striking down the Bureau of Land Management’s attempt to postpone compliance with a methane flaring rule), *appeal docketed* 17-17456 (9th Cir. Dec. 8, 2017). The proposed rule purporting to extend the applicability date of the 2015 rule seems to fall into this same category. Unless and until the agencies’ attempt to rescind the 2015 rule is upheld by a court, it remains on the books.

³⁰ See generally Complaint, *New York v. Pruitt*, 1:18-cv-01030 (S.D.N.Y. Feb. 7, 2018); Complaint for Declaratory & Injunctive Relief, *Nat. Res. Def. Council, Inc. v. Env’tl. Prot. Agency*, 1:18-cv-01048 (S.D.N.Y. Feb. 6, 2018).

³¹ Patrick Parenteau, *Does Scott Pruitt Have a Solid Case for Repealing the Clean Water Rule?*, CONVERSATION (July 5, 2017), <https://perma.cc/UTW7-LWV7>.

³² 463 U.S. 29 (1983).

³³ *Id.* at 43.

³⁴ *NAM v. DOD*, 138 S. Ct. 617, 624 (2018).

³⁵ The injunction issued by the United States District Court for the District of North Dakota is still in effect within the thirteen states that were covered by it. *North Dakota*, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015); see Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,902–03 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

Stepping back from all this political intrigue and legal maneuvering for a moment, the larger question is simply this: How should the boundaries of federal jurisdiction be determined in a way that effectuates the remedial purposes of the CWA while respecting the role of the states within the framework of cooperative federalism? Contrary to the President's Order, the Scalia opinion is not the touchstone for determining this nuanced question. In fact, it would ensure that the goals of the CWA cannot be realized by potentially excluding up to 60% of stream miles that have been covered by the CWA for decades.³⁶ The balance of this Article will argue that Justice Kennedy's significant nexus test, as fleshed out in the Clean Water Rule, provides a better framework for balancing the competing policies of the CWA in a way that best serves the national interest.

III. SETTING THE RECORD STRAIGHT

Contrary to the hyperbolic claims of many, not least President Trump,³⁷ Administrator Pruitt,³⁸ and the Republican leadership in Congress,³⁹ the rule is not a "power grab," and it does not expand the historic reach of the CWA. In fact, it shrinks it, though by exactly how much is hard to calculate. Before diving into the details, some historical perspective is necessary.

The Clean Water Rule revises regulations that have been on the books, in one form or another, for over four decades.⁴⁰ Under these regulations the term "waters of the United States"⁴¹ has consistently been interpreted in light of Congress's intent, oft repeated in the 1972 legislative history, that the

³⁶ *Streams*, U.S. ENVTL. PROTECTION AGENCY: ARCHIVE, <https://perma.cc/KS4Y-WTGF> (last updated Oct. 30, 2013) ("Almost 60 percent of stream miles in the continental U.S. only flow seasonally or after storms. The very foundation of our nation's great rivers is a vast network of unknown, unnamed and underappreciated streams."); see also Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,899.

³⁷ At the signing ceremony for his Executive Order, President Trump proclaimed that "EPA's regulators were putting people out of jobs by the hundreds of thousands"—a claim that earned a "Four Pinocchios" award from the *Washington Post* fact checker. Michelle Ye Hee Lee, *Trump's Claim that Waters of the United States Rule Cost 'Hundreds of Thousands' of Jobs*, WASH. POST (Mar. 2, 2017), <https://perma.cc/8KLD-EYDA>.

³⁸ In praising the President's rollback of the rule, Administrator Pruitt said it "represents the end of a government 'power grab' of private property land use." *EPA Chief Applauds Trump Executive Order Ending Gov't 'Power Grab'*, FOX NEWS: INSIDER (Feb. 28, 2017), <https://perma.cc/P8LP-E775>.

³⁹ Commenting on a failed attempt to override the Clean Water Rule in the Senate, Majority Leader Mitch McConnell said: "WOTUS isn't really a clean-water measure, it's an unprecedented federal power grab clumsily masquerading as one." Press Release, Mitch McConnell, Senate Majority Leader, McConnell Comments on President's VETO of Bipartisan Measure to Overturn WOTUS Rule (Jan. 20, 2016), <https://perma.cc/DTU7-THJK>.

⁴⁰ STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44585, EVOLUTION OF THE MEANING OF "WATERS OF THE UNITED STATES" IN THE CLEAN WATER ACT 10 (2016), <https://perma.cc/28WF-WDXK>.

⁴¹ The definition of "waters of the United States" is found at 33 C.F.R. § 328.3 (2017) for the Corps and 40 C.F.R. § 122.2 (2017) for EPA. The term is not defined in the statute.

CWA was meant to reach to the limits of its constitutional authority.⁴² As Senator Muskie, widely regarded as the “father” of the CWA, famously said: “Water moves in hydrological cycles and it is essential that that the discharge of pollutants be controlled at the source.”⁴³ John Dingell, the principal sponsor in the House, said the use of the term “navigable waters” in the statute meant “all ‘the waters of the United States’ in a geographical sense” rather than in a “technical sense as we sometimes see in some laws”⁴⁴—a reference to the Rivers and Harbors Act of 1899.⁴⁵

EPA embraced this expansive view in its earliest interpretations in 1973.⁴⁶ But it took a court order in *Natural Resource Defense Council, Inc. v. Callaway*⁴⁷ to convince the Corps to broaden its view.⁴⁸ Nevertheless, from 1977 onward, EPA and the Corps adopted a regulatory interpretation that encompassed the entire tributary systems of the nation’s navigable rivers including “adjacent wetlands” and “other waters” that, while not navigable in fact, were deemed to affect interstate commerce.⁴⁹ The Corps’s 1977 regulations explicitly included:

All other waters of the United States . . . such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.⁵⁰

With rare exceptions the courts upheld this expansive interpretation in hundreds of cases involving all manner of water bodies, whether perennial or intermittent, large or small, natural or artificial, and wherever situated within the watersheds and basins of navigable rivers and lakes. For example, in *United States v. Phelps Dodge Corp.*,⁵¹ a case that actually predates the Corps 1977 rules, the court stated:

Thus a legal definition of “navigable waters” or “waters of the United States” within the scope of the Act includes any waterway within the United States

⁴² See JEFFREY G. MILLER, PLAIN MEANING, PRECEDENT, AND METAPHYSICS: INTERPRETING THE ELEMENT OF THE CLEAN WATER ACT OFFENSE 129 (2017) (“The legislative history of the CWA is replete with statements that Congress intended the statute’s jurisdiction to be expansive, indeed to reach the outer limits of congressional jurisdiction under the Constitution.”).

⁴³ S. REP. NO. 92-414, at 77 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3742.

⁴⁴ 118 CONG. REC. 33,756–57 (1972) (statement of Rep. Dingell).

⁴⁵ Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401–467n (2012).

⁴⁶ National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,529 (May 22, 1973) (promulgating, among others, 40 C.F.R. § 125.1(o)(4)–(6)).

⁴⁷ 392 F. Supp. 685 (D.D.C. 1975).

⁴⁸ *Id.* at 686 (holding that the “waters of the United States” term “is not limited to the traditional tests of navigability”); see MULLIGAN, *supra* note 40, at 8–10.

⁴⁹ See William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972: Part II*, 22 STAN. ENVTL. L.J. 215, 267 (2003).

⁵⁰ Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) (promulgating, among others, 33 C.F.R. § 323.2(a)(5)).

⁵¹ 391 F. Supp. 1181 (D. Ariz. 1975).

also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States.⁵²

In *United States v. Ashland Oil & Transportation Co.*,⁵³ the Sixth Circuit held that CWA jurisdiction extended beyond waters that are navigable-in-fact to include nonnavigable tributaries, and that this broad reach was consistent with the Commerce Clause.⁵⁴ The *Ashland* court concluded that “Congress’ clear intention as revealed in the Act itself was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution a part of a navigable stream.”⁵⁵

Other cases involved an intermittent creek in California;⁵⁶ a New Mexico arroyo that only held water during “intense rainfall”;⁵⁷ an intermittent tributary to the Sheyenne River in North Dakota;⁵⁸ an intrastate stream located entirely within one county and unconnected with any other water;⁵⁹ and a drainage ditch in Florida that flowed intermittently.⁶⁰

Perhaps the most definitive decision upholding the broad scope of this “waters of the United States” definition was *United States v. Deaton*,⁶¹ involving the discharge of fill material into a wetland adjacent to a roadside ditch.⁶² The Deatons challenged the Corps’s assertion of jurisdiction over nonnavigable tributaries on constitutional grounds. They argued that Congress’s power over navigable waters is “limited to . . . protecting or encouraging navigation and the flow of commerce.”⁶³ The United States Court of Appeals for the Fourth Circuit rejected that argument noting that “Congress’s authority over the channels of commerce is thus broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes.”⁶⁴ The court held that “the Corps’ regulatory interpretation of the term ‘waters of the United States’ as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress’s power or alter the federal–state framework.”⁶⁵

⁵² *Id.* at 1187.

⁵³ 504 F.2d 1317 (6th Cir. 1974).

⁵⁴ *Id.* at 1323.

⁵⁵ *Id.*

⁵⁶ *United States v. Zanger*, 767 F. Supp. 1030, 1032–34 (N.D. Cal. 1991).

⁵⁷ *Quivira Mining Co. v. U.S. Envtl. Prot. Agency*, 765 F.2d 126, 129–30 (10th Cir. 1985).

⁵⁸ *United States v. Sheyenne Tooling & Mfg. Co.*, 952 F. Supp. 1414, 1417–18 (D.N.D. 1996).

⁵⁹ *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374–75 (10th Cir. 1979).

⁶⁰ *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (“There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country’s water quality whether they travel along man-made or natural routes.”), *abrogated by Rapanos*, 547 U.S. 715 (2006).

⁶¹ 332 F.3d 698 (4th Cir. 2003).

⁶² *Id.* at 701–02.

⁶³ *Id.* at 706.

⁶⁴ *Id.* at 707.

⁶⁵ *Id.* at 708.

The court also noted: “[T]he Clean Water Act does not invade an area of authority reserved to the states. The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states’ traditional police powers.”⁶⁶

The Deatons also argued that the Corps had misinterpreted its own regulations. They argued that the term “tributary” could only be read to include a nonnavigable branch that empties directly into a navigable waterway and not the roadside ditch at issue.⁶⁷ In response, the Corps pointed to the language in the preamble explaining that the rule was intended to cover “all tributaries (primary, secondary, tertiary, etc.) of navigable waters.”⁶⁸ The court deferred to the Corps’s interpretation of its own rules noting that “[a]lthough the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters.”⁶⁹ Thus the court concluded that CWA jurisdiction extends to “the whole tributary system of any navigable waterway.”⁷⁰

Contrary to the arguments of the opponents of the Clean Water Rule, the Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*⁷¹ (*SWANCC*) and *Rapanos* did not invalidate this regulatory scheme. *SWANCC* was an odd case that dealt with an “as applied” challenge to the Corps’s assertion of jurisdiction over an “abandoned sand and gravel pit” in Northern Illinois based solely on the fact that it provided habitat for migratory birds.⁷² The Court characterized the gravel pit as “nonnavigable, isolated, intrastate waters” that bore no relation to the kinds of traditionally navigable waters subject to Congress’s commerce clause power.⁷³ The Court did voice the concern that an overly broad assertion of federal power would be an “impingement of the States’ traditional and primary power over land and water use.”⁷⁴ Employing the “constitutional avoidance” doctrine, the Court concluded that the Corps’s interpretation was not entitled to *Chevron*⁷⁵ deference because it “invoke[d] the outer limits of Congress’ power” without “a clear indication that Congress intended that result.”⁷⁶ But the Court stopped short of invalidating the Corps’s regulation; it simply outlawed use of the so-called “Migratory

⁶⁶ *Id.* at 707.

⁶⁷ *Id.* at 708.

⁶⁸ *Id.* at 710 (quoting Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,320 (July 25, 1975)).

⁶⁹ *Id.*

⁷⁰ *Id.* at 712.

⁷¹ 531 U.S. 159 (2001).

⁷² *Id.* at 171–72, 174 (“We thus decline [the] invitation to . . . [hold] that isolated ponds, some only seasonal, . . . fall under [the] definition of ‘navigable waters’ because they serve as habitat for migratory birds.”).

⁷³ *Id.* at 172–73.

⁷⁴ *Id.* at 174.

⁷⁵ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

⁷⁶ *SWANCC*, 531 U.S. at 172–74.

Bird Rule”⁷⁷ as a proxy for establishing federal jurisdiction over navigable waters.⁷⁸

By and large, the cases that followed *SWANCC* treated it as a narrow decision confined to the unique facts presented.⁷⁹ According to an analysis by Professor Jeffrey G. Miller, federal jurisdiction was affirmed in 88% of the cases brought following *SWANCC*.⁸⁰ Although a few courts read *SWANCC* broadly to limit the CWA’s application to navigable waters and their immediately adjacent wetlands, the vast majority read it narrowly to exclude only isolated nonnavigable waters having no connection to navigable waters.⁸¹ Nevertheless, *SWANCC* did create considerable uncertainty and has led to some unfortunate policy decisions by the Corps and EPA to write off geographically isolated but ecologically important wetlands such as vernal pools and playa lakes.⁸² Since *SWANCC*, these “isolated” waters have been excluded unless the Corps and EPA jointly approve case-specific assertion of jurisdiction.⁸³

As for the fractured decision in *Rapanos*, though it has spawned endless debate and confusion, it did not strike down the regulations themselves and in fact reached no conclusion as to whether the wetlands at issue were jurisdictional or not.⁸⁴ Though it has had somewhat more impact than *SWANCC*, a large majority (68%) of the post-*Rapanos* cases have affirmed federal jurisdiction and, as discussed further below, have decisively rejected Scalia’s plurality opinion as the controlling test.⁸⁵

IV. THE CLEAN WATER RULE ACTUALLY REDUCES HISTORIC CWA JURISDICTION

In the economic analysis accompanying the final rule, the agencies estimate that the new rule will result in 2.84%–4.65% more positive

⁷⁷ In fact, it was not a rule at all. Rather it was language taken from the preamble to the 1986 rule. It referred to waters: “a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or b. Which are or would be used as habitat by other migratory birds which cross state lines.” Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (to be codified at 33 C.F.R. pts. 320–330).

⁷⁸ *SWANCC*, 531 U.S. at 174.

⁷⁹ See Lance D. Wood, *Don’t Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,187, 10,214 (2004); see also JON KUSLER, ASS’N OF STATE WETLAND MANAGERS, INC., “WATERS OF THE U.S.” AFTER *SWANCC* 8–9 (2005), <https://perma.cc/75R8-FVYK>.

⁸⁰ MILLER, *supra* note 42, at 157.

⁸¹ Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *ECOLOGY L.Q.* 811, 814 (2003).

⁸² See Appendix A: Joint Memorandum, 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003) (“EPA and the Corps are now precluded from asserting CWA jurisdiction in such situations, including over waters such as isolated, non-navigable, intrastate vernal pools, playa lakes and pocosins.”).

⁸³ *Id.*

⁸⁴ The case was ultimately settled with *Rapanos* agreeing to pay a \$150,000 civil penalty and \$750,000 to mitigate impacts on fifty-four acres of wetlands illegally filled. He also agreed to preserve an additional 134 acres of wetlands. Press Release, U.S. Dep’t of Justice, John Rapanos Agrees to Pay for Clean Water Act Violations (Dec. 29, 2008), <https://perma.cc/4JFY-6NLZ>.

⁸⁵ MILLER, *supra* note 42, at 167.

assertions of jurisdiction over U.S. waters, compared with current field practice.⁸⁶ The key here is “compared to current field practice.” Current field practice refers to a series of guidance documents issued between 2003 and 2008.⁸⁷ Though intended to clarify things, these guidance documents have been criticized on all sides.⁸⁸ More to the point, neither guidance documents nor “current field practice” constitute the law to apply; hence they are not the appropriate baseline to measure the effect of the Clean Water Rule.

Rather, the appropriate baseline is the 1986 rule.⁸⁹ When the Clean Water Rule is compared to the 1986 rule, it reveals a sizeable reduction in waters formerly protected by the CWA. The 2015 rule divides waters into three categories. Category one are those waters classified as jurisdictional by rule based on their significant nexus to navigable waters as documented in EPA’s Science Report.⁹⁰ Category two are those waters classified as non-jurisdictional by rule based on a combination of scientific evidence and exercise of policy discretion.⁹¹ Category three consists of five specific types of “isolated” wetlands that are “similarly situated” and waters within the 100-year floodplain.⁹² These waters require a case-by-case determination of significant nexus.⁹³ The effect of the rule can be seen by examining five key parameters: tributaries, ditches, adjacent waters, case-specific waters, and exclusions.

A. Tributaries

As noted, the regulatory definition of waters of the United States has since 1977 included all tributaries without qualification. However, the term “tributary” remained undefined until the 2015 rule. To meet the new rule’s definition of “tributary,” water must flow directly or through another water body to a traditional navigable water, interstate water, or the territorial

⁸⁶ U.S. ENVTL. PROT. AGENCY & U.S. DEP’T OF THE ARMY, ECONOMIC ANALYSIS OF THE EPA–ARMY CLEAN WATER RULE 53 (2015), <https://perma.cc/D296-SBJX> [hereinafter 2015 ECONOMIC ANALYSIS].

⁸⁷ See 2008 *Rapanos Guidance and Related Documents*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/7SQG-GUPE> (last updated Nov. 20, 2017); *Waters of the United States (WOTUS) Rulemaking*, *supra* note 1.

⁸⁸ See ROBERT MELTZ & CLAUDIA COPELAND, CONG. RESEARCH SERV., RL33263, THE WETLANDS COVERAGE OF THE CLEAN WATER ACT (CWA): *RAPANOS* AND BEYOND 10 (2015) (“Overall, stakeholder groups, including industry, environmental advocates, and states, expressed disappointment or frustration with the 2007 guidance and the 2008 revision—some believing that it goes too far in narrowing protection of wetlands and U.S. waters, others believing that it does not go far enough.”).

⁸⁹ 40 C.F.R. § 230.3(s) (1986).

⁹⁰ SCIENCE REPORT, *supra* note 2, at 1-2 tbl.1-1.

⁹¹ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,059, 37,073 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

⁹² *Id.* at 37,058–59.

⁹³ COPELAND, *supra* note 7, at 4, 5 & fig.1, 6 (illustrating which waters are jurisdictional by rule and which require case-specific analysis to determine if its jurisdictional).

seas.⁹⁴ A tributary could flow through a number of other water bodies such as an impoundment, a wetland, another tributary, or even a ditch, but it must be part of a tributary system that eventually flows to a traditional navigable water, an interstate water, or the territorial seas. By contrast, “an intermittent stream that exists wholly within one state . . . and whose flows eventually ends without connecting to a traditional navigable water, interstate water, or the territorial seas” would no longer qualify as a “tributary.”⁹⁵

The rule specifies that a tributary must also have a defined bed and banks and an identifiable ordinary high water mark.⁹⁶ This definition emphasizes the physical characteristics created by sufficient volume, frequency, and duration of flow to indicate a stream with a significant nexus to downstream navigable waters.⁹⁷ The term “bed and banks” means the substrate and sides of a channel between which flow is confined. Existing Corps regulations define “ordinary high water mark” as:

[the] line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.⁹⁸

The bed and banks and high water mark can be established through direct observation or in some cases through remote sensing techniques.⁹⁹ Anyone who has studied a United States Geological Survey (USGS) topographic map before taking off on a backpacking trip is familiar with the blue lines indicating streams and water sources. These are the kinds of streams that could qualify as tributaries if they eventually connect to a traditional navigable water.

“Waters that meet the rule definition of tributary remain tributaries even if there is a manmade or natural break at some point along the connection to the traditional navigable water, interstate water, or the territorial seas.”¹⁰⁰ Examples include constructed breaks such as bridges,

⁹⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,058.

⁹⁵ *Id.* at 37,076.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 33 C.F.R. § 328.3(6) (2017).

⁹⁹ Among the types of remote sensing or mapping information that can assist in establishing the presence of water are United States Geological Survey (USGS) topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs. T.E. DAHL ET AL., U.S. FISH & WILDLIFE SERV., DATA COLLECTION REQUIREMENTS AND PROCEDURES FOR MAPPING WETLAND, DEEPWATER, AND RELATED HABITATS OF THE UNITED STATES (VERSION 2), at 22–23 (2015). Light detection and ranging (LIDAR) is a powerful tool to analyze the characteristics of the land surface, including tributary identification and characterization. Christian E. Torgersen et al., *Spatial Identification of Tributary Impacts in River Networks, in RIVER CONFLUENCES, TRIBUTARIES AND THE FLUVIAL NETWORK* (Stephen P. Rice et al. eds., 2008).

¹⁰⁰ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,078.

culverts, pipes, dams, or waste treatment systems, or natural breaks such as debris piles, boulder fields, or a stream that flows underground so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.¹⁰¹

B. Ditches

Ditches have always been hard to classify under the CWA. The definition of “point source” includes the term “ditch.”¹⁰² But a ditch can also be a navigable water. The Erie Canal is technically a ditch, but few would dispute that it is a navigable-in-fact water of the United States. It was built in the 1800s to transport everything from bulk goods to animals from New York City and the Atlantic Ocean to the Great Lakes.¹⁰³ Today it is called the New York State Barge Canal, but it is still being used in commerce.¹⁰⁴

The Los Angeles River, famously the scene of the *Terminator* movies, is for much of its length a concrete-lined trapezoidal channel functioning primarily as a flood-control structure.¹⁰⁵ But it also hosts a reintroduced population of steelhead trout, known as “chromes” for their bright metallic coloration.¹⁰⁶ The Los Angeles River may be paved, but it is still a water of the United States. Thanks to the era of dam building, navigation improvements, and channelization funded and carried out by the federal government, lots of rivers and streams have been substantially modified.¹⁰⁷ “A stream or river that has been channelized or straightened . . . is not a ditch.”¹⁰⁸ A stream that has been rip-rapped with concrete and rebar is not a ditch.¹⁰⁹

The Corps has historically asserted jurisdiction over ditches that function essentially the same as natural tributaries versus those that are constructed entirely in uplands with no connection to navigable waters.¹¹⁰

¹⁰¹ *Id.*

¹⁰² CWA, 33 U.S.C. § 1362(14) (2012).

¹⁰³ See *History and Culture: A National Treasure*, ERIE CANALWAY: NAT’L HERITAGE CORRIDOR, <https://perma.cc/YV2U-HPG5> (last visited Apr. 7, 2018).

¹⁰⁴ *National Register of Historic Places Program*, NAT’L PARK SERV., <https://perma.cc/F8UZ-JMGY> (last visited Apr. 7, 2018).

¹⁰⁵ U.S. ENVTL. PROTECTION AGENCY: REGION IX, SPECIAL CASE EVALUATION REGARDING STATUS OF THE LOS ANGELES RIVER, CALIFORNIA, AS A TRADITIONAL NAVIGABLE WATER 8 (2010), <https://perma.cc/T95J-YHJ4>; see also *Los Angeles River Revitalization*, CITY OF L.A., <https://perma.cc/2KT2-VDE6> (last visited Apr. 7, 2018).

¹⁰⁶ Joanna Gilkeson, *A Story of Recovery, Bringing Back the Southern California Steelhead*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/RXB9-S9GV> (last visited Apr. 7, 2018); see also Jack Damon, *Los Angeles River Steelheading!*, FISH WITH JD (Apr. 1, 2009), <https://perma.cc/YZ5C-3626>.

¹⁰⁷ See ELLEN E. WOHL, DISCONNECTED RIVERS: LINKING RIVERS TO LANDSCAPES 178 (2004).

¹⁰⁸ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,078 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

¹⁰⁹ *Id.*

¹¹⁰ In *National Ass’n of Home Builders v. U.S. Army Corps of Engineers*, the court rejected a challenge by the National Association of Homebuilders (NAHB) to the Corps’s authority to

The United States Court of Appeals for the Ninth Circuit, in *Headwaters, Inc. v. Talent Irrigation District*,¹¹¹ held that irrigation canals were jurisdictional tributaries because they are “stream[s] which contribute[their] flow to a larger stream or other body of water.”¹¹² The Ninth Circuit distinguished *SWANCC* on the basis that the canals were not “isolated waters” like the gravel pits but were intermittent streams connected to natural streams.¹¹³

Despite this judicially sanctioned broad legal authority, the 2015 rule explicitly excludes the following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.¹¹⁴

The rule also excludes ditches that are part of a wastewater treatment system.¹¹⁵

Ditches drew some of the most heated comments during the rulemaking. In response, the agencies further narrowed the scope of ditches that will be excluded in comparison to previous regulations and guidance, such as the 2008 *Rapanos* guidance under which the agencies regulated many intermittent ditches that were considered to have a relatively permanent flow of water and a significant nexus to downstream jurisdictional waters.¹¹⁶ Many such ditches would be excluded under the final rule because they were not being excavated in a tributary or draining a jurisdictional wetland.

C. Adjacent Waters

Under the 2015 rule, if waters are determined to be adjacent, no case-specific significant nexus evaluation is required. The rule defines “adjacent” to mean “bordering, contiguous, or neighboring, including waters separated from other ‘waters of the United States’ by constructed dikes or barriers,

assert CWA jurisdiction over discharges of dredged or fill material into upland ditches. 699 F. Supp. 2d 209, 211, 216–17 (D.D.C. 2010), *vacated by* 663 F.3d 470 (D.C. Cir. 2011).

¹¹¹ 243 F.3d 526 (9th Cir. 2001).

¹¹² *Id.* at 533 (quoting *Tributary*, RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980)).

¹¹³ *Id.*

¹¹⁴ 40 C.F.R. § 230.3(o)(2)(iii) (2017).

¹¹⁵ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,097 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

¹¹⁶ U.S. ENVTL. PROT. AGENCY, CLEAN WATER RULE COMMENT COMPENDIUM TOPIC 6: DITCHES 27–28 (2015), <https://perma.cc/GMC8-VV56>.

natural river berms, [or] beach dunes.”¹¹⁷ These adjacent waters include “wetlands, ponds, lakes, oxbows, impoundments, and similar water features.”¹¹⁸ The term “neighboring” includes “all waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary.”¹¹⁹ The term also includes “all waters within the 100-year floodplain of a traditional navigable water . . . or a covered tributary that is located in whole or in part within 1,500 feet of the ordinary high water mark of that jurisdictional water,” or “within 1,500 feet of the ordinary high water mark of the Great Lakes.”¹²⁰ The 100-year floodplain means “the area that will be inundated by the flood event having a one percent chance of being equaled or exceeded in any given year.”¹²¹ Adjacent waters do not include “waters in which established, normal farming, silviculture, and ranching activities occur.”¹²²

The agencies chose to include these numerical boundaries in the definition of adjacent in response to numerous comments for more “bright line” limits on federal jurisdiction.¹²³ They included an extensive discussion of the scientific literature supporting the significant nexus between tributaries and adjacent waters as well as citations to the case law including *United States v. Riverside Bayview Homes, Inc.*,¹²⁴ *SWANCC*, and *Rapanos* supporting assertion of federal authority.¹²⁵

D. Case-Specific Waters

As noted, tributaries (including the ditches previously described) and adjacent waters are automatically classified as waters of the United States without the need for a case-by-case determination of significant nexus. “Significant nexus” is defined to mean “a significant effect . . . on the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas.”¹²⁶ “Functions to be considered for the purposes of determining significant nexus are sediment trapping, nutrient recycling, pollutant trapping,” flood control, erosion control, groundwater recharge, and “provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in traditional navigable waters.”¹²⁷

¹¹⁷ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,058.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 37,081.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 37,080.

¹²³ *Id.* at 37,057.

¹²⁴ 474 U.S. 121 (1985).

¹²⁵ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,084–86, 37,091.

¹²⁶ *Id.* at 37,091.

¹²⁷ *Id.*

The 2015 rule includes a provision allowing “for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or [otherwise] excluded” by rule (see below).¹²⁸ These are the so-called “(a)(7) and (8)” waters, in reference to the section numbers in the *Code of Federal Regulations*.¹²⁹ They consist of two broad subcategories. The (a)(7) subcategory includes five specific types of geographically isolated wetlands: Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands.¹³⁰ These five subcategories were selected on the basis that they are “similarly situated” for purposes of case-by-case significant nexus determinations. The “similarly situated” test comes from Justice Kennedy’s concurring opinion in *Rapanos* where he said that the significance of wetlands should be evaluated in the aggregate within the same “region.”¹³¹ The similarly situated waters identified in (a)(7) will be combined with other waters in the same watershed. For example, only western vernal pools can be analyzed with other western vernal pools in the same watershed.¹³²

Paragraph (a)(8) waters are located “within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas” or “within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or [covered] tributaries.”¹³³ They are not considered “similarly situated,” but they are “physically, chemically and biologically integrated with rivers via functions that improve downstream water quality,” including sediment deposition, nutrient transfer, and groundwater recharge supporting baseflow in rivers and streams.¹³⁴ They act as an “effective buffer to protect downstream waters from nonpoint source pollution (such as nitrogen and phosphorus), provide habitat for breeding fish and aquatic insects . . . and retain floodwaters . . . and contaminants that could otherwise negatively impact the condition . . . of downstream waters.”¹³⁵

As might be expected, the case-specific waters category drew fire from both sides—some claiming it went too far and others not far enough.¹³⁶ The

¹²⁸ *Id.* at 37,086.

¹²⁹ 33 C.F.R. § 328.3(a)(7)–(8) (2017).

¹³⁰ *Id.* The preamble describes the functions and values of each of these wetlands to downstream water quality. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,086.

¹³¹ *Rapanos*, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring); *see also infra* notes 202–205 and accompanying text. The agencies interpret the “region” to be the “watershed that drains to the nearest traditional navigable water.” Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,059.

¹³² Note, however, that an individual vernal pool or complex of vernal pools could be jurisdictional by rule if they are adjacent to a covered tributary. Likewise, a prairie pothole that straddles a state line could be jurisdictional as interstate water.

¹³³ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,086.

¹³⁴ *Id.* at 37,087–88.

¹³⁵ U.S. ENVTL. PROT. AGENCY & U.S. DEP’T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 350–51 (2015), <https://perma.cc/6JBU-2523> [hereinafter TECHNICAL SUPPORT DOCUMENT].

¹³⁶ *See supra* note 88 and accompanying text.

final rule attempted to strike a balance between setting clear boundaries and allowing limited case-specific reviews supported by the science.

E. Excluded Waters

The 2015 rule, for the first time, codifies what waters and landscape features are *not* waters of the United States. The rule codifies exclusions for waste treatment systems¹³⁷ and prior converted cropland¹³⁸ that have been policy for a number of years but never incorporated by rule. The rule excludes ditches that do not flow year-round or have a hydrological connection to traditional navigable waters, which clearly reduces the number of ditches that were formerly regulated as waters of the United States.¹³⁹ The list of features that are excluded includes ornamental ponds, reflecting pools, gravel pits, gullies, and puddles.¹⁴⁰ In a questionable move, the rule categorically excludes groundwater even where it may have a significant nexus with navigable water.¹⁴¹ Though EPA has traditionally taken the position that groundwater is not a water of the United States,¹⁴² a number of courts have ruled that in some cases “tributary groundwater” will be considered a water of the United States when it is hydrologically connected to navigable water and serves as conduit for polluting discharges.¹⁴³ In the response to comments, the agencies did note that “the features discussed under exclusions may function as ‘point sources’ under

¹³⁷ 33 C.F.R. § 328.3(b)(1) (2017). Waste treatment systems include “treatment ponds or lagoons” constructed in uplands and “designed to meet the requirements of the Clean Water Act.” *Id.*

¹³⁸ *Id.* § 328.3(b)(2). Prior converted croplands are defined as “wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values.” PATRICK J. KELLY, U.S. ARMY CORPS OF ENG’RS, REGULATORY GUIDANCE LETTER 90-07: CLARIFICATION OF THE PHRASE “NORMAL CIRCUMSTANCES” AS IT PERTAINS TO CROPPED WETLANDS para. 5(a) (1990), <https://perma.cc/MKB7-A4N3> (expired Dec. 31, 1993).

¹³⁹ See 33 C.F.R. § 328.3(b)(3).

¹⁴⁰ *Id.* § 328.3(b)(4).

¹⁴¹ *Id.* § 328.3(b)(5); see also Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,096, 37,099 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) (explaining that jurisdictional exemptions apply even when water is connected to navigable waters).

¹⁴² See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,099.

¹⁴³ See, e.g., *Haw. Wildlife Fund v. County of Maui*, 881 F.3d 754, 765 (9th Cir.) (holding county liable for discharge to wells that were hydrologically connected to coastal waters via groundwater), *amended*, No. 15-17447, 2018 WL 1569313 (9th Cir. Feb. 1, 2018); *Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975); *Kentucky ex rel. Hancock v. Train*, No. 74-16, 1976 WL 23662, at *2 (E.D. Ky. Aug. 31, 1976) (“[W]aters of the United States . . . includes any subsurface waters having a clear hydrological nexus with those waters of the United States specified [in EPA regulations].”); see also Michael C. Blumm & Steven M. Thiel, *(Ground)Waters of the United States: Unlawfully Excluding Tributary Groundwater from Clean Water Act Jurisdiction*, 46 ENVTL. L. 333, 333 (2016) (“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.”).

CWA section 502(14)), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).¹⁴⁴ Thus, ditches that are not waters of the United States may nonetheless be point sources, and discharges through tributary groundwater that reach a water of the United States may still be subject to permit requirements.¹⁴⁵

The final rule includes new exclusions for stormwater control features and for wastewater recycling structures that are constructed in dry land.¹⁴⁶ Some of the most common stormwater control measures include traditional stormwater control structures such as pipes, street gutters, retention basins, detention basins, and ponds, as well as the newer types of control that fall generally into the category of “green infrastructure” such as rain gardens, bioswales, cisterns, and constructed wetlands.¹⁴⁷ To the extent that a stormwater system incorporates jurisdictional waters, those waters would not be excluded.¹⁴⁸

V. THE CLEAN WATER RULE CREATES NET ECONOMIC BENEFITS

The 2015 rule itself imposes no direct costs. It is a definitional rule that does not impose any specific regulatory requirements. Those would come from other provisions of the law such as the CWA section 402 (NPDES) and 404 (dredge/fill disposal) permit programs as well as section 311 (the oil and hazardous spill provision). Other provisions such as sections 301 and 302 establish the technology and water quality-based standards that regulated entities would be required to meet.

Nonetheless, as directed by Executive Order 13563, the agencies performed an economic analysis to estimate the changes in potential costs and benefits of different CWA programs from the 2015 rule.¹⁴⁹ The agencies used two different baselines to measure costs and benefits: one being the existing 1986 regulations and historic practices; the other “recent field

¹⁴⁴ U.S. ENVTL. PROT. AGENCY, CLEAN WATER RULE COMMENT COMPENDIUM TOPIC 7: FEATURES AND WATERS NOT JURISDICTIONAL 26 (2015), <https://perma.cc/TJE6-NNJ4>.

¹⁴⁵ See *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 761–62 (E.D. Va.) (holding that the CWA does cover the discharge of pollutants to groundwater that is “hydrologically connected to surface water”), *appeal dismissed as interlocutory*, Nos. 17-1537, 17-1539, 2017 WL 5068149 (4th Cir. July 13, 2017). *But see* *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F. Supp. 3d 488, 498 (D.S.C. 2017) (holding “the CWA does not apply to claims involving discharge of pollution to groundwater that is hydrologically connected to surface waters”). Appeals are pending in the United States Courts of Appeals for the Fourth, Sixth, and Ninth Circuits on this issue. See *generally* SAM BROWN ET AL., TOP CLEAN WATER ACT CASES: NOVEMBER 2017 (2017), <https://perma.cc/C2MC-5NJN>.

¹⁴⁶ 40 C.F.R. § 122.2 (2017).

¹⁴⁷ Bethanne Sonne, Comment, *Managing Stormwater by Sustainable Measures: Preventing Neighborhood Flooding and Green Infrastructure Implementation in New Orleans*, 27 TUL. ENVTL. L.J. 323, 326 (2014).

¹⁴⁸ See U.S. ENVTL. PROT. AGENCY, *supra* note 144, at 51–52.

¹⁴⁹ See Exec. Order 13,563, 3 C.F.R. § 215 (2012).

practice following the 2008 guidance.”¹⁵⁰ “Compared to the current regulations and historic practice of making jurisdictional determinations,” the agencies concluded that “the scope of jurisdictional waters will decrease, as would the costs and benefits of CWA programs.”¹⁵¹ “Compared to a baseline of recent practice,” the agencies concluded that the 2015 rule would result in an estimated increase between 2.84% and 4.65% in “positive jurisdictional determinations annually.”¹⁵² Under either scenario, benefits would significantly exceed costs.¹⁵³ The largest category of benefits would come from the incremental protection of wetlands as compared to current practices. The agencies “calculated that total annual benefits from implementing the regulation would range from \$338.9 million to \$554.9 million. The majority of those annual benefits came from increased protection of wetlands, valued at a range of \$306.1 million to \$501.2 million.”¹⁵⁴

Enter the Trump Administration (again). In support of its decision to repeal the 2015 rule, the Administration conducted a new economic analysis and removed the benefits associated with wetlands conservation.¹⁵⁵ The purported reason was that the prior analysis relied on outdated contingent valuation (willingness to pay) studies.¹⁵⁶ The studies relied on were from 1986–2000.¹⁵⁷ The Trump reanalysis rejects this evidence: “The age of these studies introduces uncertainty, because public attitudes toward nature protection could have changed.”¹⁵⁸ The Trump reanalysis labels wetlands benefits as “not quantified” and assigns them zero value, thereby seeking to justify the repeal of the 2015 rule.¹⁵⁹

In a peer-reviewed critique of the Trump reanalysis, a team of economists concluded that there was “no defensible or consistent basis provided by the agencies for the decision to exclude what amounts to the largest category of benefits from the 2017 [regulatory impact analysis].”¹⁶⁰ The economists stated: “The age of studies alone is not a defensible criterion for excluding categories of economic benefits.”¹⁶¹ They also noted that public

¹⁵⁰ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,101 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Ariel Wittenberg, *Clean Water Rule: Trump Analysis Slashes WOTUS's Economic Benefits*, E&E NEWS: GREENWIRE (July 7, 2017), <https://perma.cc/5C46-7ESC> (citing 2015 ECONOMIC ANALYSIS, *supra* note 86, at x–xi figs.ES-1 & ES-2).

¹⁵⁵ See generally U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY, ECONOMIC ANALYSIS FOR THE PROPOSED DEFINITION OF “WATERS OF THE UNITED STATES”—RECODIFICATION OF PRE-EXISTING RULES (2017), <https://perma.cc/23JM-M3CB> [hereinafter TRUMP REANALYSIS].

¹⁵⁶ *Id.* at 8.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 8–9.

¹⁵⁹ *Id.* at 10–11 tbls.1 & 2.

¹⁶⁰ Kevin J. Boyle et al., *Deciphering Dueling Analyses of Clean Water Regulations*, 358 SCIENCE 49, 49 (2017).

¹⁶¹ *Id.* at 50.

attitude towards nature protection “has been very stable, averaging 89% since 1986.”¹⁶²

Another critique of the Trump economic reanalysis, by the Institute for Policy Integrity (IPR) at New York University School of Law, pointed out other flaws in the methodology used.¹⁶³ First, rather than use the 2015 rule as the baseline for its analysis of the effect of repealing and replacing the rule, the Trump reanalysis assumed that the relevant baseline was the 1986 rule which was in effect under the Sixth Circuit stay.¹⁶⁴ But the stay has been lifted, and the attempt to “recodify” the 1986 rule has yet to be adjudicated. In any event, it is clear that the Trump Administration is intent upon repealing the 2015 rule and either replacing it with one that is less inclusive (i.e., based on Scalia’s opinion) or continuing to rely on the 2008 guidance and “field practice” which will certainly include less wetlands protection than the 2015 rule would provide. Thus, an honest economic analysis would require using the 2015 rule as the baseline for judging the costs and benefits of any proposal to reduce wetlands regulation.

Second, IPR challenged the assumption underlying the Trump reanalysis that the states would fill any gaps created by reduction of federal regulation.¹⁶⁵ In fact, however, according to a study by the Environmental Law Institute, twenty-four states do not have any wetland protections beyond those provided by the CWA.¹⁶⁶ Further, the states that have no additional protections beyond those provided by the CWA are also those containing the largest areas of wetlands likely to be affected by the repeal of the 2015 rule.¹⁶⁷

Finally, the IPR analysis shows that the costs of compliance with 404 permits are declining due to the expansion of wetland mitigation banks.¹⁶⁸ It concludes that “the evidence shows that the Clean Water Rule is likely even more cost effective than the 2015 analysis suggests. The benefits of wetland protection are quantifiable, positive, and growing over time while the costs of wetland mitigation will likely fall in the future.”¹⁶⁹

¹⁶² *Id.*

¹⁶³ JASON SCHWARTZ & JEFFREY SHRADER, INST. FOR POLICY INTEGRITY, MUDDYING THE WATERS: HOW THE TRUMP ADMINISTRATION IS OBSCURING THE VALUE OF WETLANDS PROTECTION FROM THE CLEAN WATER RULE 2 (2017), <https://perma.cc/7WJD-8GGQ>.

¹⁶⁴ TRUMP REANALYSIS, *supra* note 155, at 2–4.

¹⁶⁵ *Id.* at 9.

¹⁶⁶ *See* ENVTL. LAW INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 11 (2013); ENVTL. LAW INST., AMERICA’S VULNERABLE WATERS: ASSESSING THE NATION’S PORTFOLIO OF VULNERABLE AQUATIC RESOURCES SINCE *RAPANOS V. UNITED STATES*, at iii (2011).

¹⁶⁷ SCHWARTZ & SHRADER, *supra* note 163, at 9.

¹⁶⁸ *Id.* at 11–12.

¹⁶⁹ *Id.* at 11.

VI. THE CLEAN WATER RULE IS BASED ON A CONSERVATIVE READING OF SUPREME COURT PRECEDENT

The Supreme Court has dealt with the waters of the United States issue three times, all in the context of 404 permit programs. In *Riverside Bayview*, a unanimous Court upheld the Corps's regulation extending federal jurisdiction to "wetlands adjacent to navigable or interstate waters and their tributaries."¹⁷⁰ In *SWANCC*, the Court held that the use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA.¹⁷¹ In *Rapanos*, a fractured 4–1–4 decision failed to produce a majority opinion in a case involving wetlands adjacent to nonnavigable streams far removed from any traditional navigable waters.¹⁷² The plurality opinion authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito, concludes that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"¹⁷³ According to Justice Scalia, the term "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."¹⁷⁴

Justice Kennedy wrote an opinion concurring in the judgment to remand the case but rejecting the plurality's "relatively permanent" test. He noted that "the Corps can reasonably interpret the [CWA] to cover the paths of such impermanent streams," and he concluded that "the Corps' definition of adjacency is a reasonable one."¹⁷⁵ Justice Kennedy said that the Corps could exercise jurisdiction over a wetland only if there was "a significant nexus between the wetlands in question and navigable waters in the traditional sense."¹⁷⁶ Justice Kennedy explained: "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"¹⁷⁷

Four members of the Court joined the dissent authored by Justice Stevens. His dissent concluded that the Corps's regulations were a reasonable interpretation of the CWA and that any wetland adjacent to navigable waters or their tributaries is subject to the CWA.¹⁷⁸ He faulted both

¹⁷⁰ *Riverside Bayview*, 474 U.S. 121, 129, 131 (1985).

¹⁷¹ *SWANCC*, 531 U.S. 159, 172–74 (2001).

¹⁷² See generally *Rapanos*, 547 U.S. 715 (2006).

¹⁷³ *Id.* at 739 (Scalia, J., plurality) (alterations and omission in original) (quoting *Water, Webster's New International Dictionary* (2d ed. 1954)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 770, 775 (Kennedy, J., concurring).

¹⁷⁶ *Id.* at 779.

¹⁷⁷ *Id.* at 780.

¹⁷⁸ *Id.* at 788, 807–08 (Stevens, J., dissenting).

Justice Scalia and Kennedy for failing “to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act.”¹⁷⁹ Justice Stevens offered this advice to the lower courts on how to interpret this fractured decision:

Given that all four Justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.¹⁸⁰

In *Marks v. United States*,¹⁸¹ the Supreme Court said, “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”¹⁸² As Professor Blumm has written: “In deciding how to apply the *Rapanos* opinions, most courts have either employed the Supreme Court’s advice in *Marks* and concluded that Justice Kennedy’s test prevails, or decided that *Marks* is inapplicable, and thus either the plurality’s or Justice Kennedy’s tests can provide a basis for CWA jurisdiction.”¹⁸³

In fact, all nine of the United States courts of appeals to have considered the issue have stated that Justice Kennedy’s significant nexus standard may be used to establish applicability of the CWA. Two circuits have ruled that Kennedy’s “significant nexus” test alone controls;¹⁸⁴ two applied the Kennedy test but reserved the question whether the plurality test could provide an alternative basis for jurisdiction;¹⁸⁵ three adopted Justice Stevens’s advice that a wetland satisfying either the Kennedy or plurality tests is jurisdictional;¹⁸⁶ and two found it unnecessary to decide because the Kennedy test and plurality test were both satisfied by the particular wetland

¹⁷⁹ *Id.* at 810.

¹⁸⁰ *Id.* He also offered this somewhat optimistic prediction: “Justice Kennedy’s ‘significant-nexus’ test will probably not do much to diminish the number of wetlands covered by the Act in the long run.” *Id.* at 808.

¹⁸¹ 430 U.S. 188 (1977). It should be noted that the Supreme Court has accepted certiorari in a case challenging the workability of the “narrowest ground” test under *Marks*. See Brief of Petitioner at i, *Hughes v. United States*, No. 17-155 (U.S. Jan. 22, 2018), 2018 WL 565327; see also Justin Marceau, *Argument Analysis: “We Know How to Get to Five” – Justices Debate Precedent in the Absence of a Majority Opinion*, SCOTUSBLOG (Mar. 28, 2018), <https://perma.cc/9RNA-S7XC>.

¹⁸² *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

¹⁸³ Blumm & Thiel, *supra* note 143, at 363.

¹⁸⁴ *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

¹⁸⁵ *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2011), *clarifying* *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 288 (4th Cir. 2011).

¹⁸⁶ *United States v. Donovan*, 661 F.3d 174, 180 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006).

at issue.¹⁸⁷ In addition, the United States Court of Appeals for the Second Circuit cited Kennedy's test for determining whether a wetland was jurisdictional but ultimately concluded that the area in question did not meet the criteria for a wetland.¹⁸⁸ None of the circuits have said that the Scalia formulation is the exclusive test.¹⁸⁹ Indeed, no court has held that waters must meet the plurality test or must meet both the plurality test and the Kennedy test. All of the circuit courts agree that a nexus is formed between a nonnavigable water and a traditionally navigable water when the nonnavigable water, alone or in combination with other similarly situated waters in the region, performs a function or otherwise has an effect on a downstream traditionally navigable water that is neither speculative nor insubstantial.¹⁹⁰

The United States Court of Appeals for the Third Circuit, in *United States v. Donovan*, provides the most detailed analysis of how to reconcile the plurality and Kennedy tests:

In any given case, this disjunctive standard will yield a result with which a majority of the *Rapanos* Justices would agree. If the wetlands have a continuous surface connection with "waters of the United States," the plurality and dissenting Justices would combine to uphold the Corps' jurisdiction over the land, whether or not the wetlands have a "substantial nexus" (as Justice Kennedy defined the term) with the covered waters. If the wetlands (either alone or in combination with similarly situated lands in the region) significantly affect the chemical, physical, and biological integrity of "waters of the United States," then Justice Kennedy would join the four dissenting Justices from *Rapanos* to conclude that the wetlands are covered by the CWA, regardless of whether the wetlands have a continuous surface connection with "waters of the United States." Finally, if neither of the tests is met, the plurality and Justice Kennedy would form a majority saying that the wetlands are not covered by the CWA.¹⁹¹

Thus, the agencies wisely chose to use Kennedy's significant nexus test to guide development of the Clean Water Rule.¹⁹² Indeed, the agencies would have been on extremely thin ice had they elected to model the rule on the plurality's formulation that a water body could only be jurisdictional if it was relatively permanent and had a continuous surface connection to a traditional navigable water. That interpretation was soundly rejected by a

¹⁸⁷ *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 326–27 (5th Cir. 2008).

¹⁸⁸ *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 215–17 (2d Cir. 2009).

¹⁸⁹ At least one district court declined to accept the Kennedy test because it felt Justice Kennedy "failed to elaborate on the 'significant nexus' required." *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

¹⁹⁰ See, e.g., *Donovan*, 661 F.3d at 186; *Cundiff*, 555 F.3d at 210–11; *Lucas*, 516 F.3d at 327.

¹⁹¹ *Donovan*, 661 F.3d at 184 (citation omitted).

¹⁹² Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) ("The analysis used by the agencies has been supported by all nine of the United States Courts of Appeals that have considered the issue.").

majority of the Supreme Court in *Rapanos*.¹⁹³ However, the agencies did not entirely ignore the plurality opinion. In fact, they relied upon it to justify reducing jurisdiction over waters and wetlands that were previously covered.¹⁹⁴ In some cases they did so against the advice of the Science Advisory Board.¹⁹⁵

The most substantial change was the deletion of the so-called “(a)(3)” waters defined as:

All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.¹⁹⁶

Under the 2015 rule, “an interstate commerce connection is [no longer] sufficient to meet the definition of ‘waters of the United States.’”¹⁹⁷ The rule provides for case-specific analysis of only five specific types of wetlands to determine whether they are “waters of the United States,” but that determination will be based on the significant nexus standard and not whether “the use, degradation or destruction of [such waters] could affect interstate or foreign commerce.”¹⁹⁸ Further, “waters in a watershed [where] there is no connection to traditional navigable water, interstate water or the territorial seas would not be ‘waters of the United States.’”¹⁹⁹

As discussed, the Clean Water Rule for the first time defines “tributary” in a way that excludes some intermittent, ephemeral, and artificial tributaries formerly considered jurisdictional.²⁰⁰ It narrows the definition of “ditches” to exclude many that courts in the past have found to be

¹⁹³ *Rapanos*, 547 U.S. at 769–76 (Kennedy, J., concurring); *id.* at 802 (Stevens, J., dissenting).

¹⁹⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,056 (“The agencies also utilized the plurality standard in *Rapanos* by establishing boundaries on the scope of ‘waters of the United States’ and in support of the exclusions from the definition of ‘waters of the United States.’”).

¹⁹⁵ See Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 ENVTL. L. 379, 381–84 (2016).

¹⁹⁶ Compare 33 C.F.R. § 328.3(a)(3) (2015), and 40 C.F.R. § 122.2 (2014), with 33 C.F.R. § 328.3(a)(3) (2017), and 40 C.F.R. § 122.2 (2017).

¹⁹⁷ TECHNICAL SUPPORT DOCUMENT, *supra* note 135, at 30.

¹⁹⁸ 33 C.F.R. § 328.3(a)(3) (2015); 40 C.F.R. § 122.2 (2014); see TECHNICAL SUPPORT DOCUMENT, *supra* note 135, at 32.

¹⁹⁹ TECHNICAL SUPPORT DOCUMENT, *supra* note 135, at 30.

²⁰⁰ See discussion *supra* Part III.A.

jurisdictional.²⁰¹ It shrinks the definition of adjacent waters. It writes off valuable “isolated” wetlands like playa lakes and wet meadows regardless of whether they may have a significant nexus to navigable waters.²⁰² It excludes wetlands located more than 4,000 feet from the high water mark of a water of the United States regardless of the fact that there may be a significant nexus.²⁰³ It permanently removes prior converted cropland regardless of the fact that at some point wetland functions may be restored through abandonment or other means.²⁰⁴ It categorically excludes all groundwater, even though some courts have found “tributary groundwater” to be waters of the United States.²⁰⁵

In sum, the Clean Water Rule reflects an honest effort to balance the competing goals of the statute to restore and maintain water quality while respecting the role of the states in regulating land and water use. The agencies did not go as far as the law would allow or science might demand. The claims of overreach and land grab are unfounded. The rule is more pragmatic than dogmatic. The agencies were left to resolve a problem that the Supreme Court had created and Congress had refused to fix. They did the best they could with what they had to work with. While imperfect, the result was perhaps the best that could be expected.

VII. SO NOW WHAT?

As Yogi Berra might have said: “It’s tough to make predictions, especially about the future.”²⁰⁶ But one thing is sure: there will be plenty of work for lawyers over the next several years as a torrent of litigation sweeps through the federal judiciary. The first wave has already been unleashed and involves attempts to persuade a district court to issue a nationwide

²⁰¹ See, e.g., *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 805–06 (7th Cir. 2005), *vacated*, 548 U.S. 901 (2006); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 417 (4th Cir. 2003); *United States v. Rapanos*, 339 F.3d 447, 449, 451–53 (6th Cir. 2003); *Deaton*, 332 F.3d 698, 710–12 (4th Cir. 2003); *Headwaters, Inc.*, 243 F.3d 526, 533 (9th Cir. 2001); *Eidson*, 108 F.3d 1336, 1341–43 (11th Cir. 1997); *Ashland Oil*, 504 F.2d 1317, 1320, 1325 (6th Cir. 1974).

²⁰² See TECHNICAL SUPPORT DOCUMENT, *supra* note 135, at 32 (“Case-specific determinations of jurisdiction are only authorized for five specific types of waters under (a)(7), and for waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters located within 4,000 feet of the ordinary high water mark or high tide line of an (a)(1) through (a)(5) water under (a)(8).”).

²⁰³ *Id.*

²⁰⁴ *Id.* at 19 (“Waters of the United States do not include prior converted cropland.”).

²⁰⁵ See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,055 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) (“The rule also does not regulate shallow subsurface connections nor any type of groundwater.”); see also *supra* note 143 and accompanying text.

²⁰⁶ *Yogi Berra Quotes*, FAMOUS QUOTES & QUOTATIONS, <https://perma.cc/TA4N-75MB> (last visited Apr. 7, 2018). The author of this quote is unknown, but scholars believe it is of Danish origin. See *It’s Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR, <https://perma.cc/BRX6-R4C5> (last visited Apr. 7, 2018).

injunction to block the 2015 rule.²⁰⁷ The United States Court of Appeals for the Eleventh Circuit has already issued an order vacating the prior decision of the United States District Court for the District of Georgia denying a preliminary injunction on the ground that it lacked jurisdiction and remanding the case for further proceedings.²⁰⁸ Historically, the Justice Department has vigorously contested the authority of district courts to issue nationwide injunctions.²⁰⁹ Attorney General Jeff Sessions just announced that he will seek Supreme Court review of the nationwide injunction issued by the United States District Court for the Northern District of California barring the Trump Administration from phasing out the Deferred Action for Childhood Arrivals (DACA) program protecting immigrants brought to the country illegally as minors.²¹⁰

As mentioned, litigation challenging the “applicability rule” is also pending in the United States District Court for the Southern District of New York, though opponents are attempting to have the case transferred to Texas.²¹¹ As discussed, this is a dubious move that stands little chance of success.²¹² In the case filed by New York Attorney General Eric T. Schneiderman, plaintiffs have also challenged Scott Pruitt’s involvement in the rulemaking as a violation of EPA’s ethical guidelines,²¹³ arguing that he’s already made up his mind and cannot objectively consider opposing points of view.²¹⁴

The next challenge will be the rule rescinding the 2015 rule and recodifying the 1986 rule. The comment period on that rule closed on

²⁰⁷ Cf. States’ Motion for a Nationwide Preliminary Injunction, *Texas v. U.S. Envtl. Prot. Agency*, No. 3:15-cv-00162 (S.D. Tex. May 15, 2018), <https://perma.cc/J889-RB7W>.

²⁰⁸ *Georgia ex rel. Carr v. Pruitt*, 880 F.3d 1270, 1272 (11th Cir. 2018) (per curiam). The United States Court of Appeals for the Tenth Circuit followed suit in *Chamber of Commerce v. U.S. EPA*, remanding the case that then-Oklahoma Attorney General Pruitt filed in the United States District Court for the Northern District of Oklahoma. 709 Fed. App’x 526, 529 (10th Cir. 2018).

²⁰⁹ Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017), <https://perma.cc/HT2D-6GW7>.

²¹⁰ Deborah Cassens Weiss, *Justice Department Will Ask Supreme Court for Direct Review of Judge’s DACA Injunction*, ABA J. (Jan. 16, 2018), <https://perma.cc/GE58-UUBJ> (noting that Attorney General Sessions was quoted as saying “it defies both law and common sense” for the immigration policy ‘to somehow be mandated nationwide by a single district court in San Francisco’”).

²¹¹ Ariel Wittenberg, *Trump Admin Wants Texas Court as WOTUS Battleground*, E&E NEWS: GREENWIRE (Feb. 15, 2018), <https://perma.cc/HH6C-7W2F>.

²¹² See *supra* notes 25–29 and accompanying text.

²¹³ 5 C.F.R. § 2635.502 (2017); see Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Leads Coalition of 11 AGs in Challenging Trump EPA’s Illegal Delay of Clean Water Protections (Dec. 15, 2017), <https://perma.cc/SF6J-QVNA>.

²¹⁴ See Letter from Attorneys General of New York, California, Hawaii, Maine, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia to E. Scott Pruitt, Adm’r, U.S. Envtl. Prot. Agency, & Ryan A. Fisher, Acting Assistant Sec’y, Army for Civil Works 20 (Dec. 13, 2017), <https://perma.cc/VKA8-YEUW>.

September 27, 2017.²¹⁵ In testimony before the Senate Environmental and Public Works Committee, “Pruitt said he expects EPA will propose a substitute rule in April or May this year.”²¹⁶ The delay may have something to do with the need to respond to the large volume (over 700,000) of comments.²¹⁷ As soon as it is published in the Federal Register, environmentalists will pick their favorite forum to challenge it under the APA.²¹⁸ In the last round of litigation challenging the 2015 rule, suits were filed in seven different district courts by a number of plaintiffs.²¹⁹ Much to everyone’s surprise, the Judicial Panel on Multidistrict Litigation, which was established to prevent this kind of chaos, denied the government’s motion to consolidate the cases.²²⁰ Perhaps the new Panel will reconsider once it sees that the chaos is only increasing.

On the merits, it is far from clear that the rescission rule will be upheld. Agencies are free to change their minds and even reverse course, but they must have good reasons for doing so.²²¹ In the statement accompanying the proposed repeal, EPA stated that it did not need to point to any change in circumstances or new information to justify repealing the 2015 rule.²²² In effect, it was enough that Trump won the election and wanted to go in a different direction.²²³ Whether a court will accept this rationale is an open question, especially in light of the exhaustive record compiled to support the 2015 rule and relative paucity of legal or scientific support for the repeal rule.²²⁴

At some point the skirmishing over the fate of the 2015 rule will be overtaken by the publication of a proposed replacement rule. What that will look like is anyone’s guess. President Trump has made clear he wants it modeled on Scalia’s narrow test, but until we see a proposed rule it is

²¹⁵ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules; Extension of Comment Period, 82 Fed. Reg. 39,712, 39,712 (Aug. 22, 2017) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

²¹⁶ Kevin Bogardus, *Carper to Pruitt: I Want Real Answers*, E&E NEWS: GREENWIRE (Jan. 30, 2018), <https://perma.cc/92G6-P89A>.

²¹⁷ Ariel Wittenberg, *In Wake of Supreme Court’s Ruling, More Confusion*, E&E NEWS: GREENWIRE (Jan. 23, 2018), <https://perma.cc/J9TX-EW3A>.

²¹⁸ The most likely venue is the United States District Court for the District of Columbia. See Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 322–23 (2004). Both the district court and circuit court have a majority of judges appointed by democrats, which research has shown to tend to favor environmental plaintiffs. See *id.*

²¹⁹ See COPELAND, *supra* note 7, at 2, 14; see also *In re Clean Water Rule: Definition of “Waters of the U.S.”*, 140 F. Supp. 3d 1340, 1340–41 (J.P.M.L. 2015).

²²⁰ See *In re Clean Water Rule: Definition of “Waters of the U.S.”*, 140 F. Supp. 3d at 1341.

²²¹ See *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1982).

²²² Definitions of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,901 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) (“Importantly, such a revised decision need not be based upon a change of facts or circumstances.”).

²²³ *Id.* (“[A] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal”); see also Parenteau, *supra* note 31.

²²⁴ See discussion *supra* Part IV.

impossible to evaluate its legal efficacy. Nor do we know who will be on the Supreme Court if and when the new rule gets there years from now.²²⁵ Justice Kennedy remains the swing vote on the Court, and eyebrows were raised by some critical remarks he made in a concurring opinion in *U.S. Army Corps of Engineers v. Hawkes Co.*²²⁶ that seemed to suggest a further souring on the way the agencies are interpreting and implementing the CWA.²²⁷ However, assuming Kennedy is still on the Court, it is hard to see how he could ever vote in favor of a rule modeled on an approach he emphatically rejected in his concurring opinion in *Rapanos*. He rejected Scalia's fixation on Congress's use of the word "waters" instead of "water."²²⁸ He rejected Scalia's insistence that wetlands must be connected to navigable water by a "continuous surface connection."²²⁹ He rejected Scalia's view that *Riverside Bayview* requires that wetlands "must contain moisture originating in neighboring waterways" and pointed out the ecological values that disconnected ("isolated") wetlands can have.²³⁰ He rejected Scalia's interpretation that *SWANCC* compelled the narrow interpretation adopted by the plurality.²³¹ Ultimately Kennedy concluded: "In sum the plurality's opinion is inconsistent with the [CWA]'s text, structure, and purpose."²³²

That conclusion remains true today and is supported by a large body of law and science developed over the past four decades. Barring a major reshuffling on the Court, it should remain true when the case returns to the Court following years of litigation over the Administration's efforts to reinvent the law.

VIII. CONCLUSION

The Supreme Court has recognized that agencies must be allowed to "adapt their rules and policies to the demands of changing circumstances."²³³ But the Court has also noted that "the forces of change do not always or necessarily point in the direction of deregulation"; and further that "there is no more reason to presume that changing circumstances require the

²²⁵ Rumors that Justice Kennedy might retire after this term were somewhat allayed when he hired a full complement of new clerks. Ian Millhiser, *Justice Kennedy Just Gave Liberals a Huge Ray of Hope for Christmas*, THINK PROGRESS (Dec. 21, 2017), <https://perma.cc/WY9W-4YXF>.

²²⁶ 136 S. Ct. 1807 (2016).

²²⁷ *Id.* at 1817 (Kennedy, J., concurring) ("The [CWA] . . . continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation.").

²²⁸ *Rapanos*, 547 U.S. 715, 770 (2006) (Kennedy, J., concurring) ("Congress' use of 'waters' instead of 'water' does not necessarily carry the connotation of 'relatively permanent, standing or flowing bodies of water.'" (citation omitted)).

²²⁹ *Id.* at 772 ("To begin with, the plurality is wrong to suggest that wetlands are 'indistinguishable' from waters to which they bear a surface connection.").

²³⁰ *Id.* at 773–74.

²³¹ *Id.* at 774, 776 ("The concerns addressed in *SWANCC* do not support the plurality's interpretation of the [CWA].").

²³² *Id.* at 776.

²³³ *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

rescission of prior action, instead of a revision in or even the extension of current regulation.”²³⁴ A decision to deregulate must be judged by the same standard as the decision to regulate in the first instance. In both cases, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²³⁵ An agency receives no deference where it has “offered an explanation for its decision that runs counter to the evidence before the agency.”²³⁶

Here, nothing has changed that justifies rescinding the Clean Water Rule. The “relevant data” used to support the rule remains the same and is laid out in meticulous detail in the administrative record of the 2014–2015 rulemaking. The post-*Rapanos* law remains the same and decidedly favors Kennedy’s significant nexus test based on the narrowest ground rationale of the *Marks* formulation.²³⁷ The positive economic benefits of the rule have not changed except that they may be even stronger. The sole rationale offered in support of the proposed rescission is that in the previous rulemaking the agencies did not include enough discussion in the preamble of the 2015 rule “of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the [CWA].”²³⁸ Section 101(b) provides that:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority.²³⁹

The preamble to the proposed rescission concedes that “[t]he 2015 rule did acknowledge the language contained in section 101(b) and the vital role states and tribes play in the implementation of the [CWA] and the effort to meet the [CWA]’s stated objective.”²⁴⁰ However, the current leadership of the agencies faults their predecessors for not giving enough emphasis to the cooperative federalism policy underlying section 101(b). Under new

²³⁴ *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1982).

²³⁵ *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

²³⁶ *Id.*

²³⁷ The vitality of the *Marks* formulation will be tested this term as the Supreme Court hears argument in *Hughes v. United States*. The question presented is whether an inmate who enters into a plea bargain under Federal Rule of Criminal Procedure 11(c)(1)(C)—which specifies that an attorney for the government will agree that a specific sentence is appropriate—is eligible to have his sentence reduced later if the sentencing guidelines are changed. The question turns on how to interpret a 4–1–4 decision of the Court in a prior sentencing case. Brief of Petitioner at i–ii, *Hughes v. United States*, No. 17-155 (U.S. Jan. 22, 2018), 2018 WL 565327.

²³⁸ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,902 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

²³⁹ CWA, 33 U.S.C. § 1251(b) (2012).

²⁴⁰ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,902.

management the agencies vow that they “will more fully consider the policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction.”²⁴¹

This smacks of throwing out the baby with the bath water. No evidence has been presented to make the case that the 2015 rule violates the policies of section 101(b), let alone justifies jettisoning the entire rule rather than proposing a more surgical fix for whatever problem is identified. Why not mend it instead of end it?

Elections do have consequences, and a new administration is certainly entitled to adopt different policies provided they reflect well-reasoned choices. But the kind of radical departure from positions and policies that have been taken by past administrations regardless of party affiliation demands a more fulsome explanation than what has been provided. Such a major change in national policy demands more than a change in the occupant of 1600 Pennsylvania Avenue.

²⁴¹ *Id.*