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Doesn't Look Like Anything to Me: Protecting Wetlands by Narrowing the Definition of "Waters of the United States"

Brandon Pang

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INTRODUCTION

A farmer sets out to stake his claim to the American Dream. Like his father and generations before, the farmer desires only to make an honest living. The farmer purchases a vast tract of land in Northern California with plans to grow wheat on the property. The farmer plows the field and plants the wheat. Satisfied with his work, the farmer sits back and waits for the crops to grow. A few weeks before the harvest, two Environmental Protection Agency (EPA) agents arrive at the farmer's fields. The agents claim that by plowing his fields the farmer has violated the Clean Water Act's (CWA) provision protecting the "waters of the United States." The farmer is confused. He doesn't understand how the CWA is violated if the only water in the fields comes from the irrigation system he installed.

The agents inform him that the field constitutes a wetland and that he failed to acquire the requisite permit to plow the field. The only wetlands the farmer knows are those down in Louisiana where his favorite show "Swamp Citizens" is filmed. The EPA fines the farmer various amounts totaling over two million dollars. Believing there is a mistake, the farmer challenges these fines in court. Unfortunately, the court finds that the farmer did violate the Clean Water Act by dredging a "seasonal wetland."[1] The farmer reluctantly settles the case for one million dollars. Now, nearly bankrupt, the farmer's dream has turned into a nightmare.

This distressing hypothetical is based on an actual farmer's encounter with the EPA and the CWA's nebulous "waters of the United States" (WOTUS) definition.[2] The ambiguous definition leaves both farmers and legal scholars alike, questioning the scope of governmental regulations of the CWA. Without a clear determination of what areas fall under the purview of the CWA, the rights of property owners are at risk. The various interpretations of the WOTUS provision causes the EPA, courts, and property owners to struggle to determine the scope of the EPA's regulatory authority. The purpose behind the CWA and the definition of WOTUS indicate that the intent of the drafters was the protection of water bodies

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1. "Seasonal wetlands" are areas that are dry for one or more seasons every year or may only be wet periodically. *What is a Wetland?,* ENVTL. PROT. AGENCY (Oct. 15, 2017), https://perma.cc/QZY9-T2G5.

2. *See* Alexis Garcia, *How Obama's EPA Nearly Bankrupted John Duarte's Farm*, REASON.COM (Sept. 14, 2017), https://perma.cc/7MGM-U5K4.

from pollutants. However, the EPA and courts have expanded the provision to include things that play a vital role in the ecology of the water bodies, such as wetlands and tributaries.[3] Wetlands are not always wet; they may be wet seasonally or periodically. Under the CWA, there is no clear way to determine what constitutes a wetland, leaving the scope of federal regulation equally unclear.

There have been many controversial and unsuccessful attempts to resolve this issue: the Supreme Court of the United States (SCOTUS) interpreted the scope of the "waters of the United States;"[4] the EPA, under the Obama administration, promulgated the Clean Water Rule in 2015 in an attempt to clarify the WOTUS definition; and the EPA, under the Trump administration, proposed a new definition.[5] The best solution to dispel the confusion is for Congress to revisit and amend the CWA, redefining WOTUS once and for all.

To help the reader fully understand how the definition of WOTUS creates so many problems, Part I of this Comment surveys the statutory history of the "waters of the United States." Part II examines the interpretation of "waters of the United States" by the Supreme Court. Part III analyzes the EPA's Clean Water Rule (CWR) promulgated in 2015 and the ongoing battles in federal court with states and property owners fighting its implementation. Part IV addresses the EPA's newly proposed rule to rescind the CWR and redefine WOTUS pursuant to President Trump's Executive Order. Part V concludes the best solution is for Congress to amend the CWA by narrowing the definition of WOTUS to a more commonsense understanding of the term "waters." This more permanent solution is necessary to put an end to the confusion and over-regulation.

I. NAVIGATING THE "WATERS OF THE UNITED STATES"

It was not until the mid-twentieth century, as a response to growing public concern, that the United States government formally enacted regulations to protect water sources from pollution.[6] The Federal Water Pollution Control Act (FWPCA) of 1948 was the first major federal law to address water pollution.[7] The Act sought to encourage water pollution

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3. *Section 404 of the Clean Water Act: How Wetlands are Defined and Identified*, ENVTL. PROT. AGENCY (Sept. 16, 2017), https://perma.cc/H59Z-VEAE.

4. *See* discussion *infra* Part II.

5. *See infra* note 127.

6. *See* ENVTL. PROT. AGENCY, *History of the Clean Water Act* (Sept. 16, 2017), https://perma.cc/W53W-F6SG.

7. *Id*.

control at the state level.[8] Under the FWPCA, Congress had no authority to establish water quality standards, limit discharges, or engage in enforcement actions for interstate waters.[9] It would take an additional three decades for the federal government to take a more active role in the protection of what would become the "waters of the United States."[10]

Sweeping concerns over water pollution prompted a series of amendments in 1972 to the FWPCA known as the Clean Water Act (CWA).[11] The CWA established a basic structure for regulating discharges of pollutants into the "waters of the United States" and set quality standards for surface waters.[12] The current CWA generally prohibits the discharge of any pollutant by any person into the WOTUS.[13] Discharge under the CWA refers to "any addition of any pollutant into 'navigable waters' from any point source."[14] Pollution here refers to "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."[15] The CWA further provides a list of pollutants discharged into water including: dredged spoil, solid waste, sewage, garbage, chemical wastes, rock, sand, and agricultural waste.[16] The CWA interprets the term "pollutants" broadly enough to even include dirt. Thus, almost anything that involves moving dirt or depositing fill materials for construction can constitute a discharge of pollutants into the WOTUS.

The CWA gives federal regulators the authority to promulgate and enforce regulations to protect America's "navigable waters."[17] "Navigable waters," defined as "waters of the United States," include the territorial seas.[18] The CWA does not, however, identify which water bodies fall under the umbrella of "waters of the United States." In 1974, in an attempt to provide guidance, the U.S. Army Corps of Engineers ("Corps") interpreted "navigable waters" as "waters of the United States which are

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8. Kayla A. Currie, *Clear Waters Ahead? The Clean Water Rule Attempts To Bring Clarity To The Scope Of The Clean Water Act*, 47 CUMB. L. REV. 191, 198 (2017).

9. *Id*.

10. *See* ENVTL. PROT. AGENCY, *supra* note 6.

11. *Id*.

12. ENVTL. PROT. AGENCY, *Summary of the Clean Water Act* (Sept. 16, 2017), https://perma.cc/K52Z-8GEQ.

13. Clean Water Act, 33 U.S.C. § 1311(a) (2012).

14. Clean Water Act, 33 U.S.C. § 1362(12) (2012).

15. *Id*. at § 1362(19).

16. *Id*. at § 1362(6).

17. *Id*. at § 1362(7).

18. *Id*.

subject to the ebb and flow of the tide, and presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[19] Over the course of the next eight years, the Corps further expanded the definition to include adjacent wetlands and tributaries of navigable and interstate waters.[20] While the expansion of federal regulation to tributaries that feed into "waters of the United States" is a reasonable step in furtherance of the Clean Water Act, the inclusion of wetlands in this expanded definition requires a greater logical leap and raises some concern.

A. What's a Wetland Good For? Absolutely Nothing!

Determining whether a wetland falls into the category of WOTUS is a fundamental problem for identifying what constitutes a wetland. The presence of hydric soils and hydrophytes sometimes acts as an identification of wetlands.[21] It is often difficult to determine from outward appearance whether a piece of land is classified as a wetland. For example, despite their classification as wetlands, the Florida Everglades and Mississippi bottomland hardwood swamps are often dry.[22] This is because "the amount of water present in wetlands fluctuates as a result of rainfall patterns, snow melt, dry seasons, and long droughts."[23] The Corps and the EPA define wetlands for regulatory purposes as follows:

> Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[24]

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19. Navigation and Navigable Waters, 33 C.F.R. § 209.120(d)(1) (1974).

20. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123-4 (1985) (recounting the expansion of the Corp's interpretation).

21. "The upper part of the soil is saturated with water at growing season temperatures, soil organisms consume the oxygen in the soil and cause conditions unsuitable for most plants. Such conditions also cause the development of soil characteristics (such as color and texture) of so-called 'hydric soils'. The plants that can grow in such conditions, such as marsh grasses, are called 'hydrophytes.'" ENVTL. PROT. AGENCY, *supra* note 3.

22. *Id.*

23. *Id.*

24. 33 C.F.R. § 328.3(c)(4).

Though humid and muddy, wetlands are a vital component of the aquatic ecosystem.[25] This key component to various environmental processes is disappearing at an alarming rate due to natural disasters, storms, and human intervention.[26] Between the 1950's and 1970's, an average of 458,000 acres of the United States' wetlands disappeared each year.[27] Louisiana's three million acres of wetlands are disappearing at the rate of about seventy-five square kilometers annually.[28] The significance of the wetlands' role in the environment, coupled with rapid disappearance of these lands, led to increased regulation and protection. The rapid loss of wetlands is a cause for concern, but it should not be used as a pretense to expand federal regulations of land under the CWA.

B. Section 404 Permitting Process: A License to Fill

Section 404 of the CWA gives the Corps the authority to grant permits for the discharge of dredged or fill materials into the navigable waters.[29] Failure to comply with the permit process's conditions and limitations can result in civil and criminal liability.[30] The common applicants for these permits are individual property owners and businesses. The Corps issues jurisdictional determinations on whether a body of water will be regulated under the CWA by performing a jurisdictional delineation of waters on a property.[31] The Corps performs jurisdictional delineations on a property to determine which waters are classified as WOTUS.[32] The Corps uses the 1987 Corps of Engineers Wetland Delineation Manual and ten regional supplements to conduct wetland delineation.[33] The manual organizes characteristics of potential wetlands into three categories: hydric soils, hydrophytic vegetation, and hydrology.[34] During a wetland delineation,

25. *See* Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities Under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1,2 (1991).

26. *Threats to Wetlands,* WORLD WIDE FUND FOR NATURE, https://perma.cc/NK86-4NBW (last visited Nov. 13, 2017).

27. *See EPA'S Report on The Environment: Wetland Extent, Change, and Sources of Change*, ENVTL. PROT. AGENCY, https://perma.cc/67VG-7XL3 (last visited Sept. 21, 2017).

28. Jefferess Williams, *Louisiana Costal Wetlands: A Resource At Risk*, U.S.G.S., https://perma.cc/4GMS-35Y9 (last visited Sept. 21, 2017).

29. 33 U.S.C. § 1344(a) (2012).

30. 33 U.S.C. § 1319(b), (c).

31. ENVTL. PROT. AGENCY, *supra* note 3.

32. *Id*.

33. *Id*.

34. *Id*.

the Corps surveys a project area to determine whether the three characteristics are present.[35] An area that possesses the three above characteristics is a wetland and thus subject to Section 404's permit process.

Section 404's permit program raises a specific point of controversy regarding federal wetland regulation.[36] Critics of the permit program call it an "unprecedented federal presence in land use regulation," while defenders see it as "the most effective means of preserving wetlands."[37] Landowners and businesses that oppose the permit requirements claim the process is time-consuming and financially burdensome. A study highlighting the cost and delays for a Section 404 permit found the average applicant for an individual permit spends 788 days and $271,596 to complete the process, with the average applicant for a nationwide permit spending 313 days and $28,915.[38]

The broad scope of pollutants and the uncertainty of which areas of land constitute "waters" under the CWA make it difficult for property owners to determine when a permit is required before altering their property. In *Sackett v. EPA*, the EPA threatened a couple with a $75,000 per day fine for placing gravel on essentially dry land to build a home in a subdivision.[39] The Sacketts owned a property north of Priest Lake, but separated from the lake by several lots containing permanent structures.[40] The Sacketts filled in part of their lot with dirt and rock in preparation for constructing a house.[41] The EPA sent a compliance order asserting the following: (1) the Sackett's property was subject to the CWA, (2) the act of placing fill material on the property was a violation, and (3) an EPA work plan required the Sacketts to immediately restore the property.[42] The compliance order asserted that the Sacketts' lot was an adjacent wetland to a "navigable water," i.e. Priest Lake.[43] This case highlights how broad interpretations of WOTUS and pollutants can make an act, such as laying

35. *Id*.

36. Michael C. Blumm and D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 698 (1989).

37. *Id*.

38. Daren Bakst, *What You Need to Know About the EPA/Corps Water Rule: It's a Power Grab and an Attack on Property Rights*, HERITAGE FOUNDATION (Apr. 29, 2015), https://perma.cc/ATK5-S8RH.

39. *Id*.

40. Sackett v. EPA, 566 U.S. 120, 124 (2012).

41. *Id*.

42. *Id*. at 122.

43. *Id*. at 124.

a foundation on perceivably dry land to build a home, a discharge of pollutants into WOTUS.

II. SCOTUS TAKES A SWING AT WOTUS

The Corps' interpretation of "waters of the United States" expanded during the eight years after it issued initial guidance in 1974.[44] These expansive interpretations ultimately led to challenges in federal court. The Supreme Court of the United States (SCOTUS) reviewed the scope of "navigable waters" under the CWA's Section 404 permitting program. SCOTUS interpreted the scope of the "navigable waters" definition in three landmark cases: *United States v. Riverside Bayview Homes, Inc.* (*Riverside*); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*); and *Rapanos v. United States* (*Rapanos*). In this trilogy of cases, SCOTUS addressed the scope of the Corps' power to assert regulatory authority over wetlands. Each opinion illustrates the Court's struggle to define the scope of the ambiguous phrase "waters of the United States."

A. United States v. Riverside Bayview Homes, Inc.

In 1985, the Corps filed suit against Riverside Bayview, Inc. seeking an injunction to prevent further filling of low-lying marshlands without a permit.[45] The Corps believed the marshlands to be "adjacent wetland" subject to the federal regulation.[46] The marshland in dispute was "adjacent to but not connected to Lake St. Clair, a navigable water."[47] The district court found the marshlands constituted a wetland and granted an injunction to prevent filling without a permit.[48] The Sixth Circuit disagreed, construing the Corps' regulations to exclude from the category of "adjacent wetlands" those wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth aquatic vegetation.[49]

In a unanimous opinion, the Supreme Court deferred to the Corps' ecological judgment that adjacent wetlands "in reasonable proximity to other waters of the United States" are "inseparably bound up" with the waters to which they are adjacent, and the Court further upheld the

44. 33 C.F.R. § 209.120(d)(1).
45. United States v. Riverside Bayview Homes, 474 U.S. 121, 124 (1985).
46. *Id.* at 125.
47. *Id*.
48. *Id*. at 125.
49. *Id*.

inclusion of "adjacent wetlands" in the regulatory definition of "waters of the United States."[50] The Court conceded that "it may appear unreasonable to classify lands, wet or otherwise as waters;"[51] however, where on the continuum to find the limit of "waters" was far from obvious, the classification was appropriate.[52] The Court gave deference to the Army Corps of Engineers' interpretation, finding that Congress' concern for protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands.[53] The Court did not address whether "wetlands that are not adjacent to bodies of open water" fall within the jurisdiction of the CWA, a holding resulting in the expansion of the Corps' jurisdiction over WOTUS to "adjacent wetlands."

B. Solid Waste Agency v. United States Army Corps of Engineers

In *SWANCC* (2001), the Supreme Court addressed whether "isolated waters" fell within the jurisdiction of the CWA. The Solid Waste Agency sought to utilize an abandoned mining site as a solid waste disposal site and contacted the Corps to determine the necessity of a permit.[54] The Corps originally concluded it lacked jurisdiction over the site due to the lack of "wetlands," or areas which support "vegetation typically adapted for life in saturated soil conditions."[55] The Corps then reversed its position and asserted jurisdiction pursuant to the "Migratory Bird Rule."[56] The Corps believed that filling the pits would disturb 121 migratory bird species that depended on the seasonal ponds created by the abandoned gravel pits.[57]

SCOTUS rejected the Corps' assertion of jurisdiction, holding that the use of "isolated," non-navigable intrastate ponds by migratory birds did not provide a sufficient basis for the exercise of federal regulatory authority under the CWA.[58] The majority held that the Corps exceeded its authority, finding that a "significant nexus" between the wetlands at issue

50. *Id*. at 134.
51. *Id*. at 132.
52. *Id*.
53. *Id*. at 134.
54. *Id*. at 131, n.8; Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 163 (2001).
55. *Id*. at 164.
56. The Migratory Bird Rule extended jurisdiction over interstate waters "which are or would be used as habitat by other migratory birds which cross state lines." *Id*.
57. *Id*.
58. *Id*. at 167.

and the adjacent "navigable waters" is required to invoke jurisdiction under Section 404 of the CWA.[59] The Court distinguished this case from *Riverside* because the gravel pits here remained isolated from, and not adjacent to, navigable waters.[60] The Court concluded that the Corps' assertion of jurisdiction over ponds and mudflats would result in a "significant impingement of the state's traditional and primary power over land and water use."[61] The Supreme Court's holding restricted the Corps' expansive exercise of jurisdiction but left many questions unanswered.

The scope of the CWA's jurisdiction was still unclear after the ruling in *SWANCC*. *Riverside* held that "adjacent wetlands" fell under the CWA's jurisdiction, while *SWANCC* held that "isolated waters" did not. As a result of this uncertainty, the circuit split on the extent of the regulatory authority the Corps had over wetlands near non-navigable tributaries that flowed into navigable rivers and non-adjacent wetlands.[62]

C. Rapanos v. United States

The Supreme Court's most recent decision in *Rapanos* (2006) resulted in a plurality opinion which does not provide much guidance.[63] The Court consolidated two cases[64] concerning land not adjacent to "navigable waters" but adjacent to non-navigable tributaries that flowed into "navigable waters."[65] The Court considered whether the wetlands near ditches or man-made drains that eventually emptied into traditional navigable waters constituted "waters of the United States" under the CWA.[66] The Solicitor General argued that broad deference should be given to the Corps' interpretation.[67] The plurality rejected this argument and sought to rein in the government's interpretation, ultimately remanding the case without reaching a consensus.[68]

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59. *Id*.
60. *Id.* at 168.
61. *Id*. at 174.
62. Bradford C. Mank, *Implementing Rapanos - Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 291-92 (2007).
63. Rapanos v. United States, 547 U.S. 715, (2006).
64. The two consolidated cases are: Carabell v. U.S. Army Corps of Engineers; and United States v. Rapanos.
65. *Rapanos*, 547 U.S. 729.
66. *Id*.
67. Currie, *supra* note 8, at 208.
68. *Id*.

Justices Scalia and Kennedy disagreed over the scope of the jurisdiction under the CWA.[69] Justice Scalia, writing for the plurality (4-1-4), held the CWA's phrase "waters of the United States" included "only relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' described in ordinary parlance as streams, oceans, rivers, and lakes."[70] Scalia stated that "these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally of intermittently flows."[71] The phrase did not include intermittent or ephemeral channels or channels that periodically provided drainage for rainfall.[72] Justice Scalia acknowledged that the "waters of the United States" definition should not be limited to the traditional "navigable in fact" standard.[73] Scalia's opinion narrowed the scope of the CWA by shifting the focus of interpretation to the term "water" rather than the qualifiers "navigable" and "of the United States."[74] Under Scalia's approach, the CWA encompasses only those wetlands that possess a continuous surface connection with "waters of the United States" in their own right.[75]

Justice Kennedy concurred, concluding that the appropriate test for the scope of jurisdictional waters is whether a water or wetland possessed a "'significant nexus'[76] to the waters that are or were navigable in fact or that could reasonably be so made."[77] Kennedy suggests wetlands that affect covered waters deemed "navigable" are subject to federal regulation.[78] Justice Kennedy's "significant nexus" test does not specify how much impact a wetland must have on a "navigable water" to significantly affect the water quality; however, Justice Kennedy did note that adjacency to a non-navigable tributary alone is insufficient to assert

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69. *See Rapanos*, 547 U.S. 715.
70. *Id*. at 732.
71. *Id*. at 732-33.
72. *Id*.
73. *Id*. at 731-32.
74. *Id*. at 731.
75. *Id*. at 742.
76. Justice Kennedy explained that "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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id*. at 780.
77. *Id*. at 759 (Kennedy, J., concurring).
78. *Id*.

jurisdiction.[79] Justice Kennedy suggested the Corps proceed on a case-by-case basis when regulating wetlands based on adjacency to non-navigable tributaries.[80] Furthermore, the Corps may presume covered status for similarly situated wetlands in the region.[81] Absent a definite standard to help determine how much of an effect a wetland must have on a water quality, Justice Kennedy's analysis fails to provide clarity.

The difference between Justice Scalia's opinion and Justice Kennedy's opinion stems largely from statutory interpretation. Justice Scalia's approach is based in textualism, while Justice Kennedy looks to the legislative purpose of the CWA. Justice Scalia's standard restricts waters to encompass those that accord with the commonsense understanding of the term "waters." Justice Scalia further requires a "continuous connection" between the "waters" and wetlands. In contrast, Justice Kennedy's standard focuses on the wetlands' ecological impact on the waters. Both standards accept that wetlands adjacent to navigable waters fall within the purview of the CWA, but disagree when adjacent non-navigable tributaries only flow into navigable waters. The four dissenters argued that the term "waters of the United States" encompasses all tributaries and wetlands that satisfy either the plurality's standard or Justice Kennedy's "significant nexus" standard.[82] The dissension soon spilled over into lower courts.

The circuits quickly split over which Justice's analysis to apply.[83] The First, Third, and Eighth Circuits concluded that CWA jurisdiction exists if the government can satisfy either Justice Kennedy's concurrence or Justice Scalia's test.[84] The Seventh and Ninth Circuits applied Justice Kennedy's standard to the facts of particular cases, but did not foreclose the possibility that in some cases, Justice Scalia's test might apply instead.[85] The Fifth and Sixth Circuits declined to choose between the Scalia and Kennedy tests because the waters at issue in the cases before them qualified under both standards.[86] With the circuits split and an outcry urging the promulgation of a new rule, the EPA proposed a new Clean Water Rule in 2015 to remedy the confusion.

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79. *Id*. at 786.
80. *Id*. at 782.
81. *Id*.
82. *Id*. at 810.
83. Currie, *supra* note 8, at 210.
84. Paul Larkin, *The "Waters of the United States" Rule and the Void-for-Vagueness Doctrine*, HERITAGE FOUNDATION (June 21, 2017), https://perma.cc/ULH2-B9XN (last visited Sept. 21, 2017).
85. *Id*.
86. *Id*.

III. THE CLEAN WATER RULE MUDDIES THE WATERS

The Obama Administration introduced the Clean Water Rule (CWR) in 2015.[87] The purpose of this rule was to clarify which waters constitute "navigable waters."[88] The CWR aimed to precisely and predictably determine the jurisdictional reach of the CWA.[89] The intent was to ground the new rule in law and science, shaped by public input.[90] The CWR maintained the old definition of "navigable waters" as "waters of the United States" and the territorial seas but also accounted for past Supreme Court rulings, public comment, and the EPA's 2015 Connectivity of Streams and Wetlands to Downstream Water Assessment.[91] Notably, the CWR sought to clarify which types of waters are covered categorically, covered on a case-by-case basis, or not covered at all.[92] The CWR identifies the following six categories of waters that as per se jurisdictional: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of jurisdictional waters, (5) tributaries, and (6) adjacent waters.[93] The CWR also lists two categories of waters of which jurisdiction is determined on a case-specific basis applying the "significant nexus" standard.[94]

The CWR expands the phrase "waters of the United States" to include streams and wetlands that significantly impact "downstream water quality

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87. Rebecca Long, *What You Need To Know About The Clean Water Rule*, AMERICAN RIVERS (Aug. 28, 2017), https://perma.cc/MW45-JASV (last visited Sept. 16, 2017).

88. *Id*.

89. Clean Water Rule: Definitions of "Waters of the United States," 80 Fed. Reg. 124, 37054 (June 29, 2015) (codified at 33 C.F.R. § 328).

90. *Id*.

91. Long, *supra* note 87. (The Connectivity of Stream and Wetlands to Downstream Water Assessment's purpose was to summarize the current understandings about the connectivity and mechanisms by which streams and wetlands affect the physical, chemical, and biological integrity of downstream waters.) ENVTL. PROT. AGENCY, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence (Final Report)* (Jan. 15, 2015), https://perma.cc/Q9BM-533D.

92. Reagan Waskom and David Cooper, *Why Farmers and Ranchers Think the EPA Clean Water Rule goes too far*, PBS NEWSHOUR (Mar. 4, 2017), https://perma.cc/J7RB-SB4X.

93. 33 C.F.R. § 328.3(a)(1)-(6) (2015).

94. *Id*. at § 328.3(a)(7), (8). (Section 7 covers (i) Prairie potholes, (ii) Carolina bays and Delmarva bays, (iii) Pocosins, (iv) Western Vernal Pools, (v) Texas costal prairie wetlands. Section 8 covers all water located within 100-year floodplain).

and form the foundation of our nation's water resources."[95] In addition to the CWR's attempt to clarify WOTUS, the new rule incorporated the "significant nexus" analysis of Justice Kennedy's concurrence in *Rapanos*.[96] In determining the existence of a "significant nexus," the EPA shall assess the waters by evaluating their aquatic functions.[97] A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water.[98]

The CWR immediately came under fire by critics because the addition of the "significant nexus" analysis created a catch-all provision that extended regulation to land that does not fall within the six categories of the CWR's WOTUS definition.[99] Waters that do not fit within one of the categories and do not qualify as a "neighboring" water are subject to a "significant nexus" analysis under the CWR.[100] The CWR's inclusion of the catch-all provision goes beyond the scope of Justice Kennedy's significant nexus test and allows the government even more regulatory authority over private lands.

When the EPA promulgated the CWR in August 2015, various challenges emerged immediately, including thirty-one states that filed suit to stay the rule.[101] Both chambers of Congress sought to overturn the CWR by invoking the Congressional Review Act[102] but failed to receive the requisite majority to overcome President Obama's veto power.[103] Challengers claim that the EPA will use this rule to micromanage private

95. *Id*.

96. *Id*. at § 328.3(c)(5).

97. *See id*. at § 328.3(c)(5)(i)-(ix). The functions relevant to the significant nexus evaluations are the following: (i) Sediment trapping, (ii) Nutrient recycling, (iii) Pollutant trapping, transformation, filtering, and transport, (iv) Retention and attenuation of flood waters, (v) Runoff storage, (vi) Contribution of flow, (vii) Export of organic matter, (viii) Export of food resources, and (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

98. *Id*. at § 328.3(c)(5).

99. *See* Currie, *supra* note 8, at 217.

100. *Id*.

101. Long, *supra* note 89.

102. The Congressional Review Act allows Congress to pass a law within sixty days to invalidate an agency's rule; however, this law is subject to the president's veto power. *See generally* 5 U.S.C. § 801.

103. Currie, *supra* note 8, at 192.

land use.[104] These challengers, many of which are private landowners, believe the CWR's overreach will result in increased costs and more hurdles to jump through for property owners and states to utilize their lands.[105] On August 27, 2015, the U.S. District Court for the District of North Dakota enjoined the applicability of the CWR in the thirteen states challenging the rule before that court.[106] Soon after the Sixth Circuit stayed the CWR nationwide, leaving the pre-rule regime to govern while the CWR is under review.[107] On January 13, 2017, SCOTUS granted certiorari on the question of whether the Sixth Circuit has original jurisdiction to review challenges to the CWR.[108] One year later, on January 22, 2018, the Supreme Court held that the courts of appeal do not have original jurisdiction to review challenges to the 2015 rule.[109] It is important to note that the Supreme Court was not deciding the validity of the CWR, but only whether the district courts or courts of appeal had jurisdiction over challenges to the CWR. The challengers, which included industry and environmental groups and eighteen states, preferred to have the merits of their arguments heard first at the district court level.[110]

The challengers argue that the CWR is arbitrary and capricious because the agency did not adequately provide notice and comment rulemaking[111] and the final rule substantially varies from the proposed rule.[112] Specifically, they contend that there is no record of scientific support for the distance limitations in the final rule.[113] The scientific report drafted by the Scientific Advisory Board was not released until after the

104. Garcia, *supra* note 2.

105. Timothy Benson, *Sixth Circuit Provides Bridge over Troubled WOTUS*, THE HILL (Oct. 28, 2015), https://perma.cc/T77B-MJDS.

106. Definition of "Waters of the United States" – Addition of an Applicability Date 50 2015 Clean Water Rule, 83 Fed. Reg. 25 (Feb. 6, 2018); *see also* North Dakota v. United States EPA, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015).

107. Definition of "Waters of the United States" - Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed July 27, 2017) (to be codified at 33 C.F.R. pt. 328).

108. *Id*.

109. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018).

110. Christopher D. Thomas, *Judicial challenges to the Clean Water Rule: A brief and relatively painless guide for the procrastinator*, TRENDS Vol. 47 No. 4, https://perma.cc/R4KT-25N6.

111. In order for an agency to promulgate a rule or make a change to an existing rule, the agency must comply with the requirements of the Administrative Procedure Act requirements for rulemaking codified in 5 U.S.C. § 553 (1966).

112. *See* complaint at 35, Georgia v. McCarthy, No. CV 215-79, 2015 U.S. Dist. LEXIS 114040 (S.D. Ga. Aug. 27, 2015).

113. Currie, *supra* note 8, at 215.

new rule was published, failing to allow for any comment on the findings.[114] The challengers of the rule argue that the final rule is not a product of reasoned decision-making and is impermissibly arbitrary and capricious under the Administrative Procedure Act (APA).[115] The APA provides that "[a] reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[116]

Many states challenged the rule on the grounds that the EPA usurped states' authority over land management.[117] The CWA 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 of land and water resources."[118] Under the CWA, states provide an important role in the administration of the CWA because they have a better sense of their specific environmental needs than the federal government and can tailor regulation to their needs.[119]

Challengers also argue the rule is too broad and the result is an unnecessary overreach that threatens private farm owners' land.[120] Despite the EPA's assurances, landowners worry the CWR might include agricultural ditches, canals, and drainages in the definition of "tributary."[121] The CWR defines tributary for the first time as water that contributes flow, whether directly or indirectly, into a WOTUS.[122] The definition goes on to state that tributaries can be natural or man-made.[123] With the expansive scope of the current CWA jurisdiction already causing problems for landowners, the CWR makes private landowners nervous.

IV. POTUS SHAKES UP WOTUS

On June 27, 2017, the EPA, under the Trump administration announced a roll back on the Obama-era policy's protection of more than

114. Bakst, *supra* note 38.
115. Currie, *supra* note 8, at 215.
116. Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
117. Currie, *supra* note 8, at 220.
118. Clean Water Act, 33 U.S.C. § 1251(b) (2012).
119. *Id*. at § 1251(g); Bakst, *supra* note 38.
120. Reagan Waskom and David J. Cooper, *Why farmers and ranchers think the EPA Clean Water Rule goes too far*, PBS NEWSHOUR (Mar. 4, 2017), https://perma.cc/QRB3-E7UB.
121. Currie, *supra* note 8, at 222.
122. 33 C.F.R. § 328.3(c)(3).
123. *Id*.

half the nation's streams.[124] Former EPA Chief Scott Pruitt[125] aimed to return the agency to their core focus of protecting the environment while following "the letter of the law."[126] The EPA decided to take a new direction after President Trump's Executive Order 13778: "Restoring the Rule of Law, Federalism, and Economic Growth By Reviewing the 'waters of the United States' Rule."[127] The Executive Order directed the EPA and the Corps to rescind the 2015 CWR and propose a new rule that is "appropriate and consistent with the law."[128]

The first section of the Executive Order addressed the need to protect the Nation's waters from pollutants, while also highlighting the importance of not burdening economy through regulatory uncertainty in the process.[129] Section two stated that executive agencies have the authority to rescind and revise the regulatory definition of "waters of the United States," consistent with the policy guidance in the Executive Order, so long as the revised definition remained "authorized under the law and based on a reasoned explanation."[130] Section three of the Executive Order also directed the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*.[131] This section recommended that the EPA narrow the interpretive scope of the term "navigable waters."[132]

The Executive Order called for the rescission of a rule that is not currently in effect nationwide. The EPA, under the Obama administration, promulgated the CWR in 2015, but the Sixth Circuit stayed its effect. To carry out the goals of the Executive Order, the EPA will first have to propose a rule to rescind the CWR ("Proposed Rule"), before it can promulgate a rule to redefine the definition of "navigable waters" ("New Rule"). To do this, the EPA will have to conduct formal rulemaking in

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124. Long, *supra* note 88.

125. Scott Pruitt resigned on July 5, 2018, in the face of numerous ethics investigations. *See* Coral Davenport, Lisa Friedman, and Maggie Haberman, *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, THE NEW YORK TIMES (July 5, 2018), https://perma.cc/UN3Y-LEW7.

126. Garcia, *supra* note 2.

127. *See* Exec. Order No. 13,777, 82 Fed. Reg. 12285 (2017).

128. Definition of "Waters of the United States" - Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed July 27, 2017) (to be codified at 33 C.F.R. pt. 328).

129. *Id*.

130. *Id*.

131. *Id*.

132. *Id*.

accordance with the APA.[133] If the agency ultimately decides to promulgate a rule, then it must issue a concise general statement that articulates the basis for the rule and respond to the comments it has received.[134] The Proposed Rule, rescinding the CWR, establishes a clear regulatory framework that avoids the inconsistency, uncertainty, and confusion that would result if the Sixth Circuit lifted the stay and the CWR went into effect.[135] This Proposed Rule is intended to ensure that during this interim period between the rescission of the CWR and the promulgation of the New Rule, the status quo will be maintained, thus providing continuity and regulatory certainty for regulated entities, States, Tribes, and the public.[136] If the EPA successfully rescinds the CWR, the EPA will have to once again engage in the rulemaking process to redefine "navigable waters" as part of its plan to promulgate the New Rule.

In November of 2017, the EPA and the Corps proposed another rule ("Suspension Rule") adding an applicability date to the 2015 CWR two years from the final action on this proposal.[137] The most likely reason for the EPA's Suspension Rule was to maintain the status quo in the event the Sixth Circuit's stay was lifted before rescission of the CWR was complete. After holding a notice and comment period, the EPA and Corps issued a final rule on February 6, 2018, adding an applicability date of February 6, 2020, to the 2015 CWR.[138] The same day the Suspension Rule went into effect, the manner in which the Suspension Rule was enacted was immediately challenged in the U.S. District Court of South Carolina by the Southern Environmental Law Center.[139]

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133. The APA requires the EPA to give general notice of a proposed rule by publishing it in the Federal Register and providing interested persons the opportunity to participate through submission of data and arguments. *See* Administrative Procedure Act, 5 U.S.C. § 553.

134. *Id*. at § 553(c).

135. Definition of "Waters of the United States" - Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed July 27, 2017) (to be codified at 33 C.F.R. pt. 328).

136. *Id*.

137. Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55542 (proposed Nov. 22, 2017) (to be codified at 33 C.F.R. pt. 328).

138. Definition of "Waters of the United States" Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (codified at 33 C.F.R. pt. 328).

139. *See Conservation Groups Challenge Attack on Clean Water in Federal Court*, SOUTHERN ENVTL. LAW CENTER (Feb. 6, 2018), https://perma.cc/YL7D-QT6A.

On August 16, 2018, a federal judge in South Carolina issued a nationwide injunction to block the Suspension Rule, making the 2015 CWR applicable in the twenty-six states that have not blocked it.[140] The district court found that the EPA and Corps violated the APA's rule making procedures by delaying the 2015 CWR.[141] The court held it was the "agencies' decision to promulgate the Suspension Rule without allowing the public to comment on the substance of either the WOTUS Rule or the 1980's regulations that rendered the notice-and-comment rule making infirm under the APA."[142] While the South Carolina decision seems to signal a win for environmentalist groups, the battle is far from finished. On the following day, August 17, 2018, the American Farm Bureau Federation ("AFBF") and a coalition of businesses notified the U.S. District Court in South Carolina that they will appeal the court's ruling.[143] "The AFBF also notified the U.S. District Court in Texas – where the AFBF filed its original legal challenge to WOTUS – of the South Carolina ruling, urging the court to issue a nationwide injunction against the 2015 CWR."[144]

If the rescission of the CWR is successful, the EPA and the Corps will have considerable flexibility to redefine "waters of the United States." The Supreme Court's case law demonstrates that there is no single, stable interpretation of the phrase "waters of the United States." The lower courts have been unable to develop a workable interpretation in the eleven years since the *Rapanos* decision. The EPA has discretion in choosing how to construe the CWA based on the Supreme Court's ruling in *Chevron v. NRDC*.[145]

The *Chevron* analysis is a two-step inquiry for the judicial review of an agency's interpretation of a statute.[146] The first inquiry asks whether the statute is ambiguous with respect to the precise question at issue.[147] The term "navigable waters" remains ambiguous because the courts have consistently found non-navigable waters are within the jurisdiction of the CWA. Furthermore, the term "waters of the United States" is undoubtedly

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140. *See* Emily Moon, *A federal Judge Reinstates the Clean Water Rule For 26 States*, PACIFIC STANDARD (Aug 16, 2018), https://perma.cc/KQH2-QKZ6.

141. Southern Carolina Coastal Conservation League v. Pruitt, No. 18-CV-330-DCN, 2018 WL 3933811, at *8 (D.S.C. Aug. 16, 2018).

142. *Id*. at *5.

143. Carol Dumas, *Farm Bureau Continues Fight to Stop WOTUS Implementation*, CAPITAL PRESS (Aug. 20, 2018), https://perma.cc/5JH2-XDDQ.

144. *Id*.

145. Larkin, *supra* note 84.

146. *Id*.

147. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 865 (1984).

ambiguous as applications by the EPA and the courts continue to reach conflicting interpretations.

The second question examines whether the agency has employed or embraced a permissible construction of the statute.[148] While the first step determines whether the statute creates a zone of ambiguity; if the statute creates such an ambiguity, the second step asks whether the agency's interpretation falls within the zone of ambiguity. If the agency's interpretation is permissible, the court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[149] According to *Chevron*, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[150] Ultimately, if a challenge to the EPA's "new rule" redefining WOTUS emerges it is likely that the court would grant deference to the EPA's interpretation.

Under *Chevron*, the EPA's proposed rule clarifying and interpreting "waters of the United States" is presumptively valid unless proven unreasonable. This presumption makes challenging the EPA's new rule in court more difficult. The frequent fluctuation of power in the Executive branch presents a problem with this system because the rule is subject to rescission and revision every time the Executive branch changes hands. In addition to the changing political landscape, rulemaking is a long and cumbersome process that results in a merely temporary fix due to the possibility of rescission every four years. The EPA closed the notice and comment period on its proposed rule to rescind the CWR in October 2017.[151] As of January 2018, the EPA has not promulgated a final rule to rescind the CWR, and the Supreme Court has not rendered a decision on the Sixth Circuit's nationwide stay of the CWR.

V. PURIFYING THE WATERS

The Legislative, Judicial, and Executive branches all attempted to define "waters of the United States" without success, each resulting in more confusion and consequences. Judicial interpretations continue to split the courts. As a result of the changing presidential administrations, the Executive branch is engaged in a political gridlock to rescind and

148. *Id*.
149. *Id*. at 844.
150. *Id*. at 843-44.
151. ENVTL. PROT. AGENCY, *Extension of Comment Period for the Definition of "Waters of the United States" – Recodification of Pre-existing Rules,* https:// perma.cc/45QR-LNN2 (last visited November 12, 2017).

revise. Unfortunately, this is the position that Congress created by not providing any clarification despite many years of controversy surrounding the interpretation of the CWA.

The most permanent solution to remedy the ambiguity is for Congress to revisit and redefine WOTUS under the CWA through legislative amendment. A legislative amendment to the CWA is the most permanent solution for resolving the ambiguity surrounding the WOTUS definition. The legislative amendment should narrow the scope of the CWA by restricting the expansive interpretations of "waters of the United States" to provide more certainty and respect for the rights of landowners.

In making this amendment, the legislature should adopt Justice Scalia's standard in *Rapanos,* effectively narrowing WOTUS "to include only permanent, standing, or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes."[152] The amendment should further exclude from the definition any "channels through which waters flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[153] This amendment should effectively return the term "waters" to its commonsense definition. Finally, the amendment should expressly state that wetlands are only subject to the jurisdiction of the CWA when there exists a continuous surface connection to WOTUS.

Adopting Justice Scalia's interpretation and defining WOTUS under the CWA will rein in the confusion and constrain the expansive scope of the CWA. Narrowing the CWA to focus only on "waters" with a "continuous surface connection" prevents further overreaching regulation of wetlands. The terms "navigable" and "of the United States" should be abandoned to restrict the scope only to those water bodies forming geographic features. A narrow interpretation reduces the Corps' jurisdiction under the Section 404 permitting process. Curtailing the scope of the CWA's jurisdiction eases property owners' fears of unwarranted fines, civil or criminal liability, and overregulation of private land.

Passing a legislative amendment is no easy task: Both houses of Congress have previously attempted to pass legislative amendments clarifying "waters of the United States" without success.[154] The political influences affecting the EPA's interpretation are not isolated to the Executive branch. Getting both houses of Congress to support a single

152. *Rapanos*, 547 U.S. at 732.

153. *Id*.

154. *See generally* for discussions of the various bills introduced by Congress; Claudia Copeland, *The "Waters of the United States" Rule: Legislative Options and 114th Congress Responses*, CONGRESSIONAL RESEARCH SERVICE (Dec. 29, 2016) https://fas.org/sgp/crs/misc/R43943.pdf.

interpretation will be a difficult task. Taking the judicial uncertainty and Congress's inaction into consideration, the EPA is currently in the best position to narrow the scope of WOTUS because of the deference given to agencies interpreting their own statutes. Arguably, Congress intended all along to leave it up to the EPA to make the interpretations. While that may have been the intent when drafting the CWA, the ambiguity has existed for more than thirty years without a clear resolution. The temporary nature and political back-and-forth of agency interpretations necessitates a legislative amendment to correct the ambiguity.

In the alternative, if Congress cannot successfully pass a legislative amendment to the CWA, the EPA should stay its course and rescind and replace the CWR. The EPA's current planned revision involves the adoption of Scalia's opinion in *Rapanos*. This revision would achieve the narrowing of the WOTUS interpretation. In conducting the rulemaking process, the EPA needs to tread carefully and follow the APA requirements on rulemaking to ensure the revised rule is not struck down on the grounds of being arbitrary and capricious. Of course, this revision would be temporary because a new administration can always rescind the rule, but the EPA is still in the best position to quickly clarify the ambiguity.

CONCLUSION

The definition of "waters of the United States" has long been ambiguous and attempts to clarify the term have only added to the confusion. Various problems have arisen surrounding the government's regulation of wetlands. Wetlands play an important role in the ecology of neighboring water bodies, but not all wetlands are within the scope of the CWA, nor should they be. The history of the EPA's regulation under the CWA has shown that the current definition of WOTUS is an unworkable, ambiguous categorization that has led to problems for courts and private landowners alike. A clear, workable definition is long overdue. These expansive agency interpretations must be reined in by narrowing the scope of waters governed by the CWA.

The EPA can narrow the definition by altering the language to apply to only those standing or continuously flowing "water" bodies that form "geographical features." This revision could come from the EPA through its rulemaking process. However, the problem with choosing this route is that it is a long process and subject to rescission whenever political power shifts.

A better, more permanent solution would be for Congress to revisit the CWA. An amendment to the CWA that defines "waters of the United

States" by applying the late Justice Scalia's plurality opinion in *Rapanos* would prevent the expansive regulation of non-navigable and non-adjacent wetlands. A narrow interpretation would provide further clarity and limit the Corps' assertion of jurisdiction under the Section 404 permit process. A legislative amendment embracing a narrower interpretation would allow for the protection of the "waters of the United States" from pollutants while also protecting the property rights over isolated wetlands.

Brandon Pang[*]

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