

## COMMENTS

### THE BATTLE OVER U.S. WATER: WHY THE CLEAN WATER RULE “FLOWS” WITHIN THE BOUNDS OF SUPREME COURT PRECEDENT

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*For close to thirty years, the U.S. government and courts have struggled to determine the scope of the Clean Water Act (“CWA”). The CWA is the primary federal statute that regulates pollution of our nation’s waters, vaguely defined by Congress as the “waters of the United States.” A body of water defined as a “water of the United States” is subject to the Act’s jurisdiction and permit requirements. On June 29, 2015, the Environmental Protection Agency and U.S. Army Corps of Engineers issued a long-awaited rule—the Clean Water Rule—redefining the “waters of the United States.” This Rule has led to widespread controversy among landowners, state governments, and environmental groups who are challenging its validity and scope. At one extreme, landowners are concerned about increased federal regulation over private property and the need for costly permits prior to development or use; at the other, environmental groups contend that the Rule is not strong enough to protect our nation’s crucial waterways from pollution. This Comment analyzes the Clean Water Rule and argues that it falls within the permissible*

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*scope of CWA jurisdiction and comports with Supreme Court precedent. This Comment further contends that the Rule was a good faith attempt to streamline the permit process and provide the public with increased clarity on the scope of the “waters of the United States.”*

#### TABLE OF CONTENTS

Introduction.....	147
I. History of the Clean Water Act and the Controversy over the “Waters of the United States” .....	152
A. The History and Purpose of the Clean Water Act .....	153
B. Development of Agency Regulations and the Court’s Interpretation of CWA Jurisdiction .....	157
C. Deciphering the Correct Standard to Apply Post- <i>Rapanos</i> .....	165
1. Seventh, Ninth, and Eleventh Circuits: Justice Kennedy’s test controls.....	166
2. First, Third, and Eighth Circuits: Either the plurality’s or Justice Kennedy’s tests may be used.....	167
D. Post- <i>Rapanos</i> Regulation and the Agencies’ Development of the Clean Water Rule .....	168
II. The Clean Water Rule Properly Interprets CWA Jurisdiction and Comports with Supreme Court Precedent.....	174
A. The Rule Adopts Justice Kennedy’s “Significant Nexus” Test.....	174
B. The Rule Incorporates the “Significant Nexus” Test into Three Categories of CWA Jurisdiction .....	178
1. Waters that are per se jurisdictional .....	178
2. Waters that are not jurisdictional: Exclusions .....	187
3. Waters to be evaluated on a case-by-case basis under the “significant nexus” test.....	190
Conclusion .....	194

## INTRODUCTION

The United States is currently engaged in a nationwide battle over how to define the “waters of the United States.”<sup>1</sup> On June 29, 2015, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (“Corps” and together with the EPA, the “Agencies”) jointly published the much-anticipated final Clean Water Rule that defines the “waters of the United States”—a term that determines the scope of waters protected under the Clean Water Act (CWA).<sup>2</sup> Following its publication, the Rule has faced nationwide criticism from state and local officials, businesses, associations, and environmental advocates who have questioned the Rule’s legality and claimed that the Rule constitutes federal overreach.<sup>3</sup> While disputes about water ownership and use have existed since our nation’s founding, this particular controversy has become the most contentious water debate for close to half a century.<sup>4</sup>

The Clean Water Rule (“the Rule”), also commonly referred to as the “WOTUS”<sup>5</sup> Rule, will replace the existing definition in the Agencies’ regulations, which has been in effect for more than twenty-five years.<sup>6</sup> The Rule seeks to clarify which waters are protected under the CWA and thus fall within the Agencies’ regulatory

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1. See Susan K. Hori, *New “Waters of the US” Rule on Hold: Enduring Debate Creates Uncertainty for Developers*, ENVTL. LEADER (Dec. 14, 2015), <http://www.environmentalleader.com/2015/12/14/new-waters-of-the-us-rule-on-hold-enduring-debate-creates-uncertainty-for-developers> (chronicling the interpretation of the phrase “waters of the United States” since 1985).

2. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

3. See CLAUDIA COPELAND, CONG. RESEARCH SERV., R43943, EPA AND THE ARMY CORPS’ “WATERS OF THE UNITED STATES” RULE: CONGRESSIONAL RESPONSE AND OPTIONS 1 (2016) [hereinafter COPELAND, R43943], <https://www.fas.org/sgp/crs/misc/R43943.pdf> (noting that critics argue that the Rule’s vagueness opens the door for increased regulatory jurisdiction).

4. See Jeremy P. Jacobs & Annie Snider, “Mr. Clean Water Act” Faces Biggest Challenge, GREENWIRE (Sept. 30, 2015), <http://www.eenews.net/stories/1060025570> (“I personally, in 30 years, have never experienced anything like this. . . . I’m not sure the division has. I’m not sure the Department of Justice has. So many challenges in district courts to the same agency action. And so many challenges in courts of appeals.” (quoting Department of Justice Attorney Steve Samuels)).

5. WOTUS is an abbreviation for “waters of the United States.” *Id.*

6. CLAUDIA COPELAND, CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 1 (2016) [hereinafter COPELAND, R43455], <https://www.fas.org/sgp/crs/misc/R43455.pdf>. For the Agencies’ definition of “waters of the United States” used between November 13, 1986, and August 27, 2015, see generally 33 C.F.R. § 328.3 (1986) (Corps); 40 C.F.R. § 122.2 (1986) (EPA).

authority, or jurisdiction. If a body of water is determined to be a “water of the United States,” the Agencies may require businesses and individuals to obtain federal CWA permits prior to development or use.<sup>7</sup> The Rule defines several types of protected waters for the first time and redefines categories of waters that the Agencies previously considered jurisdictional on a case-by-case basis.<sup>8</sup> As a result, the Rule expands federal jurisdiction over some categories of water and could increase determinations that a body of water is a “water of the United States,” subject to federal regulation, by three to five percent.<sup>9</sup>

Consequently, the Rule’s new definition has raised fears about increased permit requirements and federal regulation over water on private property and intrastate land.<sup>10</sup> The concerns surrounding the Rule stem from the facts that (1) federal CWA permit applications are time-consuming and costly and (2) failure to obtain a permit before discharging pollutants into jurisdictional waters may result in civil and criminal liability that carries potentially substantial fines.<sup>11</sup> Landowners, companies, and state governments have expressed concerns about the potential for increased costs associated with agriculture, development, or state projects near waters newly protected under the Rule because they would need to comply with CWA permit requirements or risk liability.<sup>12</sup>

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7. COPELAND, R43455, *supra* note 6, at 1. The Rule defines the “waters of the United States” for all CWA regulatory programs that use this term. *Id.* at 2. However, this Comment will focus on the Rule’s impact on the section 404 regulatory program. *See infra* text accompanying notes 56–62 (explaining the EPA and Corps’ regulatory permit programs).

8. *See infra* text accompanying notes 169–83 (explaining the changes in the Rule).

9. COPELAND, R43455, *supra* note 6, at 11.

10. *See* Jenny Hopkinson, *Obama’s Water War*, POLITICO (May 27, 2015, 10:41 AM), <http://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319> (declaring that “the federal government shouldn’t be regulating puddles on private property” and describing the Rule as “a raw and tyrannical power grab” that will lead “to a regulatory and economic hell”).

11. *See infra* notes 61–62 and accompanying text (describing the costs associated with section 404 permits); *see, e.g.*, Jeremy P. Jacobs, *Regulatory Showdown in Calif. Wheat Field*, E&E REP. (Feb. 4, 2016), <http://www.eenews.net/stories/1060031808> (providing a first-hand account of the Rule’s potential liability implications).

12. *See* Timothy Benson, *Sixth Circuit Provides Bridge over Troubled WOTUS*, HILL: CONGRESS BLOG (Oct. 28, 2015, 2:30 PM), <http://thehill.com/blogs/congress-blog/energy-environment/258287-sixth-circuit-provides-bridge-over-troubled-wotus> (explaining that the Rule leads to increased restrictions, red tape, and costs if an owner’s land protected by the Rule is minimally altered and commenting that the Rule leads to a “usurpation of states’ authority”); COPELAND, R43455, *supra* note 6, at 1 (discussing the reaction of state and local officials who are concerned about the Rule affecting their own infrastructure projects).

The CWA, enacted in 1972, is the primary federal statute regulating pollution of the U.S. waterways.<sup>13</sup> The CWA granted the federal government the authority to regulate the discharge of pollutants into “navigable waters,” which Congress broadly defined as the “waters of the United States, including the territorial seas.”<sup>14</sup> The Agencies were left to define the scope of the “waters of the United States” in future regulations.<sup>15</sup> The Agencies have always had the authority to regulate traditional navigable waters—waters used or with the capacity for use in commerce.<sup>16</sup> However, the Agencies and courts have struggled to determine how far CWA jurisdiction extends to non-navigable streams, wetlands, and adjacent waters that are not directly connected to traditional navigable waters.<sup>17</sup> These non-navigable and adjacent waters account for approximately sixty percent of our nation’s streams and wetlands, leading to inconsistent application of the CWA among Agency officials and to confusion among the regulated public.<sup>18</sup>

Confusion about CWA jurisdiction continued following three United States Supreme Court cases that ambiguously interpreted the scope of the CWA: *United States v. Riverside Bayview Homes, Inc.*,<sup>19</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*<sup>20</sup> (“SWANCC”), and the most recent case, *Rapanos v. United States*.<sup>21</sup> The Court failed to reach a majority decision in *Rapanos*, which addressed CWA jurisdiction over wetlands adjacent to non-navigable tributaries.<sup>22</sup> This decision led to two standards that the Agencies and courts have

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13. Federal Water Pollution Control Act Amendments of 1972 (CWA), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)).

14. CWA § 502(7); 33 U.S.C. § 1362(7).

15. COPELAND, R43943, *supra* note 3, at 3; *see supra* note 6 (discussing the regulations passed by the Corps and EPA in 1986).

16. ROYAL C. GARDNER, LAWYERS, SWAMPS, AND MONEY: U.S. WETLAND LAW, POLICY, AND POLITICS 38 (2011).

17. *See, e.g.*, COPELAND, R43455, *supra* note 6, at 3 (referencing the ambiguity of the extent of the CWA’s scope of jurisdiction and supporters’ acknowledgment that the scope needed clarification).

18. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.); *Factsheet: Clean Water Rule*, EPA (2015), [https://www.epa.gov/sites/producti/files/2015-05/documents/fact\\_sheet\\_summary\\_final\\_1.pdf](https://www.epa.gov/sites/producti/files/2015-05/documents/fact_sheet_summary_final_1.pdf) [hereinafter *Factsheet*].

19. 474 U.S. 121 (1985).

20. 531 U.S. 159 (2001).

21. 547 U.S. 715 (2006) (plurality opinion).

22. *Id.* at 729.

applied to establish CWA jurisdiction.<sup>23</sup> The plurality opinion held that waters are jurisdictional under the CWA if they have a “continuous surface connection” with a “water of the United States.”<sup>24</sup> In a separate concurring opinion, Justice Kennedy created a different test, which established CWA jurisdiction only if there is a “significant nexus” between the two bodies of water.<sup>25</sup> To date, there has been no consensus on whether the plurality’s standard or Justice Kennedy’s “significant nexus” test is the appropriate standard to find a body of water or wetland jurisdictional as a “water of the United States.”<sup>26</sup>

In the wake of *Rapanos*, the EPA received hundreds of requests from elected officials, local agency associations, nongovernmental organizations, and businesses seeking clarification on the scope of the “waters of the United States.”<sup>27</sup> On April 21, 2014, the Agencies issued a proposed rule to clarify which bodies of water they considered to be “waters of the United States,”<sup>28</sup> and that proposal received over one million public comments.<sup>29</sup> Following review of the public comments, the final revised rule was published on June 29, 2015, and became effective on August 28, 2015.<sup>30</sup> The Rule clarifies

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23. Joshua A. Bloom & Estie A. Manchik, *Defining “Significant Nexus” After Rapanos*, 39 TRENDS 1, 4 (2008).

24. *Rapanos*, 547 U.S. at 742 (explaining that a “continuous surface connection” occurs when it is difficult to determine “where the ‘water’ ends and the ‘wetland’ begins”).

25. *Id.* at 779 (Kennedy, J., concurring).

26. See *infra* Section I.C (explaining the disagreement among federal courts over the appropriate standard post-*Rapanos*).

27. *Persons and Organizations Requesting Clarification of “Waters of the United States” by Rulemaking*, EPA, <http://www.epa.gov/cleanwaterrule/persons-and-organizations-requesting-clarification-waters-united-states-rulemaking> (last visited Oct. 19, 2016) [hereinafter *EPA Requests*].

28. Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).

29. See *Definition of “Waters of the United States” Under the Clean Water Act*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OW-2011-0880> (last visited Oct. 19, 2016) (providing access to the public comments submitted following the Proposed Rule).

30. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.). However, the U.S. District Court for the District of North Dakota issued an order enjoining implementation of the Clean Water Rule the day before the Rule was to become effective nationwide. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015). On September 4, 2015, the North Dakota District Court confirmed that its Order only prevented implementation of the Rule in the thirteen states—Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming—that were parties to the litigation. *Order Limiting the Scope of Preliminary Injunction to Plaintiffs*, *North Dakota v. EPA*, 3:15-cv-59, (D.N.D. Sept. 4, 2015), ECF No. 79. Thus, the Rule

the CWA's jurisdiction over this ambiguous category of waters, which includes waters used for fishing, swimming, and wildlife habitation, as well as streams that affect drinking water for roughly 117 million Americans.<sup>31</sup> Nevertheless, some environmental advocates believe that the Rule falls short of its goals because it increases permit exemptions and fails to protect other important categories of water, such as groundwater.<sup>32</sup>

The Agencies insist that the scope of jurisdiction under the Rule is actually narrower than existing regulations.<sup>33</sup> Despite this assurance, litigation has plagued the Rule at both the district and appellate levels, and, on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed enforcement of the Rule nationwide.<sup>34</sup> Moreover, Congress has made several attempts to block the Rule's implementation.<sup>35</sup> While this is not the first opposition that the CWA has faced,<sup>36</sup> the strong immediate reaction from both environmental and industry groups following the Rule's publication has sparked a

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went into effect on August 28, 2015, for the remaining states that were not parties to the litigation. *Id.*

31. *Factsheet, supra* note 18.

32. Tina Posterli, *US EPA and Army Corps Issue Weak Clean Water Rule*, WATERKEEPER ALLIANCE (May 27, 2015), <http://waterkeeper.org/us-epa-and-army-corps-issue-weak-clean-water-rule> (referencing arguments by environmental groups); *see also* Kelli Barrett, *Mixed Initial Responses to Final US Clean Water Rule*, ECOSYSTEM MARKETPLACE (May 29, 2015), <http://www.ecosystemmarketplace.com/articles/mixed-initial-responses-to-final-us-clean-water-rule> (discussing the Rule's shortcomings).

33. Clean Water Rule, 80 Fed. Reg. at 37,054 (noting that the Rule adds "important qualifiers on some existing categories such as tributaries").

34. *See In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015) (staying enforcement of the Rule pending the litigation consolidated in the Sixth Circuit); *In re Clean Water Rule: Definition of "Waters of the United States,"* 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015) (rejecting consolidation of nine complaints filed in district courts nationwide); *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* Consolidation Order, MCP No. 135 (J.P.M.L. July 28, 2015), Dkt. No. 3 (consolidating twelve petitions for review in the Sixth Circuit).

35. *See, e.g.*, H.R. 1732, 114th Cong. (2015) (requiring, upon passage of the Act, the withdrawal of any final rule based on the 2014 proposed rule); S.J. Res. 22, 114th Cong. (2015) (proposing to nullify the Clean Water Rule published on June 29, 2015). On January 19, 2016, President Barack Obama vetoed Joint Resolution 22, which would have overturned the Rule. Daniel Wilson, *Senate Fails to Block Obama's Veto of Anti-Water Rule Bill*, LAW360 (Jan. 21, 2016, 11:59 AM), <http://www.law360.com/articles/749073/senate-fails-to-block-obamas-veto-of-anti-water-rule-bill>. The House and Senate have not garnered enough support to override President Obama's veto. *Id.*

36. In 1972, Congress had to override a veto by President Richard Nixon to implement the CWA. JOEL M. GROSS & KERRI L. STELCEN, *BASIC PRACTICE SERIES: CLEAN WATER ACT* 7 (2d ed. 2012).

contentious debate regarding its legality, resulting in a prolonged, uphill battle for the Agencies.<sup>37</sup>

This Comment analyzes the Rule and argues that the Rule falls within the permissible scope of CWA jurisdiction and does not violate the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, or *Rapanos*.<sup>38</sup> Further, this Comment argues that the Rule was a good faith effort by the Obama Administration to streamline review of the CWA permit process and make the scope of CWA jurisdiction easier for the public to understand. The Rule reflects Congress's intent behind the CWA, a combination of Supreme Court precedent, recent science, Agency practice, and consideration of public comments.

Part I of this Comment provides a brief history of the CWA and the recent Supreme Court decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* addressing the scope of the CWA. It also discusses the diverse U.S. Courts of Appeals interpretations of CWA jurisdiction following *Rapanos* and introduces the text of the Rule. Part II analyzes the Rule and asserts that the Rule adopts Justice Kennedy's "significant nexus" standard into the definition of "waters of the United States." Further, Part II analyzes the Rule's three categories of CWA jurisdiction and argues that each of these categories comports with the permissible scope of CWA jurisdiction under Supreme Court precedent. Finally, this Comment concludes that the Rule provides the public with increased clarity about the scope of jurisdictional waters under the CWA and is important to ensure protection of our nation's waters.

#### I. HISTORY OF THE CLEAN WATER ACT AND THE CONTROVERSY OVER THE "WATERS OF THE UNITED STATES"

The Agencies and courts have struggled to interpret the jurisdictional scope of the CWA since its implementation. The

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37. See Garret Ellison, *Michigan Unique in Clean Water Rule Debate Due to 1984 Wetland Program*, MLIVE MEDIA GROUP (Sept. 14, 2015, 8:30 AM), [http://www.mlive.com/news/index.ssf/2015/09/clean\\_water\\_rule\\_michigan\\_wotu.html](http://www.mlive.com/news/index.ssf/2015/09/clean_water_rule_michigan_wotu.html) (describing disagreement over the Rule and the conflicting responses by the Obama Administration, Congress, and numerous states); Jennifer Yachnin, *House Republican Compares WOTUS to Terrorism, the Plague*, GREENWIRE (Nov. 23, 2015), <http://www.eenews.net/greenwire/stories/1060028451> ("In the farming community, which both Republicans and Democrats represent, this is as popular as the plague, as popular as ISIS. This is not popular at all." (quoting Rep. Ken Calvert)).

38. This Comment will only analyze the Rule in light of the past CWA Supreme Court cases and will not address any other constitutional arguments that have been raised in litigation.

development of the new Rule defining “waters of the United States” resulted from confusion regarding three Supreme Court cases—*Riverside Bayview*, *SWANCC*, and *Rapanos*—that ambiguously interpreted the Agencies’ authority to regulate adjacent waters and smaller, non-navigable streams under the CWA. This Part expounds on the history of the CWA and the development of the Rule by discussing the Supreme Court cases and explaining both the Agencies’ and courts’ difficulty determining the appropriate standard to establish CWA jurisdiction following *Rapanos*.

#### A. *The History and Purpose of the Clean Water Act*

The Agencies consider the CWA to be “the Nation’s single most important statute for protecting America’s clean water against pollution, degradation, and destruction.”<sup>39</sup> In 1972, Congress enacted the CWA in amendments to the Federal Water Pollution Control Act (“FWPCA”).<sup>40</sup> The CWA’s stated objective was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” with the national goal “that the discharge of pollutants into the navigable waters be eliminated by 1985.”<sup>41</sup> However, this was a lofty goal given that two-thirds of our nation’s waters had been deemed no longer safe for swimming or fishing.<sup>42</sup>

Prior to the CWA’s enactment, Congress had made numerous attempts to regulate water pollution beginning in the 1890s.<sup>43</sup> At that time, Congress was focused primarily on pollution that affected navigation.<sup>44</sup> In 1948, in an effort to expand protection in light of

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39. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,055 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

40. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)).

41. CWA § 101(a); 33 U.S.C. § 1251(a).

42. *Troubled Waters: A Brief History of the Clean Water Act*, NOW (Dec. 20, 2002), <http://www.pbs.org/now/science/cleanwater.html> (noting that in 1969, pollution of America’s waters with discharge, such as untreated sewage, had killed record numbers of fish and had caused bacteria levels to rise to 170 times the safe limit in the Hudson River).

43. One of the earliest efforts of federal water regulation was the Rivers and Harbors Appropriation Act of 1899 (“RHA”), which prohibited the discharge of “refuse matter . . . flowing from streets and sewers . . . into any navigable water of the United States” and granted authority to the Corps to regulate and issue permits. GROSS & STELCEN, *supra* note 36, at 5 (quoting 33 U.S.C. § 407) (describing how the RHA became a mechanism for regulating water pollution).

44. *See id.* (explaining how the RHA was an attempt to reduce discharge that had hampered the “navigable capacity” of the nation’s waters).

increased industrialization, Congress enacted the FWPCA.<sup>45</sup> The FWPCA left implementation and enforcement to state-led initiatives.<sup>46</sup> However, by 1971, only half of the states had approved water quality standards, leaving the federal government without any enforcement authority.<sup>47</sup> Ultimately, observers viewed this regulatory scheme as ineffective due to its limited scope of authority and inadequate mechanisms of enforcement.<sup>48</sup> Thus, in 1972, Congress comprehensively amended the FWPCA to cover this “widening gap in federal legislation.”<sup>49</sup> The amendments contained a “comprehensive legislative anti-pollution scheme,” which became commonly known as the CWA.<sup>50</sup>

The CWA was a landmark congressional response to the lack of adequate enforcement of water pollution legislation and increased environmental awareness nationwide.<sup>51</sup> Representatives referred to the

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45. Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1376). *But see* Heather Keith, Comment, United States v. Rapanos: *Is “Waters of the United States” Necessary for Clean Water Act Jurisdiction?*, 3 SETON HALL CIR. REV. 565, 573 (2007) (detailing that many waters were left unprotected and polluted under the RHA’s regulatory scheme).

46. GROSS & STELCEN, *supra* note 36, at 6 (discussing the confined supporting role of the federal government in the 1948 FWPCA due to the delegation of enforcement to the state level). Further, in an attempt to strengthen the FWPCA, Congress enacted the Water Quality Act of 1965, which required “each state . . . to develop standards for water quality within its state boundaries by July 1, 1967.” *Id.*

47. *Id.*

48. THE CLEAN WATER ACT HANDBOOK 1 (Mark A. Ryan ed., 3d ed. 2011) [hereinafter CWA HANDBOOK].

49. Keith, *supra* note 45, at 573 (noting that the Corps could not indefinitely expand the interpretation of its jurisdiction under the RHA to regulate water pollution); *see* Federal Water Pollution Control Act Amendments of 1972 (CWA), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)). While the RHA had tied “the Corps[’] objectives to solely protect the physical navigability of the nation’s waterways, the CWA expanded the Corps’ focus to address critical issues of pollution” by including objectives that were not solely tied to navigability. Keith, *supra* note 45, at 575.

50. Keith, *supra* note 45, at 573. In 1972, the official title of the CWA was the “Federal Water Pollution Control Act Amendments”; however, after further amendments in 1977, the law and its subsequent amendments became known as the “Clean Water Act.” *Federal Water Pollution Control Act (1972) or the Clean Water Act (CWA)*, BUREAU OCEAN ENERGY MGMT., <http://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/CWA/index.aspx> (last visited Oct. 19, 2016).

51. *See* GROSS & STELCEN, *supra* note 36, at 6–7 (detailing the degradation of the nation’s waters and the effect of the changing national consciousness on the implementation of the CWA). For example, several serious pollution events occurred in 1969, including an oil spill off the coast of Santa Barbara, California, and a fire on the polluted Cuyahoga River in Ohio. *Id.* at 7. A year later, the first Earth Day took place in 1970, and in 1972 the CWA was enacted. *Id.*

Act as “the most comprehensive and far-reaching water pollution bill [Congress had] ever drafted.”<sup>52</sup> In fact, Senator Randolph, Chairman of the Committee on Public Works, stated that it was “perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment.”<sup>53</sup>

The CWA imposes a basic prohibition against “the discharge of any pollutant by any person” from any “point source” into “navigable waters” without a permit.<sup>54</sup> One goal of the CWA’s regulatory structure is to prevent pollutants from flowing downstream into larger navigable waters.<sup>55</sup> Accordingly, the CWA established two main permit programs for discharging pollutants into “navigable waters.”<sup>56</sup> First, section 402 of the CWA established the National Pollutant Discharge Elimination System (NPDES), which authorizes the EPA to regulate permits allowing the “discharge of any pollutant.”<sup>57</sup> Second, section 404 requires a permit “for the discharge of dredged or fill material into the navigable waters.”<sup>58</sup> The Corps oversees the section 404 permit program, but the EPA and the Corps both implement the section.<sup>59</sup> For example, the Agencies issue joint regulations pertaining to section 404, and the EPA has the ability to override a

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52. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 179 (2001) (Stevens, J., dissenting) (statement of Rep. Mizell) (citing 1 CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 369 (1973)).

53. *Id.* (citing 2 CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1269 (1973)).

54. CWA § 301(a); 33 U.S.C. § 1311(a). The “discharge of a pollutant” is defined to mean “any addition of any pollutant to navigable waters from any point source.” CWA § 502(12); 33 U.S.C. § 1362(12). Further, a “pollutant” includes dredged material, rock, sand, sewage, or industrial and agricultural waste. CWA § 502(6); 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.2 (2015) (providing a complete definition of “pollutant”). Further, a “point source” is defined as “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, [or] tunnel . . . from which pollutants are or may be discharged.” CWA § 502(14); 33 U.S.C. § 1362(14).

55. *See* CWA HANDBOOK, *supra* note 48, at 12 (quoting S. REP. NO. 92-414, at 77 (1977)) (observing that “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source” (alteration in original)).

56. *Id.* at 27.

57. CWA § 402; 33 U.S.C. § 1342.

58. CWA § 404(a); 33 U.S.C. § 1344(a). “Wetlands are an important subset of the ‘waters of the United States’ that section 404 protects,” and section 404 is often referenced as the “wetlands program.” CWA HANDBOOK, *supra* note 48, at 113.

59. CWA HANDBOOK, *supra* note 48, at 113, 118 (explaining that the EPA is responsible for compliance and enforcement of the CWA and all permit requirements).

Corps permit decision.<sup>60</sup> Some regulated individuals and businesses dislike these CWA permit requirements because compliance is time-consuming and costly.<sup>61</sup> Further, failure to comply can result in civil and criminal liability, which carries the potential for hundreds of thousands of dollars in fines.<sup>62</sup>

Ultimately, the CWA delegates authority to the EPA and the Corps to regulate “navigable waters,” which Congress defined as “waters of the United States, including territorial seas.”<sup>63</sup> Although Congress did not define what constitutes “waters of the United States,” it granted the Agencies the authority to define these “waters” further with regulations.<sup>64</sup> The key question for establishing whether a body of water or a wetland falls within CWA jurisdiction is whether it is a “water of the United States” as defined by the Agencies’ regulations.<sup>65</sup> Thus, uncertainty regarding the appropriate definition of “waters of the United States” has created confusion “as to when a person does or does not need [a section 402] NPDES or [s]ection 404 permit to discharge pollutants.”<sup>66</sup>

Historically, there has been consensus that the CWA protects traditional navigable waters, or waters that were used, are presently used, or could be used for commerce, and waters “subject to the ebb and flow of the tide.”<sup>67</sup> For example, the Corps has found Three Rivers in Pittsburgh, PA; Yellowstone River in Billings, MT; and the Mississippi River to be traditional navigable waters.<sup>68</sup> This interpretation derives

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60. *Id.* at 118–19.

61. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. . . . ‘[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.’” (quoting David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 81 (2002))).

62. See 33 U.S.C. § 1319 (codifying enforcement provisions for the CWA).

63. CWA § 502(7); 33 U.S.C. § 1362(7).

64. See 33 C.F.R. § 328.3(a) (2015) (defining “waters of the United States” for the Corps); 40 C.F.R. § 230.3(s) (defining “waters of the United States” for the EPA).

65. See CWA § 502(7); 33 U.S.C. § 1362(7) (regulating discharge into “navigable waters” defined as “waters of the United States”).

66. Allyson C. Chwee, Note, *United States v. Cundiff: Sixth Circuit Decision Makes Rapanos v. United States Controversy (Navigable) Water Under a Bridge*, 43 CREIGHTON L. REV. 233, 242 (2009).

67. GARDNER, *supra* note 16, at 38.

68. U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK 17–18, 20 (2007) [hereinafter CORPS’ GUIDEBOOK],

from the Corps' authority to regulate navigable waters under the Rivers and Harbors Appropriation Act ("RHA"), dating back to the 1890s.<sup>69</sup> However, the CWA's legislative history demonstrates that Congress did not intend for the interpretation of "waters of the United States" to be strictly limited to navigable-in-fact waters.<sup>70</sup> The Committee on Public Works House Report explained that

[o]ne term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes.<sup>71</sup>

A Senate-House Conference Committee Report, the FWPCA Conference Report, and the floor debate of both the House and Senate also support this broad interpretation of the CWA.<sup>72</sup> This legislative history "links the *statutory* jurisdiction of the CWA to the *constitutional* authority of the federal government to regulate waters and water pollution, leaving both matters to be addressed in the future by the federal courts."<sup>73</sup>

*B. Development of Agency Regulations and the Court's Interpretation of CWA Jurisdiction*

Federal courts have considered the regulatory definition of "waters of the United States" on several occasions. After Congress granted the Corps the authority to implement and enforce the CWA in 1972, the Corps issued regulations that defined "navigable waters" using the definition for "traditional navigable waters" in the RHA.<sup>74</sup> In 1975,

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[http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/jd\\_guidebook\\_051207final.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf).

69. *Id.* at 50. See generally *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, FISH & WILDLIFE SERV., <https://www.fws.gov/laws/lawsdigest/riv1899.html> (last visited Oct. 19, 2016) (discussing the RHA's history).

70. CWA HANDBOOK, *supra* note 48, at 12 & nn.9–11.

71. H.R. REP. NO. 92-911, at 131 (1972).

72. CWA HANDBOOK, *supra* note 48, at 12 & n.10 (citing S. REP. NO. 92-1236, at 144 (1971) and H.R. REP. NO. 92-911, at 131); Keith, *supra* note 45, at 574 (citing H.R. REP. NO. 92-1465, at 144 (1972) (Conf. Rep.)).

73. CWA HANDBOOK, *supra* note 48, at 12.

74. GARDNER, *supra* note 16, at 38 (explaining that the RHA defined "navigable waters" to be "only those waters that were navigable in the traditional sense: navigable in fact (used in commerce), navigable in the future with reasonable improvements, navigable in the past, and subject to the ebb and flow of the tide").

the U.S. District Court for the District of Columbia invalidated the Corps' regulation due to its unduly narrow interpretation of the term and held that jurisdiction under the CWA should encompass more than traditional navigable waters.<sup>75</sup> Specifically, the Court held that the Corps should interpret jurisdiction to "the maximum extent permissible under the Commerce Clause of the Constitution."<sup>76</sup> Consequently, courts began applying jurisdiction more broadly after this case, finding that CWA jurisdiction extended to more than just traditional navigable waters and using legislative intent and history to ascertain the permissible scope of jurisdiction under the CWA.<sup>77</sup>

In 1977, the Corps promulgated a regulation that defined "waters of the United States" to include not only navigable waters but also wetlands adjacent to traditional navigable waters and their tributaries—waters that flow directly or indirectly into traditional navigable waters—as well as "other waters" that "could affect interstate commerce."<sup>78</sup> Although environmentalists were content with this regulatory definition, property owners challenged the Corps' jurisdiction over "adjacent wetlands" in a case that eventually made its way to the Supreme Court.<sup>79</sup>

That 1985 case, *United States v. Riverside Bayview Homes, Inc.*, was the first in which the Supreme Court reviewed the scope of the Agencies' regulations under the CWA. It concerned wetlands adjacent but not connected to Lake St. Clair in Macomb County, Michigan,<sup>80</sup> and the Court considered whether the term "navigable waters" permitted CWA jurisdiction over such "adjacent wetlands."<sup>81</sup> A unanimous Court deferred to the Corps' determination that adjacent wetlands that border or "are in reasonable proximity to other waters of the United States" are "inseparably bound up" with these "waters."<sup>82</sup>

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75. Nat. Res. Def. Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

76. *Id.*

77. CWA HANDBOOK, *supra* note 48, at 14 (indicating that one CWA law casebook even stated in 1998 that "by now, little serious dispute remains over the necessity for either a § 402 or 404 permit for discharges into any water").

78. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) (codified at 33 C.F.R. § 323) (defining "waters of the United States"). The Corps first promulgated interim final regulations in 1974 and later refined the definition of "wetlands" in 1977. Keith, *supra* note 45, at 575.

79. GARDNER, *supra* note 16, at 39.

80. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 (1985).

81. *Id.* at 126.

82. *Id.* at 134 (first quoting 42 Fed. Reg. 37,128 (1977)). Further, the Court refused to distinguish CWA jurisdiction between "wetlands" and "waters." *See id.* at

Further, the Court affirmed that the CWA's definition of "'navigable waters' as 'waters of the United States' makes it clear that the term 'navigable' . . . is of limited import," and that Congress intended the CWA to regulate at least some waters that would not be considered traditionally navigable.<sup>83</sup>

Thus, the Court upheld the Corps' regulation and held that the Corps had not exceeded its authority by including wetlands adjacent to navigable waters in its definition of "waters of the United States." Consequently, the Court determined that wetlands adjacent to navigable waters were "navigable waters" within the Agencies' jurisdiction under the CWA.<sup>84</sup> However, the Court declined to address whether federal regulatory jurisdiction extends to "wetlands that are not adjacent to bodies of open water."<sup>85</sup>

Following the Court's unanimous opinion in *Riverside Bayview*, the Corps revised and reorganized its regulations in 1986.<sup>86</sup> The Corps did not change the definition of "waters of the United States"; however, the Corps added preamble language to clarify jurisdiction over "isolated waters," which became known as the Migratory Bird Rule.<sup>87</sup> The Migratory Bird Rule gave the Corps the authority to regulate activities in isolated waters, such as wetlands, that "are or would be used as habitat by . . . migratory birds which cross state lines."<sup>88</sup> The Agencies used this preamble language to gain

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133 (declaring that "it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined").

83. *Id.* at 132–33.

84. *Id.* at 133–34, 139 (concluding that it was "reasonable for the Corps to interpret the term 'waters' to encompass [adjacent] wetlands").

85. *Id.* at 131 n.8.

86. GARDNER, *supra* note 16, at 44 (explaining that the Corps separated its definition of "waters of the United States" into its own part in the regulations).

87. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,216–17 (Nov. 13, 1986) [hereinafter Migratory Bird Rule]; GARDNER, *supra* note 16, at 44.

88. Migratory Bird Rule, 51 Fed. Reg. at 41,217. In the Rule, the Corps clarified that "waters of the United States" includes intrastate 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; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.

*Id.* This Rule was not a regulation and was issued by the Corps without following the notice-and-comment procedures in the Administrative Procedure Act, 5 U.S.C. § 553 (2012). Thus, courts regarded it as an interpretive rule, and therefore did not afford

jurisdiction over “isolated waters,” upsetting many landowners who questioned the extent of the Agencies’ jurisdiction under the CWA.

In 2001, the Supreme Court addressed the issue of CWA jurisdiction over isolated waters. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“SWANCC”), a waste management company challenged federal authority over an abandoned sand and gravel pit in northern Illinois that provided a habitat for migratory birds.<sup>89</sup> Initially, the Corps concluded that it did not have jurisdiction over the site due to the lack of “wetlands” that the Court found to be jurisdictional under the CWA in *Riverside Bayview*.<sup>90</sup> However, the Corps later claimed jurisdiction, stating that the site contained “waters of the United States” solely because it provided a habitat for migratory birds.<sup>91</sup>

In a 5-4 decision, the Supreme Court held that the Migratory Bird Rule exceeded the scope of authority granted to the Corps under section 404(a) of the CWA.<sup>92</sup> The Court determined that the Corps could not extend the definition of “navigable waters” to “isolated” non-navigable intrastate ponds used by migratory birds.<sup>93</sup> The Court based its ruling on the statutory construction of the CWA without reaching the question of whether the Corps had the constitutional authority to regulate isolated waters.<sup>94</sup>

The Court clarified that the difference between *SWANCC* and *Riverside Bayview* was the “significant nexus” between the “navigable waters” and the waters in question.<sup>95</sup> In *Riverside Bayview*, the wetlands “actually abutted on a navigable waterway,” whereas in

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it as much deference as they would have an agency regulation. GARDNER, *supra* note 16, at 46–47.

89. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 162, 164 (2001) (“The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements.”).

90. *Id.* at 164 (noting the lack of wetlands or support for vegetation typically found near water).

91. *Id.* The Corps used the following criteria for its determination: “(1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [sic] which cross state lines.” *Id.* at 164–65.

92. *Id.* at 174.

93. *Id.* at 171.

94. *Id.* at 173–74. The Court reviewed the statutory construction of “navigable” and viewed Congress’s intention for jurisdiction to be grounded in “its commerce power over navigation.” *Id.* at 168 n.3.

95. *See id.* at 167 (emphasizing the presence of a “‘significant nexus’ between the wetlands and ‘navigable waters’” in *Riverside Bayview*).

SWANCC the waters were not directly connected.<sup>96</sup> While the Court affirmed that the word “navigable” was of “limited import,” it declared that it is not the case that the word “navigable” has “no effect whatever.”<sup>97</sup> Ultimately, the Court found no legislative history indicating that Congress contemplated CWA jurisdiction over isolated waters and rejected the Corps’ attempt to use the Migratory Bird Rule to regulate isolated, non-navigable, intrastate waters that had no connection to a navigable waterway.<sup>98</sup>

Following SWANCC, the Agencies temporarily considered revising their regulations.<sup>99</sup> Although the Court struck down the preamble language (the Migratory Bird Rule), its decision did not affect the Agencies’ definition of “waters of the United States” in the 1986 regulations.<sup>100</sup> However, in December 2003, the Agencies issued notice that there would be no new rulemaking.<sup>101</sup> After SWANCC, several litigants challenged the Agencies’ jurisdiction over “waters” that were *neither* isolated *nor* directly adjacent to traditional navigable waters.<sup>102</sup> Subsequently, lower courts struggled to determine whether the CWA granted the Agencies jurisdiction over wetlands that were adjacent to non-navigable tributaries<sup>103</sup> of navigable waters, such as those depicted below in Figure 1.<sup>104</sup>

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96. *See generally id.* at 167–68 (explaining that for the Corps to prevail, the Court “would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water”).

97. *Id.* at 172 (asserting that the word “navigable” shows “what Congress had in mind as its authority for enacting the CWA”).

98. *Id.* at 170–71.

99. Margaret “Peggy” Strand & Lowell M. Rothschild, *What Wetlands Are Regulated? Jurisdiction of the §404 Program*, 40 ENVTL. L. REP. 10,372, 10,377 (2010).

100. CWA HANDBOOK, *supra* note 48, at 19.

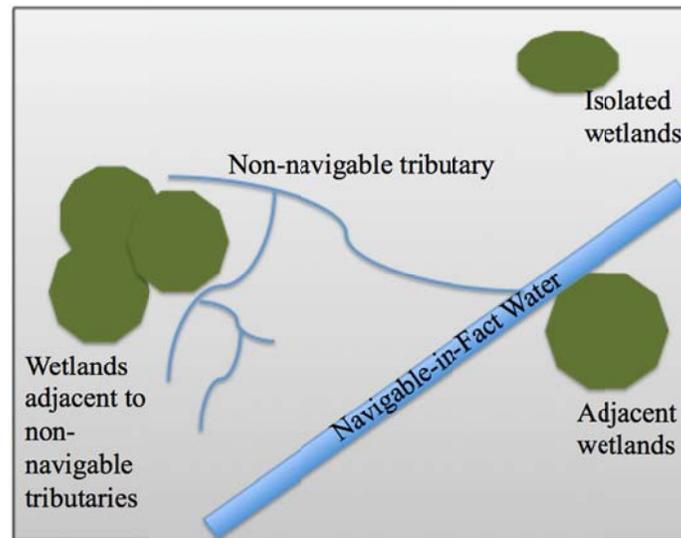
101. Strand & Rothschild, *supra* note 99, at 10,377. In lieu of rulemaking, the Agencies issued a joint guidance legal memorandum that explained the Agencies’ position of CWA jurisdiction following SWANCC. *Id.*

102. CWA HANDBOOK, *supra* note 48, at 15.

103. “A non-navigable tributary of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries.” EPA & U.S. ARMY CORPS OF ENG’RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES 6 (2008) [hereinafter RAPANOS GUIDANCE], [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

104. *See* Jonathan H. Adler, *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL’Y REV. 1, 7–8 (2006) (discussing the inconsistency of the CWA’s application following SWANCC in the federal courts of appeals); CWA HANDBOOK, *supra* note 48, at 15.

Figure 1: Adjacent Wetlands



In 2006, the Supreme Court issued its most recent decision defining the scope of the CWA in *Rapanos v. United States*, which considered whether wetlands adjacent to, or narrowly separated from, non-navigable tributaries of traditional navigable waters could be considered “waters of the United States.”<sup>105</sup> The case consolidated two Sixth Circuit cases, *Carabell v. U.S. Army Corps of Engineers*<sup>106</sup> and *United States v. Rapanos*.<sup>107</sup> Both cases involved landowners who argued that their land was too far removed from “navigable waters” to be subject to federal jurisdiction.<sup>108</sup> In one of the cases, a landowner sought to develop his fifty-four acres of land, with the closest body of navigable water approximately eleven to twenty miles away.<sup>109</sup> His wetlands were connected by a man-made drain that drained into a creek that flowed into a river that eventually emptied into Saginaw Bay and Lake Huron.<sup>110</sup> However, it was unclear whether the connections between the wetlands and these drains were continuous or intermittent.<sup>111</sup> Upon review, the Corps and the Sixth Circuit

105. *Rapanos v. United States*, 547 U.S. 715, 729 (2006) (plurality opinion).

106. 391 F.3d 704 (6th Cir. 2004).

107. 376 F.3d 629 (6th Cir. 2004).

108. *Rapanos*, 547 U.S. at 729–30.

109. *Id.* at 719–20.

110. *Id.* at 729.

111. *Id.*

determined that the landowner's wetlands were jurisdictional under the CWA—and thus could not be filled without a permit—because “there were hydrological connections between [the wetlands] and corresponding adjacent tributaries of navigable waters.”<sup>112</sup>

The Supreme Court failed to reach a consensus, issuing a plurality opinion with a 4-1-4 split among the Justices.<sup>113</sup> Five Justices voted to vacate the Sixth Circuit decision, and the Court remanded both cases, holding that the Corps failed to apply the correct standard to establish jurisdiction over these wetlands as “waters of the United States” under the CWA.<sup>114</sup> Justice Scalia, writing for the plurality, determined that “waters of the United States” under the CWA includes only “relatively *permanent*, standing or flowing bodies of water.”<sup>115</sup> The plurality explained that “waters of the United States” refers more to flowing “bodies forming geographic features such as oceans, rivers, [and] lakes.”<sup>116</sup>

The plurality acknowledged that the CWA allows jurisdiction in certain circumstances over “navigable waters . . . *other than* those waters” which are or could be used “as a means to transport interstate or foreign commerce,” such as “adjacent wetlands.”<sup>117</sup> Ultimately, Justice Scalia explained that “adjacent” wetlands include “*only* those wetlands with a *continuous surface connection* to bodies that are ‘waters of the United States’” such that there is no clear separation between “where the ‘water’ ends and the ‘wetland’ begins.”<sup>118</sup> According to the plurality, if the wetland is not “relatively permanent” and has no “continuous surface connection” with a traditional navigable water, the wetland is not jurisdictional under the CWA.<sup>119</sup>

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112. *Rapanos*, 376 F.3d at 643.

113. *Rapanos*, 547 U.S. at 718 (showing that four Justices joined in the plurality opinion, one Justice concurred in the judgment, and four Justices dissented).

114. *Id.* at 757.

115. *Id.* at 732 (emphasis added). Further, Justice Scalia specified that CWA jurisdiction does not include “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Id.* at 739.

116. *Id.* at 732 (alteration in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

117. *Id.* at 731, 742 (alteration in original) (quoting 33 U.S.C. § 1344(g)(1)).

118. *Id.* at 742 (second emphasis added). Thus, the Court reasoned that “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*, and . . . lack the necessary connection to covered waters that [the Court] described as a ‘significant nexus’ in *SWANCC*.” *Id.* (citing *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001)).

119. *Id.* at 742.

Justice Kennedy, concurring in the judgment, agreed that the cases should be remanded but disagreed that a “continuous surface connection” was the appropriate standard for determining whether wetlands constitute “waters of the United States.”<sup>120</sup> Justice Kennedy concluded that the Corps’ jurisdiction over wetlands “depends on the existence of a *significant nexus* between the wetlands in question and navigable waters in the traditional sense.”<sup>121</sup> He stated 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.’”<sup>122</sup> Further, if the wetlands were found to be “speculative” or “insubstantial,” then they would not be found jurisdictional under the CWA.<sup>123</sup> While the Corps could presume jurisdiction over wetlands adjacent to truly navigable waters,<sup>124</sup> Justice Kennedy specified that adjacency to a *non-navigable* tributary will not establish jurisdiction without a greater ecological connection.<sup>125</sup>

Further, Justice Kennedy explained that the Corps could choose to identify “categories of tributaries that[,] due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations,” have a “significant nexus” with navigable waters.<sup>126</sup> However, in the absence of regulations, Justice Kennedy directed the Corps to proceed on a case-by-case basis to determine whether it had authority to regulate wetlands based on their adjacency to non-navigable tributaries. He also suggested that, in the interest of administrative efficiency or necessity, the Corps might have presumptive jurisdiction over similar wetlands in the region.<sup>127</sup>

Justice Stevens, writing for the dissent, criticized both Justice Kennedy and the plurality for “[r]ejecting more than [thirty] years of practice by the Army Corps.”<sup>128</sup> He concluded that on remand “each

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120. *Id.* at 779 (Kennedy, J., concurring).

121. *Id.* (emphasis added).

122. *Id.* at 780.

123. *Id.*

124. *See* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (holding that wetlands adjacent to navigable waters were considered jurisdictional under the CWA).

125. *Rapanos*, 547 U.S. at 786 (Kennedy, J., concurring).

126. *Id.* at 781.

127. *Id.*

128. *Id.* at 788 (Stevens, J., dissenting). Justice Stevens explained that the Corps’ “decision to treat these wetlands as encompassed within the term ‘waters of the

of the judgments should be reinstated if *either* [Justice Kennedy's or the plurality's test] is met."<sup>129</sup> Chief Justice Roberts and Justice Breyer each wrote separately and urged the Corps to promulgate rules to redefine "waters of the United States."<sup>130</sup>

Despite the Court's lack of consensus, *Rapanos* is the closest guidance for properly interpreting the scope of CWA jurisdiction.<sup>131</sup> However, because *Rapanos* did not garner a majority opinion, two competing tests for establishing CWA jurisdiction have emerged from the Court's decisions.<sup>132</sup> The first test, established in Justice Scalia's plurality opinion, provides for CWA jurisdiction for "relatively permanent" waters with a "continuous surface connection" between the wetland and other "waters of the United States."<sup>133</sup> The second test, articulated in Justice Kennedy's concurring opinion, provides for jurisdiction if a "significant nexus" exists between a wetland and other "waters of the United States."<sup>134</sup> To date, courts at both the district and appellate levels have wrestled with which test to apply.<sup>135</sup>

### C. Deciphering the Correct Standard to Apply Post-Rapanos

Since *Rapanos*, the U.S. Courts of Appeals have failed to agree about whether the plurality's opinion or Justice Kennedy's opinion provides the controlling standard.<sup>136</sup> The circuit courts have found

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United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision." *Id.* (citing *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

129. *Id.* at 810.

130. *Id.* at 758 (Roberts, C.J., concurring) (referencing the Agencies' failure to promulgate guidelines following SWANCC, which would have received "deference under [the Court's] generous standards"); *id.* at 812 (Breyer, J., dissenting).

131. See *infra* Sections I.C–D (discussing the courts' and Agencies' interpretations of CWA jurisdiction following *Rapanos*).

132. Kristen Clark, Comment, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act Is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295, 296–97 (2014).

133. *Rapanos*, 547 U.S. at 742 (plurality opinion).

134. *Id.* at 779–80 (Kennedy, J., concurring).

135. One district court judge even stated, "I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again." *United States v. Robison*, 521 F. Supp. 2d 1247, 1248 (N.D. Ala. 2007); see also *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (reviewing a case on existing precedent in the U.S. Court of Appeals for the Fifth Circuit and essentially ignoring *Rapanos* because the case "leaves no guidance on how to implement its vague, subjective centerpiece").

136. See Memorandum from Dick Pedersen, President, Env'tl. Council of the States, to Whom It May Concern 7, 8 (Sept. 11, 2014) [hereinafter ECOS Memo], [http://acoel.org/file.axd?file=2014%2f9%2fWaters+of+the+U+S+Final+9\\_11\\_14.pdf](http://acoel.org/file.axd?file=2014%2f9%2fWaters+of+the+U+S+Final+9_11_14.pdf)

CWA jurisdiction for wetlands that meet *only* Justice Kennedy's standard or wetlands that meet *either* standard.<sup>137</sup> However, no federal court of appeals has held that the plurality's standard alone is controlling.<sup>138</sup> The Supreme Court has denied each petition for review requesting the Court to clarify the scope of CWA jurisdiction following *Rapanos*.<sup>139</sup>

1. *Seventh, Ninth, and Eleventh Circuits: Justice Kennedy's test controls*

The U.S. Courts of Appeals for the Seventh, Ninth, and Eleventh Circuits have all held that Justice Kennedy's opinion provides the controlling standard from *Rapanos*.<sup>140</sup> Each of these courts reasoned that the "significant nexus" standard was the "narrowest ground"—the least restrictive ground—upon which *Rapanos* could be interpreted.<sup>141</sup> The circuit courts determined that Justice Kennedy's test would "classify a water as 'navigable' more frequently than the plurality's test."<sup>142</sup> The Seventh and Ninth Circuits explained that it would be rare for a wetland to meet the plurality's test and not meet Justice Kennedy's "significant nexus" test.<sup>143</sup> In most cases in which the plurality would find jurisdiction due to a "surface-water connection," Justice Kennedy would also find a "significant nexus."<sup>144</sup> However, the circuit courts acknowledged the potential for a rare case in which the plurality would find jurisdiction over a surface-water connection so "remote" that a "significant nexus" would not be found under Justice

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(discussing how lower courts have struggled to interpret the Supreme Court's plurality decision in *Rapanos*).

137. *Id.* at 8–13. Additionally, the Second, Fourth, Fifth, Sixth, Tenth, and District of Columbia Circuits have refrained from making a decision as to which standard controls. *Id.* at 13.

138. Chwee, *supra* note 66, at 264.

139. CWA HANDBOOK, *supra* note 48, at 21.

140. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); *United States v. Robinson*, 505 F.3d 1208, 1222 (11th Cir. 2007), *cert. denied sub nom.* *United States v. McWane, Inc.*, 555 U.S. 1045 (2008); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006) (*per curiam*), *cert. denied*, 552 U.S. 810 (2007).

141. *N. Cal. River Watch*, 496 F.3d at 999; *Robinson*, 505 F.3d at 1222; *Gerke Excavating*, 464 F.3d at 724–25. The circuits used *Marks v. United States* to interpret the holding of the plurality opinion in *Rapanos*. 430 U.S. 188 (1977). The Supreme Court held in *Marks* that "[w]hen 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 . . .'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

142. *Robinson*, 505 F.3d at 1221.

143. *Id.* at 1223; *Gerke Excavating*, 464 F.3d at 724–25.

144. *Gerke Excavating*, 464 F.3d at 724–25.

Kennedy's test.<sup>145</sup> Regardless of this rare possibility, the courts agreed that Justice Kennedy's concurrence provided the "least common denominator" between all of the fragmented opinions in *Rapanos* and is the controlling standard for establishing CWA jurisdiction.<sup>146</sup>

2. *First, Third, and Eighth Circuits: Either the plurality's or Justice Kennedy's tests may be used*

The U.S. Courts of Appeals for the First, Third, and Eighth Circuits have reasoned that neither test controls, and that courts may use *either* the plurality's standard *or* Justice Kennedy's "significant nexus" test to determine whether wetlands fall under the jurisdiction of the CWA as "waters of the United States."<sup>147</sup> The First Circuit disagreed with the reasoning of the Seventh, Ninth, and Eleventh Circuits.<sup>148</sup> The First Circuit emphasized the scenario in which the plurality's test would find jurisdiction based on a remote surface connection but Justice Kennedy's test would not.<sup>149</sup> Thus, the court concluded that if Justice Kennedy's test controlled, "there would be a bizarre outcome . . . [in which] the court would find no federal jurisdiction even though eight Justices . . . would all agree that federal authority should extend to such a situation."<sup>150</sup>

For this reason, the First Circuit decided that it was more logical to follow Justice Stevens's approach in the *Rapanos* dissent, which would hold that the "United States may elect to prove jurisdiction under

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145. *Id.*

146. *Id.* at 725; *see also N. Cal. River Watch*, 496 F.3d at 999–1000 (explaining that Justice Kennedy's concurrence "[is] the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases"); *Robinson*, 505 F.3d at 1221–22 (finding that the "significant nexus" test in Justice Kennedy's concurrence is the controlling test).

147. *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007).

148. *Johnson*, 467 F.3d at 61–64. The First Circuit concluded that the standard from *Marks* did not translate to *Rapanos*. *Id.* at 64. The court reasoned there are several other plausible interpretations of "narrowest ground" and concluded that an opinion is "narrower" "only when one opinion is a logical subset of other, broader opinions." *Id.* at 63. Ultimately, the First, Third, and Eighth Circuits concluded that Justice Kennedy's concurrence was not a logical subset of the plurality's opinion because there is a case when the plurality would find jurisdiction and Justice Kennedy may not. *Donovan*, 661 F.3d at 181; *Bailey*, 571 F.3d at 799; *Johnson*, 467 F.3d at 64.

149. *Johnson*, 467 F.3d at 64.

150. *Id.* In this hypothetical situation, the court notes that the *Rapanos* plurality and dissenters could agree about jurisdiction to form the eight Justice majority. *Id.*

either test.”<sup>151</sup> Under Justice Stevens’s approach, the court explained, jurisdiction exists “where a majority of the Court would support such a finding.”<sup>152</sup> Subsequently, the Third and Eighth Circuits followed suit, holding that “federal regulatory jurisdiction can be established over wetlands that meet *either* the plurality’s *or* Justice Kennedy’s test from *Rapanos*.”<sup>153</sup>

*D. Post-Rapanos Regulation and the Agencies’ Development of the Clean Water Rule*

After *Rapanos*, the Agencies issued joint guidance documents that interpreted the scope of the “waters of the United States” in light of the Court’s opinion.<sup>154</sup> The Agencies asserted that “water” would fall under the jurisdiction of the CWA if it met either the plurality’s standard or Justice Kennedy’s “significant nexus” test.<sup>155</sup> The guidance documents identified categories of waters that remained jurisdictional, categories that were not jurisdictional, and categories that would require case-specific analysis as required by Justice Kennedy’s concurring opinion in *Rapanos*.<sup>156</sup> The Agencies used case-specific analysis to review waters that did not meet the plurality’s standard of a continuous surface connection and did not fit evenly into any other category of jurisdiction. Thus, these “waters” needed closer examination to determine if a “significant nexus” was present for CWA jurisdiction.<sup>157</sup>

Ultimately, many CWA permit applications fell into this category and required lengthy and burdensome case-specific review to determine whether a “significant nexus” was present with a “water of the United States.”<sup>158</sup> Despite the Agencies’ attempt to clarify the

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151. *Id.* (citing *Rapanos v. United States*, 547 U.S. 715, 810 n.14 (2006) (Stevens, J., dissent)) (“I assume that Justice Kennedy’s approach will be controlling in most cases because it treats more of the Nation’s waters as within the Corps’ jurisdiction, but in the unlikely event that the plurality’s test is met but Justice Kennedy’s is not, courts should also uphold the Corps’ jurisdiction.”).

152. *Id.*

153. *Donovan*, 661 F.3d at 182 (emphasis added); *Bailey*, 571 F.3d at 799.

154. Strand & Rothschild, *supra* note 99, at 10,377 (detailing that the Agencies first issued joint guidance in June 2007; however, they later reissued this guidance in December 2008).

155. CWA HANDBOOK, *supra* note 48, at 19–20.

156. Strand & Rothschild, *supra* note 99, at 10,378.

157. RAPANOS GUIDANCE, *supra* note 103, at 12.

158. COPELAND, R43943, *supra* note 3, at 1; *see also* Clark, *supra* note 132, at 297 (describing the administrative burden and taxing nature of conducting case-specific analysis to establish CWA jurisdiction).

scope of CWA jurisdiction with guidance documents, the regulated public was still confused about which “waters” constituted “waters of the United States” and when a permit was required to discharge pollutants into these “waters.”<sup>159</sup> In 2011, the Agencies attempted to issue another guidance document to make the “case-by-case analysis of ‘significant nexus’ waters more clear”; however, they never published the final guidance.<sup>160</sup>

As a result of this confusion, businesses, environmental groups, landowners, and even the Supreme Court urged the Agencies to promulgate rules that would increase uniformity and consistency in the CWA permit process.<sup>161</sup> Finally, in 2014, the Agencies responded to these pleas and jointly issued a proposed rule to clarify the definition of “waters of the United States.”<sup>162</sup> After receiving over one million public comments, the Agencies published the final rule in June 2015, titled “Clean Water Rule: Definition of ‘Waters of the United States.’”<sup>163</sup>

In August 2015, the Rule went into effect replacing the Agencies’ existing guidance documents.<sup>164</sup> The goal of the Rule is to “clarify the scope of ‘waters of the United States’ that are protected under the” CWA and make the process of identifying these “waters” easier to

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159. See Clark, *supra* note 132, at 297 (discussing the Agencies’ inability to provide sufficient clarification with guidance documents following *Rapanos*).

160. *Id.* at 308–09.

161. See *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (criticizing the proposed rulemaking following *SWANCC*, which “went nowhere”); *id.* at 812 (Breyer, J., dissenting) (urging the Agencies to “write new regulations, and speedily so”); *EPA Requests*, *supra* note 27 (listing requests for rulemaking from business associations, environmental groups, and landowners); see also Stephen M. Johnson, *The Rulemaking Response to Rapanos: The Government’s Best Hope for Retaining Broad Clean Water Act Jurisdiction*, in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 22, 33 (L. Kinvin Wroth ed., 2007) (explaining that agency rulemaking allows for increased reliability when interpreting statutes and increased public participation due to the notice and comment requirements under the Administrative Procedure Act). However, agencies often prefer to issue guidance documents over rulemaking because there are fewer procedural requirements, and agencies can adopt or change policy more quickly with guidance than with rulemaking. *Id.* at 31–32.

162. Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).

163. 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

164. See *supra* note 30 (explaining that the North Dakota District Court’s Order enjoined implementation of the Rule in thirteen states). The Sixth Circuit has also stayed enforcement of the Rule nationwide pending its decision on the merits. See *supra* note 34 (mentioning the stay on the Rule’s implementation issued in October 2015).

understand and more predictable.<sup>165</sup> The Agencies rely on a comprehensive scientific report titled *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* (“Science Report”) to provide a scientific basis for determining connections between certain categories of water in the Rule.<sup>166</sup> The Science Report is “based on a review of more than 1,200 peer-reviewed publications” and concludes that “waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the [A]gencies’ task to determine where along that gradient to draw lines of jurisdiction under the CWA.”<sup>167</sup> Using the Science Report, legal analysis, and practical experience, the Agencies categorized jurisdictional waters as waters that possess a “significant nexus” with “traditional navigable waters, interstate waters, or the territorial seas.”<sup>168</sup>

The Rule maintains the general structure of the Agencies’ definition in existing regulations and follows the same categorical breakdown of waters in the Agencies’ guidance documents.<sup>169</sup> Similarly, the Rule includes three categories of jurisdiction: (1) “[w]aters that are jurisdictional in all instances,” (2) “waters that are excluded from jurisdiction,” and (3) “a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional.”<sup>170</sup> The Rule defines “waters of the United States” as follows:

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165. Clean Water Rule, 80 Fed. Reg. at 37,055; *see also* COPELAND, R43943, *supra* note 3, at 1 (explaining that the Final Rule was meant to condense and streamline jurisdictional determinations and to minimize case-specific review).

166. Clean Water Rule, 80 Fed. Reg. at 37,057 (citing U.S. ENVTL. PROT. AGENCY, EPA/600/R-14/475F, *CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE* (2015) [hereinafter *SCIENCE REPORT*], <http://cfpub.epa.gov/ncea/risk/recorddisplay.cfm?deid=296414&CFID=41777546&CFTOKEN=20401943>). The Agencies also issued a Technical Support Document, which is a 423-page document that addresses the legal basis and existing scientific literature supporting the “significant nexus” determinations in the Rule. U.S. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, *TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES* (2015) [hereinafter *TECHNICAL SUPPORT DOCUMENT*], [http://www.epa.gov/sites/production/files/2015-05/documents/technical\\_support\\_document\\_for\\_the\\_clean\\_water\\_rule\\_1.pdf](http://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf). This Comment takes the Science Report at face value and analyzes the Rule with the presumption that the Report is valid.

167. Clean Water Rule, 80 Fed. Reg. at 37,057.

168. *Id.* The Rule also notes that “[i]f evolving science and the [A]gencies’ experience lead to a need for action to alter the jurisdictional categories, any such action will be conducted as part of a rule-making process.” *Id.* at 37,058.

169. COPELAND, R43455, *supra* note 6, at 2.

170. Clean Water Rule, 80 Fed. Reg. at 37,057.

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters otherwise identified as waters of the United States under this section;
- (5) All tributaries . . . of waters identified in paragraphs (a)(1) through (3) of this section;
- (6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters.<sup>171</sup>

The Rule also includes two categories of waters in sections (a)(7) and (a)(8) that the Agencies must consider on a case-by-case basis to determine whether a “significant nexus” connection exists.<sup>172</sup> These new sections allow the Agencies to determine whether a “significant nexus” connection is present with these waters alone, or in combination with other similarly situated waters.<sup>173</sup> Section (a)(7) of the Rule lists five specific types of “waters” that the Science Report has found “function alike and are sufficiently close to function together in affecting downstream waters.”<sup>174</sup> Accordingly, the Rule requires the Agencies to consider these “waters” together when

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171. *Id.* at 37,104 (codified at 33 C.F.R. § 328.3(a)(1)–(6)). This section of 33 C.F.R. Part 328 and all further citations in this Comment to 33 C.F.R. Part 328 also appear in 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 as outlined in the Final Rule. *Id.* at 37, 106–27.

172. *Id.* at 37,104–05 (codified at 33 C.F.R. § 328.3(a)(7)–(8)).

173. *Id.* at 37,058–59.

174. TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 331. Clean Water Rule, 80 Fed. Reg. at 37,104–05 (codified at 33 C.F.R. § 328.3(a)(7)) (emphasis added) includes [a]ll waters in paragraphs (a)(7)(i) through (v) of this section [defined as *Prairie potholes, Carolina bays and Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands*] where they are determined, on a case-specific basis, to have a *significant nexus to a water identified in paragraphs (a)(1) through (3) of this section*. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section *are similarly situated and shall be combined*, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

determining whether a “significant nexus” exists with another “water of the United States” listed in sections (a)(1)–(3).<sup>175</sup>

Further, section (a)(8) identifies additional waters that the Agencies will also consider on a case-by-case basis.<sup>176</sup> Unlike section (a)(7), section (a)(8) requires Agency officials to determine whether the “waters” should be combined for the “significant nexus” analysis.<sup>177</sup> These waters include (1) “waters located within the 100-year floodplain<sup>[178]</sup> of a water identified in paragraphs (a)(1) through (3),” and (2) “all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5).”<sup>179</sup>

Next, the Rule specifies waters that *will not* be considered “waters of the United States.”<sup>180</sup> Some of these waters include waste treatment systems, prior converted cropland, certain artificial water features—such as reflecting pools—three types of ditches, erosional features, puddles, groundwater, and storm water control features.<sup>181</sup>

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175. Clean Water Rule, 80 Fed. Reg. at 37,058–59.

176. *Id.* at 37,105 (codified at 33 C.F.R. § 328.3(a)(8)) (“All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.”).

177. *Id.* Specifically, the Rule provides,

For waters determined to have a *significant nexus*, the entire water is a water of the United States if a portion is *located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark*. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also *an adjacent water* under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

*Id.* (emphasis added).

178. “The ‘100-year floodplain’ is the area with a one percent annual chance of flooding.” TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 124.

179. Clean Water Rule, 80 Fed. Reg. at 37,105. The Rule defines “high tide line” as the “line of intersection of the land with the water’s surface at the maximum height reached by a rising tide.” *Id.* at 37,106 (codified at 33 C.F.R. § 328.3(c)(7)).

180. *Id.* at 37, 105 (codified at 33 C.F.R. § 328.3(b)).

181. *Id.* For the complete list of excluded “waters,” see *id.*

The Rule also defines several terms for the first time, including “tributary,” “neighboring,” and “significant nexus.”<sup>182</sup> Most importantly, the Rule defines “significant nexus”:

*Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, *significantly affects* the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. . . . For an effect to be significant, it must be *more than speculative or insubstantial*. Waters are similarly situated when they *function alike and are sufficiently close to function together in affecting downstream waters*. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions . . . of this section. 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 identified in paragraphs (a)(1) through (3) of this section.<sup>183</sup>

The Rule’s preamble explains that “[t]he scope of jurisdiction in this [R]ule is narrower than that under the existing regulation.”<sup>184</sup> It further notes that “[f]ewer waters will be defined as ‘waters of the United States’ under the rule than under the existing regulations.”<sup>185</sup> Nevertheless, the Rule has created significant controversy among “regulated entities[, which] have criticized the Agencies for overreaching and expanding CWA jurisdiction.”<sup>186</sup> This Comment

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182. *Id.* at 37,073. For full definitions of these terms, see *id.* at 37,105–06 (codified at 33 C.F.R. § 328.3(c)(2), (3), (5)).

183. *Id.* at 37,106 (codified at 33 C.F.R. § 328.3(c)(5)) (emphasis added). Further, a significant nexus evaluation involves consideration of the following relevant functions:

- (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.

*Id.*

184. *Id.* at 37,054.

185. *See id.* (explaining that the Rule reduces jurisdiction by expanding regulatory exclusions and defining certain terms that were previously undefined).

186. *See* Andrea M. Hogan et al., *What to Know About the “Waters of the United States” Rule*, LAW360 (July 6, 2015, 1:03 PM), <http://www.law360.com/articles/674520/wha>

addresses one allegation, among many, namely whether the Rule “expand[s] CWA jurisdiction beyond historical coverage and U.S. Supreme Court precedent.”<sup>187</sup>

## II. THE CLEAN WATER RULE PROPERLY INTERPRETS CWA JURISDICTION AND COMPORTS WITH SUPREME COURT PRECEDENT

The Clean Water Rule was a response to hundreds of requests for clarification on the scope of “waters of the United States.” In the Rule, the Agencies have used a combination of science, technical expertise, and practical experience to establish when a “significant nexus” is always present with certain categories of “waters.” These “waters” are considered per se jurisdictional under the CWA. Further, the Rule creates two categories of “water” where jurisdiction must be reviewed on a case-by-case basis. This Part analyzes the Rule and argues that it is permissible under Supreme Court precedent. Moreover, the Rule provides the public with additional clarity on the scope of federal jurisdiction by defining terms previously undefined, providing bright-line delineations, and creating per se categories that will help to streamline agency review.

### A. *The Rule Adopts Justice Kennedy’s “Significant Nexus” Test*

The Final Rule adopts and incorporates Justice Kennedy’s “significant nexus” test into its definition of “waters of the United States.”<sup>188</sup> While there is no unanimous agreement that his concurrence in *Rapanos* is controlling, courts have generally accepted Justice Kennedy’s “significant nexus” test as the “best instruction on the permissible parameters of ‘waters of the United States.’”<sup>189</sup> While

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t-to-know-about-the-waters-of-the-united-states-rule (listing potential legal challenges that the Rule would face following its implementation).

187. *Id.*

188. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,104–08 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.); see, e.g., Christopher D. Thomas, *Defining “Waters of the United States”: A Mean-Spirited Guide*, NAT. RESOURCES & ENV’T, Summer 2015, at 33 (noting that the Final Rule and its preamble mention the phrase ‘significant nexus’ 438 times in comparison to the phrase “relatively permanent” from the plurality’s standard, which is mentioned only twice).

189. *In re* EPA, 803 F.3d 804, 807 (6th Cir. 2015) (citing *United States v. Cundiff*, 555 F.3d 200, 208–10 (6th Cir. 2009)). In its October 2015 Order staying implementation of the Clean Water Rule nationwide, the Sixth Circuit noted that “[t]here are real questions regarding the collective meaning of the Court’s fragmented opinions in *Rapanos*.” *Id.* at 807 n.3. However, even the parties challenging the Rule have accepted the Agencies’ interpretation of CWA jurisdiction

the Agencies used both the plurality's and Justice Kennedy's tests to establish jurisdiction following *Rapanos*,<sup>190</sup> the Rule incorporates Justice Kennedy's "significant nexus" standard into the new definition of "waters of the United States."<sup>191</sup> The Rule explains that each category of jurisdictional water must have a "significant nexus" with traditional navigable waters.<sup>192</sup> In the Rule, the Agencies define "significant nexus" for the first time and redefine the categories of CWA jurisdiction using the "significant nexus" test.<sup>193</sup> The Agencies used the Science Report and their own expertise to identify six categories of waters, listed in sections (a) (1)–(6), that are per se jurisdictional because there will always be a "significant nexus" between these types of waters and traditional navigable water.<sup>194</sup> Further, the Rule establishes two categories of "waters" in sections (a) (7) and (a) (8) that the Agencies must consider on a case-specific basis to determine if a "significant nexus" is present to justify CWA jurisdiction.<sup>195</sup>

The Rule's definition of "significant nexus" expounds on Justice Kennedy's framework of what may constitute a "significant nexus" in *Rapanos*. In *Rapanos*, Justice Kennedy stated that "[t]he required nexus must be assessed in terms of the statute's goals and purposes," which Congress specified were "to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"<sup>196</sup> Similarly, the Rule's definition of "significant nexus" specifies that a

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using Justice Kennedy's "significant nexus" test. *Id.* at 807. Further, both the Agencies and all of the Circuit Courts of Appeals following *Rapanos* have acknowledged Justice Kennedy's test as the requisite standard. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 41 (explaining agreement between all of the Circuit Courts of Appeal that Justice Kennedy's "significant nexus" standard should be considered when determining jurisdiction under the CWA). For more discussion, entire scholarly articles have been devoted to the analysis of interpreting a controlling opinion from *Rapanos*. See generally Chwee, *supra* note 66 (analyzing how courts should apply the plurality's and Justice Kennedy's standard in *Rapanos*).

190. See RAPANOS GUIDANCE, *supra* note 103, at 3 (announcing that the Agencies will find CWA jurisdiction if either the plurality's or Justice Kennedy's test is met).

191. *Id.* at 7.

192. Clean Water Rule, 80 Fed. Reg. at 37,057.

193. See *id.* at 37,068, 37,073 (finding categorical jurisdiction for *all* tributaries and adjacent waters based on scientific findings that these waters have a "significant nexus" connection with traditional navigable waters).

194. See *supra* note 171 and accompanying text (citing the sections of the Rule that provide for per se CWA jurisdiction).

195. See *supra* notes 172–79 and accompanying text (citing and explaining the types of waters that may be considered jurisdictional on a case-by-case basis).

196. *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a)).

“significant nexus means that a water . . . significantly affects the chemical, physical, or biological integrity of a water.”<sup>197</sup>

Further, in *Rapanos*, Justice Kennedy identified factors such as “volume of flow” and “proximity to navigable waters,” which the Agencies may view as “relevant considerations” to determine whether adjacent wetlands have a “significant enough” connection to navigable waters to be jurisdictional under the CWA.<sup>198</sup> Accordingly, the Rule’s definition incorporated similar factors to evaluate the presence of a “significant nexus.”<sup>199</sup> While the Agencies defined “significant nexus” officially for the first time, the factors codified in the Rule’s definition are the same factors that the Circuit Courts of Appeals have applied nationwide following *Rapanos* to establish a “significant nexus.”<sup>200</sup> Hence, the presence of these factors in the Rule’s definition should come as no surprise to CWA permit seekers and lower court judges. While Justice Kennedy specified that CWA jurisdiction depended on a “significant nexus” connection, he acknowledged that the Agencies could further define this standard, which is precisely what the Agencies have done.<sup>201</sup> Although the Agencies do not specifically articulate that they have adopted Justice Kennedy’s “significant nexus” test, they have implicitly adopted his test as the requisite standard to establish CWA jurisdiction by incorporating the test into each category of jurisdictional water in the Rule.<sup>202</sup>

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197. Clean Water Rule, 80 Fed. Reg. at 37,106 (codified at 33 C.F.R. § 328.3(c)(5)).

198. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring).

199. See Clean Water Rule, 80 Fed. Reg. at 37,106 (codified at 33 C.F.R. § 328.3(c)(5)(vi)) (incorporating other factors, such as sediment trapping, nutrient recycling, runoff storage, contribution of flow, and export of organic matter).

200. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 44–45 (listing the types of functions used by federal circuit courts to evaluate a “significant nexus” with a downstream traditionally navigable water”). For example, courts have considered “water storage capacity,” *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 603 F. App’x 149, 151 (4th Cir. 2015); “contribution of flow,” *United States v. Donovan*, 661 F.3d 174, 186 (3d Cir. 2011); “runoff,” *United States v. Cundiff*, 555 F.3d 200, 210–11 (6th Cir. 2009); “nutrient recycling,” *Donovan*, 662 F.3d at 186; “pollutant trapping or filtering,” *Donovan*, 662 F.3d at 186, *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008); “export of organic matter,” *Donovan*, 662 F.3d at 186; and “fish and wildlife habitat,” *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000–01 (9th Cir. 2007).

201. See *Rapanos*, 547 U.S. at 781–82 (Kennedy, J., concurring) (referencing the Agencies’ ability to specify with “regulations or adjudication”); see also Thomas, *supra* note 188, at 33–34 (hypothesizing that the Agencies “prepared the administrative record with the belief that Justice Kennedy might someday be the fifth vote to uphold the rule”).

202. Thomas, *supra* note 188, at 33.

The definition of “significant nexus” and the incorporation of the “significant nexus” test into the Rule’s categories of CWA jurisdiction will help streamline review and make regulation of the CWA more consistent. Prior to the Rule, the Agencies’ guidance documents explained that the Agencies could evaluate waters for a “significant nexus” connection; however, the documents presented no uniform standard for doing so to the regulated public.<sup>203</sup> The absence of a definition led to inconsistency not only among Agency decisions but also in the standard courts used to evaluate challenges to permit decisions.<sup>204</sup> Thus, to implement the “significant nexus” test consistently, the Agencies needed a uniform definition to clarify what constituted a “significant nexus.” By incorporating the “significant nexus” standard into categories of waters that the Agencies will consider per se jurisdictional,<sup>205</sup> the Rule will help streamline Agency review by eliminating burdensome and time-consuming case-by-case analyses for these waters.

Despite this benefit, critics of the Rule have argued that the Agencies have impermissibly expanded CWA jurisdiction by defining “significant nexus” more broadly to include “waters that would previously have been out of reach.”<sup>206</sup> However, the Agencies have adopted the definition based on Justice Kennedy’s opinion in *Rapanos* and have codified the Agency standards used in practice.<sup>207</sup> If anything, the Rule’s definition should provide assurance to permit-seekers that the Agencies will apply the standard more consistently

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203. See RAPANOS GUIDANCE, *supra* note 103, at 1, 8 (indicating the factors that will be taken into consideration when determining the presence of a “significant nexus” without further detail).

204. See, e.g., *Precon*, 603 F. App’x at 151 (declaring that “the significant nexus test is a ‘flexible ecological inquiry’”); *Cundiff*, 555 F.3d at 211 (declaring laboratory analysis “is [not] the sole method by which a significant nexus may be proved”); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (declaring the ambiguity of “significant nexus” in *Rapanos* when the court reflected, “exactly what is ‘significant’ and how is a ‘nexus’ determined?”).

205. See *supra* text accompanying note 171 (listing sections (a)(1)–(6) of the Rule and explaining the types of “waters” that will be considered per se jurisdictional).

206. Christopher H. Dolan & Olivia D. Lucas, *Unsettled Waters: Clean Water Rule Challenges Remain*, LAW360 (Sept. 16, 2015, 12:28 PM), <http://www.law360.com/articles/701635/unsettled-waters-clean-water-rule-challenges-remain> (alteration in original) (explaining that many of the industry and agriculture sectors interpreted the Rule as a significant expansion of the waters the Agencies could regulate within their CWA jurisdiction).

207. RAPANOS GUIDANCE, *supra* note 103, at 9 (announcing how the Agencies will apply the “significant nexus” test to establish CWA jurisdiction following *Rapanos*).

nationwide.<sup>208</sup> Therefore, by adopting Justice Kennedy's framework and promulgating a definition for "significant nexus," the Agencies have provided increased clarity to the regulated public and have adhered to the permissible scope of CWA jurisdiction articulated by Justice Kennedy in *Rapanos*.

*B. The Rule Incorporates the "Significant Nexus" Test into Three Categories of CWA Jurisdiction*

The Rule's definition of "waters of the United States" includes three broad categories of jurisdiction for waters protected under the CWA.<sup>209</sup> These categories include (1) "[w]aters that are jurisdictional in all instances," (2) "waters that are excluded from jurisdiction," and (3) "a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional."<sup>210</sup> While the Rule retains this general categorical structure from the Agencies' guidance documents, the Rule primarily affects a few portions of the definition in existing regulations.<sup>211</sup> "Tributaries" and "adjacent waters" are now considered per se jurisdictional based on new definitions for these waters,<sup>212</sup> and the category formerly called "other waters" is now two categories of "waters" that the Agencies must review on a case-by-case basis.<sup>213</sup> Despite public concern over these changes, the Rule comports with Supreme Court precedent.

*1. Waters that are per se jurisdictional*

The Rule identifies "waters" that will always be considered jurisdictional under the CWA. The per se jurisdictional "waters" are further divided into six subcategories: (1) traditional navigable

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208. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,095 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.) (explaining how the Rule provides "clear and consistent parameters" for Agency officials and "transparency to the regulated public over which factors will be considered").

209. *Id.* at 37,057.

210. *Id.* The Rule explains that the Agencies will alter these categories, if needed, to reflect any changes in the evolving science around water classifications or the Agencies' own experience implementing the Rule. *Id.* at 37,058.

211. See Thomas, *supra* note 188, at 34 (analyzing that the "Final Rule most notably tinkers with the language in three areas of major concern").

212. The Rule did not change the primary definition of "adjacent"; however, it defined the term "neighboring," which is included in the definition of "adjacent waters," for the first time. Hogan et al., *supra* note 186.

213. *Id.*

waters, (2) interstate waters, (3) territorial seas, (4) impoundments of jurisdictional waters, (5) tributaries, and (6) adjacent waters.<sup>214</sup>

The first four subcategories of per se “waters” have been traditionally classified as jurisdictional under the CWA.<sup>215</sup> The Corps has had federal authority over traditional navigable waters tracing back to the 1899 Rivers and Harbors Appropriations Act, which granted the Corps authority to regulate discharge into “navigable waters” that were used or could be used for commerce.<sup>216</sup> Further, the Agencies’ jurisdiction over interstate waters (waters that cross state lines) has historically been part of the Agencies’ regulations, and Congress’s definition of “navigable waters” in the CWA explicitly includes jurisdiction over “the territorial seas.”<sup>217</sup> The Supreme Court has also recognized CWA jurisdiction over impoundments of jurisdictional waters—waters in sections (a)(1)–(3) that have been dammed.<sup>218</sup> Accordingly, the Rule does not make any changes to CWA jurisdiction for these subcategories.<sup>219</sup>

The fifth subcategory, tributaries, also comports with Supreme Court precedent. Federal jurisdiction over tributaries is not novel; however, the Rule “makes tributaries . . . that share a ‘significant nexus’ to ‘waters of the United States’ jurisdictional by rule.”<sup>220</sup>

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214. Clean Water Rule, 80 Fed. Reg. at 37,058, 37,104 (codified at 33 C.F.R. § 328.3(a)(1)–(6)).

215. See *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 370 (2006) (upholding jurisdiction over dammed water as a “waters of the United States”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (upholding the Corps’ regulation, which established CWA jurisdiction over traditionally navigable waters, interstate waters, and the territorial seas).

216. See *supra* note 43 (explaining the history of the RHA). More examples of traditional navigable waters under CWA jurisdiction include Great Salt Lake in Utah and Lake Minnetonka in Minnesota. RAPANOS GUIDANCE, *supra* note 103, at 5 n.20.

217. See CWA § 502(7); 33 U.S.C. § 1362(7) (2012) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”); 33 C.F.R. § 323.2(a)(2)(1985) (establishing jurisdiction for “[a]ll interstate waters including interstate wetlands”).

218. See *S.D. Warren Co.*, 547 U.S. at 379 n.5 (clarifying that one cannot avoid jurisdiction by damming or impounding a “water of the United States”); see also Clean Water Rule, 80 Fed. Reg. at 37,075 (same).

219. Clean Water Rule, 80 Fed. Reg. at 37,056 (citing 33 C.F.R. § 328.3; 40 C.F.R. § 122.2) (“Existing regulations (last codified in 1896) define ‘waters of the United States’ as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.”).

220. Hogan et al., *supra* note 186; see *Riverside Bayview*, 474 U.S. at 129 (“The [1975] regulation extends the Corps’ authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries.”); TECHNICAL SUPPORT

Previously, the Agencies regulated all tributaries without restriction.<sup>221</sup> The Rule's key change to the regulation of tributaries is that the Agencies define "tributary" for the first time, and thus, some tributaries that previously may have been considered on a case-by-case basis are now considered per se jurisdictional.<sup>222</sup> The Rule defines "tributary" as a "water that contributes flow, either directly or through another water . . . that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark."<sup>223</sup> Further, a "tributary" can be natural, man-made, or man-altered and does not lose its status if it has constructed or natural breaks, such as "wetlands, along the run of a stream, debris piles, boulder fields, or a stream that flows underground."<sup>224</sup>

The Rule's definition for "tributary" is consistent with Justice Kennedy's "significant nexus" test.<sup>225</sup> As Justice Kennedy specified, a "significant nexus" connection to navigable or potentially navigable water must be present for CWA jurisdiction.<sup>226</sup> The Rule's definition of "tributary" requires physical indicators of a "bed and banks" and an "ordinary high water mark"<sup>227</sup> to ensure the presence of sufficient

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DOCUMENT, *supra* note 166, at 24 (referencing the Corps' 1975 interim regulations that "defined navigable waters for the purposes of the [CWA] to include non-navigable tributaries").

221. Clean Water Rule, 80 Fed. Reg. at 37,058.

222. See Deborah Freeman & Steve Dougherty, *New Clean Water Act Rule Defining Waters of the United States*, 44 COLO. LAW. 43, 44 (2015) (explaining that intermittent tributaries were previously considered "other waters" and were considered on a case-by-case basis); Hogan et al., *supra* note 186 (mentioning that the Rule's definition for tributaries "removes a distinction in the [Agencies'] 2008 guidance between permanent and intermittent tributaries"); *supra* notes 171, 182 and accompanying text (citing the Rule and describing the new definitions).

223. Clean Water Rule, 80 Fed. Reg. at 37,105 (codified at 33 C.F.R. § 328.3(c)(3)).

224. *Id.* at 37,105–06. A tributary may also be considered jurisdictional if "it contributes flow through a water of the United States" to a traditionally navigable water. *Id.* at 37,106.

225. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 31 (explaining that while Justice Kennedy specifically referred to a "significant nexus" with adjacent wetlands in *Rapanos*, the "significant nexus" test is not solely limited to application with "adjacent wetlands").

226. *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

227. Clean Water Rule, 80 Fed. Reg. at 37,105 (codified at 33 C.F.R. § 328.3(c)(6)). An "ordinary high water mark" is defined as the "line on the shore established by the fluctuations of water and indicated by the physical characteristics such as a clear, natural line impressed on the bank, shelving, [and] changes in the character of soil." *Id.* at 37,106.

and regular “volume, frequency, and duration of flow” of water.<sup>228</sup> Hence, the Agencies defined “tributary” to include physical characteristics that demonstrate either consistent surface flow or other biological or chemical connections to downstream navigable waters.<sup>229</sup> These physical characteristics ensure that jurisdictional tributaries possess the requisite “significant nexus” connection with traditional navigable waters so that jurisdiction is consistent with the permissible scope of the “waters of the United States” that the Supreme Court outlined in *Rapanos*.<sup>230</sup>

The allegation that the Rule’s per se jurisdiction over tributaries does not satisfy the “significant nexus” test misinterprets Justice Kennedy’s opinion.<sup>231</sup> Justice Kennedy only expressed concern with tributaries that did not have a “significant nexus” connection.<sup>232</sup> He also did not express any disfavor with categorical jurisdiction once the Agencies had undergone rulemaking.<sup>233</sup> Although Justice Kennedy concluded that a “significant nexus” must be present to establish jurisdiction, he stipulated that the Agencies could “choose to identify categories of tributaries [through regulations or adjudication] that, due to their volume of flow,” are “significant

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228. See *id.* at 37,105–06 (codified at 33 C.F.R. § 328.3(c)(3)); TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 69–72 (defining “tributary” to include waters where there is evidence of a “strong influence on the physical, chemical, and biological integrity of downstream waters” consistent with the CWA’s statutory objective).

229. Clean Water Rule, 80 Fed. Reg. at 37,076; see also TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 70 (explaining the Agencies’ process for identifying and concluding that these types of connections were “significant enough” for CWA jurisdiction).

230. See *Rapanos*, 547 U.S. at 779, 786 (Kennedy, J., concurring) (rejecting jurisdiction over “waters” that “carry only insubstantial flow” or otherwise have no connection to navigable waters).

231. See First Amended Complaint at 14–16, *Georgia v. EPA*, No. 2:15-cv-79, 2015 WL 5117699 (S.D. Ga. July 20, 2015) (alleging the Rule’s per se jurisdiction over tributaries exceeds the permissible scope of CWA jurisdiction).

232. See *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring) (expressing concern with the Corps establishing jurisdiction over uncertain “surface water connections” and his conclusion that the “presence of a hydrologic connection . . . [a]bsent some [other] measure” of the “significance of the connection” between the tributaries and navigable-in-fact waters was insufficient to establish CWA jurisdiction); see also TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 67 (explaining that Justice Kennedy “did not raise concerns with the [A]gencies’ existing jurisdiction over tributaries themselves”).

233. *Rapanos*, 547 U.S. at 780, 782 (Kennedy, J., concurring) (suggesting that the Agencies may “presume covered status for other comparable wetlands [as a matter of administrative convenience]”).

enough” to be considered jurisdictional.<sup>234</sup> This is exactly what the Agencies have done: the Agencies have used Justice Kennedy’s “significant nexus” standard to define “tributary” in a manner whereby the tributaries’ features will demonstrate the requisite “nexus” for jurisdiction.<sup>235</sup> Essentially, pursuant to *Rapanos*, once an Agency finds a “significant nexus,” CWA jurisdiction is appropriate. Therefore, the Agencies’ decision to establish this jurisdiction with a per se definition comports with the Supreme Court’s decision in *Rapanos*.<sup>236</sup>

Moreover, the claim that the categorical jurisdiction of “tributaries” violates the plurality’s standard for a “continuous surface connection” under *Rapanos* is inconsequential.<sup>237</sup> No court has held that the plurality’s standard is the primary standard for determining CWA jurisdiction after *Rapanos*.<sup>238</sup> In fact, the courts that have considered the plurality’s standard have used it in combination with Justice Kennedy’s “significant nexus” test.<sup>239</sup> Thus, if a “water” satisfied either test, the courts upheld CWA jurisdiction.<sup>240</sup> Therefore, if waters meet the definition of “tributary” in the Rule, the fact that a court may not find jurisdiction under the plurality’s test is irrelevant because a tributary is jurisdictional under the “significant nexus” test.<sup>241</sup>

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234. *Id.* at 780–81.

235. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 70–71 (explaining the scientific analysis used to determine the presence of a “significant nexus” with navigable waters).

236. See *Rapanos*, 547 U.S. at 783 (emphasizing that the “significant-nexus test itself prevents problematic applications of statute”).

237. See Complaint for Declaratory and Injunctive Relief at 14, Ass’n of Am. R.R.s v. EPA, No. 3:15-cv-266 (S.D. Tex. Sept. 22, 2015) (claiming that the Rule asserts jurisdiction over “water features that do not constitute a ‘continuous surface connection’”); First Amended Complaint at 16, Georgia v. EPA, No. 2:15-cv-79, 2015 WL 5117699 (S.D. Ga. July 20, 2015). The Rule explains that tributaries with intermittent flow may still possess a “significant nexus” with traditional navigable waters to be considered jurisdictional under the CWA. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,079 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

238. Chwee, *supra* note 66, at 264.

239. See *supra* Section I.C (explaining the different courts of appeals interpretations of CWA jurisdiction under Justice Kennedy’s opinion or the plurality’s opinion).

240. See *id.* (demonstrating that the plurality’s “surface-water connection” standard was always considered with Justice Kennedy’s “significant nexus” standard; thus, if a connection was only found under Justice Kennedy’s standard, that was sufficient for CWA jurisdiction).

241. See Clean Water Rule, 80 Fed. Reg. at 37,058 (clarifying that the Rule only covers tributaries “that meet the significant nexus standard”).

Ultimately, any finding that a water does not meet the plurality's test in no way contravenes the Supreme Court's holding in *Rapanos*.

The sixth subcategory, "adjacent waters," is also consistent with *Rapanos*. The Rule changes existing jurisdiction in Agency regulations from per se jurisdiction over "adjacent wetlands" to per se jurisdiction over "adjacent waters."<sup>242</sup> The Rule keeps the existing definition of "adjacent wetlands" and reclassifies it as the definition for "adjacent waters."<sup>243</sup> "Adjacent waters" include "all waters bordering, contiguous to, or 'neighboring'"<sup>244</sup> jurisdictional waters in sections (a)(1)–(5),<sup>245</sup> including waters separated by constructed or natural barriers, such as dikes or beach dunes.<sup>246</sup>

The per se jurisdiction of "adjacent waters" in lieu of "adjacent wetlands" does not impermissibly expand CWA jurisdiction beyond the scope of the CWA that the Supreme Court has already outlined in its previous cases. While *Riverside Bayview* specifically upheld jurisdiction over "adjacent wetlands," the Court had to determine whether the Corps could reasonably interpret the term "navigable waters" under the CWA to include "adjacent wetlands."<sup>247</sup> Congress's specific use of the term "navigable waters" indicates that the CWA has always had jurisdiction over "waters."<sup>248</sup> Nevertheless, some critics have viewed the Rule's change in terminology from "wetlands" to "waters" as an impermissible expansion of CWA jurisdiction.<sup>249</sup> Specifically, the concern is that the Rule expands per se jurisdiction

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242. Hogan et al., *supra* note 186.

243. *Id.*

244. Clean Water Rule, 80 Fed. Reg. at 37,105 (codified as 33 C.F.R. § 328.3(c)(2)) (defining "neighboring" waters to include "all waters located within 100 feet of the ordinary high water mark," "within the 100-year floodplain," and "within 1,500 feet of the high tide line of a water in [sections] (a)(1) or (a)(3)").

245. See *supra* note 171 and accompanying text (citing Rule sections (a)(1)–(5) establishing jurisdiction over traditional navigable waters, interstate waters, territorial seas, impoundments, and tributaries).

246. Clean Water Rule, 80 Fed. Reg. at 37,105 (codified at 33 C.F.R. § 328.3(c)(1)).

247. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (considering the "wetlands" question without any debate about the inclusion of traditional "waters").

248. CWA § 502(7); 33 U.S.C. § 1362(7) (2012) (defining "navigable waters" under the CWA); *Riverside Bayview*, 474 U.S. at 133 (acknowledging Congress's intent to cover "navigable waters").

249. Freeman & Dougherty, *supra* note 222, at 45.

to “waters” that were previously considered on a case-by-case basis and therefore may not have been found jurisdictional.<sup>250</sup>

However, whether a “water” is a “wetland” or a body of water that is adjacent to a “water of the United States” listed in sections (a)(1)–(a)(5) of the Rule should not affect the determination of CWA jurisdiction where a “significant nexus” connection is present.<sup>251</sup> Justice Kennedy specified that “[a]bsent more specific regulations,” the Agencies “must establish a significant nexus on a case-by-case basis . . . to regulate wetlands based on adjacency to non[-]navigable tributaries.”<sup>252</sup> A literal interpretation of this sentence suggests that once the Agencies promulgate specific regulations, case-by-case analysis is no longer necessary. Moreover, the Agencies have followed Justice Kennedy’s suggestion to develop more specific regulations—the Rule—to mitigate against the need for ongoing case-by-case analysis.<sup>253</sup> The Rule confirms that “adjacent waters” jurisdictional under the Rule are “physically, chemically, and biologically integrated with downstream traditional navigable waters.”<sup>254</sup> Therefore, the Rule does not expand jurisdiction over any surface waters that would not have been found to have a “significant nexus” under an individual case-specific review. The Agencies have jurisdiction over these “adjacent waters” regardless of whether they continue to evaluate the waters on a case-by-case basis or create a rule that establishes per se jurisdiction over the waters.

Further, the Rule’s new definition of the term “neighboring” includes distance limitations, which provide when the Agencies may

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250. See Complaint for Declaratory and Injunctive Relief at 17, *Ass’n of Am. R.R.s v. EPA*, No. 3:15-cv-266 (S.D. Tex. Sept. 22, 2015) (claiming that the Rule’s jurisdiction over all “adjacent waters” violates the permissible scope of CWA jurisdiction in *Rapanos*); First Amended Complaint at 17, *Georgia v. EPA*, No. 2:15-cv-79, 2015 WL 5117699 (S.D. Ga. July 20, 2015) (arguing that the expansion of per se coverage exceeds the Agencies’ authority under the CWA).

251. See *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring) (emphasizing Justice Kennedy’s sole focus upon “the existence of a significant nexus” connection to establish CWA jurisdiction).

252. *Id.* at 782.

253. *Id.* (detailing that the Agencies could “presume covered status for other comparable wetlands [as a matter of administrative convenience]”).

254. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 275–79 (explaining how these waters “can significantly affect downstream traditional navigable waters, interstate waters, or the territorial seas”); *id.* at 162 (indicating that the Science Report also supports finding “adjacency” on the basis of functional relationships “rather than solely on the basis of geographical proximity to jurisdictional waters”).

deem waters per se jurisdictional as “adjacent waters.”<sup>255</sup> Despite concerns about federal overreach, the distance limitations do not expand jurisdiction of “adjacent waters” beyond the scope that the Court outlined in *Riverside Bayview* and *Rapanos*.<sup>256</sup> The Court has repeatedly acknowledged the boundary-drawing problem that the Agencies have faced in establishing the scope of jurisdiction based on adjacency.<sup>257</sup> In both *Riverside Bayview* and *Rapanos*, the Court noted that when the Agencies define the outer limits of CWA jurisdiction, the Agencies “must necessarily choose some point at which water ends and land begins.”<sup>258</sup> In the Rule, the Agencies have concluded that functional relationships sufficient to establish a “significant nexus connection” with navigable waters occur within these distances.<sup>259</sup> As such, the Agencies have used reasonable judgment to determine the outer limit of jurisdiction for “adjacent waters,” a task

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255. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,105 (June 29, 2015) (codified as 33 C.F.R. § 328.3(c)(1)–(2)) (defining “adjacent” waters to include “neighboring” waters and defining “neighboring” waters to include “[a]ll waters located within 100 feet of the ordinary high water mark,” “within the 100-year floodplain,” and “within 1,500 feet of the high tide line of a water”). There is pending litigation alleging that the distance limitations included in the Rule violate the Administrative Procedure Act, 5 U.S.C. § 553, because these limitations were not included in the Proposed Rule. Jonathan H. Adler, *Sixth Circuit Puts Controversial “Waters of the United States” (WOTUS) Rule on Hold*, WASH. POST: VOLOKH CONSPIRACY (Oct. 9, 2015), <https://www.washingtonpost.com/news/vo-lokh-conspiracy/wp/2015/10/09/sixth-circuit-puts-controversial-waters-of-the-united-states-wotus-rule-on-hold>. Notwithstanding this argument, which will not be addressed in this Comment, the distance limitations alone do not mean that a “significant nexus” may not be found between these waters and a traditional navigable water so that jurisdiction would be appropriate.

256. *But see* Dolan & Lucas, *supra* note 206 (expressing some critics’ concern over many borderline waters “being immediately swept in under over-broad definitions” using the “significant nexus” standard).

257. See *Rapanos*, 547 U.S. at 742–43 (plurality opinion) (noting that Agencies have found it troublesome to determine adjacency based on ecological considerations); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (explaining the difficulty of defining the bounds of regulatory authority for adjoining waters).

258. *Rapanos*, 547 U.S. at 740 (quoting *Riverside Bayview*, 474 U.S. at 132); *Riverside Bayview*, 474 U.S. at 132 (recognizing that “[w]here on this continuum [between open waters and dry land] to find the limit of ‘waters’ is far from obvious”).

259. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 298–305 (discussing the research and agency expertise that suggest waters within 100 feet “perform critical processes and functions”). The Science Report recognizes that distance is not the only factor “that influences connections”; however, it does confirm that “waters” within these distance ranges are in a position to “individually and collectively affect the integrity of downstream waters.” *Id.* at 295–96.

that the Court recognized was not only necessary but also extremely difficult.<sup>260</sup> Presumably under Justice Kennedy's standard, if a "significant nexus" is found with a traditional navigable water, jurisdiction would be appropriate regardless of the distance from the outer limits of the "waters" listed in sections (a)(1)–(5).<sup>261</sup> Therefore, the per se definition of "adjacent waters" and the incorporation of distance limitations into the Rule's definition does not exceed the scope of permissible CWA jurisdiction that the Court outlined in *Riverside Bayview* and *Rapanos*.

Overall, the Agencies have provided the regulated public with additional clarity about the scope of CWA jurisdiction by defining what constitutes a "tributary," including "adjacent waters" as a per se category, and establishing bright-line boundaries of jurisdiction for these "waters." Previously, all tributaries, which were undefined, were either jurisdictional or considered on a case-by-case basis.<sup>262</sup> Thus, by defining "tributary," the Agencies have given the public a precise definition so the public can better understand what "tributaries" will be considered jurisdictional under the CWA.<sup>263</sup> Additionally, following *Rapanos*, many "adjacent waters" still required a lengthy and

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260. See Clean Water Rule, 80 Fed. Reg. at 37,081 (explaining that the Agencies have "established boundaries that are, in their judgment, reasonable and consistent with the statute"). Further, the Rule's adoption of distance limitations can be distinguished from the "complacent acceptance" of distance limitations critiqued by the plurality in *Rapanos* due to the scientific substantiation in the Science Report. Compare *Rapanos*, 547 U.S. at 746 ("*Riverside Bayview* . . . provides no support for the dissent's complacent acceptance of the Corps' definition of 'adjacent,' which . . . has extended beyond reason to include . . . the 100-year floodplain of covered waters."), with TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 294–305 (finding that waters within these distances are "integrally linked to the chemical, physical, or biological functions of waters to which they are adjacent and downstream to the traditional navigable waters").

261. See *Rapanos*, 547 U.S. at 783–85 (Kennedy, J., concurring) (announcing that "as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute"). In *SWANCC*, the Court emphasized that "[i]t was the significant nexus between the wetlands and 'navigable waters'" that permitted jurisdiction in *Riverside Bayview*. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001). Thus, presumably, if a "significant nexus" had been present in *SWANCC*, the Court would have found the isolated ponds to be within CWA jurisdiction regardless of their distance with navigable water.

262. Clean Water Rule, 80 Fed. Reg. at 37,058 (explaining that the existing regulations regulated "all tributaries without qualification"). See *supra* note 222 and accompanying text (describing the Agencies' former distinction between intermittent and permanent tributaries).

263. See Clean Water Rule, 80 Fed. Reg. at 37,079 (describing the physical characteristics that must be present for CWA jurisdiction over a "tributary").

time-consuming case-by-case analysis.<sup>264</sup> The new Rule includes “adjacent waters” in the former per se category of “adjacent wetlands,” and the public has the “bright-line boundaries” it requested during the notice and comment period to limit federal regulation over these “waters.”<sup>265</sup> These per se categories will not only clarify the Agencies’ regulations but will also help streamline Agency review of permit applications and provide more consistent regulation of the CWA to the benefit of both the Agencies and the regulated public.<sup>266</sup>

## 2. *Waters that are not jurisdictional: Exclusions*

The Rule maintains all of the Agencies’ “regulatory exclusions,” which enumerate the waters that *will not* be considered “waters of the United States.”<sup>267</sup> In fact, compared with existing regulations, the Rule expands the list of exclusions, thereby reducing the scope of CWA jurisdiction.<sup>268</sup> The Agencies have explained that “[a]ll existing exclusions from the definition of ‘waters of the United States’ are retained, and several exclusions reflecting longstanding [A]gencies’ practice are added to the regulation for the first time.”<sup>269</sup> Some of these new bright-line exclusions include erosional features (such as gullies), artificial reflecting pools, groundwater, puddles, and three types of ditches.<sup>270</sup>

The Agencies’ failure to exclude all ditches from CWA jurisdiction falls within the *Rapanos* Court’s interpretation of the scope of the CWA. The Rule redefines and clarifies the type of ditches that are excluded from CWA jurisdiction, and in certain circumstances, a ditch may be considered jurisdictional.<sup>271</sup> Specifically, a ditch will fall under

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264. Hogan et. al, *supra* note 186.

265. See Clean Water Rule, 80 Fed. Reg. at 37,057 (referencing many comments urging the Agencies to provide more bright-line boundaries to make it easier to identify jurisdictional “adjacent waters”).

266. See *id.* at 37,056 (discussing how “case-specific jurisdictional analysis . . . can result in inconsistent interpretation of CWA jurisdiction”).

267. See *supra* notes 180–81 and accompanying text (specifying the waters codified at 33 C.F.R. § 328.3(b) that will not be considered “waters of the United States”).

268. Clean Water Rule, 80 Fed. Reg. at 37,055. The Rule also excludes “some waters that were previously considered jurisdictional on a case-specific basis.” Freeman & Dougherty, *supra* note 222, at 45.

269. Clean Water Rule, 80 Fed. Reg. at 37,073.

270. *Id.* at 37,098 (listing the regulatory exclusions that have been added or modified).

271. *Id.* at 37,078, 37,097.

CWA jurisdiction if it meets both (1) the definition of “tributary”<sup>272</sup> and (2) is not one of the three types of ditches that are expressly excluded in the Rule.<sup>273</sup> This exclusion has been one of the most controversial provisions of the Rule among regulated industry groups.<sup>274</sup>

The Rule explains when the Agencies may consider ditches jurisdictional. To be held jurisdictional, a ditch must meet the definition of “tributary,” and, as previously discussed, that definition includes physical characteristics, such as an “ordinary high water mark,” which demonstrate the presence of a “significant nexus” connection with navigable waters.<sup>275</sup> The Science Report expresses how perennial, intermittent, or ephemeral streams may have a “significant nexus” connection with traditional navigable water.<sup>276</sup> Under the Rule’s definition, isolated ditches without a “significant nexus” connection, or ditches with only a shallow hydrologic linkage to navigable water, are not jurisdictional.<sup>277</sup> Thus, Justice Kennedy’s concerns about the Agencies establishing CWA jurisdiction over these types of tenuous surface connections are not at issue. Ultimately, if the ditch qualifies as a “tributary” and possesses a “significant nexus,” it meets Justice Kennedy’s standard for CWA jurisdiction in *Rapanos*.<sup>278</sup>

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272. A ditch will fall under CWA jurisdiction when it (1) has “a bed and banks and ordinary high water mark” and (2) “contribut[es] flow directly or indirectly through another water to a traditional navigable water, interstate water, or territorial seas.” *Id.* at 37,078.

273. *Id.* The types of ditches that are excluded are ditches that are not excavated in a tributary, do not relocate a tributary, and do not drain a wetland. *Id.* at 37,105 (codified at 33 C.F.R. § 328.3(b)(3)).

274. See Complaint for Declaratory and Injunctive Relief at 15, *Ass’n of Am. R.R.s v. EPA*, No. 3:15-cv-266 (S.D. Tex. Sept. 22, 2015) (claiming that the Rule’s jurisdiction over certain ditches violates the scope of CWA jurisdiction as discussed in *Rapanos*).

275. See *supra* notes 220–41 and accompanying text (explaining how the Agencies used Justice Kennedy’s “significant nexus” standard to define “tributary” in a manner that it will possess the requisite “nexus” for jurisdiction); see also Clean Water Rule, 80 Fed. Reg. at 37,098 (discussing why ditches that relocate streams are not excluded and how a ditch can affect the “natural functions performed by wetlands”).

276. See Clean Water Rule, 80 Fed. Reg. at 37,076 (clarifying how “tributaries regardless of flow duration are very effective at transporting pollutants downstream . . . which impact the integrity and character of traditional navigable waters, interstate waters, and the territorial seas”); Technical Support Document, *supra* note 166, at 259–60.

277. See *id.* at 37,078 (noting that ditches must meet the definition of “tributary, having a bed and banks and ordinary high water mark, and contributing flow directly or indirectly through another water to a traditional navigable water”).

278. See *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring) (holding that “jurisdiction over wetlands depends upon the existence of

Current beliefs that the Agencies' regulation of ditches violates Supreme Court precedent appear to take Justice Kennedy's opinion out of context. Petitioners currently challenging the Rule's validity have cited Justice Kennedy's concern about the expansion of CWA jurisdiction to cover ditches that are isolated from navigable-in-fact waters or carry insubstantial surface flow to these navigable waters as indicative of his disapproval of CWA jurisdiction over all types of ditches.<sup>279</sup> However, this is not the case. Justice Kennedy did not express concern over regulating ditches in general. In fact, he emphasized the plurality's rejection of authority over "man-made drainage ditches" as "dismissive of the interests asserted by the United States in these cases."<sup>280</sup> His concern with isolated waters and waters with "insubstantial flow" stemmed from the lack of a requisite "nexus" to navigable water.<sup>281</sup> At no point did Justice Kennedy indicate that a shallow surface connection will never have a "significant nexus" for CWA jurisdiction.<sup>282</sup> He simply warned that a "mere hydrologic connection" may be "too insubstantial" to establish the required "nexus with navigable waters."<sup>283</sup> Yet, once the requisite "nexus" is established, jurisdiction would be appropriate. Accordingly, the Rule's jurisdiction over ditches that qualify as "tributaries" adheres to Justice Kennedy's decision in *Rapanos*.

Moreover, the Rule's express exclusions provide clear bright-line categories to help the public understand the types of waters that will *never* be considered jurisdictional under the CWA. While the

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a significant nexus between the [waters] in question and navigable waters in the traditional sense"). Further, ditches have been held to be jurisdictional by all of the Circuit Courts of Appeals. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 73 (listing decisions by the circuit courts of appeals that have held that "a man-made ditch can be a 'tributary' of the downstream waters to which the ditch ultimately contributes flow").

279. See First Amended Complaint at 11, *Georgia v. EPA*, No. 2:15-cv-79, 2015 WL 5117699 (S.D. Ga. July 20, 2015) (raising Justice Kennedy's concern that the "Agency's position would impermissibly 'permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters'" (quoting *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring))).

280. *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring).

281. See *id.* at 784–86 (explaining that a "ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it" so "[a] more specific inquiry, based on the significant[-]nexus standard, is therefore necessary").

282. See *id.* at 784 (rejecting the determination of a "significant nexus" connection from a "mere hydrological connection" without further review).

283. *Id.* at 784–85.

Agencies did not exclude every ditch from jurisdiction, the Rule does expressly exclude three types of ditches and several other types of waters that were either previously considered jurisdictional on a case-by-case basis or were excluded in Agency practice but never expressly excluded in the Agencies' regulations.<sup>284</sup> Therefore, the Agencies' expansion of the "regulated exclusions" in the Rule should provide the regulated public with additional clarity and reassurance about which "waters" will never require CWA permits.<sup>285</sup>

3. *Waters to be evaluated on a case-by-case basis under the "significant nexus" test*

The last category includes two types of waters in sections (a)(7) and (a)(8) of the Rule over which the Agencies may find jurisdiction after a case-specific analysis;<sup>286</sup> these categories also comport with the Supreme Court's decision in *Rapanos*. Prior to this Rule, most of these "waters" fell under the category of "other waters" in existing regulations.<sup>287</sup> The Agencies have determined that these waters do not always possess a "significant nexus" with traditional navigable waters appropriate for per se jurisdiction, so the Agencies have decided that these categories of waters must be reviewed on a case-by-case basis.<sup>288</sup>

The first category in section (a)(7) includes five types of waters that the Agencies have found to be "similarly situated"<sup>289</sup> and must be

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284. See *supra* note 273 (describing the types of ditches that will never be found jurisdictional); Freeman & Dougherty, *supra* note 222, at 45 (explaining the changes to exclusions in the Rule).

285. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,097 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.) (noting that "[t]he majority of commenters requested that the [A]gencies' ditch exclusion be clarified or broadened"). The Agencies also added an express exclusion for "puddles," and "farm ponds, log cleaning ponds, and cooling ponds to the list of excluded ponds in the [R]ule based on public comments." *Id.* at 37,099.

286. *Id.* at 37,104–05 (codified at 33 C.F.R. § 328.3(a)(7)–(8)).

287. Hogan et al., *supra* note 186 (explaining the change to this category in the Rule).

288. See TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 331 (citing the Science Report's conclusion that "current science does not support evaluations of the degree of connectivity for specific groups or classes of wetlands," but "[e]valuations of individual wetlands or groups of wetlands, however, could be possible through case-by-case analysis" (quoting *Connectivity of Streams & Wetlands to Downstream Waters*, EPA (2015), at ES-4, <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=67575455&CFTOKEN=91277579>)).

289. Clean Water Rule, 80 Fed. Reg. at 37,104–05 (codified at 33 C.F.R. § 328.3(a)(7)). These waters include prairie potholes (shallow wetlands), Carolina and Delmarva bays (shallow lakes, wetlands, and depressions), pocosins (swamps in upland coastal region), western vernal pools in California (seasonal

combined together for the purpose of analyzing whether a “significant nexus” is present.<sup>290</sup> If one “similarly situated” water is found to have a “significant nexus” with a traditional navigable water, all of the “similarly situated” waters in the region are considered to be jurisdictional.<sup>291</sup>

The second category in section (a)(8) consists of waters (a) within the 100-year floodplain<sup>292</sup> of a traditional navigable water, interstate water, or territorial sea; or (b) all waters within 4,000 feet of the high tide line<sup>293</sup> or ordinary high water mark of one of these traditionally jurisdictional waters.<sup>294</sup> The Agencies may review the effect of these waters either individually or together.<sup>295</sup> Unlike the first category, this category requires a determination of whether to combine the “waters” for the Agencies’ “significant nexus” analysis.<sup>296</sup>

Justice Kennedy’s opinion permits the Rule’s case-specific categories. In *Rapanos*, Justice Kennedy expressly stated that “the [Agencies] must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries.”<sup>297</sup> The Rule specifies that the Agencies must find a “significant nexus” on a case-by-case basis for these

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depressional wetlands), and Texas coastal prairie wetlands. *Id.* at 37,105. The Rule states that these “subcategories are similarly situated because they perform similar functions and they are located sufficiently close to each other to function together in affecting downstream waters.” *Id.* at 37,071. Accordingly, these waters are “sufficiently near each other . . . to function as an integrated habitat.” *Id.*

290. *Id.* at 37,104 (codified at 33 C.F.R. § 328.3(a)(7)). Under the Rule, these types of “waters” must be considered in “combination with all waters of the *same* subcategory [e.g., only pocosins may be analyzed with other pocosins] in the region.” *Id.* at 37,087 (emphasis added).

291. *Id.* at 37,095. The region is “the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry.” *Id.* at 37,091.

292. *See supra* note 178 (defining the “100-year flood plain” as “the area with a one percent annual chance of flooding”).

293. The “high tide line” is the “line of intersection of the land with the water’s surface at the maximum height reached by a rising tide.” Clean Water Rule, 80 Fed. Reg. at 37,106 (codified at 33 C.F.R. § 328.3(c)(7)).

294. *Id.* at 37,105 (codified at 33 C.F.R. § 328.3(a)(8)).

295. *Id.* at 37,095. The Agencies “have not determined that such waters are categorically similarly situated,” so the Agencies will conduct a determination to see whether they are “similarly situated” for the purpose of being combined. *Id.*

296. *Id.* Waters will be combined as “similarly situated” when they “function alike and are sufficiently close to function together in affecting downstream waters.” *Id.*

297. *Rapanos v. United States*, 547 U.S. 715, 782 (2006) (Kennedy, J., concurring) (explaining that “this showing is necessary to avoid unreasonable applications of the statute”).

categories of water.<sup>298</sup> Thus, these categories satisfy Justice Kennedy's requisite standard of review to properly establish CWA jurisdiction.

Further, the combination of "similarly situated" waters also adheres to the Supreme Court's decision in *Rapanos*. Justice Kennedy clearly indicated that the "requisite nexus" would be met "if the wetlands either alone or *in combination* with similarly situated lands in the region, significantly affect the chemical, physical, [or] biological integrity" of other "waters."<sup>299</sup> The Science Report concludes that certain types of "waters" act together in regions and may significantly affect traditional navigable waters.<sup>300</sup> Using the Report's findings of "comparable" or "similarly situated" waters, the Agencies identified which subcategories of "waters" they should review together when assessing the presence of a "significant nexus."<sup>301</sup>

Additionally, dispute over the Rule's combination of "similarly situated" waters in a region misconstrues Justice Kennedy's opinion. Specifically, the argument that the Agencies need to find a "significant nexus" to each similarly situated water is incorrect.<sup>302</sup> This is not the standard that Justice Kennedy proposed in *Rapanos*.<sup>303</sup> Rather, in *Rapanos*, Justice Kennedy stated that the "requisite nexus" would be met "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect . . . *other covered waters more readily understood as 'navigable.'*"<sup>304</sup> Ultimately, his focus was the effect on the connection to "*navigable water*," not between each type of "water" found to be "similarly situated."

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298. Clean Water Rule, 80 Fed. Reg. at 37,105–06 (codified at 33 C.F.R. § 328.3(c)(7)–(8)).

299. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added).

300. TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 331 (explaining that certain waters "have a similar influence on the physical, chemical, and biological integrity of downstream waters and are similarly situated on the landscape").

301. *See id.* at 330–49 (explaining the scientific analysis behind the categories of waters that are considered "similarly situated" in the Rule).

302. *See* First Amended Complaint at 21, *Georgia v. EPA*, No. 2:15-cv-79, 2015 WL 5117699 (S.D. Ga. July 20, 2015) (arguing that the Rule "violates Justice Kennedy's test because Justice Kennedy would only permit the Agencies to assert jurisdiction over a water that 'significantly affect[s] the chemical, physical, and biological integrity of other covered waters,'" and that "Justice Kennedy's test would not permit aggregation of waters across amorphous 'region[s],' as the Rule asserts the Agencies will do" (citations omitted) (quoting *Rapanos*, 547 U.S. at 717 (Kennedy, J., concurring))).

303. *See Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring) (focusing on a "significant nexus between the *wetlands* in question and *navigable waters* in the traditional sense" (emphasis added)).

304. *Id.* at 780 (emphasis added).

Moreover, Justice Kennedy clearly indicated that “[w]here an adequate nexus is established for a particular wetland, it may be permissible as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.”<sup>305</sup> Agencies have made precisely this presumption: they have used the Science Report to presume covered status for certain categories of “waters” that the Report found to be “comparable” or “similarly situated” once Agency officials have determined that a “significant nexus” connection is present.<sup>306</sup> In addition, the Rule follows Justice Kennedy’s instruction to review this effect on a case-by-case basis.<sup>307</sup> Evidently, these sections of the Rule follow Justice Kennedy’s standard proposed in *Rapanos*.

Overall, the Rule’s case-specific categories clarify and limit the application of the “significant nexus” test that could otherwise be very broad. Without such categories, the Agencies could potentially find a “significant nexus” with any traditional navigable water. That potential breadth is the very issue that concerned many critics of the Rule’s incorporation of Justice Kennedy’s “significant nexus” test.<sup>308</sup> While there is disagreement over the distance limitations that the Rule imposes, these limits provide some of the bright-line boundaries that the regulated public requested from the Agencies and also serve as a limit to federal jurisdiction of U.S. waters.<sup>309</sup> Further, the specific sections of the Rule that require case-specific analysis limit this analysis to *only* these two types of “waters,” and this limitation will allow Agency officials to apply the CWA more consistently and provide clarity for those confused about CWA permit jurisdiction.

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305. *Id.* at 782 (emphasis added).

306. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,095 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.) (explaining that “[a] positive ‘significant nexus’ determination would . . . apply to all similarly situated waters within the point of the watershed”).

307. See *id.* at 37,104–06 (codified at 33 C.F.R. § 328.3(a)(7)–(8)) (requiring case-specific review for categories (a)(7) and (a)(8)). Further, all of the courts of appeals have agreed that a “nexus” may be formed by a non-navigable water alone or in combination with other similarly situated waters in the region. TECHNICAL SUPPORT DOCUMENT, *supra* note 166, at 44. Thus, permit seekers should not be surprised by this provision in the Rule.

308. Freeman & Dougherty, *supra* note 222, at 47 (expressing concern that the “significant nexus” test is overly expansive and allows federal overreach for these “waters”).

309. Clean Water Rule, 80 Fed. Reg. at 37,082 (noting requests for a “specific floodplain interval or other limitation . . . to more clearly identify the outer limit”). This Comment assumes that the science that has found these distance limitations to be appropriate is valid.

Ultimately, not only does the Rule provide more clarity about the “waters of the United States,” but it also comports with the Supreme Court’s precedent concerning the permissible scope of the CWA.

#### CONCLUSION

The Clean Water Rule is a response to hundreds of requests for clarification on the scope of the “waters of the United States” under the CWA. While the Rule has become extremely controversial due to its *per se* jurisdiction of tributaries and “adjacent waters,” it does not unilaterally expand the CWA or constitute federal overreach. The Rule comports with the Supreme Court’s decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos*. The Rule follows Justice Kennedy’s framework of “significant nexus” in *Rapanos* and uses his criteria to develop a Rule such that the Agencies may only find jurisdiction when a “significant nexus” is present. Accordingly, the Rule is a rational convergence, which reflects Congress’ intent, a combination of Supreme Court precedent, the most recent science, Agency practice, and public comments. While the Rule may not be the easiest to decipher, it does address many of the regulated public’s requests for greater clarity by defining previously undefined terms and establishing bright-line boundaries. The public can use these clarifications as a tool for guidance to better determine which waters fall under CWA jurisdiction. Further, the Rule creates a structure for streamlined review, which will lead to more consistent application of the CWA to the benefit of both the Agencies and regulated public.

Overall, this Rule is what the public needs, and it provides a logical definition of “waters of the United States” consistent with Congress’s goal for the CWA. If smaller streams and wetlands that have an effect on traditional navigable waters are not protected, individuals will be able to discharge pollutants, undermining the purpose of the CWA. Nevertheless, the Rule is currently subject to nationwide litigation, and the future of the Rule remains uncertain.

The Rule will inevitably make its way to the Supreme Court for review. With the recent passing of Justice Scalia, who vehemently criticized expansive environmental and wetland regulation, the Court’s new composition will likely impact the Rule’s fate. However, the Agencies have followed the permissible scope of CWA jurisdiction that the Supreme Court outlined in its previous cases. Consequently, the Court should uphold the Clean Water Rule.