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THE CLEAN WATER RULE: WHAT IT IS AND WHY IT NEEDS TO GO

Charles C. Davis, III

I. INTRODUCTION

Federal environmental regulations have been no stranger to the courts in recent years,¹ and the Clean Water Act (CWA)² in particular has been a contentious law to implement.³ In the wake of the confusion and costly implementation of the CWA, in part due to U.S. Supreme Court decisions in 2001 and 2006, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) (collectively “the Agencies”) issued the Clean Water Rule (CWR)⁴ that clarified the definition of “waters of the United States” found in the CWA through the use of bright line boundaries to make “the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and consistent with the law and peer reviewed science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.”⁵ The Agencies issued the proposed rule on June 29, 2015, which became permanent on August 28, 2015 and almost immediately a source of controversy and lawsuits.⁶

On August 27, 2015 Judge Ralph Erickson of the District Court for the District of North Dakota (District of North Dakota) issued a preliminary injunction covering thirteen states against the implementation of the CWR.⁷ On October 16, 2015 the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) issued a nationwide stay on the implementation of the CWR in a 2-1 ruling pending further action of the court.⁸ As a result, the EPA and Army Corps issued a joint memorandum

1. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699 (2015).

2. 33 U.S.C. § 1251.

3. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

4. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *Clean Water Rule: Definition of “Waters of the United States”*, 80 Fed. Reg. 37055 (June 29, 2015).

5. ENVTL. PROT. AGENCY, *What the Clean Water Rule Does* (last updated May 27, 2015), <http://www.epa.gov/cleanwaterrule/what-clean-water-rule-does>.

6. *See, e.g.*, Todd Gaziano and M. Reed Hopper, *Final ‘Waters Of The U.S.’ Rule Is More Overreach By EPA*, FORBES (August 3, 2015), <http://www.forbes.com/sites/realspin/2015/08/03/final-waters-of-the-u-s-rule-is-more-overreach-by-the-epa/#2dac57676def>; *see also* 1-11 Mealey’s Water Rights Report 10 (2015).

7. Timothy Cama, *Federal Judge Blocks Obama’s Water Rule*, THE HILL (Aug. 27, 2015), <http://thehill.com/policy/energy-environment/252140-judge-blocks-obamas-water-rule>.

8. *Ohio v. U.S. Army Corps of Eng’rs*, Nos. 15-3799/ 3822/ 3853/ 3887 (6th Cir. 2015). In the 2-1 decision Judge McKeague, writing for the majority, stated that “we conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims” due to the CWR’s distance limitations which appear to be at odds with Justice Kennedy’s *Rapanos* decision. *Id.* In his dissent, Judge Keith stated he be-

stating the Agencies would work with the U.S. Department of Justice to ensure compliance with the stay while “vigorously defending the merits of the Clean Water Rule” in court.⁹

The CWR is a contentious regulation that has divided the public and Congress.¹⁰ For instance, should the CWR come into effect and expand the definition of navigable waters, landowners could face the burden of complying with federal water regulations in addition to existing state ones, such as the permit process required through the CWA Section 404 permit program.¹¹ Though the EPA and Army Corps have attempted to provide some much needed clarification following the Court decisions on the CWA in 2001 and 2006, in this Note I will argue the Sixth Circuit was correct in issuing the stay of the CWR and the regulation should be revised or abandoned.

I begin by discussing the background of the CWA and the Agencies’ resulting regulations that led up to the CWR. Next, I examine the three major Court decisions that addressed the implementation of the CWA and the ensuing state of confusion that the Agencies sought to clarify through the CWR. Subsequently, I address the CWR itself by examining how it seeks to regulate and define navigable waters. I then discuss arguments opposing and supporting the CWR before offering my analysis on why the regulation should be struck down and revised on the grounds that it constitutes federal overreach and is inconsistent with the purpose of the CWA.

II. RELEVANT BACKGROUND ON THE CWA

A. CWA Regulatory Basics

This section will discuss the background of the CWA, from which the EPA and Army Corps asserted their authority to create and implement the CWR. In 1972, Congress amended the Federal Water Pollution Control Act of 1948 to address growing public concerns about water pollution. The amended law became known as the Clean Water Act, which has undergone further amendments since that time.¹² Its objective is to “restore and maintain the chemical, physical, and biologi-

lied the Sixth Circuit lacked subject matter jurisdiction. *Id.* (Keith, J., dissenting). See also *Cama*, *supra* note 7.

9. Memorandum from Gina McCarthy, Adm’r, Env’tl. Protection Agency, & Jo-Ellen Darcy, Assistant Sec. for Civil Works, U.S. Dep’t of the Army, to EPA Deputy Assistant Adm’r for Water et al., (Nov. 16, 2015), http://www2.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf.

10. Mary Clare Jalonick, *Senate Blocks Bill to Undercut EPA Clean Water Rules; White House had Threatened Veto*, U.S. NEWS & WORLD REPORT (Nov. 3, 2015 6:22 P.M.), <http://www.usnews.com/news/politics/articles/2015/11/03/senate-legislation-would-block-epa-clean-water-rules>.

11. ENVTL. PROT. AGENCY, SECTION 404 PERMIT PROGRAM (last updated Oct. 27, 2015), <http://www.epa.gov/cwa-404/section-404-permit-program> (the CWA establishes the ability to regulate dredged or fill material into waters of the United States, with Section 404 requiring a permit before such material is discharged into waters of the United States unless it falls under an exemption to the regulation, such as certain farming activities).

12. ENVTL. PROT. AGENCY, *History of the Clean Water Act*, (June 1, 2015), <http://www2.epa.gov/laws-regulations/history-clean-water-act> (for instance, in 1981 the municipal construction grant process was streamlined, replaced in 1987 with the State Water Pollution Control Revolving Fund, and Title I of the Great Lakes Critical Programs Act of 1990 required the EPA to establish criteria for water quality in the Great Lakes regards to the maximum level of toxic pollutants considered safe).

cal integrity of the Nation's waters."¹³ The CWA is notable for establishing the structure for regulating pollutant discharges in waters of the United States, among its other achievements.¹⁴

Importantly, the CWA enabled the federal government to improve water quality through enforcement provisions.¹⁵ For instance, Section 301¹⁶ prohibits the discharge of any pollutant not in compliance with the CWA and shifted the burden of proof onto the discharger who must show such discharges are permissible under the CWA.¹⁷ Section 301 provides the means for which such discharge can be legal under the Section 402 and Section 404 programs for issuing permits.¹⁸ Section 402 created the National Pollutant Discharge Elimination System that enables permits to be issued for the discharge of pollutants that meet the requirements in the other sections of the CWA.¹⁹ Section 404 facilitates the issuing of permits for the discharge of dredged and filled materials into navigable waters at specified disposal sites.²⁰

The Army Corps was charged with implementing the permitting process of Section 404 due to its previous role in regulating dredged and filled material under the Rivers and Harbors Act of 1899.²¹ While the Army Corps initially had a narrow interpretation of navigable waters, it began to interpret its regulation in a more expansive manner following the 1975 District Court for the District of Columbia decision in *NRDC v. Callaway* where it was determined that Congress intended "waters of the United States" to provide federal jurisdiction to the maximum extent possible under the Commerce Clause of the U.S. Constitution.²² This permitting requirement has been found to impose a burden on landowners who must then comply with federal and state environmental regulations, and has thus been a significant point of contention in CWA litigation.²³

B. U.S. Supreme Court Decisions

This section will provide an overview of the controlling decisions relevant to the CWR. The cases in this section were the three major U.S. Supreme Court

13. 33 U.S.C. § 1251.

14. Allison L. Kvien, *Is Groundwater that Is Hydrologically Connected to Navigable Waters Covered Under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 MINN. J.L. SCI. & TECH. 957, 958 (2015) (citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 179-80 (2001)). See also ENVTL. PROT. AGENCY, *supra* note 12 (giving the EPA authority to institute pollution control such as implementing industry wastewater standards and funding the construction of sewage treatment plants through its grant program).

15. See N. Lindsay Simmons, *Changing Lead Into Gold: Examining Agency Attempts to Use the Clean Water Act to Solve Ecosystem Degradation Issues*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 99, 107 (2014) (citing 33 U.S.C. § 1319 (providing the Administrator of EPA with the authority to pursue enforcement actions whenever a person is in violation of the Act)).

16. 33 U.S.C. § 1311.

17. See Simmons, *supra* note 15, at 107-108.

18. See Simmons, *supra* note 15, at 108.

19. 33 U.S.C. § 1342.

20. 33 U.S.C. § 1344.

21. Simmons, *supra* note 15, at 108 (citing Mark A. Chertok, *Federal Regulation of Wetlands*, SN085 ALI-ABA 1137, 1146 (2008) (stating that Army Corps was afforded authority over § 404 given its prior expertise over § 10 of the RHA)).

22. *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975); see also Simmons, *supra* note 15, at 108.

23. See, e.g., *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

cases dealing with issues related the implementation of the CWA through the EPA and the U.S. Army Corps of Engineers. As the CWR specifically states that it seeks to provide federal guidelines to clarify the ambiguities resulting from these cases, it is essential to understand this trio of cases before considering the CWR.²⁴

i. *United States v. Riverside Bayview Homes, Inc.*²⁵

In this 1985 decision, the respondent land developer dumped material into an area determined to be “wetlands” adjacent to “navigable waters” without obtaining a permit from the U.S. Army Corps of Engineers. This violated the CWA under 33 USC § 1344, and the petitioner challenged this action under the takings clause of the Fifth Amendment. The Court held that permit-granting authority under §1344 to “wetlands” adjacent to navigable waters was not an unreasonable interpretation of the CWA because of the broad definition of federal authority over “navigable waters” and the CWA’s purpose of “restoring the integrity of the Nation’s waters.” The Court also determined that the term “navigable” in the CWA was one of “limited import.”²⁶

ii. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*²⁷

In this 2001 Court decision, petitioners were a collection of municipalities wanting to use an abandoned gravel pit for waste disposal. Respondent U.S. Army Corps of Engineers had originally denied the petitioners’ application to do so, despite the fact the gravel pit ponds were non-navigable, isolated, and thus intrastate waters, on the basis that the disposal site was a protected habitat for migratory birds. The Army Corps defined “navigable waters” as “waters of the United States” under 33 U.S.C. 1362(7) and included intrastate waters as seen in 33 CFR 328.3(a)(3), “the use, degradation or destruction of which could affect interstate or foreign commerce.” In a 5-4 decision, Chief Justice Rehnquist writing for the Court reversed the previous judgment on the grounds that despite the fact petitioner’s waste disposal site was a migratory bird habitat, this was an overextension of federal agency jurisdiction. There, federal agency jurisdiction was found not to extend to isolated, non-navigable intrastate waters, especially when the CWA limited federal jurisdiction to navigable waters.²⁸ The Court stated §404(a) of the CWA does not support jurisdiction where there is no nexus between the wetlands and navigable waters.²⁹ Congressional authority under the CWA was delegated only to waters that were navigable in fact or for those which could so readily be made.³⁰

24. ENVTL. PROT. AGENCY, *Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy* (May 27, 2015), <http://yosemite.epa.gov/opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97>.

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

26. *Id.* at 132-133.

(determining that the term “navigable waters” as used in the CWA meant that Congress intended for some non-navigable waters to nonetheless fall under federal authority).

27. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

28. *See Id.* at 169-72

29. *Id.* at 167.

30. *Id.* at 172.

iii. *Rapanos v. United States*³¹

This split 2006 decision is the most recent time the U.S. Supreme Court decision directly interpreted the CWA, and one which created ambiguity for the public and private sectors to address. CWA provisions prohibited the discharge of any pollutant without a permit to navigable waters in 33 USC § 1362(12), stating that this included adding any pollutant to any point source of navigable waters.³² Section 1344 authorized the Army Corps of Engineers to issue such permits and navigable waters were defined as “waters of the United States, including territorial seas,” per §1362 (7).³³ The Army Corps issued regulations (33 C.F.R. § 328.3) interpreting “waters of the United States” broadly to include intrastate streams and wetlands whose destruction or degradation could affect interstate or foreign commerce, tributaries and wetlands adjacent to such waters, and other adjacent waters separated by natural or manmade barriers.³⁴ Two cases challenging whether four Michigan wetlands that were near ditches and man-made drains that eventually connected to navigable waters fell under the scope of the CWA were consolidated, with the Sixth Circuit affirming that these waters fell under federal jurisdiction because they were “adjacent” to “waters of the United States.”³⁵

The Supreme Court vacated the prior Sixth Circuit judgments and remanded the cases for further proceedings.³⁶ Five justices were unable to agree to an opinion, though they found the Sixth Circuit had not conducted a sufficiently correct analysis under the CWA. Justice Scalia announced the judgment. He stated that while “navigable waters” under the CWA included more than traditional navigable waters, the § 1362(7) phrase “waters of the United States” was not as expansive as the Army Corps had used in its regulations.³⁷ Outside of permanent, standing, or flowing bodies of water, the cannons of construction did not clearly cover adjacent wetlands or intermittent or ephemeral water flows and therefore, the Sixth Circuit applied the wrong standard. Accordingly, it was left to the lower courts to determine whether ditches and drains were “waters” and whether the wetlands were “adjacent” to these waters.³⁸ Justice Kennedy, concurring in the judgment, described a “significant nexus” test for determining which adjacent waters were subject to the CWA. He stated that in order for waters or wetlands to qualify as “navigable waters” under the CWA, (1) the waters must navigable in fact or so reasonably be made (SWANCC), and (2) deference to federal regulation under the CWA is not extensive enough to include whenever waters or wetlands lie alongside a ditch that may eventually flow into traditionally navigable waters.³⁹ He further determined the lower court had not considered the factors to determine if the wetlands had a requisite nexus, so it should therefore be remanded for proper consideration.⁴⁰

31. *Rapanos v. United States*, 547 U.S. 715 (2006). See also ENVTL. PROT. AGENCY, *supra* note 24 (mentioning the confusion left in the wake of *Rapanos* and *SWANCC*).

32. *Rapanos*, 547 U.S. at 723.

33. *Id.*

34. *Id.* at 724.

35. *Id.* at 729-30.

36. *Id.* at 757.

37. *Id.* at 731-32.

38. See *id.* at 731-39.

39. *Id.* at 779-85.

40. *Id.* at 786-87.

iv. Post-*Rapanos*

After *Rapanos*, there has been ambiguity as to which (or both) of Justice Kennedy's and Justice Scalia's tests to apply. Each test supports jurisdiction in areas the other does not. Justice Kennedy's test would support jurisdiction over groundwater connections, while Justice Scalia's could support small yet contiguous discharges into non-navigable waters.⁴¹ As a result, there have been splits in the lower appellate courts. The First, Third, and Eighth Circuits have held what constitutes "waters of the United States" may be determined by either *Rapanos* test. The Seventh and Ninth Circuits most often apply Kennedy's "significant nexus" test and Scalia's in rare cases. The Eleventh Circuit only applies the significant nexus test.⁴²

III. HOW THE CWR FUNCTIONS

This section will examine the statutory construction of the CWR. As previously discussed, the CWA regulates the "discharge of dredged or fill material into the navigable waters."⁴³ Because of the aforementioned problems in the lower courts' differing application of Justice Scalia's continuous surface test or Justice Kennedy's significant nexus test after *Rapanos*,⁴⁴ the EPA and Army Corps published a document in the Federal Register in 2007 to provide guidance as to which waters and wetlands fell under federal jurisdiction.⁴⁵ This brief guidance statement for determining future CWA jurisdiction was subsequently replaced by the EPA and the Corps' Clean Water Rule, published in the Federal Register on June 29, 2015.⁴⁶

To assist the public, the EPA subsequently devoted a portion of its website to explain its position on why the CWR regulation is justified, what the rule does, and other information pertaining to the CWR's implementation.⁴⁷ According to the website,

[The] EPA and the U.S. Army Corps of Engineers finalized the Clean Water Rule to clearly protect the streams and wetlands that form the foundation of the nation's water resources. Protection for many of the nation's streams and wetlands has been confusing, complex, and time-consuming as the result of Supreme Court decisions in 2001⁴⁸ and

41. Kvien, *supra* note 14, at 973-74.

42. Natalia Cabrera, *Using HGM Analysis to Aggregate Wetlands as "Similarly Situated" Under the Rapanos "Significant Nexus" Test*, 42 B.C. ENVTL. AFF. L. REV. 65, 84-85 (2015).

43. 33 U.S.C. § 404.

44. See Joe Koncelik, *Split in Circuits as to Whether Army Corps JD's are Appealable*, OHIO ENVTL. LAW BLOG (Apr. 23, 2015), <http://www.ohioenvironmentallawblog.com/2015/04/articles/wetlands-and-streams/split-in-circuits-as-to-whether-army-corps-jds-are-appealable/>.

45. EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, 72 Fed. Reg. 31824 (June 8, 2007), <http://www.gpo.gov/fdsys/pkg/FR-2007-06-08/pdf/E7-11123.pdf>. See also Channing Martin and Williams Mullen, *Is That Wetland Jurisdictional? A Practical Guide to the New Clean Water Rule* (Aug. 26, 2015), <http://www.jdsupra.com/legalnews/is-that-wetland-jurisdictional-a-62115/>.

46. See ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4.

47. ENVTL. PROT. AGENCY, *Clean Water Rule*, (Dec. 4, 2015), <http://www2.epa.gov/cleanwaterrule>.

48. See *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

2006.⁴⁹ The Clean Water Rule ensures that waters protected under the Clean Water Act are more precisely defined, more predictably determined, and easier for businesses and industry to understand.⁵⁰

The CWR seeks to protect the public health and aquatic resources of the United States by clarifying the scope of which “waters of the United States” are protected under the CWA.⁵¹ There are three categories of regulated waters under the CWR which will be examined in turn: those that are jurisdictional as “waters of the United States,” those that need the application of the case-by-case significant nexus test to determine if they are “waters of the United States,” and those that are excluded from the regulation.⁵²

A. Jurisdictional Waters

These waters are determined to be “waters of the United States” categorically under the CWR and are thus jurisdictional by rule, requiring no further analysis.⁵³ Traditionally navigable waters, interstate waters, the territorial seas, and impoundments are the first four types of jurisdictional waters.⁵⁴ These jurisdictional waters seem to be relatively uncontroversial in that they are largely what would be expected to be covered under the CWR. The two remaining categories of jurisdictional waters are “tributaries” and adjacent waters.⁵⁵ These last two are the most important jurisdictional categories for landowners and developers as they can include isolated wetlands “adjacent” to other jurisdictional waters in addition to small creeks, streams, and ditches that may have little to no flowing water.⁵⁶ They will now be discussed in turn.

i. Tributaries

According to the EPA, the language of prior definitions of “waters of the United States” resulted in the regulation of all tributaries without qualification.⁵⁷ The Corps’ earlier regulations had also previously not defined “tributary,” which left open questions such as: How large does a stream have to be before it is considered a jurisdictional water? Does the level of a stream’s water flow matter? Does

49. See *Rapanos v. United States*, 547 U.S. 715 (2006).

50. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4.

51. *Id.* at 37054.

52. *Id.* at 37058; see also Martin & Mullen, *supra* note 45.

53. *Id.*

54. See Channing Martin and Williams Mullen, *Is that Wetland Jurisdictional? A Practical Guide to the New Clean Water Rule 3* (Aug. 26, 2015), available at <http://www.jdsupra.com/legalnews/is-that-wetland-jurisdictional-a-62115/>.

55. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37054.

56. Martin & Mullen, *supra* note 45, at 4.

57. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

the stream need to have banks?⁵⁸ The EPA seeks to clarify these ambiguities in the new CWR.

To qualify as a jurisdictional water under the CWR, the Agencies state that they more precisely define tributaries as “waters that are characterized by the presence of physical indicators of flow—bed and banks and ordinary high water mark—and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.”⁵⁹ According to the EPA, the CWR only covers tributaries whose waters can be scientifically determined to provide chemical, physical, or biological functions to downstream waters of the United States that meet the agency’s significant nexus standard.⁶⁰ Tributaries meeting this standard are considered categorically jurisdictional, while those that are not are excluded.⁶¹

Under this definition, the CWR includes tributaries that are both natural and manmade, such as canals and ditches not otherwise excluded by the regulation.⁶² For ditches, whose water flow can vary extensively, the CWR states it seeks to clarify past inconsistencies in regulation by excluding certain categories such as those that only have water flow after precipitation. Further, the rule excludes “erosional features, including gullies, rills, and ephemeral features such as ephemeral streams” that lack beds, banks, and ordinary high water marks.⁶³ In sum, natural or tributaries, such as ditches, streams, or rivers, that have a bed, banks, high water marks, and are upstream so they eventually reach a water of the United States are jurisdictional even if at times they flow through non-jurisdictional waters or a natural or manmade break such as a wetland or dam.⁶⁴

ii. Adjacent Waters

The CWR defines “adjacent” waters as those “bordering, contiguous, or neighboring, including waters separated from other ‘waters of the United States’ by constructed dikes or barriers, natural river berms, beach dunes and the like.”⁶⁵ Adjacent waters include “wetlands, ponds, lakes, oxbows, impoundments, and other similar water features” according to the EPA, but not those “subject to established normal farming, silviculture, and ranching activities as those terms are used in Section 404(f) of the CWA.”⁶⁶ Most importantly, the CWR establishes a definition of “neighboring” for the purposes of determining adjacency so that under three cir-

58. Martin & Mullen, *supra* note 45, at 4.

59. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

60. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

(“The agencies identify these functions in the definition of ‘significant nexus’ at paragraph (c)(5).”).

61. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

62. Martin & Mullen, *supra* note 45 at 4.

63. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

64. Martin & Mullen, *supra* note 45 at 4.

65. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

66. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

cumstances, waters “neighboring” waters of the United States would be considered jurisdictional:

Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, as defined in the rule.

Waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary, as defined in the rule (“floodplain waters”).

(3) Waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.⁶⁷

The CWR further says the establishment of these bright line boundaries does not restrict states from considering state specific concerns as well as emerging science for the states to more broadly protect their waters.⁶⁸

This “adjacency” category for automatic waters of the United States is one of the most contentious issues in the CWR. *Riverside Bayview Homes* resulted in the Court upholding CWA regulation of adjacent waters and wetlands, but provided no guidance for waters further removed and in that case the Corps’ regulations did not include a minimum or maximum distance.⁶⁹ The CWR has then established the bright-line test above to determine the distance by which a water or wetland can fall under CWA jurisdiction due to “adjacency,” which some have criticized as federal overreach.⁷⁰ The “neighboring” language of this portion of the CWR asserts CWA jurisdiction over waters or wetlands even if they are not physically adjacent to other jurisdictional waters or have a significant nexus to them, subject to a few exceptions.⁷¹ As stated above, these exceptions include wetlands, ponds, and other waters included in farming or ranching, which are not automatically jurisdictional but can become so pending case-specific review.⁷² In addition, it is important to note the whole water or wetland qualifies as jurisdictional under the CWR if any part of it is considered adjacent.⁷³

67. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

68. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37059.

69. Martin & Mullen, *supra* note 45, at 3.

70. See, e.g., Gaziano and Hopper, *supra* note 6.

71. Gaziano and Hopper, *supra* note 6 at 5.

72. Gaziano and Hopper, *supra* note 6 at 6 (citing 33 U.S.C. § 1344(f)).

73. Gaziano and Hopper, *supra* note 6 at 6.

B. Case-Specific Significant Nexus Waters

In this category the CWR addresses waters that are not jurisdictional by rule, but which are subject to a required case-specific analysis to determine if a significant nexus exists so as to make them “waters of the United States.”⁷⁴ “Significant nexus” is defined “to mean a significant effect (more than speculative or insubstantial) on the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas.”⁷⁵ These waters and wetlands are evaluated either alone or in combination with other waters similarly situated in the region based on the functions⁷⁶ the waters and wetlands perform.⁷⁷ The CWR next states this significant nexus test relies on the language of the *SWANCC* and *Rapanos* decisions, that the functions are based on the Agencies’ scientific understanding of ecosystems, and that a significant nexus is established if these waters and wetlands perform at least one of the functions so that it alone or in combination has a significant impact on a water of the United States.⁷⁸ As a whole, the preamble to the CWR goes into great detail explaining the significant nexus determination.⁷⁹

After reviewing the relevant Court opinions, scientific literature, and the agencies’ expertise, the Agencies’ claim to have determined for significant nexus analysis:

- (1) which waters are “similarly situated,” and thus should be analyzed in combination, in (2) the “region,” for purposes of a significant nexus analysis, and (3) the types of functions that should be analyzed to determine if waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.⁸⁰

74. Gaziano and Hopper, *supra* note 6 at 7 (“The basis for this aspect of the rule is Justice Kennedy’s test in *Rapanos*.”). See also ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37059.

75. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37091.

76. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37091. The functions to be considered in performing significant nexus determination are sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of floodwaters, runoff storage, contribution of flow, export of organic matter, export of food resources, and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas. *Id.*

77. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37091.

78. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37091.

79. See ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37091-95.

80. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37065.

The key distinction here is the bright line test to determine which waters are “similarly situated” and which waters may be “similarly situated.”⁸¹ Both categories will be addressed in turn.

i. Similarly Situated Waters

The CWR identifies five subcategories waters that are determined to be “similarly situated” by rule and thus require a case-specific significant nexus determination if they are not already jurisdictional.⁸² In performing a significant nexus determination, these waters such as prairie potholes are evaluated alongside the other waters in their same subcategory.⁸³ For instance, if a prairie pothole is under review, then it will be combined with other prairie potholes because they are of the same subcategory if they are in the same single point of entry watershed.⁸⁴

ii. Waters that May be Similarly Situated

Waters “located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary” are subject to a case-specific analysis to determine if they have a significant nexus to a water of the United States.⁸⁵ If those waters are determined to have a significant nexus, then they are subject to jurisdiction under the CWR. Waters within these boundaries are not only evaluated for a significant nexus, but also if there are any other waters in which they are similarly situated.⁸⁶ This means the Agencies’ official or a field scientist has to determine whether some or all of the water functions together to affect downstream waters of the United States.⁸⁷

Waters in this determination are similarly situated when they are “within a contiguous area of land with relatively homogeneous soils, vegetation, and landform (e.g., plain, mountain, valley, etc.).”⁸⁸ The CWR states further that it is inappropriate to consider waters to be similarly situated if the waters are located in different landforms, elevation profiles, types of soil, etc., unless the waters perform similar functions or are sufficiently close so they consistently and collectively function to affect a water of the United States.⁸⁹ The preamble to the CWR explains this

81. Martin & Mullen, *supra* note 45, at 6.

82. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37087 (the subcategories are Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands).

83. *Id.* See also Martin & Mullen, *supra* note 45, at 6.

84. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37087; see also Martin & Mullen, *supra* note 45 at 6.

85. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37087; see also Martin & Mullen, *supra* note 45 at 6.

86. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37088.

87. Martin & Mullen, *supra* note 45, at 7.

88. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37092.

89. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at

in greater detail, but essentially those waters that are similarly situated will undergo a significant nexus evaluation as a group while those that are not do so individually.⁹⁰

There are important distinctions in this section of the CWR to note. First, if the water is defined as adjacent then it is automatically under the regulation without a case-specific analysis. Second, if any portion of a water that falls into the distance threshold is determined to have a significant nexus then all of the water is jurisdictional, making some waters outside the distance nonetheless subject to the CWR.⁹¹

C. Waters That are Excluded by the CWR

The following seven categories of waters are excluded by the CWR, even if they would have been otherwise been defined under the regulation as waters of the United States:

- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- (2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.
- (3) The following ditches:
 - (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
 - (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
 - (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
- (4) The following features:
 - (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
 - (ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
 - (iii) Artificial reflecting pools or swimming pools created in dry land;
 - (iv) Small ornamental waters created in dry land;
 - (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

37092.

90. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 3092-95.; *see also* Martin & Mullen, *supra* note 45, at 8.

91. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37088; *see also* Martin & Mullen, *supra* note 45, at 7.

- (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
 - (vii) Puddles.
- (5) Groundwater, including groundwater drained through subsurface drainage systems.
- (6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.⁹²

IV. ARGUMENTS SURROUNDING THE CWR

A. *Argument Background*

This section will first discuss basic arguments supporting the CWR before examining those opposing it. The CWR faced immediate opposition to its implementation after the proposed rule was announced. The CWR in its proposed form was released on June 29, 2015,⁹³ and on June 30th 2015 it was noted that 27 states sought to challenge the regulation in court.⁹⁴ As described in Section I of this Note, the legal challenges of the opponents of the CWR resulted in injunctions issued by the District of North Dakota⁹⁵ and the Sixth Circuit.⁹⁶

The Sixth Circuit heard oral arguments on December 8, 2015⁹⁷ and noted that the decision would likely later result in a ruling by the U.S. Supreme Court.⁹⁸ Currently, a main source of contention in the Sixth Circuit case has been a jurisdictional one.⁹⁹ In short, the Sixth Circuit's issue of stay from October 13, 2015 on the CWR will remain in place until the Sixth Circuit determines whether it as an appellate court or a district court has jurisdiction over the challenges to the CWR.¹⁰⁰ Opponents of the CWR generally believe the district courts are the appropriate venue

92. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37105.

93. Gaziano & Hopper, *supra* note 6.

94. Timothy Cama, *27 States Challenge Obama Water Rule in Court*, THE HILL (June 30, 2015, 12:02 PM), <http://thehill.com/policy/energy-environment/246539-27-states-challenge-obama-water-rule-in-court> (noting that lawsuits challenging the CWR were coming from Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Wyoming, Ohio, Michigan, Texas, Mississippi and Louisiana, which in turn were following those from South Carolina, West Virginia, Alabama, Florida, Georgia, Kansas, Kentucky, Utah and Wisconsin already in place).

95. Cama, *supra* note 7.

96. Juan Carlos Rodriguez, *EPA Water Rule Blocked Nationwide by 6th Circuit*, LAW360 (Oct. 9, 2015).

97. See *In re Murray Energy Corp. v. Ent'l Prot. Agency* (In re Murray Energy Corp.), No. 15-3751, (6th Cir. 2016).

98. *6th Circuit: Clean Water Rule "Is Going to the Supreme Court,"* 2-3 Mealey's Water Rights Report 1 (Dec. 2015).

99. Bebe Raupe, *Sixth Circuit Hears Oral Arguments on Water Rule*, BLOOMBERG BNA (Dec. 9, 2015), <http://www.bna.com/sixth-circuit-hears-n57982064762/>.

100. *Id.*

so the Sixth Circuit should dismiss the case for a lack of jurisdiction.¹⁰¹ Proponents of the CWR argue giving the district courts jurisdiction would result in delays and constitute a waste of judicial resources. They further question whether the EPA and Army Corps' action with the CWR is even reviewable at all.¹⁰² The Eleventh Circuit will also determine if it has jurisdiction in a hearing scheduled for spring of 2016,¹⁰³ however this Note will focus on the other issues facing the implementation of the CWR outside of the jurisdictional one.

B. Support for the CWR

As it is the agency at the forefront of the CWR, the EPA has been publicly championing the regulation. Around its release, the EPA created a website explaining what the CWR is, why it created the regulation, its alleged limits, along with a series of links to supporting editorials, videos, and info-graphics to publicly demonstrate why its efforts are justified.¹⁰⁴ The EPA and Army Corps have issued statements offering support of the CWR from a number of fronts. First, representatives of these Agencies have stated that the CWR preserves vital access to clean drinking water. According to the Agencies, 117 million Americans receive their drinking water from streams which would lack clear protection from pollution if the CWR was not in place.¹⁰⁵ The Agencies also mentioned that major economic sectors, such as manufacturing, tourism, and especially agriculture depend on access to such clean water in order to “function and flourish.”¹⁰⁶ Agriculture in particular is singled out in order to note that “[t]he final doesn't create any new permitting requirements for agriculture” by maintaining prior exemptions and exceptions to CWA permitting requirements, such as planting, harvesting, and moving livestock, and adding new ones such as an exclusion for artificial lakes and ponds.¹⁰⁷

The Agencies further stated that they conducted “extensive outreach” by hosting more than 400 meetings throughout the United States on the CWR in this regard.¹⁰⁸ They stressed that they are providing requested bright-line guidance for where the CWA would apply and that it only deals with “the pollution and destruction of waterways” without touching land use or private property rights.¹⁰⁹ Issues resulting from climate change were also cited by the Agencies as a justification for the CWR due to states facing drought conditions, such as California.¹¹⁰

The Agencies who created the CWR however have not been alone in championing its alleged merits. Various environmental activist groups, outdoor recreation enthusiasts, and a number of others have written or pledged support for the

101. *Id.* (noting that Ohio Solicitor General Eric Murphy made this argument on behalf of eighteen states and several industry groups).

102. *Id.* (noting that Attorney Martha Mann with the U.S. Department of Justice made this argument).

103. *Id.* The Eleventh Circuit will hear oral arguments on Feb. 22, 2016.

104. ENVTL. PROT. AGENCY, *supra* note 47.

105. Gina McCarthy & Jo-Ellen Darcy, *Reasons We Need the Clean Water Rule*, EPA CONNECT (May 27, 2015, 10:08 AM), <https://blog.epa.gov/blog/2015/05/reasons-we-need-the-clean-water-rule/>.

106. *Id.*

107. *Id.*

108. Gina McCarthy & Jo-Ellen Darcy, *Protecting Clean Water While Respecting Agriculture*, EPA CONNECT (May 27, 2015, 12:50 PM), <https://blog.epa.gov/blog/2015/05/protecting-clean-water-while-respecting-agriculture/>.

109. *Id.*

110. *See* McCarthy & Darcy, *supra* note 104.

CWR or the need for such a regulation in various op-eds and editorials in the news throughout the country.¹¹¹ Some members of the legal community have also weighed in to support the CWR from the standpoint that it provides clarification to the confusion arising out of the Court decisions on the implementation of the CWA described in Section II(B) of this Note.¹¹² Arguments in favor of the CWR mirror those raised by the EPA. Proponents see the regulation as providing needed clarification to this confusion arising out of the *SWANCC* and *Rapanos* decisions by applying the “significant nexus test” in a bright-line manner that clearly divides waters into three categories to put on notice which would be subject to automatic regulation, which would be excluded, and which would be subject to case by case significant nexus analysis.¹¹³ Proponents of the CWR can also have legislative satisfaction in that provisions to block the EPA from implementing the CWR were not included in the \$1.15 trillion omnibus spending bill that was unveiled on December 16, 2015.¹¹⁴

C. Opposition to the CWR

Opponents have highlighted a main point of contention with the CWR. They claim that the EPA and Army Corps are using the regulation to broadly expand the scope of their power, while simultaneously restricting the availability of opportunities for judicial review for challengers of the regulation, when the Court has twice rejected efforts to do so in the past as being beyond what the CWA permits.¹¹⁵ The CWA provides that the states have the predominant responsibility to protect non-navigable waters from pollution, with Congress never having made any changes to this authority or the definition of “navigable waters” despite multiple amendments to the CWA.¹¹⁶ Under the CWA, it is unlawful to discharge pollutants into “navigable waters” which have been defined as “waters of the United States.” In this sense, the argument is that the EPA and the Army Corps are ignoring express provisions of the CWA to have the states take primary control in implementing the law by broadly redefining what constitutes “waters of the United States” which are subject to federal authority.¹¹⁷

The Court has held that these agencies may not regulate isolated and non-navigable waters in their reading of “navigable waters” and has rejected the assertion that they could regulate any water that has a hydrological connection to a

111. See generally, ENVTL. PROT. AGENCY, *Op-Eds and Editorials About the Clean Water Rule* (last visited Dec. 17, 2015), http://www.epa.gov/sites/production/files/2015-06/documents/opeds_and_editorials.pdf (a series of links provided by the EPA to supportive online articles regarding the CWR).

112. See e.g., Lauren Kalisek, *Finding the High Ground in The Clean Water Rule*, 31 TEXAS LAWYER 35 (July 27, 2015).

113. *Id.*

114. David Schultz et al., *EPA Avoids Cuts, Most Riders in Omnibus Bill*, BLOOMBERG BNA (Dec. 17, 2015), <http://www.bna.com/epa-avoids-cuts-n57982065235/>.

115. *Id.* Ohio State Solicitor General Eric Murphy stated this while arguing that the proper jurisdiction for redress for the alleged harms caused by the CWR lies in the district courts. *Id.*

116. Gaziano & Hopper, *supra* note 6 (noting that Mr. Hopper successfully represented John Rapanos in *Rapanos v. United States* and is the lead counsel in the Pacific Legal Foundation’s lawsuit to overturn the CWR on behalf of the Washington Cattleman’s Association and eight other plaintiffs).

117. Daren Bakst, Don Parrish, & The Heritage Foundation, *Property Owners Should Beware Federal Government’s New Water Rule*, THE TAMPA TRIBUNE (Dec. 17, 2015), <http://www.tbo.com/list/news-opinion-commentary/property-owners-should-beware-federal-governments-new-water-rule-20151217/>.

downstream “navigable-in-fact water.”¹¹⁸ Opponents of the CWR argue that the Agencies are overriding these limits to their authority by making cosmetic exemptions to the regulation while pushing an interpretation of the CWA’s jurisdiction beyond what the Act authorizes.¹¹⁹ For instance, while the CWR expressly exempts the regulation of “puddles,” opponents argue that other depressions containing water that people may think of as puddles, such as “prairie potholes,” “vernal pools” in California, or small ponds are determined to fall under the Agencies’ authority if certain conditions are met.¹²⁰

The essence of this argument is that the Agencies are using the CWR as the means for an unjustified land-grab. In this sense, “navigable waterways” are interpreted overly-broad and would now include “tributaries of any size that contribute flow.”¹²¹ To opponents, the addition of categories such as “adjacent waters” in the CWR are vague and include overly large amounts of land, such as the 100 year floodplain or a floodplain within 4000 feet of a jurisdictional water, that are categorically included or subject to a case by case determination from the Agencies to see if factors they determine demonstrate if waters in question are jurisdictional by passing the “significant nexus” test.¹²² They argue the “significant nexus” test that determines if the water in question affects the “chemical, physical, or biological integrity” of a downstream jurisdictional water is so expansive that almost all waters may conceivably be included under the CWR.¹²³ This can be seen for instance in the fact that 100 year floodplains can fall under the Agencies’ authority through the CWR even if the land itself is dry for 99 of those years.¹²⁴ Opponents have stated this therefore shows the CWR does not simplify or make the Agencies’ authority under the CWA more predictable, but in fact creates uncertainty that enables an unjustified increase in federal power.¹²⁵

V. REASONS TO REVISE OR ABANDON THE CWR

A. Introduction

In this Section, I will explain why the CWR should be revised or abandoned, as it is currently not in line with the Court’s interpretation of the CWA, how it constitutes an overreach of federal authority by the EPA and Army Corps, and is also inconsistent with the Agencies’ stated goals of clarifying the scope of the CWA.¹²⁶ Though I recognize the challenges the Agencies faced in implementing the often vague and confusing CWA, the arguments opposing the CWR are ultimately stronger. I begin by discussing an example of problematic language in the CWR. I will then examine the impact of the problematic and ambiguous language in the CWR on landowners. Finally, I demonstrate why the Agencies’ goals of

118. Gaziano & Hopper, *supra* note 6. See SWACC, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

119. See *Rapanos*, 547 U.S. 715

120. *Id.*

121. *Id.*

122. *Id.* See also *supra* Section III of this Note.

123. Gaziano & Hopper, *supra* note 6.

124. Gaziano & Hopper, *supra* note 6.

125. Gaziano & Hopper, *supra* note 6.

126. Cabrera, *supra* note 42.

transparency and clarity of the CWA through the CWR should not be taken at face value.¹²⁷

B. Problematic Language in the CWR: The High Water Mark Standard

The Agencies hold that certain “waters of the United States” are categorically jurisdictional, including “tributaries.”¹²⁸ The Agencies state tributaries are more precisely defined under the CWR as “as waters that are characterized by the presence of physical indicators of flow—bed and banks and ordinary high water mark—and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.”¹²⁹ This definition of tributary however reads far more broadly than the Agencies portray when they allege that they are being more precise. This is problematic in that it makes tributaries jurisdictional while relying on the questionable concept of an ordinary high watermark. The public has long warned the Agencies that this is a faulty standard needing further clarification.¹³⁰ In his concurrence in *Rapanos*, Justice Kennedy also noted the problematic nature of the high watermark standard stating:

[Y]et the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.¹³¹

The Agencies’ use of the high water mark standard in the definition of what is jurisdictional is also problematic because of how it relates to the other categories of jurisdiction as well as excluded ones. The threshold distances¹³² in the adjacent and case specific waters for instance will often be measured from the ordinary high water mark. Ordinary water marks are so relatively common on

127. See Eric Lipton & Michael Shear, *E.P.A. Broke Law With Social Media Push for Water Rule, Auditor Finds*, N.Y. TIMES (Dec. 14, 2015) (discussing a ruling by the Government Accountability Office that stated the EPA violated anti-lobbying laws and other regulations in its public promotion of the CWR by engaging in “covert propaganda”).

128. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

129. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37058.

130. EPA’s “*Waters of the United States*” Rule: *Substance and Significance*, 45 ELR 10995, 10999 (Nov. 2015) (Deidre Duncan, a partner at Hunton & Williams LLP who has previous experience as a regulator for jurisdictional determinations in the U.S. Army, highlighting the problematic provisions that the CWR contains).

131. *Rapanos v. United States*, 547 U.S. 715, 781 (2006).

132. *Supra* Section III of this Note (discussing jurisdictional limits such as 1,500 feet from the ordinary high water mark for adjacent waters and 4,000 feet for case-specific ones).

landscapes, few if any will fall outside the threshold distances.¹³³ For example, even if a water does not fall within the initial adjacency threshold of 1,500 feet from the ordinary high watermark of a navigable water, it can still be regulated under the CWR in the case-specific jurisdiction if it falls within 4,000 feet of a navigable water's ordinary high watermark or within a 100 year floodplain.¹³⁴ The broad rather than more precise scope of the CWR is further demonstrated by the Agencies' position that if any part of a water in question is considered neighboring or adjacent, then it is considered to be neighboring or adjacent as a whole.¹³⁵

The CWR makes its implementation complicated by employing circular language with this problematic ordinary high watermark standard. For instance, a tributary is defined as having a bed, bank, and ordinary high watermark.¹³⁶ However, erosional features qualify as an exclusion from the CWR but only if they lack a bed, bank, and high watermark so as to constitute a tributary.¹³⁷ In a similar sense, ephemeral ditches are excluded unless they are a relocated or excavated in a tributary.¹³⁸ This essentially means that unless it is proven there was no ordinary high watermark whenever the relocation or excavation occurred, then the ephemeral ditch can be subject to the CWR.¹³⁹ The difference here then under the CWR between the generally excluded erosional features and the generally regulated ephemeral stream turns on the existence of these problematic ordinary high water marks.¹⁴⁰

C. Distance Thresholds in the CWR

While the CWR describes the factors of what constitutes a significant nexus for potentially jurisdictional waters, the explanation of how exactly the Agencies came up with the distance thresholds of 4,000 feet and a 100 year floodplain intended to go into effect nationwide comes across as lacking. In the CWR the Agencies state that in coming up with the bright line threshold distances, they "are carefully applying available science."¹⁴¹ The Agencies explain that they conducted an extensive consultation through their science report as well as many other sources of information such as geological surveys, photography, etc. to come up with their jurisdictional determinations.¹⁴² Despite this stated scientific basis however, applying such a bright line rule nationwide is nonetheless problematic.

133. EPA's "Waters of the United States" Rule: Substance and Significance, *supra* note 129, at 10999.

134. *Supra* Section III of this Note.

135. 45 ELR 10995, *supra* note 130, at 10999; *see also* ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37080 (stating that if part of the water falls into the category then its entire body is subject).

136. 45 ELR 10995, *supra* note 130, at 1100; *see also* ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37088.

137. 45 ELR 10995, *supra* note 130, at 1100; *see also* ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37098.

138. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37059.

139. EPA's "Waters of the United States" Rule: Substance and Significance, *supra* note 129, at 1100.

140. EPA's "Waters of the United States" Rule: Substance and Significance, *supra* note 129, at 1100.

141. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37059.

142. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37065.

In a question-and-answer document published by the EPA on the Clean Water Rule, the question was posed whether the distance thresholds were to be measured as straight line distances or if they took vertical changes into account. The response was that the measurement for the distance threshold should be a straight line, perpendicular to the high water mark where there would be no account for vertical changes.¹⁴³ This is significant for landowners in hilly or mountainous areas where jurisdiction will extend beyond the 4,000 foot threshold. For instance, if one walks from the high water mark to measure the 4,000 feet, then this could be significantly less land if the water is bordered by hills or mountains compared to the Agencies' measurement from a straight line on a two dimensional map.¹⁴⁴ Therefore, while the bright line justification may be served, landowners may face the burden of complying with the CWR beyond 4,000 feet should there be vertical changes in the topography.¹⁴⁵ This burden can certainly be a significant one for reasons discussed below.

D. The CWR's Overly-Broad Significant Nexus Test Places A Significant Burden on Landowners

Under the CWR, waters that are not jurisdictional by rule may still be subject to the Agencies' regulation on a case-by-case basis if the water or wetlands at issue either alone or in combination with other similarly situated¹⁴⁶ waters in the region significantly¹⁴⁷ affects the chemical, physical, or biological integrity of a downstream "water of the United States."¹⁴⁸ The Agencies claim this authority arises out of Justice Kennedy's opinion in *Rapanos*,¹⁴⁹ where he stated the Agencies had the option of establishing more specific regulation or relying on the significant nexus test on a case by case basis.¹⁵⁰ This significant nexus test however, despite having the window-dressing of scientific language and a seeming deference to the controlling *Rapanos* decision, does in effect leave landowners subject to a costly regulatory burden through this ambiguous case by case determination that lacks a foundation in both science and the Clean Water Act.¹⁵¹

143. ENVTL. PROT. AGENCY, *Technical Questions and Answers For Implementation of the Clean Water Rule* (last updated Sept. 2, 2015), <http://www.epa.gov/cleanwaterrule/technical-questions-and-answers-implementation-clean-water-rule>.

144. See Lowell M. Rothschild, *Update on the Waters of the US – Put Away the Tape Measure and Get a Map*, NAT'L. L. REV. (Aug. 27, 2015), <http://www.natlawreview.com/article/update-waters-us-put-away-tape-measure-and-get-map>.

145. *Id.*

146. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37124 ("Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters").

147. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37124 (noting that for the effect to be significant, it must be more than speculative or insubstantial).

148. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37124.

149. *Rapanos v. United States*, 547 U.S. 715, 782 (2006) (Kennedy, J., concurring) (stating that absent more specific regulations, the Army Corps must establish a significant nexus on a case by case basis when wetlands are regulated based on adjacency to non-navigable tributaries).

150. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CORPS OF ENG'RS, *supra* note 4, at 37058.

151. See Lowell M. Rothschild, *The Practical Application of the Significant Nexus Test: The Final Waters of the US Rule*, NAT'L. L. REV. (June 8, 2015), <http://www.natlawreview.com/article/practical->

Given the wide-ranging application of the case-specific significant nexus test in the CWR,¹⁵² the burden in practice falls onto the landowner or regulated entity to demonstrate that a water in question is not jurisdictional.¹⁵³ For instance, if a landowner seeks a permit under the CWA for the use of a water that has been defined as potentially jurisdictional, he or she will face the burden of applying the significant nexus test to demonstrate to the agencies which waters do not fall under their jurisdiction through the CWR.¹⁵⁴ In practice, this means an applicant will need to identify the closest navigable water or sea by estimating which waters are subject to “commerce.”¹⁵⁵ Further, the applicant will need to identify what other waters will qualify under the CWR as “similarly situated,” which will require analyzing both the functions of the waters in question as well as the Agencies’ understanding of what constitutes “sufficiently close.”¹⁵⁶ This will presumably result in having to analyze neighboring properties in order to understand the physical, chemical, and biological integrity of the water in question to satisfy the Agencies’ test and will add to the expense, and likely require the services of lawyers, contractors, and other professionals.¹⁵⁷

The significant burdens that the ambiguous language of the CWR is imposing on landowners is not merely conjecture or a fact the Agencies are unaware of.¹⁵⁸ In *Rapanos* itself, Justice Scalia highlighted the fact that for a Section 404 dredge and fill permit “[t]he 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.”¹⁵⁹ Nationwide, Justice Scalia noted that over \$1.7 billion each year was spent in the private and public sector to obtain such permits, whose cost cannot be avoided due to the broad range of activities that the CWA imposes through criminal and civil liabilities.¹⁶⁰

The burden of complying with such ambiguities under the wide-ranging reach of the CWR becomes even more onerous when combined with other provisions in the CWA. For instance, landowners may need to seek a permit for knocking sand or dirt into a jurisdictional or potentially jurisdictional water given the broad definition of what constitutes a “pollutant.”¹⁶¹ Landowners could then be re-

application-significant-nexus-test-final-waters-us-rule.

152. ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *supra* note 4, at 37122 (noting that where waters are potentially jurisdictional if a piece falls within 4,000 feet of the ordinary high water-mark of a regulated water or sits within a 100 year floodplain that could have been dry for decades).

153. Rothschild, *supra* note 150.

154. Rothschild, *supra* note 150.

155. Rothschild, *supra* note 150.

156. Rothschild, *supra* note 150.

157. Rothschild, *supra* note 150.

158. See ENVTL. PROT. AGENCY & DEP’T OF THE ARMY, CORPS OF ENG’RS, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (Mar. 2014), http://www.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

159. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 74-76 (2002)).

160. *Id.*

161. See Daren Bakst, *What You Need to Know About the EPA/Corps Water Rule: It’s a Power Grab and an Attack on Property Rights*, THE HERITAGE FOUNDATION (Apr. 29, 2015), <http://www.heritage.org/research/reports/2015/04/what-you-need-to-know-about-the-epacorps-water-rule-its->

quired to obtain a permit if there is a discharge of dredged or fill material¹⁶² that could inhibit farmers, construction workers, and local governments who are not seeking to harm a jurisdictional water, but to engage in the everyday use of their property.¹⁶³ The result would have a chilling effect on land use for those that are unable to put the time or money into obtaining the required permits for jurisdictional or potentially jurisdictional waters under the CWA,¹⁶⁴ and now the CWR.¹⁶⁵

This development will burden the Agencies as well. With fewer permit applicants unable to obtain nationwide permits, more will require individual ones.¹⁶⁶ As a result, individual permits require the Army Corps in particular to consult with other agencies such as the U.S. Fish and Wildlife service and to comply with the National Environmental Policy Act. This takes away time and resources from the Agencies who would then need additional funding for personnel to prevent the permitting process from taking any longer.¹⁶⁷ While the CWR may help the application of the CWA be more predictable, ultimately the Rule is a throwback with its broad language to the time before *SWANCC* that will increase compliance costs in both the public and private sectors.¹⁶⁸

E. The Agencies' Actions Have Undermined the CWR

The Agencies have promoted the CWR as a solution to the ambiguity surrounding the CWA after the *SWANCC* and *Rapanos* decisions in that it provides a clearer and more transparent regulatory system that ensures protection for the waters falling under federal control.¹⁶⁹ From February 2014 through July 2015, the EPA engaged a social media campaign to support these efforts it was undertaking through the CWR.¹⁷⁰ In practice however, the Agencies actions both through the CWR and in their efforts to promote the legislation have undermined these stated goals.

The Agencies' goals of transparency and clarity in the CWR have been tainted by misleading statements and the improper use of promotion tools to garner support for the regulation. On December 14, 2015 a ruling by the Government Accountability Office (GAO) determined that the EPA had engaged in "covert propa-

a-power-grab-and-an-attack-on-property-rights#_ftnref23, *discussing* Env'tl Protection Agency, *Clean Water Act, Section 502 General Definitions*, (last updated Oct. 27, 2015) <http://www.epa.gov/cwa-404/clean-water-act-section-502-general-definitions> (looking at the broad range of materials that constitute pollutants, including "rock, sand, and cellar dirt").

162. Bakst, *supra* note 161 (citing 33 U.S.C. §323.2, (explaining that dredged material is "material excavated or dredged from waters of the U.S" and fill material is "material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes")).

163. Bakst, *supra* note 161.

164. Bakst, *supra* note 161.

165. Lowell M. Rothschild, *The Practical Bottom Line: The Final Waters of the U.S. Rule*, NAT'L. L. REV. (June 9, 2015), <http://www.natlawreview.com/article/practical-bottom-line-final-waters-us-rule>.

166. *Id.*

167. *Id.*

168. *Id.*

169. See McCarthy and Darcy, *supra* note 105. See also ENVTL. PROT. AGENCY, *Clean Water Rule Litigation Statement* (last updated Nov. 17, 2015), <http://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement>.

170. See U.S. GOV'T ACCOUNTABILITY OFF., memo, *Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions*, 3 (Dec. 14, 2015), available at <https://www.documentcloud.org/documents/2646341-GAO-Opinion-EPA-Social-Media-121415.html>.

ganda” in its social media campaign to encourage the public to support the CWR.¹⁷¹ While Federal agencies may promote their own policies, they are prohibited from engaging in propaganda, or “covert activity intended to influence the American public”¹⁷² and from using federal resources to engage in grassroots lobbying, which is urging the public to contact Congress to act on pending legislation.¹⁷³ In a legal opinion to the U.S. Senate Committee on Environment and Public Works, the GAO determined the EPA violated these prohibitions in the campaign to promote the CWR.¹⁷⁴ The GAO concluded the EPA should report the violation to the President and Congress and determine the cost associated with the prohibited conduct.¹⁷⁵

Though this example alone may not reflect the Agencies’ overall conduct, when combined with other statements and actions by the Agencies’ in regards to the CWR, there is a sense that they have not been forthright about this regulation and its scope. For instance, the EPA has stated that a “Clean Water Act permit is only needed if a water is going to be polluted or destroyed”¹⁷⁶ and the “Clean Water Rule addresses the pollution and destruction of waterways – not land use or private property rights.”¹⁷⁷ However, “pollutant” is defined broadly in Section 502 of the CWA to include everything from “radioactive materials” and “sewage” to “rock, sand, and cellar dirt.”¹⁷⁸ Given the large threshold of what waters are jurisdictional under the CWR and which can be considered potentially jurisdictional,¹⁷⁹ and despite exceptions to the CWR,¹⁸⁰ it is certainly within the realm of possibilities a landowner may be held to violate the CWR for private land use that may not initially appear to degrade a water of the United States, such as knocking sand into potentially jurisdictional water, despite statements to the contrary. Overall then, the conduct and statements of the Agencies in regards to the scope of the CWR and garnering support for the regulation have not served to further the goals of transparency and clarity on the CWA.

VI. CONCLUSION

The CWR is a complex regulation¹⁸¹ that is rightly in the sphere of public debate as well as the U.S. court system. On one hand the Agencies recognize there

171. *Id.* See also Lipton & Shear, *supra* note 127.

172. Lipton and Shear, *supra* note 127.

173. Lipton and Shear, *supra* note 127. See also The Antideficiency Act, 31 U.S.C § 1341(a)(1)(a); see also Financial Services and General Government Appropriations Act, Pub. L. No. 113-235, § 715, 128 Stat. 2382, 2383.

174. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 170. See generally Lipton & Shear, *supra* note 127. Two specific violations were alleged. First, the use of Thunderclap to post the EPA’s CWR-supportive messages for its social media campaign where the EPA used message recipients as conduits to reach a broader audience and deliberately disassociated itself as the writer. The second included blog posts and hyperlinks directed at surfers by telling readers to “take action” “to tell Congress to stop interfering with your right to clean water”.

175. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 170, at 26.

176. ENVTL. PROT. AGENCY, *supra* note 24.

177. *Id.*

178. ENVTL. PROT. AGENCY, *Clean Water Act, Section 502 General Definitions*, (last updated Oct. 27, 2015), <http://www.epa.gov/cwa-404/clean-water-act-section-502-general-definitions>.

179. See *supra* Section III of this Note. See also *supra* Section V, A–D of this Note.

180. See *supra* Section III of this Note.

181. See *supra* Section III of this Note.

needs to be clarification on how to implement the CWA, especially after the confusion arising out of the *SWANCC* and *Rapanos* decisions in 2001 and 2006 respectively.¹⁸² Ensuring the safety and security of the water systems of the United States is certainly a worthwhile goal in an era of climate uncertainty and population growth.¹⁸³ Unfortunately, the problematic language and overly-broad scope of the CWR and the misleading actions by the Agencies mean this regulation should not be upheld and should be significantly revised.

The distance thresholds for CWR jurisdiction and potential jurisdiction, through the significant nexus test, are overly-broad and rely on problematic standards such as the ordinary high water mark and 100 year flood plain where many landowners will now be forced to comply with the Agencies' as well as state regulatory standards.¹⁸⁴ This is a significant burden that, despite assurances and some of the language in the CWR, is being imposed despite the lack of a clear foundation in the CWA or science for such an all-encompassing bright line test for jurisdiction.¹⁸⁵ Further, the actions by the Agencies' on behalf of the CWR such as issuing misleading statements as well as engaging in "covert propaganda" leading to a rebuke by the GAO, also demonstrate problems with the effort to implement this regulation.¹⁸⁶ While these are by no means the only arguments for overturning the regulation, in its current state the CWR should not stand for the reasons stated above in this Note.

182. ENVTL. PROT. AGENCY, *supra* note 5.

183. ENVTL. PROT. AGENCY, *supra* note 5. *See also, supra* Section IV, B of this Note.

184. *See supra* Section V of this Note.

185. *See supra* Section V of this Note.

186. *See supra* Section V of this Note.