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I. INTRODUCTION

Water flows in an intricate system—a system that distributes water from high elevation landscapes, through watersheds, where it interacts with vegetation or is absorbed through soil, percolating down to groundwater aqueducts, then continues its path to the ocean where it evaporates, thus renewing the cycle. Water, as a system, is never sedentary, and it reacts closely with its environment. The phrase "navigable waters" has come to represent a portion of a complex system. The phrase simplifies the system by removing its intricacies, allowing political regimes and the public to designate what they consider important and worthy of protection under the Clean Water Act.

In February 2018, the United States Environmental Protection Agency (EPA) and the Department of the Army (Army) (referred to collectively as "the Agencies") finalized a rule that established an applicability date of February 2020 for the 2015 Rule defining "waters of the United States" (WOTUS).[1] Following finalization of the rule, the Southern District of Washington enjoined and vacated this 2018 applicability date.[2] This has led the Agencies to focus on the rulemaking actions underway, rather than litigation.[3] Through the rulemaking process, the public has a chance to weigh

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[1] 33 C.F.R. § 328.3 (2018).

[2] *Definition of "Waters of the United States": Rule Status and Litigation Update*, ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update [https://perma.cc/4LAF-QC8Z].

[3] *Id.*

in on what the "waters of the United States" are and hopefully find a rule that will benefit the entire nation.

II. BACKGROUND

Prior to the Clean Water Act (CWA), the primary federal water pollution control law was the Refuse Act of 1899.[4] The Refuse Act requires that the Army Corps of Engineers (Corps) approve obstructions to navigation, excavations, or fills that modify parts of the "channel of any navigable water of the United States."[5] In 1968, the Corps expanded its historic jurisdiction and promulgated regulations allowing the Corps to consider environmental factors in its permit decisions in response to growing criticisms that the former policy was destroying too many wetlands.[6] This authority was challenged when the Corps denied a permit to dredge and fill in Boca Ciega Bay after it found fish and wildlife would be harmed, even though the project would not interfere with navigation, flood control, or the production of power.[7] The Fifth Circuit upheld the expansion of the Corps' power and started a path towards granting the Corps authority to deny permits for substantial and tangible ecological reasons.[8] The court relied heavily on the Fish and Wildlife Coordination Act, which mandated the Secretary "weigh the effect a dredge and fill project will have on conservation."[9]

In 1972, Congress passed the CWA aiming "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[10] through a policy that "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources."[11] This quelled the debate on the federal government's power to control pollution on the protection of navigable waters. The CWA authorizes the EPA and the Corps to prohibit the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source."[12] "Navigable waters" are the "waters of the United

[4] 33 U.S.C. §§ 403, 407 (2012).
[5] *See id.* at 407.
[6] Zabel v. Tabb, 430 F.2d 199, 202 n.27 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *see also* H.R. REP. NO. 91-917, at 5 (1970).
[7] *Zabel*, 430 F.2d at 202.
[8] *Id.* at 202–03.
[9] *Id.* at 211; *see also* 16 U.S.C. §§ 661–668ee (2012).
[10] 33 U.S.C. § 1251(a) (2012).
[11] *Id.* § 1251(b) (2012).
[12] 33 U.S.C. §§ 1342, 1362(12) (2012).

States, including the territorial seas."[13] This definition of "waters of the United States" ignited flames that have captured the attention of every branch of the United States government.[14]

When the CWA was passed, the Supreme Court interpreted the Commerce Power very broadly.[15] Courts used this broad Commerce Power to extend federal CWA jurisdiction to non-navigable tributaries.[16] However, section 404 of the CWA requires a permit for anyone who wants to put any fill material in waters of the United States.[17] The Corps' definition of navigable is similar to the CWA's but includes wetlands.[18]

The extent of federal control and regulation of wetlands has been reviewed by the United States Supreme Court multiple times. Initially, the Court, applying Chevron deference, upheld the Corps' jurisdiction requiring a 404 permit for a planned housing project on marshy land in Michigan.[19] The Corps classified the land to be built upon as adjacent to a wetland, thus requiring a 404 permit.[20] The Court stated:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

"For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States—based as it is

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[13] 33 U.S.C. § 1362(7) (2012).

[14] *See* Vanessa Ramirez, *An Attempt at Clearing the Muddied Waters of the United States*, 34 J. ENVTL. L. & LITIG. 161 (2019) (discussing the proposition and subsequent withdrawal of regulations by the Environmental Protection Agency and U.S. Army Corps of Engineers as well as judicial and legislative attempts to clarify "waters of the United States").

[15] *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (discussing that commerce is not a technical conception but a practical one in an attempt to sustain the exercise of national power over intrastate activity).

[16] *See generally* United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) (holding that the commerce power extends to those activities with a substantial effect on interstate commerce).

[17] 33 U.S.C. § 1344 (2012).

[18] 33 C.F.R. § 328.3(a)(2).

[19] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).

[20] *Id.* at 124.

on the Corps' and EPA's technical expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.[21]

The Court then began to narrow Congress' power under the Commerce Clause.[22] As this narrowing of 404 jurisdiction was questioned again, the Court stayed consistent and ruled that the Corps-asserted 404 jurisdiction over an abandoned gravel quarry was ultra vires.[23] The quarry was not connected to a navigable body of water, was not classified as a wetland, but was habitat for migratory birds.[24] As such, the Corps asserted jurisdiction under the migratory bird rule which allows the use of a body of water by birds crossing state lines to establish a connection with interstate commerce.[25] The Court determined the migratory bird rule was outside 404 jurisdiction because there was no clear congressional intent, and clear congressional intent was needed for administrative interpretations "invok[ing] the outer limits of Congress' power . . . ."[26]

It did not take long for 404 jurisdiction to come back into question, once again in the form of a wetlands issue and the key to the new developments with the WOTUS definition. A fractured Supreme Court ruled in a plurality opinion that the waters must be "relatively permanent, standing or continuously flowing bodies of water 'forming geographical features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[27] Justice Scalia, writing for the plurality, stated that wetlands must have a "continuous surface connection" to an adjacent jurisdiction water such that "there is no clear demarcation" between the waters and wetlands.[28] Justice Scalia stated:

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[21] *Id.* at 133–34 (quoting Navigation and Navigable Waters, 42 Fed. Reg. 37,122, 37,128 (July 19, 1977) (to be codified in 33 C.F.R. §§ 209, 320–29).

[22] *See, e.g.*, United States v. Lopez, 514 U.S. 598 (2000) (holding that the commerce power does not extend to regulation of firearms in school zones because possession is not economic activity); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding that the commerce power does not allow the government to compel individuals to become active participants in commerce).

[23] Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001).

[24] *Id.* at 166.

[25] *Id.*

[26] *Id.* at 172.

[27] Rapanos v. United States, 547 U.S. 715, 739 (2006) (citations omitted).

[28] *Id.* at 742 (citing Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r, 531 U.S. 159, 167 (2001)).

> Therefore, *only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands 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 thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*.[29]

Under this more restrictive standard, the Corps has been denied 404 jurisdiction.[30]

In the same case, Justice Kennedy wrote a concurring opinion establishing an alternative approach for lower courts to use for questions of defining WOTUS.[31] In this concurrence, Justice Kennedy established factors to determine whether wetlands are "adjacent" to navigable waterways, bringing them under the jurisdiction of the CWA.[32] He applied the significant nexus test, where wetlands are considered adjacent to navigable waterways when "either alone or in combination with similarly situated lands in the region, [the area in question] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[33] The effects cannot be speculative or insubstantial. Since then, courts have applied Justice Kennedy's approach.[34]

Seemingly foreseeing that courts would pick and choose which approach to apply, the Chief Justice also wrote a concurring opinion, urging the Agencies to issue a clear rule giving guidance not only for those governed by the rule but for courts as well.[35] This invitation was heard loud and clear by the political branches.

III. WHERE RULEMAKING MEETS THE ROAD

After *Rapanos*, the Obama administration EPA issued new guidance ("2015 Rule").[36] The 2015 Rule chose Justice Kennedy's approach, adopting

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[29] *Id.*

[30] *See generally* N. Cal. River Watch v. Wilcox, 633 F.3d 766 (9th Cir. 2011) ("We thus interpret 'areas under Federal jurisdiction' as not including all of the 'waters of the United States' as defined by the CWA and its regulations.").

[31] *Rapanos,* 547 U.S. at 759 (Kennedy, J., concurring).

[32] *Id.* at 780.

[33] *Id.*

[34] *See* United States v. Donovan, 661 F.3d 174, 187 (3d Cir. 2011) (applying both the plurality's test from *Rapanos* and Justice Kennedy's test to determine jurisdiction).

[35] *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring in the judgment).

[36] *See* "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. § 328).

the significant nexus and hydraulic functioning tests.[37] This 2015 Rule split water into three categories.[38] The first and third categories are relatively straightforward: the former identifying water that traditionally falls under the CWA's jurisdictional umbrella,[39] and the latter demarking water that is generally not within the jurisdiction of the CWA.[40] However, the second category has sparked a debate between environmentalists and strict constructionists that continues today.[41] This category is water that is under the significant nexus and hydrologic function tests.[42] While applying the significant nexus test, agencies are given the power to define a watershed and then use aggregation to determine whether there is a significant nexus with the nearest traditional navigable or interstate waters.[43]

Additionally, the Obama administration's EPA later extended the reach of the CWA's protections by amending the CWA to include "'wetlands, ponds, lakes, oxbows, impoundments, and similar waters' that are 'adjacent to' a primary water, impoundment, or tributary."[44] In doing so, the administration sought to improve the quality of the Nation's waters directly and to address the fundamental cause of poor water quality by truly considering the water system in its entirety. This 2015 Rule amendment acknowledged that the health of navigable water sources impacts the viability of navigable waters themselves.

The Trump administration's EPA and Corps recently replaced the Obama-era rule. This new proposed rule purports to adhere more closely to the text of the CWA, maintain the constitutional limits on federal government action, and provide greater clarity for the communities regulated by the rule.[45] Specifically, the proposed rule places significant importance on the CWA's grant of authority to states to play a "major role . . . in implementing the CWA" and to balance their "traditional power . . .

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[37] *Id.* at 37,061; *see also Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

[38] *See* "Waters of the United States," 80 Fed. Reg. 37,054, 37,065 (June 29, 2015) (codified at 33 C.F.R. § 328).

[39] *Id.* at 37,065–66 (explaining "Similarly Situated Waters").

[40] *Id.* at 37,067–68 (explaining "Significantly Affect Chemical, Physical, or Biological Integrity").

[41] *See id.* at 37,066–67 (explaining "In the Region").

[42] *Id.*

[43] *Id.* at 37,066–67 (explaining "In the Region").

[44] *See* Revised Definition of "Waters of the United States", 84 Fed. Reg. 4154, 4160 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. § 328) (quoting "Waters of the United States," 80 Fed. Reg. 37,054, 37,104 (June 29, 2015) (codified at 33 C.F.R. § 328)).

[45] *Id.* at 4168–70 (explaining that the new proposed rule aligns more with the pluralities' opinion in *Rapanos* and rejecting the Corp definition and Justice Kennedy's concurring opinion in terming 'waters of the United States.').

to regulate land and water resources within their borders with the need for a national water quality regulation."[46]

IV. THE PUBLIC TOUCH

The process for implementing the replacement for the 2015 Rule began with the Agencies implementing Executive Order 13778. The executive order called on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final 2015 Rule and "publish for notice and comment a proposed rule rescinding or revising the rule . . . ."[47] Specifically, the executive order directed the EPA and the Army to consider interpreting "the term 'navigable waters'" in a manner "consistent with Justice Scalia's opinion" in *Rapanos*.[48]

Generally, the rulemaking process is a two-step process. Step one is to repeal, and step two is to revise. Both steps must follow the Administrative Procedure Act (APA).[49] The APA governs the process by which federal agencies are required to develop and issue regulations. This includes giving notice in the Federal Register and providing the public an opportunity to comment on the notices of the proposed rulemaking.[50] Thus, the public can attempt to influence the proposed rules by writing comments to be considered by the rulemaking agencies.

A. Step One: Repealing the 2015 Rule

The Agencies proposed a rule that would repeal the 2015 Rule and re-codify the regulatory text in place prior to the 2015 Rule. The proposed rule was published in the Federal Register on July 27, 2017.[51] This rule creates some stability while the Agencies engaged in the revision of the WOTUS Rule. On June 29, 2018, the Agencies signed a supplemental notice of proposed rulemaking for the repeal of the 2015 Rule.[52] This notice made

[46] *Id.* at 4156 (indicating the commonly understood meaning of "waters").
[47] Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).
[48] *Definition of "Waters of the United States": Rule Status and Litigation Update*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act [https://perma.cc/N45U-SHXF].
[49] 5 U.S.C. §§ 551– 59 (2011).
[50] 5 U.S.C. § 552(a) (2011).
[51] *Definition of "Waters of the United States": Proposed Rule Definition Waters United States Recodification Pre-Exiting Rules*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/wotus-rule/proposed-rule-definition-waters-united-states-recodification-pre-existing-rules [https://perma.cc/JBC8-75T3].
[52] *Definition of "Waters of the United States": Supplemental Notice: Definition of Waters of the United States - Recodification of Preexisting Rule*, U.S. ENVTL. PROT. AGENCY,

clear that the Agencies were proposing to permanently repeal the 2015 Rule in its entirety. This notice also made clear that once the 2015 Rule was vacated, the pre-2015 regulations would fill the vacancy until a replacement rule was finalized and finished. The supplemental notice also extended the public comment period to August 13, 2018.[53] This rule received 689,688 public comments.[54] Ultimately, the Agencies repealed the 2015 Rule on September 12, 2019, signing a final rule to repeal and restore the regulatory regime to its existence before the 2015 Rule.[55] Under the APA, promulgated rules generally take effect 60 days after publication in the Federal Register.[56]

The Agencies' decision to repeal the 2015 Rule was based on multiple issues within the Rule. For example, the 2015 Rule "did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act as intended by Congress."[57] The 2015 Rule also failed to "adequately recognize, preserve, and protect the primary responsibilities and rights of states to manage their own land and water resources."[58] The increased reach of WOTUS in the 2015 Rule led to less state control. The goal of the new regulations is to return to a more state-centered approach when governing the states' own resources. The Agencies also took issue with the 2015 Rule as it "[a]pproached the limits of the agencies' constitutional and statutory authority absent a clear statement from Congress."[59] Lastly, the Agencies mentioned that the 2015 Rule suffered from "certain procedural errors and a lack of adequate record support as it relates to the 2015 Rule's distance-based limitations."[60] Essentially, the hope is for more stability and guidance. The Agencies claim that reverting to the pre-2015 regulations create this

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https://www.epa.gov/wotus-rule/supplemental-notice-definition-waters-united-states-recodification-preexisting-rule [https://perma.cc/XL9G-ATGZ].

[53] *Final Rule: Definition of "Waters of the United States" – Recodification of Pre-existing Rules,* U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/wotus-rule/step-one-repeal [https://perma.cc/F8H9-F9B4].

[54] *Definition of Waters of United States – Recodification of Pre-Existing Rules*, U.S. ENVTL. PROT. AGENCY, https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0001 [https://perma.cc/L2G9-BTM2].

[55] *EPA, U.S. Army Repeal 2015 Rule Defining "Waters of the United States" Ending Regulatory Patchwork*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork [https://perma.cc/3JHE-NPNE].

[56] *Id.*

[57] *EPA, U.S. Army Repeal 2015 Rule Defining "Waters of the United States" Ending Regulatory Patchwork*, *supra* note 55.

[58] *Id.*

[59] *Id.*

[60] *Id.*

stability, and the judicial decisions ruling on the pre-2015 regulations provide the necessary guidance.[61]

B. Step Two: Revise

Following the repeal of the 2015 Rule, the Agencies proposed a revised definition of WOTUS on December 11, 2018. In this step, the Agencies invited written pre-proposal recommendations. More than 6000 recommendations were received and considered while the Agencies were developing the proposed revision. The EPA lists five major concerns voiced by the public that the proposed rule encapsulates: (1) the need for clarity, predictability, and consistency; (2) respecting the role of the states and tribes in protecting the nation's water resources; (3) narrowing the previous definition of WOTUS; (4) recognition that clean water is important for the environment, outdoor recreation, and protecting public health; and (5) a need to address procedural and legal deficiencies in the 2015 Rule.[62] Regardless of the position a person takes on WOTUS, this showcases an essential attribute of agency rulemakings: the ability of the public to comment on the proposals and influence what is written in the finalized versions. It is essential for stakeholders to partake in the process for rules to be well-rounded.

C. Parallel Problems

While the comment period was open for the new proposed rule, the Supreme Court answered another question related to WOTUS. The Supreme Court held in *National Association of Manufacturers v. Department of Defense* that the circuit courts lacked original jurisdiction over WOTUS claims.[63] Specifically, challenges to WOTUS were required to be brought in federal district courts because the rule fell outside the ambit of the CWA section listing the categories of EPA actions where review is directly and exclusively in the federal court of appeals. Accordingly, the Sixth Circuit lifted the nationwide injunction it had issued in October 2015 and dismissed the pending cases seeking circuit court review of the validity of the "Clean Water Rule" due to lack of jurisdiction.[64] Although,

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[61] *Id.*

[62] *Proposed Revised Definition of "Waters of the United States" Responding to Public Input,* U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/sites/production/files/2018-12/documents/factsheet_- _responding_to_public_input_12.10.pdf [https://perma.cc/P5EJ-QZWU].

[63] National Ass'n of Mfrs. v. Department of Def., 138 S. Ct. 617, 634 (2018).

[64] Murray Energy Corp. v. United States Dep't. of Def. (*In re* United States DOD), 713 F. Appx. 489 (6th Cir. 2018).

preliminary injunctions of the 2015 Rule were issued by district courts in North Dakota, Georgia, and Texas.[65] One reason for the injunction was the deprivation of the public's ability to comment.[66] Another reason voiced was that the 2015 Rule was defective because it puts waters within agency reach that have no effect on the "chemical, physical, or biological integrity" of any "navigable-in-fact water."[67]

V. THE NEW RULE

The Trump administration's newly proposed WOTUS definition eliminates the applicability of Justice Kennedy's significant nexus test to tributaries and wetlands by limiting the scope of federally protected waterways to those bodies of water that are "relatively permanent."[68] This phrase refers to those waterways with flows that are caused by forces other than precipitation.[69] This new rule is consistent with Justice Scalia's *Rapanos* majority opinion, since it applies "the ordinary meaning of the term 'waters[ ]' . . . as opposed to . . . ephemeral geographic features that are dry almost all of the year, as well as nonnavigable, isolated waters."[70] The new rule defines jurisdiction based on the duration, not volume, of water flow.

Specifically, the new rule requires that wetlands must either directly neighbor or have a direct hydrologic surface connection to navigable waters to fall under the CWA's definition.[71] For example, standing water resulting from an uncommon flooding event does not qualify as a wetland with a sufficient hydrologic connection to navigable waters to fall within the CWA's reach.[72] However, an isolated wetland *can* neighbor a navigable water within the CWA's jurisdiction if it has a "direct hydrologic *surface* connection to a jurisdictional water during a typical year."[73] This definition generally excludes roadside, transportation, and agricultural ditches.[74] Finally, the proposed rule expressly excludes groundwater from its scope, leaving the states the authority to regulate groundwater.[75]

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[65] North Dakota v. EPA, 127 F. Supp. 3d 1047, (D.N.D. 2018); Georgia v. Pruitt, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018); Texas v. EPA, 389 F. Supp. 3d 497 (S.D. Tex. 2019).
[66] *Texas*, 389 F. Supp. 3d at 503.
[67] *Pruitt*, 326 F. Supp. 3d at 1365.
[68] Revised Definition of "Waters of the United States", 84 Fed. Reg. 4154, 4170 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. § 328).
[69] *Id.* at 4155, 4173.
[70] *Id.* at 4196.
[71] *Id.* at 4184.
[72] *See id.* at 4188.
[73] *Id.* (emphasis added).
[74] *Id.* at 4179, 4193 (referencing Corps regulations from the 1970s).
[75] *Id.* at 4169. The 2015 Rule also expressly excluded groundwater from the definition of "waters of the United States." *See* 33 C.F.R. § 328.3(b)(5).

VI. POTENTIAL PROBLEMS WITH THE NEW RULE

While the public has voiced concerns through the comment periods, there still seems to be room for improvement in certain areas of the proposed rule. Improvements to the rule are taken in turn based on the type of water they involve.

A. Tributaries, Small Streams, and Lakes

There are multiple sources that feed navigable waters. If protection is only granted to navigable waters, then efforts to eliminate pollution will be ineffective because the water flowing into those navigable water systems are not monitored at the same level as the waterway systems themselves. The EPA suggests nutrient pollution is "one of America's most widespread, costly and challenging environmental problems."[76] Nutrient pollution is caused when an excess amount of nitrogen and phosphorus enter into the water system.[77] While both of these elements occur naturally in the environment, human activities can greatly influence their concentration in natural systems through excess runoff and mismanagement.[78] In large concentrations, nitrogen and phosphorus will decrease the productivity of aquatic ecosystems by disrupting their chemical balance.[79] The overabundance of nitrogen and phosphorous encourages the growth of algae that can overwhelm the ecosystem leading to dangerous algae blooms.[80] When this occurs, the availability of oxygen drastically decreases, resulting in a die-off of fish and aquatic life, as well as the creation of potentially hazardous drinking water.[81]

Without proper management systems in place, tributaries, lakes, and streams can introduce higher levels of nutrient pollutants into rivers causing a decrease in the productivity of the entire system.[82] The 2015 Rule created a management system for these water sources[83] and extended protection to these sources under the CWA.[84] The protection granted to these waters helps to maintain water quality and supports the aquatic life and wildlife

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[76] *Nutrient Pollution: The Issue*, U.S. ENVTL. PROT. AGENCY (last updated Feb. 4, 2019), https://www.epa.gov/nutrientpollution/issue [https://perma.cc/B2GX-9NB8].
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (proposed June 29, 2015) (to be codified at 33 C.F.R. 328 and 40 CFR Parts 110, 112, 116, et al.).
[84] *Id.* at 37,058.

depending on these sources for habitat and survival. If the removal of the 2015 Rule is successful, the ramifications could lead to further deterioration in aquatic ecosystems.

B. Wetlands

These potential negative impacts extend to wetlands. Under the 2015 Rule, most wetlands, regardless of their proximity to navigable waters, were protected under the CWA.[85] This designation aligns with goals of maintaining the physical, chemical, and biological integrity of the Nation's waters.[86] Although wetlands are often overlooked, they are essential ecosystems that help maintain the quality of the Nation's waters. Not only do they provide critical habitat to fish, waterfowl, and wildlife, they also provide indispensable ecosystem services that are beneficial to the surrounding communities.[87] For example, wetlands act as natural filtration systems.[88] Due to the slow flow of water within a wetland, sediments suspended in water that would typically be washed away into waterways settle onto the wetland floor.[89] Those sediments are filtered out by root systems, then broken down and used by microorganisms, effectively purifying water. Wetlands also help maintain the base flow of surface water systems.[90] For example, because of the characteristics that make up a wetland, they are naturally adept at storing water.[91] In times of drought, wetlands release stored water, allowing that water supply to enter into surface water systems.[92] In addition to water purification and storage, wetlands help reduce the impacts of severe weather events like flooding and storm protection in coastal areas.[93] Wetlands can absorb large quantities of water. This characteristic allows wetlands to act as a buffer, slowing the momentum of water and reducing flood heights, ultimately lessening flood damage in areas downstream of the wetland.[94]

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[85] Revised Definition of "Waters of the United States", 84 Fed. Reg. 4154, 4169 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. § 328).
[86] *Id.* at 4156.
[87] U.S. ENVTL. PROT. AGENCY, EPA'S 2008 REPORT ON THE ENVIRONMENT, 3–31 (2008), https://cfpub.epa.gov/roe/documents/EPAROE_FINAL_2008.PDF [https://perma.cc/ZD78-E8TN].
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Siddharth Narayan et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, SCIENTIFIC REPORTS (Aug. 31, 2017), https://www.nature.com/articles/s41598-017-09269-z [https://perma.cc/S8XP-R2VF].

While these are only a few of the ecosystem services provided by wetlands, the benefits of keeping them intact are substantial. If the removal of the 2015 Rule is successful, many wetlands will be at risk. The proposed rule will drastically reduce the waters covered under the CWA, leaving these ecosystems subject to development. Repealing the 2015 Rule is problematic because it would eliminate the ecosystem services provided by wetlands, resulting in the reduction of productivity and diversity of the environment and leaving communities with the complex problem of replacing the services provided by wetlands.

VII. THE BENEFITS OF THE NEW RULE

The new rule decentralizes the governance of some waters in favor of more localized responsibility. State sovereignty and localized governance are fundamental tenets to our republic, the benefits of which are seen in each state's different legal approach to the use of water. This disparity is based on the difference each unique area of our country faces. The water issues in the western United States are not the same as the water issues faced in the eastern United States.[95] Thus, by giving states the ability to merge water quality regulations into their state systems, there is less of a chance for friction and inefficiency between the federal and state legal regimes in the area.

The CWA was created for "the navigable waters," not "water" of the United States,[96] showing congressional intent to make sure that the CWA did not govern every water body. This limitation shows that the CWA is intended to be narrow. It also applies the plain language of the statute.

The new rule creates stability, clarity, and certainty, as requested through public comment. When even the courts struggle to understand the regulatory regime, it seems a little outrageous for entities to try and operate without violating the rules. This is typically a tenet of due process: preventing the implementation of vague laws that take away a person's liberty.[97] By outlining six categories of "waters of the United States" and stating that if water is not in one of the six categories it simply is not a part of WOTUS, the new rule is clear on what is and what is not a part of WOTUS.

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[95] Revised Definition of "Waters of the United States", 84 Fed. Reg. 4154, 4169 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. § 328).

[96] Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1972).

[97] *See generally* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Sessions v. Dimaya, 138 S. Ct. 1204, 1207 (2017) (discussing the basic principle of due process that enactments are void for vagueness if their prohibitions are not clearly defined).

The new rule protects the environment by continuing the purpose of the CWA: preventing pollution from finding its ways into the WOTUS.[98] However, the new rule does this in a narrow manner, making sure that people have the ability to continue to progress in life, without needing a permit from the federal government for all bodies of water. The six categories allow for more efficient and stable practices for those making a living under WOTUS. For example, the small family farmer, whose fifth-generation farm is next to a wetland, would be forced to consider if there was a significant nexus between the activities of irrigation on the farm and the wetlands. The new rule's removal of the significant nexus test removes that uncertainty of what can be under the regulations and what is outside the regulations, allowing the farmer to make decisions with more certainty. Thus, the new rule has an opportunity to help clarify what is and what is not within WOTUS and help all those who live underneath WOTUS to make efficient decisions. Any broader of a reading would slow down economic growth and be very costly for every party involved.

The new rule is also a product of an extensive public process. The public was heard through multiple comment periods, and the rule was crafted based on what the Agencies interpreted to be the major concerns of the public. This is our republic's democratic process at work: giving the public a voice in the process and the ability to show up and vote if it feels the administrative process does not represent the best interest for the Nation.

VIII. CONCLUSION

Ultimately, the battle for clarity for a definition of WOTUS continues. While there are positives for both sides of the argument, negatives also exist.

One end of the spectrum calls for federal regulation to be as broad as possible because the CWA seeks to protect, "restore[,] and maintain the chemical, physical, and biological integrity of the Nation's waters."[99] It only authorizes the enforcement and protection of "navigable waters."[100] In this context, "navigable waters" represents those "waters of the United States including the territorial sea."[101] However, "navigable waters" are not representative of the Nation's water as a whole, and should not be viewed as the only waters that should be protected. There is a connectivity between navigable waters and the water sources that feed them. Tributaries, lakes,

[98] Revised Definition of "Waters of the United States", 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. § 328).
[99] 33 U.S.C. § 1251(a) (2012).
[100] *Id.*
[101] 33 U.S.C. § 1362(7) (2012).

wetlands, and surface water runoff all contribute to the integrity of the Nation's waters. If maintaining the chemical, physical, and biological integrity of the Nation's waters is the goal of the CWA, then we must also protect the waters that sustain them.

The other end of the spectrum believes federal regulation should be as minimal as possible. The regulation of the state's water systems is best left to the states because each area is so unique, and a one size fits all solution would fail everyone. The increased federal regulation would increase costs, delay productivity, and in the end, fail to accomplish the goals of the federal government.

The ideal policy likely falls in between these two spectrums. However, the one thing that is certain is that public involvement in rulemaking processes is essential because it helps illuminate the public perception of current rules. It also helps highlight the strengths and weaknesses of current rules, so that the Agencies can continue to progress and craft better rules and guidance to help protect and make efficient use of valuable natural resources. That is the end goal: efficient, beneficial use of natural resources that not only promotes growth but also protects the environment and the way of living to which we have become accustomed.