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Volume 31 | Issue 1

Article 2

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1-27-2020

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### Recommended Citation

Brian W. Blomain, *Trump Administration Makes a Splash: The Altered Clean Water Act's Rippling Effect on State and Federal Water Regulation*, 31 Vill. Envtl. L.J. (2020).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol31/iss1/2>

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2019]

TRUMP ADMINISTRATION MAKES A SPLASH: THE ALTERED  
CLEAN WATER ACT'S RIPPLING EFFECT ON STATE  
AND FEDERAL WATER REGULATION

Clean water ranks near the top of the list of environmental concerns for both Americans and politicians alike.<sup>1</sup> Since Congress enacted the Clean Water Act (CWA) in 1972, it has imposed environmental regulations on individuals and corporations, fining violators who pollute the waters of the United States.<sup>2</sup> The Obama Administration, by way of the Clean Water Rule, redefined the scope of the CWA by establishing the Act to include the “Waters of the United States” (WOTUS).<sup>3</sup> The Clean Water Rule more clearly defines the tributaries and adjacent waters under federal jurisdiction by stating: “[A] tributary must show physical features of flowing water – a bed, bank, and ordinary high water mark – to warrant protection.”<sup>4</sup> The Obama Administration’s changes to the CWA altered the traditional definition of the “WOTUS” set out by the original CWA when it was created in 1972.<sup>5</sup> Presently at issue is the Trump Administration’s proposed controversial change to effectively roll back the same provisions of the CWA previously modified by the Obama Administration.<sup>6</sup>

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1. See Ellie Kaufman, *EPA Announces New Definition of Waters Protected Under Clean Water Act*, CNN POLITICS (Dec. 11, 2018, 4:25 PM), <https://www.cnn.com/2018/12/10/politics/epa-wotus/index.html> (describing importance Americans give to clean water in light of all environmental issues).

2. See generally *id.* (describing general purpose and accomplishments of Clean Water Act).

3. See generally *Factsheet Clean Water Rule*, U.S. ENVTL. PROT. AGENCY, [https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact\\_sheet\\_summary\\_final\\_1.pdf](https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf) (last visited Jan. 22, 2019) (providing information about Obama Administration’s changes to Clean Water Act by way of Clean Water Rule). The Obama administration changed the definition and scope of the Clean Water Act by redefining the WOTUS as all-encompassing of freshwater sources in the United States. *Id.* (illustrating redefinition of WOTUS).

4. *Id.* (describing in detail Obama Administration’s redefining of WOTUS).

5. *Id.* (explaining Obama Administration’s intent behind changes to CWA under Clean Water Rule). The Obama Administration believed that their changes would revert to the original purpose and scope of the CWA, that is, to be as all encompassing. *Id.* (illustrating Obama-era interpretation of CWA’s purpose).

6. *Id.* (describing how Trump and Obama administrations scrutinized and changed definition of “waters of the United States”).

## I. GETTING YOUR SEALEGS: BACKGROUND SURROUNDING PRESIDENT TRUMP'S PROPOSED CHANGES TO THE CLEAN WATER ACT

President Trump fulfilled one of his campaign pledges by issuing Executive Order 13778, directing the Environmental Protection Agency (EPA) to publish the Clean Water Rule “for notice and comment” to consider its amendment or revocation.<sup>7</sup> The Executive Order also requested the reversion of the Clean Water Rule to “a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*”<sup>8</sup> by interpreting “navigable waters” to mean “relatively permanent, standing or continuously flowing bodies of water,” and only cover wetlands with a “continuous surface connection” to such relatively permanent waters.<sup>9</sup>

On December 11, 2018, President Trump announced his plan to drastically alter the CWA by retracting the Obama Administration’s definition of the WOTUS.<sup>10</sup> Under this proposal, the CWA would no longer federally protect nearly all American wetlands and thousands of miles of U.S. waterways.<sup>11</sup> President Trump’s proposal aims to redefine the EPA’s definition of the WOTUS, which the Obama Administration changed.<sup>12</sup>

Additionally, this proposal limits water that falls under federal protection to “major waterways, their tributaries, adjacent wetlands and a few other categories.”<sup>13</sup> The Administrator of the EPA, An-

7. Exec. Order No. 13,778, 82 Fed. Reg. 12,497, 12,497 (Mar. 3, 2017) (outlining Trump Administration’s proposed changes to WOTUS under CWA); see Patrick Parenteau, *The Clean Water Rule: Not Dead Yet*, 48 ENVTL. L. 377, 380 (2018) (describing how and why Trump Administration created executive order to alter CWA).

8. *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (describing Justice Scalia’s plurality opinion from *Rapanos*).

9. Parenteau, *supra* note 7, at 377 (outlining Justice Scalia’s definition of “navigable waters” as was intended by original wording of Clean Water Act).

10. See Ellie Kaufman, *EPA Announces New Definition of Waters Protected Under Clean Water Act*, CNN POLITICS (Dec. 11, 2018, 4:25 PM), <https://www.cnn.com/2018/12/10/politics/epa-wotus/index.html> (describing President Trump’s plan to repeal and replace Clean Water Rule).

11. *Id.* (explaining specifics of proposed change to definition of WOTUS under CWA).

12. *Id.* (describing President Trump’s rationale behind proposed changes to CWA).

13. Nathan Rott, *Trump EPA Proposed Major Rollback of Federal Water Regulation*, NPR (Dec. 11, 2018), <https://www.npr.org/2018/12/11/675477583/trump-epa-proposes-big-changes-to-federal-water-protections> (explaining specific elements of President Trump’s proposed changes to CWA). The proposed waterways protected under the proposed changes are now “major waterways, their tributaries, adjacent wetlands and a few other categories,” areas President Trump believes revert the CWA to its original purpose and make it less confusing. *Id.* (outlining rationale behind Trump Administration’s proposed CWA changes).

drew Wheeler, claims the change aims to benefit landowners in possession of the lands surrounding waterways to “provide states and landowners the certainty they need to manage their natural resources and grow local economies.”<sup>14</sup>

The proposed change runs afoul of the definition amended by the Obama Administration in 2015, which broadened federal water protection to include waterways and their tributaries.<sup>15</sup> Farming and agricultural lobbyists, including the American Farm Bureau Federation, have pushed back against the Obama Administration’s regulation changes since they came to fruition in 2015, believing the Clean Water Rule was used as a pretext to arbitrarily control portions of their farmland.<sup>16</sup>

In contrast, opponents of the Trump Administration’s proposed change speculate that President Trump is attempting to change the Obama-era rule to appease some of his constituents.<sup>17</sup> From an environmental standpoint, President Trump’s most avid supporters and constituents include rural farmers, real estate developers, and golf course owners because the Obama-era rule was more stringent regarding bodies of water that affected land development projects, farms, and golf courses.<sup>18</sup> The Trump Administration prioritized the CWA’s revision, rationalizing the proposed change by positing the Clean Water Rule was a regulatory overreach and “one of the worst examples of federal regulation.”<sup>19</sup>

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14. *Id.* (describing EPA Administrator’s reasoning behind backing President Trump’s proposed changes to CWA).

15. See Kaufman, *supra* note 10 and accompanying text (explaining specific elements of President Trump’s proposed changes to the CWA). President Obama’s Clean Water Rule “aimed to widen federal clean water protections to include not only those large waterways, but also the smaller streams and tributaries that feed into them.” *Id.* (illustrating broadened water protections under Obama Administration’s CWA).

16. See generally *Trump Rolls Back Decades of Clean Water Act Protections*, BBC NEWS (Dec. 11, 2018), <https://www.bbc.com/news/world-us-canada-46526776> (describing proponents of Trump Administration’s proposal and why it is beneficial to revert to CWA’s old language).

17. See Coral Davenport, *Trump Rule Would Limit E.P.A.’s Control Over Water Pollution*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/climate/trump-water-pollution-wotus-replacement.html> (describing how opponents of Trump Administration’s proposal allege proposed change motivated by appeasing Trump’s constituents).

18. *Id.* (describing President Trump’s constituents and bodies of water that he is involved with in his non-presidential life).

19. Nathan Rott, *Trump EPA Proposed Major Rollback of Federal Water Regulation*, NPR (Dec. 11, 2018), <https://www.npr.org/2018/12/11/675477583/trump-epa-proposes-big-changes-to-federal-water-protections> (explaining Trump Administration’s rationale behind proposed changes).

Opponents believe that “[t]his proposal is reckless . . . [g]iven the problems facing our lakes, streams and wetlands from the beaches of Florida to the drinking water of Toledo. . . .”<sup>20</sup> Some environmentalists believe the proposed change will lead to increased pollution levels in American waters and threaten public health.<sup>21</sup> More specifically, an environmental advocacy group, the Natural Resources Defense Council, believes the Trump Administration’s proposal will “gut water protections nationwide,” and “limit the scope of the Clean Water Act, exempting many oil companies, industrial facilities and developers from programs that aim to protect our rivers, lakes, streams and wetlands from degradation.”<sup>22</sup> This Comment will discuss the potential implications of the Trump Administration’s repeal of the Obama Administration’s water rules and regulations, including major changes to the CWA.<sup>23</sup> First, this Comment will provide background information on the CWA and EPA.<sup>24</sup> Next, this Comment will discuss whether the CWA is fulfilling its original intent or having a different effect than intended.<sup>25</sup> Finally, this Comment will discuss whether the CWA should be upheld and altered to include wetlands and ephemeral

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20. See Irwin Dawid, *EPA and Army Corps of Engineers Propose Revision of Wetlands Definition*, PLANETIZEN (Dec. 14, 2018), <https://www.planetizen.com/news/2018/12/101972-epa-and-army-corps-engineers-propose-revision-wetlands-definition> (describing opponents of Trump Administration’s proposal). Jon Devine, director of federal water policy for the Natural Resources Defense Council, is a major opponent and authored the abovementioned statement. *Id.* (illustrating Devine’s rationale behind opposition).

21. See Davenport, *supra* note 17 (explaining environmentalist’s opinions regarding detrimental environmental effects of Trump Administration’s proposed changes).

22. *Id.* (describing environmental advocacy group’s position on harmfulness of Trump Administration’s proposed changes to environment). The Natural Resources Defense Council believes President Trump’s proposed changes will give breaks to big businesses who are polluting, setting America back years in terms of environmental regulation. *Id.* (stating environmental impact of proposed CWA changes).

23. See Rapanos, *supra* note 8 and accompanying text (describing Trump Administration’s proposed changes as reason for debate among environmentalists and politicians alike).

24. See Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/> (describing CWA in general and legislative history of how water regulation has changed over years).

25. See David Keiser & Joseph S. Shapiro, *How the Clean Water Act has served the environment and the economy*, VOX (Oct. 24, 2018), <https://voxeu.org/article/impact-clean-water-act> (describing amount of money expended by taxpayers since CWA enactment in 1972). This illustrates where the CWA does and does not work, as well as proposed changes to improve water regulation. *Id.* (outlining cost-benefit analysis of CWA implementation).

streams under the WOTUS or if it should be repealed and replaced with another piece of legislation.<sup>26</sup>

## II. MAN-MADE MAYHEM: LEGISLATIVE HISTORY OF THE CWA

The federal government's first attempt at curtailing water pollution came in the form of 1948's Federal Water Pollution Control Act (FWPCA).<sup>27</sup> Congress subsequently opened the FWPCA up to amendments.<sup>28</sup> The FWPCA was in effect until 1972, when Congress amended the statute again in response to growing public concern over reversing the damage caused by water pollution; as such, the FWPCA became known as the CWA of 1972.<sup>29</sup> Congress made multitudes of amendments to the CWA over the years, which have ultimately become the skeleton of the modern CWA.<sup>30</sup> Though there were subsequent revisions in 1978, 1981, 1987, and 1990 that expanded the CWA's scope to different bodies of water and intensified pollution regulations, the general framework of the CWA has remained constant since it was enacted in 1972.<sup>31</sup>

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26. See Ellie Kaufman, *EPA Announces New Definition of Waters Protected Under Clean Water Act*, CNN POLITICS (Dec. 11, 2018, 4:25 PM), <https://www.cnn.com/2018/12/10/politics/epa-wotus/index.html> (describing proposals of intragovernmental regulation that would improve CWA).

27. See Laws & Regulations, *History of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/history-clean-water-act> (last visited Feb. 14, 2019) (describing government's first attempt at regulating water in United States).

28. *Id.* (explaining then-existing concern of curtailing water pollution into WOTUS).

29. *Id.* (describing government's second attempt at curtailing water pollution in form of amendment that ultimately became Clean Water Act).

30. See *id.* (listing amendments to Federal Water Pollution Control Act of 1948 that are basis of CWA today). Some of the amendments to the CWA are as follows: "[e]stablished the basic structure for regulating pollutant discharges into the waters of the United States"; "[e]stablished the basic structure for regulating pollutant discharges into the waters of the United States"; "[g]ave EPA the authority to implement pollution control programs such as setting wastewater standards for industry"; "[m]aintained existing requirements to set water quality standards for all contaminants in surface waters"; "[m]ade it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions"; "[f]unded the construction of sewage treatment plants under the construction grants program"; "[r]ecognized the need for planning to address the critical problems posed by nonpoint source pollution." *Id.* (explaining amendments to CWA over time).

31. See *History of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/history-clean-water-act> (last visited Feb. 14, 2019) (describing subsequent revisions that did not affect CWA, but rather supplemented it to allow it to become CWA as understood today).

The Trump and Obama Administration's debate over the CWA's scope stems from the definition of the WOTUS.<sup>32</sup> The Trump Administration's proposal seeks to redefine the WOTUS to exclude "ephemeral streams" and "wetlands not directly connected or adjacent to large bodies of water."<sup>33</sup> Although ephemeral streams only appear after rainfall and were therefore only recently addressed in environmental regulation, the wetlands change would alter protections dating back to the George H.W. Bush Administration.<sup>34</sup> The Trump Administration's proposed change to the definition of the WOTUS "would not change protections for large bodies of water[,] . . . neighbouring wetlands, and any state-imposed rules. . . ."<sup>35</sup>

#### A. Overview of the CWA

The general purpose of the CWA is "[r]estoration and maintenance of chemical, physical and biological integrity of [the] Nation's waters."<sup>36</sup> This general purpose also governs the objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>37</sup> Given this stated purpose and objective, the CWA, on its face, aims to be as encompassing as possible regarding environmental protection.<sup>38</sup> Under the CWA, water pollution can come from two different sources: point and nonpoint sources.<sup>39</sup> Nonpoint sources are pollution acts such as

32. See *Trump Rolls Back Decades of Clean Water Act Protections*, BBC (Dec. 11, 2019), <https://www.bbc.com/news/world-us-canada-46526776> (describing constant battle between new and old presidential administrations changing the CWA's definition of the WOTUS).

33. *Id.* (describing specifics of Trump Administration's proposal). President Trump aims to limit the scope of the WOTUS under the CWA to not include "ephemeral streams" because he believes that this is "a more precise definition" of the CWA. *Id.* (explaining Trump Administration's desire to reduce CWA's ambiguity).

34. *Id.* (explaining historical implications of Trump Administration's proposed changes to the WOTUS).

35. *Id.* (clarifying what provisions continue under Trump Administration's proposed changes to WOTUS definition). The Trump Administration is only changing one small portion of the WOTUS; however, this one small portion is what past presidential administrations have been tweaking since the CWA's enactment in 1972. *Id.* (explaining WOTUS as controversial term).

36. See generally Clean Water Act, 33 U.S.C. § 1251(a) (2012) (describing general purpose, intent, and scope of CWA).

37. *Id.* (explaining statute's purpose of maintaining water integrity).

38. See *id.* (stating purpose and intent of CWA as "[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters").

39. See Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1035 (2013) (explaining two different types of water pollution as recognized and defined under CWA).

“leakage” or “runoff” that are difficult to trace back to the original source of contamination, making their regulation much more challenging.<sup>40</sup>

The CWA vests power to the states to regulate both agricultural point and nonpoint sources of water pollution.<sup>41</sup> The CWA defines a pollutant as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”<sup>42</sup> This list describes nearly any type of man-made waste that an individual or company could possibly create.<sup>43</sup> Thus, the list goes hand-in-hand with the CWA’s aim to be as inclusive as possible regarding environmental protection.<sup>44</sup>

The text of the CWA includes all “navigable waters” of the United States.<sup>45</sup> Before the proposed changes, the term “navigable waters” was defined as “the waters of the United States, including the territorial seas.”<sup>46</sup> This section, regarding the definition of navigable waters covered under the CWA, is precisely the section that has been scrutinized by both the Obama and Trump Administrations.<sup>47</sup> Courts have attempted to interpret the term “waters of the United States” with Congress’s intent in mind, broadening the CWA’s terms “to the limits of [their] constitutional authority.”<sup>48</sup>

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40. *See id.* at 1034 (explaining intricacies of nonpoint sources of water pollution and how they are indirect as opposed to point source contaminants).

41. *Id.* (clarifying where EPA receives its originally congressionally-vested powers to regulate environment).

42. 33 U.S.C. § 1362(6) (2017) (listing types of pollutants covered under CWA protection).

43. *See id.* (generalizing that all types of man-made pollutants covered under CWA).

44. *See id.* (describing definitions within CWA as being as encompassing as possible).

45. *Id.* § 1362(7) (including “navigable waters” in definition of CWA).

46. *Id.* § 1362(8) (defining navigable waters and waters of the United States, including territorial seas as waters protected under the CWA).

47. 33 U.S.C. § 1362(7)-(8) (listing both navigable waters meaning waters of the United States, including territorial seas as encompassed by CWA protection); *see* Ellie Kaufman, *EPA Announces New Definition of Waters Protected Under Clean Water Act*, CNN POLITICS (Dec. 11, 2018, 4:25 PM), <https://www.cnn.com/2018/12/10/politics/epa-wotus/index.html> (explaining Obama Administration’s Clean Water Rule protections and proposed changes by President Trump).

48. *See* Patrick Parenteau, *The Clean Water Rule: Not Dead Yet*, 48 ENVTL. L. 377, 383-84 (2018) (restating Congress’ original intent of scope of CWA to be as encompassing as possible).



## B. Where Does the CWA's Power Come From and How Does the EPA Regulate It?

As the environment has not been of great regulatory concern over the last fifty years, there is no explicit constitutional authority granting the EPA the power to regulate.<sup>49</sup> Accordingly, a logical place to start when looking at the power of the executive branch concerning the EPA is how EPA derives its power and enforces compliance.<sup>50</sup> In 1970, President Nixon united with Congress to pass a series of laws that established the EPA.<sup>51</sup> Establishment through executive order means the EPA can only act under congressionally-approved statutes in a manner also consistent with executive instruction.<sup>52</sup>

### 1. EPA's Regulatory Process

The first step in the regulatory process is for Congress to write a bill relating to a prevalent environmental issue.<sup>53</sup> Next, the President approves or vetoes the bill.<sup>54</sup> If the President approves the bill and the ensuing act is codified, the EPA can then create additional regulations to implement the law and serve the purpose set out by the executive branch.<sup>55</sup>

The first step in implementing a regulation is for the EPA to propose a regulation.<sup>56</sup> The Agency proposes a regulation by reviewing the complex issue at hand and issuing a Notice of Proposed

49. See Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/> (explaining Congress' delegation of power to EPA because of explicit Constitutional authority).

50. See *id.* (stating where EPA derives power from and process behind enforcing water regulation to ensure compliance).

51. See *id.* (listing specifics of President Nixon's establishment of EPA).

52. See *id.* (explaining process by which EPA is able to pass regulations to protect environment).

53. See *The Basics of the Regulatory Process*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/basics-regulatory-process> (last visited Feb. 2, 2019) (stating first step of regulatory process as member of Congress proposes bill). "A bill is a document that, if approved, will become law". *Id.* (defining role of bill in regulatory process).

54. *Id.* (describing second step of regulatory process). "If both houses of Congress approve a bill, it goes to the President who has the option to either approve it or veto it." *Id.* (outlining further regulatory steps).

55. *Id.* (explaining third step of regulatory process as House of Representatives standardizes text of law and publishes it in United States Code upon act's passing).

56. *Id.* (describing first step in creating regulation). When creating regulations, "the [a]gency [first] researches the issues, and if necessary, proposes a regulation." *Id.* (describing how agencies propose regulatory language).

Rulemaking (NPRM).<sup>57</sup> Once the EPA proposes the regulation, the EPA collects feedback from political activists, businesses, farmers, and the general public, and the agency may then alter the regulation accordingly.<sup>58</sup> Next, the EPA publishes the final rule in the Federal Register and the EPA's official docket, and once the regulation has gained approval—or in some cases without full approval—the EPA codifies the regulation to the upcoming volume of the Code of Federal Regulations.<sup>59</sup>

## 2. *Constitutional Authority*

Diving deeper, it is important to understand the source from which Congress derives its power to create statutes governing the environment.<sup>60</sup> The Commerce Clause of the United States Constitution states that Congress has the power “to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>61</sup> Every environmental law passed since 1970, including the CWA, has relied on the powers granted by the Commerce Clause, which states that Congress's power is derived from a need “to restrict air and water pollution and protect endangered species.”<sup>62</sup> The CWA is unique because it is one of the two environmental statutes in which Congress has delegated all regulatory power to the EPA.<sup>63</sup> Under this delegated power, the EPA may constitutionally create any regulation related to water pollution,

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57. See *id.* (explaining significance of Notice of Proposed Rulemaking). The NPRM proposal is “listed in the Federal Register so that members of the public can consider it and send their comments to us.” *Id.* (explaining purpose for NPRM).

58. See *The Basics of the Regulatory Process*, *supra* note 53 (explaining how regulatory process is altered and changed according to general public's opinion).

59. *Id.* (listing codification into CFR as last step in regulatory process).

60. See generally Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/> (explaining how Congress delegates its power over environmental regulation to EPA).

61. U.S. CONST. art. I, § 8, cl. 3 (defining Congress' powers granted under Commerce Clause). The purpose of the Commerce Clause “was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain.” *Id.* (establishing origin of federal environmental regulation).

62. See generally Robinson Meyer, *supra* note 60 (explaining authoritative power basis for creating environmental protection laws).

63. See generally *id.* (describing process of executive branch acquiring Congressional powers through delegation to regulate specific thing).

though EPA regulations are still subject to be overturned by Congress if the regulations are unpopular.<sup>64</sup>

Due to the longevity of the CWA, it has been subject to multiple alterations by different presidential administrations throughout the decades.<sup>65</sup> In 2015, the Obama Administration broadened the definition of what “bodies of water” the federal government had regulatory authority over to include ephemeral streams and wetlands.<sup>66</sup> In response, the Trump Administration has proposed a regulation that divides waters into six categories: “traditional navigable waters, tributaries to those navigable waters, certain ditches—including those used for navigation or affected by the tide, certain lakes and ponds, impoundments and wetlands that are adjacent to water covered by the rule.”<sup>67</sup> The issue arises not with what waters the Act encompasses but with what waters the proposal excludes.<sup>68</sup> The waters excluded are: “groundwater; ditches, including roadside and farm ditches; prior converted cropland; storm water control features and wastewater and waste treatment systems.”<sup>69</sup> The Trump administration claims the newly proposed interpretation of the CWA will make it “easier to understand,” whereas critics believe that it is a blind power grab to fulfill his campaign promise of repealing the Obama administration’s changes to the CWA.<sup>70</sup>

### 3. *Compliance Enforcement Under the CWA*

Individual compliance with the CWA is determined by regulations proposed and established by the EPA with the CWA’s broad

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64. *Id.* (describing limits of agency regulatory power). Regulations established by the EPA “carry the force of law,” but the regulations can be superseded or deemed moot by a Congressional law because “Congress remains the higher power.” *Id.* (explaining limitations of EPA’s power).

65. See Ellie Kaufman, *EPA announces new definition of waters protected under clean water act*, CNN POLITICS (Dec. 11, 2018, 4:25 PM), <https://www.cnn.com/2018/12/10/politics/epa-wotus/index.html> (outlining changes to CWA made by both Obama and Trump administrations).

66. *Id.* (describing Obama Administration’s changes to CWA’s terms).

67. *Id.* (outlining Trump Administration’s proposed changes to CWA).

68. *Id.* (explaining Trump Administration’s proposal will not include wetlands and ephemeral streams as historically encompassed by CWA).

69. *Id.* (listing specific waters not covered by CWA).

70. See Kaufman, *supra* note 65 (explaining conflicting opinions on what Trump Administration’s proposal will change in terms of CWA’s scope); see also 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 FOUND. (Apr. 29, 2015), <https://www.heritage.org/environment/report/what-you-need-know-about-the-epacorps-water-rule-its-power-grab-and-attack> (illustrating motive behind proposed rule change).

purpose in mind.<sup>71</sup> According to the EPA, there is intragovernmental cooperation between “federal, state, and tribal regulatory partners to monitor and ensure compliance” with the CWA and the regulations set out to implement the Act’s purpose.<sup>72</sup> In order to monitor compliance, the CWA has a built-in pollution-control system, the National Pollutant Discharge Elimination System (NPDES) Program.<sup>73</sup> The NPDES Program issues permits to facilities that serve as “point sources that discharge pollutants into waters of the United States” and monitors which pollution practices are acceptable.<sup>74</sup> Under the NPDES Program, compliance is monitored by various techniques including discharge monitoring report reviews and “on-site compliance evaluation as well as providing assistance to enhance compliance with NPDES permits.”<sup>75</sup> NPDES permits, which change “general requirements of the CWA into specific provisions tailored to the operations of each person discharging pollutants,” are issued to any facility that discharges directly into WOTUS.<sup>76</sup>

States are primarily in charge of monitoring and ensuring compliance with the NPDES Program.<sup>77</sup> Currently, only four states are not authorized by the EPA to implement their own NPDES water pollution control programs.<sup>78</sup> The EPA oversees and governs authorized state programs, enumerates responsibilities over unauthorized states, including Native American Country, and maintains

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71. *Clean Water Act (CWA) Compliance Monitoring*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> (last visited Feb. 2, 2019) (explaining how individual compliance enforced by EPA under rules established by CWA).

72. *See id.* (explaining how enforcement process includes cooperation at all levels of government).

73. *See id.* (stating purpose of NPDES Program and how compliance is monitored).

74. *Id.* (describing point permits and to whom they are issued).

75. *Id.* (explaining who monitors compliance under CWA and process behind monitoring it).

76. *National Pollutant Discharge Elimination System (NPDES)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/npdes/npdes-permit-basics> (last visited Feb. 2, 2019) (clarifying who is granted NPDES permits and purpose of NPDES permit system).

77. *See Clean Water Act (CWA) Compliance Monitoring*, *supra* note 71 (explaining what level of government institutes compliance monitoring according to current structure of state and federal EPAs).

78. *NPDES Permits Around the Nation*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/npdes-permits> (last visited Feb. 2, 2019) (listing states exempted from NPDES permit requirements). The four states not authorized to implement their own NPDES programs to control water pollution are: Idaho, New Mexico, Massachusetts and New Hampshire. *See id.* (illustrating division between federal and state regulation).

federal facilities.<sup>79</sup> The NPDES Compliance Monitoring Strategy “provides implementation guidance to EPA regions and authorized states by describing EPA’s inspection frequency goals.”<sup>80</sup>

Most granted NPDES permits are called publicly owned treatment works (POTW).<sup>81</sup> POTW are wastewater treatment facilities that collect wastewater from domestic, commercial, and industrial facilities, which then treat the wastewater and typically discharge treated water into a stream, creek, river, lake, estuary, or ocean.<sup>82</sup> The CWA establishes general pretreatment program regulations, and the three types of national pretreatment standards that apply to industrial users are prohibited discharges, categorical standards, and local limits.<sup>83</sup> The pretreatment programs must be approved by the “Approval Authority,” which oversees implementation and enforcement of the pretreatment programs either at the state or federal level of enforcement.<sup>84</sup>

Additionally, each POTW must develop a response plan to ensure compliance.<sup>85</sup> Response plans include minimum requirements for all creators to obey.<sup>86</sup> The EPA also encourages the

79. See *Clean Water Act (CWA) and Federal Facilities*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities> (last visited Feb. 2, 2019) (explaining power breakdown of EPA’s control over NPDES authorized and unauthorized states with regard to NPDES permit system).

80. See *Clean Water Act (CWA) Compliance Monitoring*, *supra* note 71 (clarifying NPDES permit’s purpose and goal).

81. *Pretreatment Roles and Responsibilities*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/npdes/pretreatment-roles-and-responsibilities> (last visited Feb. 2, 2019) (clarifying difference between NPDES permit holders and POTW).

82. See *id.* (explaining types of POTW facilities and types of regulated pollution).

83. See *id.* (listing general pretreatment program regulations and types of national pretreatment standards POTWs permit and regulate).

84. *Id.* (stating pretreatment plans must include specific components). The pretreatment plans must include: “[l]egal authority to implement the program”; “[p]rocedures for program implementation”; “[f]unding adequate to implement the program”; “[l]ocal limits, including periodic reevaluations to ensure that the limits remain protective of the POTW”; “[e]nforcement, including development and implementation of an enforcement response plan”; and “[a] comprehensive list of industrial users.” *Id.* (outlining pretreatment plan requirements).

85. *Id.* (stating POTW required response plan). POTWs will look into and address any instance of non-compliance. *Id.* (explaining POTW’s role in compliance process).

86. See Shawn D. Hagerty & Rebecca Andrews, *Establishing and Managing Wastewater Treatment Facilities Under the Clean Water Act*, WESTLAW w-010-9851 (2017) (listing procedures necessary to implement pretreatment programs). The procedure is as follows: “[d]escribe how the POTW will investigate instances of noncompliance; [d]escribe the types of escalating enforcement responses the POTW will take in response to all anticipated types of industrial user violations and the time periods within which responses will take place; [i]dentify the officials, by title, responsible for each type of response; and [a]dequately reflect the POTW’s primary

POTWs to create an enforcement plan to monitor the enforcement of the response plan.<sup>87</sup> The general requirements of these enforcement response plans include identifying the official responsible for taking an enforcement action; the time frame for actions; the expected responses from a discharger; and the “potential escalated actions based on . . . the nature of the violation . . . magnitude of the violation . . . duration of the violation . . . frequency of the violation . . . [and] effect of the violation.”<sup>88</sup> The mechanisms of enforcement are determined by the amount of power the individual regulatory agencies grant to the POTW.<sup>89</sup> Common mechanisms of enforcement are informal notices and meetings, warning letters, administrative orders and compliance schedules, administrative fines, civil actions, criminal prosecution, or termination of service.<sup>90</sup> Thus, the process of compliance enforcement under the CWA is part of a complete framework; however, it is not always monitored efficiently and effectively.<sup>91</sup>

Section 404 of the CWA regulates “the placement of dredged or fill material into wetlands, lakes, streams rivers, estuaries and certain other types of waters.”<sup>92</sup> The purpose of this section is “to avoid and minimize losses to wetlands and other waters and to compensate for unavoidable loss through mitigation and restoration.”<sup>93</sup> Both the EPA and the U.S. Army Corps of Engineers are responsible for Section 404’s implementation and compliance with the permits issued, and, in the event of unpermitted discharges, conducting the on-site investigations.<sup>94</sup>

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responsibility to enforce all applicable pretreatment requirements and standards.” *Id.* (illustrating POTW procedures); see 40 C.F.R. § 403.8(f)(1)-(2) (describing statutory requirement for POTW response plans).

87. *Pretreatment Roles and Responsibilities*, *supra* note 81 (explaining purpose of creation of response plan and how it is enforced).

88. *Introduction to the National Pretreatment Program*, U.S. ENVTL. PROT. AGENCY, [https://www3.epa.gov/npdes/pubs/pretreatment\\_program\\_iintr\\_2011.pdf](https://www3.epa.gov/npdes/pubs/pretreatment_program_iintr_2011.pdf) (last visited Feb. 3, 2019) (listing requirements of enforcement response plans).

89. *Id.* (explaining mechanisms of enforcement and pretreatment program requirements in NPDES permits for POTWs).

90. *Id.* (listing formal mechanisms of enforcement).

91. See *id.* (summarizing enforcement and compliance monitoring of CWA by EPA).

92. *Clean Water Act (CWA) Compliance Monitoring*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> (last visited Feb. 2, 2019) (defining scope of Section 404 including regulated pollutants and bodies of water).

93. *Id.* (defining purpose of Section 404).

94. *Id.* (listing who is responsible for monitoring compliance under Section 404).

#### 4. *Data Analysis: CWA Enforcement Statistics*

EPA data demonstrates that in 2018, state regulatory agencies inspected 27,474 facilities with general NPDES permits, while the EPA inspected only 974.<sup>95</sup> Of those inspected by the state regulatory agencies, 10,338 were not in compliance with the regulations established under the CWA, and of those inspected by the EPA, 407 were not in compliance.<sup>96</sup> These individual permit holders who were in violation were considered “Category 1” violators, the most serious of violations.<sup>97</sup> “Category 1” violators are considered guilty of “significant noncompliance,” which includes: “[c]hronic violations of certain wastewater discharge limits, [d]ischarges that cause imminent endangerment to human health, welfare, or the environment, [f]ailure to meet certain compliance milestones, and [f]ailure to provide required reports.”<sup>98</sup> Formal enforcement actions were filed against 329 noncompliant facilities inspected by the EPA and 2,465 inspected by the state regulatory agencies.<sup>99</sup> Finally, of those facilities in which formal enforcement actions were filed, ninety-eight facilities inspected by the EPA and 1,315 inspected by state regulatory agencies were sanctioned with monetary penalties.<sup>100</sup>

Based on these statistics, the EPA is neither given enough power to regulate the facilities, judging by the sheer difference in

95. *Analyze Trends: State Water Dashboard*, U.S. ENVTL. PROT. AGENCY, <https://echo.epa.gov/trends/comparative-maps-dashboards/state-water-dashboard?view=activity&state=national> (last visited Feb. 2, 2019) (showing EPAs at both state and federal levels inspected 27,474 facilities and 974 facilities, respectively).

96. *Id.* (showing 10,338 facilities not in compliance on state level and 407 not in compliance on federal level).

97. *Water Dashboard Help*, U.S. ENVTL. PROT. AGENCY, <https://echo.epa.gov/help/water-dashboard-help> (last visited Feb. 2, 2019) (defining Category 1 violations). “Category 1 [a.k.a. Significant Noncompliance (SNC) for permittees designated as majors] and Category 2 . . . [f]acilities identified as in Category 1 noncompliance are typically those facilities with the most serious violations of their permit effluent limits in terms of duration, frequency, and magnitude, other permit requirements.” *Id.* (differentiating Category 1 and 2 violations).

98. See Shawn D. Hagerty & Rebecca Andrews, *Establishing and Managing Wastewater Treatment Facilities Under the Clean Water Act*, WESTLAW w-010-9851 (2017) (listing parameters involving individual that is in “significant noncompliance”).

99. *Analyze Trends: State Water Dashboard*, U.S. ENVTL. PROT. AGENCY, <https://echo.epa.gov/trends/comparative-maps-dashboards/state-water-dashboard?view=activity&state=national> (last visited Feb. 2, 2019) (showing 329 facilities inspected by EPA and 2,465 inspected by state regulatory agencies).

100. *Id.* (stating monetary penalties assessed to ninety-eight facilities inspected by the EPA and 1,315 inspected by state regulatory agencies). These choices demonstrate “the distribution of enforcement actions with monetary penalty by enforcement action lead agency state, other authorized agency, or EPA.” *Id.* (showing current divisions of power between federal and state EPAs).

number of facilities inspected, nor given the power to govern how the states inspect the facilities through their individual regulatory agencies.<sup>101</sup> From a regulatory perspective, the lack of EPA power is concerning because a federal environmental protection statute enacted by a federal regulatory agency should have the majority of its control delegated to the federal government, not the state government.<sup>102</sup> This imbalance of power is especially concerning when there are trillions of taxpayer dollars at stake.<sup>103</sup>

Although the CWA has reduced and limited water pollution, it costs the government and taxpayers billions of dollars per year to enforce regulations.<sup>104</sup> Since its creation in 1972, conservative estimates believe the CWA has cost “650 billion [dollars] in expenditure due to grants the federal government provided municipalities to build sewage treatment plants or improve upon existing facilities.”<sup>105</sup> To break that down into a more comprehensible number, “it costs approximately . . . 1.5 million [dollars] to make one mile of river fishable for one year.”<sup>106</sup> When measuring water quality downstream of sewage treatment plants, the quality of the water consistently improved after municipalities received state and federal grants.<sup>107</sup> These funds needed to come from somewhere, and in most cases these “federal grants” came directly out of taxpayer’s pockets.<sup>108</sup> In 2015, there were a reported 141.2 million taxpayers,

101. *See id.* (showing discrepancy in numbers between federal and state regulation, enforcement, and inspection).

102. *See id.* (showing EPA is not able to fully enforce and regulate statute enacted by executive powers).

103. *See* David Keiser & Joseph S. Shapiro, *How the Clean Water Act has served the environment and the economy*, Vox (Oct. 24, 2018), <https://voxeu.org/article/im-pact-clean-water-act> (listing amount of taxpayer dollars expended by CWA since enactment at over one trillion dollars and counting).

104. *See* Kara Manke, *Clean Water Act dramatically cut Pollution in US waterways*, BERKLEY NEWS (Oct. 8, 2018), <https://news.berkeley.edu/2018/10/08/clean-water-act-dramatically-cut-pollution-in-u-s-waterways/> (showing amount taxpayer dollars expended by CWA since enactment at over one trillion dollars and yearly costs at billions of dollars).

105. *Id.* (stating conservative estimates total amount expended on the CWA since enactment at 650 billion dollars expenditure on federal grants).

106. *See id.* (breaking down large amount spent on water regulation into more comprehensible number).

107. *Id.* (explaining CWA’s successes in form of treatment plants significantly reducing water pollution). Since the CWA was created, it “has imposed environmental regulations on individuals and industries that dump waste into waterways, and has led to 650 billion [dollars] in expenditure due to grants the federal government provided municipalities to build sewage treatment plants or improve upon existing facilities.” *Id.* (stating cost to federal government to assist in building or improving sewage plants).

108. *See* Erica York, *Summary of the Latest Federal Income Tax Data, 2017 Update*, TAX FOUNDATION (Jan. 17, 2018), <https://taxfoundation.org/summary-federal-in>



which would equate to about 106 dollars spent per taxpayer per year on enforcing the CWA's regulations.<sup>109</sup> If each taxpayer is paying over one hundred dollars per year to keep the CWA afloat, then it is imperative that the regulations are enforced as efficiently and effectively as possible.<sup>110</sup>

### III. THE CASES CAUSING THE SPLASH

In the 2006 *Rapanos* case, the Supreme Court issued a plurality decision that would become the basis of the ever-changing definition of the WOTUS.<sup>111</sup> Twelve years later, President Trump, through the Solicitor General, urged the Supreme Court to grant certiorari and hastily decide *County of Maui v. Hawai'i Wildlife Fund*.<sup>112</sup> The Supreme Court is considering hearing an argument regarding how to interpret groundwater contamination under the CWA summarized as follows: "a violation of the [CWA] may occur when a pollutant is released from a point source to groundwater and ultimately migrates to a body of water covered by the [CWA]."<sup>113</sup> If certiorari is granted, and the lower court's opinion is upheld by the Supreme Court, the *Maui* case has the potential to significantly change water regulation.<sup>114</sup>

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come-tax-data-2017/ (showing yearly taxpayer data from taxpayer perspective of amount paid per person).

109. *Id.* (listing number of taxpayers in the United States in 2015). This was calculated by dividing the total amount spent on the CWA to date by the total number of yearly taxpayers divided by the total number of years the CWA has been in effect. *Id.* (providing data used to make calculations).

110. *See id.* (showing number of taxpayers in the United States in 2015 including the amount taxpayers paid in income taxes). "In 2015, 141.2 million taxpayers reported earning 10.14 trillion [dollars] in adjusted gross income and paid 1.45 trillion [dollars] in individual income taxes." *Id.* (stating American taxpayer data for 2015).

111. *See Rapanos v. United States*, 547 U.S. 715, 715-20 (2006) (plurality opinion) (explaining two opinions that became presidential administration's interpretations of the CWA).

112. *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 737-40 (9th Cir. 2018) (citing case that President Trump has urged Supreme Court to grant certiorari); *see also*, Duke K. McCall & Douglas A. Hastings, *Solicitor General Urges US Supreme Court to Review Whether Clean Water Act Regulates Discharges to Groundwater*, MORGAN LEWIS (Jan. 10, 2019), <https://www.morganlewis.com/pubs/solicitor-general-urges-us-supreme-court-to-review-whether-clean-water-act-regulates-discharges-to-groundwater> (stating President Trump's actions by urging Solicitor General to hear case involving redefining WOTUS).

113. *See id.* (explaining argument set out in *County of Maui v. Hawai'i Wildlife Fund et al.* with regard to redefining WOTUS).

114. *See id.* (explaining opinion that has potential to ultimately change the scope of CWA). Pollutant discharges are subject to the CWA if the discharge to the surface water is "fairly traceable" to the discharge. *Id.* (discussing liability under CWA for discharges that are linked to the pollution).

## A. Rapanos Explained

While the decision in *Rapanos* yielded multiple opinions, the ones relevant to this discussion are Justice Scalia's plurality and Justice Kennedy's concurrence.<sup>115</sup> Mr. Rapanos drained and filled-in twenty-two acres of "wetlands" on property that he owned in preparation for a construction project.<sup>116</sup> His project was stopped because the EPA interpreted the definition of "navigable waterway" under the CWA as "areas connected to or linked to waters via tributaries or other similar means."<sup>117</sup> Mr. Rapanos attempted to circumvent the Supreme Court's decision in *United States v. Riverside Bayview*, where the Court found that wetlands were within the CWA's scope because waters with a "significant nexus" to navigable waters were covered under the CWA.<sup>118</sup>

Justice Scalia took a textualist approach and stated that WOTUS should include "relatively permanent, standing or flowing bodies of water" as supported by the Webster's Dictionary definition of water.<sup>119</sup> Justice Scalia's approach appears to be closest to the "commonsense understanding," as the CWA does not list "intermittent or ephemeral flows" under its definition of the WOTUS.<sup>120</sup> Furthermore, Justice Scalia noted that interpreting the CWA in this way would be stretching the definition of the WOTUS far beyond legislative intent, as "[t]he plain language of the statute does not authorize this 'Land is Waters' approach to federal jurisdiction."<sup>121</sup> The Trump Administration's proposed changes to the definition of WOTUS are derivative of Justice Scalia's textualist approach.<sup>122</sup>

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115. *Rapanos*, 547 U.S. at 716, 733, 754 (citing Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion).

116. *Id.* at 789 (describing background information of *Rapanos*).

117. *Id.* at 724-26 (discussing background information regarding Mr. Rapanos' project being stopped due to his property being encompassed by "navigable waters" as defined under CWA).

118. *See id.* at 753-56 (describing significant nexus test ultimately discussed in Justice Kennedy's concurrence).

119. *See id.* at 716 (reciting definition of WOTUS from Webster's Dictionary); Courtney Covington, *Rapanos v. United States: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws*, 34 *ECOLOGY L.Q.* 801, 811 (2007) (describing in detail Justice Scalia's approach to WOTUS definition under CWA).

120. Covington, *supra* note 120, at 811 (discussing Justice Scalia's approach to WOTUS definition under CWA).

121. *Rapanos*, 547 U.S. at 734 (explaining Justice Scalia's rationale behind his opinion that CWA would be stretched far beyond its legislative intent).

122. *See* Ellie Kaufman, *EPA Announces New Definition of Waters Protected Under Clean Water Act*, CNN POLITICS (Dec. 11, 2018, 4:25 PM), <https://www.cnn.com/2018/12/10/politics/epa-wotus/index.html> (describing Trump Administration's proposed changes to CWA).

Justice Kennedy's concurring opinion disagreed with Justice Scalia's opinion on how WOTUS should be interpreted.<sup>123</sup> Justice Kennedy believed that under the CWA, a "wetland" or "non-navigable waterbody" was considered WOTUS if it possessed a "significant nexus" to a traditional navigable waterway.<sup>124</sup> Justice Kennedy's argument focused primarily on the premise that a significant nexus exists where the wetland or waterbody affects the "biological integrity" of the downstream navigable waterway, and thus should be covered under the CWA's definition of the WOTUS.<sup>125</sup> Justice Kennedy labeled Justice Scalia's opinion as being "inconsistent with the Act's text, structure, and purpose," and asserted that the "biological integrity" argument is taken directly out of the CWA's wording, thereby interpreting the CWA on its face.<sup>126</sup> Interpreting the CWA on its face resulted in the "significant nexus" to navigable water approach, which is very similar to what the Obama Administration created in the Clean Water Rule.<sup>127</sup>

#### B. *Maui* Explained

Since *Rapanos*, some courts have solely employed Justice Scalia's "continuous connection" approach, whereas other courts have required a combination of Justice Scalia's "continuous connection" and Justice Kennedy's "significant nexus" approaches.<sup>128</sup> In *Maui*, "a citizen's group brought suit against a county after wastewater injected into underground wells was found to have reached the Pacific Ocean."<sup>129</sup> The issue in *Maui* boils down to "whether the

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123. Memorandum from Benjamin H. Grumbles and John P. Woodley on Clean Water Act Jurisdiction Following the U.S., Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, U.S. ENVTL. PROT. AGENCY (Dec. 02, 2008), [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf) (describing difference between Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion).

124. *Id.* (explaining in detail Justice Kennedy's "significant nexus" interpretation of WOTUS under CWA).

125. *Id.* (stating rationale behind "significant nexus" interpretation as promoting biological integrity of ecosystems in all WOTUS).

126. *Id.* (explaining Justice Kennedy's "on its face" reading of CWA by interpreting CWA to protect all biological diversity in WOTUS).

127. See Factsheet Clean Water Rule, EPA, [https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact\\_sheet\\_summary\\_final\\_1.pdf](https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf) (last visited Jan. 22, 2019) (describing Obama Administration's redefining of WOTUS under CWA by instituting Clean Water Rule).

128. See generally *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) (explaining WOTUS definition based on Scalia's opinion)

129. See generally *Two Circuit Courts Allow Groundwater Discharge Liability Under Clean Water Act*, PRAC. L. REAL EST., Apr. 23, 2018, Westlaw W-014-3396 (stating general background for case).

[CWA] is violated by releases of pollutants to groundwater that subsequently enter a ‘water of the United States.’”<sup>130</sup> Under 33 U.S.C. § 1311(a) of the CWA, “discharge of a pollutant” is prohibited in “navigable waters from any point source.”<sup>131</sup> The statute defines navigable waters to include “waters of the United States, including the territorial seas;” however, groundwater is explicitly excluded from the list of waters of the United States.<sup>132</sup>

In *Maui*, the Ninth Circuit held that pollutant discharges are subject to the CWA if the discharge to the surface water is “fairly traceable” to the discharge.<sup>133</sup> This “fairly traceable” link is similar to Justice Kennedy’s “significant nexus” test in *Rapanos* and directly contrasts Justice Scalia’s plurality opinion.<sup>134</sup> If the Supreme Court were to grant certiorari and adopt the Ninth Circuit’s reasoning in *Maui*, it would be the first decision of its time to completely employ Justice Kennedy’s “significant nexus” approach without also, or solely, employing Justice Scalia’s “continuous connection” approach.<sup>135</sup>

#### IV. RIVER’S END: WHERE THE CWA DOES NOT WORK AS CONGRESS INTENDED

As of 2018, the CWA has cost taxpayers more than one trillion dollars total since enacted in 1972.<sup>136</sup> Economists who oppose the allocation of funds to the CWA do so because research indicates that the benefit of the CWA does not outweigh the exorbitant costs.<sup>137</sup> Of the one trillion dollars spent since 1972, 650 billion dollars in the form of thirty-five thousand individual federal grants to cities have gone towards new treatment plants, improvement of

130. *Id.* (discussing various arguments regarding redefining CWA definition of WOTUS).

131. *Id.* (describing navigable waters as defined under CWA); 33 U.S.C. § 1362(6) (2019) (defining discharge of pollutant under United States Code).

132. See *Rapanos*, 547 U.S. at 723 (stating navigable waters theory of CWA as established under Scalia’s opinion in *Rapanos*).

133. *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018) (describing “fairly traceable” theory of CWA’s definition of WOTUS established by Ninth Circuit in recent ruling).

134. For a further discussion on the different *Rapanos* tests, see *supra* note 123 and accompanying text.

135. For further discussion on the precedential potential of *Maui*, see *supra* notes 129-131 and accompanying text.

136. David Keiser & Joseph S. Shapiro, *How the Clean Water Act has served the environment and the economy*, *Vox* (Oct. 24, 2018), <https://voxeu.org/article/impact-clean-water-act> (describing amount of money expended by taxpayers since CWA enactment in 1972).

137. For a further discussion on EPA’s regulatory authority under the CWA, see *supra* notes 95-103 and accompanying text.

existing plants, and upgrades to sewers for the individual cities.<sup>138</sup> Although these individualized grants were proven to reduce pollution in cities within a twenty-five mile radius over a thirty-year period, there is minimal evidence that residents of those cities value the clean water, and the increase in house value and quality of life is not outweighed by the extraordinary cost.<sup>139</sup> If the estimated change in home value due to CWA funding was outweighed by the costs of implementing the changes, this indicates that individuals were not focused on regulation targeting the water itself.<sup>140</sup> Thus, although the CWA demonstratively reduces pollution, it fails on a cost-benefit analysis, as individuals value the environmental impact less than the money expended.<sup>141</sup>

The water-targeting regulations under the CWA are widely unsuccessful from an economic standpoint because of waste at the state government level.<sup>142</sup> The EPA's power is limited in regard to the creation of water pollution control plans under the CWA because "[n]othing in the CWA allows the EPA to produce a substitute plan for a disapproved state plan."<sup>143</sup> Therefore, in the event the EPA believes that a state is improperly allocating funds at the state level, the EPA has no power to overrule or modify the state's plan.<sup>144</sup> The EPA's only remedy is to attempt to strong-arm the states into total compliance with the CWA by withholding federal grants unless the state's plan meets certain preestablished parameters.<sup>145</sup>

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138. See David Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, 134 Q. J. OF ECON. 349, 390 (2018) (stating statistics about amount of money spent on CWA enforcement and regulation by way of vast amount of federal grants).

139. *Id.* at 352 (describing number of years and radius of cleanup of CWA since enactment in 1972).

140. See *id.* (describing change in estimated home value due to successful environmental cleanup).

141. *Id.* at 351 (discussing cost-benefit analyses of CWA).

142. See Keiser & Shapiro, *supra* note 137 (describing state-level government programs aimed at water pollution itself rather than compliance and enforcement of CWA).

143. Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1042 (2013) (discussing lack of power given to federal EPA in present day environmental regulation).

144. See *id.* (addressing inefficiency in CWA regulation and enforcement that does not give federal EPA enough power to properly regulate states).

145. *Id.* (discussing only remedy that federal EPA has to combat state-level inefficiency in regulation and compliance enforcement).

The CWA also fails in regard to the type of pollution it protects against.<sup>146</sup> Although the purpose and scope of the CWA is supposed to include nonpoint sources of water pollution, the CWA inadvertently ignores nonpoint pollution sources from agricultural runoff and industrial waste leakage into the water supply.<sup>147</sup> With the primary focus of regulation and enforcement on those in possession of an NPDES permit, it is nearly impossible to calculate the extent of the nonpoint source pollution on a national level, especially when nonpoint source pollution is generally accidental.<sup>148</sup> This ignorance to nonpoint source pollution makes tracking the amount of pollution and calculating expenses for cleanup difficult and costly.<sup>149</sup>

In 2014, states issued “223 new fish advisories, bringing the total advisories recognized by the EPA to 4,821” and demonstrating that the CWA seems to fail at regulating nonpoint source pollution.<sup>150</sup> As of 2011, there were “17.7 million lake acres and 1.36 million river miles . . . under advisory,” a number which represents “42.3 percent of the nation’s total lake acreage and [thirty-six] percent of the nation’s total river miles.”<sup>151</sup> Moreover, “[o]f the nation’s 3,650 beaches monitored in 2011, health notifications and closures affected 33,127 beach-days.”<sup>152</sup> In conclusion, although the CWA has helped to clean up pollution from point sources, it fails entirely at calculating and regulating nonpoint source pollution, suggesting the benefits of the CWA seem to be outweighed by the costs of its enforcement and compliance.<sup>153</sup>

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146. See Keiser & Shapiro, *supra* note 139, at 356 (discussing authors’ proposed position that CWA fails at regulating pollutants from “nonpoint” sources).

147. *Id.* (explaining how CWA inadvertently ignores “nonpoint” sources of pollution). “Much water pollution also comes from ‘nonpoint’ pollution sources such as urban and agricultural runoff. *Id.* (explaining difficulty of regulating nonpoint sources). The Clean Water Act has largely exempted these latter sources from regulation.” *Id.* (illustrating waters not yet encompassed by CWA).

148. See *id.* (discussing pollution in form of “runoff” that is inadvertently excluded from CWA regulation).

149. For a further discussion on the regulation of nonpoint source pollution under CWA, see *supra* notes 146-148 and accompanying text.

150. See John Cronin, *The 31st Anniversary of the Clean Water Act’s Failure to Achieve Its First Policy Goal*, EARTHDESK (July 1, 2014), <https://earthdesk.blogs.pace.edu/2014/07/01/the-31st-anniversary-of-the-clean-water-acts-failure-to-meet-its-first-policy-goal/> (giving statistics regarding fish advisories in waters supposedly cleaned and protected by CWA).

151. *Id.* (stating statistics explaining condition of WOTUS, including lakes and rivers, despite CWA regulation and enforcement).

152. *Id.* (stating statistics explaining how polluted some WOTUS are, including oceans, despite CWA regulation and enforcement).

153. For a further discussion on the shortcomings of the CWA, see *supra* notes 146-152 and accompanying text.

Congress, in delegating their control over the environment to the EPA, intended for the EPA to regulate the environment to the fullest extent of its constitutional authority.<sup>154</sup> Moreover, Congress intended the CWA to encompass as much of the United States' waters as possible.<sup>155</sup> The CWA succeeds in its congressionally intended purpose, but does not succeed in efficiency.<sup>156</sup> With the constant stream of proposed changes to the CWA by each new presidential administration, it is quite difficult for both the EPA and the individual states' regulatory agencies to establish a system of consistent intragovernmental regulation.<sup>157</sup> Because each proposed change is different from the last, the EPA and the individual state regulatory agencies are uncertain as to the scope of the WOTUS under the CWA and the extent of the constitutional authority they will be permitted to act upon.<sup>158</sup> To achieve efficiency in regulation, the question arises as to whether the CWA ought to be replaced entirely by a new federal water protection statute or whether parts of the CWA should continue to be changed to fit the current presidential administration's agenda.<sup>159</sup>

#### V. RIDING THE WAVE: PROPOSALS OF EFFICIENT AND EFFECTIVE INTRAGOVERNMENTAL REGULATION AND ENFORCEMENT

A new proposal could come in the form of a change to the current CWA's definition of the WOTUS or a repeal of the CWA with a formal replacement policy.<sup>160</sup> Regardless of the choice, the proposal must be efficient and effective, and it must promote intragovernmental regulation.<sup>161</sup> The best possible solution would be

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154. For a further discussion on the EPA's authority under the CWA, see *supra* note 48 and accompanying text.

155. See Clean Water Act, 33 U.S.C. § 1251(a) (2012) and accompanying text (explaining CWA's purpose and intent to be as encompassing as possible).

156. For a further discussion on the success and shortcomings of the CWA, see *supra* notes 146-153 and accompanying text.

157. For a further discussion on the history of presidential changes to CWA, see *supra* notes 4-9 and accompanying text.

158. See *id.* (comparing and contrasting Obama and Trump Administration's proposals to see key differences in goals of given administration's proposed regulation).

159. For a discussion of how the differences between the Obama and Trump Administrations' proposals are leading to questions about where CWA regulation should go in the future, see *supra* notes 10-19 and accompanying text.

160. For a summary of changes made to the CWA and the definition of WOTUS over the past decade by the Obama and Trump Administrations, see *supra* notes 10-19 and accompanying text.

161. For a further discussion of the Trump Administration's proposed changes to the CWA and the Clean Water Rule, see *supra* notes 4-9 and accompanying text.

one that reallocates the power to where Congress originally intended it to be delegated: the federal EPA.<sup>162</sup> Another successful proposal would be one that combines the Trump and Obama Administration's EPA's ideas into one cohesive rule change to the CWA that may gain bipartisan approval.<sup>163</sup> Lastly, the Trump Administration could replace the Clean Water Rule with an alternative water regulating statute.<sup>164</sup>

#### A. Reallocating Power Where It Should Be Vested

A properly proposed change to the CWA would allow the EPA to take full control over the WOTUS, including waters within the individual states.<sup>165</sup> In this type of proposal, the state governments would simply be acting as enforcers of the law as opposed to individual states making proposals for their own regulatory plans.<sup>166</sup> To achieve the maximum social welfare from CWA enforcement, lawmakers' best bet is to spend more of the allocated funding on proper enforcement of the CWA.<sup>167</sup> The EPA needs to be given the power to overrule the state regulatory plans because the majority of the wastefulness from the CWA stems from inefficiencies within state government.<sup>168</sup> A change like this would allow for the proper constitutionally vested authority, the EPA, to regulate all of the WOTUS without state-level interference.<sup>169</sup> The proposal would also reduce government waste and increase social welfare because the EPA, being an executive branch regulatory agency, has the most

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162. For a description of the process by which Congress delegated control of the environment to the EPA, see *supra* notes 60-64 and accompanying text.

163. For a summary of changes made to the CWA and the definition of WOTUS over the past decade by the Obama and Trump Administrations, see *supra* notes 10-19 and accompanying text.

164. See Kaufman, *supra* note 1 (discussing Trump's reason for proposing changes to CWA as being part of his campaign promise to constituents).

165. For a discussion of state-level inefficiencies regarding enforcement of and compliance with environmental protection provisions established by the CWA, see *supra* notes 95-103 and accompanying text.

166. For a discussion of state-level overreach regarding the number of tests performed by both state and federal EPAs, see *supra* notes 95-103 and accompanying text.

167. See Keiser & Shapiro, *supra* note 167, at 382 (describing lack of social welfare achieved from CWA regulation targeted at water itself). "Related patterns have been found for air pollution, and suggest that allowing the stringency of pollution regulation to vary over space has potential to increase social welfare." *Id.* at 392 (discussing similarities between air and water pollution).

168. For a discussion of potential waste from state-level inefficiencies surrounding compliance and enforcement of the CWA, see *supra* notes 95-103 and accompanying text.

169. See Meyer, *supra* note 24 (describing process by which Congress has delegated EPA power to control environment).



power and knowledge to create successful and efficient regulations.<sup>170</sup> For example, the EPA would have the authority to instruct states that portions of their CWA compliance are less efficient than national averages and need to be changed to fit the status quo.<sup>171</sup> These state-level inefficiencies could come by way of expensive water treatment facilities, testing, or simply manpower hours expended to ensure compliance.<sup>172</sup> More than 650 billion of taxpayer dollars are being allocated towards state water treatment facilities and the reduction of water pollution as a whole, and there is no correlation with an increase in social welfare.<sup>173</sup> It is time to start reallocating taxpayer dollars to enforcement and compliance of the rules under the CWA not only to make sure that companies are complying with the CWA, but also that the EPA is enforcing the penalties imposed to deter future pollution.<sup>174</sup>

Although one could argue that such a change would raise commandeering red flags under the Tenth Amendment of the United States Constitution, the power to regulate water was never actually vested in the states in the first place.<sup>175</sup> Congress has completely delegated its power of environmental control to the federal EPA, not necessarily the individualized state EPAs.<sup>176</sup> Congress needs to step in and “emphasize in statute that water resources are best protected when the federal and state partnership outlined in the CWA is respected,” not when a regulation permits states to make their own regulatory plans and the federal EPA has little say.<sup>177</sup>

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170. See *id.* (explaining process of state-level CWA enforcement and regulation)

171. For a discussion of why the EPA should be given more power, see *supra* notes 142-145 and accompanying text.

172. See *Pretreatment Roles and Responsibilities*, *supra* note 81 (suggesting potential sources of state-level inefficiencies causing improper enforcement and regulation of CWA).

173. See Keiser & Shapiro, *supra* note 167, at 382, 392 (discussing social welfare regarding water regulation targeted at water itself instead of enforcement and compliance).

174. See *Analyze Trends: State Water Dashboard*, *supra* note 95 (mentioning enforcement of penalties regarding issues of compliance and enforcement of provisions of CWA).

175. See U.S. CONST. amend. X (defining 10th amendment right that Federal Government cannot overreach constitutional authority to affect state rights).

176. See Meyer, *supra* note 24 (describing process by which Congress has delegated EPA power to control environment).

177. 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 FOUND. (Apr. 29, 2015), <https://www.heritage.org/environment/report/what-you-need-know-about-the-epacorps-water-rule-its-power-grab-and-attack> (discussing what Congress must do to stop process of Presidential Administration defining WOTUS only to be overturned by subsequent presidential administrations).

## B. Where Different Waters Meet: Combining Past and Present EPA's Ideas

Another proposed change would be a combination of proposals suggested by the former EPA Administrator under the Obama Administration, Gina McCarthy, and changes to the CWA to make the WOTUS less ambiguous and more agreeable from a bipartisan standpoint.<sup>178</sup> Three of McCarthy's most applicable suggestions were as follows: "[r]educe uncertainties about the scope of the CWA;" "[c]reate new paradigms including state, tribal, city roles and incentives for local action; and "[c]oordinate closely with local, state, and regional stakeholders, including elected officials, industry, non-governmental organizations, and environmental entities[.]"<sup>179</sup> From a regulatory standpoint, these three changes would reduce inefficiency and government waste on a federal, state, and local government level because the three levels of the government would be working together in unison.<sup>180</sup> This is because the root cause of these inefficiencies is regulatory uncertainty regarding the definition of the WOTUS under the CWA.<sup>181</sup> If Congress wants this type of intragovernmental cooperation, then it must develop clear definitions for jurisdictional waters through clear-cut rules and define "waters of the United States" as generally being limited to traditional navigable waters.<sup>182</sup>

This type of redefinition would be similar to Justice Scalia's opinion in *Rapanos* and is the most logical reading of the WOTUS as originally defined by the EPA in the CWA.<sup>183</sup> Although it may exclude some bodies of water such as wetlands and ephemeral streams, the redefinition would cut down on both compliance and enforcement costs because, from a regulatory standpoint, it is difficult and costly to monitor and maintain every wetland and ephem-

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178. See Cronin, *supra* note 178 (listing some of Administrator McCarthy's proposed changes to CWA).

179. *Id.* (discussing pertinent proposals in attempt to promote bipartisan approval for changes to CWA).

180. For a discussion of why a lack of intragovernmental regulation is ineffective, see *supra* notes 142-145 and accompanying text.

181. See Cronin, *supra* note 178 (highlighting one of Gina McCarthy's proposals urging Congress to come to decision to reduce uncertainties over definition of WOTUS under CWA); see also Bakst, *supra* note 177 (suggesting Congress should clearly define jurisdictional waters and WOTUS).

182. Bakst, *supra* note 177 (describing what Congress should do if it wants less uncertainty surrounding definition of WOTUS under CWA).

183. For a discussion of Justice Scalia's plurality opinion in *Rapanos*, see *supra* notes 119-122 and accompanying text.

eral stream that appears temporarily after rainfall.<sup>184</sup> Although wetlands do harbor biological ecosystems and promote the “biological integrity” of the nations’ waters as established by the CWA, the sheer cost to the taxpayers of enforcing of this provision alone needs to be addressed.<sup>185</sup> It seems as though science moves to an ecosystem analysis in an attempt to promote “biological integrity,” but regulations cannot move towards this analysis against the sheer cost of enforcement.<sup>186</sup> A change is necessary because the majority of the issues holding back the government from working at an optimal efficiency level are never-ending battles between the federal government redefining the WOTUS and the states not agreeing with it.<sup>187</sup> This needs to be remedied, as it creates government inefficiency by clogging the judicial system with both lawsuits and motions to stay.<sup>188</sup> Thus, from a cost-benefit analysis and feasibility of regulation standpoint, and with trillions of taxpayer dollars at stake, it is imperative that the government takes these steps to fix the way that the federal and state EPAs enforce regulations.<sup>189</sup>

### C. Clean Water Rule’s WOTUS Can Still Be Protected

Hold back the floodgates—this Comment is not advocating for elimination of protections for wetlands and ephemeral streams from federal water regulation entirely.<sup>190</sup> These bodies of water

184. See Kaufman, *supra* note 1 (discussing how Trump Administration’s proposed changes exclude wetlands and ephemeral streams from CWA protection).

185. For a description of Justice Kennedy’s “biological integrity” argument established in the *Rapanos* case, see *supra* notes 36-38, 125-126 and accompanying text.

186. See *id.* (describing Justice Kennedy’s “biological integrity” argument established in *Rapanos*). According to Justice Scalia, this argument is not the “commonsense understanding” of the CWA and appears to stray from the text of the Act. See Courtney Covington, *Rapanos v. United States: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws*, 34 *ECOLOGY L.Q.* 801, 826 (2007) (discussing Justice Scalia’s textual reason as to why “biological integrity” argument is not best understanding of CWA).

187. See *supra* notes 3-9 and accompanying text (highlighting how definition of WOTUS under CWA continues to change depending on presidential administration’s agenda).

188. See Miano et al., *WOTUS and the Reach of CWA Jurisdiction*, AM. BAR ASS’N (Mar. 18, 2019), [https://www.americanbar.org/groups/environment\\_energy\\_resources/resources/wotus/](https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/) (describing process by which motions to stay filed after new change to CWA have potential to clog court system with costly, unnecessary lawsuits).

189. See Keiser & Shapiro, *supra* note 143 and accompanying text (discussing CWA’s failure of cost-benefit analysis due to primary focus on targeting water itself, not enforcement or compliance with CWA).

190. See *supra* notes 119-122 and accompanying text (discussing Trump Administration’s proposal, which mainly adopts Justice Scalia’s plurality opinion from *Rapanos*).

can still be protected through an additional proposed change to the CWA that provides economic incentives to those who go above and beyond the minimum protections of the CWA.<sup>191</sup> Before enactment, the EPA would need to outline and add basic achievable health goals to the CWA that individuals could attain for economic compensation.<sup>192</sup> These public health goals would cover yearly levels of clean up or pollution reduction.<sup>193</sup> Although individuals would not be required to surpass the goals, they would still provide attractive economic incentives, in the form of federal grants or tax cuts, to those individuals who protect and preserve wetlands or ephemeral streams.<sup>194</sup> Health goals would not only incentivize individuals to protect and preserve these bodies of water, but also incentivize individuals to protect and preserve all WOTUS as well.<sup>195</sup> It is possible this proposal would gain bipartisan approval because it would still define WOTUS under the CWA through its most natural reading, thereby incentivizing individuals to protect bodies of water that are not traditionally covered under the CWA, like wetlands and ephemeral streams.<sup>196</sup>

#### D. Alternate Path: President Trump Could Replace the Clean Water Rule

An alternative path that the Trump Administration could take is to repeal the Obama Administration's Clean Water Rule entirely and replace it with a new rule.<sup>197</sup> To fit President Trump's political agenda and fulfill his campaign promise, it would have to be nearly

191. 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 FOUND. (Apr. 29, 2015), <https://www.heritage.org/environment/report/what-you-need-know-about-the-epacorps-water-rule-its-power-grab-and-attack> (listing one of Gina McCarthy's proposals to CWA, incentivizing individuals who go beyond minimum requirements established in CWA).

192. *Id.* (highlighting one of Gina McCarthy's proposals for CWA to create system of public health goals for CWA).

193. *Id.* (outlining potential addition of public health goals to CWA including yearly achievable goals).

194. See York, *supra* notes 109-110 and accompanying text (discussing taxpayer dollars spent both yearly and cumulatively on CWA).

195. See Bakst, *supra* notes 191-193 and accompanying text (describing great impact public health goals would have on facilitating protection of WOTUS if introduced to CWA).

196. *Id.* (discussing Trump Administration's proposed change as most natural reading of WOTUS under CWA, similar to Justice Scalia in *Rapanos*).

197. See Coral Davenport, *What Trump Can and Can't Do to Dismantle Obama's Climate Rules*, N.Y. TIMES (Dec. 6, 2018) <https://www.nytimes.com/2018/12/06/climate/trump-water-pollution-wotus-replacement.html> (describing one of President Trump's options to repeal CWA in its entirety to create new federal water regulatory statute).

identical to Justice Scalia's opinion in *Rapanos*.<sup>198</sup> Although President Trump's proposed changes to the CWA are in line with *Rapanos*, they would not receive approval by environmentalists and the Democratic Party.<sup>199</sup> A new rule would be an extremely complex legal vortex attempting to redefine the terms of federal waterways and wetlands to gain bi-partisan approval, a feat which past presidential administrations have attempted and failed to do.<sup>200</sup> Due to how late it is into President Trump's presidential term and the looming 2020 election, and from a popularity standpoint, it is doubtful that the president will take the route of completely dissolving the Clean Water Rule.<sup>201</sup>

## VI. GLASS HALF EMPTY OR HALF FULL: CONCLUSION

In order for the CWA to work as originally intended, Congress must step up and give a concrete definition of the WOTUS to eliminate government inefficiencies and inconsistencies that occur when enforcing the rules of the CWA.<sup>202</sup> Both federal and state regulatory agencies want regulatory certainty with regard to the definition of WOTUS under the CWA.<sup>203</sup> Ultimately, to some degree, the WOTUS will always be the way it was originally defined under the CWA's text due to the Administrative Procedure Act (APA).<sup>204</sup> The Supreme Court found that the APA empowers individuals to seek

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198. See *supra* notes 119-122 and accompanying text (describing Justice Scalia's opinion in *Rapanos* as textualist "common sense" understanding of WOTUS based on dictionary definition).

199. *Id.* (describing Justice Scalia's opinion in *Rapanos*).

200. See Davenport, *supra* note 197 and accompanying text (explaining President Trump's option of replacing CWA with entirely new piece of legislation as extremely complex legal issue with no clear-cut solution).

201. *Id.* (describing President Trump's option of replacing CWA with entirely new piece of legislation).

202. 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 FOUND. (Apr. 29, 2015), <https://www.heritage.org/environment/report/what-you-need-know-about-the-epacorps-water-rule-its-power-grab-and-attack> (providing background behind notion of Congress stepping in and giving concrete definition of WOTUS under CWA).

203. See *supra* note 83 and accompanying text (clarifying what federal and state regulatory agencies want in terms of defining WOTUS under CWA).

204. See Leah Pilconis, *Administrative Procedures Act Affords Public the Right to Participate in, Challenge CWA Permitting Procedures*, ASSOCIATED GEN. CONTRACTORS OF AM. (Aug. 29, 2012), <https://www.agc.org/news/2012/08/29/administrative-procedures-act-affords-public-right-participate-challenge-cwa> (outlining Administrative Procedures Act's relation to cases surrounding CWA). "The ruling builds on an earlier U.S. Supreme Court decision that now affords recipients of CWA compliance orders the right to challenge their alleged violations under the APA before EPA brings an enforcement action." *Id.* (illustrating method of challenging CWA).

judicial review of “administrative compliance orders,” such as changes to the CWA.<sup>205</sup> Furthermore, nothing in the CWA precludes judicial review of these orders under the APA.<sup>206</sup> Therefore, these changes to the CWA would always be subject to judicial review under the APA because they are a “final decision.”<sup>207</sup> Thus, regardless of how the EPA and Congress eventually define the WOTUS, lawsuits pertaining to the constitutionality of any changes and motions to stay will inevitably congest the judicial system.<sup>208</sup> With this in mind, it is crucial for Congress to vote on a distinct and final definition of the WOTUS promptly so that potential lawsuits can run their course and the definition and redefinition of the WOTUS can finally be put to rest.<sup>209</sup>

Although there is no precise solution for defining the WOTUS, the proposals within this Comment offer a bipartisan alternative to the Trump Administration’s current proposal that would allow all levels of government to work in unison to regulate and enforce the CWA.<sup>210</sup> In the end, all that is being discussed is maintaining the waters of the United States in a manner that is economically feasible and fiscally responsible.<sup>211</sup> Hopefully, the Trump Administration’s EPA can work across party lines to propose a bipartisan alternative, similar to the ones mentioned in this Comment, to pro-

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205. *Id.* (explaining process by which APA allows individuals to seek judicial review in form of revisions to CWA).

206. Sean Moloney, *Supreme Court Allows Legal Challenge to EPA Authority to Proceed*, THE REG. REV. (Mar. 22, 2012), <https://www.theregreview.org/2012/03/22/supreme-court-allows-legal-challenge-to-epa-authority-to-proceed/> (discussing process of judicial review for cases about changes to CWA).

207. *Id.* (clarifying suits can be heard because they are considered “final decisions”). The APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” *Id.* (providing method to review agency actions).

208. *See supra* notes 204-206 and accompanying text (explaining potential clogging of judicial system with lawsuits and motions to stay pertaining to any changes to CWA).

209. *See supra* notes 202-203 and accompanying text (urging Congress to vote on concrete definition of WOTUS as defined under CWA).

210. *See supra* notes 165-174 and accompanying text (describing properly proposed plan to gain bipartisan approval).

211. *See supra* note 75 and accompanying text (defining WOTUS as all navigable waters of United States).

tect one of America's most valuable resources: the waters of the United States.<sup>212</sup>

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212. *See supra* notes 165-201 and accompanying text (describing proposed changes to CWA that would gain bipartisan approval in today's political climate).

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