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The Shifting Definition: The Clean Water Act, “Waters of the United States,” and the Impact on Agriculture

I. Introduction

“Farming looks mighty easy when your plow is a pencil, and you’re a thousand miles from the corn field.”¹ Agriculture has never been an easy way of life, particularly when water is the lifeblood that decides whether crops grow or animals have nutrients to survive. Besides nature’s fickle rains, agriculturalists also battle the added struggles of complying with environmental and conservation rules and regulations. From hydrating yards, to cleaning toxic spills, to providing a safe habitat for animals, water is a flexible, fluid, and fascinating compound. Indeed, as the famed natural science writer and philosopher Loren Eiseley commented, “If there is magic on this planet, it is contained in water.”² Because of water’s importance, there needs to be some form of government intervention to protect this resource while still allowing water to be utilized efficiently.

In the United States, the most important water and environmental protection laws were passed in the mid-twentieth century, beginning with the Federal Water Pollution Control Act of 1948.³ The passage of the Clean Water Act of 1977⁴ (CWA) and the Water Quality Act of 1987⁵ overhauled the Federal Water Pollution Control Act. Both the CWA as originally enacted and the Water Quality Act of 1987 help form what is now commonly called the CWA as a whole.⁶ The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷ In the initial reading of this statement, it appears to be a simple and readily achievable objective; however, the definition of some terms (and the cross-definition of others) creates a confusing landscape. The CWA first notes that the waters eligible for protection are “navigable waters,”⁸ which the CWA defines as “the waters of the United States,

1. President Dwight D. Eisenhower, Address at Bradley University, Peoria, Illinois (Sept. 25, 1956), <https://www.presidency.ucsb.edu/node/233210>.

2. LOREN C. EISELEY, *THE IMMENSE JOURNEY* 15 (1957).

3. Federal Water Pollution Control Act of 1948, Pub. L. No. 845, 62 Stat. 1155; *see also History of the Clean Water Act*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/history-clean-water-act> (last visited Sept. 2, 2020).

4. Pub. L. No. 95-217, 91 Stat. 1566.

5. Pub. L. No. 1004, 101 Stat. 7.

6. 33 U.S.C. §§ 1251–1388 (2018).

7. *Id.* § 1251(a).

8. *Id.* § 1251(a)(1).

including territorial seas.”⁹ The remainder of the CWA is silent as to what exactly fits within the definition of “the waters of the United States” or WOTUS.

In the early to mid-2000s, the Supreme Court of the United States granted certiorari to hear two cases—*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*¹⁰ and *Rapanos v. United States*¹¹—that would have a profound impact on the interpretation and definition of WOTUS. These cases helped set the significant groundwork for how the Court thought of WOTUS, navigable waters, and whether the federal government had jurisdiction to regulate those waters. While the cases provided some guidance, uncertainty remained.

To help alleviate some of the confusion, the Army Corps of Engineers and the EPA each created documents that explained their joint interpretations of the Court’s rulings regarding WOTUS.¹² The EPA, under President Obama’s administration, promulgated a clarification in 2015 aimed at defining “waters of the United States.”¹³ To make matters even more complicated, President Trump’s administration then issued a final rule that repealed the 2015 Rule.¹⁴ This recodification of the pre-2015 definition pushed the CWA and WOTUS back into a regulatory scheme mostly created in the late 1980s,¹⁵ with modifications made by the Supreme Court along the way.¹⁶

9. *Id.* § 1362(7).

10. 529 U.S. 1129 (2000) (mem.).

11. 546 U.S. 932 (2005) (mem.).

12. See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 app. (Jan. 15, 2003); Memorandum from Benjamin H. Grumbles, Assistant Adm’r for Water, U.S. Env’tl. Prot. Agency, and John Paul Woodley, Jr., Assistant Sec’y of the Army, Dep’t of the Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008).

13. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401) [hereinafter Clean Water Rule].

14. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (“The agencies are taking this final action to repeal the Clean Water Rule: Definition of ‘Waters of the United States,’ 80 FR 37054 (June 29, 2015), and to recodify the regulatory definitions of ‘waters of the United States’ that existed prior to the August 28, 2015 effective date of the 2015 Rule.”).

15. See, e.g., Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,210 (Nov. 13, 1986) (moving the regulatory definitions of “waters of the United States” and related terms to a separate section of the C.F.R. in order to provide

On April 21, 2020, the EPA and the Department of the Army published the Navigable Waters Protection Rule (NWPR) to further clarify how waters of the United States are federally regulated.¹⁷ Now codified in the Federal Register, this new definition provides four categories of waters of the United States: “[1] [t]he territorial seas and traditional navigable waters; [2] perennial and intermittent tributaries that contribute surface water flow to such waters; [3] certain lakes, ponds, and impoundments of jurisdictional waters; and [4] wetlands adjacent to other jurisdictional waters.”¹⁸ This Comment will examine the Navigable Waters Protection Rule and how its changes will affect agriculture across the country.

The purpose of this Comment is to both provide a helpful guide on the history of the legal and administrative procedures of the CWA and WOTUS, and to interpret the current regulations and caselaw on the jurisdictional requirements of WOTUS. This Comment will follow the history of the CWA, followed by policy changes, relevant caselaw, and then an in-depth look at the NWPR and its application to waters. First, Part II sets the stage by explaining the codified language of the CWA that is relevant to categorizing WOTUS and defining the terms. Part III details the history of WOTUS, focusing on recent administrations’ changes beginning in 2015 with President Obama’s changes to WOTUS and moving forward to President Trump’s most recent announcement and reversion to previous rules. Part IV provides background and explanation of selected WOTUS caselaw. Part V examines the Navigable Waters Protection Rule in detail, noting the differences between the 2019 Rule—which repealed President Obama’s 2015 Rule—and the NWPR. Part VI explains how the NWPR will affect the water permitting process for agriculturists. Lastly, Part VII examines current litigation over the NWPR.

greater clarification of federal agency jurisdiction); *see also* Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988) (to be codified at 40 C.F.R. pts. 232, 233) (adding further language to the regulatory definition of “waters of the United States” to clarify what it encompasses).

16. *See infra* Part IV.

17. The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401) [hereinafter Navigable Waters Protection Rule].

18. *Id.* at 22,251. Jurisdictional waters are waters that fall under the jurisdiction of the CWA, 33 U.S.C. §§ 1251–1388 (2018).

II. Clean Water Act Sections 402 and 404

Specific to agriculture, sections 402¹⁹ and 404²⁰ of the Clean Water Act cause the greatest number of issues for pinpointing an exact determination of permitting requirements. These sections are important for agriculture as their additional permitting requirements are triggered if agriculturalists produce a pollutant that is discharged into a federally regulated water.²¹ Those concerned with the integrity of our nation's water supply call for greater permitting requirements for agriculture due to the impact of farming and ranch activities on these waters.²²

Section 402, titled "National pollutant discharge elimination system," allows for the permit of a discharge of "any pollutant, or combination of pollutants."²³ The difficulty surrounding this permitting is determining what exactly qualifies as a: (1) point source; (2) discharge; (3) pollutant; and (4) navigable waters.²⁴ Section 502 provides the black-letter definition for these terms. A point source is defined as "any discernible, confined and discrete conveyance" of a pollutant.²⁵ Pollutant "means 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" that have been "discharged into water."²⁶ A discharge is "any addition of any pollutant to navigable waters from any point source."²⁷ Finally, navigable waters are "the waters of the United States, including the territorial seas."²⁸

Section 404, titled "Permits for dredged or fill material," authorizes the Secretary of the Army, acting through the Chief of Engineers, to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites."²⁹ This section of the CWA also allows

19. 33 U.S.C. § 1342 (2018).

20. *Id.* § 1344.

21. *Id.* §§ 1342, 1344.

22. See Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1036 (2013) ("If agricultural pollution is largely unregulated, then the nation's waters will continue to be impaired.").

23. 33 U.S.C. § 1342(a)(1).

24. See, e.g., *id.* § 1342(a)(1), (a)(4), (f).

25. *Id.* § 1362(14).

26. *Id.* § 1362(6).

27. *Id.* § 1362(12).

28. *Id.* § 1362(7).

29. *Id.* § 1344(a), (d).

the Administrator of the EPA to work alongside the Army Secretary in issuing these permits.³⁰ However, the CWA takes agricultural interests into account by defining a point source as “not includ[ing] agricultural stormwater discharges and return flows from irrigated agriculture.”³¹

While these definitions may appear straightforward on paper, applying them in practice is no simple task. Many grassroots advocacy groups and trade associations demanded a clear system that could identify whether the features of the land they were attempting to alter would require a national pollutant discharge elimination system (NPDES) permit.³² Instead of arguing over intricacies and nuances of the land on a case-by-case basis, these groups strongly suggested that there should be a broad and easy-to-interpret set of rules.³³

III. Administrative and Executive Procedures

A. 2015 Rule – President Obama

In 2015, the EPA and the U.S. Army Corps of Engineers promulgated the Clean Water Rule: Definition of “Waters of the United States.”³⁴ The goal of this clarification was to expand the EPA’s jurisdiction under the CWA to “reach[] beyond waters that are navigable in fact.”³⁵ This final rule redefined several terms to determine the jurisdictional bounds of WOTUS under the CWA.³⁶ As before, traditional navigable waters remained under the authority of the CWA.³⁷ However, the 2015 Rule modified the regulatory enforcement of the CWA to include more “bright-line boundaries . . . and limit the need for case-specific analysis” to determine whether a water fell under federal jurisdiction.³⁸

30. *Id.* § 1344(b), (c).

31. *Id.* § 1362(14).

32. See Chris Clayton, *New Clean Water Rule Released*, PROGRESSIVE FARMER (Jan. 23, 2020, 2:28 PM CST), <https://www.dtnpf.com/agriculture/web/AG/news/world-policy/article/2020/01/23/ag-groups-praise-trump-waters-us>.

33. See *id.* (reporting that American Farm Bureau Federation president Zippy Duval praised the NWPR because it “provides clarity and certainty”).

34. 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

35. *Id.* at 37,055.

36. *Id.*

37. *Id.*

38. *Id.*

Under the 2015 Rule, tributaries were redefined “as waters that are characterized by the presence of physical indicators of flow—bed and banks and ordinary high water mark—and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.”³⁹ This definition relied heavily on the “physical indicators” of these waters and whether their flow could move materials to waters further downstream.⁴⁰ The rule continued to require permitting for ditches where “science clearly demonstrate[d] [the ditches] [we]re functioning as a tributary.”⁴¹ The 2015 Rule noted that tributaries under the authority of the permitting system of the CWA had to be waters that “affect[ed] the chemical, physical, and biological integrity of downstream waters.”⁴² Finally, the 2015 Rule used Justice Kenney’s “significant nexus” standard as articulated in *Rapanos v. United States* for the basis of many WOTUS determinations.⁴³

Adjacent waters under the jurisdictional authority of the CWA permitting regime had to “have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters.”⁴⁴ The final rule then defined adjacent to mean “bordering, contiguous, or neighboring” other waters of the United States.⁴⁵ The U.S. Army Corps of Engineers and the EPA further clarified three instances where such neighboring waters became part of the waters of the United States system.⁴⁶ Like the tributaries defined earlier, these adjacent waters are jurisdictional under the CWA.⁴⁷

39. *Id.* at 37,058.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 37,059; *see also* 547 U.S. 715, 759 (2006) (Kennedy, J., concurring). For further discussion of Justice Kennedy’s “significant nexus” test, *see infra* Section IV.C.

44. Clean Water Rule, *supra* note 13, at 37,058.

45. *Id.*

46. *Id.* (stating these three circumstances) (“(1) Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, as defined in the rule. (2) Waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary, as defined in the rule (‘floodplain waters’). (3) Waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.”).

47. *Id.*

As a result, they must have a clear “hydrological and ecological connection” with the waters of the United States to which they are adjacent.⁴⁸

Lastly, the 2015 Rule encouraged interpretation of the significant nexus standard on a case-by-case analysis based on relevant scientific and legal evidence.⁴⁹ The 2015 Rule acknowledged five types of waters subject to this significant nexus analysis: “[1] Prairie potholes; [2] Carolina and Delmarva bays; [3] pocosins; [4] western vernal pools in California; and [5] Texas coastal prairie wetlands.”⁵⁰ As noted in the names of these types of waters, they were often limited to a specific geographic area. To determine whether these specific types of waters fell under the jurisdictional bounds of the NPDES (and the CWA), the entire watershed system is to be considered as a group.⁵¹ The whole group should include both the specific water system being examined, as well as the “nearest traditional navigable water, interstate water, or the territorial seas.”⁵²

As a whole, the U.S. Army Corps of Engineers and the EPA wanted to create a final rule that provided greater clarity for determining the jurisdictional limits of 33 U.S.C. §§ 1251–1388 while incorporating a greater reliance on science and continuing to protect the waters of the United States.⁵³ Environmental groups praised the 2015 Rule, but industry groups and some trade associations were outraged as they claimed vast overreach by the federal government.⁵⁴ The agricultural industry, headed by the American Farm Bureau Federation, led the charge against the final rule, with help from mining and manufacturing industries.⁵⁵ What ensued was a mass of litigation in various district courts across the nation.⁵⁶ Some of the

48. *Id.*

49. *Id.* at 37,058–59.

50. *Id.* at 37,059.

51. *Id.*

52. *Id.*

53. *Id.* at 37,055.

54. See Rebecca Lessner, *Environmentalists Praise New Clean Water Rules; Farmers Upset*, MARYLANDREPORTER.COM (May 27, 2015), <https://marylandreporter.com/2015/05/27/environmentalists-praise-new-clean-water-rules-farmers-upset/>.

55. See, e.g., *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019) (challenging the 2015 Rule under the Administrative Procedure Act); *id.* at 499 n.1 (listing the first three private party plaintiffs in the suit as the American Farm Bureau Federation, the American Petroleum Institute, and the American Road and Transportation Builders Association).

56. See, e.g., *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1309–10 (D. Colo. 2020) (“Several states—including Colorado—successfully sued to enjoin the 2015 Rule.”);

lawsuits claimed that the Agencies⁵⁷ failed to follow the guidelines outlined in the Administrative Procedure Act for promulgating a final rule,⁵⁸ but the merits of those claims are beyond the scope of this Comment. Overall, President Obama's 2015 Rule steered the regulation of waters of the United States towards science-based determinations to protect these waters, but at the cost of complex and time-intensive case-by-case examinations.

B. 2018 Rule – President Trump

Within two months of being sworn in as President of the United States, President Trump and his administration set a goal to repeal the 2015 Rule.⁵⁹ The administration's executive order promulgated a policy that "[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."⁶⁰ The executive order created a two-step process: (1) repeal the 2015 Rule defining "waters of the United States" and replace with regulation existing prior to the 2015 Rule; and (2) publish a new rule that revises the 2015 Rule and all related orders and regulations to make them consistent with the policy as set forth by the Executive Order.⁶¹ The main goal of Step 1 was to assess which rules would be followed and to help clarify the confusing regulations that are applicable in some states but not others. With the enactment of Step 1—and before the finalization of Step 2—permit applicants had to follow the pre-2015 regulations,⁶² along with addendums that were consistent with previous Supreme Court decisions and historical EPA practices.⁶³ The final

California v. Wheeler, No. 20-cv-03005-RS, 2020 WL 3403072, at *2 (N.D. Cal. June 19, 2020) ("Multiple parties sought judicial review of the 2015 Rule in courts across the country.").

57. "Agencies" is used frequently throughout this Comment to describe both the EPA and the Army Corps of Engineers.

58. See, e.g., *Wheeler*, 2020 WL 3403072, at *1.

59. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

60. *Id.*

61. *Id.*

62. In October 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 Rule in one of the many lawsuits challenging it. See *Ohio v. U.S. Army Corps of Eng'rs*, 803 F.3d 804, 809 (6th Cir. 2015), *vacated*, 713 F. App'x 489 (2018) (dismissing for lack of jurisdiction pursuant to the judgment in *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018)).

63. See Exec. Order No. 13,778, 82 Fed. Reg. at 12,497 (instructing the EPA and Army Corps of Engineers to interpret the CWA term "navigable waters" in a manner "consistent

action taken under Step 2 was to revise and replace both the pre-2015 regulations and the 2015 Rule.⁶⁴

Step 1 of this two-step process was finalized in October 2019 and became effective on December 23, 2019.⁶⁵ President Trump's administration provided four primary reasons for repealing the 2015 Rule. These justifications included that the 2015 Rule: overstepped the Agencies' authority under the CWA; failed to consider the policy objective of the CWA; encroached on the rights of states to regulate pollution and water resources; and "suffered from certain procedural errors and a lack of adequate record support."⁶⁶

Before the implementation of Step 2, President Trump's administration in 2018 issued a rule which created a delay for the pending definitions previously allowed under President Obama's administration. This new rule pushed the effective date of the new definitions to February 6, 2020.⁶⁷ The 2017 Executive Order also instructed the EPA and Army Corps of Engineers to interpret "navigable waters"⁶⁸ to be "consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)."⁶⁹

Step 2, which culminated in 2020 with the promulgation of the Navigable Waters Protection Rule, created a single set of regulations that are clear and easy for the Agencies to understand and follow, consistent with the 2017 Executive Order.⁷⁰

Although these executive orders and final rules were a major step forward in the rollback of what the Trump administration and certain

with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)".

64. *See infra* Part V.

65. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

66. *Id.*

67. Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200, 5,201 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

68. *See* 33 U.S.C. § 1362(7) (2018).

69. Exec. Order No. 13,778, 82 Fed. Reg. 12,497, 12,497 (Feb. 28, 2017).

70. *See* Navigable Waters Protection Rule, *supra* note 17.

grassroots organization perceived as a major “overreach”⁷¹ by President Obama’s 2015 Rule, there were (and are) many pending cases, battling over what test should apply in determining whether the federal government has jurisdiction over the permitting of specific waters. Some courts have implemented Justice Kennedy’s “significant nexus” test,⁷² while others remained undecided,⁷³ and yet others followed some combination of the tests.⁷⁴ As a result, there is a patchwork of regulatory confusion and litigation that continues to muddy the WOTUS definition. However, because the NWPR has now replaced the 2015 Rule, many pending court cases have been rendered moot.⁷⁵

IV. CWA and WOTUS Caselaw

Two Supreme Court cases in the early 2000s were highly influential on the regulation and permitting of navigable waters under the Clean Water Act.⁷⁶ However, the arguments made in these two cases over how to define a navigable water had already been litigated extensively over a decade prior in *United States v. Riverside Bayview Homes, Inc.*⁷⁷ These three cases are

71. *Farm Bureau Hails District Court WOTUS Decision*, AM. FARM BUREAU FED’N (June 11, 2018), <https://www.fb.org/newsroom/farm-bureau-hails-district-court-wotus-decision>.

72. *See, e.g.*, *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (“Justice Kennedy’s concurrence [in *Rapanos*] provides the controlling rule of law”); *Jones Creek Inv’rs, LLC v. Columbia Cty.*, 98 F. Supp. 3d 1279, 1304 (S.D. Ga. 2015) (“The Eleventh Circuit has adopted Justice Kennedy’s ‘significant nexus’ test as the governing definition of ‘navigable waters’ under *Rapanos*.”).

73. *See, e.g.*, *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008) (declining to decide which *Rapanos* standard controls because “the evidence presented at trial supports [the jury’s guilty verdict under] all three of the *Rapanos* standards”).

74. *See, e.g.*, *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (“We agree with the conclusion of the First Circuit Court of Appeals that neither the plurality’s test nor Justice Kennedy’s can be viewed as relying on narrower grounds than the other, and that, therefore, a strict application of *Marks* is not a workable framework for determining the governing standard established in *Rapanos*. We also agree with its conclusion that each of the plurality’s test and Justice Kennedy’s test should be used to determine the Corps’ jurisdiction under the CWA.”).

75. *See, e.g.*, *Ohio v. EPA*, 969 F.3d 306, 310 (6th Cir. 2020) (dismissing an appeal from the denial of a preliminary injunction of the 2015 Rule on the ground that the Rule’s repeal and replacement had mooted the controversy).

76. *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

77. 474 U.S. 121 (1985).

among the most significant water law cases for arguments about federal jurisdiction under the Clean Water Act. However, the most recent Supreme Court decision regarding the CWA and permitting occurred in *County of Maui v. Hawaii Wildlife Fund*.⁷⁸

A. Riverside Bayview Homes, Inc.

Tracing WOTUS cases chronologically, *Riverside* set the stage for the first showdown between the Agencies and property owners over the definition of waters of the United States. Here, the Army Corps of Engineers filed a lawsuit in federal district court to enjoin Riverside Bayview Homes, Inc. (Riverside) from placing fill material on the property without permission from the Corps.⁷⁹ The district court initially held that part of Riverside's property was a covered wetland and enjoined Riverside from filling the land with dredged material until it received a permit from the Corps.⁸⁰ Through several stages of litigation between the district court and the Sixth Circuit Court of Appeals,⁸¹ along with the changing definition of "wetlands," *Riverside* eventually reached the Supreme Court.⁸²

Using statutory interpretation of the CWA, the Court gave a wide-ranging reading to the jurisdiction over types of waters the Corps had authority to regulate.⁸³ The Court held that two aspects of the Clean Water Act of 1977 confirmed that the Corps had the authority to require permits of certain discharges of fill material in wetlands.⁸⁴ The Court based this conclusion on two findings. First, Congress's explicit refusal to overrule an agency's determination was a sign that its original delineation of authority

78. 140 S. Ct. 1462 (2020).

79. *Riverside Bayview Homes*, 474 U.S. at 124.

80. *Id.* at 125.

81. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 399 (6th Cir. 1984) ("We construed the Corps wetlands definition narrowly and concluded that Riverside's property is not a wetland and that, therefore, the Corps has no jurisdiction over it.").

82. *See* 474 U.S. at 125–26.

83. *See id.* at 139.

84. *Id.* at 138–39 ("First, in amending § 404 to allow federally approved state permit programs to supplant regulation by the Corps of certain discharges of fill material, Congress provided that the States would not be permitted to supersede the Corps' jurisdiction to regulate discharges into actually navigable waters and waters subject to the ebb and flow of the tide, 'including wetlands adjacent thereto.' . . . [Second], [t]he enactment of [an appropriation of \$6 million for completing a National Wetlands Inventory] reflects congressional recognition that wetlands are a concern of the Clean Water Act . . .").

to that agency was “reasonable.”⁸⁵ Second, those who suggested removing “wetlands” from the “navigable waters” definition did not think that elimination of the term was appropriate, but rather that the jurisdiction given to the Corps was necessary to regulate discharges of pollution.⁸⁶ This decision clarified that the Corps and the EPA had broad discretion in protecting waters.

B. Solid Waste Agency of Northern Cook County (SWANCC)

While the Court in *Riverside* examined the CWA through a wide lens, it took a narrower stance sixteen years later in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. *Solid Waste Agency of Northern Cook County* (SWANCC) involved a dispute over filling excavation trenches, which required permitting because the trenches had become ponds for migratory birds.⁸⁷ Section 404(a) of the Clean Water Act requires a permit for the “discharge of dredged or fill materials into the navigable waters,”⁸⁸ in which “navigable waters” is further clarified to mean “the waters of the United States, including the territorial seas.”⁸⁹ The Army Corps of Engineers had previously defined the term “waters of the United States” to contain “waters such as *intrastate* lake[s], rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could *affect interstate or foreign commerce*.”⁹⁰

Eventually, the Army Corps of Engineers declined to grant SWANCC a section 404(a) permit to fill the excavation trenches because SWANCC failed to prove that this solution was the least damaging method for disposal of the waste.⁹¹ The district court ruled in favor of SWANCC, but the

85. *Id.* at 137 (“Although we are chary of attributing significance to Congress’ failure to act, a refusal by Congress to overrule an agency’s construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress’ attention through legislation specifically designed to supplant it.”).

86. *Id.*

87. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 163–64 (2001).

88. 33 U.S.C. § 1344(a) (2018).

89. *Id.* § 1362(7).

90. 33 C.F.R. § 328.3(a)(3) (1999) (emphasis added).

91. *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 165.

Seventh Circuit subsequently reversed, holding the CWA “reaches as many waters as the Commerce Clause allows.”⁹²

The issue before the Court narrowed to whether the Clean Water Act’s jurisdiction reaches intrastate waters—including excavation trenches which had recently become homes of migratory birds.⁹³ In writing for the majority, Chief Justice Rehnquist declined to extend the reasoning in *Riverside*⁹⁴ to include “isolated ponds” in “§ 404(a)’s definition of navigable waters because they serve as a habitat for migratory birds.”⁹⁵ The Court further held that “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”⁹⁶

SWANCC provided a restriction on the federal government’s control over waters of the United States. While there may be the opportunity for the CWA to extend to pollutants that reach directly into federally regulated waters, other instances are unable to meet the navigable waters threshold.⁹⁷ As the Court noted, “[w]e cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute.”⁹⁸ This decision refined and narrowed what authority the government had to regulate waters under the CWA.

C. *Rapanos v. United States*

Only a few years later, the Supreme Court heard another CWA permitting case that questioned the reach of the waters of the United States. *Rapanos v. United States* involved an individual who wanted to fill wetlands on his property to then develop it.⁹⁹ However, the CWA required Rapanos to receive a permit to fill these wetlands because they were

92. *Id.* at 166.

93. *See id.* at 162.

94. 474 U.S. 121, 134–35 (1985) (noting that adjacent wetlands can serve as habitats for aquatic species and are “integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water”).

95. *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 171–72 (internal quotation marks omitted).

96. *Id.* at 172.

97. *Id.* at 173–74.

98. *Id.*

99. 547 U.S. 715, 719–20 (2006) (plurality opinion).

classified as “waters of the United States.”¹⁰⁰ The district court upheld the Army Corps of Engineers’ determination that Rapanos’s wetlands were included as “waters of the United States.”¹⁰¹ Later, the Sixth Circuit affirmed, noting that the “hydrological connection” between the wetlands and definitive navigable waters confirmed the wetlands as “waters of the United States.”¹⁰²

There were two differing opinions written to resolve this case before the Supreme Court.¹⁰³ Because neither opinion received a majority of the nine-justice panel, each opinion contained distinct language that failed to clarify the final extension of waters of the United States. In the end, the Court vacated and remanded the Sixth Circuit Court of Appeals’ judgment for further consideration.¹⁰⁴

Justice Scalia’s plurality opinion received support from Chief Justice Roberts, Justice Thomas, and Justice Alito. This opinion noted that “the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”¹⁰⁵ While this definition does afford some regulation under the CWA, the above “does not include channels through which water flows intermittently or ephemerally,” and the Army Corps of Engineers’ expansion of this rule was not “based on a permissible construction of the statute.”¹⁰⁶ Only waters with a “continuous surface connection” to waters that are already considered “waters of the United States” fell under federal jurisdiction.¹⁰⁷ Justice Scalia’s analysis lends to his attitude towards government intervention: less federal oversight is a good thing.¹⁰⁸ Justice Scalia noted the problem in deciding what is covered as a federally regulated water under the CWA: it is “difficult to

100. *Id.* at 720–21.

101. *Id.* (internal quotation marks omitted).

102. *See Rapanos v. United States*, 376 F.3d 629, 640, 648 (6th Cir. 2004).

103. *See Rapanos*, 547 U.S. at 753–57.

104. *Id.* at 757.

105. *Id.* at 739 (plurality opinion).

106. *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

107. *Id.* at 742.

108. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

determine where ‘water[s of the United States]’ end[] and the ‘wetland’ begins.”¹⁰⁹

Justice Kennedy’s concurrence reached a different conclusion when he disposed of the continuous surface connection. Instead, he determined that wetlands need to have a “significant nexus” to a body of water that “significantly affect[s] the chemical, physical, and biological integrity of covered waters . . . [which are already determined to be] ‘navigable.’”¹¹⁰ However, Justice Kennedy also provided an out: if the “wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”¹¹¹

The discrepancy between Justice Kennedy and Justice Scalia’s opinions adds even more confusion to a complicated subject,¹¹² but the discussion of plurality versus plurality is beyond the scope of this Comment. Although these cases are nearly twenty years old, they are still critical in determining agency action over WOTUS. President Obama’s administration employed Justice Kennedy’s “significant nexus” test, while President Trump directed his agencies to follow Justice Scalia’s opinion.¹¹³ The “significant nexus” test is clearly more encompassing of waters that fall under federal jurisdiction, while the “continuous surface connection” test requires more proof to reach that threshold.¹¹⁴

D. County of Maui v. Hawaii Defenders of Wildlife

The Court developed an entirely new test while wrestling with the question of whether a CWA permit is required when a pollutant that originates from a point source¹¹⁵ reaches a navigable water through a non-

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

110. *Id.* at 767, 780 (Kennedy, J., concurring).

111. *Id.* at 780.

112. *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that when there is a plurality opinion with no controlling rationale, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))). *But see* *Nichols v. United States*, 511 U.S. 738, 745–46 (1994) (“We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.”).

113. *See* Exec. Order No. 13,778, 82 Fed. Reg. 12,497, 12,497 (Feb. 28, 2017).

114. *Cf. Rapanos*, 547 U.S. at 756 (plurality opinion) (explaining that Justice Kennedy’s test “would [at least] disallow some of the Corps’ excesses”).

115. 33 U.S.C. § 1362(14) (2018) (defining a point source as “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged”).

point source, such as groundwater.¹¹⁶ In this case, the County of Maui had a wastewater reclamation plant that pumped treated water from the plant hundreds of feet underground.¹¹⁷ Environmental groups then brought suit against the County of Maui for discharging a pollutant into a “navigable water” without the necessary CWA permit.¹¹⁸ The district court granted summary judgment in favor of the environmental groups because “the pollutants discharged [without a permit] by the County at the [Lahaina Wastewater Reclamation Facility] injection wells migrate to the ocean . . . [and thus] the County is violating the Clean Water Act.”¹¹⁹ The district court noted that the wells’ discharge into the groundwater was “functionally one into navigable water[s].”¹²⁰

While the Ninth Circuit affirmed the decision of the lower court, it also narrowed the permitting standard. The old standard required that pollutants be “functionally [discharged] into navigable water,”¹²¹ but the new test required only that pollutants be “fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”¹²² Because of the differences in applicable standards for determining when a pollutant is discharged into a navigable water—e.g., “fairly traceable,”¹²³ having a “direct hydrological connection,”¹²⁴ and even excluding discharges through ground water from the CWA permitting requirements¹²⁵—the Court granted Maui’s petition for certiorari.

116. *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

117. *Id.* at 1469.

118. *Id.*

119. *Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 1000 (D. Haw. 2014).

120. *Id.* at 998.

121. *Id.*

122. *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018).

123. *Id.*

124. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018) (“[W]e hold that a plaintiff must allege a direct hydrological connection between ground water and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through ground water.”), *vacated and remanded*, 140 S. Ct. 2736 (2020) (mem.); *see also* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2964 (proposed Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122, 412).

125. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 932–33 (6th Cir. 2018) (holding that “the CWA does not extend its reach to this form of pollution,” and thus disagreeing with the circuit court rulings in *Upstate Forever* and *Haw. Wildlife Fund*).

The County of Maui advocated for a bright line test: “[A] point source permit is necessary only where pollutants are being delivered to navigable waters by a point source or series of point sources.”¹²⁶ Hawaii Wildlife Fund’s arguments aligned with the decision of the Ninth Circuit, requesting that “if pollutants are fairly traceable to the point source,” a CWA permit is necessary.¹²⁷ The Solicitor General, as amicus curiae, followed a recent EPA Interpretative Statement¹²⁸ and asked the Court to confirm that the CWA reflects “Congress’s intent to leave regulation of releases of pollutants to groundwater with the states.”¹²⁹

The Court ultimately rejected all three arguments in favor of its own interpretation. First, the Court determined that the Ninth Circuit’s interpretation of the phrase “from any point source” was too broad.¹³⁰ Next, because of a “large and obvious loophole,”¹³¹ the Court rejected the County of Maui and the Solicitor General’s argument that if the pollutant traveled through any groundwater, the permitting requirement is not necessary.¹³² Finally, as neither party nor the Solicitor General asked for *Chevron* deference¹³³ on the EPA’s Interpretive Statement, the Court examined the

126. Brief for Petitioner at 27, *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260), 2019 WL 2068597, at *27.

127. Brief for Respondents at 13, *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260), 2019 WL 3230945, at *13.

128. Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,814 (proposed Apr. 23, 2019) (to be codified at 40 C.F.R. pt. 122) [hereinafter Interpretive Statement] (“The interposition of groundwater between a point source and the navigable water thus may be said to break the causal chain between the two, or alternatively may be described as an intervening cause.”).

129. Brief for the United States as Amicus Curiae Supporting Petitioner at 19, *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (No. 18-260), 2019 WL 2153160, at *19 (citing Interpretive Statement, 84 Fed. Reg. at 16,814).

130. *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1470 (2020).

131. *Id.* at 1474 (“If that is the correct interpretation of the statute, then why could not the pipe’s owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?” (citing Brief for State of Maryland et al. as Amici Curiae Supporting Respondents at 9 n.4, *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260), 2019 WL 3336988, at *9 n.4.)).

132. *Id.*

133. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by

interpretation in light of agency expertise and practical experience.¹³⁴ During this examination, the Court concluded that the interpretation argued for by the County of Maui and the Solicitor General is “neither persuasive nor reasonable.”¹³⁵

The Court held that “the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.”¹³⁶ To determine whether there is a functional equivalent of a direct discharge, the Court gave a “nonexhaustive”¹³⁷ list of seven factors:

- (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.¹³⁸

Of these seven factors, the majority noted that “[t]ime and distance will be the most important factors in most cases,”¹³⁹ but there are several other useful methods for courts to apply these factors. The Court acknowledged that these factors may be difficult to apply in practice, but the arguments proposed by both parties and the Solicitor General are inconsistent with congressional intent and the Court’s interpretation of the CWA.¹⁴⁰ Because of the new functional equivalent test, this decision paves the way for further litigation over the new definitions of waters of the United States as defined by the Navigable Waters Protection Rule.

regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

134. *Cty. of Maui*, 140 S. Ct. at 1475.

135. *Id.* at 1474.

136. *Id.* at 1476.

137. *Id.* at 1481 n.2 (Thomas, J., dissenting).

138. *Id.* at 1476–77 (majority opinion).

139. *Id.* at 1477.

140. *Id.*

V. Navigable Waters Protection Rule

On January 23, 2020, the EPA announced its newest definition of “waters of the United States” in the form of the Navigable Waters Protection Rule (NPWR), codified on April 21.¹⁴¹ This rule provides that there are now four clearly defined categories for waters of the United States: “(1) [t]he territorial seas and traditional navigable waters; (2) perennial and intermittent tributaries that contribute surface water flow to such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters.”¹⁴² This is a change from the previous 2015 Rule and President Trump’s Step 1 recodification of pre-2015 CWA rules, some of which provided federal jurisdiction for wetlands that were either adjacent¹⁴³ and/or neighboring¹⁴⁴ to a water that was already jurisdictional under the CWA. The goal of the NPWR is to set the “boundary between regulated ‘waters of the United States,’ and the waters subject solely to state and tribal authority.”¹⁴⁵ The following subsections will dissect the new categories of waters of the United States and those types of waters explicitly excluded.

A. Traditional Navigable Waters (TNWs)

The first category of WOTUS on the NPWR list includes territorial seas and traditional navigable waters. Section (a)(1) of the NPWR defines this category to mean: “[t]he territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow

141. Navigable Waters Protection Rule, *supra* note 17; *see also* EPA Press Office, *EPA and Army Deliver on President Trump’s Promise to Issue the Navigable Waters Protection Rule – A New Definition of WOTUS*, EPA (Jan. 23, 2020), <https://www.epa.gov/newsreleases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-0>.

142. Navigable Waters Protection Rule, *supra* note 17, at 22,251.

143. Clean Water Rule, *supra* note 13, at 37,058 (defining adjacent waters as “bordering, contiguous, or neighboring” to “waters of the United States”).

144. *Id.* (defining “neighboring” further to include “(1) Waters located in whole or in part within 100 feet of the ordinary high water mark” of a jurisdictional water; “(2) Waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark” of a jurisdictional water; and “(3) Waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes”).

145. Navigable Waters Protection Rule, *supra* note 17, at 22,269.

of the tide.”¹⁴⁶ This new definition does not provide any substantive changes to the text of previous rules regarding traditional navigable waters (TNWs); rather, the prior rules are now combined into one paragraph.¹⁴⁷ The rationale for combining these definitions into a single paragraph follows the mindset of commenters, stating that this single paragraph was to “help[] streamline the regulatory text” as this particular definition of TNWs is “well understood” by interpreters.¹⁴⁸ The Agencies note that there has been no change in the interpretation of TNWs as it has been understood for decades.¹⁴⁹

Included within this first category of jurisdictional waters alongside TNWs are territorial seas. “Territorial seas” are defined in the CWA as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”¹⁵⁰ The text of the NWPR notes that the streamlining of territorial seas and other waters that “are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce”¹⁵¹ was added in order to prevent exclusion of waters that fit the definition of territorial seas under the CWA.

The tradition of navigable waters has long been cemented in caselaw. In 1870, the Supreme Court in *The Daniel Ball* stated that waters are considered “navigable in fact when they are used, or are susceptible of being used in their ordinary condition, as highways for commerce.”¹⁵² Over a century later, the Court further noted that federal jurisdiction of these navigable waters extends further than *The Daniel Ball* suggests, indicating that waters fall under CWA permitting authority when they are “relatively permanent bodies of water.”¹⁵³ These navigable-in-fact waters fit the exact definition of a TNW.

146. *Id.* at 22,338.

147. *Id.* at 22,280.

148. *Id.*

149. *Id.* at 22,281.

150. 33 U.S.C. § 1362(8) (2018).

151. Navigable Waters Protection Rule, *supra* note 17, at 22,281.

152. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

153. *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (“In addition, the Act’s use of the traditional phrase ‘navigable waters’ (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water.”). For a further discussion, see *supra* Section IV.C.

Some commenters expressed concern over whether these waters that are “susceptible of being used . . . for commerce,” as stated in *The Daniel Ball*, could be interpreted liberally to mean any water that has the possibility of floating a boat.¹⁵⁴ However, this idea is quickly dispelled, as it takes “more than simply being able to float a boat to establish jurisdiction over navigable-in-fact waters under paragraph (a)(1); it requires evidence of physical capacity for commercial navigation and that it was, is, or actually could be used for that purpose.”¹⁵⁵

As there is not much change between previous definitions of territorial seas and this new proposed definition, there is little room for dissenters to complain. In fact, it appears that consolidating these definitions in a single paragraph creates a simplified and clearer explanation for traditional navigable waters.

B. Tributaries

The second category of WOTUS on the NWPR list is tributaries. Section (a)(2) notes that “tributaries” are jurisdictional waters under the CWA.¹⁵⁶ A tributary is defined as a “river, stream, or similar naturally occurring surface water channel that contributes surface water flow” to a subsection (a)(1) water (TNWs) “in a typical year either directly or through one or more waters identified in paragraph (a)(2), (3), or (4).”¹⁵⁷ The Agencies chose this definition to “establish a clear and easily implementable definition” that is “consistent with the role of the Federal government under the Constitution and the CWA.”¹⁵⁸ This idea is driven by a precedent created by the Court that local government should oversee land-use decisions.¹⁵⁹

The definition of tributaries includes many changes from previous rules. Notably, a water must contribute a flow of surface water during a “typical

154. Navigable Waters Protection Rule, *supra* note 17, at 22,281–82.

155. *Id.* at 22,282 (citing U.S. ARMY CORPS OF ENGINEERS, U.S. ARMY CORPS OF ENGINEERS JURISDICTION DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK app. D (2007), <https://usace.contentdm.oclc.org/digital/collection/p16021coll11/id/2316>).

156. *Id.* at 22,338.

157. *Id.* at 22,339.

158. *Id.* at 22,287.

159. *See, e.g.*, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (holding that CWA jurisdiction using the “Migratory Bird Rule” would . . . result in a significant impingement of the States’ traditional and primary power over land and water use”); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”).

year.”¹⁶⁰ The term “typical year” is defined to mean a year “when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.”¹⁶¹ More importantly, the Agencies also clarify that tributaries are only jurisdictional if they have a “relatively permanent” surface water contribution.¹⁶²

Some commenters have expressed concerns that this definition of “tributary” is unfounded and inconsistent with science, the CWA, and existing caselaw.¹⁶³ The EPA’s Science Advisory Board proposed a Connectivity Report, which stated that “ephemeral, intermittent, and perennial streams exert a strong influence on the character and function of downstream waters and that tributary streams are connected to downstream waters.”¹⁶⁴ While the EPA notes that this Connectivity Report was influential in creating the definition of tributaries, it is not the sole factor used to create policy.¹⁶⁵ This definition—which excludes ephemeral waters—is consistent with previous decisions by the Court, including both *SWANCC*¹⁶⁶ and *Rapanos*.¹⁶⁷

Following the same line of thinking, when there is a “break” that prevents the flow of water from a tributary to a TNW, the upstream tributary is not considered a WOTUS under the NWPR.¹⁶⁸ These instances of an artificial or natural “break” split waters of jurisdiction. These breaks prevent jurisdiction under the CWA, as this water would not contribute to

160. Navigable Waters Protection Rule, *supra* note 17, at 22,274.

161. *Id.*

162. *Id.* at 22,273–74.

163. *Id.* at 22,288.

164. *Id.* (internal quotation marks omitted) (citing Letter from David T. Allen, Chair, Sci. Advisory Bd., & Amanda D. Rodewald, Chair, SAB Panel for the Review of the EPA Water Body Connectivity Rep., to Gina McCarthy, Adm’r, EPA (Oct. 17, 2014) at 3).

165. *Id.* at 22,261 (“[S]cience cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the CWA.”).

166. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 168 n.3 (2001) (explaining that while the Conference Report discussing the term “navigable waters” noted the term should “be given the broadest possible constitutional interpretation,” nothing in the report indicated that “Congress intended to exert anything more than its commerce power over navigation”).

167. *Rapanos v. United States*, 547 U.S. 715, 733 (2006) (stating that waters of the United States should “include only relatively permanent, standing or flowing bodies of water”).

168. *See* Navigable Waters Protection Rule, *supra* note 17, at 22,276–77.

the surface water flow necessary to establish flow on a perennial or intermittent basis.¹⁶⁹ This new rule has caused apprehension as some public comments demonstrate a fear that excluding waters upstream from breaks would prevent jurisdiction for waters that would typically be considered TNWs, but are now excluded due to the break.¹⁷⁰ However, the Agencies provide that “channelized non-jurisdictional surface water features do not sever jurisdiction of upstream perennial or intermittent waters so long as they convey surface water from such upstream waters to downstream jurisdictional waters in a typical year.”¹⁷¹ “Channelized” is further defined to mean water flows with a “defined path or course” and that these flows are restricted to their defined path or course.¹⁷²

Finally, in cases where there are features that disturb the surface water flow (such as dams, boulder fields, or gravel pits) but do not sever the surface flow, the Agencies have determined that these waters are still considered jurisdictional if they meet the other requirements of the CWA.¹⁷³ However, if these features themselves do not meet the definition of a tributary from (a)(2) of the NWPR, they are not jurisdictional, regardless of whether these features convey a surface water flow.¹⁷⁴

Some of the biggest shifts in defining WOTUS fall under the tributary section of the NWPR. Further analysis of ditches and how they fit into this equation are discussed below.¹⁷⁵ While the overall theme of the NWPR is to offer greater clarity when it comes to defining WOTUS, there are still instances when a case-by-case analysis of individual waters would be the best test to determine federal jurisdiction.

C. Lakes and Ponds, and Impoundments of Jurisdictional Waters

The third category of WOTUS on the NWPR list includes lakes and ponds and impoundments of jurisdictional waters. Section (a)(3) defines lakes, ponds, and impoundments of jurisdictional waters to be “waters of the United States.”¹⁷⁶ Specifically, a lake, pond, or impoundment is a jurisdictional water under three rules: (1) it is considered a territorial sea or

169. *Id.*

170. *Id.*

171. *Id.* at 22,289.

172. *Id.*

173. *Id.*

174. *Id.*

175. *See infra* Section VI.A.

176. Navigable Waters Protection Rule, *supra* note 17, at 22,300.

TNW as defined under section (a)(1); (2) it “contributes surface water flow to the territorial seas or a traditional navigable water in a typical year either directly or through one or more jurisdictional waters;” or (3) it “is inundated by flooding from a paragraph (a)(1) through (3) water in a typical year.”¹⁷⁷ Further, if a lake, pond, or impoundment is considered a jurisdictional water, it does not lose this status if the surface water flow reaches an already-regulated water in a typical year “through a channelized non-jurisdictional surface water feature.”¹⁷⁸ Examples of these channelized, non-jurisdictional surface water features include both artificial features, such as culverts, dikes, or spillways, and natural features, like boulder fields.¹⁷⁹

Separating lakes, ponds, and impoundments from adjacent waters is a departure from the 2015 Rule. The 2015 Rule included all lakes and ponds within 1,500 feet of a tributary, and other, qualified, lakes and ponds that could be up to 4,000 feet from a jurisdictional water.¹⁸⁰ The key distinction between the two rules is highlighted by the NWPR’s regulation of waters that drain downstream into an already jurisdictional water, regardless of the distance between the two bodies of water. However, a lake, pond, or impoundment is considered a WOTUS *only* if the water flows from a jurisdictional water to the pond, lake, or impoundment.¹⁸¹

Overall, while there is some change in how the NWPR affects lakes, ponds, and impoundments, these changes are familiar as they follow both legal and administrative precedents,¹⁸² albeit in a slightly narrower view. Now these types of water are combined into a single definition, with lakes, ponds, and impoundments qualifying as jurisdictional if, in a typical year, they drain to a jurisdictional water.¹⁸³

177. *Id.*

178. *Id.*

179. *Id.*

180. Clean Water Rule, *supra* note 13, at 37,058–059.

181. Navigable Waters Protection Rule, *supra* note 17, at 22,251. This flow of water from the jurisdictional water to the lake, pond, or impoundment makes that feature a part of the jurisdictional water, thereby making it jurisdictional as well. *Id.*

182. *Id.* Justice Scalia’s plurality opinion in *Rapanos* stated that the term “the waters” is most commonly understood to refer to “‘streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’” 547 U.S. at 732 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

183. Navigable Waters Protection Rule, *supra* note 17, at 22,251.

D. Adjacent Wetlands

The fourth category of WOTUS on the NWPR list is adjacent wetlands. Section (a)(4) defines the last section of waters to be considered WOTUS under the NWPR: adjacent wetlands.¹⁸⁴ In a pattern beginning to feel familiar to readers, there are several specific factors that an adjacent wetland must meet in order to be a jurisdictional water. To be jurisdictional, the adjacent wetland must meet one or more of the following: (1) abut a territorial sea, TNW, tributary, or jurisdictional lake, pond, or impoundment; (2) in a typical year, be flooded by a territorial sea, TNW, tributary, or jurisdictional lake, pond, or impoundment; (3) be physically separated from a territorial sea, TNW, tributary, or jurisdictional lake, pond, or impoundment by a natural feature; or (4) be separated from a territorial sea, TNW, tributary, or jurisdictional lake, pond, or impoundment by an artificial feature, but only if the feature allows for a “direct hydrologic surface connection” between this adjacent wetland and the territorial sea, TNW, tributary, or jurisdictional lake, pond, or impoundment in a typical year.¹⁸⁵ For example, a wetland will be considered a jurisdictional water if it is divided by a “berm, bank, dune, or other similar feature” or an artificial feature, such as a road or a culvert, as long as there is a “direct hydrological connection through or over that structure in a typical year.”¹⁸⁶

Just as with the lakes, ponds, and impoundments, the departure from the previous rule involves changing from a specific distance to a jurisdictional water requirement.¹⁸⁷ As a result, regulated wetlands are: directly abutted or flooded by a jurisdictional water; separated from jurisdictional waters by natural features; or separated from jurisdictional waters by artificial features that allow water to pass through.¹⁸⁸ Another textual change is that the NWPR eliminates the “bordering, contiguous, or neighboring” language from the 2015 Rule,¹⁸⁹ while using the familiar “adjacent” term, in an effort to “reduce the potential confusion associated with using [these] three seemingly similar terms in the same definition.”¹⁹⁰

184. *Id.* at 22,338.

185. *Id.* at 22,251.

186. *Id.*

187. Clean Water Rule, *supra* note 13, at 37,059.

188. Navigable Waters Protection Rule, *supra* note 17, at 22,312–13.

189. Clean Water Rule, *supra* note 13, at 30,755.

190. Navigable Waters Protection Rule, *supra* note 17, at 22,307.

E. Non-WOTUS Waters

Section (b) of the rule sets forth twelve exclusions from WOTUS under the CWA.¹⁹¹ Many of the waters explicitly excluded are consistent with previous interpretations.¹⁹² Foremost, any body of water that does not explicitly fit the definitions from paragraphs (a)(1)–(4) is not regulated by the CWA.¹⁹³ Some of these excluded waters include groundwater, “irrigation ditches” and “irrigation canals” which have “irrigation returns flows” and are constructed upland.¹⁹⁴ Upland¹⁹⁵ is further defined to mean “any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(16) of this section, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.”¹⁹⁶ The goal of the excluded waters in section (b) of the NWPR is to follow long-standing practice while eliminating confusion over which waters are regulated by the CWA and which waters are not.¹⁹⁷

VI. Impact of the Navigable Waters Protection Rule on Agriculture

Agriculture industry leaders¹⁹⁸ praised the adoption of the NWPR as it provides greater clarity in determining which waters fall under federal jurisdiction and which waters are regulated on the local level.¹⁹⁹ Prior to the introduction of the NWPR, many notable complaints from agriculturists were that the federal government was overreaching its bounds to regulate

191. *Id.* at 22,278.

192. *See id.* at 22,317 (“Two of the exclusions (waste treatment systems and prior converted cropland) have been expressly included in the regulatory text for decades.”).

193. *Id.* at 22,338 (emphasis added).

194. *Id.* at 22,261.

195. *See infra* Section VI.B (further discussing the term “upland”).

196. Navigable Waters Protection Rule, *supra* note 17, at 22,339.

197. *Id.* at 22,317–18.

198. Agricultural industry leaders who praised the NWPR include Zippy Duval, President of the American Farm Bureau Federation; Roger Johnson, President of the National Farmers Union; Ben Scholz, President of the National Association of Wheat Growers; Bill Gordon, President of the American Soybean Association; Jennifer Houston, President of the National Cattlemen’s Beef Association; David Herring, President of the National Pork Producers Council; and Barbara Glenn, CEO of the National Association of State Departments of Agriculture.

199. Carol Ryan Dumas, *Agriculture Applauds New WOTUS Rule*, CAP. PRESS (Jan. 23, 2020), https://www.capitalpress.com/nation_world/agriculture-applauds-new-wotus-rule/article_408287cc-3e32-11ea-ab4b-8ba892778b6f.html.

waters where it has no authority to regulate.²⁰⁰ Even the Supreme Court notes that determining where “water ends and land begins . . . is often no easy task.”²⁰¹

As the NWPR relates to agriculture, the major changes from the previous rules to this current rule focus on categories (a)(2) (tributaries) and (a)(4) (adjacent wetlands). Both areas are essential to agriculture as they are commonly found on an individual landowner’s property. As Justice Scalia noted, “[C]lean water is not the *only* purpose of the [Clean Water Act]. So is the preservation of primary state responsibility for ordinary land-use decisions.”²⁰² The Agencies wanted to ensure that “States and Tribes retain authority over their land and water resources.”²⁰³

A. Tributaries

Tributaries are only jurisdictional waters if their surface contribution flows at a perennial or intermittent rate, and this flow contribution arrives at a TNW in a typical year.²⁰⁴ This distinction is key because it changes the regulation of waters that have an ephemeral flow. Ephemeral flows occur “only in direct response to precipitation.”²⁰⁵ Because intermittent²⁰⁶ and perennial²⁰⁷ water flows require continuous flow, ephemeral waters fail to meet this standard.

This definition of tributary replaces Justice Kennedy’s “significant nexus” test, which analyzed waters on a case-by-case basis.²⁰⁸ The Agencies think this new definition will provide greater clarity across the board.²⁰⁹ Implementation of the new definition for tributaries will require the identification of distinct features to determine whether a tributary

200. *Id.*

201. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

202. *Rapanos v. United States*, 547 U.S. 715, 755–56 (2006) (citing 33 U.S.C. § 1251(b)).

203. Navigable Waters Protection Rule, *supra* note 17, at 22,269.

204. *Id.* at 22,287.

205. *Id.* at 22,338.

206. *Id.* at 22,338 (“The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation . . .”).

207. *Id.* at 22,339 (“The term *perennial* means surface water flowing continuously year-round.”).

208. *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring) (“Jurisdiction over wetlands depends upon the existence of a significant nexus between the wetland in question and navigable waters in the traditional sense.”).

209. Navigable Waters Protection Rule, *supra* note 17, at 22,270–71.

exists.²¹⁰ However, identification will be an easier process than “multi-factored case-specific significant nexus analysis.”²¹¹

Ditches, while not on the list of WOTUS—and thereby exempted unless they have other qualifications—are nearly exclusively exempt from federal jurisdiction under the CWA.²¹² The Agencies, noting that determining whether ditches are federally jurisdictional has been a great source of confusion for agriculturalists,²¹³ proposed three categories of ditches which are jurisdictional waters, and the rest were exempt:

- (1) [d]itches that are traditional navigable waters or that are subject to the ebb and flow of the tide (*e.g.*, paragraph (a)(1) waters);
- (2) ditches that are constructed in tributaries or that relocate or alter tributaries as long as the ditch satisfies the flow conditions of the tributary definition; and
- (3) ditches constructed in adjacent wetlands as long as the ditch likewise satisfies the conditions of the tributary definition.²¹⁴

The NWPR, however, decided against creating a free-standing category for ditches and blended the Agencies’ proposal into the “tributary” category.²¹⁵ The goal of this new rule is to alleviate the confusion and provide greater clarity, as the regulation of all other types of ditches is best left to the states and tribes.²¹⁶

Specific to agriculture and irrigation ditches, Congress has already granted an exemption to the construction or maintenance of these ditches if they are associated with normal farming activities.²¹⁷ There is little legislative history that precisely identifies Congress’s exact reasoning for

210. *See id.* at 22,270 (“[T]he agencies acknowledge that field work may frequently be necessary to verify whether a feature is a water of the United States.”).

211. *Id.* at 22,270–71 (“The application of a clear test for categorically covered and excluded waters, as presented in this final rule, is inherently less complicated than a complex multi-factored significant nexus test that must be applied on a case-by-case basis to countless waters and wetlands across the nation.”).

212. *Id.* at 22,251–52.

213. *See id.* at 22,295.

214. *Id.*

215. *Id.*

216. *See id.* at 22,295–96 (noting that States and Tribes retain regulatory power over “all other ditches . . . as part of their primary authority over land and water resources within their borders” (citing 33 U.S.C. §§ 1251(b), 1370)).

217. 33 U.S.C. § 1344(f)(1)(A), (C) (2018) (exempting activities of normal farming and ranching, the construction of farm or stock ponds, and the construction and maintenance of drainage ditches from sections 301, 402, and 404 of the CWA).

these exemptions.²¹⁸ Nevertheless, ditches could still be subject to regulation even if they do not meet the definition of a tributary. If a ditch is classified as a point source,²¹⁹ it could still be subject to CWA permitting under the NWPR rule.²²⁰ The bottom line regarding ditches is that they are excluded unless they are already considered a jurisdictional water or meet the definition of a point source. However, the burden of proof for determining whether a ditch is a jurisdictional water under the definition of a tributary falls to the Agencies.²²¹

B. Adjacent Wetlands

As discussed above, there are four specific ways for a wetland to be considered a jurisdictional water.²²² However, land that does meet all three of the wetland factors from the Army Corps of Engineer's Wetlands Delineation Manual²²³ or as defined by the Agencies²²⁴ is to be considered "upland" and not a jurisdictional water. Uplands could be previous wetlands that have been converted by natural transformation or lawful conversion.²²⁵ Adjacent wetlands, under the NWPR, are narrowed to

218. *See* Navigable Waters Protection Rule, *supra* note 17, at 22,296 ("One possible interpretation of these exemptions is that they function as an implicit acknowledgement that there may be some irrigation or drainage ditches that are waters of the United States, thus the need to exempt common agricultural and related practices in those waters from CWA section 404 permitting.").

219. 33 U.S.C. § 1362(14) (defining a point source as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged").

220. *See* Navigable Waters Protection Rule, *supra* note 17, at 22,297 ("Either it is a water of the United States that subjects a discharger to sections 402 and 404 permitting requirements for direct discharges into the ditch, or, if it is non-jurisdictional but conveys pollutants to downstream jurisdictional waters, it may be a point source that subjects a discharger into a ditch to section 402 permitting requirements.").

221. DEP'T OF THE ARMY & ENVTL. PROT. AGENCY, NAVIGABLE WATERS PROTECTION RULE: RURAL AMERICA AND THE NAVIGABLE WATERS PROTECTION RULE 2 (2020) [hereinafter RURAL AMERICA AND THE NWPR] (fact sheet) ("Absent such evidence, the agencies will determine the ditch is non-jurisdictional.").

222. *See supra* Part V.

223. U.S. ARMY CORPS OF ENG'RS, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL 9–10 (Jan. 1987) ("Wetlands have the following general diagnostic environmental characteristics: (1) *Vegetation* . . . (2) *Soil* . . . [and] (3) *Hydrology*.").

224. Navigable Waters Protection Rule, *supra* note 17, at 22,308 (including factors for defining a wetland, "i.e., hydrology, hydrophytic vegetation, and hydric soils").

225. *Id.*

wetlands, rather than “all waters” adjacent to CWA-jurisdictional waters as prescribed under the 2015 Rule.²²⁶

C. Non-Jurisdictional Waters

Further excluded waters are all groundwaters, ephemeral features, and prior converted cropland. The NWPR offers clarification for each of these categories. Groundwaters exempted include all “groundwater drained through subsurface drainage systems.”²²⁷ This groundwater exemption is crucial to agriculture because it excludes drainage systems, such as tile drains, from agricultural land.²²⁸ Ephemeral features are discussed above,²²⁹ but include almost any type of waterbody created by precipitation.²³⁰ These are particularly vital for agriculture as these features are common among landowners. Prior converted cropland includes any land, before December 23, 1985, which was converted to make the “production of an agricultural product possible.”²³¹

Prior converted cropland can only be considered a jurisdictional water under the CWA if the “area is abandoned and has reverted to [a jurisdictional] wetland[].”²³² Abandonment occurs when the “prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.”²³³ A crucial distinction is that cropland that is undisturbed for any conservation or agricultural purpose is still considered an agricultural use, and the exemption will still apply to these lands.²³⁴

Finally, any artificial lake or pond that is constructed in upland or non-jurisdictional waters is not considered a WOTUS under the CWA.²³⁵ Even if these waters have a surface water connection to a downstream

226. Clean Water Rule, *supra* note 13, at 30,758–59.

227. Navigable Waters Protection Rule, *supra* note 17, at 22,251.

228. RURAL AMERICA AND THE NWPR, *supra* note 221, at 3.

229. *See supra* Section VI.A.

230. Navigable Waters Protection Rule, *supra* note 17, at 22,317 (excluding “ephemeral features, including ephemeral streams, swales, gullies, rills, and pools”).

231. *Id.* at 22,339.

232. *Id.*

233. *Id.*

234. RURAL AMERICA AND THE NWPR, *supra* note 221, at 2–3.

235. *Id.* at 3.

jurisdictional water, these upland waters are excluded.²³⁶ Uses of this water can be for irrigation or creating stock or farm ponds.²³⁷

These new changes created by the NWPR will have a positive impact on agriculturalists. The new categories under the NWPR establish an application process that is streamlined based on existing definitions from previous precedent and tailored to the powers delineated to the Agencies by Congress. Because the NWPR proposes easy-to-apply rules to determine the jurisdictional status of a water, landowners are spared excess costs and time that was previously lost in the confusing and complex permitting process from earlier regulation. The NWPR should stop the shifting definition of waters of United States, at least for now.

VII. Litigation over the Navigable Waters Protection Rule

In the Supreme Court's most recent WOTUS decision—*County of Maui*²³⁸—none of the opinions addressed the Navigable Waters Protection Rule (NWPR) in detail. The facts in *County of Maui* did not support any argument that the Pacific Ocean was not clearly a navigable water subject to CWA requirements.²³⁹ However, if future NWPR litigation calls into question whether a water is considered a WOTUS under the NWPR, *County of Maui* will be heavily involved in both arguments and determining the outcome. Many different groups, from states to industry groups, are attacking the NWPR. Some claim that the NWPR is a vast overreach by the federal government,²⁴⁰ while others say it is woefully inadequate in protecting our nation's waters.²⁴¹ Both of these arguments are analyzed below.

A. NWPR Is Overreach by Federal Government

Several ranchers in western states claim this new WOTUS rule is a violation of the Constitution, the Clean Water Act, and Supreme Court precedent.²⁴² Further, New Mexico Cattle Grower's Association argues that the NWPR is an "illegal interpretation" by the Army Corps of Engineers

236. *Id.*

237. *See id.*

238. *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

239. *See id.* at 1469 (describing the Pacific Ocean as a navigable water).

240. *See infra* Section VII.A.

241. *See infra* Section VII.B.

242. Complaint for Declaratory and Injunctive Relief at 19–20, *Or. Cattlemen's Ass'n v. Wheeler*, No. 3:19-cv-00564-AC (D. Or. filed Apr. 16, 2019).

and the EPA because these interpretations are arbitrary and capricious, *ultra vires*, and violate the Administrative Procedure Act.²⁴³ These groups attack several of the specific definitions of TNWs because of lack of conformity with Supreme Court precedent and previous interpretation by the Army Corps of Engineers and the EPA.²⁴⁴ For example, intermittent tributaries could now be considered navigable waters because there is no minimum amount of water flow or duration of water flow for the body of water to be considered a tributary.²⁴⁵

These farmers and ranchers argue that the NWPR places an undue burden on them to operate their land by requiring costly permit approval under the CWA.²⁴⁶ These costs can be amplified because the CWA is unique in that “most laws do not require the hiring of expert consultants to determine if [the law] appl[ies] to you or your property.”²⁴⁷ Both the New Mexico Cattle Grower’s and Oregon Cattlemen’s Association’s lawsuits request declaratory and injunctive relief that invalidates the NWPR.²⁴⁸

B. NWPR Ignores Science and Precedent

Several state attorneys general and environmental groups have also filed lawsuits against the EPA and the Army Corps of Engineers, but they are arguing the other side of the spectrum from what the landowners and ranchers argued in their lawsuit: that the NWPR does not do enough to protect waters of the United States.²⁴⁹ These groups have argued that the NWPR “expressly” ignores the purpose of the CWA and “hampers the objective to restore and maintain our Nation’s waters.”²⁵⁰ Despite the

243. First Supplemental Complaint at 14, 18, *N.M. Cattle Grower’s Ass’n v. U.S. Env’tl. Prot. Agency*, No. 1:19-cv-00988-JHR-SCY (D.N.M. filed Apr. 27, 2020).

244. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *supra* note 242, at 18, 25.

245. First Supplemental Complaint, *supra* note 243, at 30.

246. Complaint for Declaratory and Injunctive Relief, *supra* note 242, at 18; First Supplemental Complaint, *supra* note 243, at 15.

247. *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 782 F.3d 944, 1003 (8th Cir. 2015) (Kelly, J., concurring), *aff’d*, 136 S. Ct. 1807 (2016).

248. First Supplemental Complaint, *supra* note 243, at 44–47; Complaint for Declaratory and Injunctive Relief, *supra* note 242, at 26–27.

249. *See, e.g.*, Complaint for Declaratory Judgment and Injunctive Relief at 24, *Chesapeake Bay Found. v. Env’tl. Prot. Agency*, No. 1:20-cv-01064-GLR (D. Md. filed Apr. 27, 2020).

250. *Id.*

different arguments being made, the request for relief is the same: vacate and set aside the NWPR.²⁵¹

VIII. Conclusion

Overall, the area of permitting will continue to provide litigation and administrative dispute for some time, especially as the Navigable Waters Protection Rule is published in the Federal Register. While the intent to create new, easier-to-understand, and less powerful regulations for the federal control of waters is an admirable one, environmental rights groups and others will argue that this deregulation will have adverse effects on water quality.²⁵² The merits of their arguments are (again) beyond the scope of this Comment, but they raise what I believe to be a moot point: the deregulation is a bit of a misnomer. The deregulation does not completely gut any provision to protect the “waters of the United States.” If the federal government is unable to regulate these waters, there are still state regulations which protect the environment.²⁵³ However, the protection of our waters is still an important endeavor and one that will continue to grow in importance. Indeed, “among these treasures of our land is water fast becoming our most valuable, most prized, most critical resource.”²⁵⁴

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251. *Id.* at 37; *see also* Complaint for Declaratory and Injunctive Relief at 24, State et al. v. Wheeler, No. 3:20-cv-03005 (N.D. Cal. filed May 5, 2020).

252. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *supra* note 251, at 16.

253. *See, e.g.*, 60 OKLA. STAT. § 60 (2011) (noting that public water is “for the benefit and welfare of the people of the state” and is subject to state appropriation and pollution laws).

254. President Dwight D. Eisenhower, Address at the Dedication of McNary Dam, Walla Walla, Washington (Sept. 23, 1954), <https://www.presidency.ucsb.edu/node/232715>.