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TURTLES ALL THE WAY DOWN¹: A CLEARER UNDERSTANDING OF THE SCOPE OF WATERS OF THE UNITED STATES BASED ON THE U.S. SUPREME COURT DECISIONS

JESSE J. RICHARDSON, JR.,* TIFFANY DOWELL LASHMET** & GATLIN SQUIRES***

INTRODUCTION

The meaning of “waters of the United States”² under the Clean Water Act (“CWA”) has been debated in Congress, federal agencies, and courtrooms across the country for almost fifty years. Despite the long-standing attention to the term, most consider the term even more unclear today than in 1972 when the CWA was adopted.³ However, a methodical examination of the statutory and regulatory history and the U.S. Supreme Court decisions on the issue reveal more consensus than previously understood. In addition, this focused examination shows that the debate centers on one problem that the arguments rarely acknowledge: wetlands adjacent to a “tributary.” Specifically, litigants and agencies attempt to show that the wetland at issue lies close to some type of water, whether a ditch, drain, or creek. If that water eventually reaches a navigable water, no matter how indirect or attenuated the path, the wetland is arguably jurisdictional.⁴ This Article distills the issues and clarifies the agreements and controversies surrounding “waters of the United States.”

The meaning of the phrase “waters of the United States” has been debated in the legislature, federal agencies, and courtrooms across the country since Congress adopted the CWA in 1972.⁵ The debate intensified

¹ *Rapanos v. United States*, 547 U.S. 715, 754 n.14 (2006).

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² Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1151, sec. 502(7) (1972).

³ *Id.*

⁴ EPA, *About Waters of the United States* (Sept. 12, 2021, 6:08 PM), <https://www.epa.gov/wotus/about-waters-united-states> [<https://perma.cc/NP7C-YVJC>].

⁵ *Id.*

beginning in 1985 and now forms the focus of much rule-making and litigation.⁶ Section 404 of the CWA prohibits the discharge of dredged or fill material into the “navigable waters.”⁷ Navigable waters mean the “waters of the United States, including the territorial seas.”⁸ The term waters of the United States, as used in the CWA, was not further defined by Congress.

This Article first provides a brief overview of the history and background of the CWA and the regulations thereunder.⁹ The history reflects a shift in focus from commerce to environmental protection.¹⁰ U.S. Supreme Court case law interpreting the meaning of waters of the United States (“WOTUS”) is then examined. The Article then reviews the 2015 WOTUS Rule (“Obama Rule”) and the 2020 Navigable Waters Protection Rule (“Trump Rule”).¹¹ The Article also explores the applications of deference to the agency in various cases and how judicial deference may evolve in the future.¹² Given the attention of case law on the definition of tributaries and adjacency of wetlands to tributaries, those issues form the Article’s focus.

I. BACKGROUND

The difficulties in defining the jurisdictional reach of federal regulations addressing water contamination began even before the CWA was passed. The evolution of the regulation reflects a winding path that led from regulating commerce to regulating the environment. One relative constant during the development was the struggle to determine the scope of federal oversight or what waters came under the federal government’s purview.

In turn, the debate pivots on how far Congress, the Agencies, and the Court wish to stretch the Commerce Clause¹³ in the pursuit of clean water. The Commerce Clause states that Congress holds the authority

⁶ *Id.*

⁷ 33 U.S.C.A. § 1344 (2021).

⁸ *Id.* § 1362(7).

⁹ See discussion *infra* Part I.

¹⁰ See generally Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873 (1993) (providing a comprehensive and enlightening review of the history and background of the Clean Water Act, explaining in part the present difficulties in fitting the regulations to wetlands).

¹¹ See discussion *infra* Parts II, III.

¹² See discussion *infra* Part II.

¹³ U.S. CONST. art. 1, § 8, cl. 3.

“to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹⁴ The limits of the Commerce Clause have forced regulators to take odd approaches to, most prominently, protecting wetlands. Unlike the federal government, the states may regulate wetlands directly.¹⁵

A. *Precursors to the Clean Water Act*

The precursors to the CWA focused on the obstruction of navigable waters. The framework imposed by U.S. Constitution, however, proved “awkward,” as the states could not regulate interstate commerce, but no existing law prevented obstruction of navigable waters.¹⁶ Congress attempted to address the issue by passing various Rivers and Harbors Act, including the Rivers and Harbors Act of 1899.¹⁷ Section 13 of the Act, referred to as the Refuse Act, prohibits the discharge of “refuse matter” from floating craft, the shore, or manufacturing establishments into any “navigable water” or “any tributary of any navigable water” unless permitted by the Secretary of the Army upon application.¹⁸ Discharge of liquids from streets and sewers are excepted.¹⁹

Although passed to prevent obstructions to navigation, Section 13 evolved into a pollution prevention statute.²⁰ A pair of decisions by the U.S. Supreme Court sanctioned the application of the act to pollutants. The first found that industrial solid waste, upon settling, constituted an obstruction of waterways.²¹ The second held that commercially valuable aviation fluid could be “refuse” and that refuse includes substances harmful to waterways, like pollutants.²² In 1970, the U.S. Court of Appeals for the Fifth Circuit held in *Zabel v. Tabb*²³ that the Corps of Engineers (“Corps”) must consider ecological considerations when issuing permits under Section 13 of the Rivers and Harbors Act.²⁴

¹⁴ *Id.*

¹⁵ ENV'T L. INST., STATE WETLAND PROTECTION: STATUS, TRENDS, & MODEL APPROACHES 6 (2008).

¹⁶ Kalen, *supra* note 10, at 879.

¹⁷ Ch. 425, § 9, 30 Sta. 1121 (1899); *see also* Kalen, *supra* note 10, at 879 (discussing Congress’s adoption of the Act).

¹⁸ Ch. 425, § 13, 30 Stat. 1152 (1899) (codified as 33 U.S.C.A. § 407).

¹⁹ *Id.*

²⁰ Kalen, *supra* note 10, at 880–81.

²¹ *United States v. Republic Steel Corp.*, 362 U.S. 482, 485, 488–89 (1960).

²² *United States v. Standard Oil Company*, 384 U.S. 224, 229–30 (1966).

²³ *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

²⁴ *Id.* at 201.

Soon after the *Zabel* decision, and in response to an Executive Order by President Richard Nixon,²⁵ the Corps of Engineers issued a notice of proposed rule-making.²⁶ On April 7, 1971, the Corps delivered a final regulation²⁷ that established a permitting program for discharges into navigable waters or their tributaries.²⁸ The regulation would have prohibited discharges into “navigable waters of the United States or into any tributary from which discharged or deposited matter shall float or be washed into a navigable water.”²⁹ Yet, one federal court declared the program *ultra vires* before its full implementation.³⁰ In a foreshadowing of arguments that still plague the courts, the *Kalur* court found that the Refuse Act authorized the issuance of permits for discharges in navigable waters, but the Act failed to include language that included non-navigable tributaries.³¹

In response to *Kalur*, the Corps promulgated a narrower definition of navigable waters under the Rivers and Harbors Act in 1972.³² The regulation defined navigable waters of the United States as “waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”³³

Also, in 1972, Congress passed the Federal Water Pollution Control Amendments of 1972 (“FWPCA”).³⁴ The Amendments included the National Pollutant Discharge Elimination System (“NPDES”) and a program, under Section 404, for issuing permits for discharges of dredge or fill material.³⁵ The FWPCA defined navigable waters as “waters of the United States, including the territorial seas.”³⁶ Courts, relying on legislative debates on the FWPCA, interpreted the Corps’s jurisdiction broadly.³⁷ At the same time, however, the Corps of Engineers attempted to narrow the definition.

²⁵ Exec. Order No. 11,574, *reprinted in* 35 Fed. Reg. 19627 (1970).

²⁶ Permits for Discharges or Deposits into Navigable Waters, 35 Fed. Reg. 20,005 (proposed Dec. 31, 1970) (to be codified at 33 C.F.R. pt. 209).

²⁷ Permits for Discharges or Deposits into Navigable Waters, 36 Fed. Reg. 6564 (Apr. 7, 1971) (to be codified at 33 C.F.R. §. 209).

²⁸ Kalen, *supra* note 10, at 883–85.

²⁹ Permits for Discharges or Deposits into Navigable Waters, 36 Fed. Reg. at 6564–66.

³⁰ *Kalur v. Resor*, 335 F. Supp. 1, 10 (D.D.C. 1971).

³¹ *Id.*

³² 33 C.F.R. § 209 (1972).

³³ Definition of Navigable Waters of the United States, 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972) (to be codified at 33 C.F.R. pt. 209).

³⁴ Pub. L. No. 92-500 (1972) (codified at 33 U.S.C. §§ 1251–1376).

³⁵ *Id.*

³⁶ 33 U.S.C. § 1362(7) (2021).

³⁷ Kalen, *supra* note 10, at 891.

Specifically, the Corps proposed regulations that limited waters of the United States to those waters “which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”³⁸

The U.S. District Court for the District of Columbia took exception, finding that Congress intended for jurisdiction to extend to the maximum extent possible and beyond traditional notions of navigable waters.³⁹ The Corps of Engineers obliged, proposing a lengthy definition of navigable waters of the United States that included, *inter alia*⁴⁰:

- (d) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark;
- (e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;
- (f) Interstate waters landward to their ordinary high water mark and up to their headwaters;
- (g) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized: (1) By interstate travelers for water related recreational purposes; (2) For the removal of fish that are sold in interstate commerce;

³⁸ Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) (to be codified at 33 C.F.R. 209).

³⁹ *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

⁴⁰ The first three categories were:

- (a) Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark (mean higher high water mark on the Pacific coast);
- (b) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. “Coastal wetlands” includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction;
- (c) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark . . .

Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324–25 (July 25, 1974) (to be codified at 33 C.F.R. 209).

- (3) For industrial purposes by industries in interstate commerce; or (4) In the production of agricultural commodities sold or transported in interstate commerce;
- (h) Freshwater wetlands including marshes, shallows, swamps and, similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction;
- (i) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands—that are not contiguous or adjacent to navigable waters identified in paragraphs (a)–(h), a decision on jurisdiction shall be made by the District Engineer.⁴¹

B. The 1977 Regulation

In 1977, the Corps amended the regulations again, "consolidating" the definition of waters of the United States into four categories.⁴² Category 1 included "[c]oastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands."⁴³ Category 2 comprised "[t]ributaries to navigable waters of the United States, including adjacent wetlands."⁴⁴ The Corps incorporated within the definition of Category 2 waters the "statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States,'" covering these activities under other programs of the FWPCA.⁴⁵

⁴¹ *Id.* at 31,324–25.

⁴² Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,127–28 (July 19, 1977).

⁴³ Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 33,127.

⁴⁴ *Id.*

⁴⁵ *Id.*

Category 3 waters focused upon “[i]nterstate waters and their tributaries, including adjacent wetlands.”⁴⁶ Category 4 constituted a catch-all provision, referring to “all other waters . . . the degradation or destruction of which could affect interstate commerce.”⁴⁷ These waters could include isolated waters or isolated wetlands, intermittent streams, or isolated waters like prairie potholes.⁴⁸ This category comprises waters not part of a tributary system for interstate or navigable waters of the United States.⁴⁹ Impacts on the quality of these waters impact interstate commerce.⁵⁰

The definition of adjacent was also added in 1977.⁵¹ The Corps defined adjacent as “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”⁵² The regulations also defined the ordinary high-water mark and tidal waters.⁵³

Later in 1977, Congress amended the FWPCA with the CWA and “once again rendered the Corps’s regulations obsolete.”⁵⁴ These amendments authorized general permits, provided exemptions from the program, and added Section 404(g), which allowed states to administer their own permitting programs.⁵⁵

The legislative debates over these amendments are detailed extensively in many court opinions and scholarly publications with respect to gleaning the scope of waters of the United States. The debates clearly show Congress’s desire to protect wetlands and the rejection of limiting navigable waters under the Act to navigable-in-fact waters.⁵⁶ The debates also indicated that Congress recognized the Corps’s authority over Category 1, 2, and 3 waters.⁵⁷ On the other hand, Congress contemplated that states would hold authority over “more jurisdictionally attenuated areas” in Category 4, like isolated waters and intermittent streams.⁵⁸

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37,126 (July 19, 1977).

⁴⁹ *See id.*

⁵⁰ *See id.* at 37,128.

⁵¹ *See id.* at 37,144.

⁵² 33 C.F.R. § 328.3(e) (1977).

⁵³ *Id.* § 328.3(e)–(f).

⁵⁴ Kalen, *supra* note 10, at 897–98.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

C. *The 1980/1982 Regulation*

In May of 1980, the EPA passed additional regulations defining the meaning of waters of the United States as used in the CWA.⁵⁹ In 1982, the Corps of Engineers adopted an identical definition.⁶⁰ These regulations listed seven categories of WOTUS:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, 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 including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.⁶¹

⁵⁹ Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (codified in 40 C.F.R. § 122.3 (1981)).

⁶⁰ Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31794, 31,811 (July 22, 1982) (codified in 33 C.F.R. § 323.2 (1983)).

⁶¹ Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (codified in 40 C.F.R. § 122.3 (1981)).

Courts, regulatory disputes, and this Article focus on the scope of the terms tributaries and adjacent wetlands (subsections (5) and (7) of the 1980 definition). Although not clearly articulated by the U.S. Supreme Court, the question centers upon the expansion of jurisdiction resulting from the inclusion of wetlands adjacent to a tributary that flow into another tributary and then another before finally emptying into traditional navigable waters. The authors refer to this issue as the “tributary of a tributary of a tributary” issue, or “chain jurisdiction.”

In defining the term “wetlands,” 33 C.F.R. section 328.3(b) provided that:

The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.⁶²

While the 1980/1982 regulations defined neither “intermittent” nor “tributary,” the definition of “adjacent” from the 1977 regulation remained.⁶³

D. 1986 Clarifying Regulations

In 1986, the agencies adopted regulations “clarifying” the definition of WOTUS by adding what became known as the Migratory Bird Rule. Under this regulation:

[The] EPA . . . clarified that waters of the United States at 40 C.F.R. § 328.3(a)(3) also include waters:

- (a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- (b) Which are or would be used as habitat by other migratory birds which cross state lines; or
- (c) Which are or would be used as habitat for endangered species; or
- (d) Used to irrigate crops sold in interstate commerce.⁶⁴

⁶² *Id.*

⁶³ Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

⁶⁴ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

This inclusion of the Migratory Bird Rule expanded the scope of the waters of the United States definition.

E. 1993 Regulation

In 1993, the EPA and Corps codified “the current policy that prior converted croplands are not waters of the United States.”⁶⁵ The definition was otherwise unchanged, but this regulation clarified that the definition does not include areas that had previously been drained of water and converted to agricultural use.

F. 2000 Final Notice of Issuance and Modification of Nationwide Permits

The Corps discussed intermittent streams and ephemeral streams as tributaries of waters of the United States in a 2000 Final Notice of Issuance and Modification of Nationwide Permits⁶⁶:

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.⁶⁷

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.⁶⁸

This guidance stated that “ephemeral streams that are tributary to other waters of the United States are waters of the United States, as long as they possess an ordinary high water mark.”⁶⁹ Similarly, perennial

⁶⁵ Clean Water Act Regulatory Programs Final Rule, 58 Fed. Reg. 45,008, 45,033 (Aug. 25, 1993).

⁶⁶ Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000).

⁶⁷ *Id.* at 12,898.

⁶⁸ *Id.* at 12,897.

⁶⁹ *Id.* at 12,823.

and intermittent streams were likewise jurisdictional so long as they possessed the required physical ordinary high-water mark.

II. CASE LAW

Although countless cases address the meaning and scope of “waters of the United States,” only a handful of critical U.S. Supreme Court cases examine this issue. This section summarizes those three cases, highlighting the key issues addressed by the Court in attempting to define waters of the United States. Additionally, the question of whether the Court should defer to the agency forms a fundamental issue underlying cases challenging the scope of the WOTUS definition.

A. *Deference to the Agency*

The level of deference the Court should afford the agency forms a recurring theme in the cases and plays prominently in the latest attempts at rule-making. Deference to an agency’s construction of a statute that the agency administers derives from the standard announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.⁷⁰ That case addressed the standard of review when a court reviews an agency’s construction of a statute that the agency administers.⁷¹ Referred to as “*Chevron* deference,” the test consists of two steps.⁷² First, the courts ask whether Congress has “directly spoken to the precise question at issue.”⁷³ If so, the intent of Congress is clear and controls. If Congressional intent is not clear, the courts ask whether “the agency’s answer is based on a permissible construction of the statute.”⁷⁴ If so, a court will defer to the agency interpretation.

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

The question presented in this case was whether the CWA authorizes the U.S. Army Corps of Engineers to require landowners to obtain

⁷⁰ 467 U.S. 837, 842–44 (1984).

⁷¹ *Id.*

⁷² See generally Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594 (2010).

⁷³ *Chevron*, 467 U.S. at 842.

⁷⁴ *Id.* at 843.

permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.⁷⁵ The wetlands at issue lie “near” the shores of Lake St. Clair in Michigan.⁷⁶ Riverside Bayview Homes, Inc. (“Riverside Bayview”) began placing fill materials on the property to prepare a housing development site.⁷⁷ The Corps of Engineers filed suit to enjoin Riverside Bayview from filling the property, alleging that Riverside Bayview was discharging fill material into waters of the United States, namely an adjacent wetland, without a permit.⁷⁸

The U.S. District Court found that the property constituted an adjacent wetland and enjoined Riverside Bayview from filling the wetland without a permit.⁷⁹ On appeal, the U.S. Court of Appeals for the Sixth Circuit held that wetlands are not subject to CWA jurisdiction where, as here, the wetlands were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation.⁸⁰ The Sixth Circuit, troubled by its belief that a different reading would implicate the Constitution’s Takings Clause, did not grant deference to the Corps’s interpretation.⁸¹ The court narrowly construed the statute and implementing regulations to avoid the finding of a taking without just compensation.⁸²

The U.S. Supreme Court, in a unanimous decision, reversed.⁸³ Addressing the issue of a taking, the Court opined that neither a permit requirement nor a denial of a permit necessarily constitutes a taking.⁸⁴ Further, the fact that a permitting scheme may result in a taking in some circumstances does not justify a narrow construction of the statutes and regulations.⁸⁵ The Tucker Act provides a means for obtaining compensation for a taking in those cases where a taking occurs so that taking is not a consideration in statutory construction.⁸⁶

The main issue addressed by the Supreme Court was whether the wetland at issue was adjacent.⁸⁷ After dispensing with the regulatory

⁷⁵ United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

⁷⁶ *Id.* at 124.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 125.

⁸⁰ *Id.*

⁸¹ *Riverside Bayview*, 474 U.S. at 126.

⁸² *Id.*

⁸³ *Id.* at 121.

⁸⁴ *Id.* at 127.

⁸⁵ *Id.* at 128.

⁸⁶ *Id.*

⁸⁷ *Riverside Bayview*, 474 U.S. at 126.

taking issue, the Supreme Court rejected the notion that the wetland characteristics must result from flooding from the adjacent wetland, noting that the regulation referred to inundation from either surface water or *groundwater*.⁸⁸ Here, groundwater provides the source of the saturated soil conditions characteristic of a wetland.⁸⁹ The Court then found that the wetland was adjacent given that “the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of [the] property to Black Creek, a navigable waterway.”⁹⁰ Later in the opinion, the Court noted that the wetland at issue “actually abuts on a navigable waterway.”⁹¹

The bulk of the opinion discusses whether the Corps’s inclusion of adjacent wetlands as WOTUS was reasonable. The Court explicitly applied *Chevron* deference.⁹² The Court glossed over the first step, presumably finding that Congress had not spoken clearly on the issue.⁹³ Given the ambiguity, the Court held that the Corps’s interpretation that the abutting wetlands were waters of the United States was reasonable.⁹⁴

Finding that the Corps “must necessarily choose some point at which water ends and land begins,” the Court found that defining adjacent wetlands as “waters” under the CWA was reasonable.⁹⁵ Despite finding that the term “navigable” is of “limited import” in the Act, the Court noted that including wetlands as “waters” entailed a more nuanced analysis.⁹⁶ However, the Corps’s conclusion that “wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality” was reasonable.⁹⁷

Footnote 9 to the opinion laid out the reasoning for finding the regulation reasonable in more detail:

Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps’ decision to define all adjacent

⁸⁸ *Id.* at 129–30 (emphasis added).

⁸⁹ *Id.* at 130–31.

⁹⁰ *Id.* at 131.

⁹¹ *Id.* at 135.

⁹² *Id.* at 131.

⁹³ *Riverside Bayview*, 474 U.S. at 131.

⁹⁴ *Id.*

⁹⁵ *Id.* at 132–34.

⁹⁶ *Id.* at 133.

⁹⁷ *Id.*

wetlands as “waters.” If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps’ definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.⁹⁸

This opinion in *Riverside Bayview* set the course for the Supreme Court’s analysis for years to come. Although the decision was unanimous, interpretations by justices in the cases that followed vary dramatically. In part, the varying interpretations may be due to the limited holding in *Riverside Bayview*—that wetlands abutting a navigable waterway are WOTUS.⁹⁹ Later opinions have interpreted the holding to go far beyond this modest proposition. The dissenting opinion in *Rapanos* characterized the *Riverside Bayview* holding as encompassing wetlands adjacent to tributaries.¹⁰⁰ Although *Riverside Bayview* often used the phrase “and their tributaries,” the facts of the case involved only a wetland adjacent to waters navigable-in-fact.¹⁰¹

The majority opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“SWANCC”)¹⁰² characterized the Court’s opinion in *Riverside Bayview* as holding that the Corps has jurisdiction over “wetlands that actually abutted on a navigable waterway.”¹⁰³ Indeed, the Court’s ultimate holding in *Riverside Bayview* found that “[b]ecause respondent’s property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.”¹⁰⁴

⁹⁸ *Id.* at 135, n.9 (citations omitted).

⁹⁹ *Riverside Bayview*, 474 U.S. at 122.

¹⁰⁰ *Rapanos v United States*, 547 U.S. 715, at 792–93 (2006).

¹⁰¹ *Riverside Bayview*, 474 U.S. at 123.

¹⁰² 531 U.S. 159 (2001).

¹⁰³ *Id.* at 167.

¹⁰⁴ Even though the Sixth Circuit Court of Appeals decision included a map, an extensive search failed to uncover explicit evidence of actual adjacency, or that the wetland was separated in any way from the navigable waterway. *Riverside Bayview*, 474 U.S. at 135.

Although the wetland at issue in *Riverside Bayview* is consistently referred to as abutting the navigable water, the Dissent in *SWANCC*, in an opinion authored by Justice Stevens, inexplicably characterizes the wetlands at issue in *Riverside Bayview* as a “parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was a part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek.”¹⁰⁵ Interestingly, Justice Stevens also authored the dissenting opinion in *Rapanos*, which acknowledges that wetland at issue in *Riverside Bayview* “abutted” a navigable waterway.¹⁰⁶

According to the plurality in *Rapanos*, *Riverside Bayview* stands for the narrow proposition that, even though not all adjacent wetlands have a substantial nexus to navigable waters, to interpret all adjacent wetlands as covered by the CWA is reasonable.¹⁰⁷ The *Rapanos* plurality also noted that “adjacent” and “adjoining” are used interchangeably in footnote 9 of the *Riverside Bayview* opinion.¹⁰⁸

C. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (“SWANCC”)

The *SWANCC* case considered whether the Corps had jurisdiction over an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds.¹⁰⁹ The Corps asserted jurisdiction under the Migratory Bird Rule, which “clarified” the definition of waters of the United States in 1986.¹¹⁰ The 1986 definition stated that WOTUS includes intrastate waters that, *inter alia*, provide habitat for migratory birds.¹¹¹ The U.S. Court of Appeals for the Seventh Circuit held that the Migratory Bird Rule was a reasonable interpretation of the CWA and the Commerce Clause gave Congress authority to regulate such waters based on the cumulative impact theory.¹¹²

¹⁰⁵ Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng’rs, 531 U.S. 159, 175–76 (2001) (Stevens, J., dissenting). An extensive search revealed no similar description of the wetland at issue in *Riverside Bayview*. The Court’s opinion in that case referred to the wetland as “actually abut[ting] a navigable waterway.” See *Riverside Bayview*, 474 U.S. at 135.

¹⁰⁶ *Rapanos*, 547 U.S. at 792.

¹⁰⁷ *Id.* at 747.

¹⁰⁸ *Id.* (citing *Riverside Bayview*, 474 U.S. at 136, n.9).

¹⁰⁹ *Solid Waste Agency of Northern Cook County*, 531 U.S. at 162.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 164–65.

¹¹² *Id.* at 165.

The U.S. Supreme Court reversed in a 5–4 decision, with Chief Justice Rehnquist writing the majority opinion.¹¹³ The Migratory Bird Rule, according to the majority, failed to find support in the CWA.¹¹⁴

The Supreme Court found that, in applying step 1 of *Chevron* deference, Congress spoke clearly in Section 404 of the CWA: Waters are not considered WOTUS if the only link to navigable waterways is migratory birds.¹¹⁵ The Court stated that the CWA would not allow it to hold “that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water.”¹¹⁶ “We find § 404(a) to be clear, but even were we to [find that Congress has not clearly spoken to the precise issue], we would not extend *Chevron* deference here.”¹¹⁷ The arguments supporting jurisdiction based on the Migratory Bird Rule “raise significant constitutional questions.”¹¹⁸ Upholding jurisdiction based on the Rule would “result in serious impingement of the States’ traditional and primary power over land and water use.”¹¹⁹ Therefore, deference would not be given, and the Migratory Bird Rule would be rejected.

The Corps argued that Congress’s failure to pass proposed legislation to reject the Corps’s 1977 regulations expanding the reach of the CWA and the Corps’s jurisdiction in a portion of the Act constituted Congressional acquiescence.¹²⁰ However, “failed legislative proposals are ‘a particularly dangerous ground on which to rest an interpretation of a prior statute.’”¹²¹ “[S]ubsequent history is less illuminating than the contemporaneous evidence.”¹²²

The Corps also argued that the regulation reasonably implements Congressional intent given the commercial nature of the proposed landfill.¹²³ However, the statute confers jurisdiction to “navigable waters” and “waters and the United States” and fails to mention or consider commercial activity.¹²⁴

¹¹³ *See id.* at 159.

¹¹⁴ *Id.* at 167.

¹¹⁵ *Solid Waste Agency of Northern Cook County*, 531 U.S. at 167.

¹¹⁶ *Id.* at 168.

¹¹⁷ *Id.* at 172.

¹¹⁸ *Id.* at 173.

¹¹⁹ *Id.* at 174.

¹²⁰ *Id.* at 160.

¹²¹ *Solid Waste Agency of Northern Cook County*, 531 U.S. at 169–70 (citations omitted).

¹²² *Id.* at 170.

¹²³ *Id.* at 173.

¹²⁴ *Id.*

The Court, employing the term “significant nexus” for the first time in a CWA case, stated that “the significant nexus between the wetlands and “navigable waters . . .” informed [the Court’s] reading of the CWA in *Riverside Bayview Homes*.”¹²⁵ *Riverside Bayview* did not address the “question of authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.”¹²⁶ According to the SWANCC majority, the text of the CWA “will not allow” a holding “that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water.”¹²⁷ The holding in SWANCC can reasonably be interpreted as finding that isolated waters or isolated wetlands, with no adjacency, are not WOTUS. The case addressed neither the meaning of adjacency nor what type of waters qualify for adjacency. The Court never mentioned substantial nexus again in the opinion, nor did the Court expound upon the meaning of the term.

The dissenting opinion would have upheld the Corps interpretation as reasonable under *Chevron* deference.¹²⁸ In particular, the dissenting Justices characterized the majority as “draw[ing] a new jurisdictional line [that] invalidates the Corps’s assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each.”¹²⁹

The dissent, applying *Chevron*, initially found that Congress had not spoken clearly on the issue.¹³⁰ Thus, under Step 2 of *Chevron*, the dissent would have found the agencies’ interpretation reasonable.¹³¹ The dissent chastised the majority for refusing to grant such deference to the agency interpretation.¹³² In making this determination, the dissent placed great weight on an asserted Congressional acquiescence to the Corps’s 1977 regulations, particularly on the Category 4 waters.¹³³ The majority, acknowledging occasional reliance on Congressional acquiescence, rejected the practice as “dangerous.”¹³⁴

¹²⁵ *Id.* at 167. Although *Riverside Bayview* Court failed to mention “nexus” at any point, the Court in SWANCC presumably refers to Footnote 9 of the *Riverside Bayview* opinion, where it details that “wetlands that are . . . significantly intertwined with the ecosystem of adjacent waterways.” *Riverside Bayview*, 474 U.S. at 135, n.9.

¹²⁶ *Riverside Bayview*, 474 U.S. at 131, n.8.

¹²⁷ *Solid Waste Agency of Northern Cook County*, 531 U.S. at 168.

¹²⁸ *Id.* at 191 (Stevens, J., dissenting).

¹²⁹ *Id.* at 176–77.

¹³⁰ *Id.* at 191 (Stevens, J., dissenting).

¹³¹ *Id.* at 191–93.

¹³² *Id.* at 191.

¹³³ *Solid Waste Agency of Northern Cook County*, 531 U.S. at 189–90 (Stevens, J., dissenting).

¹³⁴ *Id.* at 168–69.

The dissent would have also upheld the regulation under standard commerce clause principles.¹³⁵ Specifically, the landfill constitutes an activity that “substantially affects” interstate commerce, the third broad category of activity that Congress may regulate under the commerce power.¹³⁶

D. *Tributary of a Tributary of a Tributary*

Even before the *SWANCC* decision, the Corps of Engineers and litigants had attempted to expand the meaning of waters of the United States by showing adjacency of wetlands to a tributary of navigable waters. After the decision in *SWANCC* foreclosed options to include isolated wetlands as WOTUS, adjacency became even more important. These efforts focused on the seventh category of WOTUS: wetlands adjacent to other waters of the United States.¹³⁷ In particular, efforts focused on adjacency to the sixth category of WOTUS: tributaries of navigable waters.¹³⁸ The focus on tributaries proves particularly interesting given the Corps failed to define the term at that time, and neither the *SWANCC* nor the *Riverside Bayview* opinion addressed the issue of tributaries at all.

Justice Scalia’s plurality opinion in *Rapanos v. United States*¹³⁹ recognized the trend with consternation.¹⁴⁰ The Justice noted a U.S. District Court case that distinguished *SWANCC* from the case before them.¹⁴¹ Specifically, in contrast to the isolated waters in *SWANCC*, “water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies,” and “[a] drop of rain-water landing in the Site is certain to intermingle with water from the [nearby river].”¹⁴²

These cases often involved a series of ditches, drains, and similar types of conveyances. *United States v. Eidson*,¹⁴³ although before *SWANCC*, provides an example of the series of indirect pathways that courts relied on to find jurisdiction to a tributary. In *Eidson*, a company disposed of a “sludge substance” into a storm sewer that drained into a storm drainage ditch, then a drainage canal, which empties Picnic Island Creek, a

¹³⁵ *Id.* at 181.

¹³⁶ *Id.* at 192–93 (citing *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)).

¹³⁷ 40 C.F.R. § 122.3.

¹³⁸ *Id.*

¹³⁹ *Rapanos v. United States*, 547 U.S. 715, 715 (2006).

¹⁴⁰ *Id.* at 728–29.

¹⁴¹ *Id.* at 724.

¹⁴² *United States v. Rueth Dev. Co.*, 189 F. Supp. 2d 874, 877–78 (N.D. Ind. 2002).

¹⁴³ 108 F.3d 1336 (11th Cir. 1997).

tributary of Tampa Bay.¹⁴⁴ The Eleventh Circuit Court of Appeals found that whether a conveyance is man-made or intermittent makes no difference under Section 404 of the CWA.¹⁴⁵ The court also found that the drainage ditch qualified as a tributary of Tampa Bay.¹⁴⁶

The U.S. District Court for the District of Montana also addressed this issue in a rehearing of the case after the *SWANCC* decision.¹⁴⁷ The case addressed whether wetlands adjacent to Fred Burr creek constituted waters of the United States.

Fred Burr Creek wends its way through a small segment of southwestern Montana. “Creek” is a seasonal misnomer; during spring runoff, Fred Burr Creek thunders through its broad valley at a deafening roar. The Creek is too wide to jump across, up to 20 or 30 feet wide in some locations, and approximately six inches to two or three feet deep, depending on location and time of year. While its level of flow varies, there is always water in the Creek.¹⁴⁸

Fred Burr Creek is not navigable-in-fact due to frequent shallow stretches and blockages by irrigation weirs, fences, and other obstructions.¹⁴⁹ The sediments at issue in the case likely did not reach a navigable waterway.¹⁵⁰ If not blocked by dams or obstructions, the sediments may travel to the Pacific Ocean in a “decade.”¹⁵¹

The court acknowledged that Fred Burr Creek was a tributary of a tributary of the Clark Fork River, a navigable-in-fact waterway.¹⁵² That finding caused the court little pause, as the court noted that “case law from the Circuit Courts of Appeals strongly suggests that tributaries thrice-removed from navigable waters fall under federal jurisdiction.”¹⁵³ More troubling was that the wetland abutting Fred Burr Creek lay approximately 225 miles from the point where the Clark Fork becomes navigable-in-fact.¹⁵⁴ Most of the cases cited by the court did not address

¹⁴⁴ *Id.* at 1340–42.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1342.

¹⁴⁷ *United States v. Buday*, 138 F. Supp. 2d 1282, 1284–85 (D. Mont. 2001).

¹⁴⁸ *Id.* at 1283 (citations omitted).

¹⁴⁹ *Id.* at 1288.

¹⁵⁰ *Id.* at 1284.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1288.

¹⁵³ *Buday*, 138 F. Supp. 2d at 1291.

¹⁵⁴ *Id.*

distance but appear to address “waters that are geographically relatively near an indisputably navigable water.”¹⁵⁵

Despite the great distance between the wetlands and a navigable waterway, the court found, based on legislative history and prior case law, that Congress intended to include Fred Burr Creek as a water of the United States.¹⁵⁶ Second, finding the Clark Fork to be a channel or potential channel for interstate commerce, the court found that Congress did not exceed its authority in including Fred Burr Creek as jurisdictional.¹⁵⁷ The court analogized Fred Burr Creek’s contribution to the waters of the United States to the contributions of the wheat farmer in *Wickard v. Filburn*¹⁵⁸ to interstate commerce.¹⁵⁹

E. Rapanos v. United States, 547 U.S. 715 (2006)

Five years after the *SWANCC* decision, the U.S. Supreme Court revisited the meaning of waters of the United States.¹⁶⁰ *Riverside Bayview* established that wetlands that abutted navigable waterways constituted waters of the United States.¹⁶¹ The Court in *SWANCC* drew a boundary to jurisdiction, finding that isolated waters frequented by migratory birds did not constitute waters of the United States.¹⁶² In *Rapanos*, the Court faced a case in the middle of these clear boundaries—wetlands adjacent to a tributary of a tributary of a navigable water.¹⁶³ The case resulted in a fractured 4–4–1 opinion that continues to confound litigants and their attorneys.¹⁶⁴ Ultimately, it appears to have, arguably, generated more confusion than clarity.

1. Facts and Procedural Posture

Rapanos involved two consolidated cases and four wetlands in Michigan.¹⁶⁵ *Rapanos* deposited fill into wetlands on three different

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1292.

¹⁵⁷ *Id.*

¹⁵⁸ 317 U.S. 111 (1942).

¹⁵⁹ *Buday*, 138 F. Supp. 2d at 1293.

¹⁶⁰ *Rapanos v. United States*, 547 U.S. 715, 715 (2006).

¹⁶¹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134–39 (1985).

¹⁶² *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 162 (2001).

¹⁶³ *Rapanos*, 547 U.S. at 716–17.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 729.

sites.¹⁶⁶ The wetlands at one site are connected to a man-made ditch, which drains into a creek, then a river that drains into the Saginaw Bay and Lake Huron.¹⁶⁷ On another site, the wetlands connect to a drain that has a surface connection to a river.¹⁶⁸ At the third site, the wetlands connect to a river that flows into Lake Huron.¹⁶⁹ Whether the connections are continuous or intermittent, or ditches and drains flow continuously or occasionally was not clear from the record.¹⁷⁰ The wetlands lay 11–20 miles from the navigable waters in question.¹⁷¹

In a civil enforcement action, the District Court found that the three wetlands were “adjacent” to waters of the United States and, thus, jurisdictional.¹⁷² The Sixth Circuit Court of Appeals affirmed, finding “hydrological connections between all three sites and the corresponding adjacent tributaries of navigable waters.”¹⁷³

In the other consolidated case, the Carabells were denied a permit to fill a wetland about one mile from Lake St. Clair.¹⁷⁴ A man-made drainage ditch lies along one side of the wetland, separated from the wetland by a 4-foot-long impermeable, man-made berm.¹⁷⁵ The ditch runs into another ditch or drain, which connects to a creek that empties into Lake St. Clair.¹⁷⁶

After exhausting administrative appeals, the Carabells filed suit in the District Court challenging the Corps’s jurisdiction over the site.¹⁷⁷ The District Court found jurisdiction based on adjacency and “a significant nexus to ‘waters of the United States.’”¹⁷⁸ The Sixth Circuit Court of Appeals affirmed upon a finding of adjacency.¹⁷⁹

In essence, the *Rapanos* cases address the issue not directly addressed in *Riverside Bayview*—whether a wetland adjacent to a tributary of a navigable water constitutes a water of the United States. *Riverside*

¹⁶⁶ *Id.* at 719–21.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Rapanos*, 547 U.S. at 719–21.

¹⁷⁰ *Id.* at 729.

¹⁷¹ *Id.* at 720.

¹⁷² *Id.* at 729 (citation omitted).

¹⁷³ *U.S. v. Rapanos*, 376 F.3d 629, 643 (6th Cir. 2004).

¹⁷⁴ *Carabell v. United States Army Corps of Eng’rs*, 257 F. Supp. 2d 917, 918 (E.D. Mich. 2003).

¹⁷⁵ *Rapanos*, 547 U.S. at 730.

¹⁷⁶ *Id.*

¹⁷⁷ *See Carabell*, 257 F. Supp. 2d at 918–20.

¹⁷⁸ *Rapanos*, 547 U.S. at 730 (citation omitted).

¹⁷⁹ *Id.*

Bayview's wetland was adjacent to a navigable-in-fact water body, but the holding included "wetlands adjacent to navigable bodies of water and their tributaries."¹⁸⁰ But no tributaries were at issue in *Riverside Bayview*, and, in fact, no regulatory definition of "tributary" existed at that point. The justices in *Rapanos* struggle to define "tributary" and "adjacent."¹⁸¹ The term "tributaries" had not been defined in the statute and regulations at the time of the *Riverside Bayview* decision, nor before the *Rapanos* decision.¹⁸²

In a now-infamous 4–1–4 decision, Justice Scalia writing for the plurality, in which concurring Justice Kennedy joined with respect to the holding, vacated the Sixth Circuit judgment and remanded the case further proceedings.¹⁸³ Justices Thomas and Alito, along with Chief Justice Roberts, joined Justice Scalia's opinion.¹⁸⁴ Justice Stevens drafted the dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer.¹⁸⁵ Chief Justice Roberts also filed a concurring opinion.¹⁸⁶ Justice Breyer also wrote a separate dissenting opinion.¹⁸⁷

2. Plurality Opinion

Justice Scalia's opinion rails against the "U.S. Army Corps of Engineers ("Corps") exercis[ing] the discretion of an enlightened despot"¹⁸⁸ while overseeing an "immense expansion of federal regulation of land use . . . under the CWA without any change in the governing statute."¹⁸⁹ The plurality opinion posited that a determination that a wetland is covered by the CWA requires two findings. First, the adjacent waterway must contain a "relatively permanent body of water connected to traditional interstate navigable waters."¹⁹⁰ Second, the wetland must have a continuous surface connection (abut) with that water.¹⁹¹ These two findings harken back to *Riverside Bayview*'s holding that applies where the court finds difficulty in determining where "'water' ends and the 'wetland'

¹⁸⁰ *Id.* at 748.

¹⁸¹ *Id.* at 724–26.

¹⁸² *Id.* at 718.

¹⁸³ *Id.* at 757.

¹⁸⁴ *Rapanos*, 547 U.S. at 715.

¹⁸⁵ *Id.* at 787.

¹⁸⁶ *Id.* at 757.

¹⁸⁷ *Id.* at 810.

¹⁸⁸ *Id.* at 720.

¹⁸⁹ *Id.* at 722.

¹⁹⁰ *Rapanos*, 547 U.S. at 742.

¹⁹¹ *Id.*

begins.”¹⁹² The first requirement goes to the breadth of the term tributary, while the second refers to the adjacency of a particular wetland. The plurality, then, clarified the appropriate test to apply in this scenario.

a. Tributaries

The plurality held that the meaning of “tributaries” within 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,’ . . . and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage or rainfall.”¹⁹³ Justice Scalia presumably intends that waters must meet this definition to qualify as a tributary to navigable waters. Congress spoke clearly on the matter of “waters” and, applying Step 1 of *Chevron*, “[t]he plain language of the statute simply does not authorize this ‘Land Is Waters’ approach to federal jurisdiction.”¹⁹⁴ Even further, the plurality of four justices supported that notion that the plurality’s definition constitutes “the only plausible interpretation.”¹⁹⁵ Justice Kennedy’s concurrence noted this assertion and assumes that the plurality theory forecloses any agency regulation to the contrary.¹⁹⁶

The plurality, therefore, would require that the wetland abuts on “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams,’ ‘oceans, rivers, [and] lakes,’ to be considered jurisdictional.”¹⁹⁷ This ruling falls short of requiring that a tributary be “navigable-in-fact.”¹⁹⁸

The plurality also addressed the Corps’s interpretation of its regulations to include ephemeral streams and drainage ditches as tributaries and, therefore, as waters of the United States.¹⁹⁹ Further, Justice Scalia noted that “man-made, intermittently flowing features, such as ‘drain tiles, storm drains systems and culverts’ had been interpreted by the Corps as tributaries.”²⁰⁰ According to the plurality, drain tiles, storm drain systems,

¹⁹² *Id.*

¹⁹³ *Id.* at 732–33 (internal citations omitted).

¹⁹⁴ *Id.* at 734.

¹⁹⁵ *Id.* at 739.

¹⁹⁶ *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring).

¹⁹⁷ *Id.* at 716.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 725.

²⁰⁰ *Id.* at 727–28.

and culverts constitute point sources, not waterways.²⁰¹ The statute's language indicates that "navigable waters" differ from a "point source" and that a point source is therefore not a navigable water.²⁰² Point sources carry intermittent flows.²⁰³ Many of the conduits classified by the Corps and lower courts as tributaries are actually point sources.²⁰⁴

The plurality excludes intermittent waters, ephemeral streams, and "transitory puddles" from waters of the United States.²⁰⁵ Only "relatively permanent" waters qualify.²⁰⁶ The Corps's interpretation would, the plurality opined, interfere with the state's authority to regulate water and land use, turning the Corps into a federal zoning board.²⁰⁷ This stretching of the limits of the commerce power urges a narrow interpretation of the Corps's authority.²⁰⁸

b. Adjacency

After reviewing the history of the interpretation of "waters of the United States" under the CWA, the plurality reviewed *Riverside Bayview*.²⁰⁹ Justice Scalia summarized that holding as deference to the Corps's interpretation that "waters of United States" include wetlands that "actually abut[ed] on' traditional navigable waters."²¹⁰ *Riverside Bayview* unambiguously found that adjacent means "physically abutting," not merely nearby.²¹¹

The plurality opinion referred to the Corps's interpretation of "adjacency" that expanded upon the narrow holding of *Riverside Bayview*.²¹² These interpretations broaden the notion of adjacency to include wetlands connected through "directional sheet flow during storm events," lying within the 100-year flood-plain or within 200 feet of a navigable waterway as "adjacent."²¹³ The plurality rejected this notion of converting the abutment standard to one of a hydrologic connection, even insubstantial,

²⁰¹ *Id.* at 735.

²⁰² *Rapanos*, 547 U.S. at 735.

²⁰³ *Id.*

²⁰⁴ *Id.* See also *supra* Section II.C.

²⁰⁵ *Rapanos*, 547 U.S. at 733.

²⁰⁶ *Id.* at 734.

²⁰⁷ *Id.* at 737–38.

²⁰⁸ *Id.* at 738–39.

²⁰⁹ *Id.* (discussing 474 U.S. 121 (1985)).

²¹⁰ *Id.* at 725 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985)).

²¹¹ *Rapanos*, 547 U.S. at 748.

²¹² *Id.* at 735.

²¹³ *Id.* at 728 (citations omitted).

as a “significant nexus.”²¹⁴ The plurality continued, “Wetlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection to covered waters that [the Court] described as a ‘significant nexus’ in *SWANCC*.”²¹⁵

Additionally, Justice Scalia set out, in the plurality’s view, the correct standard to determine adjacency. To be adjacent, a wetland must possess “a continuous surface connection that creates the boundary-drawing problem . . . addressed in *Riverside Bayview*.”²¹⁶ When Justice Scalia referred to “surface connection,” he presumably intended to articulate that the wetland extended to the boundary (abutted) of the navigable water in *Riverside Bayview*.²¹⁷ But Justice Scalia did not refer to, as some commentators seem to infer, “surface water connection” with connection to the definition of waters of the United States.²¹⁸

Some courts and commentators have confused Justice Scalia’s reference to a surface connection to mean that a continuous surface *water* connection confers jurisdiction.²¹⁹ That interpretation incorrectly applies the plurality test. The context of the opinion, particularly the use of “continuous surface connection” and abutment synonymously, indicates that the plurality limited *Riverside Bayview* to its facts and require actual abutment.²²⁰

The plurality opinion clearly rejected the notion of hydrologic connections equating to abutment, noting that such a test would make wetlands connected via “the most insubstantial hydrologic connection” may qualify as jurisdictional under such a test.²²¹ Hydrologic connections

²¹⁴ *Id.*

²¹⁵ *Id.* at 742 (citations omitted).

²¹⁶ *Id.* at 757.

²¹⁷ *Rapanos*, 547 U.S. at 717, 724–25.

²¹⁸ A word search of the *Rapanos* decision finds “surface water connection” twice—once in the Kennedy concurrence. *Id.* at 762. It was used once when the plurality referred to the Appendix to the Petition for Cert. *Id.* at 745. “Surface-water connection” is used six times in the concurrence *Id.* at 762–63, 776, 784.

²¹⁹ See, e.g., Clifton Cottrell, *The Wetlands Adjacent to Non-Navigable Waters Less Traveled: Clean Water Act Jurisdiction and the Fifth Circuit*, 43 TEX. ENV’T L. J. 19, 33 (2012); Brandee Ketchum, Note, *Like the Swamp Thing: Something Ambiguous Rises From the Hidden Depths of Murky Waters—The Supreme Court’s Treatment of Murky Wetland in Rapanos v. United States*, 68 LA. L. REV. 983, 999, 1000, 1002–03, 1010 (2008) (using “surface water connection” and “surface connection” interchangeably); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (2006) (citing the misinterpretation of the plurality opinion contained in Justice Kennedy’s concurring opinion).

²²⁰ *Rapanos*, 547 U.S. at 728, 742, 748.

²²¹ *Id.* at 728.

fail to evoke the line-drawing problems that compelled deference in *Riverside Bayview*.²²² However, a surface connection constitutes abutment, which may explain, in part, the confusion.

The use of the term “continuous” in connection with surface connection also creates confusion.²²³ If a surface hydrologic connection exists, then the wetland abuts the surface water body. Perhaps the modifier “continuous” reinforces the notion of a continuous flow of the water body, but the opinion lacks clarity on that issue.²²⁴

Justice Scalia explained that deference to the agency under *Riverside Bayview* arose, at least in part, from the difficulty in drawing the line between where land ends and water begins.²²⁵ The late Justice further noted that *Riverside Bayview* presented that case with an abutting wetland.²²⁶ No such difficulty exists concerning “isolated” wetlands.²²⁷ Therefore, the plurality held that only adjacent wetlands are jurisdictional.²²⁸ *Riverside Bayview* stands for the principle that abutment, and only abutment, provides the “significant nexus” referred to in *SWANCC* between wetlands and navigable waters.

Contrary to Justice Kennedy’s formulation, the plurality understands that abutment and significant nexus as used by the Court in *SWANCC* are synonymous. Justice Kennedy’s significant nexus test is therefore misplaced, as the significant nexus test adds an extra requirement to certain types of wetlands that abut tributaries.²²⁹ The plurality bemoaned the lack of clear definitions for tributary and adjacent.²³⁰ Where the wetlands abut navigable waters, the wetlands become indistinguishable from the waters of the United States.²³¹

From the plurality opinion:

Therefore, *only* those wetlands with a continuous surface connection to bodies that are “waters of the United States”

²²² *Id.* at 742. A groundwater connection existed in *Riverside Bayview*, another fact that indicates that Justice Scalia was referring to actual abutment. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 130–31 (1985).

²²³ *Rapanos*, 547 U.S. at 733.

²²⁴ *Id.* at 729, 733, 736.

²²⁵ *Id.* at 740.

²²⁶ *Id.*

²²⁷ *Id.* at 741.

²²⁸ *Id.* at 724, 726, 730.

²²⁹ Note, however, that Justice Kennedy did not equate adjacency to abutment, as did the plurality. *Rapanos*, 547 U.S. at 775.

²³⁰ *Id.* at 735, 738, 742.

²³¹ *Id.* at 756.

in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC*. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: first, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.²³²

3. Concurring Opinion (Kennedy)

Justice Kennedy’s concurrence sets out the test that is most often used after *Rapanos*, which has also generated the most uncertainty.²³³ The “significant nexus” test (drawn from the first use of the phrase in *SWANCC*) grants the Corps jurisdiction over “adjacent wetlands”²³⁴ where a significant nexus exists between the wetlands and “navigable waters in a traditional sense.”²³⁵

The term “significant nexus” is used only once in *SWANCC*.²³⁶ Even then, the term merely referred to the holding in *Riverside Bayview*, an opinion that does not mention the term at all.²³⁷ Neither the statute nor any regulations promulgated to the point of the *Rapanos* opinion

²³² *Id.* at 742 (internal citations omitted).

²³³ See generally *Precon Dev. Corp. v. United States Army Corps of Eng’rs*, 633 F.3d 278, 281 (4th Cir. 2010); *Sackett v. United States EPA*, No. 19-35469, 2021 U.S. App. LEXIS 24329, at *1 (9th Cir. Aug. 9, 2021); *Lewis v. United States Army Corp of Eng’rs*, No. 18-1838 SECTION: “S” (1), 2020 U.S. Dist. LEXIS 149115, at *1 (E.D. La. Aug. 18, 2020).

²³⁴ Whether the Kennedy test includes “waters” adjacent to navigable-in-fact waters is unclear. Justice Kennedy referred only to wetlands. *Rapanos*, 547 U.S. at 759–87 (Kennedy, J., concurring).

²³⁵ *Id.* at 779 (Kennedy, J., concurring).

²³⁶ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001).

²³⁷ See generally *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

mentioned significant nexus. The dissenting opinion notes this anomaly,²³⁸ as well as the plurality, meaning that 8 of 9 justices did not support the significant nexus test. The plurality characterizes the Kennedy test as “devis[ing] his new statute all on his own.”²³⁹

Justice Kennedy characterizes the holding in *SWANCC* as a finding that the substantial nexus that controlled in *Riverside Bayview* was lacking with respect to the isolated pits in *SWANNC*.²⁴⁰ However, the majority opinion in *SWANCC* never applied any significant nexus analysis, instead finding that Congress had clearly spoken to the issue of isolated waters.

Justice Kennedy found that a significant nexus automatically exists when a wetland is adjacent to a navigable-in-fact water body.²⁴¹ Wetlands adjacent to waters not navigable-in-fact²⁴² possess this nexus where the wetlands, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”²⁴³ The plurality opinion characterized Justice Kennedy’s concurrence as seizing upon a term that appears nowhere in the CWA, but arose from a single U.S. Supreme Court case.²⁴⁴ However, similar to the plurality, Justice Kennedy opined that a “mere hydrologic connection” fails to equate to a significant nexus “in all cases.”²⁴⁵

Justice Kennedy finds that the Corps’s definition of “adjacent” is reasonable and entitled to deference.²⁴⁶ Added to the four dissenting justices, who would also defer, a majority of the Court found the definition of adjacent a reasonable one.

Justice Kennedy also appears to find that the Corps’s standard for jurisdiction over adjacent wetlands is based upon a reasonable interpretation of the statute under the *Chevron* test.²⁴⁷ However, the concurrence reasoned that the Corps’s interpretation of “tributary” is too broad and interpreting the statute in this way is not reasonable.²⁴⁸ Therefore, a

²³⁸ *Rapanos*, 547 U.S. at 807 (Stevens, J., concurring).

²³⁹ *Id.* at 756.

²⁴⁰ *Id.* at 766–67, 774.

²⁴¹ *See id.* at 759 (Kennedy, J., concurring).

²⁴² Presumably this water must also be a tributary.

²⁴³ *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

²⁴⁴ *Id.* at 753.

²⁴⁵ *Id.* at 784 (Kennedy, J., concurring).

²⁴⁶ *Id.* at 775.

²⁴⁷ *Id.* at 780 (Kennedy, J., concurring) (applying the reasoning of *Riverside Bayview*).

²⁴⁸ *See id.* at 780–82.

case-by-case analysis is necessary for making jurisdictional determinations for wetlands adjacent to waters not navigable-in-fact.²⁴⁹

Therefore, Justice Kennedy's concurrence interprets jurisdiction much more expansively than the plurality, yet more narrowly in some respects. Under the Kennedy test, a significant nexus per se (and hence jurisdiction) exists between a wetland and an adjacent navigable-in-fact water.²⁵⁰ In contrast, under the plurality test, the adjacent waterway need not be navigable-in-fact to be jurisdictional, so long as the adjacent water is continuous and relatively permanent.²⁵¹ However, the plurality believes that jurisdiction stops at adjacency to a continuous and relatively permanent water.²⁵² Under the significant nexus test propounded by Justice Kennedy, an intermittent or ephemeral stream may be jurisdictional, depending on the particular facts.²⁵³ For example, assume a wetland adjacent to a continuous and relatively permanent tributary that is not navigable-in-fact. The plurality would find this to be jurisdictional, while Kennedy would only do so if a significant nexus is present. Justice Kennedy also claims that the significant nexus test is "*the* most reasonable interpretation," again raising doubts as to whether an agency interpretation otherwise would be worthy of deference.²⁵⁴

Justice Kennedy appears to misinterpret the plurality when he states that "when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority."²⁵⁵ The plurality opinion states that if a "surface connection" exists with navigable water, the wetland is jurisdictional.²⁵⁶

Justice Scalia used "surface connection" interchangeably with "abuts." So, Justice Scalia (the plurality rule) states that if the wetland abuts certain waterways, the wetland is jurisdictional.²⁵⁷ Justice Scalia never uses the term "surface-water connection" except in referring to the lower court opinions. If some hydrologic connection exists, but there is no physical abutment, Justice Scalia would appear to believe jurisdiction is

²⁴⁹ *Rapanos*, 547 U.S. at 782.

²⁵⁰ *Id.* at 767, 772.

²⁵¹ *Id.* at 716, 726.

²⁵² *Id.* at 732.

²⁵³ *Id.* at 767, 776, 782, 787.

²⁵⁴ *Id.* at 756–57.

²⁵⁵ *Rapanos*, 547 U.S. at 776.

²⁵⁶ *Id.* at 757.

²⁵⁷ *Id.* at 717, 725, 735, 740.

lacking.²⁵⁸ Justice Kennedy uses “surface-water connection” and “surface connection” interchangeably. Scalia uses “surface connection” and “abut” interchangeably. Clearly, a disconnect exists.

For example, Justice Kennedy refutes the plurality’s finding that a continuous surface connection is required, in part, by using the flooding context.²⁵⁹ In a flood, the surface *water* comes into contact with the wetlands only intermittently.²⁶⁰ However, that analysis is irrelevant to the plurality’s rule, which examines abutment, not the source of water for the wetland. The relevance of the source of the wetland characteristics was rejected in *Riverside Bayview*.²⁶¹

More directly, Justice Kennedy incorrectly concludes that where a surface-*water* connection is lacking, but abutment exists, the plurality would find no jurisdiction.²⁶² This analysis misinterprets the plurality’s decision. The concurring opinion also presumes that the plurality would find jurisdiction where a surface water connection exists, but the wetland does not abut the waterway.²⁶³ On the contrary, the plurality would find no jurisdiction where a surface *water* connection exists, but the wetland fails to abut the navigable waterway.

However, Justice Kennedy would not defer to the Corps’s existing “standard” for tributaries.²⁶⁴ The Corps “deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark. . . .”²⁶⁵ This standard is overbroad, allowing for “regulation of drains, ditches and streams remote from any navigable-in-fact water.”²⁶⁶ The concurring opinion concludes that adjacency to navigable-in-fact waters provides a sufficient nexus for regulation, but a significant nexus must be established on a case-by-case basis for wetlands adjacent to non-navigable tributaries.²⁶⁷

4. Dissenting Opinion

The dissenting opinion criticizes both the plurality and the Kennedy concurrence for failing to grant sufficient deference to the agency, given

²⁵⁸ *Id.* at 742.

²⁵⁹ *Id.* at 773–74.

²⁶⁰ *Id.* (emphasis added).

²⁶¹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129–30 (1985).

²⁶² *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring).

²⁶³ *Id.*

²⁶⁴ *Id.* at 780–81.

²⁶⁵ *Id.* at 781.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 782 (Kennedy, J., concurring).

the “technical and complex character of the issues at stake” and the “nature of the congressional delegation to the agency.”²⁶⁸ Justice Stevens applies Step 2 of *Chevron* and finds that the Corps’s interpretation is a reasonable one.²⁶⁹ Justice Stevens finds the analysis “straightforward”—the Corps “has determined that wetlands adjacent to tributaries of traditionally navigable water preserve the quality of our Nation’s waters . . . ,” a “quintessential example of the Executive’s reasonable interpretation of a statutory provision.”²⁷⁰ The plurality and Kennedy decisions amounted to a “judicial amendment of the CWA.”²⁷¹

The plurality opinion describes the dissent as finding that “the waters of the United States’ include any wetlands ‘adjacent’ (no matter how broadly defined) to ‘tributaries’ (again, no matter how broadly defined) of traditional navigable waters.”²⁷² Meanwhile, Justice Kennedy objects to the dissent reading the term “navigable waters” entirely out of the CWA and giving too much deference to the Corps.²⁷³

Acknowledging that *Riverside Bayview* involved a wetland that abutted a navigable waterway, the dissent nonetheless asserts that the Court deferred to the Corps’s definition of adjacent, which included wetlands in “reasonable proximity” to navigable waters and wetlands adjacent to tributaries of navigable waters.²⁷⁴ Therefore, *Riverside Bayview* controls according to the dissent, even though no tributary was involved.²⁷⁵

The dissent opined that the plurality’s reliance on *SWANCC* was misplaced, as *SWANCC* involved “waters,” not “wetlands.”²⁷⁶ The dissent considers *Rapanos* and *Riverside Bayview* as equivalent cases—wetlands adjacent to navigable waters or tributaries of navigable waters.²⁷⁷ Left unaddressed by the dissent is whether the Corps’s interpretation of the undefined term tributary is worthy of deference.

²⁶⁸ *Rapanos*, 547 U.S. at 787–88 (Stevens, J., dissenting).

²⁶⁹ *Id.* at 788.

²⁷⁰ *Id.*

²⁷¹ *Id.* One may reasonably question whether the U.S. Supreme Court holds the authority to, instead of merely remanding the case to the agency, essentially engage in rule-making and promulgate its own definition of waters of the United States. The plurality and Kennedy decisions may more accurately be described as amending the regulations that implement the Clean Water Act.

²⁷² *Id.* at 746.

²⁷³ *Id.* at 778–79.

²⁷⁴ *Rapanos*, 547 U.S. at 792–93 (Stevens, J., dissenting).

²⁷⁵ *Id.* at 792.

²⁷⁶ *Id.* at 794.

²⁷⁷ *Id.* at 796.

The dissent also misinterprets the plurality test. The plurality would allow, according to the dissent, a developer to fill a wetland that “border[s] traditionally navigable waters or their tributaries” that “perform the essential function of soaking up overflow waters during hurricane season” because the “wetlands lack a surface connection with the adjacent waterway the rest of the year.”²⁷⁸ This interpretation conflicts with the clear language of the plurality that a wetland that abuts relatively permanent water that connects to traditional navigable waters constitutes waters of the United States.²⁷⁹ Justice Kennedy’s “significant nexus” test similarly draws the ire of the dissent as constituting a “judicially crafted rule distilled from” the passing use of the term “significant nexus” in the *SWANCC* case.²⁸⁰

The dissent also uses dictionary references to assert that “adjacent” includes more than just wetlands that abut a waterway.²⁸¹ More importantly, the dissent argues, the question is whether the Corps’s definition of adjacent is reasonable, not whether the plurality would define the term differently.²⁸² Finally, the dissent notes that since the four dissenters would find that wetlands defined as waters of the United States under either the plurality test or the Kennedy test are indeed waters of the United States, lower courts should similarly find that wetlands qualify if meeting either test.²⁸³

5. Other Opinions

Justice Breyer’s separate dissent asserts that Congress intended to invoke the Commerce Clause’s full extent when enacting the CWA.²⁸⁴ The Court improperly adds a “significant nexus” requirement into the statute.²⁸⁵ Congress intended that the Court defer to the agency’s expertise, so the agency should immediately craft new regulations.²⁸⁶

Chief Justice Roberts wrote a separate concurring opinion, mainly to chide the Corps for failing to enact rules to clarify the meaning of

²⁷⁸ *Id.* at 805.

²⁷⁹ *Id.* at 742.

²⁸⁰ *Rapanos*, 547 U.S. at 807 (Stevens, J., dissenting).

²⁸¹ *Id.* at 805.

²⁸² *Id.* at 805–06.

²⁸³ *Id.* at 810.

²⁸⁴ *Id.* at 811 (Breyer, J., dissenting).

²⁸⁵ *Id.*

²⁸⁶ *Rapanos*, 547 U.S. at 811–12.

WOTUS.²⁸⁷ The Chief Justice noted that the Court rejected the Corps’s position that its authority was “essentially limitless” in this respect in *SWANCC*.²⁸⁸ Such rules, conceded Roberts, would be subject to *Chevron* deference.²⁸⁹ Although the Corps and EPA initiated a rule-making, the “proposed rulemaking went nowhere.”²⁹⁰ Chief Justice Roberts bemoans how easily the fractured opinion in *Rapanos* could have been avoided by rule-making.²⁹¹

III. POST *RAPANOS* RULE-MAKING

In the absence of a statutory definition of “waters of the United States,” in light of the decades of legal debate over the meaning of this term, and perhaps in response to the chiding of Chief Justice Roberts in his *Rapanos* concurrence, the EPA set out to promulgate a rule defining “waters of the United States.”²⁹² Far from ending the controversy surrounding the meaning of waters of the United States, the confusion and debates have only increased.²⁹³

A. *Obama Administration WOTUS Rule*

The Environmental Protection Agency and the U.S. Army Corps of Engineers issued a proposed definition of WOTUS in 2014.²⁹⁴ Numerous stakeholder groups had requested this action as well.²⁹⁵ The agencies received over one million comments on the proposed rule and published the final rule in June 2015, which would go into effect on August 28, 2015.²⁹⁶

²⁸⁷ *Id.* at 757–58 (Roberts, C.J., concurring).

²⁸⁸ *Id.* at 757.

²⁸⁹ *Id.* at 758.

²⁹⁰ *Id.* at 758.

²⁹¹ *Id.*

²⁹² See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).

²⁹³ Richard M. Glick & Oliver F. Jamin, ‘Waters of the United States’: Nearly 50 Years of Jurisdictional Uncertainty, and More to Come, 26 J. WATER L. 147, 150–51 (2020).

²⁹⁴ See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,188.

²⁹⁵ See EPA WEBARCHIVE, *Persons and Organizations Requesting Clarification of “Waters of the United States” by Rulemaking*, https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf [<https://perma.cc/WJ3G-Q4JS>].

²⁹⁶ See Clean Water Rule: Definition of “Waters of the United States” Final Rule 80 Fed. Reg. 37,054 (June 29, 2015).

For purposes of clarity, we will refer to this as the “Obama Rule” or the “WOTUS Rule.”

1. The Text of the WOTUS Rule

The agencies attempted to interpret the scope of WOTUS “using the goals, objectives and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies’ technical expertise and experience as support.”²⁹⁷ In particular, the rule cites the “significant nexus standard” as “an important element of the agencies’ interpretation” of the CWA.²⁹⁸ This rule essentially provides seven categories of jurisdictional waters.

a. Categorically Jurisdictional Waters

First, certain waters are categorically jurisdictional: traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and impoundments of waters identified as WOTUS.²⁹⁹ The definitions of these three categories did not change from the prior regulations/interpretations of the WOTUS Rule.³⁰⁰ Traditional navigable waters, the territorial seas, impoundments of waters identified as a WOTUS have not been subject to much of the controversy surrounding the WOTUS Rule.³⁰¹ Interstate waters, however, were not included in the Trump definition, creating a significant difference as discussed below.³⁰²

b. Definitionally Jurisdictional Waters

Second, the rule designates two categories of waters as jurisdictional if the waters meet the definitions included in the WOTUS Rule.³⁰³ Much of the controversy and legal debate surrounding the WOTUS Rule focuses on these definitions of tributaries and adjacent waters.³⁰⁴

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See 33 C.F.R. § 328.3(a)(1)–(4) (2020).

³⁰⁰ 33 C.F.R. § 328.3(a)(1)–(2), (4), (6) (2015).

³⁰¹ Staff Report, *Federal Judge Vacates Trump-Era WOTUS Rule Replacement*, COASTALREVIEW.ORG (Aug. 31, 2021), <https://coastalreview.org/2021/08/federal-judge-vacates-trump-era-wotus-rule-replacement/> [https://perma.cc/HK7J-Y9YT].

³⁰² 33 C.F.R. § 328.3(a)(1)–(4) (2020).

³⁰³ *Id.* §§ 328.3(a)(2), (4), (c)(1), (12).

³⁰⁴ Staff Report, *supra* note 301.

1) Tributaries

The Obama Rule defined tributaries for the first time under the CWA and provided that all tributaries of traditional navigable waters, interstate waters, and the territorial seas are considered a WOTUS.³⁰⁵ Tributaries are defined as “water that contributes flow, either directly or through another water,” to a traditional navigable water, interstate water, or territorial sea “that is characterized by the presence of the physical indicators of a bed and banks and ordinary high water mark.”³⁰⁶ Tributaries can be naturally occurring, man-made, or man-altered and “include[] waters such as rivers, streams canals, and ditches not [otherwise] excluded” by the Obama Rule.³⁰⁷

2) Adjacent Waters

The Obama Rule also provides that “all waters adjacent” to traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries, including wetlands,³⁰⁸ ponds, lakes, oxbows, impoundments, and similar waters, are jurisdictional.³⁰⁹

Two additional definitions prove critical to understanding the meaning of adjacent waters under this Rule. First, adjacent under the regulations, “means bordering, contiguous, or neighboring” and includes “waters separated by [] dikes or barriers, natural river berms, [and] beach dunes”³¹⁰ Second, the Obama Rule defines neighboring waters as “all waters located within 100 feet of the ordinary high water mark” of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries; “all waters located within the 100-year floodplain” of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries; and “all waters located within 1,500 feet of the high tide line”³¹¹ of a traditional

³⁰⁵ See 33 C.F.R. §§ 328.3(a)(1)–(3), (c)(3) (2015).

³⁰⁶ *Id.* §§ 328.3(c)(3).

³⁰⁷ *Id.*

³⁰⁸ Wetlands are defined as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted or life in saturated soil conditions” including “swamps, marshes, bogs, and similarly areas.” *Id.* § 328.3(b), (a)(1)–(6).

³⁰⁹ See *id.* § 328.3(a)(1)–(6).

³¹⁰ *Id.* § 328.3(c)(1).

³¹¹ The “high tide line” is the “intersection of the land with the water’s surface at the maximum height reached by a rising tide.” 33 C.F.R. §§ 328.3(a)(1)–(5), (c)(2)(i)–(iii).

navigable water, interstate water, or the territorial seas.³¹² If any portion of a water body is located within these bounds, the entire water is considered neighboring.³¹³

With regard to open waters such as ponds or lakes, the adjacent waters include any wetlands within or abutting the ordinary high-water mark.³¹⁴ Adjacent waters include all waters that connect segments of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries.³¹⁵

The WOTUS Rule expressly excludes “[w]aters being used for established normal farming, ranching, and silviculture activities,” from the “adjacent” definition, citing to the Section 404 exception defining normal farming, silviculture, and ranching activities “such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.”³¹⁶

c. Case-by-Case Evaluation

“Certain waters would be subject to a case-by-case, factual evaluation of whether or not they are a WOTUS based on the existence of a significant nexus to a jurisdictional water.”³¹⁷ The waters included within the WOTUS rule’s significant nexus test include a much wider range of waters than intended by Justice Kennedy’s concurring opinion.³¹⁸ Justice Kennedy applied the significant nexus only to adjacent wetlands.³¹⁹

The WOTUS Rule defines “significant nexus” as “a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of” traditional navigable waters, interstate waters, or territorial seas.³²⁰ The effect must be more than speculative or insubstantial.³²¹ The Obama Rule lists several functions relevant to analyzing

³¹² *Id.* § 328.3(a)(1)–(3).

³¹³ *Id.* § 328.3(c)(2)(i)–(iii).

³¹⁴ *Id.* § 328.3(c)(1).

³¹⁵ *Id.* § 328.3(c)(1) (2015).

³¹⁶ *Id.* § 328.3(c)(1); *see also* 33 U.S.C. § 1344(f)(1)(a).

³¹⁷ Jesse J. Richardson & Tiffany D. Lashmet, *Agriculture and the Clean Water Act: WOTUS, Groundwater and More WOTUS, and Agriculture*, AM. BAR ASS’N (Jan. 10, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/am/2020-01-10-agriculture-and-the-clean-water-act/ [https://perma.cc/D52B-ZS2G].

³¹⁸ *See id.*

³¹⁹ *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

³²⁰ 33 C.F.R. § 328.3(c)(5) (2015).

³²¹ *Id.*

significant nexus, including “sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources, and; provision of life cycle dependent aquatic habitat.”³²²

1) Regional Water Features with a Significant Nexus

Certain regional water features are jurisdictional if the features possess a “significant nexus” to traditional navigable waters, interstate waters, or the territorial seas.³²³ For purposes of the significant nexus analysis, all waters “similarly situated” within the “watershed that drains” into the jurisdictional water will be aggregated.³²⁴ The waters included under this category are:

- (i) prairie potholes (a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest);
- (ii) Carolina and Delmarva bays (ponded, depression wetlands that occur along the Atlantic coastal plain);
- (iii) Pocosins (evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic Coastal plain);
- (iv) Western vernal pools (seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers);
- and (v) Texas coastal prairie wetlands (freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast).³²⁵

The analysis of whether a feature listed in this category has a “significant nexus” to waters used or susceptible to use in interstate commerce, interstate waters, or the territorial seas is to be conducted on a case-by-case basis.³²⁶

³²² *Id.*

³²³ *See id.* § 328.3(a)(7).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ 33 C.F.R. § 328.3(a)(7) (2015).

2) Proximity to Flood-Plain or High Tide Line with a Significant Nexus

The Obama Rule includes as jurisdictional all waters that are determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or territorial sea and are either (1) “located within the 100-year floodplain” of a traditional navigable waters, interstate waters, or territorial sea or (2) “within 4,000 feet of the high tide line or ordinary high water mark” of a traditional navigable waters, interstate waters, territorial sea, impoundment of jurisdictional water, or tributary.³²⁷ Any water determined to have a significant nexus that is only partially within the flood-plain or within 4,000 feet of the high tide line or ordinary high-water mark shall be entirely deemed a WOTUS.³²⁸

d. Categorical Exclusions

The Obama Rule lists numerous waters that are categorically excluded from the definition of WOTUS, even if the waters meet the terms of the definitions in the Rule.³²⁹ These include:

- Waste treatment systems;
- Prior converted cropland;
- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary;
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands;
- Ditches that do not flow either directly or through another water into traditional navigable waters, interstate waters, or territorial sea;
- Artificially irrigated areas that would revert to dry land should application of water to that area cease;
- Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

³²⁷ See *id.* § 328.3(a)(8).

³²⁸ *Id.*

³²⁹ Richardson & Lashmet, *supra* note 317.

- Artificial reflecting pools or swimming pools on dry land;
- Small ornamental waters created on dry land;
- Water-filled depressions created in dry land incidental to mining or construction;
- Erosional features such as gullies, rills, or other ephemeral features that do not meet the definition of a tributary, non-wetland swale, and lawfully constructed grassed waterways;
- Puddles;
- Groundwater (including groundwater drained through subsurface drainage systems);
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and
- Wastewater recycling structures constructed on dry land, groundwater recharge basins, percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.³³⁰

2. Litigation

A flurry of litigation challenged both the Obama Rule itself and the Trump Administration's later procedural approach to repeal and revise the Rule.

a. Challenges to Obama Rule

Upon publication of the Obama Rule, lawsuits were filed across the country by thirty-one states and fifty-three non-state parties, including environmental groups and industry groups representing agriculture, forestry, and recreational interests.³³¹ These cases were filed in both federal district courts and federal courts of appeal across the country.³³² Numerous court decisions related to the Obama Rule have been issued.³³³ The

³³⁰ 33 C.F.R. § 328.3(b) (2015).

³³¹ See Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4161 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. § 328).

³³² *Id.*

³³³ See, e.g., *North Dakota v. United States EPA*, 127 F. Supp. 3d 1047, 1051–52, 1060 (D.N.D. 2015) (issuing injunction in thirteen states); *Ohio v. United States Army Corps*

myriad of decisions, including numerous injunctions being issued, resulted in a patchwork of the WOTUS Rule's applicability.³³⁴ Prior to its repeal in December 2019, the WOTUS Rule formed the default rule, binding unless legal action prevented the rule's applicability in a jurisdiction.³³⁵ At that time, judicial action blocked the rule in twenty-seven states: Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Iowa, Indiana, Idaho, Kansas, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Carolina, Nebraska, Nevada, New Mexico,³³⁶ North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming.³³⁷ In these states, the pre-Obama Rule case law and regulatory structure discussed

of Eng'rs, 803 F.3d 804, 808–09 (6th Cir. 2015) (issuing nationwide stay of Obama Rule); *Nat'l Ass'n of Mfrs. v. United States Dep't of Def.*, 138 S. Ct. 617, 621 (2017) (holding proper venue for legal challenges to WOTUS definition is district court and not direct review in Circuit Courts of Appeals); *Murray Energy Corp. v. United States Dep't of Def.*, 713 Fed. App. 489, 490–91 (6th Cir. 2018) (lifting nationwide stay of Obama Rule in light of the Supreme Court's decision in *Nat'l Ass'n of Mfrs.*); *Georgia v. Pruitt*, No. 15-cv-79, slip op. at 10 (S.D. Ga. June 8, 2018) (issuing eleven-state injunction); *Texas v. United States EPA*, No. 3:15-cv-162, 2018 U.S. Dist. LEXIS 160443, at *4 (S.D. Tex. Sept. 12, 2018) (enjoining the rule in three states); *Texas v. United States EPA*, No. 3:15-cv-00162, Memorandum Opinion and Order (S.D. Tex. May 28, 2019) (holding EPA violated APA in passing final Obama Rule based upon significant differences between proposed and final rules); *Oklahoma ex rel. Hunter v. United States EPA*, No. 15-CV-0381-CVE-FHM, *Opinion and Order* (May 29, 2019) (denying motion for preliminary injunction to prevent enforcement of Obama Rule in Oklahoma upon finding no proof of irreparable harm).

³³⁴ EPA, U.S. ARMY REPEAL 2015 RULE DEFINING “WATERS OF THE UNITED STATES” ENDING REGULATORY PATCHWORK, EPA (Sept. 12, 2019), <https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork> [<https://perma.cc/FN77-8GQR>].

³³⁵ *About Waters of the United States*, EPA, <https://www.epa.gov/wotus/about-waters-united-states#history> [<https://perma.cc/8XAZ-GTP8>] (last updated Sept. 3, 2021).

³³⁶ Initially, New Mexico was part of the thirteen-state injunction issued by the North Dakota federal court. In March 2019, New Mexico filed a motion to leave the case, which was granted by the court. In granting that motion, the court stated the injunction would be lifted, but said that it would remain in effect as to Intervenor-Plaintiff Coalition of Arizona/New Mexico Counties for Stable Economic Growth, which represents New Mexicans across the state. Both attorneys for the Coalition and New Mexico state officials have said they believe the court's order preserves the injunction in New Mexico, meaning the Obama Rule does not apply at this time. See Ellen M. Gilmer & Ariel Wittenberg, *Court Sides with WOTUS Foes as Legal Fight Gets Messier*, E&E NEWS (May 29, 2019), <https://www.eenews.net/stories/1060425141> [<https://perma.cc/6BDD-8CYG>].

³³⁷ See Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4162 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. § 328); *North Dakota v. United States EPA*, 127 F. Supp. 1047 (D.N.D. 2015); *Georgia v. Pruitt*, No. 15-cv-79, slip op. at 10 (S.D. Ga. June 8, 2018); *Texas v. United States EPA*, No. 3:15-cv-162, 2018 U.S. Dist. LEXIS 160443, at *4 (S.D. Tex. Sept. 12, 2018).

in *supra* Part III remained the applicable law.³³⁸ For the remaining twenty-three states, the WOTUS Rule was in place: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington.³³⁹

The legal challenges to the Rule were similar in many of the cases. Plaintiffs primarily alleged that the EPA violated its authority under the CWA and violated the Administrative Procedures Act in promulgating the WOTUS Rule.³⁴⁰ In *Georgia v. Wheeler*, the court held that the new WOTUS definition violated the EPA's authority pursuant to the CWA with regard to several elements of the definition.³⁴¹

First, the court found the WOTUS Rule's inclusion of "interstate waters, including interstate wetlands" to be overly broad as "read[ing] navigability out of the CWA."³⁴² The Court noted that interstate waters could include isolated ponds like those in *SWANCC* and even those isolated waters with no significant nexus to jurisdictional waters.³⁴³ This result was particularly problematic given the definitions of adjacent and tributary, which could extend jurisdiction beyond even the isolated pond to those waters within 4,000 feet of said interstate water.³⁴⁴ Thus, this portion of the rule exceeded the EPA's authority under the CWA.³⁴⁵

Second, the court found the Rule's definition of tributaries similarly overreached.³⁴⁶ The possibility of determining the presence of a bed and banks and an ordinary high-water mark of tributaries using mapping technology, historical data, and computer-based modeling, even if not physically present, proved particularly troubling to the court.³⁴⁷ The court reasoned that the rule strayed too far from Justice Kennedy's significant nexus test as there need not actually be sufficient volume and

³³⁸ Brent Carson et al., *Federal Judge Limits the Reach of the WOTUS Rule*, NAT'L L. REV. (Sept. 5, 2021), <https://www.natlawreview.com/article/federal-judge-limits-reach-wotus-rule> [<https://perma.cc/VG39-8TNP>].

³³⁹ *See id.*

³⁴⁰ *See, e.g.*, *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1343 (S.D. Ga. 2019).

³⁴¹ *Id.* at 1344.

³⁴² *Id.* at 1358.

³⁴³ *Id.* at 1359.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 1360.

³⁴⁶ Note that the U.S. District Court for the District of North Dakota reached a similar conclusion with regard to the "tributary" definition when analyzing the plaintiffs' likelihood of success on the merits on a motion for injunction. *Compare Wheeler*, 418 F. Supp. 3d at 1361 with *North Dakota v. United States EPA*, 127 F. Supp. 3d 1047, 1055–56 (D.N.D. 2015).

³⁴⁷ *Wheeler*, 418 F. Supp. 3d at 1361.

flow physically present in an area so long as computer programs can determine they have been there sometime in the past.³⁴⁸ An additional concern was expressed with regard to the West, where physical features like an ordinary high-water mark could be “randomly and inconsistently distributed throughout the landscape.”³⁴⁹ Again, the Court held the definition too broad for the authority granted by the CWA.³⁵⁰

Third, the Court held that the definition of adjacent waters included no significant nexus requirement and, instead, relied upon the distance from a flood-plain, ordinary high-water mark, or high tide line also violated the CWA.³⁵¹ The Court noted, “selecting a 100-year floodplain on this basis may well be practical and convenient, but it does not show how or why the waters within that floodplain, as opposed to a different flood-plain, have a significant nexus to navigable waters.”³⁵²

Next, the Court turned to the WOTUS Rule’s case-by-case approach concerning certain physical features like prairie potholes.³⁵³ Because jurisdiction for these features would require proof of significant nexus to a jurisdictional water, the Court found this category to be within the CWA’s scope.³⁵⁴

Finally, concerning the Administrative Procedures Act challenge, the court held that many of the provisions in the final rule were not a “logical outgrowth” of the proposed rule, including the distance limits for adjacent and case-by-case waters and the existence of a farming exception for adjacent waters but not for tributaries.³⁵⁵ The Court compared the text of the proposed rule and the final rule and agreed that no logical outgrowth existed from the proposed rule.³⁵⁶ Further, the interested parties were prevented from making substantive comments on the final rule due to this issue, which all violated the Administrative Procedures Act.³⁵⁷ The Court also found the WOTUS Rule arbitrary and capricious

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 1362.

³⁵⁰ *Id.* at 1362–63.

³⁵¹ *Id.* at 1363.

³⁵² *Id.* at 1366.

³⁵³ *Wheeler*, 418 F. Supp. 3d at 1367–68, 1368 n.8.

³⁵⁴ *Id.* at 1369.

³⁵⁵ *Id.* at 1372.

³⁵⁶ *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1376–78 (S.D. Ga. 2019), *appeal dismissed sub nom.*, *Georgia Ex. Rel. Carr v. McCarthy*, 19-14237-CC, 2019 WL 7761571 (11th Cir. Dec. 26, 2019), and reconsideration denied, 2:15-CV-00079, 2020 WL 6948800 (S.D. Ga. Jan. 3, 2020).

³⁵⁷ *See also Texas v. United States EPA*, 389 F. Supp. 3d 497, 504, 506 (S.D. Tex. 2019) (holding final rule’s definition of adjacent waters as compared to the proposed rule definition

regarding the farming exception applying to adjacent waters and not tributaries, the use of the 100-year flood-plain to identify case by case and adjacent waters, and the 1,500-foot limit for adjacent waters.³⁵⁸

While the National Wildlife Federation and One Hundred Miles initially appealed this decision to the U.S. Court of Appeals for the Eleventh Circuit, the parties voluntarily dismissed that lawsuit in December 2019.³⁵⁹

b. Challenges to Rescind/Revise Rule

Another line of litigation related to the WOTUS Rule arose in 2018 when the Trump EPA issued a final rule setting the applicability date of the Obama Rule as February 6, 2020.³⁶⁰ The result of this final rule would have been to delay the implementation of the Obama Rule.³⁶¹ During that time, the Trump administration would propose its own version of a definition.³⁶² This final rule delaying the application was challenged in several district courts by various states and environmental groups.³⁶³ Two federal courts ruled in favor of the challengers and vacated the final rule delaying the WOTUS Rule's applicability.³⁶⁴ The Trump EPA chose not to challenge these rulings, instead focusing on the new proposed Navigable Waters Protection Rule definition discussed in Part V below.³⁶⁵

deprived “Plaintiffs of a meaningful opportunity to comment and possibly deconstruct the Final Connectivity Report” thereby violating the APA); *North Dakota v. United States EPA*, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015) (plaintiffs likely to succeed on merits of same claim).

³⁵⁸ See also *North Dakota v. United States EPA*, 127 F. Supp. 3d at 1057 (noting Plaintiffs were likely to succeed on the merits because the 4,000-foot standard from a high-water mark is arbitrary and capricious).

³⁵⁹ *Georgia ex. rel. Carr v. McCarthy*, No. 19-14237-CC, 2019 WL 7761571, at *1 (11th Cir. Dec. 26, 2019).

³⁶⁰ See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

³⁶¹ Rachel Neumann, *Is the Trump Administration’s New WOTUS Definition a Restoration of Federalism or a Retreat from Principles of Environmental Protection?*, 22 DENV. WATER L. REV. 703, 705, 707, 713 (2019).

³⁶² *Id.* at 705.

³⁶³ Jacob Aronson & Marc Bruner, *EPA Delays Applicability of Clean Water Rule While Challenges to Rule Proceed in District Courts*, PERKINS COIE, CAL. LAND USE & DEV. L. REP. (Apr. 4, 2018), <https://www.californialandusedevelopmentlaw.com/2018/04/04/epa-delays-applicability-of-clean-water-rule-while-challenges-to-rule-proceed-in-district-courts/> [<https://perma.cc/G7RL-MJRC>].

³⁶⁴ See *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 962–63 (D.S.C. 2018); *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196, at *7 (W.D. Wash. Nov. 26, 2018).

³⁶⁵ See Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

B. Trump Administration Navigable Waters Protection Rule

Within one month after his inauguration, President Trump issued an Executive Order requiring the EPA and Corps of Engineers to either rescind or revise the WOTUS rule and to consider interpreting the term waters of the United States in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*.³⁶⁶

In July 2017, as part of a two-step process, the EPA published a proposed rule referred to as the "step-one rule" to rescind the Obama Rule and essentially recodify the regulatory definition of WOTUS that existed before the Obama Rule's enactment.³⁶⁷ A year later, on July 12, 2018, the agencies published a supplemental notice of public rule-making to clarify, supplement, and seek additional comment on the Step One notice of proposed rule-making.³⁶⁸ A final "step-one rule," known as the Repeal Rule, was effective on December 23, 2019.³⁶⁹ This rule "implemented the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice."³⁷⁰ Although several lawsuits challenged the Repeal Rule, no rulings have been issued in such lawsuits, leaving the Repeal Rule in effect nationwide.³⁷¹

On December 11, 2018, the EPA and Corps of Engineers issued a proposed their "step-two" rule to revise the definition of WOTUS.³⁷² Public comment was allowed from February 14, 2019, through April 15, 2019.³⁷³ The final rule, termed the Navigable Waters Protection Rule, was released in January 2020 and became effective on June 22, 2020.³⁷⁴

³⁶⁶ *Id.*

³⁶⁷ See Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,900 (proposed July 27, 2017). See also discussion *supra* Part II.

³⁶⁸ See Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, 32,230–31 (July 12, 2018).

³⁶⁹ Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (proposed Oct. 22, 2019).

³⁷⁰ *Id.* at 56,661.

³⁷¹ See *California v. Wheeler*, 467 F. Supp. 3d 864, 870 (N.D. Cal. 2020); see, e.g., *Pascua Yaqui Tribe v. United States EPA*, CV-20-00266-TUC-RM, 2021 WL 3855977, at *1 (D. Ariz. Aug. 30, 2021); *Puget Soundkeeper All. v. Wheeler*, C20-0950-JCC, 2020 WL 5095 463, at *1 (W.D. Wash. Aug. 28, 2020).

³⁷² See Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (the "Trump Rule").

³⁷³ *Id.*

³⁷⁴ The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85

1. The Text of the Navigable Waters Protection Rule (“NWPR”)

The final NWPR essentially includes three sections: (1) Jurisdictional waters; (2) Non-jurisdictional waters; and (3) Definitions.³⁷⁵

a. Jurisdictional Waters

The NWPR defines waters of the United States as:

- (i) The territorial seas, and waters currently used, previously used, or may be susceptible to use in interstate or foreign commerce, including waters subject to the ebb and flow of the tide;³⁷⁶
- (ii) Tributaries;
- (iii) Lakes, ponds, and impoundments of jurisdictional waters;³⁷⁷ and
- (iv) Adjacent wetlands.³⁷⁸

As with the Obama Rule, the definitions of tributary and adjacent wetlands are critical to understanding the scope of the Trump waters of the United States definition.

The Trump Rule defines a tributary as “a river, stream, or similar naturally occurring surface water channel that contributes surface water

Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. § 328.3); *Proposed Revised Definition of WOTUS—Public Hearing*, EPA, <https://www.epa.gov/wotus/proposed-revised-definition-wotus-public-hearing> [<https://perma.cc/T2QU-4GB5>] (last updated May 14, 2021).

³⁷⁵ 33 C.F.R. § 328.3(a)–(c) (2020).

³⁷⁶ “Those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun.” *Id.* § 328.3(a); These waters end where “the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.” 33 C.F.R. § 328.3(c)(11).

³⁷⁷ Defined as standing bodies of open water that contribute surface flow to a jurisdictional water identified in category 1(i) in a typical year either directly or through a tributary; lake, pond, or impoundment of jurisdictional water; or adjacent wetland. *Id.* §§ 328.3(a)(3–4), (c)(6). A lake, pond or impoundment does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. *Id.* It is also jurisdictional if it is inundated by flooding from a water in categories (1)(i), (ii), and (iii) above. *Id.* § 328.3(c)(6).

³⁷⁸ *Id.* § 328.3(c)(1)(i)–(iv).

flow” into a jurisdictional water in category 1(i) “in a typical year either directly or through” a tributary; lake, pond, or impoundment of jurisdictional water; or adjacent wetland.³⁷⁹ A tributary must be perennial³⁸⁰ or intermittent³⁸¹ in a typical year.³⁸²

The NWPR defines adjacent wetlands³⁸³ as those that:

- (A) abut, meaning to touch at least one point or side of, a water identified in category (1)(i), (ii), or (iii) above;
- (B) are inundated by flooding from a water identified in category (1)(i), (ii), or (iii) above in a typical year;
- (C) are physically separated from a water identified in category (1)(i), (ii), or (iii) above only by a natural berm, bank, dune, or similar natural feature, or;
- (D) are physically separated from a water identified in category (1)(i), (ii), or (iii) above only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in category (1)(i), (ii), or (iii) above in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.³⁸⁴

“An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, so long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.”³⁸⁵

³⁷⁹ *Id.* § 328.3(c)(12).

³⁸⁰ Perennial is defined as having “surface water flowing continuously year-round.” *Id.* § 328.3(c)(8), (12).

³⁸¹ Intermittent is defined as “surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).” 33 C.F.R. § 328.3(c)(5).

³⁸² *Id.* § 328.3(c)(12).

³⁸³ “Wetlands” are “areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” *Id.* § 328.3(c)(16).

³⁸⁴ *Id.* § 328.3(c)(1).

³⁸⁵ *Id.* § 328.3(b)(iv).

b. Non-jurisdictional Waters

The NWPR excludes the following categories from the definition of “waters of the United States,” meaning the CWA is inapplicable:

- (i) Waters or water features not identified as “jurisdictional waters” under this definition;
- (ii) Groundwater, including groundwater drained through subsurface drainage systems;
- (iii) Ephemeral³⁸⁶ features, including ephemeral streams, swales, gullies, rills, and pools;
- (iv) Diffuse stormwater run-off and directional sheet flow over upland;
- (v) Ditches that are not waters identified in Section (1)(i) or (ii) of the definition, and those portions of ditched constructed in waters identified in Section (1)(iv) of this definition that do not satisfy the definition of adjacent wetlands;
- (vi) Prior converted cropland,³⁸⁷
- (vii) Artificially irrigated areas, including fields flooded for ag production, that would revert to upland³⁸⁸

³⁸⁶ “Surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).” *Id.* § 328.3(c)(3).

³⁸⁷ The Obama Rule did not define prior converted cropland, but the Trump Rule did include the following definition: Any area that, prior to 12/23/85, was “drained or otherwise manipulated for the purpose, or having the effect, of making production” of agricultural products possible. The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. at 22,320 (Apr. 21, 2020). Designations made by the USDA will be recognized. *Id.* at 22,320. An area is no longer considered prior converted cropland when the area is abandoned and has reverted to wetlands. *Id.* at 22,326. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding 5 years. *Id.*

³⁸⁸ Any “area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophobic vegetation, hydric soils) . . . and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.” 33 C.F.R. § 328.3(c)(14). The ordinary high-water mark is defined as:

that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Id. § 328.3(c)(7). The high tide line is defined as “the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide.” *Id.* § 328.3(c)(4). In

- should application of irrigation water to that area cease;
- (viii) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the definitions of “lakes and ponds and impoundments of jurisdictional waters” discussed in section (1)(iii) above;
 - (ix) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
 - (x) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;
 - (xi) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and
 - (xxi) Waste treatment systems.³⁸⁹

2. Litigation

As was the case with the WOTUS Rule, the ink was not dry on the final NWPR when lawsuits began flooding in.³⁹⁰ Extremely broad in

the absence of actual data, this may be determined “by a line of oil or scum along the shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide.” *Id.* The line includes:

spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicated reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

Id.

³⁸⁹ 40 C.F.R. § 120.2(2)(i)–(xxi) (2020).

³⁹⁰ Clean Water Rule Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015); *see infra* discussion note 391.

scope, some claim the NWPR is too narrowly written, while others claim the provisions are overly broad.³⁹¹

³⁹¹ See Complaint at 3, *Pascua Yaqui Tribe v. United States EPA*, No. CV-20-00266-TUC-RM, 2021 U.S. Dist. LEXIS 163921 (D. Ariz. Aug. 30, 2021) (claiming NWPR is contrary to the purpose of the Clean Water Act and arbitrary and capricious because it did not analyze the scientific importance of protecting ephemeral and intermittent streams); Motion for Preliminary Injunction at 1–3, *State of California et al. v. Wheeler*, No. 3:20-cv-03005-RS, 467 F. Supp. 3d 864 (N.D. Cal. 2020) (several states claim NWPR fails to properly interpret Clean Water Act, fails to consider prior factual findings and fails to provide a reasoned explanation to change long-term policy); Complaint at 2–6, *State of California, et al. v. Wheeler*, No. 3:20-cv-4869 (N.D. Cal. July 21, 2020) (lawsuit by California, Washington, New York, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Wisconsin and the District of Columbia claiming rule arbitrary and capricious in disregarding prior agency policy and failure to consider statutory objective); *Colorado v. United States EPA*, 445 F. Supp. 3d 1295, 1311–13 (D. Colo. 2020) (motion for injunction granted for Colorado finding likelihood of success on the merits arguing that *Rapanos* already foreclosed this approach because five justices rejected Scalia’s similar definitional approach); Complaint at 3–5, 33–36, *Environmental Integrity Project v. Wheeler*, No. 1:20-cv-1734 (D.D.C. June 25, 2020) (interpretation foreclosed by *Rapanos*, failure to consider relevant and important factors in drafting rule, no reasonable basis for departing from scientific evidence, prior factual findings, or policy and practice); Motion for Preliminary Injunction at 13, 26, *New Mexico Cattle Growers’ Assn. v. United States EPA.*, Case No. 1:19-cv-00988-RB-SCY (D.N.M. May 26, 2020) (arguing that NWPR and 1986 definition are both too broad and advocating for definition of “waters used in commerce”); Complaint at 37–40, *Navajo Nation v. Wheeler*, Case No. 2:20-CV-00602-MV-GJF, Doc. (D.N.M. June 22, 2020) (failure to consider impact of new rule on tribal waters and treaty rights and failure to consider whether Recession Rule and NWPR frustrate or promote the Clean Water Act’s purpose); Complaint at 7–8, *South Carolina Coastal Conservation League v. Wheeler*, No. 2:20-CV-01687-DCN (D.S.C. Apr. 29, 2020) (allege arbitrary and capricious reversal of policy and failure to allow meaningful opportunity to comment on rule); Complaint at 12–14, 27–28, *Puget Soundkeeper All. v. United States EPA*, No. 2:20-cv-00950 (W.D. Wash. June 22, 2020) (arguing that exclusion of interstate waters, elimination of ephemeral waters under the definition of tributaries, and other various changes in the 2020 WOTUS Rule, the Plaintiffs assert the 2020 rule is contrary to the Clean Water Act and that action was arbitrary and capricious for failure to explain change in position); Second Amended Complaint at 36–43, *Washington Cattlemen’s Ass’n v. United States EPA*, No. 2:19-cv-00569-JCC (W.D. Wash. May 4, 2020) (amended complaint filed challenging 2020 Rule’s regulation of all intermittent tributaries, non-navigable perennial tributaries, and non-navigable lakes and ponds, and non-abutting wetlands); Plaintiff’s Reply Brief in Support of Second Motion for Preliminary Injunction at 12, *Oregon Cattlemen’s Ass’n v. United States EPA*, No. 3:19-cv-00564-AC (D. Or. July 20, 2020) (seeking to enjoin application of intermittent tributary and non-abutting wetlands provisions); Complaint at 26–27, *Chesapeake Bay Found., Inc. v. Wheeler*, No. 1:20-cv-01064-GLR (D. Md. Apr. 27, 2020) (violations of APA and notice and comment rule-making for changing agency direction); Amended Complaint at 4, 31–32, *Conservation Law Found. v. United States EPA*, No. 20-cv-10820-DPW (D. Mass. Aug. 3, 2020) (arbitrary and capricious, violates Clean Water Act, violates Endangered Species Act).

On August 30, 2021, the United States District Court for the District of Arizona granted the EPA's voluntary motion for remand of the NWPR and vacated the NWPR.³⁹² Shortly thereafter, the United States District Court for the District of Massachusetts noted that in light of the Arizona decision, "the most orderly means for me to assist in resolving the larger dispute over the Rule is to remand this case to the agencies and correlatively dismiss it without separately addressing the merits to which the litigation is in an advanced state in the District of Arizona."³⁹³ On the heels of these two decisions, the EPA issued a statement on its website that in light of the Arizona decision, the EPA would halt the implementation of the NWPR and would interpret the Clean Water Act based on the pre-WOTUS Rule regulatory regime until further notice.³⁹⁴

IV. FINDING COMMON GROUND AND IDENTIFYING DIFFERENCES

A line-by-line comparison of the rules and Supreme Court interpretation proves useful.

A. *Where the Rules Agree*

A focus only on where the two rules have significant differences belies the fact that there are significant areas—both with regard to those waters included and those waters excluded—that align under both the WOTUS Rule and the NWPR.

1. Jurisdictional

Both rules provide that waters currently used, previously used, or which may be susceptible to use in interstate or foreign commerce in the future, including waters subject to the tide's ebb and flow, are jurisdictional.³⁹⁵ Similarly, both definitions clearly include the territorial seas as jurisdictional waters.³⁹⁶ Finally, both rules include impoundments of

³⁹² *Pasqua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, Order (D. Ariz. Aug. 30, 2021).

³⁹³ *Conservation Law Foundation v. EPA*, No. 20-10820-DPW, Memorandum and Order of Remand and Dismissal (D. Mass. Sept 1, 2021).

³⁹⁴ EPA, Definition of 'Waters of the United States: Rule Status and Litigation Update, available at <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> (<https://perma.cc/V7M8-HFL6>) (last visited Nov. 3, 2021).

³⁹⁵ Compare 33 C.F.R. § 328.3(a)(1) (2015), with 33 C.F.R. § 328.3 (a)(1) (2020).

³⁹⁶ Compare 33 C.F.R. § 328.3(a)(6) (2015), with 33 C.F.R. § 328.3 (a)(1) (2020).

jurisdictional waters as being included in the definition of “waters of the United States.”³⁹⁷ Additionally, the definition of “wetlands” is identical in both of the rules as well.³⁹⁸

2. Non-jurisdictional

Similarly, both definitions exclude certain water features from the definition of waters of the United States.³⁹⁹

Groundwater, including groundwater drained through subsurface drainage systems, is not considered jurisdictional under either the WOTUS Rule or the NWPR.⁴⁰⁰

Likewise, both administrations agree that prior converted cropland, wastewater treatment systems, stormwater control features constructed to convey, treat, infiltrate, or store stormwater run-off, water-filled depressions constructed or created incidentally to mining or construction or pits excavated for obtaining fill, sand, or gravel, artificially irrigated areas that would revert to dry land should irrigation cease, artificially constructed lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering and log cleaning ponds, and wastewater recycling structures are expressly excluded from being jurisdictional under both definitions.⁴⁰¹

B. *Where the Rules Diverge*

However, several areas of confusion and disagreement regarding the scope of waters of the United States definition exist between the two rules.⁴⁰² This section focuses on six of the main areas of contention.

1. Tributaries

The scope of the term “tributary” proved contentious during the history of WOTUS disputes.⁴⁰³ The term remained undefined in any formal way until the Obama Rule.

³⁹⁷ Compare 33 C.F.R. § 328.3(a)(4) (2015), with 33 C.F.R. § 328.3(a)(3) (2020).

³⁹⁸ Compare 33 C.F.R. § 328.3(b) (2015), with 33 C.F.R. § 328.3(c)(16) (2020).

³⁹⁹ Compare 33 C.F.R. § 328.3(b)(1)–(7) (2015), with 33 C.F.R. § 328.3(b)(1)–(12) (2020).

⁴⁰⁰ Compare 33 C.F.R. § 328.3(b)(5) (2015), with 33 C.F.R. § 328.3(b)(2) (2020).

⁴⁰¹ Compare 33 C.F.R. §§ 328.3(b)(1)–(2), (b)(4)(i)–(ii), (v), (b)(6)–(7) (2015), with 33 C.F.R. § 328.3(b)(6)–(12) (2020).

⁴⁰² See discussion *infra* Sections IV.B.1–6.

⁴⁰³ See discussion *infra* Section IV.B.1.a.

a. Case Law

In *Rapanos*, Justice Kennedy joined the four-justice plurality in refusing to defer to the Corps's broad application of the term.⁴⁰⁴ The plurality held that waters of the United States include only those relatively permanent, standing or continuously flowing bodies of water "forming geographical features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage or rainfall."⁴⁰⁵

The plurality focused on the distinction between "point source" and "navigable waters," emphasizing that a tributary must be a waterway.⁴⁰⁶ The language of the statute indicates that "navigable waters" differ from a "point source" and that a point source is therefore not a navigable water.⁴⁰⁷ Many of the conduits classified by the Corps and lower courts as tributaries are actually point sources.⁴⁰⁸

The plurality also addressed the Corps's interpretation of its regulations to include ephemeral streams and drainage ditches as tributaries and, therefore, as waters of the United States,⁴⁰⁹ noting that "man-made, intermittently flowing features, such as 'drain tiles, storm drains systems and culverts'" had been interpreted by the Corps as tributaries.⁴¹⁰

Even after *SWANCC*, the lower courts continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries.' For example, courts have held that jurisdictional 'tributaries' include the 'intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64),' *Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (4th Cir. 2003); a "roadside ditch" whose water took "a winding, thirty-two mile path to the Chesapeake Bay," *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003); irrigation ditches and drains that

⁴⁰⁴ *Rapanos v. United States*, 547 U.S. 715, 782 (2006).

⁴⁰⁵ *Id.* at 732–33.

⁴⁰⁶ *Id.* at 735.

⁴⁰⁷ *Id.* at 743.

⁴⁰⁸ *Id.* at 743–44; *see also supra* Section II.E.2.

⁴⁰⁹ *Id.* at 725.

⁴¹⁰ *Rapanos*, 547 U.S. at 727–28.

intermittently connect to covered waters, *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 954–955 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001); and (most implausibly of all) the “washes and arroyos” of an “arid development site,” located in the middle of the desert, through which “water courses . . . during periods of heavy rain,” *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005).⁴¹¹

Justice Kennedy also would not defer to the Corps’s existing standard for tributaries.⁴¹² The Corps included as a tributary any water that feeds into a traditional navigable water or a tributary of a navigable water and possesses an ordinary high-water mark.⁴¹³ This standard is overbroad, allowing for “regulation of drains, ditches and streams remote from any navigable-in-fact water.”⁴¹⁴ The concurring opinion concludes that adjacency to navigable-in-fact waters provides a sufficient nexus for regulation, but a significant nexus must be established on a case-by-case basis for wetlands adjacent to non-navigable tributaries.⁴¹⁵ After *Rapanos*, courts attempted to apply the plurality opinion and Justice Kennedy’s concurring opinion to determine the scope of the term tributary.⁴¹⁶

While both the WOTUS and NWPR rules agree that tributaries of jurisdictional waters should be included in the definition of waters of the United States, the definitions differ significantly on what constitutes a tributary.⁴¹⁷

b. Obama Rule

Under the Obama WOTUS Rule, tributaries of waters that have been, are currently being, or could be used in the future for interstate commerce, tributaries of the territorial seas, and tributaries of all interstate waters are considered jurisdictional.⁴¹⁸ A “tributary” is defined as

⁴¹¹ *Id.* at 726–27.

⁴¹² *Id.* at 781 (Kennedy, J., concurring).

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 782 (“Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”).

⁴¹⁶ *See, e.g.*, *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

⁴¹⁷ *Compare* 33 C.F.R. §§ 328.3(a)(5), (c)(3) (2015), *with* 33 C.F.R. §§ 328.3(a)(2), (c)(12) (2020).

⁴¹⁸ 33 C.F.R. § 328.3(a)(1)–(3), (5) (2015).

“a water that contributes flow, either directly” or through another water, including an impoundment or jurisdictional waters, that is “characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.”⁴¹⁹ A tributary can be either natural, man-made, or man-altered and includes rivers, streams, canals, and ditches not otherwise excluded.⁴²⁰ A water qualifying as tributary under the Obama Rule does not lose its tributary status if one or more natural or constructed breaks exist so long as the bed and banks and ordinary high-water mark can be identified upstream of the break⁴²¹ and does not lose its status if continuing through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water.⁴²²

c. Trump Rule

The NWPR defines a tributary as “a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a jurisdictional water in a typical year⁴²³ either directly or through one or more” tributaries; lakes and ponds, and impoundments of jurisdictional waters; or adjacent wetlands.⁴²⁴ “The tributary must be perennial⁴²⁵ or intermittent⁴²⁶ in a typical year.”⁴²⁷ An altered or relocated tributary retains jurisdictional status so long the waterway continues to meet the definition.⁴²⁸ A tributary remains jurisdictional if the waterway “contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature,

⁴¹⁹ *Id.* § 328.3(e) (defining “ordinary high water mark” as the “line on the shore established by the fluctuations of water and indicated by physical characteristics such as [a] clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”).

⁴²⁰ *Id.* § 328.3(c)(3).

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* § 328.3(c)(12)–(13) (2020) (“The term typical year means 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.”).

⁴²⁴ 33 C.F.R. § 328.3(a)(1)–(4).

⁴²⁵ *Id.* § 328.3(c)(8) (“The term *perennial* means surface water flowing continuously year-round.”).

⁴²⁶ *Id.* § 328.3(c)(5), (c)(12) (“The term intermittent means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).”).

⁴²⁷ *Id.* § 328.3(e)(12).

⁴²⁸ *Id.*

through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.”⁴²⁹ Ditches that relocate tributaries constructed in a tributary or constructed in an adjacent wetland are included so long as the ditch satisfies the definition of tributary.⁴³⁰

d. Comparison

Several key differences in the two definitions of tributary exist. First, the WOTUS Rule considers any water contributing flow to a jurisdictional water characterized by the presence of a bed and banks and ordinary high-water mark to be a tributary.⁴³¹ At the same time, the Trump Rule limits the scope to those perennial or intermittent waters contributing flow to a jurisdictional water in a typical year.⁴³² The Trump Rule is likely based on the *Rapanos* plurality, which defined tributary as “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[. . .] oceans, rivers, [and] lakes. . . .’”⁴³³ The *Rapanos* plurality would not include as tributaries “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”⁴³⁴ The Obama Rule, on the other hand, appears to harken back to the 2000 Guidance Document, providing that ephemeral streams that are tributary to a water of the United States were WOTUS if they possess an ordinary high-water mark.⁴³⁵ Thus, the Obama Rule would allow intermittent, perennial, or ephemeral streams to be tributaries. The Trump Rule would allow only intermittent or perennial streams to be tributaries. Interestingly, the *Rapanos* plurality would have taken the narrowest approach, allowing only perennial streams to be included.

Second, the WOTUS Rule broadly applies to natural, man-made, or man-altered waters, while the NWPR discusses only “naturally occurring surface water channels.”⁴³⁶ This analysis appears to be the first time a

⁴²⁹ *Id.* § 328.3(c)(12).

⁴³⁰ *Id.*

⁴³¹ 33 C.F.R. § 328.3(3) (2015).

⁴³² 33 C.F.R. § 328.3(12) (2020).

⁴³³ *See Rapanos v. United States*, 547 U.S. 715, 739 (2006) (alterations in original).

⁴³⁴ *Id.* at 716.

⁴³⁵ *See* Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818, 12,823 (2000).

⁴³⁶ 33 C.F.R. § 328.3(c)(3) (2015). The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,251, 22,292 (Apr. 21, 2020).

natural versus man-made distinction has been drawn with regard to tributaries.

Third, the Trump Rule limits a tributary to only those waters that flow perennially or intermittently, expressly excluding any ephemeral flow.⁴³⁷ The Obama Rule included ephemeral streams so long as they satisfied the definitional requirements, and this inclusion was a significant cause of criticism from opponents of the Obama Rule.⁴³⁸ Interestingly, both definitions are broader in this aspect than Justice Scalia's *Rapanos* opinion, which expressly excluded intermittent streams.⁴³⁹

Finally, while the Obama Rule focuses on waters with ordinary high-water marks and visible bed and banks, the Trump Rule does not include these topographical features.⁴⁴⁰ This language from the Obama Rule is strikingly similar to that addressed by the *Rapanos* Court. There, the Corps defined tributary as any water that "feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark."⁴⁴¹ This was rejected by the plurality, which would require a relatively permanent or continuously flowing water body, as well as by Justice Kennedy, who refused to defer to the agency's overbroad definition of tributary.⁴⁴² The only difference between the Corps's rule rejected in *Rapanos* and the Obama Rule is the latter's inclusion of a requirement of the physical indicators of a bed and bank.

2. Adjacency

The most litigated issue with regard to the scope of the waters of the United States definition is that of adjacency.⁴⁴³ What began in a

⁴³⁷ See Mark Ryan & Betsy Southerland, *Undoing the Trump Water Rule*, HILL (Sept. 3, 2021), <https://thehill.com/opinion/energy-environment/570656-undoing-the-trump-water-rule> [<https://perma.cc/9GBW-SXUX>].

⁴³⁸ Karen Winters, *US EPA and the Corps Finally Publish Their Definition of "Waters of the United States" Narrowing the Scope of Federal Jurisdiction Under the Clean Water Act*, SQUIRE PATTON BOGGS: FRESH (Apr. 23, 2020), <https://www.freshlawblog.com/2020/04/23/us-epa-and-the-corps-finally-publish-their-definition-of-waters-of-the-united-states-narrowing-the-scope-of-federal-jurisdiction-under-the-clean-water-act/> [<https://perma.cc/TEL3-B7D4>].

⁴³⁹ See *Rapanos*, 547 U.S. at 733–34, 736.

⁴⁴⁰ See James Bradbury et al., *Obama, Trump & Biden: Where Are We Now on Regulation of Federal Waters Under the Clean Water Act*, 14TH ANN. JOHN HUFFAKER AGRIC. L. 1, 1, 4 (2021), <https://agrillife.org/texasaglaw/files/2021/07/Obama-Trump-Biden.pdf> [<https://perma.cc/979K-N732>].

⁴⁴¹ *Rapanos*, 547 U.S. at 781.

⁴⁴² *Id.* at 739, 742, 782.

⁴⁴³ See *supra* Sections IV.B.2.a–d.

unanimous decision in *Riverside Bayview* has morphed into a complex issue, which has left courts, legal scholars, and landowners scratching their heads. The issue of adjacency is likely the point at which the WOTUS Rule and NWPR diverge most starkly.

a. Case Law

Riverside Bayview arguably⁴⁴⁴ found that adjacent means “physically abutting,” not merely “nearby.”⁴⁴⁵ In his *SWANCC* opinion, Justice Rehnquist described the *Riverside Bayview* case as addressing “wetlands that actually abutted on a navigable waterway.”⁴⁴⁶ Justice Scalia summarized that holding as deference to the Corps’s interpretation that “the waters of the United States” included “wetlands that “actually abut[ted] on’ traditional navigable waters.”⁴⁴⁷

SWANCC then held that isolated waters were not jurisdictional.⁴⁴⁸ The Corps had attempted to base jurisdiction on the Migratory Bird Rule, a rule based on interstate visitors generating interstate commerce.⁴⁴⁹ The majority rejected that proposition, finding that Congress clearly intended to exclude isolated waters from the jurisdiction.⁴⁵⁰ The majority in *SWANCC* focused on the deference issue in finding clear Congressional intent, but also stated that “the significant nexus between the wetlands and ‘navigable waters’ . . . informed [the Court’s] reading of the CWA in *Riverside Bayview Homes*.”⁴⁵¹

⁴⁴⁴ Justice Stevens’ dissenting opinion in *SWANCC* described the factual scenario in *Riverside Bayview* as “an 80-acre parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek.” *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 175–76 (2001) (Stevens, J. dissenting). It is unclear whether he believed the wetlands did not actually abut, particularly because in his *Rapanos* dissent, he wrote “the particular wetland at issue in *Riverside Bayview* abutted a navigable creek.” See *Rapanos*, 547 U.S. at 792 (Stevens, J., dissenting).

⁴⁴⁵ *Rapanos*, 547 U.S. at 748.

⁴⁴⁶ *Solid Waste Agency of Northern Cook County*, 531 U.S. at 167.

⁴⁴⁷ *Rapanos*, 547 U.S. at 725.

⁴⁴⁸ See *Solid Waste Agency of Northern Cook County*, 531 U.S. at 170–71.

⁴⁴⁹ *Id.* at 170.

⁴⁵⁰ See *id.* at 170, 174.

⁴⁵¹ *Solid Waste Agency of Northern Cook County*, 531 U.S. at 167. Although the *Riverside Bayview* Court failed to refer “nexus” at any point, the Court presumably refers to Footnote 9 of the *Riverside Bayview* opinion, referring to “wetlands that are . . . significantly intertwined with the ecosystem of adjacent waterways.” See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, n.9 (1985).

Next, the plurality opinion in *Rapanos* discussed the Corps's interpretation of adjacency.⁴⁵² It opined that interpretations went far beyond *Riverside Bayview*'s holding, which the plurality believed was limited to situations of actual abutment.⁴⁵³ For example, the Court cited interpretations that include wetlands connected through "directional sheet flow during storm events," lying within the 100-year flood-plain, or within 200 feet of a navigable waterway as adjacent.⁴⁵⁴ The plurality felt that adjacent should be limited to actual abutment.⁴⁵⁵

The plurality also opined that Justice Kennedy's significant nexus test improperly expands the narrow foundation of significant nexus in *Riverside Bayview*.⁴⁵⁶ In the plurality's view, *Riverside Bayview* found that abutment was the significant nexus.⁴⁵⁷ However, since *Riverside Bayview* never used the term significant nexus, a true meaning proves elusive.

In addition, Justice Scalia set out, in the plurality's view, the correct standard to determine adjacency.⁴⁵⁸ To be adjacent, wetlands must "[possess] a continuous surface connection that creates the boundary-drawing problem . . . addressed in *Riverside Bayview*."⁴⁵⁹ When Justice Scalia referred to surface connection, he presumably intended to articulate the fact that the wetland extended to the boundary (abutted) the navigable water in *Riverside Bayview*. Note that the plurality did not require "surface water connection," as some commentators seem to infer.⁴⁶⁰ A groundwater connection existed in *Riverside Bayview*, another fact that indicates that Justice Scalia was referring to actual abutment.⁴⁶¹

The concurring opinion in *Rapanos* concludes that wetlands adjacent to navigable-in-fact waters provide a sufficient nexus for regulation, but a significant nexus must be established on a case-by-case basis for wetlands adjacent to non-navigable tributaries.⁴⁶² The dissenters in *Rapanos* would have deferred to the agency.

⁴⁵² See *Rapanos*, 547 U.S. at 718, 728.

⁴⁵³ See *id.* at 741, 753.

⁴⁵⁴ *Id.* at 728.

⁴⁵⁵ See *id.* at 740, 748–49.

⁴⁵⁶ See *id.* at 753–54.

⁴⁵⁷ See *id.* at 728.

⁴⁵⁸ See *Rapanos*, 547 U.S. at 742.

⁴⁵⁹ *Id.* at 757.

⁴⁶⁰ The plurality opinion refers to "surface water connection" twice, both times with reference to a lower court decision. *Id.* at 717, 720, 742, 762–63.

⁴⁶¹ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

⁴⁶² *Rapanos*, 547 U.S. at 718, 782 ("Given the potential overbreadth of the Corps's regulations, this showing is necessary to avoid unreasonable applications of the statute.").

b. Obama Rule

The Obama definition includes “all waters adjacent to” a jurisdictional water, “including wetlands, ponds, lakes, oxbows, impoundments, and similar waters.”⁴⁶³ Key to this is the WOTUS Rule’s definition using three terms: waters, adjacent, and neighboring.⁴⁶⁴

First, the WOTUS Rule refers to all “waters” adjacent to a jurisdictional water, while historically, the regulations and court had referred to all “wetlands” adjacent to a jurisdictional water.⁴⁶⁵ Certainly, the term water seems more broad than wetlands where wetlands are defined as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁴⁶⁶ Further, wetlands generally consist of “swamps, marshes, bogs, and similar areas.”⁴⁶⁷

Second, adjacent is defined as “bordering, contiguous, or neighboring” a jurisdictional water.⁴⁶⁸ This definition comes from the 1993 Rule.⁴⁶⁹ It includes “waters separated by constructed dikes or barriers, natural river berms, beach dunes and the like.”⁴⁷⁰ With regard to open waters such as lakes or ponds, the adjacent waters include any wetlands within or abutting the ordinary highwater mark.⁴⁷¹ Importantly, adjacent waters are not limited to those located laterally to a jurisdictional water.⁴⁷² Instead, adjacent waters include “all waters that connect segments of a” jurisdictional water or are located at the head of a jurisdictional water “and are bordering, contiguous, or neighboring” said water.⁴⁷³ Expressly excluded as not adjacent are waters being used for established normal farming, ranching, and silviculture activities.⁴⁷⁴

Third, since adjacent is defined as those waters “neighboring” a jurisdictional water, the definition of neighboring is critical.⁴⁷⁵ The WOTUS

⁴⁶³ 33 C.F.R. § 328.3(a)(6) (2015).

⁴⁶⁴ *Id.* § 328.3(a), (c)(1–2).

⁴⁶⁵ *Id.* § 328.3(a)(6); 33 C.F.R. § 328.3(a)(7) (1993).

⁴⁶⁶ 33 C.F.R. §§ 328.1, 328.3(b) (2015).

⁴⁶⁷ *Id.* § 328.3(b).

⁴⁶⁸ *See id.* § 328.3(c).

⁴⁶⁹ *See* 33 C.F.R. § 328.3(c) (1993).

⁴⁷⁰ *Id.* 33 C.F.R. § 328.3(c)(1) (2015).

⁴⁷¹ *Id.*

⁴⁷² *Id.* § 328.3(a)(7).

⁴⁷³ *Id.* § 328.3(c)(1).

⁴⁷⁴ *Id.*

⁴⁷⁵ 33 C.F.R. § 328.3(c) (2015).

Rule provides a three-prong definition of neighboring: (1) all waters within 100 feet of the ordinary high-water mark of a jurisdictional water; and (2) all waters located within the 100-year flood-plain of a jurisdictional water and not more than 1,500 feet from the ordinary high-water mark of any such water; and (3) all waters within 1,500 feet of the high tide line of a water used, previously used, or susceptible to use in interstate commerce, interstate waters, or the territorial seas, and all waters within 1,500 feet of the ordinary high-water mark of the Great Lakes.⁴⁷⁶ For each of these categories, if any portion of a water falls within the neighboring definition, the entire water is deemed neighboring.⁴⁷⁷

c. Trump Rule

The Trump Rule includes adjacent wetlands, familiar language that had historically been included for decades in prior rules.⁴⁷⁸ The NWPR provides a four-prong test to define “adjacent wetlands” as those that: (1) abut, meaning to touch at least at one point or side, a jurisdictional water; (2) are inundated by flooding by a jurisdictional water in a typical year; (3) are physically separated from a jurisdictional water by only a natural berm, bank, dune or similar natural feature; and (4) are physically separated by a jurisdictional water by only an artificial dike, barrier, or some similar artificial structure that allows for a direct hydrologic surface connection between the wetlands and jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.⁴⁷⁹ “An adjacent wetland is jurisdictional in its entirety” only if “a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection exist through or over that structure in a typical year.”⁴⁸⁰

d. Comparison

Perhaps the easiest distinction to recognize is that the Obama Rule includes all adjacent *waters* as jurisdictional, while the Trump Rule and prior versions of the definition limit the scope of the Act to adjacent

⁴⁷⁶ *Id.* § 328.3(c)(2).

⁴⁷⁷ *See id.* § 328.3(a)(6).

⁴⁷⁸ 33 C.F.R. § 328.3(a)(4) (2020). *See* 33 C.F.R. § 328.3(a)(7) (2015); *see also* 33 C.F.R. § 328.3(a)(7) (1993).

⁴⁷⁹ 33 C.F.R. § 328.3(c)(1)(i)–(iv) (2020).

⁴⁸⁰ *Id.* § 328.3 (c)(1)(iv).

wetlands.⁴⁸¹ The text of the Obama Rule, therefore, represents a significant departure.

Throughout the history of the regulations under the CWA and precursors to the CWA, “adjacent wetlands” were a covered category of waters of the United States.⁴⁸² *Riverside Bayview* addresses an adjacent wetland and does not address adjacent waters.⁴⁸³ Inclusion of adjacent waters as jurisdictional would further expand the CWA’s scope than any prior interpretation. Furthermore, the addition would allow more “chain” compilations to include waters within jurisdictions. For example, a non-navigable water adjacent to a tributary of a tributary of a tributary of a navigable waterway.

The more complex comparison is to look at the definitions of adjacency. The Obama Rule takes the broadest approach, appearing to go beyond even the prior cases. While *Riverside Bayview* held that abutting wetlands were jurisdictional, and five justices in *Rapanos* would have deferred to the agency definition, the Obama Rule used a more objective approach based primarily on distance.⁴⁸⁴ Arguably, in reaching this bright-line, objective standard, the WOTUS Rule expands the scope of adjacency. For example, all waters within certain distances of ordinary high-water marks, flood-plains, and high tide lines of jurisdictional waters are deemed adjacent, regardless of whether they actually touch or have any proven hydrologic connection.⁴⁸⁵ This rule was found to be unlawfully broad, as there was simply not a sufficient explanation for how these objective measurements were selected.⁴⁸⁶ “Selecting a 100-year flood-plain on this basis may well be practical and convenient, but it does not show how or why the waters within that floodplain, as opposed to a different flood-plain, have a significant nexus to navigable waters.”⁴⁸⁷

However, in *Rapanos*, both the four-Justice dissent and the Justice Kennedy concurrence deferred to the Corps’s definition, which includes “neighboring” and “nearby” wetlands, not requiring actual abutment.⁴⁸⁸

⁴⁸¹ See 33 C.F.R. § 328.3(a)(6) (2015); see also 33 C.F.R. § 328.3(a)(4), (c)(1), (c)(1)(iv) (2020).

⁴⁸² See 33 C.F.R. § 328.3(a)(2), (7) (2015); see also 33 C.F.R. § 328.4(c)(2) (1993).

⁴⁸³ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

⁴⁸⁴ See Clean Water Rule Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,071 (June 29, 2015) [hereinafter Clean Water Rule].

⁴⁸⁵ *Id.*

⁴⁸⁶ *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1367 (S.D. Ga. 2019) (“*Rapanos* requires that the Agencies demonstrate that waters within a chosen limit have a significant nexus, and merely stating that the Agencies have decided that a significant nexus exists based on ‘science’ and their ‘expertise’ is not sufficient.”).

⁴⁸⁷ *Id.* at 1366.

⁴⁸⁸ *Rapanos v. United States*, 547 U.S. 715, 775 (2006).

The NWPR seems to fall somewhere in the middle, focusing on waters that actually touch a jurisdictional water and those inundated by flooding from a jurisdictional water in a given year. While perhaps less easy to measure with a ruler, this rule certainly appears narrower in scope than the WOTUS definition. However, it would expand on the actual abutting requirement addressed in *Riverside Bayview*.⁴⁸⁹

Additionally, the Obama Rule provides that if any part of a water falls within the measurable distance from flood-plains, ordinary high-water marks, or high tide lines, the entire water is jurisdictional.⁴⁹⁰ Yet, the Trump Rule provides that an entire wetland is jurisdictional only if it maintains a direct hydrologic surface connection through or over a dividing artificial structure in a typical year.⁴⁹¹ The Supreme Court has not addressed this issue in prior cases.

3. Interstate Waters

The Trump Rule marked a departure from the decades-old inclusion of “interstate waters, including interstate wetlands” as part of the waters of the United States definition. Even in 1980, the definition included this category of water, which continued through the Obama Rule.⁴⁹² However, the NWPR contains no provision for including waters or wetlands solely by virtue of them being interstate.⁴⁹³ Instead, an interstate water would have to satisfy otherwise one of the four categories identified as waters of the United States to be jurisdictional.⁴⁹⁴

Seemingly, the Obama definition could be problematic under Supreme Court precedent. For example, the *SWANCC* opinion was clear that isolated wetlands were not jurisdictional.⁴⁹⁵ However, there could certainly be an isolated wetland sitting on two states’ boundary, which would qualify as an interstate water. This reasoning certainly seems to fall in line with Justice Kennedy’s concern in *Rapanos* that such an interpretation would “read out the central requirement that the word

⁴⁸⁹ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,315 (Apr. 21, 2020) (to be codified at 33 C.F.R. § 328.3) [hereinafter Navigable Waters Protection Rule].

⁴⁹⁰ Clean Water Rule, *supra* note 484, at 37,081.

⁴⁹¹ The Navigable Waters Protection Rule, Definition of “Waters of the United States,” 85 Fed. Reg. at 22,251.

⁴⁹² Clean Water Rule, *supra* note 484, at 37,055.

⁴⁹³ *See, e.g.*, 33 C.F.R. § 328.3(a) (2020).

⁴⁹⁴ *Id.*

⁴⁹⁵ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 171–72 (2001).

navigable . . . be given some importance.”⁴⁹⁶ Without imposing any sort of limitation or significant nexus requirement, this portion of the Obama Rule seems sweeping and potentially problematic.

Further, the breadth of interstate waters becomes more problematic when one considers that all tributaries of and wetlands adjacent to interstate waters are also jurisdictional. Accordingly, it is not only an isolated wetland like that in *SWANCC*, but also the WOTUS Rule would consider the water jurisdictional if it crossed interstate lines. Also included could be any waters within the 100-year flood-plain and not more than 1,500 feet from the ordinary high-water mark of the interstate water. Likewise, it could include a stream or other water with a bed, bank, and ordinary high-water mark that contributes flow to the interstate water. This dilemma is an example of the turtle stacking that concerned Justice Scalia in his *Rapanos* opinion.⁴⁹⁷

4. Ditches

“Ditches and canals” have been held to be navigable waters if they meet the definition of tributaries of navigable-in-fact waters.⁴⁹⁸ The Fourth Circuit Court of Appeals addressed ditches in two cases.⁴⁹⁹ In one, water from a wetland flowed from a wetland to a roadside ditch, then into a culvert on the other side of the road.⁵⁰⁰ From the culvert, the water flowed into a second ditch, which flowed into a creek that formed a tributary of Wicomico River, a navigable water.⁵⁰¹ The distance from the wetlands to the navigable waters was approximately eight miles.⁵⁰² The court found the wetland jurisdictional.⁵⁰³

In *Newdunn*, water flows intermittently from wetlands on the subject property through a series of natural and man-made waterways, including ditches and Stony Run, and eventually to navigable waters.⁵⁰⁴

⁴⁹⁶ *Rapanos v. United States*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring).

⁴⁹⁷ *Id.* at 754.

⁴⁹⁸ *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997).

⁴⁹⁹ *Treacy v. Newdunn*, 344 F.3d 407, 409 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 701–02 (4th Cir. 2003).

⁵⁰⁰ *Deaton*, 332 F.3d at 702.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.* at 708.

⁵⁰⁴ *Newdunn*, 344 F.3d at 407, 417.

The court seemingly found these connections sufficient to show a “sufficient nexus” between navigable-in-fact waters and the wetlands, and thus jurisdictional.⁵⁰⁵

Justice Scalia distinguished “ditches, channels, conduits and the like” from “waters” in his plurality opinion in *Rapanos*.⁵⁰⁶ Although both can hold water permanently, “we usually refer to them as ‘rivers,’ ‘creeks,’ or ‘streams’” when they do constantly retain water.⁵⁰⁷ The plurality excluded ditches from the definitions of waters and, thus, tributaries.⁵⁰⁸ The plurality similarly excluded “highly artificial, manufactured, enclosed conveyance systems,” even with continuous flows of water.⁵⁰⁹ Therefore, “continuous flow is a *necessary* condition for qualification as a ‘water,’ not an *adequate* condition.”⁵¹⁰

The Obama Rule does not expressly list ditches as something included in the waters of the United States definition. Instead, the Rule expressly excluded three categories of ditches from jurisdiction: (1) ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary; (2) ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands; and (3) ditches that do not flow, either directly or through another water, into a water used, previously used, or susceptible to use in interstate commerce, interstate waters, or the territorial seas.⁵¹¹ Thus, presumably, other ditches that meet the jurisdictional definition and are not expressly excluded could be jurisdictional under the WOTUS Rule. The Trump Rule more broadly excludes ditches.⁵¹² The provisions list ditches as being excluded unless they meet the definition of waters previously used, currently used, or susceptible to use in interstate commerce, tributaries, or are constructed in adjacent wetlands.⁵¹³ In other words, ditches are only jurisdictional if they otherwise meet the qualifications of jurisdiction, not merely because they are ditches.

Courts have struggled to determine how ditches fit into the definition of waters of the United States.⁵¹⁴ However, although the Obama

⁵⁰⁵ *Id.*

⁵⁰⁶ *Rapanos v. United States*, 547 U.S. 715, 799, n.7 (2006) (Stevens, J., dissenting).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ Clean Water Rule, *supra* note 484, at 37,105.

⁵¹² Navigable Waters Protection Rule, *supra* note 489, at 22,295.

⁵¹³ *Id.* at 22,298, 22,299.

⁵¹⁴ Staff Report, *supra* note 301.

Rule and the Trump Rule use different language, the difference in coverage of ditches in the two rules appears to be very similar. In essence, ditches must independently meet the definition of waters of the United States under either rule.

5. Significant Nexus

Indeed, one of the most polarizing topics related to the waters of the United States definition is the concept of significant nexus. Interestingly, the term was only mentioned in passing by Chief Justice Rehnquist in *SWANCC*, where this concept began.⁵¹⁵ No discussion or even mention of the phrase significant nexus appears in the *Riverside Bayview* opinion.

The *Rapanos* plurality opinion found that abutment was the significant nexus in *Riverside Bayview*, and abutment was the only way to establish a significant nexus.⁵¹⁶ Although the Kennedy concurring opinion in *Rapanos* is often referred to as the significant nexus test, Justice Kennedy's opinion would have only applied that test in limited circumstances, namely where the wetland is adjacent to a water other than a navigable-in-fact water.⁵¹⁷ For example, Justice Kennedy would apply the significant nexus test to a wetland adjacent to a non-navigable tributary of a navigable water.⁵¹⁸ However, the significant nexus test would not generally apply to water or wetland within 4,000 feet of the ordinary high-water mark of other waters under Justice Kennedy's view. Only adjacent wetlands would potentially be found as jurisdictional under the significant nexus test.

A fairly simple distinction exists between the two rules when it comes to significant nexus: The Obama Rule includes the test, and the Trump Rule does not. However, the Obama Rule has been misinterpreted to conclude any water with a significant nexus is jurisdictional.⁵¹⁹ The Obama Rule simply does not intend that result. Instead, the Obama Rule provides that certain regional water features bearing a significant nexus to certain jurisdictional waters are included in the definition of waters

⁵¹⁵ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001).

⁵¹⁶ *Rapanos v. United States*, 547 U.S. 715, 755 (2006).

⁵¹⁷ *Id.* at 786 (Kennedy, J., concurring).

⁵¹⁸ *Id.*

⁵¹⁹ Clean Water Rule, *supra* note 484, at 37,058.

of the United States.⁵²⁰ Additionally, and more broadly applicable, the Obama Rule provides that a case-by-case analysis should be determined to include all waters with a significant nexus to waters: previously, currently, or likely to be used in interstate commerce; the territorial seas; and interstate waters located within the 100-year flood-plain, within 4,000 feet of the high tide line or ordinary high-water mark of such waters are waters of the United States.⁵²¹ Conversely, under the Trump Rule, there is no such significant nexus analysis to be conducted, and there are no case-by-case determinations to be made.⁵²²

6. *Chevron* Deference

The three U.S. Supreme Court decisions seem to run the gamut with respect to affording *Chevron* deference to Corps of Engineers regulations and interpretations under the CWA. In *Riverside Bayview*, a unanimous Court deferred to the Corps regulation finding that adjacent wetlands constituted waters of the United States.⁵²³

In *SWANCC*, the majority held that Congress clearly intended to exclude isolated waters from jurisdiction under the CWA under Step 1 of *Chevron*.⁵²⁴ The majority went on to opine that, even if Congress had failed to speak clearly to the point, the justices joining that opinion would not have deferred to the agency due mainly to constitutional concerns.⁵²⁵ The four dissenting justices, on the other hand, reasoned that Congress had not spoken clearly and that the Corps's interpretation, in the form of the Migratory Bird Rule, was reasonable and worthy of deference.⁵²⁶

Finally, a fractured Court in *Rapanos* produced a similarly fractured set of opinions on *Chevron* deference. The plurality opinion did not defer with respect to interpretations of adjacent or tributary.⁵²⁷ In fact, the plurality posited its own interpretation of the term, deeming each as the only reasonable interpretation.⁵²⁸ With respect to adjacency, the plurality found that *Riverside Bayview* controlled and required abutment.⁵²⁹

⁵²⁰ *Id.* at 37,115.

⁵²¹ *Id.* at 37,123, 37,124.

⁵²² See Navigable Waters Protection Rule, *supra* note 489, at 37,123, 37,124.

⁵²³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

⁵²⁴ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 186 (2001).

⁵²⁵ *Id.* at 172.

⁵²⁶ *Id.* at 189.

⁵²⁷ See generally *Rapanos v. United States*, 547 U.S. 715 (2006).

⁵²⁸ *Id.* at 739.

⁵²⁹ *Id.* at 724–25.

Dictionary definitions provided the only reasonable interpretation of waters, and presumably tributaries, for the plurality.⁵³⁰

Chief Justice Roberts joined the plurality but penned a concurring opinion lamenting the fact that the Corps had failed to successfully engage in rule-making after *SWANCC*, while continuing to act as if the agency had unlimited authority.⁵³¹ The Chief Justice pledged deference if the Corps were to promulgate reasonable regulations.⁵³² A dissenting justice, Justice Breyer, also filed a separate dissent to object to Justice Kennedy's writing a substantial nexus requirement into the CWA.⁵³³ Justice Breyer interprets *Rapanos* as a cry for the Corps to write new regulations immediately.⁵³⁴

Justice Kennedy represented the swing vote in *Rapanos*, deferring to the Corps with respect to adjacency, but finding that the Corps's interpretation of tributary went too far.⁵³⁵ Like *SWANCC*, the dissenters in *Rapanos* would have deferred to the Corps with respect to adjacency and tributaries.⁵³⁶

The various opinions muddy the prospects of *Chevron* deference to regulations implementing the CWA. Although Chief Justice Roberts joined three other justices in failing to defer in *Rapanos*, his concurring opinion pledges future deference, conditioned, however, on reasonableness.⁵³⁷ In addition, both the plurality opinion and Justice Kennedy's concurrence presented their findings as absolute and the only reasonable interpretation.⁵³⁸ Given the unique result in *Rapanos v. United States*,⁵³⁹ a question arises as to whether the agency must, in essence, defer to the Court.

The United States District Court for the Southern District of Georgia found that any deference to the Corps's interpretation of waters of the United States has limits.⁵⁴⁰ The plurality opinion, Chief Justice Roberts' concurrence, and Justice Kennedy's concurrence in *Rapanos*

⁵³⁰ *Id.* at 716, 732.

⁵³¹ *Id.* at 758 (Roberts, C.J., concurring).

⁵³² *Id.* (Roberts, C.J., concurring).

⁵³³ *Rapanos*, 547 U.S. at 811 (Breyer, J., dissenting).

⁵³⁴ *Id.* at 811–12 (Breyer, J., dissenting).

⁵³⁵ *Id.* at 780–82 (Kennedy, J., concurring).

⁵³⁶ *Id.* at 794–95, 797, 809–11 (Stevens & Breyer JJ., dissenting); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167, 169–70 (2001).

⁵³⁷ *Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring).

⁵³⁸ *Id.* at 739, 782–83 (Kennedy, J., concurring) (plurality opinion).

⁵³⁹ *Id.*

⁵⁴⁰ *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1354 (S.D. Ga. 2019).

provide those limits.⁵⁴¹ Given that Justice Kennedy and the plurality disagreed on those limits, the boundaries of Justice Kennedy's significant nexus test apply.⁵⁴² Therefore, the extent to which *Chevron* deference applies to agency determinations relating to waters of the United States remains uncertain.

CONCLUSION

An in-depth review of the case law and past and present agency regulations defining the waters of the United States reveals several points that should guide future courts and regulators in this murky area of law.

The focus of the dispute lies mainly on adjacent wetlands. This inquiry, in turn, implicates the interpretations of adjacency and tributaries. Depending on the situation, these interpretations matter because chain adjacency formulations result in wetlands that lie over 100 miles from navigable waters being determined waters of the United States subject to the CWA.⁵⁴³

We label these cases as tributary of a tributary of a tributary cases. Although the U.S. Supreme Court opinions fail to directly confront this issue, the plurality and Kennedy concurrence in *Rapanos* craft rules that attempt to limit chain jurisdiction. The plurality limits attenuated claims of adjacency by requiring adjacency to continuous, relatively permanent waters, and by defining adjacency as actual abutment.⁵⁴⁴ This approach prevents intermittent or ephemeral streams, ditches, and drains from providing the link between the wetland and the non-abutting navigable water. Interestingly, this issue seems most concerning within the Obama Rule, particularly because the Rule includes adjacent *waters*, along with the broad definition of a tributary and the geographic requirements absent any proof of hydrologic connection with regard to adjacency.⁵⁴⁵

On the other hand, Justice Kennedy's significant nexus test posits that wetlands adjacent to navigable-in-fact waters are automatically regarded as waters of the United States, a narrower category of wetlands

⁵⁴¹ *Id.*

⁵⁴² *Id.* at 1355 (citing *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007)).

⁵⁴³ *See United States v. Buday*, 138 F. Supp. 2d 1282, 1282 (D. Mont. 2001).

⁵⁴⁴ *Rapanos*, 547 U.S. at 716–17, 740, 742.

⁵⁴⁵ Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,075–37,080 (June 29, 2015); EPA, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 232–77 (2015).

than those that fall within the plurality's test.⁵⁴⁶ However, wetlands adjacent to other waters, whether intermittent, ephemeral, or otherwise, may be jurisdictional if a significant nexus exists.⁵⁴⁷ The significant nexus test limits chain jurisdiction, at least in theory. The significant nexus test makes jurisdiction more open-ended than the plurality test, but not as open-ended as some courts and commentators believe. Wetlands not adjacent to some type of water (isolated wetlands) do not qualify as jurisdictional under Justice Kennedy's test.

A few points seem to have been resolved by the U.S. Supreme Court decisions:

- (1) Wetlands adjacent (meaning abutting) to navigable waters are jurisdictional (*Riverside Bayview*, *Rapanos* plurality, *Rapanos* Kennedy concurrence);⁵⁴⁸
- (2) The Corps's definition of adjacent as examined in *Rapanos* is reasonable (*Rapanos* dissent, *Rapanos* Kennedy concurrence);⁵⁴⁹
- (3) The Corps's interpretation of tributary as it existed at the time of the *Rapanos* decision is not reasonable (*Rapanos* plurality, *Rapanos* Kennedy concurrence).⁵⁵⁰

However, since the Court's makeup has changed significantly since the *Rapanos* decision, and some of these conclusions are less than clear, the Court may not feel compelled to find clear conclusions from these opinions. Just as interpretations of the 9–0 decision in *Riverside Bayview* have received wildly different interpretations, so too might members of the Court interpret the 5–4 decisions in *SWANCC* and *Rapanos* differently. Only Chief Justice Roberts and Justices Alito, Breyer, and Thomas remain among the justices in *Rapanos*. Only one of those four, Breyer, dissented.⁵⁵¹ The other three were included in the plurality. Replacing Justices Ginsburg, Kennedy, Scalia, Souter, and Stevens are Justices

⁵⁴⁶ *Rapanos*, 547 U.S. at 767, 780, 782 (Kennedy, J., concurring).

⁵⁴⁷ *Id.* at 779 (Kennedy, J., concurring).

⁵⁴⁸ Additionally, this is true under both the Obama and Trump Rules as well. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131–32 (1985); *Rapanos*, 547 U.S. at 765–66, 782 (Kennedy, J., concurring).

⁵⁴⁹ *Rapanos*, 547 U.S. at 775, 793, 811 (Kennedy, J., concurring) (Stevens & Breyer JJ., dissenting).

⁵⁵⁰ *Id.* at 726, 780–81 (Kennedy, J., concurring) (plurality opinion).

⁵⁵¹ *Id.* at 715, 811.

Barrett, Gorsuch, Kagan, Kavanaugh, and Sotomayor.⁵⁵² How the new makeup of Justices might interpret and apply the fractured and complex *Rapanos* decision remains to be seen.

An additional unanswered question related to deference is to which rule the Court would defer. The Obama Rule was published, and lawsuits filed in 2015.⁵⁵³ Litigation was dismissed or stayed with the Trump administration's rescinding the Obama Rule in 2017.⁵⁵⁴ The Trump Rule was published in 2020⁵⁵⁵ but may be in jeopardy with the Biden administration in place. Where there exist competing rules—such as the Obama and Trump Rules—which would receive the Court's deference? The rule reaching the Justices first? Could the Obama Rule reach the Court despite additional rules being promulgated and in place afterwards?

Further, to what extent, if any, must the agency defer to the Court precedent when drafting rules defining waters of the United States? Certainly, the opinions provide some guidance on how to interpret adjacency and tributaries, but what if the agency were to completely rewrite a definition and avoid using these terms? Would this precedent apply?

The history of the debate over the meaning of these five words, “waters of the United States” has been long, complex, and confusing. While the debate can be boiled down into questions like “what is an adjacent wetland” and “what qualifies as a tributary” history has shown that reaching answers to these seemingly simple questions is anything but. In the midst of this madness, Justice Scalia may have best described this controversy as “turtles all the way down.”⁵⁵⁶

⁵⁵² U.S. SENATE, SUPREME COURT NOMINATIONS (1789–PRESENT) (2015), <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/2WRE-G8LL>].

⁵⁵³ CONG. RSCH. SERV., “WATERS OF THE UNITED STATES” (WOTUS): CURRENT STATUS OF THE 2015 CLEAN WATER RULE 7 (2018).

⁵⁵⁴ *Georgia v. Wheeler*, 418 F. Supp. 3d 1343, 1349 (S.D. Ga. 2019).

⁵⁵⁵ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,250 (Apr. 21, 2020).

⁵⁵⁶ *Rapanos*, 547 U.S. at 754 n.14.