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Evolution of the Meaning of "Waters of the United States" in the Clean Water Act

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Summary

The scope of waters that are properly the subject of federal water pollution legislation has been the subject of long-standing consideration by all three branches of the federal government, particularly in the aftermath of the 1972 amendments to the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act. In a shift from early water pollution legislation, those amendments eliminated the requirement that the federally regulated waters—known as jurisdictional waters—must be navigable in the traditional sense, meaning that they are capable of being used by vessels in interstate commerce. Rather than use classical tests of navigability, the amendments redefined "navigable waters" for purposes of the Clean Water Act's jurisdiction to include "the waters of the United States, including the territorial seas." Disputes over the proper meaning of that phrase have been ongoing.

Some courts and commentators also disagree on how the scope of federal jurisdictional waters changed over time as a result of interpretative approaches taken by the federal agencies responsible for administering the Clean Water Act—the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). While some believe EPA and the Corps consistently expanded the meaning of "waters of the United States," others contend that, in recent years, the agencies have construed the term in a narrower fashion than permitted under the Clean Water Act. In 2015, the Corps and EPA issued a new rule, known as the Clean Water Rule, that substantially redefined "waters of the United States" in the agencies' regulations for the first time in more than two decades. Some observers disagree on whether the Clean Water Rule constitutes an expansion of jurisdiction over waters not previously regulated. This report provides context for this debate by examining the history of major changes to the meaning of "waters of the United States" as expressed in federal regulations, legislation, agency guidance, and case law.

The Clean Water Act uses the phrase "waters of the United States," but it does not include a statutory definition of that term. The long-standing disagreement over the meaning of that phrase has centered on the degree to which the Clean Water Act should be interpreted as covering the widest amount of "waters" that could permissibly be federally regulated under the Constitution, or whether that term should be interpreted in a more limited fashion.

Federal authority to regulate waters within the United States primarily derives from the Commerce Clause, and accordingly, federal laws and regulations concerning waters of the United States cannot cover matters which exceed that constitutional source of authority. During the first two decades after the passage of the Clean Water Act, courts generally interpreted the act as having a wide jurisdictional reach. In recent decades, however, the Supreme Court has emphasized that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." This modern Commerce Clause jurisprudence has informed federal courts' approach to interpreting which "waters" are subject to the Clean Water Act.

Most recently, courts have taken up legal challenges to the Clean Water Rule. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit stayed its enforcement, and the House version of the FY2017 Interior-Environment appropriations bill (H.R. 5538) would block its application by prohibiting the use of appropriated funds to implement changes to the meaning of jurisdictional waters beyond those that were in effect on October 1, 2012.

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Introduction

The scope of waters that are properly the subject of federal water pollution legislation has been the subject of long-standing consideration by all three branches of the federal government, particularly in the aftermath of the 1972 amendments to the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act. In a shift from prior water pollution legislation, those amendments eliminated the requirement that the federally regulated waters—known as jurisdictional waters—must be navigable in the traditional sense,[1] meaning that they are capable of being used by vessels in interstate commerce.[2] Rather than use classical tests of navigability developed in the 19th century,[3] the Clean Water Act redefined "navigable waters" for purposes of federal regulatory jurisdiction to include "the waters of the United States, including the territorial seas."[4] Disputes over the proper meaning of that phrase have been ongoing.

Some courts and commentators also disagree on how the scope of federal jurisdictional waters changed over time as a result of interpretative approaches taken by the agencies responsible for administering the Clean Water Act—the Environmental Protection Agency (EPA) and the U.S Army Corps of Engineers (Corps). While some believe EPA and the Corps consistently expanded the meaning of "waters of the United States," others contend that, in recent years, the agencies have construed the term in a narrower fashion than permitted under the Clean Water Act.[5] This

[1] In *Riverside Bayview Homes v. United States*, 474 U.S. 121, 132-33 (1985), the Supreme Court explained that, in the 1972 Clean Water Act amendments, "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes, and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." The Commerce Clause gives Congress the power to "regulate commerce with foreign nations, and among the several states...." U.S. CONST. art. 1, §8, cl. 3.

[2] *See The Daniel Ball*, 77 U.S. 557, 563 (1870) (construing the term "navigable waters," as employed in federal statutes at issue, as covering those waters that are "used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water"); The Montello, 87 U.S. 430, 441-42 (1874) ("If [the subject water] be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."); United States v. Holt State Bank, 270 U.S. 49 (1926) ("The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water[.]").

[3] At common law, only waters subject to the ebb and flow of tide were held to be navigable waters subject to federal jurisdiction. *See The Daniel Ball*, 77 U.S. at 563; Nelson v. Leland, 63 U.S. 48, 55 (1860). This rule was largely due to the fact that, given the geography of England, there were few waters which were susceptible to use in commerce that were not also subject to the ebb and flow and tide. *See The Daniel Ball*, 77 U.S. at 563. Based on geographic differences and the recognition that "[s]ome of our [American] rivers are as navigable for many hundreds of miles above as they are below the limits of tide water," American courts in the 19th century departed from the common law rule and began to analyze whether waters were "navigable-in-fact." *Id.*; *see also*, *e.g.*, *Nelson*, 63 U.S. at 55-56 (distinguishing between admiralty jurisdiction exercised in England and in the United States); Escanaba Cnty. v. Chicago, 107 U.S. 678, 682-83 (1883) (describing how the common law rule "has long since been discarded in this country").

[4] *See* 33 U.S.C. §1362(7).

[5] *Compare*, *e.g.*, Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion) (Scalia, J.) (describing "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations") *and* Jamison E. Colburn, *Waters of the United States, Theory, Practice, and Integrity at the Supreme Court*, 34 FLA. ST. U. L. REV. 183, 199 (2007) (explaining "how two relatively conservative administrative agencies gradually decided, in six different Presidential administrations, to expand federal jurisdiction as dramatically as they have") *with* Jon Devine et al., *The Historical Scope of Clean Water Act Jurisdiction*, ENVTL. FORUM, July/August 2012, at 57, (attempting to "refute[] the contention

debate resurfaced most recently in May 2015 when the Corps and EPA issued a rule, known as the Clean Water Rule, which substantially redefined "waters of the United States" in the agencies' regulations for the first time in more than two decades.[6] EPA and the Corps contend that the Clean Water Rule governs only waters that have been historically regulated under the Clean Water Act, but its opponents argue that it constitutes an unlawful expansion of authority beyond that which is allowed in the act or the Constitution.[7] This report provides context for this debate by examining the history of major changes to the meaning of "waters of the United States" as expressed in federal regulations, legislation, agency guidance, and case law.[8]

Background

The Clean Water Act is the principal law governing pollution of the nation's surface waters.[9] Among other requirements, the act prohibits the unauthorized discharge of pollutants into "navigable waters,"[10] and requires persons wishing to discharge dredged or fill material into "navigable waters" to obtain a permit from the Corps.[11] In its definition section, the act defines the term "navigable waters" to mean "waters of the United States, including its territorial seas."[12]

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that the Corps and EPA have steadily expanded their assertions of the [Clean Water] [A]ct's scope" and arguing "that the agencies have actually retreated from the jurisdictional scope initially intended and asserted for the CWA") *and* Envtl. Prot. Agency & Dep't of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, 18-34 (May 27, 2015), https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf [hereinafter Technical Support for the Clean Water Rule] (discussing the history of regulatory definitions of "waters of the United States" and asserting that the Clean Water Rule represents a contraction in jurisdiction).

[6] *See infra* "The Clean Water Rule."

[7] *See infra* "Response to the Clean Water Rule."

[8] While this report outlines many notable changes to the definition of "waters of the United States," it does not address every agency interpretation or application of that phrase. For example, the report does not address most property-specific applications of the definition of "waters of the United States," such as those made in National Pollutant Discharge Elimination System Permit (NPDES) decisions, *e.g.*, Envtl. Prot. Agency, Off. of Gen. Counsel, Opinion No. 21, In re Riverside Irrigation District, LTD and 17 Others (June 27, 1975), 1975 WL 23864, at *1-5 (interpreting the Clean Water Act and EPA's definition of "waters of the United States" in its regulations to determine whether an NPDES permit may be required for irrigation return flow canals and irrigation and drainage ditches); Section 404 dredge and fill permit decisions, ORM Jurisdictional Determinations and Permit Decisions, U.S. ARMY CORPS OF ENG'RS, http://corpsmapu.usace.army.mil/cm_apex/f?p=340:2:0::NO (last visited July 28, 2016) (database of Section 404 permit decisions), or jurisdictional determinations, ORM Jurisdictional Determinations and Permit Decisions, U.S. ARMY CORPS OF ENG'RS, http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO (last visited July 28, 2016) (database of jurisdictional determinations); U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 578 U.S. ___, 136 S. Ct. 1807 (2016) (providing background on the process of providing jurisdictional determinations as to whether a specific parcel is subject to Section 404's dredge and fill permit requirements). This report also does not address minor changes among EPA's various regulatory definitions which do not reflect a change in the agency's overall interpretation of the scope of waters of the United States. *See, e.g.*, Envtl. Prot. Agency, Off. of Gen. Counsel, Opinion No. 77-3, Clarification of the Term "Navigable Waters" as it is Presently Used in FWPCA Regulations and Guidelines (February 28, 1977), 1977 WL 28236 (discussing differences among EPA's definitions and proposals to streamline the definition).

[9] *See* Michael Goldman, Symposium, *Drilling into Hydraulic Fracturing and Shale Gas Development: A Texas and Federal Environmental Perspective*, 19 TEX. WESLEYAN L. REV. 185, 191 (2012); Walter G. Wright, Jr. & Albert J. Thomas III, *The Federal/Arkansas Water Pollution Control Programs: Past Present and Future*, 23 U. ARK. LITTLE ROCK L. REV. 541, 550 (2001); CRS Report RL30030, *Clean Water Act: A Summary of the Law*, by Claudia Copeland, at 1.

[10] 33 U.S.C. §1311(a).

[11] *Id.* §1344.

[12] *Id.* §1362(7).

This single, jurisdiction-defining phrase applies to the entire law, including the national pollutant discharge elimination system (NPDES) permit program;[13] permit requirements for disposal of dredged or fill material, known as the Section 404 program;[14] water quality standards and measures to attain them;[15] oil spill liability and prevention;[16] and enforcement.[17]

Key Terminology

Navigable-in-fact waters: A term of art developed by courts to describe waters that are navigable in the traditional sense, meaning they are capable of being used by vessels in interstate commerce.[18]

Navigable waters of the United States: A statutory phrase often used in pre-Clean Water Act legislation, which courts generally interpreted to mean navigable-in-fact waters.[19]

Interstate waters: Waters which form a part of state's boundary.[20]

Navigable waters: An anomalous term as used in the Clean Water Act. The Clean Water Act governs "navigable waters,"[21] but this phrase is defined within the statute such that it is not limited to waters that are navigable-in-fact.

Waters of the United States: The jurisdiction-defining phrase in the Clean Water Act. That statute generally regulates "navigable waters," but it defines that term to mean "the Waters of the United States, including the territorial seas."[22]

Jurisdictional waters: A term of art used by courts to describe those waters subject to federal regulatory jurisdiction under the Clean Water Act.[23]

The Clean Water Act itself does not expand further on the meaning of "waters of the United States." Instead, the Corps and EPA have expounded on this phrase through agency guidance and regulations, which, at various times, have been stricken down or modified as a result of legal challenges. These legal challenges—particularly those which were successful—can be seen to have followed broader trends in interpretation of the Commerce Clause,[24] which gives Congress the power to "regulate commerce with foreign nations, and among the several states...."[25]

Federal court review of the Corps' and EPA's interpretation of which "waters" are subject to the Clean Water Act has been informed by both statutory and constitutional considerations, including whether an agency's interpretation could potentially enable it to regulate matters beyond the constitutional reach of the federal government as interpreted in recent Supreme Court case law. Federal authority to regulate waters within the United States primarily derives from the Commerce Clause.[26] Accordingly, federal laws and regulations concerning waters of the United

[13] *Id.* §1342.

[14] *Id.* §1344.

[15] *Id.* §1313.

[16] *Id.* §1321.

[17] *Id.* §1319.

[18] *See, e.g.*, PPL Mont., LLC v. Montana, 565 U.S. __, 132 S. Ct. 1215, 1219 (2012) (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1871)).

[19] *See, e.g.*, *The Daniel Ball*, 77 U.S. at 563.

[20] *See* Federal Water Pollution Control Act of 1948, P.L. 845, 62 Stat. 1155, 1161.

[21] 33 U.S.C. §1362(7).

[22] *Id.*

[23] *See, e.g.*, U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 578 U.S. ___, 136 S. Ct. 1807, 1814 (2016).

[24] *See infra* "Judicially Imposed Limitations Beginning in the Late 1990s."

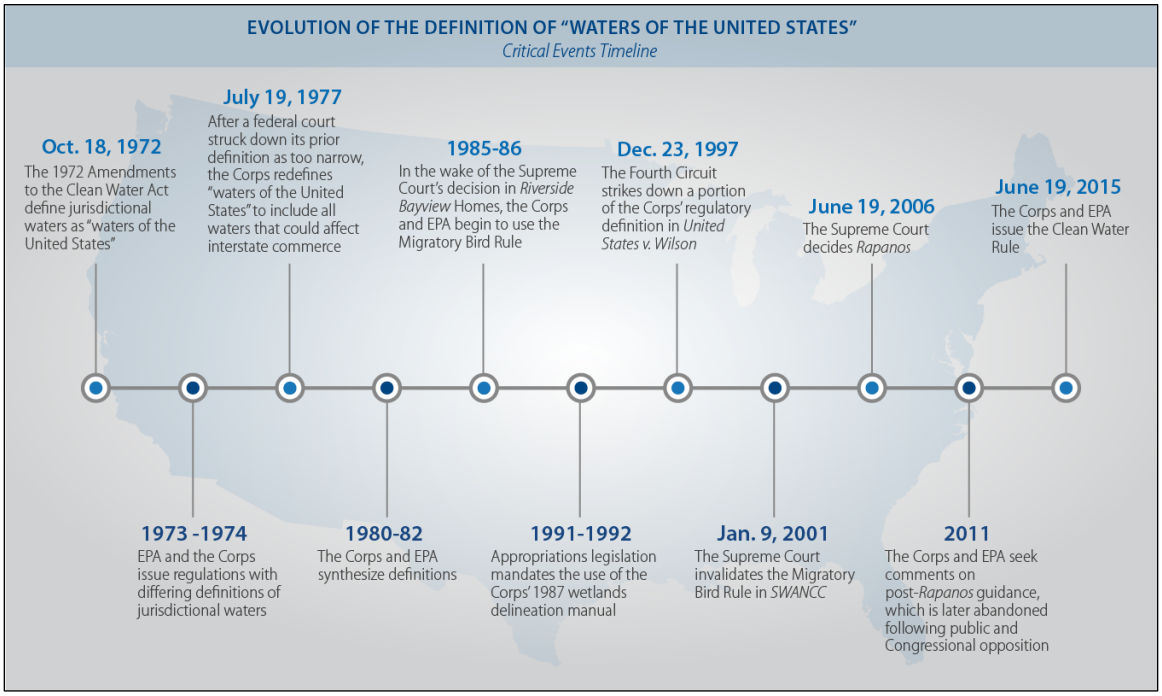
[25] U.S. CONST. art. 1, §8, cl. 3.

[26] *See* Gilman v. Philadelphia., 70 U.S. 713, 724-725 (1866) ("The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are

States cannot cover matters which exceed that constitutional source of authority.[27] For a period after its enactment in 1972, courts generally interpreted the Clean Water Act as having a wide jurisdictional reach, but, in recent decades, the Supreme Court has emphasized that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."[28]

A time line of events in the evolution of the definition of "waters of the United States" is provided in the **Appendix**, and major events are shown in **Figure 1**.

Figure 1. Major Events in the Evolution of "Waters of the United States"



Source: Congressional Research Service, based on the sources cited in this report.

accessible from a State other than those in which they lie."); Gibbons v. Ogden, 22 U.S. 1 (1824) (concluding that Congress had authority under the Commerce Clause to license steamboat operations in New York waters); see also Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (discussing Congress's invocation of the Commerce Clause powers in enacting the Clean Water Act).

[27] *See, e.g.*, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173-74 (2001) (declining to interpret jurisdictional reach of the Clean Water Act in a manner which may exceed the limits of the Commerce Clause).

[28] *See id.* at 172 (citing United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995)).

The Early History of Jurisdictional Waters

Historically, federal laws regulating waterways, such as the Rivers and Harbors Appropriations Act of 1899 (Rivers and Harbors Act), exercised jurisdiction over "navigable water[s] of the United States[.]"[29] The Supreme Court interpreted this phrase to govern only waters that were "navigable-in-fact"—meaning that they were "used, or are susceptible of being used, ... as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[30]

Beginning with the Federal Water Pollution Control Act of 1948, Congress began to use a different jurisdiction-defining phrase in which it regulated "interstate waters," defined as "all rivers, lakes, and other waters that flow across, or form a part of, a State's boundaries."[31] That legislation was amended in 1961 to expand federal jurisdiction from "interstate waters" to "interstate or navigable waters[.]"[32]

The Federal Water Pollution Control Act Amendments of 1972,[33] which have commonly become known as the Clean Water Act,[34] also amended the jurisdictional reach of federal water pollution legislation. There, Congress again exercised jurisdiction over "navigable waters," but provided a new definition of that phrase that was not used in prior legislation, stating the following: "The term 'navigable waters' means the waters of the United States, including the territorial seas."[35] This subtle definitional change proved to have tremendous consequences for the jurisdictional scope of the Clean Water Act.

In debating the 1972 amendments that created the Clean Water Act, some Members of Congress explained that the revised definition was intended to expand the law's jurisdiction beyond traditionally navigable or interstate waters. The conference report states that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation...."[36] And during debate in the House on approving the conference report, one Representative explained that the definition "clearly encompasses all water bodies, including

[29] *See* Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1121, 1151 (codified in 33 U.S.C. §401) ("It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any ... navigable water of the United States until the consent of Congress shall have been obtained...."); An Act to Provide Security for the Lives of Passengers on Board of Vessels Propelled by Steam, 5 Stat. 304 (1838) (providing that "it shall not be lawful for the owner ... of any steamboat ... to transport any goods, wares, merchandise or passengers, in or upon ... navigable waters of the United States ... without having first obtained ... a license").

[30] *See The Daniel Ball*, 77 U.S. 557, 563 (1870). Waters, the Court explained in *The Daniel Ball*, "constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a containued [sic] highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Id.*

[31] *See* Federal Water Pollution Control Act of 1948, P.L. 845, §10(e), 62 Stat. 1155, 1161.

[32] *See* Federal Water Pollution Control Act Amendments of 1961, P.L. 87-88, §8(a), 75 Stat. 204, 208 (codified in 33 U.S.C. §1160(a) (1970)).

[33] P.L. 92-500, 86 Stat. 816.

[34] *See* History of the Clean Water Act, ENVTL. PROT. AGENCY (May 25, 2016), https://www.epa.gov/laws-regulations/history-clean-water-act.

[35] *See* Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, §502(7), 86 Stat. 816, 886 (codified in §1362(7)).

[36] S.Rept. 92-1236, at 144 (1972) (Conf. Rep.).

streams and their tributaries, for water quality purposes."[37] Courts have frequently referred to this legislative history when interpreting the scope of the Clean Water Act.[38]

Differing Agency Definitions Following the Clean Water Act

The Corps and EPA share responsibilities for administering the Clean Water Act. Both agencies have administrative responsibilities under Section 404 of the act,[39] and EPA exclusively administers most other Clean Water Act-related programs.[40] As a consequence of this dual jurisdiction, both agencies create regulations defining the waters subject to their regulatory jurisdiction.[41] In the initial years following the enactment of the Clean Water Act, their respective definitions differed significantly.[42]

EPA's Initial Definition

EPA issued its first internal definition of jurisdictional waters in a February 6, 1973, memorandum from its Office of the General Counsel.[43]

[37] *See* 118 Cong. Rec. 33,757 (1972) (statement of Rep. Dingell).

[38] *See, e.g.*, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 180-81 (2001) (Stevens, J., dissenting) (discussing the conference report and changes to the House version of the 1972 amendments); Riverside Bayview Homes v. United States, 474 U.S. 121, 132-33 (1985) (citing, among other things, the conference report and statements of Rep. Dingell); United States v. Holland, 373 F. Supp. 665, 667-73 (M.D. Fla. 1974) (discussing legislative history of the 1972 amendments).

[39] *See* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1991-92 (January 15, 2003) (providing background on the agencies' roles in administering the Clean Water Act); Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 814 n.6 (2003) (discussing the division of administrative responsibility under the Clean Water Act); CRS Report RL30030, *supra* note 9, at 6 (discussing the joint administration of Section 404).

[40] *See* 33 U.S.C. §1251(d) (stating that EPA will implement the Clean Water Act unless expressly stated otherwise); Benjamin R. Civiletti, *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Op. Att'y Gen. 197, 197 (1979) ("Congress intended to confer upon the administrator of the [EPA] the final administrative authority to determine ... the reach of the term 'navigable waters'....").

[41] *See* 33 C.F.R. §328.3 (2016) (containing the Corps' definition of "waters of the United States"); 40 C.F.R. §122.2 (2016) (including one EPA definition of "waters of the United States").

[42] *See* Bradford Mank, *Implementing Rapanos—Will Justice Kennedy's Significant Nexus Text Provide a Workable Standard for Lower Courts, Regulators and Developers?*, 40 IND. L. REV. 291, 300 (2007) ("From 1972 until 1975, the EPA and the Corps disagreed about the scope of the [Clean Water] Act's jurisdiction.").

[43] *See* Envtl. Prot. Agency, Off. of Gen. Counsel, Meaning of the Term "Navigable Waters" (February 13, 1973), 1973 WL 21937. Prior to the General Counsel's memorandum, EPA published a notice of proposed rule in which it repeated, without expanding upon, the statutory definition of "navigable waters." *See* Notice of Proposed Rulemaking, National Pollutant Discharge Elimination System, 38 Fed. Reg. 1362, 1363 (January 11, 1973). Both the Corps and EPA initially addressed the definition of "navigable waters" in their Clean Water Act regulations rather than elaborate on the meaning of "waters of the United States."

EPA's First Internal Definition of Jurisdictional Waters[44]

In a February 6, 1973, memorandum from its Office of the General Counsel, EPA proposed to define jurisdictional waters through six categories:

(1) all navigable waters of the United States;

(2) tributaries of navigable waters of the United States;

(3) interstate waters;

(4) interstate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;

(5) interstate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

(6) interstate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

EPA, however, never incorporated this definition in its regulations. Instead, it published its first set of regulations implementing the Clean Water Act's NPDES program later in 1973, in which it largely adopted the general counsel's recommended definition, but with one critical change: EPA revised categories four through six to include *intrastate* lakes, rivers, and streams which are utilized for interstate activities.[45]

The Corps' Initial Definition

The Corps' early implementation of the 1972 amendments differed considerably from EPA's regulations.[46] After initially proposing regulations that simply repeated the statutory definition of "navigable waters,"[47] the Corps issued final regulations in April 1974.[48] There, the Corps acknowledged the language from the conference report for the Clean Water Act as calling for the "broadest possible constitutional interpretation" of navigable waters, but concluded that the Constitution limited its jurisdiction to the same waters which it regulated under preexisting laws, such as the Rivers and Harbors Act.[49] Based on this reasoning, the Corps defined "navigable

[44] *See* Envtl. Prot. Agency, Off. of Gen. Counsel, Meaning of the Term "Navigable Waters" (February 13, 1973), 1973 WL 21937.

[45] *See* National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13,529 (1973) (codified at 40 C.F.R. §125.1(p) (1974)). EPA issued a similar, but slightly modified definition of "navigable waters" in its regulations implementing the 1972 amendments' oil pollution prevention provisions. *See* Oil Pollution Prevention, 38 Fed. Reg. 34,164, 34,165 (December 11, 1973) (codified in 33 C.F.R. §112.2(k) (1974)). This definition did not include intrastate waters used for industrial purposes interstate commerce (Category 6), and it expanded upon on the first category as follows: "all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 amendments...." *see id.* Other EPA regulations at the time repeated the statutory definition of "navigable waters" without expanding upon it. *See* Envtl. Prot. Agency, Off. of Gen. Counsel, Opinion No. 77-3, Clarification of the Term "Navigable Waters" as it is Presently Used in FWPCA Regulations and Guidelines (February 28, 1977), 1977 WL 28236 (discussing differences among EPA's definitions).

[46] *See* Mank, *supra* note 42, at 300.

[47] *See* Proposed Policy, Practice, and Procedure: Permits for Activities in Navigable Waters or Ocean Waters, 38 Fed. Reg. 12,217, 12,218 (May 10, 1973).

[48] Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,119 (April 3, 1974) (codified in 33 C.F.R. §209.120(d)(1) (1974)).

[49] *See id.* at 12115.

waters" using language that generally limited its jurisdiction to waters that were navigable-in-fact.[50]

The Corps' First Definition of Jurisdictional Waters

In its first set of final regulations implementing Section 404, the Corps equated the "navigable waters" regulated under the Clean Water Act with traditionally navigable waterways regulated under preexisting federal laws like the Rivers and Harbors Act:

> The term "navigable waters of the United States" and "navigable waters," as used herein mean those waters of the United States 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....[51]

Callaway and its Aftermath

Less than one year after the Corps published its first regulations defining jurisdictional waters, the United States District Court for the District of Columbia struck them down as too narrow and inconsistent with the Clean Water Act.[52] In *Natural Resources Defense Council v. Callaway*, the court held that because "Congress ... asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution[,]" the definition could not be limited to "traditional tests of navigability[.]"[53] The court ordered the Corps to produce new regulations which acknowledged "the full regulatory mandate" of the Clean Water Act.[54]

The Corps' Expansion of Jurisdictional Waters Following *Callaway*

The Corps responded to *Callaway* on May 6, 1975, by publishing proposed regulations which offered four alternative methods of redefining the Corps' jurisdiction under the 1972 amendments.[55]

[50] *See* 33 C.F.R. §209.12(d)(1) (1974); *see also* 33 C.F.R. §209.260(e)(1) (1974) ("[I]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.").

[51] 33 C.F.R §209.12(d)(1) (1974).

[52] *See* Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

[53] *See* Callaway, 392 F. Supp. 685 Courts prior to *Callaway* also concluded that regulatory jurisdiction under the 1972 Amendments extended to waters that were not navigable-in-fact. *See, e.g.*, United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1129-30 (6th Cir. 1974) (holding that Congress intended to control discharge of pollutants into nonnavigable tributaries which flowed into navigable waters, and that this exercise of authority was constitutional); United States v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974) (holding that Congress intended to address "the pollution of non-navigable mosquito canals and mangrove wetland areas").

[54] *See* Callaway, 392 F. Supp. at 685. Although the court ordered the Corps to publish final regulations within 30 days, it later extended its original deadlines. *See* Proposed Policy, Practice and Procedure: Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 19,766 (May 6, 1975).

[55] *See* Proposed Policy, Practice and Procedure: Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. at 19,766.

The Corps' Four Proposed Alternatives Following *Callaway*

Following *Callaway*, the Corps published four proposed alternative scenarios in which it would evaluate Section 404 permits:

Alternative 1: Extend the Corps' jurisdiction to "virtually every coastal and inland artificial or natural waterbody[,]" and apply the Corps' permitting process to "all disposal of dredged or fill material in virtually every wetland contiguous to coastal waters, rivers, estuaries, lakes, streams and artificial waters...."

Alternative 2: Limit jurisdiction to waters subject to the ebb and flow of tide and navigable-in-fact inland waters and their primary tributaries.

Alternative 3: Apply the jurisdictional authority in Alternative 1, but utilize only the Corps' standard permitting process for navigable-in-fact waters. For waters that are not navigable-in-fact,[56] the Corps would approve permits unless the state objects.

Alternative 4: Apply the limited jurisdiction in Alternative 2 and the limited permitting process of Alternative 3. The Corps stated that Alternative 4 was its preferred approach.[57]

At the same time that it proposed these alternatives, the Corps published a press release stating that the holding of *Callaway* may require "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion" to obtain federal permits.[58] These events brought significant public and media attention to the breadth of jurisdiction under the Clean Water Act.[59] It also created a disagreement between the Corps and EPA,[60] and led to a series of subcommittee hearings in the House and Senate.[61]

In the aftermath of this attention, the Corps issued interim final regulations in 1975 in which it revised the definition of "navigable waters" by adopting much of the structure used in EPA's 1973 regulations.[62] The Corps' definition also added "wetlands, mudflats, swamps, marshes, and

[56] In its early regulations implementing the Clean Water Act, the Corps did not use the phrase "navigable-in-fact," and instead used the phrase "navigable waters of the United States," which was derived from prior laws such as the Rivers and Harbors Act. *See id.* at 17,968. Because of the similarity of language, and to provide clarity, this report uses the phrase "navigable-in-fact" to refer to traditionally navigable waters.

[57] *See id.* at 19,766.

[58] *See* Press Release, Dep't of the Army, Office of the Chief of Eng'rs (May 6, 1975), reprinted in *Section 404 of the Federal Water Pollution Control Act Amendments of 1976, Hearings Before the Senate Comm. on Public Works*, 94th Cong., 517 (1976).

[59] *See, e.g.*, *Army Engineers Seek Control of All Waters, Down to Ponds*, NEW YORK TIMES, May 7, 1975, at 12, PROQUEST; *Wetlands and the Corps of Engineers*, WASHINGTON POST, June 3, 1975, at A18, PROQUEST. The Corps received over 4,500 comments on its proposed regulations, including comments from a "large number of Governors; members of Congress; Federal, State, and local agencies;" interest groups and members of the public. *See* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975).

[60] EPA responded to the press released by accusing the Corps of misleading the public. Letter from Russell E. Train, EPA Admin., to Lt. Gen. William C. Gribble, Jr., Chief of Eng'rs, U.S. Army Corps. of Eng'rs (May 16, 1975), reprinted in *Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Hearings Before the Senate Comm. on Public Works*, 94th Cong., 528-29 (1976) (stating that the public confusion and misunderstanding "is directly attributable to the seriously inaccurate and misleading press release issued by the Corps").

[61] *See Development of New Regulations by the Corps of Engineers, Implementing Section 404 of The Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the H. Comm. On Public Works and Transportation*, 94th Cong. (1995); *see also* Joanne M. Frasca, *Federal Control of Wetlands: The Effectiveness of Corps' Regulations under 404 of the FWPCA*, 51 NOTRE DAME LAW. 505, 506 & n.11 (1976) (citing and discussing hearings held on July 15, 16, and 22, 1975).

[62] *Compare* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324 (July 25, 1975) [hereinafter 1975 Interim Final Rule] (codified in 33 C.F.R. §209.129(d)(2) (1976)) (Corps' revised definition) *with* 40

shallows" that are "contiguous or adjacent to other navigable waters" and "artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters" to the definition of "waters of the United States."[63]

The Corps' 1977 Regulations

In 1977, the Corps issued final regulations reorganizing the definition of "waters of the United States" into five categories.[64]

The Corps' 1977 Definition and Its Commerce Clause-Focused Provision

The Corps reorganized the definition of "waters of the United States" in 1977, with Category 5 waters containing its broadest definition of jurisdictional waters as of that date:

> (1) The territorial seas with respect to the discharge of fill material ... ;
>
> (2) Coastal and inland waters, lakes, rivers, and streams that are [navigable-in-fact], including adjacent wetlands;
>
> (3) Tributaries to navigable waters of the United States ... ;
>
> (4) Interstate waters and their tributaries, including adjacent wetlands; and
>
> (5) All other waters of the United States not identified in Categories 1-3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters ... the destruction of which could affect interstate commerce.[65]

The final category of the 1977 definition contained the Corps' most expansive definition of jurisdictional waters as of that time. A footnote to the Corps' regulations explained that the Category Five waters incorporate "all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate

C.F.R. §125.1(p) (1974) (EPA's definition of "navigable waters" for purposes of the Clean Water Act oil pollution prevention program).

[63] *See* 1975 Interim Final Rule, 40 Fed. Reg. at 31,324. The 1975 Interim Final Rule used a phased approach in which the Corps expanded its authority in three phases to be completed by 1977. See *id.* at 31,325-26. Phase I, which was immediately effective, included coastal waters and inland navigable-in-fact waters and their adjacent wetlands. *See id.* at 31, 321-26. Phase II, which took effect on July 1, 1976, extended to lakes and primary tributaries of Phase I waters, as well as wetlands adjacent to the lakes and primary tributaries. *Id.* Phase III, which took effect on July 1, 1977, extended to all remaining areas encompassed by the regulations. *Id.* at 31,325.

[64] *See* Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977) [hereinafter 1977 Corps Rule]. Rather than continue to adjust the meaning of "navigable waters," the Corps expanded upon the meaning of the phrase "waters of the United States" as its method of defining its regulatory jurisdiction in the 1977 Corps Rule. *See id.* at 37,127 ("Many suggested that we change our nomenclature of the term 'navigable waters' and refer to our jurisdiction under Section 404 [of the Clean Water Act] as 'waters of the United States.' ... We have adopted this suggestion and feel that it will assist in distinguishing between the Section 404 program and the types of waters that are subject to the permit programs administered under the [Rivers and Harbors Act].").

[65] *See* 33 C.F.R. §323.2(a) (1978).

commerce."[66] The Corps would continue to use this Commerce Clause-focused provision (with revisions) in its regulations through 2014,[67] and EPA would later adopt it in its regulations.[68]

The Clean Water Act of 1977

After the Corps' 1975 and 1977 regulations, bills were introduced which sought to limit the Clean Water Act's jurisdiction to traditional, navigable-in-fact waters.[69] This limiting legislation never became law. Instead, Congress amended the Federal Water Pollution Control Act through the Clean Water Act of 1977, which did not alter the jurisdictional phrase "waters of the United States."[70]

The original version of the Clean Water Act of 1977 introduced in the House would have limited the Corps' jurisdiction,[71] and an amendment proposed in the Senate sought similar limitations,[72] but the original Senate version, which generally retained the existing definition of "navigable waters," was adopted in conference and passed into law.[73] The Clean Water Act of 1977, as enacted, contained certain exemptions from Section 404 permitting for "normal farming, silviculture, ... ranching[,]" and other activities.[74]

Synthesizing Definitions Following the Clean Water Act of 1977

While the 1977 legislation appeared to temporarily resolve some congressional dispute over the reach of the Clean Water Act, disagreement arose between the Corps and EPA over which agency had final authority to determine which waters were subject to Section 404 permit requirements.[75] EPA independently defined the jurisdictional reach of the Clean Water Act as it related to the programs like NPDES and oil pollution prevention,[76] but it incorporated the Corps' definition into

[66] *See* 33 C.F.R. §323.2(a)(5) n.2 (1978).

[67] *See* 33 C.F.R. §328.3(a)(3) (2014) (defining "waters of the United States" to include, among other things, "[a]ll 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").

[68] *See* 40 C.F.R. §122.3 (1981).

[69] *See e.g.* S. 867, 95th Cong. (1977) (amending the definition of "navigable waters" to exclude water wholly contained on private property, under the jurisdiction of a state and local government, or which is not susceptible to use as a means to transport commerce); H.R. 3199, 95th Cong. (1977) (redefining "navigable waters" as navigable-in-fact waters and adjacent wetlands).

[70] *See* P.L. 95-217, 91 Stat. 1566 (1977).

[71] *See* H.R. 3199, 95th Cong. §16 (1977) (as introduced) (proposing to redefine "navigable waters" as used in Section 404 to "mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide").

[72] *See* 123 CONG. REC. 26,710-11 (1977) (proposed amendment by Sen. Bentsen).

[73] *See* 123 CONG. REC. 39,187 (1977) (statement of Sen. Muskie) ("The conference bill follows the Senate bill by maintaining the full scope of Federal regulatory authority over all discharges of dredged or fill material into any of the Nation's waters.").

[74] *See* P.L. 95-217, §67, 91 Stat. at 1600 (codified in 33 U.S.C. §1344(f)).

[75] *See* Michael C. Blumm & Elisabeth Mering, *Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform*, 33 U.C.L.A. J. ENVTL. & POLICY 215, 233 (2015).

[76] *See supra* note 45 and accompanying text.

its regulations related to Section 404 permits.[77] At the same time, however, EPA separately expanded on that definition in an appendix to its Section 404 regulations.[78]

The U.S. Attorney General ultimately intervened in 1979 and provided a legal opinion that EPA has final administrative authority to determine the reach of the term "navigable waters" for purposes of Section 404.[79] The Corps and EPA eventually executed a Memorandum of Agreement in 1989 resolving that EPA would act as the lead agency responsible for developing programmatic guidance and interpretation of the scope of jurisdictional waters, and the Corps would be responsible for most case-specific determinations on whether certain property was subject to Section 404.[80]

Although it took the agencies 10 years after the Attorney General's opinion to formally agree on a division of responsibilities,[81] the Corps and EPA streamlined and harmonized the regulatory definition of "waters of the United States" well before that. In May 1980, EPA issued regulations redefining the term among its consolidated permit requirements,[82] and the Corps adopted EPA's definition in its regulations two years later.[83] The two agencies continued to use this definition (with modifications) until the Clean Water Rule was published in 2015.[84]

[77] *See* Navigable Waters, Discharge of Dredged or Fill Material, 40 Fed. Reg. 41,292, 41,293 (September 5, 1975) (codified at 40 C.F.R. §230.2(b) (1976)).

[78] *See id.* at 41,297 app. A.

[79] *See* Benjamin R. Civiletti, *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Op. Att'y Gen. 197, 197-202 (1979), *available at* https://www.epa.gov/sites/production/files/2015-08/documents/civiletti_memo.pdf.

[80] *See* Dep't of the Army & Envtl. Prot. Agency, Mem. of Agreement: Exemptions Under Section 404(F) of the Clean Water Act (1989), available at http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf.

[81] For background on the interagency dispute over the administration of Section 404, see Blumm & Mering, *supra* note 75.

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

[83] *See* Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,810 (July 22, 1982) (codified in 33 C.F.R. §323.2 (1983)). In its initial proposed regulations implementing the Clean Water Act of 1977, the Corps proposed a shorter, three-category definition which excluded "man-made, non-tidal drainage and irrigation ditches" from "waters of the United States." *See* Proposed Rule, Proposal to Amend Regulations for Controlling Certain Activities in Waters of the United States, 45 Fed. Reg. 62,732, 62,747 (September 19, 1980). That proposal was never adopted.

[84] *Compare* Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. at 33,424 (EPA's definition in the Consolidated Regulations issued in 1980) *and* Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. at 31,810 (the Corps' adoption of EPA's definition) *with* Technical Support for the Clean Water Rule, *supra* note 5, at 18 n.1 (EPA's standard definition immediately prior to the issuance of the Clean Water Rule) *and* 33 C.F.R. §328.3(a)(3) (2014) (the Corps' definition prior to the Clean Water Rule).

The Unified Definition of "Waters of the United States"

By 1982, both the Corps and EPA used the following definition of "waters of the United States" in their regulations:

> (a) All waters which are currently used, 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 tide;
>
> (b) All interstate waters, including interstate "wetlands";[85]
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
>
> > (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
> >
> > (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> >
> > (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (1)-(4) of this definition;
>
> (f) The territorial seas; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)-(f) of this definition.[86]

Changes in Jurisdictional Waters in the 1980s

Riverside Bayview Homes

A legal challenge to the Corps' application of "waters of the United States" was reviewed by the Supreme Court for the first time in 1985 in *United States v. Riverside Bayview Homes, Inc*.[87] There, the Corps sought to enjoin a property owner from discharging fill material on his wetlands located 1 mile from the shore of Lake St. Clair in Michigan,[88] a 468-square-mile, navigable-in-fact lake that forms part of the boundary between Michigan and Ontario, Canada.[89] The Corps argued that, by defining "waters of the United States" to include wetlands that are "adjacent to"

[85] "Wetlands" were defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that do support a prevalence of vegetation.... Wetlands generally include swamps, marshes, bogs, and similar areas." *See* Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. at 33,424.

[86] *See* 40 C.F.R. §122.3 (1981) (EPA's definition); Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. at 31,810 (codified in 33 C.F.R. §323.2 (1983)) (the Corps' definition).

[87] *See* 474 U.S. 121 (1985).

[88] *See id.* at 124-25; *see also* United States v. Riverside Bayview Homes, 729 F.2d 391, 392 (6th Cir. 1984) (describing the wetland property at issue).

[89] *See Lake Saint Clair*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Lake-Saint-Clair-lake-North-America.

other jurisdictional waters, including navigable-in-fact waters like Lake St. Clair, its regulations required the landowner to obtain a Section 404 permit before discharging fill material.[90]

Before the case reached the Supreme Court, the Sixth Circuit concluded that it must construe the Corps' regulatory definition narrowly in order to avoid a potential violation of the Fifth Amendment prohibition on the taking of private property for public use without just compensation.[91] Applying this method of interpretation, the Sixth Circuit construed the Corps' regulations so as not to include the wetlands at issue, and it avoided reaching a decision on whether the Corps' regulations were constitutional.[92]

The Supreme Court reversed.[93] Although it acknowledged that on a "purely linguistic level" it may seem unreasonable to classify *lands*, wet or otherwise, as *waters*, the Supreme Court called such a plain language approach "simplistic."[94] Further, it rejected the lower courts' concerns over the constitutionality of the Corps' regulations as "spurious."[95] Instead of applying a narrow approach to avoid constitutional implications, the Court gave deference to the Corps' position, and concluded that because "[w]ater moves in hydrological cycles" rather than along "artificial lines," it was reasonable for the Corps to conclude that "adjacent wetlands are inseparably bound up with the 'waters' of the United States...."[96]

The Court also cited legislative history from the passage of the Clean Water Act and the amendments in 1977—in which the term "adjacent wetlands" was added to the statute[97]—as support for its conclusion that Congress intended for the Clean Water Act to have a broad jurisdictional reach which included the adjacent wetlands at issue.[98] In concluding that adjacent wetlands could reasonably be covered, however, the Court also emphasized that it was "not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, ... and we do not express any opinion on that question."[99]

The Migratory Bird Rule and Other Adjustments to "Waters of the United States"

Following *Riverside Bayview Homes*, the Corps and EPA engaged in rulemaking in which they interpreted the Clean Water Act to govern all waters which were used or may have been used by

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[90] *See Riverside Bayview Homes, Inc*., 474 U.S. at 124-25.

[91] *See Riverside Bayview Homes*, 729 F.2d at 397-98; *see also* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

[92] *See Riverside Bayview Homes*, 729 F.2d at 397-98.

[93] *Riverside Bayview Homes, Inc*., 474 U.S. at 139.

[94] *See id.* at 132. This comment appears to be in response to the Sixth Circuit's statement that "[t]he language of the [Clean Water Act] makes no reference to 'lands' or wetlands' or flooded areas at all." *Riverside Bayview Homes*, 729 F.2d at 397.

[95] *See Riverside Bayview Homes, Inc*., 474 U.S. at 129.

[96] *Id.* at 133-34.

[97] *See* Clean Water Act of 1977, *See* P.L. 95-217, 91 Stat. 1566, 1601 (1977) (codified in 33 U.S.C. §1344(g)(1).

[98] See *Riverside Bayview Homes, Inc*., 474 U.S. at 132-34. In a later decision, *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, the Supreme Court stated that its decision in *Riverside Bayview Homes* "was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." 531 U.S. 159, 180-81 (2001); *see also infra* "*SWANCC*."

[99] *Id*. at 131 n.8.

migratory birds crossing state lines.[100] The agencies did not redefine "waters of the United States" through this interpretation, which came to be known as the Migratory Bird Rule, but instead stated the Migratory Bird Rule was a "clarification" of the existing regulatory definition.[101]

The agencies also continued to adjust their interpretation of the definition of "waters of the United States" in the late 1980s by, among other things, excluding nontidal drainage and irrigation ditches, artificial lakes or ponds used for irrigation and stock watering, reflecting pools, and swimming pools.[102] In 1993, the agencies jointly revised their regulations to exclude "prior converted cropland"—areas that were previously drained and converted to agricultural use—from jurisdictional waters.[103]

Competing Wetland Manuals and Congressional Intervention Through Appropriations

In addition to disputes over the textual *definition* of "waters of the United States," disagreement surrounding the technical standards used to *delineate* the boundaries of jurisdictional waters, particularly wetlands, arose in the late 1980s.[104] The Corps issued the first wetlands delineation manual in 1987 (1987 Manual),[105] but EPA published its own manual the following year which utilized an alternative technical analysis.[106] Differences among these and other wetlands manuals led to the preparation of an interagency Federal Manual for Identifying and Delineating Jurisdictional Wetlands in January 1989 (Federal Manual).[107]

Some observers criticized aspects of the Federal Manual, including the methodology it employed for identifying and delineating jurisdictional waters.[108] Some also argued that the Federal Manual

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[100] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (November 13, 1986); Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988). Although it did not adopt the Migratory Bird Rule in published rulemaking until 1988, EPA began utilizing it in 1985 before the Court's decision in *Riverside Bayview Homes* was rendered. *See* Mem. from Francis Blake, Gen. Counsel, Envtl. Prot. Agency, to Richard E. Sanderson, Acting Assistant Admin., Office of External Affairs, Envtl. Prot. Agency on Clean Water Act Jurisdiction Over Isolated Waters (September 13, 1985), 1985 WL 195307, at *2.

[101] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41,217.

[102] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41,217; Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 54 Fed. Reg. at 20,765.

[103] *See* Clean Water Act Regulatory Programs; Final Rule, 58 Fed. Reg. 45,008, 45,031, 45,036-37 (August 25, 1993).

[104] *See* RALPH E. HEIMLIC ET AL., WETLANDS AND AGRICULTURE, PRIVATE INTERESTS AND PUBLIC BENEFITS, AER-765, 11 (1998).

[105] U.S. ARMY, CORPS OF ENG'RS, TECHNICAL REPORT Y-87-1, WETLANDS DELINEATION MANUAL (1987), *available at* http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf. The Corps also created regional supplements to the Wetlands Delineation Manual which are not discussed in this report. *See Regional Supplements to Corps Delineation Manual*, USACE.ARMY.MIL (last visited June 27, 2016, 4:59 p.m.), http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/.

[106] *See* HEIMLIC ET AL., *supra* note 104, at 12 (outlining history of wetlands delineation manuals); *see also* JAMES S. WAKELEY, DEVELOPING A "REGIONALIZED" VERSION OF THE CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL: ISSUES AND RECOMMENDATIONS, ERC/CEL TR-02-20, 2 (2001) (describing differences in manuals).

[107] *See* U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERV., ET AL., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989).

[108] *See* 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed Revisions, 56 Fed. Reg. 40,446 (proposed August 14, 1991) (discussing comments to the Federal Manual); Richard H. McNeer, *Nontidal Wetlands Protection in Maryland and Virginia*, 41 MD. L. REV. 105, 113 (1992) (stating the federal manual "was widely criticized for extending federal jurisdiction to areas that are rarely wet").

improperly expanded the scope of federal regulations of wetlands.[109] Disagreements ultimately led to congressional action in 1991 in the form of appropriations legislation that prohibited the Corps from using funds to identify jurisdictional waters using the Federal Manual.[110] The following year, Congress mandated that the Corps use the 1987 Manual until a new manual was published after public notice and comment.[111] The interagency group proposed revisions to the Federal Manual, which received over 100,000 comments,[112] but that proposal was never finalized, and no interagency wetlands manual was created.[113]

Judicially Imposed Limitations Beginning in the Late 1990s

In contrast to the agencies' attempt to align jurisdictional waters with what they interpreted to be outer reaches of the Commerce Clause in the 1980s, a series of court cases beginning in the late 1990s resulted in the Corps and EPA modifying their interpretation of the phrase "waters of the United States." For much of the 20th century,[114] the Supreme Court broadly construed the Commerce Clause to give Congress discretion to regulate activities which "affect" interstate commerce, so long as its legislation was "reasonably" related to achieving its goals of regulating interstate commerce.[115] In the 1995 case of *United States v. Lopez*, however, the Supreme Court

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[109] *See* HEIMLIC ET AL., *supra* note 104, at 12; *see also* WAKELEY, *supra* note 106, at 3 ("[T]he 1989 Federal manual generated almost immediate opposition from groups that believed that the manual expanded the Federal government's regulatory authority into lands previously considered to be non-jurisdictional.").

[110] *See* Energy and Water Development Appropriations Act, 1992, P.L. 102-104, 105 Stat. 510, 518.

[111] *See* Energy and Water Development Appropriations Act, 1993, P.L. 102-377, 106 Stat. 1315, 1324-25. Although the appropriations legislation did not reference EPA, EPA agreed to cease using the Federal Manual and use the 1987 Manual in order to create consistency among the agencies' programs. *See* Clean Water Act Regulatory Programs; Final Rule, Memorandum of Agreement Concerning the Determination of the Geographic Scope of the Section 404 Program, 58 Fed. Reg. 4995 (January 19, 1993).

[112] *See* 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed Revisions, 56 Fed. Reg. at 40,446. For background on the opposition to the proposed revisions to the federal manual, see Flint B. Ogle, Comment, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573, 595-96 (1993) and David M. Forman, Comment, *Economic Developments Versus Environmental Protection: Executive Oversight and Judicial Review of Wetland Policy*, 15 HAW. L. REV. 23, 48-49 (1993).

[113] *See* HEIMLIC ET AL., *supra* note 104, at 12. EPA and other agencies have continued to publish wetland guidance documents. *See, e.g.*, ENVTL. PROT. AGENCY, GUIDING PRINCIPLES FOR CONSTRUCTED TREATMENT WETLANDS: PROVIDING FOR WATER QUALITY AND WILDLIFE HABITAT (2000). Because wetland delineation on agricultural properties implicates the Food Security Act and the jurisdiction of Natural Resources Conversation Service within the Department of Agriculture, a separate wetlands delineation manual is used for agricultural lands. *See* WAKELEY, *supra* note 106, at 3.

[114] *See* CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas, at 5 (describing the history of case law interpreting the Commerce Clause including a period of expansive interpretation beginning with *NLRB v. Jones & Laughlin Steel Corporation*, 55 U.S. 1 (1937) and ending with *United States v. Lopez*, 514 U.S. 549 (1995)); *see also* Paul Alexander Fortenberry & Daniel Canton Beck, *Chief Justice Roberts—Constitutional Interpretations of Article III and the Commerce Clause: Will the "Hapless Toad" and "John Q. Public" Have any Protection in the Roberts Court?*, 13 U. BALT. J. ENVTL. L. 55, 74 ("For roughly sixty years [before *United States v. Lopez*], the Supreme Court had broadly construed Congress's Commerce Clause power.").

[115] *See* United States v. Darby, 312 U.S. 100, 118 (1941) (approving that legislation related to working conditions and stating "[t]he power of Congress over interstate commerce ... extends to those activities intrastate which so affect interstate commerce ... to make regulation of them appropriate means to the attainment of a legitimate end[.]"); Wickard v. Filburn, 317 U.S. 111, 124 (1942) (upholding regulations on price of wheat and stating that even if the regulated "activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached

struck down a federal statute for the first time in more than 50 years based purely on a finding that Congress exceeded its powers under the Commerce Clause.[116]

In *Lopez*, the Court held the Commerce Clause did not provide a constitutional basis for federal legislation criminalizing possession of a firearm in a school zone because the law neither regulated a commercial activity nor contained a requirement that the firearm possession be connected to interstate commerce.[117] The Court revisited its prior Commerce Clause cases and sorted Congress's commerce power into three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities which not only affect but "substantially affect" interstate commerce.[118] *Lopez* set the backdrop for a series of three major opinions limiting federal jurisdiction under the Clean Water Act.

United States v. Wilson

The United States Court of Appeals for the Fourth Circuit issued the first in the series of decisions limiting the jurisdictional reach of the Clean Water Act in 1997.[119] Following a seven-week jury trial in *United States v. Wilson*, three defendants were convicted of violating Section 404[120] for knowingly discharging fill material into wetland property located approximately 10 miles from the Chesapeake Bay and 6 miles from the Potomac River in Maryland.[121] On appeal, the defendants challenged their conviction on the grounds that the portion of Corps' regulatory definition of "waters of the United States"—which included all "waters ... the use, degradation or destruction of which *could affect* interstate or foreign commerce"—exceeded the Corps' statutory authority in the Clean Water Act and Congress's constitutional authority in the Commerce Clause.[122]

Relying in part on the holding in *Lopez*, the Fourth Circuit agreed with a portion of the defendants' arguments and ordered a new trial.[123] The court reasoned that, under *Lopez*, the regulated conduct must "substantially affect" interstate commerce in order to invoke the Commerce Clause power, and therefore the Corps exceeded its authority by regulating waters which "could affect" interstate commerce without regard to whether there was any actual effect, substantial or otherwise.[124] And although the Fourth Circuit strongly suggested that the Corps' assertion of jurisdiction exceeded the constitutional grant of authority under the Commerce

by Congress if it exerts a substantial economic effect on interstate commerce"); *see also* CRS Report RL32844, *supra* note 114, at 5 (describing history of Commerce Clause cases).

[116] 514 U.S. 549 (1995).

[117] *See id.* at 551.

[118] *See id.* at 558-59.

[119] United States v. Wilson, 133 F.3d 251 (4th Cir. 1997). In *Wilson*, the three-judge panel unanimously agreed that the convictions in the district court should be reversed and remanded for a new trial, and a two-judge majority concluded that a portion of the Corps' regulatory definition of "waters of the United States" exceeded the statutory authorization of the Clean Water Act. *See id.* at 257 (Niemeyer & Payne, JJ. joining in part II of the opinion).

[120] *See* 33 U.S.C. §§1319(c), 1311(a).

[121] *See Wilson*, 113 F. 3d at 254, 256.

[122] *Id.* at 256-57. (quoting 33 C.F.R. §328.3(a)(3)(1993)) (emphasis in opinion but not in regulation).

[123] *See id.* at 255-57.

[124] *See id.*

Clause,[125] it ultimately invalidated the challenged portion of the regulations solely on the ground that it exceeded the congressional authorization under the Clean Water Act.[126]

As *Wilson* never reached the Supreme Court,[127] it was only binding precedent in the Fourth Circuit,[128] and the stricken language remained in the regulations of the Corps and EPA until the release of the Clean Water Rule.[129]

The Corps' 2000 Guidance in Response to *Wilson*

Although the Corps did not modify its regulatory definition of "waters of the United States" in response to *Wilson*, it did publish guidance in March 2000 on the effect of the decision on its Section 404 jurisdiction.[130] The Corps explained that, *within the Fourth Circuit only*, "isolated waters" must be shown to have an *actual* connection to interstate or foreign commerce.[131] "Isolated waters," in Clean Water Act parlance, are waters that are not navigable-in-fact, not interstate, not tributaries of the foregoing, and not hydrologically connected to such waters—but whose use degradation or destruction could affect interstate commerce.[132]

The 2000 guidance also provided clarification on certain nontraditional waters that the Corps considered part of the "waters of the United States." Jurisdictional waters, the Corps explained, included both *intermittent streams*, which have flowing water supplied by groundwater during certain times of the year, and *ephemeral streams*, which have flowing water only during and for a short period after precipitation events.[133] Drainage ditches constructed in jurisdictional waters were also deemed to be subject to the Clean Water Act except when the drainage was so complete that it converted the entire area to dry land.[134]

SWANCC

In 2001, the Supreme Court took up another challenge to the jurisdictional reach of the Clean Water Act in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), revisiting the issue for the first time since its 1995 decision in *Riverside Bayview Homes*. In *SWANCC*, the Court evaluated whether Clean Water Act jurisdiction extended to an abandoned sand and gravel pit which contained water that had become a habitat for migratory

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[125] *See id.* at 257 ("Were this regulation a statute duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause.").

[126] *See id.*

[127] Following remand, one defendant pled guilty to a single felony county, which it later unsuccessfully attempted to vacate. *See* United States v. Interstate Gen. Co., 152 F. Supp. 2d 843 (D. Md. 2001), *aff'd sub nom*., United States v. Interstate Gen. Co., L.P., 39 F. App'x 870 (4th Cir. 2002).

[128] *See* Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) ("the decisions of one circuit are not binding on other circuits"); Duran-Quezada v. Clark Constr. Grp., LLC, 582 Fed. Appx. 238, 239 (4th Cir. 2014) ("the decisions of other circuits are not binding").

[129] *See* 33 C.F.R. §328(a)(3) (2014); 40 C.F.R. §122.2 (2014).

[130] *See* Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (March 9, 2000).

[131] *See id.* at 12,824 (emphasis added).

[132] *See* CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Claudia Copeland and Alexandra M. Wyatt, at 2-3.

[133] *See* Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. at 12,823, 12,897-98. Under the 2000 Guidance, ephemeral streams must have an ordinary high water mark to be jurisdictional. *Id.* at 12,823.

[134] *See id.* at 12,823.

birds.[135] Citing the legislative history of the 1972 amendments and the Clean Water Act of 1977, the Corps had argued that the Clean Water Act can extend to such isolated waters under the Migratory Bird Rule.[136]

In a 5-4 ruling, the Court rejected the Corps' position, and held that the Corps' assertion of jurisdiction over isolated waters based purely on their use by migratory birds exceeded its statutory authority.[137] The *SWANCC* Court's conclusion was informed, in part, by *Lopez* and another landmark Commerce Clause decision issued five years later, *United States v. Morrison*,[138] in which the Court held that Congress lacked constitutional authority under the Commerce Clause to enact portions of the Violence Against Women Act.[139] In light of this jurisprudence, the *SWANCC* Court concluded that allowing the Corps to assert jurisdiction under the Migratory Bird Rule raised "serious constitutional questions" about the limits of Congress's authority and "would result in significant impingement of States' traditional and primary power of land and water use."[140] Rather than interpret the Clean Water Act in a way that would implicate these "significant constitutional and federalism questions[,]" the Court concluded that Congress's use of the phrase "navigable waters" in the Clean Water Act "has at least the import of showing us what Congress had in mind for enacting the [Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so."[141] Based on this reading, the Court concluded that Congress did not intend to invoke the outer limits of the Commerce Clause in the Clean Water Act, and the Corps could not rely on the Migratory Bird Rule as a basis for jurisdiction.[142]

In contrast to *Riverside Bayview Homes*, the *SWANCC* Court focused less on the legislative history of the Clean Water Act, and instead emphasized the Corps' original interpretation of the 1972 amendments in which it limited its jurisdiction to navigable-in-fact waters.[143] Although the *Riverside Bayview Homes* Court found that classical "navigability" was of "limited import" in determining Clean Water Act jurisdiction,[144] the *SWANCC* Court distinguished that case as focused on "wetlands adjacent to navigable waters."[145] The ponds which formed in the abandoned gravel pits in *SWANCC* were "*not* adjacent to open water[,]" and therefore lacked the requisite "significant nexus" to traditionally navigable waters necessary for jurisdiction under the Clean Water Act.[146]

SWANCC did not go as far as the Fourth Circuit, however, in striking down an entire subsection of the definition of "waters of the United States." It limited its holding to the Migratory Bird

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[135] *See* 531 U.S. 159, 162 (2001).

[136] *See id* at 168-70.

[137] *Id.* at 173-74.

[138] 529 U.S. 598, 627 (2000) (affirming decision holding that Congress lacked constitutional authority to enact 42 U.S.C. §13981 (2000)).

[139] *See SWANCC*, 531 U.S. at 173 (citing *Lopez* and *Morrison* and stating "[t]wice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.").

[140] *See id.* at 173-74.

[141] *See id.* at 172-74.

[142] *See id.*

[143] *See id.* at 168 (quoting 33 C.F.R. §209.120(d)(1) (1974)).

[144] United States v. Riverside Bayview Homes, Inc. 474 U.S. 121, 133 (1985).

[145] *See SWANCC*, 531 U.S. at 167-68.

[146] *See id.* at 167 (emphasis in original).

Rule, which was described in the Corps' guidance as an effort to "clarify" the definition.[147] But while its direct holding was arguably narrow, *SWANCC*'s rationale was much broader and called into question whether the Corps and EPA could assert jurisdiction under the Clean Water Act over many wholly intrastate isolated waters.[148] The relationship between *SWANCC*'s limited holding and the Court's broader rationale generated considerable litigation over the scope of the Clean Water Act.[149]

Agency Guidance in Response to *SWANCC*

The general counsels for the Corps and EPA added their voices to the post-*SWANCC* debate in a joint memorandum issued on the last full day of the Clinton Administration, January 19, 2001.[150] Combining the "significant nexus" language from *SWANCC* with the existing regulatory definition of "waters of the United States," the agencies concluded that they could continue to exercise jurisdiction over isolated waters so long as the use, degradation, or destruction of those waters could affect other "waters of the United States."[151] The potential effect on or degradation on existing jurisdictional waters, the agencies reasoned, established the "significant nexus" mentioned in *SWANCC*.[152]

In January 2003, the Corps and EPA issued a notice of proposed rulemaking regarding how field staff should address jurisdictional issues in the Clean Water Act and which contained a revised joint memorandum on the effect of *SWANCC*.[153] That proposed rulemaking effort was later abandoned, leaving unanswered questions over the agencies' jurisdiction over isolated waters after *SWANCC*.[154] These uncertainties caused the Corps and EPA to shift their attention to alternative bases for jurisdiction in defining "waters of the United States"—such as "adjacent wetlands"—and set the stage for the Supreme Court's next encounter with a Clean Water Act jurisdictional dispute in *Rapanos v. United States*.

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[147] *See SWANCC*, 531 U.S. at 174.

[148] *See* Advanced Notice of Proposed Rulemaking on the Clean Water Regulatory Definitions of "Waters of the United States," 68 Fed. Reg. 1991, 1996 (January 15, 2003) (discussing "uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable"). Justice Stevens wrote in his dissent that *SWANCC* precluded jurisdiction "over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." *See SWANCC*, 531 U.S. at 176-77 (Stevens, J., dissenting).

[149] *See* Robert R. Rm. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 846 (2004) (describing *SWANCC* as sending the Corps into a "tailspin" of litigation).

[150] Joint Memorandum from Gary S. Guzy, General Counsel, U.S. Envtl. Prot. Agency, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Eng'rs on Supreme Court Rule Concerning CWA Jurisdiction Over Isolated Waters (January 19, 2001) [hereinafter 2001 Joint Memorandum], *available* at https://www.environment.fhwa.dot.gov/ecosystems/laws_swepacoe.asp.

[151] *See id.* at 3.

[152] *See id*. ("With respect to waters that are isolated, intrastate, and nonnavigable—jurisdiction may be possible if their use, degradation, or destruction could affect other 'waters of the United States,' thus establishing a significant nexus between the water in question and other 'waters of the United States[.]").

[153] *See* Advanced Notice of Proposed Rule Making on the Clean Water Regulatory Definitions of "Waters of the United States," 68 Fed. Reg. at 1991, 1995 app. A.

[154] *See* Rapanos v. United States, 547 U.S. 715, 758 (2006) (Kennedy, J., concurring) ("The proposed rulemaking went nowhere.").

Rapanos

Rapanos involved a consolidation of two cases on appeal from the Sixth Circuit—*Rapanos*[155] and *Carabell*[156]—both of which involved disputes over the breadth of the Clean Water Act's jurisdiction over "adjacent wetlands." In *Carabell*, landowners challenged whether Section 404 jurisdiction extends to "wetlands that are hydrologically isolated from any of the 'waters of the United States[,]'"[157] and *Rapanos* presented the similar question of whether this jurisdiction includes nonnavigable wetlands "that do not even abut a navigable water."[158] In both cases, which are collectively referred to as *Rapanos*, the Sixth Circuit upheld the Corps' assertion of jurisdiction over the wetland property at issue.[159]

Many anticipated that *Rapanos* would provide clarity on the disputes following *SWANCC*.[160] And although a majority of five Justices agreed that the Sixth Circuit decision was flawed, they were not able to agree on a single, underlying standard which would govern future jurisdictional disputes. Instead, a four-Justice plurality opinion, authored by Justice Scalia, and an opinion by Justice Kennedy, writing only for himself, proposed two alternative tests for determining jurisdictional waters.

The Competing Approaches Following *Rapanos*

The Plurality's Bright-Line Rule: Writing for a four-Justice plurality, Justice Scalia adopted the bright-line rule that the word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes.[161] Wetlands could also be included, but only when they have a "continuous surface connection" to other "waters of the United States."[162]

Justice Kennedy's "Significant Nexus" Test: In a separate concurring opinion, Justice Kennedy concluded that the Clean Water Act requires a more malleable approach: the Corps should determine, on a case-by-case basis, whether the water in question possesses a "significant nexus" to waters that are navigable-in-fact.[163] For wetlands, a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody.[164]

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[155] Rapanos v. United States, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 546 U.S. 932-33 (2005).

[156] Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 546 U.S. 932-33 (2005).

[157] Questions Presented, U.S. Army Corps of Eng'rs, No. 04-1384, 547 U.S. 715 (2006), available at http://www.supremecourt.gov/qp/04-01384qp.pdf.

[158] Questions Presented, Rapanos v. United States, No. 04-1034, 547 U.S. 715 (2006), available at http://www.supremecourt.gov/qp/04-01034qp.pdf.

[159] *See Rapanos*, 547 U.S. at 729-30.

[160] *See, e.g.*, Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473, 522 (2004) ("With the lower courts in conflict and the political branches unable to move on this important question [of CWA jurisdiction,] only the Supreme Court can fix the problem."); CRS Report RL33263, *supra* note 132, at 5 ("For many who had waited so long to have 'waters of the United States' clarified, the *Rapanos* decision ... was a disappointment.").

[161] *See Rapanos*, 547 U.S. at 739.

[162] *See id.* at 742.

[163] *See id.* at 782 (Kennedy, J., concurring).

[164] *See id.* at 780.

Lower Courts' Response to *Rapanos*

With no controlling rationale from the majority, lower courts interpreting *Rapanos* struggled with the question of what analysis to apply in Clean Water Act jurisdictional disputes.[165] Of the nine circuits which have addressed the issue thus far,[166] all have applied Justice Kennedy's significant nexus test either alone or in combination with the plurality's test, and none have applied the plurality approach alone.[167] Still, some courts and observers have criticized the significant nexus test as vague and difficult to implement.[168]

Agency Guidance in Response to *Rapanos*

The Corps and EPA offered their own interpretation of *Rapanos* through guidance to field officers in 2007,[169] which was revised and replaced after public comment in 2008.[170] The 2008 guidance

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[165] In his brief concurrence, Chief Justice Roberts predicted difficulties in implementing *Rapanos*, stating the following: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will not have to feel their way on a case-by-case basis." *See id.* 547 U.S. at 758 (Roberts, C.J., concurring). For a more detailed analysis of lower courts' varying interpretations of *Rapanos*, see CRS Report RL33263, *supra* note 132, at 7-8 and Technical Support for the Clean Water Rule, *supra* note 5, at 40-47.

[166] *See* Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011); United States v. Donovan, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); United States v. Cundiff, 555 F.3d 200 (6th Cir.), *cert. denied*, 130 S. Ct. 74 (2009); United States v. Lucas, 516 F.3d 316 (5th Cir.), *cert. denied*, 555 U.S. 822 (2008); United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), *cert. denied sub nom* McWane v. United States, 555 U.S. 1045 (2008); N. Cal. River Watch v. City of Healdsburg,496 F.3d 993 (9th Cir. 2007) (superseding the original opinion published at 457 F.3d 1023 (9th Cir. 2006)), *cert. denied*, 552 U.S. 1180 (2008); United States v. Johnson, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007).

[167] When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, the holding of the Court which lower courts must follow "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...." Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Some courts have concluded that Justice Kennedy's "significant nexus" test is the narrowest ruling to be derived from *Rapanos*. *See Gerke Excavating, Inc.* 464 F.3d at 725 ("[A]s a practical matter the Kennedy concurrence is the least common denominator[.]"); *Robison*, 505 F.3d at 1222 ("[P]ursuant to *Marks*, we adopt Justice Kennedy's 'significant nexus' test as the governing definition of 'navigable waters' under *Rapanos*."). Others courts interpreted *Marks* to conclude "that two new tests should apply." *Donovan*, 661 F.3d at 183-84; *accord Bailey*, 571 F.3d at 799; *Johnson*, 467 F.3d at 66.

For more background on the differing circuit court approaches, see CRS Report RL33263, *supra* note 132, at 7-8 and Technical Support for the Clean Water Rule, *supra* note 5, at 40-47.

[168] *See, e.g.*, United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006) ("This test leaves no guidance on how to implement its vague, subject centerpiece."); Annie Snider, *The Two Words that Rewrote American Water Policy*, POLITICO (May 25, 2016), http://www.politico.com/agenda/story/2016/05/obama-wotus-wetlands-rule-supreme-court-000131 ("[A]s definitive as those words [significant nexus] sound, the real problem was—and still is—that nobody has ever known quite what they were supposed to mean."); Lowell M. Rothschild, *The Practical Application of the Significant Nexus Test: The Final Waters of the US Rule*, NAT. L. REV. (June 8, 2015), http://www.natlawreview.com/article/practical-application-significant-nexus-test-final-waters-us-rule ("[T]he significant nexus test ... is an ambiguous, case-by case test.").

[169] Mem. from Envtl. Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf.

[170] Revised Mem. from Envtl. Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (December 2, 2008) [hereinafter 2008 Memorandum], available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

adopts the view taken by some lower courts[171] that jurisdiction exists over any water body that satisfies *either* the plurality approach *or* the significant nexus test.[172] The agencies further deconstructed the jurisdictional analysis into three categories: (1) waters that are categorically jurisdictional; (2) waters that may be deemed jurisdictional on a case-by-case basis; and (3) waters that are excluded from jurisdiction under the Clean Water Act.[173]

Joint Guidance in Response to *Rapanos*

The Corps and EPA issued joint guidance in 2008 in which they reorganized the jurisdictional analysis into three types of waters:

(1) Waters that are categorically "waters of the United States," including navigable-in-fact waters, "relatively permanent" tributaries, and wetlands that have a continuous surface connection or unbroken hydrological connection to jurisdictional waters;

(2) Waters that may be deemed "waters of the United States" on a case-by-case basis upon a finding of a significant nexus with other jurisdictional waters, such as intermittent and ephemeral streams and wetlands that do not meet the criteria above; and

(3) Waterbodies that are excluded from "waters of the United States," including swales or gullies and ditches wholly in and draining only upland that do not carry a relatively permanent flow of water.[174]

In 2011, the Corps and EPA sought comments on proposed changes to the 2008 guidance, which the agencies acknowledged would increase the number of waters regulated under the Clean Water Act in comparison to its earlier post-*Rapanos* guidance.[175] According to the agencies, the 2011 draft guidance was focused on protecting smaller waters that feed into larger ones in an effort to keep downstream water safe from upstream pollutants.[176] The potential enlargement of jurisdiction spawned congressional attention, including a letter signed by 41 Senators requesting that the agencies abandon the effort.[177] Prohibitions on funding related to the draft guidance were included in several appropriations bills, but those provisions were never enacted.[178] Instead, the agencies abandoned pursuit of the 2011 draft guidance in favor of their most recent effort at defining the scope of "waters of the United States," the Clean Water Rule.

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[171] *See* United States v. Donovan, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); United States v. Johnson, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007).

[172] 2008 Memorandum, *supra* note 170, at 3.

[173] *See id.* at 4-11.

[174] *See id.*

[175] *See* EPA and Army Corps of Eng'rs. Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011) ("The agencies believe that under this proposed guidance the number of waters identified as protected by the Clean Water Act will increase compared to current practice....").

[176] *See* CRS Report RL33263, *supra* note 132, at 12 (discussing the 2011 draft guidance).

[177] *See* Letter from Sen. James Inhofe et al. to Lisa P. Jackson & Jo-Ellen Darcy (June 30, 2011), *available at* http://www.epw.senate.gov/public/_cache/files/ec609d07-a036-49e8-a8a0-c46652b479bd/110630-jackson-darcy-cwa-guidance.pdf.

[178] See H.R. 4923, 113th Cong. §106; H.R. 2584, 112th Cong. §435; H.R. 6061, 112th Cong. §434; see also CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*, by Claudia Copeland, at 1-2 (discussing legislative proposals to bar EPA and the Corps from implementing the 2011 proposed guidance or developing regulations based on it).

The Clean Water Rule

The Clean Water Rule marks the culmination of the Corps' and EPA's effort to clarify the bounds of jurisdictional waters in the wake of *SWANCC* and *Rapanos*.[179] In developing the Rule, the agencies relied on a synthesis of more than 1,200 published and peer-reviewed scientific reports related to the current scientific understanding of the connection or isolation of streams and wetlands relative to large water bodies like rivers, lakes, estuaries, and oceans.[180] After receiving over 1 million comments to a proposed version of the rule, the agencies issued the final Clean Water Rule on May 27, 2015.[181]

The final version contains the same three-tier structure from the agencies' 2008 joint guidance, identifying waters that are (1) categorically jurisdictional, (2) may be deemed jurisdictional on a case-by-case basis if they have a significant nexus with other jurisdictional waters, and (3) categorically excluded from the Clean Water Act's jurisdiction.[182] A significant impetus behind the Clean Water Rule was an effort to remove the uncertainty for the landowner and administrative burden to the Corps and EPA created when individual waters and wetlands are evaluated on a case-by-case basis.[183] To that end, the new rule increases categorical determinations as to whether certain property contains "waters of the United States."[184]

[179] *See* Proposed Rule, Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed April 21, 2014) (discussing background for proposed Clean Water Rule).

[180] *See* Final Rule, Clean Water Rule, Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (June 29, 2015) [hereinafter Clean Water Rule].

[181] *See id.* EPA extended the public comment period on two occasions. *See* Proposed Rule; Extension of Comment Period, 79 Fed. Reg. 35,712 (June 24, 2014) (extending public comment period to October 20, 2014); Proposed Rule; Extension of Comment Period, 79 Fed. Reg. 61,590 (October 14, 2014) (extending public comment period to November 14, 2014).

[182] *See* Clean Water Rule, 80 Fed. Reg. at 37,057.

[183] *See id.* ("This rule replaces existing procedures that often depend on individual, time-consuming, and inconsistent analyses of the relationship between [waters.]"); *What the Clean Water Rules Does*, EPA (May 18, 2016), https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does ("The rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features.").

[184] *See* Clean Water Rule, 80 Fed. Reg. at 37,057 ("The agencies have greatly reduced the extent of waters subject to this individual review...."); Richard M. Glick and Diego Atencio, *"Waters of the United States" Not Quite Clear Yet*, WATER REP., July 15, 2016, at 3 ("The new rule increases categorical jurisdictional determinations, and is intended to minimize the need for case-specific analyses.").

Key Provisions of the Clean Water Rule[185]

- Navigable waters, interstate waters, the territorial seas, or impoundments of such waters are categorically jurisdictional.
- Tributaries—as newly defined in the Clean Water Rule[186]—of traditional navigable waters, interstate waters, and the territorial seas are categorically jurisdictional.
- Waters, including wetlands, lakes, ponds, and "similar waters," that are adjacent to traditional navigable waters, interstate waters, and the territorial seas are categorically jurisdictional.
- Some waters would remain subject to a case-specific evaluation as to whether they have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas.
- A number of waters would be categorically excluded from Clean Water Act jurisdiction, including prior converted cropland, groundwater and certain ditches, and stormwater management systems.

Response to the Clean Water Rule

Many reported that the Clean Water Rule was met with controversy,[187] and a Government Accountability Office (GAO) report found that EPA violated publicity or propaganda and antilobbying provisions in prior appropriations acts through its promotion of the Clean Water Rule on social media.[188] Congress also took steps to block its implementation. In January 2016, the Senate and House passed a resolution of disapproval seeking to nullify the Clean Water Rule[189] under the Congressional Review Act;[190] but that resolution was vetoed by the President.[191] On January 21, 2016, a procedural vote in the Senate to override the veto failed.[192]

The Clean Water Rule was scheduled to take effect on August 28, 2015;[193] however, numerous lawsuits were filed soon after it was announced.[194] While EPA and the Corps contend that the Clean Water Rule governs only waters that have historically been covered by the Clean Water

[185] *See* Clean Water Rule 80 Fed. Reg. at 37,057-59 (discussing "Major Rule Provisions" and summarizing other elements of the Clean Water Rule); *id.* at 37,104-06 (redefining "waters of the United States" in 33 C.F.R. §329.3) *see also* CRS In Focus IF10125, *Overview of EPA and the Army Corps' Rule to Define "Waters of the United States"*, by Claudia Copeland, at 1. The details of the Clean Water Rule are also discussed in CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*, by Claudia Copeland.

[186] *See Clean Water Rule*, 80 Fed. Reg. at 37,105.

[187] *See, e.g., id.* at 14 ("The rule was controversial even before it was proposed in March 2014, and controversies have persisted since the final rule was issued"); Snider, *supra* note 168 ("When the Obama administration released [the Clean Water Rule] in early summer 2015, it detonated across the American heartland like a bomb.").

[188] *See* U.S. Gov't Accountability Office, GAO B-326944, Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions 26 (2015), *available at* http://www.gao.gov/assets/680/674163.pdf.

[189] *See* S.J.Res. 22, 114th Cong. (2016).

[190] *See* 5 U.S.C. §§801-808.

[191] *See* U.S. President (Obama), Veto Message from the President (January 19, 2016), available at https://www.whitehouse.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22.

[192] *See* U.S. Senate, Roll Call Votes on the Motion to Invoke Cloture on the Veto Message to Accompany S.J.Res. 22 (January 21, 2016), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00005#top.

[193] *See* Clean Water Rule, 80 Fed. Reg. at 37,054.

[194] *See* CRS Report RL33263, *supra* note 132, at 15; *see also* Amena H. Saiyid, *Litigation Tracker: Water Rule Challenges Dominate Courts*, BNA, July 26, 2016, http://news.bna.com/wrrn/WRRNWB/split_display.adp?fedfid=94728872&vname=wrrnotallissues&wsn=499592500&searchid=28123244&doctypeid=1&type=date&mode=doc&split=0&scm=WRRNWB&pg=0 (summarizing nationwide challenges to the Clean Water Rule in various courts).

Act,[195] its opponents argue it constitutes an unlawful expansion of authority beyond that which is allowed by the act or the Constitution and which is over-burdensome to private landowners.[196]

In one lawsuit, the U.S. Court of Appeals for the Sixth Circuit issued an order staying its implementation as of October 9, 2015.[197] The agencies have since stated that they intend to defend the Clean Water Rule until a final decision is reached by the courts, but that they will apply their prior regulations during the pendency of the stay.[198]

The most recent action related to the Clean Water Rule and jurisdictional waters occurred on July 14, 2016, when the House passed its version of the FY2017 Interior and Environment Appropriations Act.[199] That bill, as passed by the House, would prohibit the use of appropriated funds to adopt or enforce any change to jurisdictional waters beyond those that were in effect on October 1, 2012.[200]

[195] *See* Envtl. Prot. Agency & U.S. Army Corps of Eng'rs., Factsheet, Clean Water Rule, https://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf.

[196] *See, e.g.*, Snider, *supra* note 163 (describing opposition and legal challenges to the Clean Water Act); Press Release, U.S. Speaker of the House, Speaker Boehner on the Latest EPA Power Grab (May 27, 2015), http://www.speaker.gov/press-release/speaker-boehner-latest-epa-power-grab (calling the Clean Water Rule a "raw and tyrannical power grab").

[197] *See* Ohio v. U.S. Army Corps of Eng'rs., 803 F.3d 804 (6th Cir. 2015). More information on the current status of this litigation is available through CRS Legal Sidebar WSLG1503, *UPDATED: Sixth Circuit Will Hear Challenges to EPA's Clean Water Act Jurisdiction ("Waters of the United States") Rule, but Litigation Uncertainties Remain Unresolved*, by Alexandra M. Wyatt.

[198] *See* Mem. from Envtl. Prot. Agency & Dep't of the Army on Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination (November 16, 2015), at 1-2, *available at* https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf.

[199] *See* H.R. 5538, 114th Cong. (2016).

[200] *See id.* at §427.

Appendix. Table Concerning Major Federal Actions Related to "Waters of the United States" in the Clean Water Act

Table A-1. Major Federal Actions Related to "Waters of the United States" in the Clean Water Act

Date	Event	Source
Oct. 18, 1972	Federal Water Pollution Control Act Amendments of 1972 is enacted	P.L. 92-500, 86 Stat. 816
Feb. 6, 1973	EPA interprets the scope of Clean Water Act jurisdiction in an Office of the General Counsel Memorandum	1973 WL 21937
May 4, 1973	The Corps proposes its first regulations defining "navigable waters" under the Clean Water Act	38 Fed. Reg. 12,217
May 22, 1973	EPA issues regulations defining "navigable waters" under the Clean Water Act[201]	38 Fed. Reg. 13,528
April 1, 1974	The Corps issues final regulations defining "navigable waters" under the Clean Water Act	39 Fed. Reg. 12,115
Mar. 27, 1975	The U.S. District Court for the District of Columbia strikes down the Corps' regulatory definition in *National Resources Defense Council v. Callaway*	392 F. Supp. 685
May 6, 1975	The Corps publishes proposed regulations in response to *Callaway*	40 Fed. Reg. 19,766
July 25, 1975	The Corps publishes final interim regulations revising the definition of "navigable waters"	40 Fed. Reg. 31,320
July 19, 1977	The Corps publishes a final rule defining "waters of the United States"	42 Fed. Reg. 37,122
Dec. 27, 1977	The Clean Water Act of 1977 is enacted	P.L. 95-217, 91 Stat. 1566
Aug. 28. 1975	EPA adopts the Corps' definition of "navigable waters" under the Section 404 program	40 Fed. Reg. 41,292
Sept. 5, 1979	Attorney General Ben Civiletti publishes opinion that EPA has ultimate responsibility to determine jurisdictional waters	43 Op. Att'y Gen. 197
May 19, 1980	EPA publishes a Final Rule defining "waters of the United States"	45 Fed. Reg. 33,290
Sept. 19, 1980	The Corps issues a proposed rule with a definition of "waters of the United States" that continues to differ from EPA	45 FR 62,732
July 22, 1982	The Corps issues an interim final rule adopting EPA's definition of "waters of the United States"	47 FR 31,794
Sept. 13, 1985	EPA's General Counsel writes a memorandum on the applicability of the Migratory Bird Rule	1985 WL 195307

[201] For purposes of this table, the Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972 and subsequent amendments and related legislation.

Date	Event	Source
Dec. 4, 1985	The Supreme Court decides *United States v. Riverside Bayview Homes, Inc.*	474 U.S. 121
Nov. 13, 1986	The Corps issues guidance adopting the Migratory Bird Rule	51 Fed. Reg. 41,206
June 6, 1988	EPA publishes guidance adopting the Migratory Bird Rule	53 Fed. Reg. 20,764
Jan. 1987	The Corps publishes the first wetlands delineation manual	http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf
April 1988	EPA publishes a wetlands delineation manual	http://www.ers.usda.gov/media/929243/aer765_002.pdf[202]
Jan. 10, 1989	An interagency group publishes a federal wetlands delineation manual	https://www.fws.gov/northeast/ecologicalservices/pdf/wetlands/interagency%20wetland%20delineation%20manual%201989.pdf
Jan. 19, 1989	The Corps and EPA execute a Memorandum of Agreement regarding their respective jurisdiction under Section 404	http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf
Aug. 14, 1991	An interagency group proposes revisions to the 1989 federal wetlands delineation manual	56 Fed. Reg. 40,446
Aug. 17, 1991	Appropriations legislation is passed prohibiting the Corps from using the 1989 federal wetlands delineation manual	P.L. 102-104, 105 Stat. 510
Oct. 2, 1992	Appropriations legislation is passed requiring the Corps to use the 1987 wetlands delineation manual	P.L. 102-377, 106 Stat. 1315
Jan. 19, 1993	EPA ceases to use the 1989 federal wetlands delineation manual, and instead uses the Corps' 1987 manual	58 Fed. Reg. 4995
Aug. 25, 1993	The Corps and EPA revise regulations to exclude "prior converted cropland" from "waters of the United States"	58 Fed. Reg. 45,008
Dec. 23, 1997	The Fourth Circuit invalidates a portion of the Corps' definition of "waters of the United States" in *United States v. Wilson*	133 F.3d 251
Mar. 9, 2000	The Corps publishes guidance on the effect of *Wilson* and on other nontraditional "waters of the United States" including ephemeral streams, intermittent streams, and drainage ditches	65 Fed. Reg. 12,818
Jan. 9, 2001	The Supreme Court holds that the Corps cannot exercise jurisdiction over waters or wetlands based solely on the Migratory Bird Rule in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)	531 U.S. 159
Jan. 19, 2001	The general counsels of the Corps and EPA issue a joint memorandum on the on the effect of *SWANCC*	https://www.environment.fhwa.dot.gov/ecosystems/laws_swepacoe.asp

[202] The 1988 EPA manual is no longer publically disseminated or available on EPA's website; however, several secondary sources discuss the manual. *See, e.g.*, HEIMLIC ET AL., *supra* note 104, at 11-12; WAKELEY, *supra* note 106, at 3.

Date	Event	Source
Jan. 15, 2003	The Corps issues proposed rulemaking addressing how field staff should address jurisdictional waters issues, but it is never finalized	68 Fed. Reg. 1991
June 19, 2006	The Supreme Court decides *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*	547 U.S. 715
June 5, 2007	The Corps and EPA issue joint guidance on the impact of *Rapanos*	https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf
Dec. 2, 2008	The Corps and EPA revise the joint guidance on *Rapanos*	https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf
May 2, 2011	The Corps and EPA seek comments on proposed guidance which would increase the number of waters regulated under the Clean Water Act; the proposed guidance is never finalized	76 Fed. Reg. 24,479
April 21, 2014	The Corps and EPA issue the proposed Clean Water Rule	79 FR 22,188
June 29, 2015	The Corps and EPA issue the final Clean Water Rule	80 FR 37,053
Oct. 9, 2015	The U.S. Court of Appeals for the Sixth Circuit stays the application off the Clean Water Rule	803 F.3d 804
Nov. 16, 2015	The Corps and EPA issue a joint memorandum regarding their approach to resolving jurisdictional waters issues during the stay of the Clean Water Rule	https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf
Jan. 13, 2016	Senate and House pass resolution of disapproval, S.J.Res. 22, seeking to nullify the Clean Water Rule	S.J.Res. 22, 114th Cong.
Jan. 19, 2016	The President vetoes S.J.Res. 22	https://www.whitehouse.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22
Jan. 21, 2016	A procedural vote to override the President's veto of S.J.Res. 22 fails in the Senate	http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00005#top
July 14, 2016	The House passes its version of the FY2017 Interior and Environment Appropriations Bill, which contains a provision that would prohibit the use of appropriated funds to adopt or enforce a change to jurisdictional waters beyond those that were in effect on October 1, 2012	H.R. 5538, §427, 114th Cong.

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