Congressional Research Service
Informing the legislative debate since 1914

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

Updated March 5, 2019

Congressional Research Service
https://crsreports.congress.gov
R44585

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

For more than forty-five years, all three branches of government have struggled with how to interpret the meaning of "waters of the United States" in the Clean Water Act. In a shift from early water pollution legislation, the 1972 amendments to the Federal Water Pollution Control Act, which came to be known as the Clean Water Act, eliminated the requirement that federally regulated waters must be capable of being used by vessels in interstate commerce. Rather than use traditional navigability tests, the 1972 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 since that change.

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. At the same time, the Supreme Court has not always provided clear rules for determining whether a particular waterbody is a water of the United States. In its most recent case on the issue, *Rapanos v. United States*, the High Court issued a fractured 4-1-4 decision with no majority opinion providing a rationale for how to evaluate jurisdictional disputes.

Some courts and commentators 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). This debate resurfaced during the Obama Administration 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. While some argued that the Clean Water Rule constituted a large-scale expansion of federal jurisdiction, others asserted that the agencies construed the term in a narrower fashion than in prior regulations.

A vocal critic of the Clean Water Rule, President Trump shifted the executive branch's policy toward the meaning of "waters of the United States." In February 2017, President Trump issued an executive order directing EPA and the Corps to review and revise or rescind the Clean Water Rule. The agencies currently are in the process of carrying out the executive order, and they unveiled proposed regulations redefining "waters of the United States" in December 2018. As in nearly all prior attempts to define this phrase, observers disagree on whether the latest proposed definition correctly calibrates the scope of federal jurisdiction to regulate water pollution.

Contents

Background ... 3
Early History of Jurisdictional Waters ... 5
Differing Agency Definitions Following the Clean Water Act ... 6
EPA's Initial Definitions ... 6
The Corps' Initial Definition ... 7
Callaway and its Aftermath ... 8
The Corps' Expansion of Jurisdictional Waters Following *Callaway* ... 8
The Corps' 1977 Regulations ... 10
The Clean Water Act of 1977 ... 11
Synthesizing Definitions Following the Clean Water Act of 1977 ... 11
Changes in "Waters of the United States" in the 1980s ... 13
Riverside Bayview Homes ... 13
The Migratory Bird Rule and Other Adjustments to "Waters of the United States" ... 14
Competing Wetland Manuals and Congressional Intervention Through Appropriations ... 15
Judicially Imposed Limitations Beginning in the Late 1990s ... 16
United States v. Wilson ... 17
The Corps' 2000 Guidance in Response to *Wilson* ... 18
SWANCC ... 18
Agency Guidance in Response to *SWANCC* ... 20
Rapanos ... 21
Lower Courts' Response to *Rapanos* ... 22
Agency Guidance in Response to *Rapanos* ... 23
The Clean Water Rule ... 24
Response to the Clean Water Rule During the 114th Congress ... 25
National Association of Manufacturers v. Department of Defense: Jurisdiction over Challenges to the Clean Water Rule ... 25
The Trump Administration and "Waters of the United States" ... 27
The Two-Step Rescind and Revise Process ... 27
Step One Status: Repealing the Clean Water Rule ... 28
Step Two Status: Drafting a New Definition of "Waters of the United States" ... 28
The Applicability Date Rule: Suspending the Clean Water Rule During the Two-Step Process ... 30
The Legal Landscape for the 116th Congress ... 32
Proposed Legislation ... 34
Conclusion ... 34

Figures

Figure 1. Major Events in the Evolution of "Waters of the United States" ... 4
Figure 2. Status of the Clean Water Rule ... 33

Tables

Table A-1. Major Federal Actions Related to "Waters of the United States" in the Clean Water Act 35

Appendixes

Appendix. Table Concerning Major Federal Actions Related to "Waters of the United States" in the Clean Water Act 35

Contacts

Author Information 38

For more than forty-five years, all three branches of government have struggled with how to interpret the meaning of "waters of the United States" in the Clean Water Act. In 1972, Congress eliminated the requirement that waters must be navigable in the traditional sense[1]—meaning they are capable of being used by vessels in interstate commerce—in order to be subject to federal water pollution regulation.[2] Rather than use traditional tests of navigability,[3] the 1972 amendments to the Federal Water Pollution Control Act,[4] which came to be known as the Clean Water Act, redefined "navigable waters" to include "the waters of the United States, including the territorial seas."[5] Disputes over the meaning of that phrase have been ongoing ever since the change.

Some courts and commentators 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).[6] This debate resurfaced during the Obama Administration

---

[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 of 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] The Federal Water Pollution Control Act of 1948, P.L. 845, 62 Stat. 1155, was the nation's first major law to address water pollution at the federal level. *See* History of the Clean Water Act, EPA.GOV (last updated Aug. 8, 2017), https://www.epa.gov/laws-regulations/history-clean-water-act.

[5] Act to Amend the Federal Water Pollution Control Act, P.L. 92-500 § 502, 86 Stat. 816, 886 (1972).

[6] *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 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, 30-34 (May 27, 2015), https://www.epa.gov/sites/production/files/2015-05/documents/

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.[7] While some argued that the Clean Water Rule constituted a major expansion of federal jurisdiction, others asserted that the agencies construed the term in a narrower fashion than in prior regulations.[8]

A vocal critic of the Clean Water Rule, President Trump shifted the executive branch's policy toward the meaning of "waters of the United States."[9] In February 2017, President Trump issued an executive order directing EPA and the Corps to review and revise or rescind the Clean Water Rule.[10] The agencies currently are in the process of carrying out the executive order, and they unveiled proposed regulations redefining "waters of the United States" in December 2018.[11] As in nearly all prior attempts to define this phrase, however, observers disagree on whether the latest proposed definition correctly calibrates the scope of federal water pollution regulation.[12] 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.[13]

technical_support_document_for_the_clean_water_rule_1.pdf [hereinafter Technical Support for the Clean Water Rule] (asserting that the Clean Water Rule represents a contraction in jurisdiction).

[7] *See infra* § "The Clean Water Rule."

[8] *Compare, e.g.*, Jenny Hopkinson, *Obama's Water War*, POLITICO (May 27, 2015), https://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319 ("[O]pponents condemn [the Clean Water Rule] as a massive power grab by Washington, saying it will give bureaucrats carte blanche to swoop in and penalize landowners every time a cow walks through a ditch.") *with* Technical Support for Clean Water Rule, *supra* note 6, at 30 (arguing that the Clean Water Rule narrowed federal jurisdiction when compared to prior regulations).

[9] *See infra* § "The Trump Administration and "Waters of the United States"

[10] Executive Order 13778, Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12497 (issued Feb. 28, 2017).

[11] *See infra* § "The Two-Step Rescind and Revise Process."

[12] *See infra* § "The Legal Landscape for the 116th Congress."

[13] 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 Dec. 3, 2018) (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 Dec. 3, 2018) (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).

Background

The Clean Water Act is the principal law governing pollution of the nation's surface waters.[14] Among other requirements, the act prohibits the unauthorized discharge of pollutants into "navigable waters,"[15] and requires persons wishing to discharge dredged or fill material into "navigable waters" to obtain a permit from the Corps.[16] In its definition section, the act defines the term "navigable waters" to mean "waters of the United States, including its territorial seas."[17] This single, jurisdiction-defining phrase applies to the entire law, including the national pollutant discharge elimination system (NPDES) permit program;[18] permit requirements for disposal of dredged or fill material, known as the Section 404 program;[19] water quality standards and measures to attain them;[20] oil spill liability and prevention;[21] and enforcement.[22]

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 or are subject to the ebb and flow of tide.[23]

Interstate waters: Waters that form a part of a state's boundary.[24]

Navigable waters: An anomalous term as used in the Clean Water Act. The Clean Water Act governs "navigable waters,"[25] 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."[26]

Jurisdictional waters: A term of art used by courts to describe those waters subject to federal regulatory jurisdiction under the Clean Water Act.[27]

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 federal courts have struck down on various occasions as failing to satisfy statutory or constitutional requirements.

---

[14] *See* JOEL M. GROSS, KERRI L. STELCEN, CLEAN WATER ACT: BASIC PRACTICE SERIES (2d ed. 2012); CRS Report RL30030, *Clean Water Act: A Summary of the Law*, by Laura Gatz, at 1.

[15] 33 U.S.C. § 1311(a).

[16] *Id.* § 1344.

[17] *Id.* § 1362(7).

[18] *Id.* § 1342.

[19] *Id.* § 1344.

[20] *Id.* § 1313.

[21] *Id.* § 1321.

[22] *Id.* § 1319.

[23] *See, e.g.*, PPL Mont., LLC v. Montana, 565 U.S. 576, 591-92 (2012) (quoting The Daniel Ball, 77 U.S. 557, 563 (1871)).

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

[25] 33 U.S.C. § 1362(7).

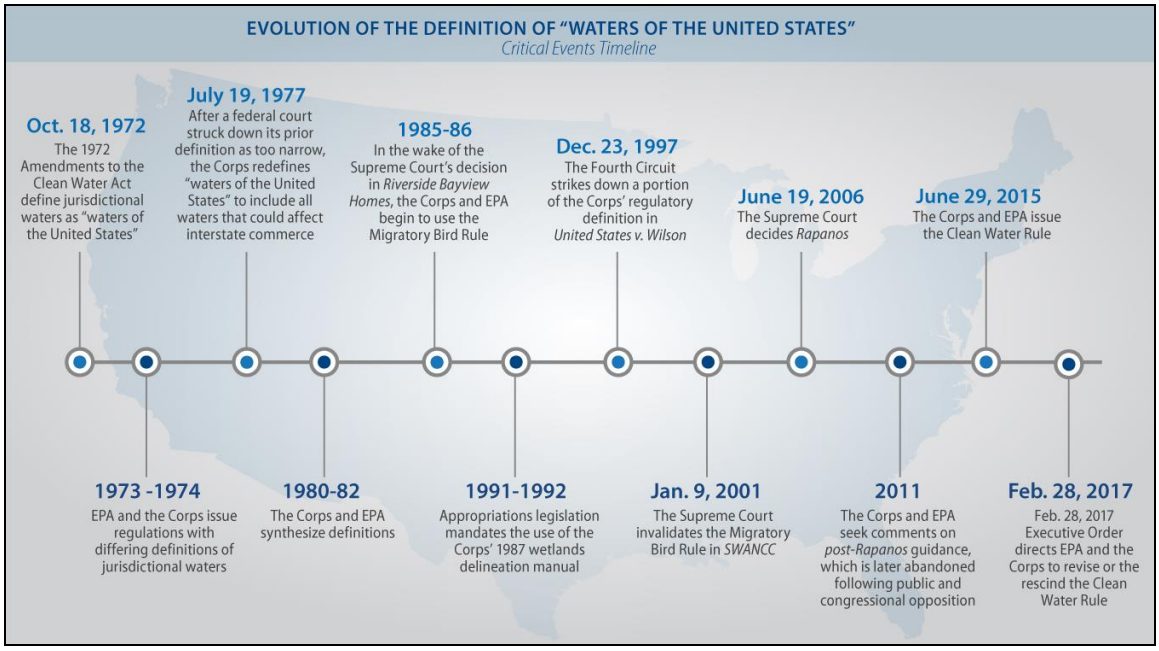
[26] *Id.*

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

Federal authority to regulate waters within the United States primarily derives from the Commerce Clause,[28] which gives Congress the power to "regulate commerce with foreign nations, and among the several states . . . ."[29] Accordingly, federal laws and regulations regulating waters of the United States cannot cover matters that exceed that constitutional source of authority.[30] Legal challenges to the Corps' and EPA's interpretation of "waters of the United States"—particularly those which were successful—often followed broader trends in interpreting the Commerce Clause.[31] 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."[32]

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.

[28] *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 accessible from a State other than those in which they lie."). *See also* United States v. 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).

[29] U.S. CONST. art. 1, § 8, cl. 3.

[30] *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).

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

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

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[.]"[33] 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."[34]

Beginning with the Federal Water Pollution Control Act of 1948, Congress began to use a different jurisdiction-defining phrase to regulate pollution of "interstate waters," which it defined as "all rivers, lakes, and other waters that flow across, or form a part of, a State's boundaries."[35] Congress amended that legislation in 1961 to expand federal jurisdiction from "interstate waters" to "interstate or navigable waters[.]"[36]

The Federal Water Pollution Control Act Amendments of 1972,[37] which came to be known as the Clean Water Act,[38] again amended the jurisdictional reach of federal water pollution legislation. There, Congress exercised jurisdiction over "navigable waters," but provided a new definition of that phrase, stating: "The term 'navigable waters' means the waters of the United States, including the territorial seas."[39] 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 they intended the revised definition 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 unencumbered by agency determinations which have been made or may be made for administrative purposes."[40] And during debate in the House on approving the conference report, one Representative explained that the definition "clearly encompasses all water bodies, including streams and their tributaries, for water quality purposes."[41] Courts have frequently referred to the

---

[33] *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").

[34] *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.*

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

[36] *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)).

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

[38] *See* History of the Clean Water Act, EPA.GOV (last updated Aug. 8, 2017), https://www.epa.gov/laws-regulations/history-clean-water-act.

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

[40] S. REPT. NO. 92-1236, at 144 (1972) (Conf. Rep.).

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

act's legislative history when interpreting its jurisdictional reach,[42] but they have not always agreed on the import of this history.[43]

Differing Agency Definitions Following the Clean Water Act

The Corps and EPA share responsibility for administering the Clean Water Act. Both agencies have administrative responsibilities under Section 404 of the act,[44] and EPA administers most other Clean Water Act-related programs in partnership with U.S. states.[45] Because of this shared jurisdiction, both agencies create regulations defining the waters subject to their regulatory jurisdiction.[46] In the initial years following the enactment of the Clean Water Act, their respective definitions differed significantly.[47]

EPA's Initial Definitions

In May 1973, EPA issued its first set of regulations implementing the Clean Water Act's NPDES permit program.[48] There, EPA defined the term "navigable waters" to include six categories of waterbodies.[49]

[42] *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).

[43] *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 749-52 (2006) (Scalia, J.) (plurality opinion) (criticizing four dissenting Justices' use of legislative history in interpreting the jurisdictional scope of the Clean Water Act).

[44] *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 14, at 6 (discussing the joint administration of Section 404).

[45] *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'. . . .").

[46] *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").

[47] *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.").

[48] *See* National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13,529 (1973) (codified at 40 C.F.R. § 125.1(p) (1974)).

[49] *Id.*

EPA's First Definition of Jurisdictional Waters[50]

In May 1973, EPA issued regulations defining jurisdictional waters for purposes of the NPDES permit program as the following:

(1) All navigable waters of the United States;

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

(3) Interstate waters;

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

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

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

Three months prior to issuing these regulations, EPA's general counsel had provided an opinion on the meaning of "navigable waters" in the Clean Water Act.[51] The general counsel's recommended definition largely mirrored EPA's 1973 regulatory definition, but with one critical difference: categories four through six of the general counsel's recommendation would have included *interstate* lakes, rivers, and streams that are utilized for interstate activities rather than *intrastate* waters used for such activities.[52] EPA's definition of "navigable waters" in its non-NPDES water pollution regulations at the time also differed in certain ways from its May 1973 definition.[53]

The Corps' Initial Definition

The Corps' early implementation of the Clean Water Act differed considerably from EPA's regulations.[54] After initially proposing regulations that simply repeated the statutory definition of "navigable waters,"[55] the Corps issued final regulations in April 1974 implementing Section 404 of the Clean Water Act.[56] There, the Corps acknowledged the language from the conference report for the Clean Water Act as calling for the "broadest possible constitutional interpretation" of

[50] *Id.*

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

[52] *Compare id. with* National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13,529 (1973) (codified at 40 C.F.R. § 125.1(p) (1974)).

[53] EPA definition of "navigable waters" in its 1973 regulations implementing the Clean Water Act's oil pollution prevention provisions did not include intrastate waters used for industrial purposes in interstate commerce (Category 6), and it expanded upon on the first category of navigable waters as follows: "all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 amendments . . . ." *See* Oil Pollution Prevention, 38 Fed. Reg. 34,164, 34,165 (December 11, 1973) (codified in 33 C.F.R. § 112.2(k) (1974)). 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).

[54] *See* Mank, *supra* note 47, at 300.

[55] *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).

[56] 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)).

navigable waters, but concluded that the Constitution limited its jurisdiction to the same waters that it regulated under preexisting laws, such as the Rivers and Harbors Act.[57] Based on this reasoning, the Corps defined "navigable waters" using language that generally limited its jurisdiction to waters that were navigable-in-fact.[58]

The Corps' First Definition of Jurisdictional Waters

In its first set of final regulations, issued in 1974, 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 . . . .[59]

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.[60] 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[.]"[61] The court ordered the Corps to produce new regulations that acknowledged "the full regulatory mandate" of the Clean Water Act.[62]

The Corps' Expansion of Jurisdictional Waters Following *Callaway*

The Corps responded to *Callaway* on May 6, 1975, by publishing proposed regulations that offered four alternative methods of redefining the Corps' jurisdiction under the 1972 amendments.[63]

[57] *See id.* at 12,115.

[58] *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.").

[59] 33 C.F.R § 209.12(d)(1) (1974).

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

[61] *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").

[62] *See* Callaway, 392 F. Supp. at 685.

[63] *See* Proposed Policy, Practice and Procedure: Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 19,766 (May 6, 1975).

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,[64] 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.[65]

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.[66] These events brought public and media attention to the breadth of jurisdiction under the Clean Water Act.[67] They also created a disagreement between the Corps and EPA,[68] and led to a series of subcommittee hearings in the House and Senate.[69]

In the aftermath of this public and congressional scrutiny, the Corps issued interim final regulations in 1975 in which it revised the definition of "navigable waters" for purposes of the Clean Water Act's Section 404 program by adopting much of the structure used in EPA's 1973

[64] 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*. Because of the similarity of language, and to provide clarity, this report uses the phrase "navigable-in-fact" to refer to traditionally navigable waters.

[65] *See id.*

[66] *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).

[67] *See, e.g.*, *Army Engineers Seek Control of All Waters, Down to Ponds*, N.Y. TIMES, May 7, 1975, at 12, PROQUEST; *Wetlands and the Corps of Engineers*, WASH. 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).

[68] 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").

[69] *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).

regulations.[70] The Corps' definition also added "wetlands, mudflats, swamps, marshes, and 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."[71] Finally, the Corps' 1975 interim regulations permitted federal regulation over all other waters that a Corps' district engineer "determines necessitate regulation for the protection of water quality" based on the Corps' technical standards and evaluation criteria.[72]

The Corps' 1977 Regulations

In 1977, the Corps issued final regulations reorganizing the definition of "waters of the United States" into five categories.[73]

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.[74]

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

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

[71] *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.

[72] *Id.* at 31,325. The criteria on which the district engineer was to base the necessity determination were set forth in 40 C.F.R. part 230 (1976).

[73] *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].").

[74] 33 C.F.R. §323.2(a) (1978).

under the federal government's Constitutional powers to regulate and protect interstate commerce."[75] The Corps would continue to use this Commerce Clause-focused provision (with revisions) until the Clean Water Rule was published in 2015,[76] and EPA would later adopt it in its regulations.[77]

The Clean Water Act of 1977

After the Corps' 1975 and 1977 regulations, some Members of Congress introduced bills that sought to limit the Clean Water Act's jurisdiction to traditional, navigable-in-fact waters,[78] but the proposed 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."[79]

The original version of the Clean Water Act of 1977 introduced in the House would have limited the Corps' jurisdiction,[80] and an amendment proposed in the Senate sought similar limitations.[81] But the original Senate version, which generally retained the existing definition of "navigable waters," was adopted in conference and passed into law.[82] The Clean Water Act of 1977, as enacted, contained certain exemptions from Section 404 permitting for "normal farming, silviculture, . . . ranching[,]" and other activities.[83]

Synthesizing Definitions Following the Clean Water Act of 1977

While the 1977 legislation appeared to resolve temporarily 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.[84] EPA independently defined the jurisdictional reach of the Clean Water Act as it related to programs like NPDES and oil pollution prevention,[85] but it incorporated the Corps' definition into

---

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

[76] *See* 33 C.F.R. § 328.3(a)(3) (2014) (defining "waters of the United States" in 2014, pre-Clean Water Rule regulations 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").

[77] *See* 40 C.F.R. § 122.3 (1981).

[78] *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).

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

[80] *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").

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

[82] *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.").

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

[84] *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).

[85] *See supra* note 53.

its regulations related to Section 404 permits.[86] At the same time, however, EPA separately expanded on that definition in an appendix to its Section 404 regulations.[87]

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.[88] 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.[89]

Although it took the agencies 10 years after the Attorney General's opinion to agree formally on a division of responsibilities,[90] 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,[91] and the Corps adopted EPA's definition in interim regulations two years later.[92] The Corps issued final regulations in 1986 that did not change the regulatory definition,[93] and the two agencies continued to use this core definition (with modifications) until they published the Clean Water Rule in 2015.[94]

[86] *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)).

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

[88] *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.

[89] *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.

[90] For background on the interagency dispute over the administration of Section 404, see Blumm & Mering, *supra* note 84.

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

[92] *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 (Sep. 19, 1980). That proposal was never adopted.

[93] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed Reg. 41,206, 41,250 (1986) (codified in 33 CFR § 323.3 (1987)).

[94] *Compare* 40 C.F.R. § 122.3 (1981) (EPA's definition) *and* 33 CFR § 323.3 (1987) (Corps' final unified definition) *with* Technical Support for the Clean Water Rule, *supra* note 6, 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";[95]
>
> (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.[96]

Changes in "Waters of the United States" in the 1980s

Riverside Bayview Homes

The Supreme Court reviewed a legal challenge to the Corps' application of "waters of the United States" for the first time in 1985 in *United States v. Riverside Bayview Homes, Inc*.[97] There, the Corps sought to enjoin a property owner from discharging fill material on his wetlands located one mile from the shore of Lake St. Clair in Michigan,[98] a 468-square-mile, navigable-in-fact lake that forms part of the boundary between Michigan and Ontario, Canada.[99] The Corps argued that, by defining "waters of the United States" to include wetlands that are "adjacent to" other

[95] "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.

[96] *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)) (Corps' definition).

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

[98] *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).

[99] *See Lake Saint Clair*, ENCYCLOPEDIA BRITANNICA (last updated Aug. 8, 2008), https://www.britannica.com/place/Lake-Saint-Clair-lake-North-America.

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.[100]

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.[101] 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.[102]

The Supreme Court reversed.[103] 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."[104] Further, it rejected the lower courts' concerns over the constitutionality of the Corps' regulations as "spurious."[105] 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 . . . ."[106]

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[107]—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.[108] In concluding that adjacent wetlands could reasonably be covered, however, the Court also emphasized that it did not express any opinion on the Corps' authority to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.[109]

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

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

[101] *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").

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

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

[104] *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.

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

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

[107] *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)).

[108] *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*."

[109] *Riverside Bayview Homes, Inc*., 474 U.S. at 131 n.8.

migratory birds crossing state lines.[110] 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 that the Migratory Bird Rule was a "clarification" of the existing regulatory definition.[111]

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.[112] 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.[113]

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 physical boundaries of jurisdictional waters, particularly wetlands, arose in the late 1980s.[114] The Corps issued the first wetlands delineation manual in 1987 (1987 Manual),[115] but EPA published its own manual the following year which used an alternative technical analysis.[116] 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).[117]

Some observers criticized aspects of the Federal Manual, including the methodology it employed for identifying and delineating jurisdictional waters.[118] Some also argued that the Federal Manual

---

[110] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 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 using it in 1985 before the Court's decision in *Riverside Bayview Homes*. *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 (Sep. 13, 1985), 1985 WL 195307, at *2.

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

[112] *See id.*; Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 54 Fed. Reg. at 20,765.

[113] *See* Clean Water Act Regulatory Programs; Final Rule, 58 Fed. Reg. 45,008, 45,031, 45,036-37 (Aug. 25, 1993). Requirements and methods for delineation of prior converted cropland are outside the scope of this report.

[114] *See* RALPH E. HEIMLIC ET AL., ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, WETLANDS AND AGRICULTURE, PRIVATE INTERESTS AND PUBLIC BENEFITS, AER-765, 11 (1998).

[115] U.S. ARMY, CORPS OF ENG'RS, TECHNICAL REPORT Y-87-1, WETLANDS DELINEATION MANUAL (1987), 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 Dec. 31, 2018), http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/.

[116] *See* HEIMLIC ET AL., *supra* note 114, 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).

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

[118] *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.[119] 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.[120] The following year, Congress mandated that the Corps use the 1987 Manual until a new manual was published after public notice and comment.[121] The interagency group proposed revisions to the Federal Manual, which received over 100,000 comments,[122] but that proposal was never finalized, and no interagency wetlands manual was created.[123]

Judicially Imposed Limitations Beginning in the Late 1990s

In contrast to the agencies' attempt to align jurisdictional waters with what they interpreted to be the outer reaches of the Commerce Clause in the 1980s, a series of court cases beginning in the late 1990s caused the Corps and EPA to modify their interpretation of "waters of the United States." For much of the 20th century, 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.[124] In the 1995 case of *United States v. Lopez*, however, the Supreme Court struck

[119] *See* HEIMLIC ET AL., *supra* note 114, at 12; *see also* WAKELEY, *supra* note 116, 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.").

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

[121] *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).

[122] *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).

[123] *See* HEIMLIC ET AL., *supra* note 114, 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 116, at 3.

[124] *See, e.g.*, United States v. Darby, 312 U.S. 100, 118 (1941) ("The 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 by Congress if it exerts a substantial economic effect on interstate commerce"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) ("How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution."); Perez v. United States, 402 U.S. 146 (1971) (holding that a criminal prohibition on "loansharking" sufficiently affected interstate commerce to withstand a Commerce Clause challenge).

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.[125]

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.[126] 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.[127] *Lopez* set the backdrop for a series of 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.[128] Following a seven-week trial in *United States v. Wilson*, a jury convicted three defendants of violating Section 404[129] 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.[130] On appeal to the Fourth Circuit, the defendants challenged their conviction on the grounds that the portion of the 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.[131]

Relying in part on the holding in *Lopez*, the Fourth Circuit agreed with a portion of the defendants' arguments and ordered a new trial.[132] The court reasoned that, under *Lopez*, the regulated conduct must "substantially affect" interstate commerce in order to invoke the Commerce Clause power.[133] Because the Corps purported to regulate waters that "could affect" interstate commerce—without regard to whether there was any actual effect, substantial or otherwise—the Fourth Circuit concluded that the Corps exceeded its authority.[134] Although the Fourth Circuit strongly suggested that the Corps' assertion of jurisdiction exceeded the constitutional grant of authority under the Commerce Clause,[135] it ultimately invalidated the

[125] 514 U.S. 549 (1995).

[126] *See id.* at 551.

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

[128] 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).

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

[130] *See Wilson*, 133 F. 3d at 254, 256.

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

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

[133] *See id*. at 256.

[134] *See id.* at 256-57.

[135] *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.").

challenged portion of the regulations solely on the ground that it exceeded the congressional authorization under the Clean Water Act.[136]

As *Wilson* never reached the Supreme Court,[137] it was only binding precedent in the Fourth Circuit,[138] and the stricken language remained in the regulations of the Corps and EPA until the release of the 2015 Clean Water Rule.[139]

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.[140] The Corps explained that, *within the Fourth Circuit only*, "isolated waters" must be shown to have an *actual* connection to interstate or foreign commerce.[141] "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.[142]

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.[143] The Corps also deemed drainage ditches constructed in jurisdictional waters to be subject to the Clean Water Act except when the drainage was so complete that it converted the entire area to dry land.[144]

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

[136] *See id.*

[137] 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).

[138] *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"). The Fourth Circuit has appellate jurisdiction over the federal district courts of Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

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

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

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

[142] *See*, *e.g.*, Rapanos v. United States, 547 U.S. 715, 794 (2006) (Stevens, J., dissenting) (quoting Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 168-69 (2001)) (discussing the meaning of "isolated waters").

[143] *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.

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

birds.[145] 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.[146]

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.[147] 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*,[148] in which the Court held that Congress lacked constitutional authority under the Commerce Clause to enact portions of the Violence Against Women Act.[149] 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."[150] 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."[151] 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.[152]

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.[153] Although the *Riverside Bayview Homes* Court found that classical "navigability" was of "limited import" in determining Clean Water Act jurisdiction,[154] the *SWANCC* Court distinguished that case as focused on "wetlands adjacent to navigable waters."[155] 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, the Court concluded.[156]

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

---

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

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

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

[148] 529 U.S. 598, 627 (2000) (affirming decision holding that Congress lacked constitutional authority to enact 42 U.S.C. § 13981 (2000)).

[149] *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.").

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

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

[152] *See id.*

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

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

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

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

Rule, which the Corps described as an effort to "clarify" its regulatory definition.[157] 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.[158] The relationship between *SWANCC*'s limited holding and the Court's broader rationale generated considerable litigation over the scope of the Clean Water Act.[159]

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.[160] 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."[161] The potential effect on or degradation on existing jurisdictional waters, the agencies reasoned, established the "significant nexus" mentioned in *SWANCC*.[162]

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*.[163] The agencies later abandoned that proposed rulemaking effort, leaving unanswered questions over federal jurisdiction over isolated waters after *SWANCC*.[164] 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*.

---

[157] *See id.* at 174.

[158] *See* Advanced Notice of Proposed Rulemaking on the Clean Water Regulatory Definitions of "Waters of the United States," 68 Fed. Reg. 1,991, 1,996 (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).

[159] *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).

[160] 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)], https://www.environment.fhwa.dot.gov/ecosystems/laws_swepacoe.asp [hereinafter 2001 Joint Memorandum].

[161] *See id.* at 3.

[162] *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[.]").

[163] *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.

[164] *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*[165] and *Carabell*[166]—both of which concerned the breadth of the Clean Water Act's jurisdiction over "adjacent" wetlands.[167] In *Carabell*, landowners challenged whether Section 404 jurisdiction extends to "wetlands that are hydrologically isolated from any of the 'waters of the United States[,]'"[168] and *Rapanos* presented the similar question of whether this jurisdiction includes nonnavigable wetlands "that do not even abut a navigable water."[169] In both cases, collectively referred to as *Rapanos*, the Sixth Circuit upheld the Corps' assertion of jurisdiction over the wetland property in question.[170]

Many anticipated that *Rapanos* would provide clarity on the disputes following *SWANCC*.[171] 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 evaluating jurisdictional waters.

---

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

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

[167] The statutory reference to "adjacent" wetlands contained in Section 404 of the Clean Water Act states "[t]he Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those 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 shoreward to their mean high water mark, or mean higher high water mark on the west coast, *including wetlands* adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C.A. § 1344(g)(1) (emphasis added).

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

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

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

[171] *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 Clean Water Act jurisdiction,] only the Supreme Court can fix the problem.").

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.[172] Wetlands could also be included, but only when they have a "continuous surface connection" to other "waters of the United States."[173]

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.[174] 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.[175]

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.[176] 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."[177] While this rule may appear straightforward, it is not always self-evident how courts should identify which Justice's opinion rests on the "narrowest grounds."[178] Some courts have held that Justice Kennedy's "significant nexus" test is the narrowest ruling to be derived from *Rapanos*.[179] Others concluded that waterbodies that satisfy *either* the plurality test or the "significant nexus" test satisfy *Rapanos* and may be deemed jurisdictional.[180] Of the nine circuits that have addressed the issue, all have applied Justice Kennedy's significant nexus test either alone or in combination

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

[173] *See id.* at 742.

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

[175] *See id.* at 780.

[176] In his brief concurrence, Chief Justice Roberts predicted difficulties in implementing *Rapanos*, stating: "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).

[177] 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.)).

[178] *See* CRS Legal Sidebar LSB10113, *What Happens When Five Supreme Court Justices Can't Agree?*, by Kevin M. Lewis.

[179] United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) ("[A]s a practical matter the Kennedy concurrence is the least common denominator[.]"), *cert. denied*, 552 U.S. 810 (2007); United States v. Robison, 505 F.3d 1208, 1222 (11th Cir. 2007) ("[P]ursuant to *Marks*, we adopt Justice Kennedy's 'significant nexus' test as the governing definition of 'navigable waters' under *Rapanos*."), *cert. denied sub nom*, McWane v. United States, 555 U.S. 1045 (2008).

[180] United States v. Donovan, 661 F.3d 174, 183-84 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009); United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007);

with the plurality's test, and none have applied the plurality approach alone.[181] Still, some courts and observers have criticized the significant nexus test as vague and difficult to implement.[182]

Agency Guidance in Response to *Rapanos*

The Corps and EPA offered their own interpretation of *Rapanos* through guidance to field officers in 2007,[183] which the agencies revised and replaced after public comment in 2008.[184] The 2008 guidance adopted the view taken by some lower courts[185] that jurisdiction exists over any waterbody that satisfies either the plurality approach or the significant nexus test.[186] 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.[187]

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.[188]

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

[181] *See* Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011); *Bailey*, 571 F.3d at 799; *Donovan*, 661 F.3d at 183-84; United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 74 (2009); United States v. Lucas, 516 F.3d 316 (5th Cir.), *cert. denied*, 555 U.S. 822 (2008); *Robison*, 505 F.3d at 1222; 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); *Johnson*, 467 F.3d at 66; *Gerke Excavating, Inc.* 464 F.3d at 725.

[182] *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.").

[183] 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), https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf.

[184] 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], https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[185] *See supra* note 180.

[186] 2008 Memorandum, *supra* note 184, at 3.

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

[188] *See id.*

Act in comparison to its earlier post-*Rapanos* guidance.[189] The potential enlargement of jurisdiction spawned congressional attention, including a letter signed by 41 Senators requesting that the agencies abandon the effort.[190] Some Members of Congress introduced prohibitions on funding related to the draft guidance in several appropriations bills, but those provisions were never enacted.[191] Instead, the agencies abandoned pursuit of the 2011 draft guidance in favor of their 2015 effort at defining the scope of "waters of the United States," the Clean Water Rule.

The Clean Water Rule

The Corps and EPA issued the Clean Water Rule in May 2015 in an effort to clarify the bounds of jurisdictional waters in the wake of *SWANCC* and *Rapanos*.[192] The agencies relied on a synthesis of more than 1,200 published and peer-reviewed scientific reports and over 1 million comments on the proposed version of the rule.[193] The Clean Water Rule contains the same three-tier structure from the agencies' 2008 joint guidance, identifying waters that (1) are 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) are categorically excluded from the Clean Water Act's jurisdiction.[194] In an effort to reduce uncertainty about the scope of federal jurisdiction, the agencies sought to increase categorical jurisdictional determinations and reduce the number of waterbodies subject to the case-specific significant nexus test.[195]

[189] *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 . . . .").

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

[191] *See* H.R. 4923, 113th Cong. § 106 (2014); H.R. 2584, 112th Cong. § 435 (2011); H.R. 6061, 112th Cong. § 434 (2012).

[192] *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). *See also* Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617, 625 (2018) ("In 2015, responding to repeated calls for a more precise definition of 'waters of the United States,' the agencies jointly promulgated" the Clean Water Rule.).

[193] *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]. 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).

[194] *See id*.

[195] *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[196]

- The 2015 Clean Water Rule included as categorically jurisdictional waters of the United States
  - Traditional, navigable waters, interstate waters, the territorial seas, or impoundments of such waters;
  - Tributaries—as newly defined in the Clean Water Rule197—of traditional navigable waters, interstate waters, and the territorial seas; and
  - Waters, including wetlands, lakes, ponds, and "similar waters," that are "adjacent" to traditional navigable waters, interstate waters, and the territorial seas.
- 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 are 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 During the 114th Congress

The Clean Water Rule was the subject of significant debate among observers, stakeholders, and Members of Congress,[198] and a 2015 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.[199] The 114th 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[200] under the Congressional Review Act.[201] However, President Obama vetoed that resolution,[202] and a procedural vote in the Senate to override the veto failed.[203]

National Association of Manufacturers v. Department of Defense: Jurisdiction over Challenges to the Clean Water Rule

The Obama Administration intended the Clean Water Rule to take effect on August 28, 2015,[204] but 31 states[205] and 53 non-state plaintiffs, including industry associations, environmental groups,

---

[196] *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 (defining "waters of the United States" in 33 C.F.R. § 329.3 (2016)). For additional analysis of the Clean Water Act, see CRS Report R45424, *"Waters of the United States" (WOTUS): Current Status of the 2015 Clean Water Rule*, by Laura Gatz, at 2-4.

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

[198] *See, e.g.*, Snider, *supra* note 182.

[199] *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.

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

[201] *See* 5 U.S.C. §§ 801-808.

[202] *See* U.S. President (Obama), Veto Message from the President—S.J. 22 (Jan. 19, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22.

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

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

[205] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico (Environment Department and State Engineer), North Carolina (Department of Environment and Natural Resources), North Dakota, Ohio, Oklahoma, South

and others, filed suit challenging its legality.[206] The plaintiffs argued, among other things, that the rule exceeded the agencies' statutory and constitutional authority and did not comply with the rulemaking requirements in the Administrative Procedure Act (APA).[207] Environmental groups, seven states,[208] and the District of Columbia intervened in defense of the rule.[209] Before any court could address the merits of the claims, however, an impasse arose over what court was the proper forum for the litigation. Whereas some plaintiffs filed suit in federal district courts, others argued that a judicial-review provision in Section 509 of the Clean Water Act[210] gave the U.S. circuit courts of appeals direct appellate-level review over challenges to the Clean Water Rule.

At the district court level, some courts dismissed their suits, concluding that the courts of appeals had exclusive jurisdiction.[211] But one district court—the District Court for the District of North Dakota (District of North Dakota)—ruled that it had jurisdiction to review the Clean Water Rule.[212] In August 2015, the District of North Dakota concluded that the rule was likely to be struck down on the merits, and it granted a motion for preliminary injunction, temporarily barring the Clean Water Rule's implementation in 13 western states.[213] (The court later added another state, Iowa, to the scope of injunction.)[214]

In the parallel litigation at the appellate level, a Judicial Panel on Multidistrict Litigation consolidated and transferred all circuit court cases to the United States Court of Appeals for the Sixth Circuit (Sixth Circuit).[215] In the consolidated, appellate-level litigation, the Sixth Circuit concluded that the agencies should not apply the Clean Water Rule during the pendency of the legal challenges, and it issued a nationwide stay of the rule.[216] The Sixth Circuit also concluded

---

Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming filed challenges to the Clean Water Rule. *See* Brief of Respondents Ohio et al., Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617 (2018). Iowa later joined in an existing legal challenge, bringing the total to 32 states. *See* Supplemental Notice of Proposed Rule Making: Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, at 32,229 n.5 (July 12, 2018) [hereinafter Supplemental Notice Proposed Step One Rule].

[206] For a description of the parties that filed suit and a list of courts in which they initiated litigation, see Supplemental Notice Proposed Step One Rule, 83 Fed. Reg. at 32,229-30.

[207] For discussion of the APA's rulemaking requirements, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey, and CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[208] New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, and Washington intervened in the consolidated appellate-level litigation at the Sixth Circuit in defense of the Clean Water Rule.

[209] *See* Petition for Writ of Certiorari at ii-iv, Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617, 627 (2018) [hereinafter *NAM* Cert. Petition] (identifying parties to the consolidated appellate-level challenges to the Clean Water Rule); Supplemental Notice Proposed Step One Rule, 83 Fed. Reg. at 32,229-30 (providing background on the challenges to the Clean Water Rule).

[210] *See* 33 U.S.C. § 1369(b).

[211] *See* Murray Energy Corp. v. EPA, No. 1:15CV110, 2015 WL 5062506, at *6 (N.D.W. Va. Aug. 26, 2015), *abrogated by* Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617 (2018); Georgia v. McCarthy, No. CV 215-79, 2015 WL 5092568, at *3 (S.D. Ga. Aug. 27, 2015), *vacated and remanded sub nom.*, Georgia ex. rel. Carr v. Pruitt, 880 F.3d 1270 (11th Cir. 2018), and *abrogated by* Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617 (2018).

[212] North Dakota v. EPA, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015).

[213] *See id*. at 1060. In 2015, the District of North Dakota enjoined EPA and the Corps from implementing the Clean Water Rule in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *See* Order Limiting the Scope of Preliminary Injunction to the Plaintiffs, North Dakota v. EPA, No. 3:14-cv-59, (D.N.D. Sep. 4, 2015), ECF No. 79.

[214] Order, North Dakota v. EPA, No. 3:14-cv-59, (D.N.D. Sep. 9, 2018), ECF No. 250.

[215] Consolidation Order, In re EPA and Dept. of Defense Final Rule, MCP No. 135, Doc. 3 (J.P.M.L. July 28, 2015).

[216] In re EPA and Dept. of Defense Final Rule, 803 F.3d 804, 809 (6th Cir. 2015), *vacated sub nom*., 713 F. App'x 489

that it—and not the district courts—had exclusive jurisdiction over the challenges to the Clean Water Rule,[217] setting the stage for the Supreme Court to address the threshold question of which court or courts possess jurisdiction to hear the Clean Water Rule cases.

In *National Association of Manufacturers (NAM) v. Department of Defense*, the Supreme Court disagreed with the Sixth Circuit and concluded that the Clean Water Act did not provide direct appellate-level jurisdiction over the pending cases.[218] Section 509 of the Clean Water Act[219] lists seven categories of agency actions subject to direct appellate review, Justice Sotomayor explained in an opinion for the unanimous Court, but a legal challenge to a rule defining "waters of the United States" does not fall within those categories.[220] "Congress has made clear that rules like the [Clean Water] Rule must be reviewed first in federal district court[,]" the Court concluded.[221]

While *NAM* resolved the threshold question of which courts can hear challenges to the Clean Water Rule, it did not address the merits of the challenges themselves. Merits challenges soon resumed at the district court level after the 2018 *NAM* decision. In the interim, while the jurisdictional issue was being litigated, the legal landscape had changed as a result of the Trump Administration's shift in United States' policy toward the jurisdictional reach of the Clean Water Act.

The Trump Administration and "Waters of the United States"

The Trump Administration opposes the Clean Water Rule, and it is in the process of attempting to rescind the rule and replace it with new regulations elaborating on the meaning of "waters of the United States."

The Two-Step Rescind and Revise Process

Less than two months after taking office, President Trump issued Executive Order 13778 directing EPA and the Corps to revise or rescind the Clean Water Rule.[222] The executive order instructs the agencies to review the Clean Water Rule for consistency with the Administration's policy to "ensure that the Nation's navigable waters should be kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the role of the Congress and the States under the Constitution."[223] The executive order

(6th Cir. 2018), and *abrogated by* Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617 (2018).

[217] In re EPA and Dept. of Defense Final Rule, 817 F.3d 261, 274 (6th Cir. 2016), *rev'd and remanded with instructions to dismiss*, Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617 (2018), *vacated by* In re EPA and Dept. of Defense Final Rule, 713 Fed. Appx. 489 (Feb. 28, 2019).

[218] Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617, 634 (2018).

[219] 33 U.S.C. § 1369(b).

[220] *Nat'l Ass'n of Mfrs*., 538 U.S. __, 138 S. Ct. at 634.

[221] *Id.* at 633.

[222] Executive Order 13778, Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12497 (issued Feb. 28, 2017).

[223] *Id.* § 1.

also provides that EPA and the Corps "shall consider" interpreting the jurisdictional reach of the Clean Water Act in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*.[224]

EPA and the Corps intend to carry out Executive Order 13778 through a two-step process.[225] First, they proposed to issue regulations that rescind the Clean Water Rule and recodify the definition of "waters of the United States" that was in place before the agencies issued that rule in 2015.[226] Second, they proposed to engage in a separate rulemaking process to develop new regulations that will define the jurisdictional reach of the Clean Water Act.[227]

Step One Status: Repealing the Clean Water Rule

In July 2017, EPA and the Corps provided notice and sought comment on a proposed rule (Step One Proposal) rescinding the Clean Water Rule and replacing it with the same text that existed before the Clean Water Rule was promulgated.[228] In 2018, the agencies issued a supplemental notice expanding on their legal rationale for repealing the Clean Water Rule and clarifying that the Step One Proposal is intended to rescind permanently the Clean Water Rule in its entirety.[229] According to the supplemental notice, a full repeal is necessary because the Clean Water Rule exceeded the agencies' statutory authority by adopting an interpretation of Justice Kennedy's *Rapanos* opinion that was inconsistent with the Clean Water Act and the opinion itself.[230] The agencies also argued that the complex legal landscape created by litigation surrounding the Clean Water Rule has undermined the Clean Water Rule's goal of providing greater clarity regarding the scope of "waters of the United States."[231] The public comment period for the proposed repeal closed on August 13, 2018.[232]

Step Two Status: Drafting a New Definition of "Waters of the United States"

In December 2018, EPA and the Corps unveiled a second proposed rule (Step Two Proposal) that would complete the second step of the repeal and revise process by creating new regulations that substantively redefine "waters of the United States."[233] According to EPA and the Corps, the Step Two Proposal is intended to provide "predictability and consistency by increasing clarity as to the scope of 'waters of the United States' federally regulated" under the Clean Water Act.[234] The

---

[224] *Id.* § 3.

[225] Proposed Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rule, 82 Fed. Reg. 34,899, at 34,899 (July 27, 2017) [hereinafter Step One Proposal].

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] Supplemental Notice of Proposed Rule Making: Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, at 32,227-28 (July 12, 2018).

[230] *See id.* at 32,228 ("The agencies also propose to conclude that the 2015 Rule exceeded the agencies' authority under the [Clean Water Act] by adopting such an interpretation of Justice Kennedy's 'significant nexus' standard articulated in [*Rapanos*] as to be inconsistent with important aspects of that opinion and to cover waters outside the scope of the Act.").

[231] *See id.* at 32,237-39.

[232] *Id.* at 32,227. *See also Waters of the United States (WOTUS) Rulemaking: Step One – Repeal*, EPA.GOV (last updated Aug. 29, 2018), https://www.epa.gov/wotus-rule/step-one-repeal.

[233] *See* Envtl. Prot. Agency & U.S. Army Corps of Eng'rs., Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019) [hereinafter Step Two Proposal]. Although the Step Two Proposal was unveiled in December 2018, it was not published in the Federal Register until February 14, 2019.

[234] *Id.* at 4,154.

agencies also intend the Step Two Proposal to "clearly implement" the Clean Water of Act's objectives of restoring and maintaining the quality of the nation's waters while respecting state and tribal authority over land and resources.[235] The Step Two Proposal would define "waters of the United States" to include six categories of waterbodies.[236]

The Trump Administration's Proposed Definition

Under the Step Two Proposal, "waters of the United States" would be defined as the waterbodies summarized below:[237]

1. Traditional navigable waters:
2. Tributaries of navigable-in-fact waters that meet the proposal's new definition of tributary;
3. Ditches that are navigable-in-fact or that meet the definition of a tributary and are constructed in or relocate a tributary or are constructed in an adjacent wetland;
4. Lakes and ponds that: (a) are navigable-in-fact; (b) contribute "perennial" (year-round) or "intermittent" (during certain times of a typical year) flow to navigable-in-fact waters directly or indirectly through other jurisdictional waters or non-jurisdictional waters, provided such non-jurisdictional waters convey downstream perennial or intermittent flows; or (c) are flooded by non-wetland jurisdictional waters;
5. Impoundments of jurisdictional waters other than ditches; and
6. Wetlands adjacent to other jurisdictional waters.

The Step Two Proposal would mark a significant change from post-*Rapanos* interpretations of "waters of the United States" because it would eliminate the case-by-case "significant nexus" evaluation that has been part of EPA and the Corps' guidance and regulations since 2007.[238] According to the agencies, improvements to the definitions of "adjacent wetland" and "tributary" in the Step Two Proposal would eliminate the need for case-specific significant nexus tests.[239]

Under the Clean Water Rule, a wetland is adjacent to jurisdictional waters (and therefore subject to Clean Water Act regulation itself) if, among other potential criteria, it meets certain distance requirements from the ordinary high water mark of other jurisdictional waters.[240] The Step Two Proposal would largely eliminate the distance evaluation and define "adjacent wetlands" as those wetlands that "abut" (*i.e.*, touch) or have a "direct hydrological surface connection with" other

[235] *Id*.

[236] *Id.* at 4,203-04.

[237] *See id*.

[238] *See id*. at 4,170 ("The agencies propose to eliminate the case-by-case application of Justice Kennedy's significant nexus test, proposing instead the establishment of clear categories of jurisdictional waters . . . ."). *See also supra* §§ "Agency Guidance in Response to *Rapanos*" (analyzing post-*Rapanos* agency guidance incorporating the "significant nexus" test); "The Clean Water Rule" (discussing the application of the significant nexus in the Clean Water Rule).

[239] *See id.* at 4,197 ("The proposed rule's specific tributary and adjacent wetlands definitions would eliminate the need for the case-specific significant nexus test that was required for many features after Justice Kennedy's concurring opinion in *Rapanos* and according to the agencies' *Rapanos* Guidance.").

[240] The Clean Water Rule defines "adjacent" as "bordering, contiguous, or neighboring" other jurisdictional waters. Clean Water Rule, 80 Fed. Reg. at 37,107. "Neighboring" is defined as waters located: (1) within 100 feet of the ordinary high water mark of a navigable-in-fact water, interstate water, the territorial seas, jurisdictional tributary, or impoundment; (2) in the 100-year floodplain and within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, jurisdictional tributary, or impoundment; or (3) located within 1,500 feet of the high tide line of a navigable-in-fact water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes. *See id*.

jurisdictional waters.[241] Tributaries under the Step Two Proposal must contribute flow to traditionally navigable waters through other jurisdictional waters or non-jurisdictional waters that convey downstream perennial or intermittent flows.[242] Under the Clean Water Rule, by contrast, a tributary is any water that contributes flow to jurisdictional waters that have a bed, bank, and ordinary high water mark.[243]

Select Changes in the Step Two Proposal

Proposed changes in the Step Two Proposal compared to the Clean Water Rule include[244]

- elimination of the significant nexus test;
- removing Clean Water Act jurisdiction over "ephemeral waters" that flow or pool only in response to precipitation and certain ditches that contain ephemeral flows or are "upland" from other jurisdictional waters;
- requiring water to flow continuously year-round or during certain times of the year for Clean Water Act jurisdiction;
- including only lakes and ponds that are traditionally navigable waters subject to federal jurisdiction or that are connected to such waters through tributaries;
- removing interstate waters—or waters which form part of state's boundary—as an independent category of waters subject to the Clean Water Act; and
- narrowing wetlands jurisdiction to include only wetlands that abut jurisdictional waters or that have a direct hydrological connection to such waters, and excluding wetlands separated by a berm, dike, or other barrier if they lack a direct hydrological surface connection in a typical year.

The Applicability Date Rule: Suspending the Clean Water Rule During the Two-Step Process

In addition to the two-step repeal and replace plan, the Trump Administration has engaged in a third rulemaking process designed to suspend the Clean Water Rule until February 2020. While the Clean Water Rule states that it is effective as of August 28, 2015,[245] EPA and the Corps

[241] Step Two Proposal, 84 Fed. Reg. at 4,155. In addition, whereas "adjacent" wetlands under the Clean Water Rule can include wetlands separated by constructed barriers, natural river berms, dunes, and other barriers; wetlands that lack a direct hydrological surface connection because they are separated by upland, dikes, or other barriers would not be meet deemed "adjacent" in the Step Two Proposal. *Compare* Clean Water Rule, 80 Fed. Reg. at 37,107 ("The term *adjacent* means bordering, contiguous, or neighboring a [jurisdictional water], including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.") *with* Step Two Proposal, 84 Fed. Reg. at 4,155 ("Wetlands physically separated from [jurisdictional waters] by upland or by dikes, barriers, or similar structures and also lacking a direct hydrological connection to such waters are not adjacent.").

[242] *See* Step Two Proposal, 84 Fed. Reg. at 4,211.

[243] Clean Water Rule, 80 Fed. Reg. at 37,105 ("The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water . . . to a water identified [as a 'water of the United States'] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.").

[244] *See* Step Two Proposal, 84 Fed. Reg. at 4,210-22. *See also* Envtl. Prot. Agency & U.S. Army Corps of Eng'rs., Fact Sheet, Proposed Revised Definition of "Waters of the United States," Key Proposed Changes, https://www.epa.gov/sites/production/files/2018-12/documents/factsheet_-_key_changes_12.10.18.pdf.

[245] Clean Water Rule, 80 Fed. Reg. at 37,047.

published a separate final rule (Applicability Date Rule), which adds a new "applicability date" of February 6, 2020, to the Clean Water Rule.[246]

The Trump Administration's impetus for the Applicability Date Rule is derived, in part, from the Supreme Court's *NAM v. Department of Defense* decision.[247] Prior to *NAM*, the Sixth Circuit's nationwide stay of the Clean Water Rule prevented EPA and the Corps from applying the Clean Water Rule anywhere in the United States.[248] But after *NAM* concluded that challenges to the rule must begin in federal district courts, the Sixth Circuit dismissed the consolidated appellate-level challenges and vacated its stay.[249] With no nationwide stay in place and with the step-one repeal rule still in proposed form, the Clean Water Rule could have reverted into effect in states that were not subject to a district court injunction.[250] Seeking to prevent reactivation of the Clean Water Rule in some parts of the country, EPA and the Corps promulgated the Applicability Date Rule in an effort to suspend the Clean Water Rule while the agencies undertake the two-step repeal and revise process.[251]

Like many prior rules related to the definition of "waters of the United States," litigants challenged the Applicability Date Rule in federal courts.[252] In late 2018, two federal district courts determined that EPA and the Corps did not comply with administrative rulemaking requirements in promulgating the Applicability Date Rule.[253] By declining to consider comments on the substantive merits of the pre-Clean Water Rule regulations, the agencies deprived the public of a "meaningful opportunity" to comment on the Applicability Date Rule in violation of the Administrative Procedure Act, the courts held.[254] Both courts issued orders vacating the

[246] Final Rule: Definition of "Waters of the United States"—Addition of an Applicability Date to the Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018) [hereinafter Applicability Date Rule]. EPA and the Corps published a proposed version of the Applicability Date Rule in November 2017. Proposed Rule: Definition of "Waters of the United States"—Addition of an Applicability Date to the Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017).

[247] *See* Applicability Date Rule, 83 Fed. Reg. at 5201-02 (contending that *NAM*' "is likely to lead to uncertainty and confusion as to the regulatory regime applicable . . . .").

[248] *See* In re EPA and Dept. of Defense Final Rule, 803 F.3d 804, 809 (6th Cir. 2015), *vacated sub nom.*, 713 F. App'x 489 (6th Cir. 2018), and *abrogated by* Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617 (2018).

[249] In re Dept. of Defense Final Rule and EPA Final Rule, 713 F. App'x 489 (6th Cir. Feb. 28, 2018).

[250] *See* Applicability Rule, 83 Fed. Reg. at 5,202 ("[W]hen the Sixth Circuit's nationwide stay expires, the 2015 [Clean Water] Rule would be enjoined under the District of North Dakota's order in States covering a large geographic area of the country, but the rule would be in effect in the rest of the country pending further judicial action or rulemaking by the agencies.").

[251] *See id*. ("The agencies continue to work as expeditiously as possible on the two-step rulemaking process. Addition of an applicability date to the 2015 [Clean Water] Rule will result in additional clarity and predictability and will ensure the application of a consistent interpretation and definition of 'waters of the United States' nationwide during the pendency of these rulemaking efforts.").

[252] *See infra* note 255.

[253] *See* S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 967 (D.S.C. 2018), *notice of appeal filed*, No. 2:18-cv-00330, ECF No. 90; Puget Soundkeeper Alliance v. Wheeler, No. C15-1342-JCC, 2018 WL 6169196, at *6 (W.D. Wash. Nov. 26, 2018), *notice of appeal filed*, No. C15-1342-JCC, ECF No. 63 (Jan. 24, 2019).

[254] *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 963 ("[T]he agencies' refusal to consider or receive public comments on the substance of the WOTUS Rule or the 1980s regulation did not provide a 'meaningful opportunity for comment' . . . .") (quoting N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012)); *Puget Soundkeeper Alliance*, 2018 WL 6169196, at *5 ("By restricting the content of the comments solicited and considered, the Agencies deprived the public of a meaningful opportunity to comment on relevant and significant issues in violation of the APA's notice and comment requirements.")

Applicability Date Rule nationwide.[255] As a consequence, there currently is no instrument (either a final rule or court order) that bars application of the Clean Water Rule on a nationwide basis.

The Legal Landscape for the 116th Congress

The multitude of legal challenges related to "waters of the United States" has created a complex legal landscape for the 116th Congress. Because both rules in the Trump Administration's rescind-and-replace process are still in proposed form, the Obama Administration's Clean Water Rule remains the current regulation defining waters of the United States. However, post-*NAM* challenges to the Clean Water Rule have proceeded at the U.S. district court level, and three federal district courts have entered preliminary injunctions barring application of the Clean Water Rule during the pendency of the suits.[256] At the same time, these district courts have limited the scope of their injunction to the specific states that brought legal challenges to the Clean Water Rule.[257] The ultimate result is that the Clean Water Rule currently is enjoined in 28 states, but it is the current enforceable regulation in 22 states, the District of Columbia, and U.S. territories.[258]

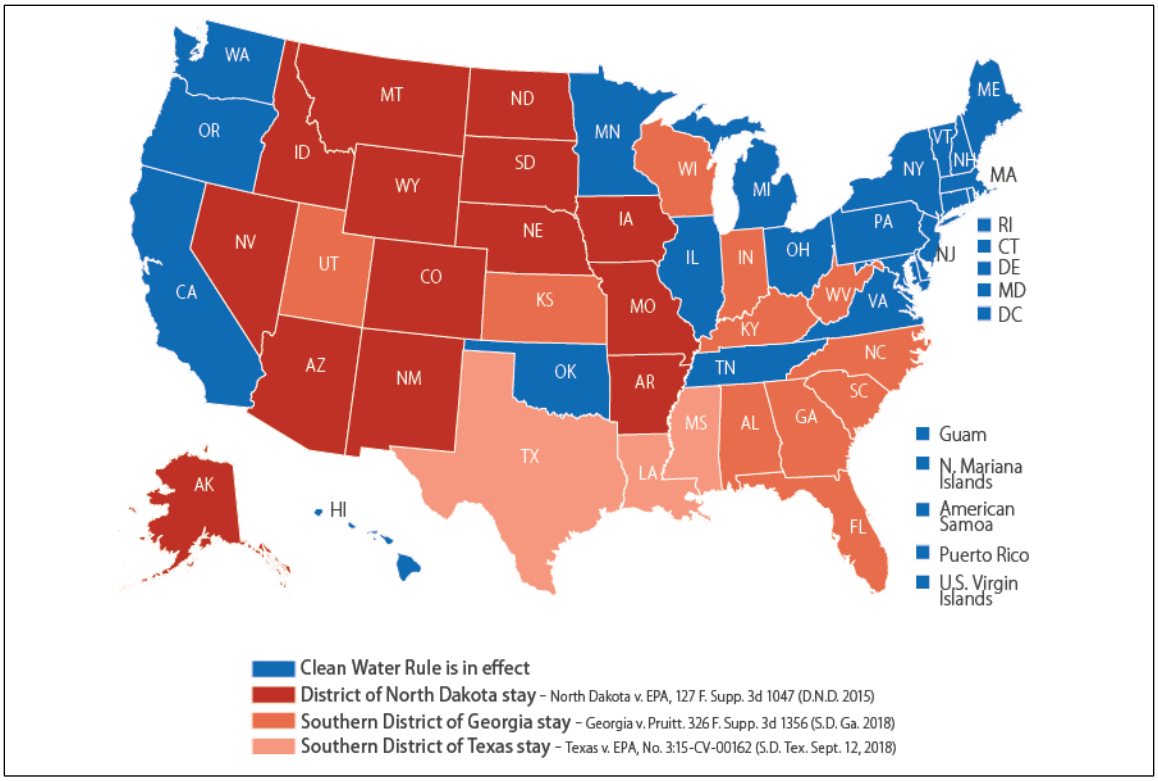
[255] *See* S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 967 (D.S.C. 2018); Puget Soundkeeper Alliance v. Wheeler, No. C15-1342-JCC, 2018 WL 6169196, at *6 (W.D. Wash. Nov. 26, 2018).

[256] *See* North Dakota v. EPA, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015); Georgia v. Pruitt, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018); Texas v. EPA, No. 3:15-CV-00162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018).

[257] *See* Order Limiting the Scope of Preliminary Injunction to the Plaintiffs, North Dakota v. EPA, No. 3:15-cv-59, ECF No. 79, at 4 (D.N.D. Sep. 4, 2015) ("Because there are competing sovereign interests and competing judicial rulings, the court declines to extend the preliminary injunction at issue beyond the entities actually before it."); *Georgia*, 326 F. Supp. at 1370 ("The Rule jointly promulgated by the EPA and the Army Corps . . . is hereby enjoined in the States of Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and the Commonwealth of Kentucky."); *Texas*, 2018 WL 4518230, at *2 ("[A]fter additional review, the Court finds it inappropriate to issue a nationwide preliminary injunction in this case.").

[258] *See infra* **Figure 2**.

Figure 2. Status of the Clean Water Rule



Source: North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015); Order, North Dakota v. EPA, No. 3:14-cv-59, (D.N.D. Sep. 9, 2018), ECF No. 250; Georgia v. Pruitt. 326 F. Supp. 3d 1356 (S.D. Ga. 2018); Texas v. EPA, No. 3:15-CV-00162 (S.D. Tex. Sept. 12, 2018)

While finalization of the Trump Administration's Step One and Step Two Proposals could bring greater uniformity to this fragmented legal landscape, those rules are also likely to engender new litigation.[259] The focus of future lawsuits, if filed, is likely to depend on the rulemaking process and content of the final rules. But observers expect critics to challenge whether EPA and the Corps considered sufficient scientific data and provided an adequate rationale to depart from prior agency guidance and regulations that utilized Justice Kennedy's "significant nexus" test.[260] While critics of that test argue that it is too unpredictable for the average landowner to determine whether a waterbody is part of the "waters of the United States,"[261] opponents of the Trump Administration's policy contend that the Step Two Proposal would also introduce new technical definitions that ordinary landowners would not be able to implement without hiring a specialist.[262]

[259] *See, e.g.*, *Proposed Narrower CWA Jurisdiction Rule Triggers Slew of Lawsuit Threats*, INSIDEEPA (Dec. 11, 2018), https://insideepa.com/daily-news/proposed-narrower-cwa-jurisdiction-rule-triggers-slew-lawsuit-threats.

[260] *See, e.g.*, Ariel Wittenberg, *Experts Predict Legal Trouble for Scalia-inspired Rule*, GREENWIRE (Dec. 14, 2018), https://www.eenews.net/greenwire/stories/1060109731/; *Environmentalists Eye Procedural, Not Substantive, Suits to Kill CWA Rule*, INSIDEEPA (Feb. 14, 2019), https://insideepa.com/daily-news/environmentalists-eye-procedural-not-substantive-suits-kill-cwa-rule.

[261] *See, e.g.*, Tony Francois, *Will We Soon Have Clarity on Navigable Waters?: How the Supreme Court's October 2017 Term Set the Stage*, 19 FEDERALIST SOC'Y REV. 90, 93 (2018) ("[I]nterpretation of navigable waters frequently boils down to 'I know it when I see it' subjective determinations by EPA or Army Corps field staff.").

[262] *See, e.g.*, Ariel Wittenberg, *Trump's WOTUS: Clear as Mud, Scientists Say*, GREENWIRE (Feb. 18, 2019),

Proposed Legislation

Because the "waters of the United States" debate hinges on the meaning of a statutory term, Congress could enact legislation that seeks to define the jurisdictional reach of the Clean Water Act more clearly. Some Members of the 115th Congress introduced legislation that would have amended the Clean Water Act by providing a narrower definition of "waters of the United States."[263] Other legislation introduced in the 115th Congress would have repealed the Clean Water Rule[264] or allowed EPA and the Corps to repeal the Clean Water Rule without regard to the requirements of the Administrative Procedure Act.[265] While none of the proposed legislation in the 115th Congress was enacted, at least one bill introduced in the 116th Congress proposes to repeal the Clean Water Rule and narrow the Clean Water Act's definition of jurisdictional waters.[266]

Conclusion

The debate over the jurisdictional reach of the Clean Water Act implicates complex and overlapping concerns of environmental protection, statutory interpretation, federalism, and constitutional law. While judicial interpretations of "waters of the United States" generally have followed broader trends in understanding of the scope of the Commerce Clause,[267] the Supreme Court's inability to identify a unified rationale in *Rapanos* has caused significant confusion and debate over the outer reaches of the Clean Water Act in the following years.[268] Both the Obama Administration (in the Clean Water Rule) and the Trump Administration (in its rescind and revise process) have sought to provide clarity by promulgating new definitions of "waters of the United States" in EPA and the Corps' regulations.[269] But both Administrations' efforts have faced criticism and legal challenges from certain stakeholders, creating a fragmented legal landscape for the 116th Congress in which "waters of the United States" means different things in different parts of the nation.[270] Because the "waters of the United States" debate hinges on the meaning of a statutory term, Congress could provide greater clarity and uniformity by amending the Clean Water Act to define its jurisdictional scope more clearly, but legislative proposals thus far have not been enacted.

---

https://www.eenews.net/stories/1060121251 (contending that the Step Two Proposal will require installation of specialized equipment and consultation with experts to determine whether particular waterbodies are "intermittent" or "ephemeral").

[263] *See* H.R. 1261, 115th Cong. § 3 (2017); H.R. 7914, 115th Cong. § 2(b) (2018).

[264] *See*, *e.g.*, H.R. 1105, 115th Cong. § 2 (2017). *See also* S.Res. 12, 115th Cong. (2012) (expressing the sense of the Senate that the Clean Water Rule should be withdrawn or vacated).

[265] *See*, *e.g.*, H.R. 3219, 115th Cong. § 108 (as engrossed in the House July 27, 2017). For additional background on legislation introduced in the 115th Congress, see CRS R44525, *supra* note 196, at 9-10.

[266] *See* H.R. 667, 116th Cong. (2019).

[267] *See supra* § "Background."

[268] *See supra* § "Rapanos."

[269] *See supra* §§ "The Clean Water Rule"; "The Two-Step Rescind and Revise Process."

[270] *See* § "The Legal Landscape for the 116th Congress."

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.[271]	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

[271] 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.* concluding that "adjacent wetlands" are "waters of the United States."	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[272]
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

[272] The 1988 EPA manual is no longer publicly disseminated or available on EPA's website; however, several secondary sources discuss the manual. *See, e.g.*, HEIMLIC ET AL., *supra* note 114, at 11-12; WAKELEY, *supra* note 116, at 3.

Date	Event	Source
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
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 issues a plurality decision in *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 Fed. Reg. 22,188
June 29, 2015	The Corps and EPA issue the final Clean Water Rule.	80 Fed. Reg. 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	President Obama vetoes S.J.Res. 22.	https://obamawhitehouse.archives.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
Feb. 28, 2017	President Trump issues Executive Order 13778 directing EPA and the Corps to revise or rescind the Clean Water Rule.	82 Fed. Reg. 12497

Jan. 22, 2018	The Supreme Court holds that legal challenges to the Clean Water Rule are not subject to direct appellate court review and must begin in federal district courts.	Nat'l Ass'n of Mfrs. v. Dep't of Def., 538 U.S. __, 138 S. Ct. 617 (2018)
Dec. 11, 2018	EPA and the Corps unveil proposed regulations redefining "waters of the United States" in accordance with Executive Order 13778.	84 Fed. Reg. 4,154

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

Author Information

Stephen P. Mulligan
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.