

# IT'S ALL DOWNHILL FROM HERE: HOW THE NATION'S DISPUTE WITH CLEAN WATER ACT JURISDICTION IS SOLVED

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## ABSTRACT

What makes the United States one of the most prosperous and safest nations in the modern world? Perhaps it is the durable economy, the strong military force, or the Constitutional protections. What most Americans take for granted, however, is something people in many nations base their entire lives around: safe, clean water. Promulgated in 1972, the original Clean Water Act has been opposed and amended over the course of forty years. No provision, however, has been as hotly contested as the § 404 program for “dredge and fill” permits. Specifically, this section led to divisions on what constitutes “water” that is subject to Clean Water Act jurisdiction and what does not. Hoping to solve the confusion once and for all, the EPA’s “Clean Water Rule” was published in 2015. The Rule, however, was immediately met with litigation and was hit with a nationwide stay by the Sixth Circuit.

This article is the first to collectively address the pending arguments against the Rule while arguing that the adoption of Justice Kennedy’s significant nexus test was the best option. When the Sixth Circuit makes its decision on the merits, the decision will likely make it to the Supreme Court. The Court should find that contrary to many allegations, the Rule does not violate the Administrative Procedure Act, the Commerce Clause, or the Clear Statement Canon. Further, by applying the 2016 Hawkes Co. ruling, the Court should be able to ease

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the minds of the Rule’s opponents while confirming the Rule on the merits.

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## INTRODUCTION

Whether for drinking, swimming, farming, or plumbing, the United States takes its water systems for granted. More than forty years after the creation of the Clean Water Act, the jurisdiction of the Act has never been more contested.

Central to the rights of American citizens is the right own, use, and enjoy property without interference from the federal government. No man wants the federal government stepping on his land, implementing regulations, requiring permits, and potentially imposing fines. Yet, this is all part of the risk for landowning Americans when dealing with the Environmental Protection Agency (EPA).

From its original designation of “navigable waters,” to its definition of “waters of the United States,” courts have battled with the proper jurisdiction of the Clean Water Act since its inception.<sup>1</sup> In an attempt to create a clear-cut rule in 2015, the EPA and Army Corps of Engineers (the Corps) looked to a 2006 opinion of Justice Kennedy. After years of confusion, the EPA adopted the “Clean Water Rule,” and codified the new rule in the Code of Federal Regulations in August 2015.<sup>2</sup>

The new rule was immediately met with opposition from states, businesses, and farmers alike, primarily claiming that the rule constitutes an arbitrary and capricious use of discretion. The suits opposing the new rule were consolidated before the Sixth Circuit Court of Appeals.<sup>3</sup> Pending further determinations on the merits, the Sixth Circuit issued a nationwide stay of the new rule. The stay of the Rule was unnecessary and the stay must be lifted.

The new Clean Water Rule follows very closely to Justice Kennedy’s 2006 concurring opinion in *Rapanos v. United States*.<sup>4</sup> While the rule may seem to be a giant federal overreach to many in the general public, the rule follows Supreme Court precedent and fits perfectly in line with the goals of the Clean Water Act.

The regulation of the nation’s waters is vital to the overall health of the American people as well as the economy. In 2016, approximately

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<sup>1</sup> 33 U.S.C.A. § 1362(7).

<sup>2</sup> 33 C.F.R. § 328.

<sup>3</sup> See *In re EPA*, 803 F.3d 804 (6th Cir. 2015). There is some controversy regarding whether the Sixth Circuit has jurisdiction to hear all of the claims and especially to issue a nationwide stay. Unlike the Clean Air Act, which mandates that all litigation takes place in the D.C. Circuit, the Clean Water Act has no such requirement.

<sup>4</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

117 million Americans, or one in three people, get their drinking water from streams that are protected by the Rule.<sup>5</sup> Further, the American lifestyle depends on consistently clean water. Beyond drinking, America needs clean water for manufacturing, farming, tourism, recreation, energy production, and many other economic sectors.<sup>6</sup>

While overreach of the federal government is a major concern for many, the need for clean water is a concern for all. Despite the seeming overreach in Kennedy's opinion, the EPA's adoption of the "significant nexus test" is essential to the future of America's water systems. Unfortunately, this rule will continue to be challenged until the Supreme Court grants certiorari for the issue and determines that the agency's regulation is not arbitrary or capricious. This article will explain why the "significant nexus test" is the best method for determining the Act's jurisdiction based on scientific evidence, Supreme Court precedent, and the goal of the Act. In conjunction, this article will survey and denounce the common claims against the Rule. Further, this article is the first to argue that the Rule should please both sides, as it accomplishes the goal of the Act and when combined with the recent *Hawkes* case, is less overreaching and more scientifically sound than any other alternative.

## I. BACKGROUND

### A. History of the Clean Water Act

The modern Clean Water Act is the result of several enactments over the course of over 100 years, culminating in an ambitious plan in the environmental decade of the 1970s. The controversial history of Section 404 jurisdiction, however, is traced through three major cases.

#### i. Goals of the Act

The initial goal of the Clean Water Act was overly ambitious: "to restore and maintain the integrity of the nation's waters" and to eliminate the discharge of pollutants by 1985.<sup>7</sup> The fight for clean water, however, started well before the late twentieth century. In 1870, the

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<sup>5</sup> *Clean Water Rule: Streams and Wetlands Matter*, available at <https://www.epa.gov/cleanwaterrule/clean-water-rule-streams-and-wetlands-matter>.

<sup>6</sup> *Id.*

<sup>7</sup> 33 U.S.C.A. § 1251. (The goal of eliminating pollution is unattainable, as the Act itself actually provides permits to pollute).

Supreme Court decided that Congress had the power under the Commerce Clause to regulate waterways, but only those that could carry interstate or foreign commerce.<sup>8</sup> The Rivers and Harbors Act of 1899 was the first federal law fighting water pollution.<sup>9</sup> At a time when the per se navigability of lakes and rivers was essential to the economy, the Rivers and Harbors Act ensured the unobstructed passage along United States waters. To accomplish this, the Rivers and Harbors Act outlawed any obstructions that impeded the navigation of any waters without congressional approval (Section 10), prohibited the discharge of substances from shore or from a floating craft into navigable waters (Section 13), and provided a way to penalize those who pollute the nation's waterways (Section 12).<sup>10</sup> It is important to note that the Rivers and Harbors Act focused solely on navigability of lakes and rivers. The goal was not necessarily to protect wildlife or the safety of the drinking water, rather the nation's economy depended on the navigability of waters in order to create commerce.

By the mid twentieth century, concerns were growing regarding the safety of the nation's drinking water.<sup>11</sup> Primarily, the industrial boom of the early 1900s created concerns that diseases would be spread by the discharge of sewage into drinking water resources. This increasing fear led to the passage of the Federal Water Pollution Control Act (FWPCA) in 1948.<sup>12</sup> While great in theory, the FWPCA lacked serious enforcement.<sup>13</sup> The FWPCA allowed the individual states to control their own water pollution, but provided an opportunity for a federal

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<sup>8</sup> See *The Daniel Ball*, 77 U.S. 557, 563 (1870).

<sup>9</sup> See 33 U.S.C.A. § 403 (codification of Rivers and Harbors Act of 1899, forbidding excavation or construction in navigable waters without approval of the Secretary of the Army).

<sup>10</sup> See Samuel Worth, *Water, Water, Everywhere, and Plenty of Drops to Regulate: Why the Newly Published WOTUS Rule Does Not Violate the Commerce Clause*, 43 B.C. ENVTL. AFF. L. REV. 605, 607. (2016). (citing Rivers and Harbors Appropriation Act of 1899, U.S. Army Corps of Engineers.) (See 33 U.S.C.A. § 406; Section 12 provided that a violation of the Rivers and Harbors Act was a misdemeanor punishable by a fine of up to \$2,500 and/or up to one year imprisonment).

<sup>11</sup> The industrial boom of the early 1900s spurred more pollution than the United States had ever seen, leading to the necessity of stronger environmental regulation.

<sup>12</sup> Worth, *supra* note 11, at 607; see also Federal Water Pollution Control Act of 1948, Publ. L. No. 845 (codified at 33 U.S.C. § 1251-1376).

<sup>13</sup> *Id.* (citing Joel M. Gross & Kerri L. Stelcen, Clean Water Act at 6 (2012)).

hearing if a state could not resolve an issue on its own.<sup>14</sup> Over twenty years after the enactment of the FWPCA, however, “only fifty informal conferences had been held, . . . only four matters [had] proceeded . . . to the administrative hearing stage,” and only one case had gone to court.<sup>15</sup> Although the intent was good, the enforcement of the FWPCA failed, forcing the nation to look for yet another alternative to protecting its navigable waters.

In some ways, the industrial boom that led to the necessity of water pollution control also contributed to the enactment of a better plan, as scientific knowledge and engineering capabilities advanced. In 1972, Congress enacted what was essentially a revised version of the Federal Water Pollution Control Act.<sup>16</sup> This new legislation became known as the Clean Water Act (the “Act”). The primary goal of the Act was to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”<sup>17</sup> For the first time, federal water pollution control was based on scientific, technology-based standards. The Act hoped to attain a national water quality that could protect wildlife habitats as well as humans’ ability to use water for recreational purposes.<sup>18</sup> Further, the Act hoped to increase federal funding of publicly-owned treatment works, and to develop and implement waste treatment management planning in the individual states.<sup>19</sup>

The permit system is the most contested framework of the Clean Water Act. The Act began funding discharge-eliminating technology and programs for “non-point source” pollution control.<sup>20</sup> As part of this endeavor, the Act prohibited discharges of any pollutant into the waters of the United States without express authorization through the National Pollutant Discharge Elimination System (NPDES) permitting system.<sup>21</sup>

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<sup>14</sup> Worth, *supra* note 11, at 607; see also 33 U.S.C. § 1251-1376; see also Joel M. Gross & Kerri L. Stelcen, *Clean Water Act* at 13.

<sup>15</sup> *Id.* (citing Joel M. Gross and Kerri L. Stelcen, *Clean Water Act* 5, 6 (2012)).

<sup>16</sup> *Id.* See also 33 U.S.C §§ 1251-1274.

<sup>17</sup> 33 U.S.C. § 1251(a).

<sup>18</sup> Worth, *supra* note 11, at 607 (citing Gross & Stelcen, 7-8).

<sup>19</sup> Gross and Stelcen, at 7-8.

<sup>20</sup> *Id.*

<sup>21</sup> Clean Water Act Compliance Monitoring, *Envtl. Prot. Agency*. The Environmental Protection Agency (EPA) and the Army Corps of Engineers (the “Corps”) were made jointly responsible for monitoring compliance with the Act by on-site investigations and enforcement of penalties for unpermitted discharges.

The Act also made its provisions enforceable by the EPA.<sup>22</sup> By setting uniform, technology-based effluent limitations on the discharge of pollutants into the nation's waters, the Act started some controversy over what could be governed.

In 1977 the Clean Water Act was amended to require the achievement of "Best Available Technology" or "BAT" limitations for toxic pollutants and "Best Available Conventional Pollutant Control Technology" or "BCT" limitations for conventional pollutants by July 1, 1984.<sup>23</sup> These amendments marked a major jump forward, as the scientific basis for clean water was now in full effect. No longer was the federal government focused solely on the navigability of waters for the sake of ships.

The implementation of these scientific-based requirements has provided visible improvements in the nation's waterways. The Act has also, however, created some frustration amongst landowners due to Section 404 of the Clean Water Act.

Section 404 of the Clean Water Act provides the "dredge and fill" permit program.<sup>24</sup> If a landowner wants to fill in a pond, lake, river, wetland, etc., the landowner must usually obtain a fill permit from the EPA and the Corps. This is particularly troublesome when the landowner desires to fill "wetlands," or land that is not traditionally navigable water. The battle over what falls under the jurisdiction of the Clean Water Act and thus what requires a dredge and fill permit has been hotly debated since the implementation of the Act. From the Rivers and Harbors Act's goal of protecting navigability to the Clean Water Act's goal of protecting "waters of the United States," the definition of "waters" has always been murky. Through case law and scientific advancements, the main concern today has evolved into the protection of the physical, chemical, and biological integrity of the waters of the United States. Since the entire authority for the Clean Water Act rests upon Congress' power to regulate interstate commerce, the regulation of intrastate waterways or non-navigable waters creates a great deal of confusion for the public.

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<sup>22</sup> Worth, *supra* note 11, at 608 (citing Gross & Stelcen, at 8).

<sup>23</sup> Worth, *supra* note 11, at 608 (citing Jerome G. Rose, Legal Foundations of Environmental Planning 323 (1983)).

<sup>24</sup> See 33 U.S.C.A. § 1344 Permits for Dredged or Fill Material. (this is the codification of the Clean Water Act Section 404 program).

ii. Major Cases

Three major Supreme Court cases, *United States v. Riverside Bayview*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, and *Rapanos v. United States*, track the judicial development of the definition of “waters of the United States.” The most recent of the three, *Rapanos*, helped spur the change in the definition of “waters of the United States” even though it contains a plurality opinion with several different viewpoints.

1. *Riverside Bayview*

In *United States v. Riverside Bayview*, the Court first referenced the “significant nexus” idea. The case focused on the Corps’ application of the Clean Water Act to include jurisdiction over “freshwater wetlands” within the meaning of “waters of the United States.”<sup>25</sup> At the time, the Corps defined freshwater wetlands as:

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.<sup>26</sup>

The respondent, *Riverside Bayview Homes, Inc.*, owned eighty acres of marshland near the shore of Lake St. Clair.<sup>27</sup> As a developer, *Riverside* placed fill materials on the marshland in preparation of the construction of a housing development.<sup>28</sup> The Corps of Engineers, however, quickly sued to enjoin *Riverside* from filling the marshland without permission from the Corps, as the marsh was considered an adjacent wetland to navigable water.<sup>29</sup>

The district court granted the injunction, holding that the portion of *Riverside*’s property that was less than 575.5 feet above sea level was a

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<sup>25</sup> See Micah Adkison, *The Significant Nexus Test: Why the Waters of the United States Are So Murky*, 1 *Oil & Gas, NAT. RESOURCES & ENERGY J.* 487, 492 (2016); see also 474 U.S. 121, 124 (1985).

<sup>26</sup> *Id.* at 493; (citing 33 C.F.R. § 323.2(c) (1979)).

<sup>27</sup> *Id.*; (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

wetland subject to Clean Water Act jurisdiction.<sup>30</sup> When Riverside appealed, the appellate court remanded the case for the consideration of the effect of more recent amendments to the Clean Water Act added in 1977.<sup>31</sup> The district court, however, found that the property was a wetland within the Corps' regulatory jurisdiction.<sup>32</sup> Riverside then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit reversed the district court's decision because the semiaquatic characteristics of the property "were not the result of frequent flooding by the nearby navigable waters."<sup>33</sup> Essentially, the Sixth Circuit implied that the wetlands were not jurisdictional because they did not flood often enough.

After granting certiorari, the Supreme Court unanimously reversed the Sixth Circuit's decision.<sup>34</sup> Primarily, the Court disagreed with the Sixth Circuit's standard that "frequent flooding" from the adjacent navigable water signified that the wetland was under Clean Water Act jurisdiction.<sup>35</sup> The Court noted that it can be difficult to determine "the point at which water ends and land begins," but that the district court's findings were not erroneous because the property was "characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction . . . the source of the saturated soil conditions on the property was ground water [and . . . the] property was adjacent to a body of navigable water [in that the] saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway."<sup>36</sup> The Court essentially focused on the fact that the property contained certain wetland-specific vegetation, not that the property contained water at all times.

The Court justified its decision by looking at Congress' intent in defining "navigable waters" as "waters of the United States."<sup>37</sup> By defining the term so broadly, the Court agreed that the Clean Water Act did not necessarily require "navigability" per se in order to find

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<sup>30</sup> *Id.*; (citing *Riverside Bayview Homes*, 474 U.S. at 125).

<sup>31</sup> Adkison, *supra* note 26, at 493. The changes from 1975 to 1977 eliminated the use of the phrase "periodic inundation." *Id.* at 124.

<sup>32</sup> *Riverside Bayview Homes*, 474 U.S. at 125.

<sup>33</sup> Adkison, *supra* note 26, at 493; (citing *Riverside Bayview Homes*, 474 U.S. at 125).

<sup>34</sup> *Riverside Bayview Homes*, 474 U.S. at 126.

<sup>35</sup> *Id.* at 129.

<sup>36</sup> *Id.* at 130-31.

<sup>37</sup> *Id.* at 133.

jurisdiction.<sup>38</sup> Further, since the purpose of the Corps' authority was "a legislative attempt to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the Court easily concluded that Congress intended for the definition of "waters" to be broadly construed.<sup>39</sup> Thus, the Court concluded that since Riverside's property was a wetland that "actually abuts" on a navigable water, the Corps and the EPA's jurisdiction over the property was reasonable.<sup>40</sup>

## 2. SWANCC

In *Solid Waste Agency of Northern Cook County* (SWANCC), the Court dealt with the "Migratory Bird Rule." The Migratory Bird Rule attempted to pull isolated waters into Clean Water Act jurisdiction solely if the waters "are or would be used as habitat by birds protected by Migratory Bird Treaties [or by] migratory birds which cross state lines."<sup>41</sup> After fifteen years of using this as a means of Clean Water Act jurisdiction, the Supreme Court heard the issue in 2001.

In *SWANCC*, a group of suburban municipalities "united in an effort to locate and develop a disposal site for baled nonhazardous solid waste."<sup>42</sup> SWANCC chose a location that comprised of a sand and gravel mining site that was abandoned around 1960. Further, the site had "[given] way to a successful stage forest . . . [and] a scattering of permanent and seasonal ponds of varying size."<sup>43</sup> The Corps initially said that it did not have jurisdiction over the site, but changed that determination after knowledge that migratory birds had been observed at the site.<sup>44</sup> Despite SWANCC's various alternative plans to mitigate the damages and preserve the site for the birds, the Corps still refused to issue any dredge or fill permit under the Clean Water Act.<sup>45</sup> The issue was appealed to the Seventh Circuit, where SWANCC argued that the Corps exceeded its authority by claiming jurisdiction over "non-navigable, isolated, intrastate waters based on the presence of migratory

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 133.

<sup>40</sup> *Id.* at 134-35.

<sup>41</sup> Adkison, *supra* note 26, at 494; citing 51 Fed. Reg. 41206-01 (1986).

<sup>42</sup> *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, at 162-63.

<sup>43</sup> *Id.* at 163.

<sup>44</sup> *Id.* at 164.

<sup>45</sup> *Id.* at 165.

birds and in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction.”<sup>46</sup> The Seventh Circuit Court of Appeals, however, ruled in favor of the Corps.

In a 5-4 ruling, the Supreme Court reversed the decision of the Seventh Circuit Court of Appeals. The Supreme Court noted that by enacting the Clean Water Act, “Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States to [regulate] pollution . . . and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.”<sup>47</sup> Further, the Court interpreted the *Riverside* holding as requiring a “significant nexus between the wetlands and ‘navigable waters.’”<sup>48</sup> The *SWANCC* case was distinguished from *Riverside Bayview*, as *SWANCC* involved wetlands that were not adjacent to bodies of open waters.

First, the Court noted that allowing expansion of the Corps’ authority “over ponds and mudflats falling within the Migratory Bird Rule would result in a significant impingement of States’ traditional and primary power over land and water use.”<sup>49</sup> Ultimately, the Court refused to defer to the Corps’ interpretation since such a broad interpretation of the Clean Water Act would “alter the federal-state framework by permitting federal encroachment upon traditional state power” and the Act was not supported by a “clear indication that Congress intended that result.”<sup>50</sup> This case made clear that the navigability factor is still important in determining whether water is subject to jurisdiction of the Act.<sup>51</sup>

### 3. Rapanos

The most recent and most influential case on Clean Water Act jurisdiction is *Rapanos v. United States*. In a plurality, 4-1-4 opinion, *Rapanos* essentially created two different tests for determining “waters of the United States.”

Mr. Rapanos, without obtaining any permit, backfilled a wetland on his property that was described as “land with sometimes-saturated soil

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 166-67.

<sup>48</sup> *SWANCC*, 531 U.S. at 167.

<sup>49</sup> *Id.* at 174.

<sup>50</sup> *Id.* at 172-73.

<sup>51</sup> Adkison, *supra* note 26, at 496.

conditions . . . [lying] 11 to 20 miles [from the nearest body of water].”<sup>52</sup> The district court found that Mr. Rapanos was liable for violating the Clean Water Act because the wetlands were adjacent to waters of the United States and thus the Corps properly claimed jurisdiction. The Sixth Circuit Court of Appeals affirmed this decision based on the notion that the federal government has jurisdiction over lands with “hydrologic connections to the nearby ditches or drains, or to remote navigable waters.”<sup>53</sup> However, the Supreme Court rejected this analysis and articulated two different rationales, one in the plurality and one in Justice Kennedy’s concurrence.

In the plurality opinion, Justice Scalia complained that the “hydrologic connection” analysis was too overreaching. Instead, Scalia proposed a more plain language analysis, as he focused on the idea that the Clean Water Act authorizes jurisdiction over waters, not dry land.<sup>54</sup> Further, Scalia argued that a water of the United States should be defined as “a *relatively permanent* body of water *connected* to traditional interstate navigable waters.”<sup>55</sup> Scalia also added that the Corps should only have jurisdiction over wetlands that have “a continuous surface connection with [a water of the United States], making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”<sup>56</sup> Aligning with Scalia’s typical preference for plain language, the opinion scolded the idea of regulating “lands” as “waters,” even referencing things as simple as dictionary definitions of those words.

Joining the holding but writing his own approach, Kennedy’s concurrence attaches isolated waters by their significant nexus to the physical, chemical, and biological integrity of a navigable water, if such a nexus exists. Kennedy essentially took the phrase “significant nexus” from the *SWANCC* case and expounded upon it. First, Kennedy disagreed with Scalia’s idea that a body of water must be relatively permanent in order to be jurisdictional. According to Kennedy, this requirement would exclude “torrents [of water] thundering at irregular intervals through otherwise dry channels.”<sup>57</sup> Further, Kennedy argued

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<sup>52</sup> *Rapanos*, 547 U.S. at 719-720 (The case also involved other petitioners, but the circumstances of Mr. Rapanos most clearly illustrate the issue. This does not affect the legal analysis in any way).

<sup>53</sup> *Id.* at 715.

<sup>54</sup> *Id.* at 731.

<sup>55</sup> *Id.* at 742.

<sup>56</sup> *Id.* at 742.

<sup>57</sup> *Id.* at 769-70.

that Scalia's requirement of a "continuous surface connection" was not supported by *Riverside*, as "the connection might well exist only during floods."<sup>58</sup>

In fairness, Kennedy also noted that "mere hydrologic connection should not suffice in all cases, . . . [a]bsent some measure of the significance of the connection for downstream water quality [of traditionally navigable waters]."<sup>59</sup> Consequently, Kennedy maintained that the word "navigable" should still be given some effect, noting "when . . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"<sup>60</sup> Perhaps **most** eloquently, Kennedy's test required that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"<sup>61</sup> After *Rapanos*, courts vary in their use of Scalia's and Kennedy's tests.<sup>62</sup>

#### A. *The New Clean Water Rule*

##### i. What the Rule Does

After decades of confusion, the EPA decided to create a clear-cut rule for defining "waters of the United States." Adopted in August 2015, the Rule came with large ambitions, just like the Clean Water Act itself. The EPA argues that its new rule clearly defines and protects tributaries that impact the health of downstream waters, provides certainty in how far safeguards extend to nearby waters, protects the nations regional water treasures, focuses on streams instead of ditches, maintains the status of waters within the Municipal Separate Storm Sewer system, and reduces the use of case-specific analysis of waters.<sup>63</sup>

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<sup>58</sup> *Id.* at 773.

<sup>59</sup> *Id.* at 784.

<sup>60</sup> *Id.* at 779-80.

<sup>61</sup> *Id.*

<sup>62</sup> Until the litigation of the Rule is complete, courts apply either of the tests in *Rapanos*. If a water meets the criteria for Scalia's adjacent and relatively permanent test or Kennedy's "significant nexus test," it can be brought into Clean Water Act jurisdiction.

<sup>63</sup> What the Clean Water Rule Does, *available at* <https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does>.

ii. What the Rule Does Not Do

Anticipating the strong opposition, the EPA also pinpoints some important things that the Rule does *not* do. The EPA argues that the Rule does *not*: “protect any types of waters that have not historically been covered by the Clean Water Act; add any new requirements for agriculture; interfere with or change private property rights; regulate most ditches; change policy on irrigation or water transfers; address land use; cover erosional features such as gullies, rills and non-wetland swales; or include groundwater, shallow subsurface flow and tile drains.”<sup>64</sup> These distinctions are important as they address many of the irrational fears of the public.

*B. The Rule is Stayed*

As soon as the Rule was promulgated, the EPA was met with numerous lawsuits. Farmers, businesses, and landowners filed suits to stop the imposition of the new rule. With numerous lawsuits rising across the country, the lawsuits were consolidated into the Sixth Circuit.<sup>65</sup> As of December 2016, the case is still pending before the Sixth Circuit Court of Appeals, awaiting a decision on the merits.

While numerous suits arose in various circuits, the suits generally contain common allegations. Most suits allege that the Rule is an arbitrary, capricious, or otherwise unlawful abuse of discretion by the EPA. In alleging this, most opponents attack the scientific validity, the “logical outgrowth” requirement of the Administrative Procedure Act, the Rule’s constitutionality under the Commerce Clause, and the Rule’s validity under the “clear statement canon.”<sup>66</sup>

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<sup>64</sup> What the Clean Water Rule Does Not Do, *available at* <https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does-not-do>.

<sup>65</sup> *See In re EPA*, 803 F.3d 804 (2015).

<sup>66</sup> *Id.* (Eighteen states alleging that the rule is contrary to the Rapanos opinion, violates the logical outgrowth requirement); *see also* Complaint and Petition for Review, *State of Texas v. EPA*, 2016 WL 686436 (2016) (lawsuit with Texas, Louisiana, and Mississippi alleging that the Rule violates the Commerce Clause and the Clear Statement Canon).

## II. THE SIGNIFICANT NEXUS TEST IS SCIENTIFICALLY SOUND

### A. Waters are “Fluid”

By essentially adopting Justice Kennedy’s “significant nexus” test, the EPA and the Corps chose the most scientifically sound analysis. While many in the general public see the Rule as a broad overreach of the federal government without justification, the EPA took extreme caution in developing the Rule on a scientific basis, including the review of 1,200 scientific articles.

While no one usually objects to the regulation of America’s rivers, the regulation of streams and wetlands is hotly contested. However, streams and wetlands “affect the amounts and types of materials that are or are not delivered to downstream waters, ultimately contributing to the structure and function of those waters.”<sup>67</sup> Although the Clean Water Act traditionally regulated interstate, navigable waters, the Rule clarifies protections that guard the scientific structure of all waters of the United States. Waters are fluid; no pun intended. Water moves, flows, and interconnects. Accordingly, the Rule is necessary as “the structure and function of rivers are highly dependent on the constituent materials stored in and transported through them.”<sup>68</sup> Specifically, streams and wetlands often transport materials that are “physical, chemical, or biological entit[ies]” into rivers; these materials can include “water, heat energy, sediment, wood, organic matter, nutrients, chemical contaminants, and organisms” that all originate outside of the river.<sup>69</sup>

### B. Function of Wetlands

To understand how physical, chemical, and biological connections between streams and wetlands and downstream waters influence river systems, the scientific reports considered five functions: source, sink, refuge, lag, and transformation.<sup>70</sup> Broadly, a river system’s function

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<sup>67</sup> Technical Support for the Clean Water Rule: Definition of Waters of the United States at 137, available at [https://www.epa.gov/sites/production/files/2015-05/documents/technical\\_support\\_document\\_for\\_the\\_clean\\_water\\_rule\\_1.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf).

<sup>68</sup> *Id.* at 136.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

depends on the biological connectivity among the system's populations of aquatic and semiaquatic organisms.<sup>71</sup>

The most common objection to the Rule, and essentially what Scalia's *Rapanos* opinion warned, is that the Clean Water Act may now regulate "dry" lands. While this fear may seem substantiated, truly "dry" lands are not covered by the Rule. Some wetlands may become dry during certain seasons of the year, but these lands are not disconnected from the quality of downstream waters. For example, riverbeds or streambeds that temporarily dry up are often "used by aquatic organisms that are specially adapted to wet and dry conditions. . . ." <sup>72</sup> Consequently, these temporary dry areas "can affect nutrient dynamics of downstream waters due to microbial activity, increased oxygen availability, and inputs of terrestrial sources of organic matter and nutrients."<sup>73</sup> To say that a piece of land that scientifically will affect water quality of other waters is not jurisdictional simply does not line up with the goal of the Act. Again, it must be factually shown that there will be an effect.

### C. Human Intervention

Although the effect of wetlands or streams on river systems may not seem noticeable, the effect of these smaller waters on larger river networks is usually only noticeable *after* some human intervention.<sup>74</sup> This is exactly what the Clean Water Act and the new Rule hope to prevent. The strongest human impact on the water system is likely the impact made through wetland drainage.<sup>75</sup> Studies show that in the United States, "states have lost more than half their original wetlands, with some losing more than 90%."<sup>76</sup> This is an issue that must be stopped. A dictionary definition of what is water and what is land is not a sufficient justification to deplete America's wetlands.<sup>77</sup>

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<sup>71</sup> *Id.* at 140.

<sup>72</sup> *Id.* at 145.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 153.

<sup>75</sup> *Id.* at 154.

<sup>76</sup> *Id.* See also Darryl Fears, *Study Says U.S. Can't Keep Up with Loss of Wetlands*, WASHINGTON POST (Dec. 8, 2013) (referencing the loss of 360,000 acres of freshwater and coastal wetlands from 2004 to 2009).

<sup>77</sup> See Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

### III. THE RULE IS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION OR OTHERWISE UNLAWFUL

With the strong scientific studies implemented prior to the Rule's creation, the hope was that the public would consider the strong scientific reasons for support of the Rule. However, the numerous lawsuits filed against the implementation of the Rule provide some common arguments in opposition. First, many of the newest lawsuits argue that the Rule is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because it is contrary to Supreme Court precedent, violates the Administrative Procedure Act, and violates the Commerce Clause of the U.S. Constitution.<sup>78</sup>

#### A. *The Rule Does Not Violate the "Logical Outgrowth" Standard of the APA*

One of the most common objections to the Rule is that the final rule differed from the proposed rule in a manner that violates the "logical outgrowth" standard under the Administrative Procedure Act.<sup>79</sup>

##### i. Logical Outgrowth Requirement

The Administrative Procedure Act requires agencies to provide a "general notice of proposed rulemaking" and to provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . ."<sup>80</sup> Case law determined further tests for this requirement, noting that an agency's final rule may differ from its proposed rule only to the extent that the final rule is a "logical outgrowth" of the rule that was originally proposed for comment.<sup>81</sup> Further, a final rule is a logical outgrowth of a

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<sup>78</sup> See generally *In re EPA*, 803 F.3d 804; see also *State of Texas v. EPA, Complaint and Petition for Review*, U.S. Dist. Court for the Southern District of Texas (2015). These lawsuits opposing the Rule were consolidated into the Sixth Circuit. The litigation is currently stalled due to issues regarding jurisdiction of the Sixth Circuit to hear all the opposition to the Rule. *In re EPA* includes the complaints of Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, and Wisconsin.

<sup>79</sup> *In re EPA*, 803 F.3d 804, 807 (6th 2015).

<sup>80</sup> 5 U.S.C. §§ 553(b)—(c).

<sup>81</sup> *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

proposed rule only to the extent that interested parties “‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”<sup>82</sup>

Specifically, opponents to the rule argue that the proposed rule, “on which interested persons were invited to comment, did not include any proposed distance limitations in its use of terms like ‘adjacent waters’ and ‘significant nexus.’”<sup>83</sup>

In both the proposed rule and the final Rule, waters that are “adjacent” to traditional waters and tributaries and impoundments of traditional waters are “waters of the United States.”<sup>84</sup> Additionally, “adjacent waters” include “neighboring waters” in both the proposed rule and the final Rule.<sup>85</sup> The proposed rule, however, defined “neighboring waters” in terms of a hydrological connection. More specifically, the proposed rule defined “neighboring waters” as “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.”<sup>86</sup> In the proposed rule, the justification for regulating “adjacent waters” was based on the “significant nexus” to traditional waters because such adjacent waters “significantly affect the chemical, physical, and biological integrity of those waters.”<sup>87</sup>

The final Rule, however, defines “neighboring waters” in terms of distance to traditional waters, impoundments, and tributaries.<sup>88</sup> Opponents argue that this change in the definition of “adjacent” from a hydrological connection to distance alone could not have been anticipated by the interested parties during the comment period and therefore was not a logical outgrowth of the proposed rule.<sup>89</sup>

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<sup>82</sup> *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

<sup>83</sup> *Id.*

<sup>84</sup> See Proposed Rule at 22, 260; see also 33 C.F.R. § 328.3(a)(5) (2015).

<sup>85</sup> *Id.*

<sup>86</sup> See Proposed Rule at 22,261, 22,271.

<sup>87</sup> *Id.* at 22,260.

<sup>88</sup> See 33 C.F.R. § 328.3(c)(2) (2015).

<sup>89</sup> See *In re EPA*; see also *State of Texas, State of Louisiana, and State of Mississippi v. EPA*, Complaint and Petition for Review, at 20. (2015).

## ii. Foreseeability and Deference of the EPA

The argument that the final Rule is not a logical outgrowth of the proposed rule is a failing argument. The numbers used in the final Rule are a result of scientific data; particularly the numbers stating that waters within the 100 year floodplain of a traditional navigable water or waters within 4,000 feet of the high tide line or ordinary high water mark. These hard numbers do not automatically subject these waters to Clean Water Act jurisdiction. Instead, if a water does not otherwise meet the definition of adjacency, the water *can* be evaluated on a case-specific basis to determine if there is a significant nexus, *if* the water is within a 100 year floodplain or within 4,000 feet of the high tide line.<sup>90</sup>

As discussed in the Science Report provided by the EPA, wetlands and open waters within floodplains are “physically, chemically and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.”<sup>91</sup> For the sake of having a clearer and easier Rule, the EPA adopted the 100 year mark as the limit for whether a floodplain should be considered on a case-by-case basis when it does not otherwise meet the definition of adjacent.

As for the 4,000 foot mark, “experience and expertise indicate that there are individual waters out to 4,000 feet where the science demonstrates that they, either alone or in combination with similarly situated waters, often have a significant effect on downstream waters.”<sup>92</sup> These numbers simply align with the goal of the Clean Water Act and do not automatically create any government overreach. Even if a property is within 4,000 feet of the high water mark or within the 100-year flood plain of a navigable water, the property still must be analyzed to determine if a significant nexus exists. If it is clear that no significant nexus exists, then the property will be exempt from the Act’s jurisdiction.

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<sup>90</sup> See *supra* note 68, at 349.

<sup>91</sup> *Id.* at 350.

<sup>92</sup> *Id.* at 353.

*B. The Rule Does Not Violate the Commerce Clause*

The Clean Water Act was originally enacted pursuant to Congress's authority to regulate interstate commerce. One common objection to the final Rule is that the Rule will subject to jurisdiction thousands of miles of intrastate waters that have no substantial effect on interstate commerce.<sup>93</sup> Under Kennedy's reasoning in *Rapanos*, jurisdiction over waters that are not traditionally navigable depends upon the existence of a significant nexus.<sup>94</sup> The final Rule faces many Commerce Clause challenges based specifically on the definitions of "other waters," the scope of the term "adjacent," and the construction of the term "tributaries."

*i. Interpretation of "Other Waters"*

The issue that opponents take with the definition of "other waters" is rooted in the elimination of the specific list of "other waters."<sup>95</sup> While eliminating the list of other waters, the new Rule replaced it with the case-by-case significant nexus test.<sup>96</sup> However, the Rule limits the types of "other waters" that can be subject to a case-specific significant nexus analysis to two types. The first type includes five subcategories: prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. The second type includes "waters located in whole or in part within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and within 4,000 feet of the high tide line or [ordinary high water mark] of a jurisdictional water." Although it somewhat expands what can be included as waters of the United States with the significant nexus

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<sup>93</sup> See Complaint and Petition for Review at 29.

<sup>94</sup> *Rapanos*, 547 U.S. at 780.

<sup>95</sup> Worth, *supra* note 11, at 622.

<sup>96</sup> *Id.* See also 33 C.F.R. § 228.3 (2015) (The old definition of waters of the United States included "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (1) which are or could be used by interstate or foreign travelers for recreational or other purposes; or (2) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) which are used by or could be used for industrial purposes by industries in interstate commerce.").

analysis, the Rule still limits the types of other waters to two specific categories.<sup>97</sup>

During the notice and comment period for the Rule, the National Association of Home Builders (NAHB) argued that the agencies' jurisdiction is bound by Congress' authority to regulate "channels" of commerce and that it does not extend to activities that "substantially affect" interstate commerce.<sup>98</sup> The NAHB also argued that the Rule's implementation of a case-by-case significant nexus analysis violates the Commerce Clause.<sup>99</sup> Opponents also allege that allowing the agencies to use scientific evidence on case-by-case determinations will give the agencies enough leeway to essentially regulate everything as "waters of the United States." These objections rely on the *Rapanos* case and the idea that *Rapanos* limited the regulation of "marginal waters or wetlands" to those that function as "channels" of interstate commerce and does not allow for regulation of waters that may simply have a substantial effect on interstate commerce. Further, opponents argue that the *SWANCC* affirms their claim because the Court held that permitting "respondents to claim federal jurisdiction over ponds and mudflats" because they may have substantial effects on interstate commerce "would result in a significant impingement of the States' traditional and primary power over land and water use."<sup>100</sup>

Following the *Lopez* decision in 1995, courts have further clarified the standards of Commerce Clause review.<sup>101</sup> Specifically in the D.C. Circuit, courts have held that the Commerce Clause analysis should consider any available scientific evidence on the issue.<sup>102</sup> In the NAHB case, the D.C. Circuit considered the question of whether the Commerce Clause authority permitted the prohibition of taking an endangered species of fly under the Endangered Species Act.<sup>103</sup> The court "relied on scientific evidence to establish the fly's importance to commercial actors."<sup>104</sup>

Similar to the holding in previous Supreme Court cases, the EPA could use scientific evidence in case-by-case examinations to determine

<sup>97</sup> Worth, *supra* note 11, at 623. (2016).

<sup>98</sup> *Id.* at 626.

<sup>99</sup> *Id.*

<sup>100</sup> See *SWANCC*; see Worth, *supra* note 11, at 627; see NAHB Comment at 24-28.

<sup>101</sup> Worth, *supra* note 11, at 612. (2016).

<sup>102</sup> See *National Ass'n. of Home Builders v. Babbitt*, 130 F.3d at 1043.

<sup>103</sup> *Id.* at 1054.

<sup>104</sup> Worth, *supra* note 11, at 612.

whether or not “other waters” satisfy the significant nexus test. In fact, case-specific, individualized analysis is the preferred manner of evaluating Commerce Clause jurisdiction.<sup>105</sup>

Further, regulating “other waters” with a “significant nexus” to navigable waters likely qualifies as regulating a “channel” of interstate commerce, similar to the *NAHB* case.<sup>106</sup> The power of Congress to regulate activities that substantially affect interstate commerce is limited to activities that are economic in nature, while the regulation of “channels” of interstate commerce is more free. However, the rule focuses on the degree to which the “other water” affects the chemical, physical, or biological integrity of the navigable-in-fact water.<sup>107</sup> Thus, the Rule essentially focuses on ways in which the “other water” could interfere with a way that navigable water is used; this is reasonably described as controlling the interference with or the misuse of a channel of interstate commerce.<sup>108</sup> Additionally, the Fourth Circuit addressed the issue of whether the Commerce power allowed Congress to regulate the flow of polluted water from privately owned wetlands to an adjacent roadside ditch and into a navigable river.<sup>109</sup> The court held that Congress’ authority indeed included the authority to regulate channels of interstate commerce *and* the channel’s use or misuse.<sup>110</sup>

#### ii. Interpretation of “Adjacent”

While the previous rule provided that “waters of the United States” includes “wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section,” the new Rule describes adjacent waters as “bordering, contiguous, or neighboring.”<sup>111</sup> Further, water will be considered “neighboring” if it is: (1) located within 100 feet of the ordinary high water mark of a jurisdictional water; (2) located in whole or in part within the 100-year flood-plain and is not more than 1500 feet from the

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<sup>105</sup> Worth, *supra* note 11, at 629; citing *U.S. v. Alderman*, 565 F.3d 641, 658 (9th Cir. 2009) (noting that “Commerce Clause analysis has never been fungible; it has been case-specific”).

<sup>106</sup> Worth, *supra* note 11, at 631.

<sup>107</sup> *Id.* at 629.

<sup>108</sup> *Id.* at 631.

<sup>109</sup> *Id.* at 630; citing *U.S. v. Deaton*, 332 F.3d at 701-702.

<sup>110</sup> *Id.* at 706.

<sup>111</sup> Worth, *supra* note 11, at 623.

ordinary high water mark of a jurisdictional water; or (3) located in whole or in part within 1500 feet of the high tide line of a jurisdictional water and within 1500 feet of the ordinary high water mark of the Great Lakes.”<sup>112</sup> Therefore, adjacent waters that are: bordering, contiguous, or within specified boundaries to a jurisdictional water are now considered jurisdictional.<sup>113</sup> Specifically, if the adjacent water is located within the 100-year floodplain, but between 1500 and 4000 feet from the ordinary high water mark, the water will be considered jurisdictional *if* it satisfies the significant nexus test.<sup>114</sup> While the old rule limited adjacent waters to wetlands, the new Rule clearly expands the eligible waters that *could* be considered adjacent.

Objections to this potential expansion were brought during the comment period on the Rule. Opponents raised the issue that this new definition of adjacent would “capture every open in a floodplain and riparian area, despite whether they are isolated or have a significant connection to downstream waters. . . .”<sup>115</sup> The opponents basically argued that the new definition would expand Clean Water Act jurisdiction to a “virtually limitless” category.<sup>116</sup>

Finding that adjacent waters are categorically jurisdictional due to their significant nexus to navigable-in-fact waters, however, is a perfectly permissible application of “adjacency” under the Commerce Clause. In short, this is because waters within these proximity limits usually possess the necessary connection to downstream waters and function as a larger system to protect the chemical, physical, or biological integrity of navigable waters. Any other waters with a less obvious hydrological connection, however, must still pass a “significant nexus” scientific analysis in order to be jurisdictional. Landowners can rest in the protection that not every hydrologic connection will bring about Clean Water Act jurisdiction. Like in *Rapanos*, a hydrologic connection may fail a significant nexus analysis because “the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.”<sup>117</sup>

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<sup>112</sup> *Id.* at 624.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 627.

<sup>116</sup> *Id.*

<sup>117</sup> *Rapanos*, 547 U.S. at 784-85.

This new consideration of the significant nexus between adjacent waters and navigable-in-fact waters should eliminate any need for the EPA or the Corps to show any separate Commerce Clause jurisdiction. When the waters are “evaluated as a single landscape unit with regard to their effect on the chemical, physical, and biological integrity” on navigable-in-fact waters, that are undoubtedly channels of interstate commerce, there is no longer a need for any Commerce Clause debate.<sup>118</sup>

### iii. Interpretation of “Tributaries”

Similar to the interpretations of “other waters” and “adjacent,” the interpretation of tributaries is based on the scientific impacts that tributaries can have on navigable waters.<sup>119</sup> The old rule was somewhat vague with regards to tributaries of navigable waters. The old rule limited the regulation of tributaries to “tributaries of waters identified in paragraphs (a)(1) through (4) of this section,” but did not actually define the term “tributaries.”<sup>120</sup> Therefore, the old rule limited jurisdiction to basic tributaries of traditionally navigable waters. The new Rule, however, defines a tributary as “a water that contributes flow, either directly or through another water . . . to a [traditionally navigable] water . . . that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.”<sup>121</sup>

Like the definitions of “other waters” and “adjacent,” the new definition of “tributaries” drew immediate opposition in regards to the Commerce Clause. In particular, the National Cattlemen’s Beef Association argued during the comment period that the new Rule’s definition of tributary violated the Commerce Clause because the *Solid Waste Agency of Northern Cook County* case implied that allowing agencies to regulate contributing flow through *any* type of water source is a violation of the Commerce Clause.<sup>122</sup> The NCBA’s argument was based on the idea that the Supreme Court struck down the Migratory Bird Rule in *SWANCC* because the rule took the idea of navigability

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<sup>118</sup> David Peterson, Coastal Prot. & Restoration Auth., EPA/Corps of Engineers “Waters of the U.S. Regulation Update.

<sup>119</sup> Worth, *supra* note 11, at 624.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 628.

completely out of the regulation, and that the new definition of “tributary” effectively does the same thing.<sup>123</sup>

Once again, the argument against the definition of “tributary” as a violation of the Commerce Clause based on the ruling of *SWANCC* fails. The new Rule considers a “tributary” to be a waterbody that contributes flow to any navigable-in-fact water.<sup>124</sup> Opponents argue that this definition violates the Commerce Clause in the same manner as the “migratory bird rule” from *SWANCC*.<sup>125</sup> However, the Migratory Bird Rule was struck down in *SWANCC* because it too far disconnected from an “activity that ‘substantially affects’ interstate commerce.”<sup>126</sup> The distinction between the Migratory Bird Rule and the definition of tributaries under the new Rule is clear. The new definition of “tributary” allows for federal regulation of non-navigable waters *that flow into* navigable-in-fact waters.<sup>127</sup> This distinction is clear because the flow-connectivity factually affects the navigable waters in a chemical, physical, and biological manner. Birds landing on a pond does not actually affect the navigability or availability of the water in any way. Multiple circuits have created precedent for this type of regulation.

In *United States v. Robinson*, the Eleventh Circuit held that it is “well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce.”<sup>128</sup> Additionally, the Supreme Court held in *Royal Rock Co-Op* that the Commerce Clause authorizes the regulation of activities that interfere with *channels* of interstate commerce.<sup>129</sup> Therefore, after the Supreme Court established that the Commerce Clause extends to activities that interfere with channels of interstate commerce, *Robinson* signified that flow connectivity falls within the

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<sup>123</sup> *Id.*

<sup>124</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,058 (June 29, 2015).

<sup>125</sup> NCBA Comment at 5, n. 11.

<sup>126</sup> *SWANCC*, 531 U.S. at 193.

<sup>127</sup> Worth, *supra* note 11, at 635.

<sup>128</sup> *U.S. v. Robinson*, 505 F.3d 1208, 1215 (11th Cir. 2007).

<sup>129</sup> Worth, *supra* note 11, at 635 (citing *U.S. v. Royal Rock Co-Op*, 307 U.S. 533, 544 (1939)).

category of “affecting interstate commerce” if it is regulated to preserve overall water quality.<sup>130</sup>

*C. The Rule Does Not Violate the Clear Statement Canon*

Another common argument against the Rule is that the phrase “waters of the United States” does not constitute such a clear and manifest statement.<sup>131</sup> Courts traditionally expect “a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority.”<sup>132</sup> The issue here is whether the Rule violates federal authority in an unprecedented way. As previously discussed with regard to the Commerce Clause, implementing a rule to preserve the good of all “waters of the United States” is not an unprecedented intrusion into state authority. The federal government has a clear interest in protecting all of the nation’s interconnected waterways.

**IV. SCALIA’S PLURALITY TEST IS INSUFFICIENT**

Although the stay of the Rule does not necessarily create an emergency situation for the waters of the United States, the long-term solution is to fully adopt the new Rule. To simply maintain the status quo or use Scalia’s plurality opinion to determine jurisdiction is not a legally sound way to protect America’s waters.

*A. Scalia’s Test is Still Unclear*

*Riverside Bayview* rejected the proposition that wetlands must contain moisture from neighboring covered waters.<sup>133</sup> Further, *Riverside Bayview* was not limited to the concept of adjacent wetlands, but had a broader focus on “wetlands’ `significant effects on water quality and the aquatic ecosystem.”<sup>134</sup>

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<sup>130</sup> *Id.* (citing *Royal Rock Co-Op*, 307 U.S. at 544; *Robinson*, 505 F.3d at 1215) (“Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce . . .”).

<sup>131</sup> See *State of Texas, Louisiana, and Mississippi v. EPA*.

<sup>132</sup> *Rapanos*, 547 U.S. at 738.

<sup>133</sup> *Riverside Bayview Homes*, 474 U.S. 121(1985).

<sup>134</sup> *Id.*

*Solid Waste Agency of Northern Cook County* interpreted the Clean Water Act to require a “significant nexus” with “navigable waters,” which is broader than the surface-water connection.<sup>135</sup>

Scalia’s interpretation of the statutory text gives insufficient deference to Congress’ purposes in enacting the Clean Water Act and to the authority of the agency in implementing the statutory mandates.<sup>136</sup>

#### B. *Scalia’s Test Does Not Coincide With the Goals of the Act*

In sum, Kennedy agrees with the—*Rapanos* dissent that “an intermittent flow can constitute a stream.”<sup>137</sup> Kennedy also agrees, “that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.”<sup>138</sup> Kennedy states that the plurality’s conclusion that “navigable waters may not be intermittent ... is unsound.”<sup>139</sup> Kennedy rejects the “plurality’s second limitation – exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters.”<sup>140</sup> To adopt Scalia’s idea of “relatively permanent” waters would likely exclude thousands of miles of small streams and wetlands that have substantial impacts on America’s water quality. While the three major cases seem contradictory, Kennedy’s concurrence, which establishes the significant nexus test, is not contrary to the previous decisions of the Court and creates the easiest, most thorough way to ensure water quality.

### V. THE NEW RULE IS LESS OVERREACHING THAN ANY PREVIOUS ALTERNATIVE

#### A. *The Court Abandoned the Purely Economic Commerce Justification*

Opponents do not claim that navigable waters do not affect interstate commerce. To do so would be a frivolous argument. However, opponents still contend that the federal government’s regulation of isolated waters or wetlands is an overreach of federal authority. Similar

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<sup>135</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>136</sup> *Rapanos*, 547 U.S. at 715.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

to the Commerce Clause argument, regulating only the isolated waters and wetlands that can negatively affect the physical, chemical, and biological integrity of the nation's navigable waters seems to clearly be necessary in protecting navigable waters as a whole. Again, a farmer with a pond has nothing to worry about, unless extreme circumstances existed where his pond could affect the integrity of some navigable water. This is the essence of the significant nexus test. With the significant nexus, there is no need to decide if a landowner's isolated water affects commerce; instead, the test is to see if the isolated water has a significant nexus to a navigable water, as such water clearly falls under commerce clause jurisdiction.

i. Issue in *SWANCC* was a Stretch of Authority

If the public is upset about federal overreach, the idea to be upset about is the idea crushed in *SWANCC*. In that case, the Supreme Court struck down the ability to grab jurisdiction of isolated waters and wetlands by saying that migratory birds used the waters, and migratory birds are hunted, etc. which affects interstate commerce. This sweeping grab of power is a reason to be upset; fortunately, both Scalia's and Kennedy's opinions in *Rapanos* further abandoned this rationale. With the new Rule, the EPA is moving in a direction that should please all parties involved while maintaining the true spirit of the Clean Water Act.

B. *Jurisdictional Determinations Can Now Be Challenged in Federal District Court*

While moving to ensure the protection of navigable waters, the federal government is also restructuring the process for citizens dealing with a Clean Water Act dispute. In the summer of 2016, the Supreme Court decided in *Hawkes* that jurisdictional determinations under the Clean Water Act can be appealed directly in a federal court.<sup>141</sup>

i. Approved JDs Constitute a Final Agency Decision

The Clean Water Act, at its core, prohibits the discharge of pollutants into waters of the United States, unless a permit is obtained.

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<sup>141</sup> *U.S. Army Corps of Engineers v. Hawkes, Co.*, 136 S.Ct. 1807 (2016).

For the EPA to implement Clean Water Act regulations on a property, the EPA must first obtain a jurisdictional determination. This determination examines the property to see if the water or wetland in dispute actually has a “significant nexus to navigable waters.” If the EPA determines that the water is within its jurisdiction, a battle usually begins between the landowner and the EPA.

One major issue with the Clean Water Act is the citizen’s ability to obtain judicial review. The EPA’s regulations typically spur disputes, particularly when it comes to whether a landowner’s property constitutes “waters of the United States.” However, federal courts may review an agency action under the Administrative Procedure Act.<sup>142</sup> Specifically, federal courts may review an action as long as that action is final, not specifically made unreviewable by statute, and not wholly committed to the agency’s discretion.<sup>143</sup>

In the *Hawkes* case, the Corps issued a jurisdictional determination stating that property owned by the peat mining company in Minnesota contained wetlands that had a significant nexus to navigable waters, specifically the Red River of the North.<sup>144</sup> The mine owners filed a suit challenging this determination under the Administrative Procedure Act.<sup>145</sup> However, the district court ruled that it did not have subject matter jurisdiction because the jurisdictional determination was not a “final agency action.”<sup>146</sup> The mine owners appealed to the Eighth Circuit, which reversed the district court’s decision.<sup>147</sup> The Supreme Court, seeing the importance of the distinction, granted certiorari and heard the case in the spring of 2016. On May 31, 2016, the Supreme Court unanimously affirmed the Eighth Circuit’s decision that an

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<sup>142</sup> See 5 U.S.C. 704. (Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority).

<sup>143</sup> *Bennett v. Spear*, 520 U.S. 154 (1997).

<sup>144</sup> See generally *Hawkes Co.*, 136 S.Ct. 1807 (2016).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

approved jurisdictional determination is a “final agency decision.”<sup>148</sup> With all eight justices in agreement, three concurrences were still written.<sup>149</sup> Most notably, Justice Kennedy argued that “the Court is right to construe a [jurisdictional determination] as binding in light of the fact that in many instances it will have a significant bearing on whether the Clean Water Act comports with due process.”<sup>150</sup> Similarly, Justice Kagan argued that jurisdictional determinations should be reviewable because “legal consequences will flow” from the Corps’ determinations in these disputes.<sup>151</sup> In the midst of its surety over the issue, the Court failed to discuss several other issues, including how this decision could affect the Clean Water Rule.<sup>152</sup>

ii. The Hawkes Decision Should Coincide with the New Rule

The Court did not discuss how the *Hawkes* decision should apply to the Rule, as the Rule was already stayed at the time of the *Hawkes* decision. However, implementing both of these new rules would greatly increase the reasonability of the whole dredge and fill permit process. Once a landowner receives an approved jurisdiction determination finding jurisdiction, the landowner can abandon the development plans, seek a permit, spending large amounts of money that will never be refunded, or proceed with the development at the risk of serious civil and criminal penalties. Perhaps the *Hawkes* decision can ease the minds of the Rule’s opponents. If the EPA wants jurisdiction over an isolated water or wetland, it must show factually that the water or wetland has a significant nexus to navigable waters. If the landowner disagrees, he is not out of luck. The landowner should now be able to appeal the decision directly to a federal court.

However, some argue that the *Hawkes* decision could be bad news for the Rule. Larry Liebesman, a former Justice Department environmental attorney, stated “The fact that the ruling was unanimous

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<sup>148</sup> *Id.*

<sup>149</sup> *See Hawkes*, 136 S.Ct. 1807, 1817 (2016). (Justices Kennedy, Kagan, and Ginsburg issued concurring opinions. This decision in this case was made after the death of Justice Scalia, hence only eight justices.)

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *See Hawkes* at footnote 2 (Some justices were in disagreement that meeting only the first prong of Bennett would suffice; nevertheless, the Court chose to delay that issue and still made a unanimous decision for purposes of the overall issue).

shows that even the liberal justices will not automatically defer to the Obama administration's Clean Water Act policy interpretations which impact property rights. . . The ruling also suggests that the WOTUS rule will likely face similar scrutiny should it reach the Court."<sup>153</sup> In contrast, environmentalists disagreed with the reasoning in *Hawkes*. Jan Goldman-Carter, of the National Wildlife Federation, argued that the Corps' process "will get even more cumbersome and time consuming" if there is a requirement of individual case-by-case determinations with the possibility of a lawsuit.<sup>154</sup>

## VI. EPA'S LITIGATION ISSUE

A massive flux of lawsuits is nothing new for the EPA. Anytime the EPA issues a new rule, it is almost always challenged as an arbitrary and capricious abuse of discretion. While the recent litigation has decided to consolidate the lawsuits into the Sixth Circuit, the court's decision is likely to be appealed regardless of the outcome. Based on the long, complicated history of the Act's jurisdiction, it is likely that the Supreme Court will eventually grant certiorari for the issue. The disputes and claims against the Rule will probably never stop until the Supreme Court issues an opinion on the merits of the Clean Water Rule.

With the recent election of Donald Trump, the fate of the Rule and the EPA as a whole has been questioned. President-elect Trump has a history of openly opposing the EPA. Trump will undoubtedly select at least one Supreme Court justice during his presidency, and probably more. Accordingly, Trump's election may be the biggest factor for the fate of Clean Water Act jurisdiction in quite some time. Whenever the Sixth Circuit makes its decision on the merits of the Rule, the vicious cycle will inevitable carry the Rule all the way to the Supreme Court. By that time, however, President-elect Trump may have appointed multiple justices to the Court. Whether conservative or liberal, one has to recognize that this possibility could drastically decrease the chances that the Rule is upheld. By acknowledging the legal soundness of the Rule and combining the application of the *Hawkes, Co.* case, however, the

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<sup>153</sup> See Annie Snider, *Supreme Court Ruling Means More Clean Water Act Lawsuits Are Likely* (May 31, 2016), available at <http://www.politico.com/story/2016/05/clean-water-act-supreme-court-223740>.

<sup>154</sup> *Id.*

Court can avoid the devastation of falling back to square one with regards to Clean Water Act jurisdiction.

### CONCLUSION

By protecting streams and wetlands, the Rule protects the communities downstream. Wetlands provide major benefits to communities such as trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitats for wildlife.<sup>155</sup> Before formulating the Rule, the EPA and the U.S. Army Corps of Engineers collaborated and utilized scientific experts. Specifically, the EPA used a report containing more than 1,200 peer-reviewed, published scientific studies showing that small streams and wetlands play a major role in the health of larger downstream waterways.<sup>156</sup>

While controversial, the impact of climate change makes the upholding of the Rule even more essential.<sup>157</sup> Much of the opposition to the Rule claims that the new Rule is a major overreach of federal power. The new Rule, however, is less overreaching than the idea presented in SWANCC. Obtaining jurisdiction because of waterfowl that affect interstate commerce is far more of a stretch than obtaining jurisdiction because the scientific facts show that the isolated water affects the physical, biological, or chemical integrity of an interstate, navigable water.

After roughly forty years of confusion and litigation, the EPA and the Corps adapted to the scientific advancements of today's society in determining a new, fair rule for Clean Water Act jurisdiction. With particular focus on the Section 404 dredge and fill permits, it is understandable why much of the public is concerned that the new Rule would be an overreaching burden. The legal claims against the Rule, however, should all fail. While the Sixth Circuit may be reaching a decision soon, the issue will surely be brought again and eventually settled by the Supreme Court of the United States.

The Clean Water Rule is the most scientifically sound rule for Clean Water Act jurisdiction that has ever been promulgated. Further, the rule does not violate the Administrative Procedure Act, the Commerce Clause, or the Clear Statement Canon, as alleged in the

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

pending lawsuits. If the Supreme Court wants to settle the issue, as it surely will, the Court will have to grant certiorari for the looming litigation that will follow the Sixth Circuit's decision on the consolidated lawsuits. Further, the Court could likely appease the public outcry by aligning its recent decision in *Hawkes Co. v. Army Corps* with the published Clean Water Rule, allowing landowners judicial review of the Corps' jurisdictional determinations on their property. After the long evolution of *Riverside Bayview*, *Solid Waste Agency of Northern Cook County*, and *Rapanos*, the new *Hawkes* case should be the nail in the coffin for the opposition, if the Court allows the decision to apply to the new Clean Water Rule.