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DON'T GO NEAR THE WATER: FOLLOWING THE FATE OF THE CLEAN WATER RULE

ABSTRACT

On August 28, 2015, the United States Environmental Protection Agency and the Army Corps of Engineers released their hotly debated Clean Water Rule (the Rule) redefining what are federally protected jurisdictional "waters of the United States." The Rule clarifies, and attempts to resolve, years of different interpretation and confusing rulings by the Supreme Court on which waterways are under the jurisdiction of the federal government and therefore subject to regulations under the Clean Water Act. This article addresses which waters are explicitly covered under the Rule and how opponents of this definition are distorting the plain language of the Rule. After facing more than a dozen lawsuits across the country, the United States Supreme Court granted a petition for certiorari in January 2017 to determine the fate of the Rule. The issues posed by the Rule arising under the CWA will likely be settled soon by the Supreme Court, and will hopefully be implemented, as the Rule seeks to provide greater predictability, clarity, and consistency on how Clean Water Act jurisdictional determinations are made.

*248 I. INTRODUCTION

Water does not respect state boundaries. It can move downstream, bringing with it excess nutrients from surface runoff from lawns and agricultural fields and can cause algae blooms, which reduce dissolved oxygen levels and increase turbidity in lakes, rivers, and territorial seas. [1] Water low in dissolved oxygen cannot support aquatic life. [2] The

Susquehanna River is one of the longest rivers on the Atlantic seaboard, flowing 444 miles from New York through Pennsylvania and Maryland into the Chesapeake Bay. [3] It is a river that does not respect state lines and poses potential problems for regulating interstate waters that present great pollution problems. [4] The 27,500-square-mile watershed drains through 67 counties and comprises 43 percent of the Chesapeake Bay's drainage area. [5] In 2016, the Susquehanna River was named the third most endangered river due to the increasing threat of pollution and being imperiled by a hydropower dam, which affects river flow and water quality. [6] In 2005, it was named America's most endangered river due to inadequate water treatment in many communities that allow millions of gallons of industrial wastewater, stormwater, and other pollutants to flow into its channel each year. [7] One of the greatest ***249** concerns in recent years has not been with the direct effect on the Susquehanna River, but rather on the Chesapeake Bay, which the river flows into. [8]

In 1972, Congress responded to the water pollution problem illustrated by the Susquehanna River, along with hundreds of other endangered waters in the United States, by adopting the Federal Water Pollution Act, [9] now known as the Clean Water Act (CWA). [10] Its original and current goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." [11] To achieve this objective, the Act established the goal of eliminating "the discharge of pollutants into surface waters." [12] Although these objectives and policies are not legal mandates, the Environmental Protection Agency (the EPA) and the courts rely on them to interpret Congress' intent regarding CWA issues. [13]

The CWA generally prohibits the "discharge of any pollutant" into navigable waters without a permit, under threat of steep civil fines and harsh criminal liability. [14] Navigable waters, in turn, are defined to mean "the waters of the United States, including the territorial seas" (WOTUS). [15] This single definition of jurisdictional boundaries applies to all regulatory provisions of the Act, including permit programs for discharges of dredged or fill material, [16] other polluting discharges, [17] water quality standards, [18] and oil spill prevention and clean up. [19] After the CWA was amended in 1972, the ***250** Army Corps of Engineers (the Corps) [20] and EPA (collectively referred to as the Agencies) promulgated a regulatory definition of the term "waters of the United States" to include seven categories of bodies of water. [21] Because Congress did not further define "waters of the United States," the Agencies created regulations with their own interpretation. [22] The Agencies further defined "navigable waters" as "waters that are subject to the ebb and flow of the tide and/or presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." [23] These definitions were originally interpreted to include essentially all bodies of water, in part due to the assumed hydrologic connection between most national waters. [24]

The determination of whether an interstate water falls within this definition of "waters of the United States" is controversial. [25] The CWA gives the federal government jurisdiction over "navigable" waters, but a series of Supreme Court cases over the past few decades have caused confusion over what "navigable" and "waters of the United States" mean. [26] In the wake of these cases, there has ***251** been confusion as to which non-navigable waters and wetlands are subject to the Act's authority. [27]

On August 28, 2015, the Agencies released the Clean Water Rule (the Rule) articulating and redefining what are federally protected jurisdictional "waters of the United States." [28] The Rule demarcates the limit of federal jurisdiction over waters and wetlands for purposes of the CWA. [29] The Rule clarifies, and attempts to resolve, years of different interpretation

and confusing rulings by the Supreme Court on what waterways are under the jurisdiction of the federal government and therefore subject to regulations under the CWA. [30] The Rule is now facing more than a dozen lawsuits across the country and has been attacked for allegedly being overly broad and harming businesses and landowners. [31] This article will address which waters are explicitly covered under the Rule and how opponents of this definition are distorting the plain language of the Rule.

Part II summarizes the larger issues and events relating to the history of "waters of the United States"--namely three United States Supreme Court opinions which brought more confusion than clarity to the definition of what waters are covered by the CWA. Part III concentrates on the recent court developments surrounding the Rule and considers the procedural and substantive challenges. Part IV examines the language of the Rule and discusses how opponents are misconstruing the statutory language as overly broad and unconstitutional.

II. THE SUPREME COURT LIMITING THE SCOPE OF "WATERS OF THE UNITED STATES"

Three Supreme Court cases--*Riverside*, *SWANCC*, and *Rapanos* [32] attempted to clarify the Rule for deciding which wetlands were considered waters of the United States but instead created confusion and uncertainty over the scope of waters protected by the ***252** CWA. [33] The United States Supreme Court first addressed the scope of waters of the United States under the CWA in *United States v. Riverside Bayview Homes, Inc.*, a 1985 decision addressing the Agencies' jurisdiction over adjacent wetlands. [34] In a unanimous decision, the Court deferred to the Agencies' ecological judgment that adjacent wetlands are "inseparably bound up" with the water to which they are adjacent, and upheld the provision that included adjacent wetlands in the regulatory definition of "waters of the United States." [35] According to the Court, Congress chose a broad definition of "waters," as evidenced by Congressional findings that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the sources." [36]

The Supreme Court next weighed in on CWA jurisdiction in 2001. [37] In *SWANCC*, the Court narrowly eliminated CWA jurisdiction over non-navigable waters, where jurisdiction is asserted on the basis of the use of the waters as habitats for migratory birds that cross state lines. [38] Since this decision, the agencies have not relied exclusively on the presence of migratory birds to establish jurisdiction. [39] While the *SWANCC* decision did not invalidate the Agencies' regulations, it emphasized that some type of relationship with waters that are navigable is necessary for jurisdiction. [40] This decision introduced the concept of significant nexus. [41]

Five years later, in 2006, the Supreme Court failed again to resolve the dispute over the meaning of "waters of the United States" in regard to jurisdiction over wetlands located near man-made ditches, which eventually drain into navigable waters." [42] In *Rapanos v. United States*, the Justices were divided so sharply over both the results and rationales that they managed to author five ***253** separate opinions. [43] However, all nine Justices reaffirmed the Court's prior holdings in *Riverside* and *SWANCC* that "the Act's term 'navigable waters' includes something more than traditional navigable waters." [44] The Court offered two primary tests for determining jurisdiction over wetlands adjacent to non-navigable waters. [45] Justice Antonin Scalia's opinion of the court supported CWA jurisdiction in situations where a wetland is both adjacent to, and has a continuous surface connection with, a "relatively permanent" body of water. [46] Justice Kennedy's concurring opinion determined that CWA jurisdiction extends to wetlands that have a "significant nexus" to traditional navigable waters "if 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.'" [47] The four dissenting Justices, in an opinion authored by Justice John Paul Stevens, held that the waters were jurisdictional. [48] Chief Justice John Roberts and Justice Stephen Breyer each wrote separately, urging the EPA and the Corps to conduct a rulemaking process to define "waters of the United States." [49] The Court thereby created a jurisdictional debate by failing to specify to lower courts and regulatory authorities which test to apply to determine which waters may be regulated under the CWA. [50]

Today, no consensus exists as to which test prevails. [51] Yet, *Rapanos* provides the most recent Supreme Court opinion of when wetlands are to be considered "waters of the United States" under the CWA. [52] These three Supreme Court decisions restricted the Agencies' regulatory authority over wetlands under the CWA and ***254** did so in ambiguous language, leaving how to treat many bodies of water that are used by communities across the country unresolved. [53] As a result of the ambiguity that existed under the old Rule and practices, almost all wetlands across the country theoretically could be subject to a case-by-case jurisdictional determination. [54] Business owners, members of Congress, developers, farmers, and local governments requested new regulations to make the process of identifying waters protected under the CWA clearer and simpler. [55]

III. REDEFINING WHICH WATERS WARRANT FEDERAL PROTECTION UNDER THE CWA

The scope of federal jurisdiction under the CWA involves the interplay of many factors, including the text and history of the Act, rulings of the Supreme Court, and actions taken by the Corps and the EPA. On May 27, 2015, the Agencies issued a proposed Rule that defines "waters of the United States," [56] a threshold term that determines the CWA's scope and application. [57] The Rule, which became effective on August 28, 2015, has broad application as it defines jurisdictional water for many CWA programs. [58] The Rule seeks to provide greater predictability, clarity, and consistency on how the CWA jurisdictional determinations are made. [59]

A. Procedural and Substantive Challenges

The manner in which the Rule was released raised serious questions about its legal validity. [60] Unfortunately, the Rule has muddied the waters, and its future is uncertain. [61] As soon as the Rule ***255** was promulgated, procedural and substantive challenges were filed across the country in federal district courts as well as courts of appeal. [62] The central procedural challenge alleges that the Rule violates the Administrative Procedure Act because the Agencies made significant changes from the proposed rule to the final Rule, thereby failing to provide commenters with adequate notice of the framework for the final Rule. [63] The major substantive challenge alleges the Rule exceeds the Supreme Court's jurisdictional limits of the CWA as set forth in *Rapanos*. [64] However, before these issues can be determined, the courts will have to decide whether jurisdiction lies with the district courts or courts of appeal, an issue that requires interpretation of the CWA's grant of jurisdiction. [65]

The jurisdictional question posed by the Rule is to determine which court has the jurisdiction to hear the substantive issues posed by the rule. [66] The CWA vests jurisdiction in the federal courts of appeal for review of agency action "approving or promulgating any *effluent limitation* or *other limitation* under Section 1311, 1312 or 1316 or 1345 of this title ... [and] ... in issuing or denying any permit under Section 1342 of this title ...." [67] If the Rule constitutes an "effluent limitation" or "other limitation," then the CWA authorizes the cases to proceed straight to appeals courts, bypassing

district courts. [68] The Agencies contend that the Rule acts as an "other limitation" under judicial precedent interpreting "other limitations" as used in §1369(b), thereby vesting jurisdiction in the federal courts of appeal. [69] Parties who oppose the Rule claim jurisdiction is not proper in the courts of appeal, but rather in the district courts under 28 U.S.C. § 1331. [70] In the district court cases challenging the Rule, the plaintiffs argue that the Rule does not concern issuing or denying permits and does not approve or promulgate any "other limitation." [71]

256** ***B. Sixth Circuit Stays the Rule

On October 9, 2015, the U.S. Circuit Court of Appeals for the Sixth Circuit issued a nationwide stay blocking the Rule pending the Circuit's decision on whether it has original jurisdiction. [72] In a 2-1 ruling, the court concluded that: "[a] stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new rule and whether they will survive legal testing." [73] The court found that the Rule's treatment of tributaries, adjacent waters, and waters having a significant nexus to navigable waters is at odds with *Rapanos*, a decision holding that jurisdiction is limited to those waters that have a significant nexus to downstream navigable water, not just any hydrologic connection. [74]

The court also relied on 33 U.S.C. § 1369(b)(1)(F) in its holding, finding that the section grants circuit courts original jurisdiction over actions challenging the Agencies' issuance or denial of any permit under the CWA. [75] The court relied on *National Cotton Council of America v. U.S. EPA*, where the court previously held that subsection (F) allows for direct circuit court review of actions issuing or denying a permit and regulations governing the issuance of permits. [76] Therefore, under *National Cotton*, the courts of appeals have jurisdiction under subsection (F) to review a regulation that imposes no restriction or limitation, if its affects or is related to permitting requirements. [77]

Procedurally, the court noted the rulemaking process by which the distance limitations were adopted was "facially suspect" because the proposed rule did not include any distance limitations in its use of terms like "adjacent waters" and "significant nexus," which are included in the Rule. [78] The dissenting judge argued that it is not prudent for a court to act before it determines that it has ***257** subject matter jurisdiction. [79] In fact, if a court lacks "jurisdiction to review the rule, then [it] lack[s] jurisdiction to grant a stay." [80]

One central issue the Sixth Circuit faced was whether it will take control over the litigation, as the Agencies would prefer, or whether to let the several district courts in which challenges have been filed hear the cases and let appeals trickle up at a later time. [81] During oral arguments held by the Sixth Circuit in regard to the jurisdictional issues posed by the Rule on December 8, 2015, the Agencies argued that giving district courts jurisdiction would waste judicial resources and result in substantial delays in resolving challenges to the Rule. [82] Opponents of the Rule argue that jurisdiction is proper at the district court level, and not with the courts of appeal. [83]

C. Conflicting District Court Rulings

The Sixth Circuit ruling came after three federal judges ruled in the same week in August 2015 on states' challenges to the Rule, with two holding [84] that they had no jurisdiction and the third issuing an injunction to halt the implementation of the Rule. [85] Similar to the Sixth Circuit's decision, the U.S. District Court for the Southeastern District of North Dakota

Court opined it "appears likely" that the agencies violated their grant of authority in promulgating the rule and that the agencies also failed to comply with the Administrative Procedures Act. [86] The North Dakota District Court held that the Rule expanded the federal government's role beyond that granted by Congress per the CWA, 33 U.S.C. § 1331, because the Rule could allow the EPA to regulate waters such as streams that are far from any navigable waters. [87] Specifically, in *North Dakota v. EPA,* the district court judge granted the injunction against the Rule, determining that the thirteen states that filed in his court are likely to succeed on their claims. [88]

***258** The rulings from judges in Georgia and West Virginia squarely conflict with the North Dakota judge on the issue of which court has jurisdiction to hear challenges to the Rule. [89] Contrary to its sister districts, the North Dakota Court for the Southeastern District found that the Rule was not an "other limitation" and, accordingly, the CWA did not require direct appellate jurisdiction. [90] The court for the U.S. Court for the Southern District of Georgia rejected the reasoning used by the court in North Dakota, finding that "its undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the Clean Water Act's permit program." [91] The decisions by the Sixth Circuit, the Southeastern District of North Dakota, the Southern District of Georgia, and the Northern District of West Virginia are far from the end of the story, but their harsh critiques suggest that the Rule will eventually be clarified. [92]

Congress has also been involved in quashing the Rule. On June 10, 2015, the U.S. Senate Environment and Public Works Committee advanced a bill to halt implementation of the Rule and limit which waterways the EPA can regulate. [93] This measure is similar to a bill the U.S. House of Representatives passed in May 2015 that would require the EPA to withdraw its regulation and draft a new one based on consultation with state and local officials. [94] Also on June 10, 2015, the U.S. House Interior Subcommittee passed an appropriations bill that would cut EPA funding by $718 million, or 9 percent, and cap the agency's staffing levels. [95] However, the spending provisions attacking the Rule had not passed when Congress ***259** recessed for the year. [96] Congress decided not to derail funding for the Rule in its 114th session, which may allow the agencies to better decide what is, and what is not, a water afforded protection by the CWA. [97]

D. Was the Sixth Circuit's Ruling Proper?

The Sixth Circuit and the North Dakota Court for the Southeastern District correctly halted the implementation of the Rule; however the outcome was reached by relying on unsupported authority in order to grant the stay. Opponents of the Rule prefer jurisdiction to be at the district court level, not the appellate level. [98] However, in order to maintain consistency and to avoid fragmented district court rulings on the Rule, the Agencies have a good chance of winning jurisdiction in the appellate courts--as evidenced by the Supreme Court agreeing to hear the case. [99]

While the jurisdictional question was still in the process of briefing before the Sixth Circuit, it nonetheless held that it has the jurisdiction and authority to stay the Rule. [100] The dissenting judge argued that the court should not grant the stay because the question of jurisdiction--which is a threshold matter--had not been decided, stating that if the court lacks "jurisdiction to review the rule, then [it] lack[s] jurisdiction to grant a stay." [101] The court went through two analyses before evaluating the merits of enjoining the Rule. [102] First, the court decided to preserve "the status quo as it existed before the Rule went into effect." [103] However, the court does not cite any authority for its decision, and relies on *Rapanos* to indicate which definition it refers to for the status quo. [104] Second, the Sixth Circuit held that it had the authority to stay the implementation of the Rule pending the determination of its own jurisdiction ***260** to review it. [105]

The majority relied on a Supreme Court case allowing a stay to "preserve the existing conditions and the subject of the petition," when the parties were properly before the court. [106] Here, the propriety of the subject matter of the suit and parties before the court were indeterminate. It seems illogical for a court that allegedly does not have jurisdiction to then possess jurisdiction to temporarily decide the outcome of the case. [107] The dissenting judge takes issue with this point, arguing that when exclusive review is available in one court, action by a different court is not valid. [108]

The Sixth Circuit also correctly validated its stay by relying on "public interest." [109] However, in this part of the opinion the judges speculated and substituted their judgment for the expertise of two federal agencies and thousands of stakeholders. [110] The court does acknowledge that the "clarification that the new Rule strives to achieve is long overdue ... [and] respondent [A]gencies have conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality." [111] Despite this acknowledgement and bypassing deference to the Agencies' decision, the court stated that the "sheer breadth of ripple effects" mandates the stay of the Rule. [112]

The Sixth Circuit wrongly halted the implementation of the Rule by relying on the possible inconsistencies that it has with the *Rapanos* decision. The Court went too far by holding that *Rapanos* is solely limited to waters that have a significant nexus to downstream navigable water, not just any hydrologic connection. [113] The Rule, Technical Support documents, and the science literature review all contain evidence that even "remote wetlands," such as intermittent streams, do have a significant nexus to water quality in navigable-in-fact waterways. [114] In addition, the Court in *Rapanos* addressed only the construction of the CWA language "navigable waters" and "waters of the United States." [115] The Supreme Court ***261** did not address interstate waters in that case, nor did it overrule prior precedent, which discussed the interaction between the CWA and federal law to address pollution of interstate waters. [116] Therefore, the Rule, in light of *Rapanos*, does not impose the additional requirement that interstate waters be water that is navigable or connected to water that is navigable for purposes of federal regulation under the CWA. [117]

E. Continued Litigation and the Rule's Path to the Supreme Court

Shortly after the Sixth Circuit's decision, the U.S. District Court for the Northern District of Oklahoma sua sponte dismissed two challenges to the Rule. [118] Former Oklahoma Attorney General, and now EPA Administrator, Scott Pruitt told the court that the challenge should stay in his state, regardless of the Sixth Circuit decision. [119] Likewise, the U.S. District Court for the Southern District of Ohio dismissed a similar complaint filed in that court. [120] Several other motions to dismiss have been filed in district court challenging the Rule. [121]

In addition to the various district court cases challenging the Rule, eleven state plaintiffs filed an appeal before the Eleventh Circuit, identifying the same jurisdictional question that was before the Sixth Circuit. On August 16, 2016, the Eleventh Circuit found that identical litigation in the federal courts should be avoided. [122] Specifically:

> ***262** If there were an exhibition hall for prudential restraint on the exercise of judicial authority, this case could be an exemplar in the duplicative litigation wing. The case before us and the case before the Sixth Circuit involve the same parties on each side, the same jurisdictional and merits issues, and the same

> requested relief .... It would be a colossal waste of judicial resources for both this Court and the Sixth Circuit to undertake to decide the same issues about the same rule presented by the same parties. [123]

In addition, the Eleventh Circuit noted that the decision by the Sixth Circuit "involve[s] the same parties on each side, the same jurisdictional and merits issues, and the same requested relief." [124]

After the Sixth Circuit's decision, various petitions for rehearing en banc were filed. [125] The Sixth Circuit directed the Agencies to file a response, and on April 21, 2016, the court issued an order denying the petitions for rehearing, noting that "although the Rule does not itself impose any limitation, its effect, in the regulatory scheme established under the Clean Water Act, is such as to render the Rule ... subject to direct circuit court review under § 1369(b)(1)(E)." [126]

Thereafter, the National Association of Manufacturers (NAM), one of the parties in the Sixth Circuit proceedings, subsequently filed a petition for writ of certiorari in the United States Supreme Court. [127] NAM argued that the continued litigation of the suit's merits would be tremendously burdensome if the Supreme Court determines the Sixth Circuit lacks jurisdiction. [128] On January 25, 2017, the United States Supreme Court granted a petition for certiorari challenging the decision of the divided Sixth Circuit. [129]

*263 IV. DISTORTING THE LANGUAGE OF THE RULE

A precise definition of navigable waters is needed to protect wetlands. [130] This clarification of the Rule is crucial to maintain healthy waterways across the nation and to ensure a bright future for all citizens of the United States. The Rule is based on solid science [131] and it aligns with Supreme Court precedent. [132] It's timely. It's relevant. It is needed both to restore and maintain one of our most vital resources: an abundance of clean water.

A. Statutory Language

By changing the regulatory definition of "waters of the United States," there may be situations in which the CWA applies categorically for the first time, and there may also be instances in which the CWA no longer applies. [133] For example, compared to the old regulations and historical practice of making jurisdictional determinations, the scope of jurisdictional waters will decrease, as would the costs of CWA programs. [134] In an economic analysis document accompanying the Rule, the Agencies estimate the revised Rule will result in 2.84 to 4.65% more positive assertion of jurisdiction over Untied States water, compared with the practice under the old statutory language. [135] In addition, the new definition of "waters of the United States," by itself, imposes no direct costs. [136]

Under prior CWA authority, the term "waters of the United States" includes seven categories of bodies of water. [137] Six of these categories are retained by the Rule in paragraph (a), and fall under the jurisdiction of the CWA with no additional required analysis. [138] These waters include: traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, and adjacent ***264** waters. [139] There is no change from the old statutory language for waters that are susceptible to interstate commerce, known as traditional navigable waters. [140] Likewise, all interstate waters, the territorial seas, and impoundments of the above waters or a tributary are also considered jurisdictional under both

the old statutory language and the new Rule. [141] All waters that are considered adjacent, including wetlands, ponds, lakes, oxbows, and similar waters, are considered jurisdictional under the Rule because the Agencies conclude they have a significant nexus to traditional navigable water. [142]

Similar to past guidance and rulemaking, the Rule identifies categories of water that are and are not jurisdictional, as well as categories of water that require a case-specific determination. [143] In paragraph (a), the Rule abandons the "other waters" designations and replaces it with two different mechanisms for evaluating them. [144] These two sets of waters are identified for purposes of conducting a case-specific significant nexus analysis to determine if CWA jurisdiction applies, narrowing the scope of waters that could be assessed under a case-specific significant analysis compared with the old statutory language. [145] The first waters subject to a significant nexus analysis are five regional waters that are identified in the rule: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. [146] These waters are subject to this analysis only when they impact downstream waters. [147] The second category of waters subject to a significant nexus analysis are those within the 100-year flood plain of traditional navigable waters, interstate water of the territorial seas, as well as waters with a significant nexus within 4,000 feet of each jurisdictional water. [148]

In paragraph (b), the Rule maintains and expands the exclusion from the old Rule to the new, including those for the waste treatment systems and prior converted cropland, but it also adds three types of ditches: groundwater, gullies and rills, and non-wetland swales to the list as excluded. [149] The Rule focuses on streams, not ***265** ditches. [150] It provides protections to ditches that are constructed out of streams or function like streams and can carry pollution downstream. [151] In addition, the Rule significantly limits the use of case-specific analysis by demarcating and limiting the number of similarly situated waters. [152] The Rule excludes constructed components, water delivery/reuse, and erosional features. [153] Finally, other constructed features such as stock ponds, cooling ponds, and settling basins are excluded from CWA jurisdiction. [154] In paragraph (c) the Rule provides a revised definition for the first time that sets limits on what will be considered "adjacent." [155]

In addition, tributaries of the above waters are jurisdictional if they meet the definition of "tributary." [156] Specifically, these waters are jurisdictional under the old rule, but the term "tributary" is newly defined in the Rule. [157] One crucial change in the Rule is that it makes "tributaries" and "adjacent waters" that share a "significant nexus" to the "waters of the United States" jurisdictional by rule. [158] In the Rule, the EPA and the Corps responded to comments that had requested some limits on the definition of adjacent waters. [159] Under the Rule, water that is adjacent to jurisdictional water is itself jurisdictional if it meets the related definition of neighboring. [160] The Rule establishes maximum distances, or specific boundaries from jurisdictional waters, for purposes of defining "neighboring." [161]

The term "neighboring" has now been defined to include waters located, in whole or in part: within 100 feet of the ordinary high water mark (OHWM) of a jurisdictional water; within the 100-year floodplain that are not more than 1,500 feet from the OHWM of a jurisdictional water; and all waters located within 1,500 feet of the high tide line of a jurisdictional water and within 1,500 feet of the OHWM of the Great Lakes. [162] The water is considered "neighboring" if a portion of it is located within these specific boundaries. [163] In addition, there has been a change from prior law, which referred ***266** to "adjacent wetlands" and left much of the jurisdictional analysis to case-by-case determinations. [164] The

term "adjacent" as in "adjacent waters" is defined to mean, "bordering, contiguous or neighboring," and thus remains unchanged from past statutory language. [165]

Under old statutory language, tributaries were considered jurisdictional without any specific qualification and were not defined. The Rule now defines "tributaries" as those that impact the health of downstream waters. [166] Tributary status is indicated by physical features of flowing water and can be natural or constructed, but must have a bed, a bank, and an ordinary high-water mark in order to warrant protection. [167] A tributary as defined by the Rule does not lose its jurisdictional status even if there are one or more natural breaks (e.g., a debris pile) or constructed/man-made breaks such as a bridge or a dam. [168]

The term "significant nexus," which originated from Justice Anthony Kennedy's concurring opinion in *Rapanos*, is defined for the first time by a regulatory definition in paragraph (c). [169] The Rule defines "significant nexus" as the water at issue which significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea. [170] "Significant effects" must be "more than speculative or insubstantial." [171] The Rule also adds a list of factors that must be considered in deciding whether a significant nexus exists. [172]

B. Explanation and Implementation

The Rule explicitly recognizes the interrelatedness of water bodies and codifies jurisdiction over upstream sources to "traditional ***267** navigable waters" protected by the CWA. [173] The Rule does not create any new permitting requirements for agriculture and maintains all previous exemptions and exclusions. [174] There are additional exclusions for features like artificial lakes and ponds and water-filled depressions. [175] As before, a CWA permit is only needed if a waterway is going to be polluted or destroyed. [176] The Rule only protects waters historically covered under the CWA. [177] It also maintains the exclusion of previously converted cropland--meaning that over 50 million acres of land are still not subject to CWA permitting. [178] It does not interfere with private property rights, and it only covers water, not land, use. [179] The Rule also does not regulate most ditches, does not regulate groundwater or shallow subsurface flows, and does not change policy on irrigation or water transfers. [180] The Rule explicitly states that the CWA does not apply to ground water. [181]

Recognition of the need for federal oversight of source waters, including small or temporary streams and wetlands, is not new to policy. For example, in the debates about the scope of the CWA in the Senate and Environment Public Works Committee in 1977, former Senator Howard Baker (Republican, Tennessee) said that "the once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource." [182] Despite such arguments, legal challenges to the CWA have continued, and despite repeated attempts at resolution by the Agencies, regulators, and Congress, confusion about the CWA has persisted. [183]

Within the language and preamble of the Rule itself, the EPA and the Corps explain in great detail why tributaries, including ephemeral ***268** tributaries, have a significant nexus to water quality in traditionally navigable waters. [184] The Agencies included specific numerical requirements to provide more simplified jurisdictional determinations for adjacent waters, neighboring waters, and some waters subject to the significant nexus analysis. [185] These numerical requirements

included in the statutory language are exactly what opponents claim the Rule lacks. [186] The Rule also cites a Technical Support document, which explains those connections in even greater depth. [187] Notwithstanding the legal history of the CWA, science has also informed the evolution of which waters are considered to be "waters of the United States." [188] The supporting documents were also vetted by an independent science advisory board, which also agreed that key terms in the Rule need clarification and better definitions, including the terms "significant," "adjacent," "floodplain," and "similarly situated." [189] The science advisory board also concluded "[t]here is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act." [190] However, science cannot in all cases provide "bright lines" to interpret and implement policy. In the preamble to the Rule, the Agencies recognize this point:

> The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during ***269** a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate. [191]

Therefore, the preamble and Technical Support documents are essential to understanding how the Agencies aligned contributions and limitations from five primary sources for explanation and implementation of the CWA: the statute itself, peer-reviewed science, case law, public input, and agency experience and expertise. [192]

V. CONCLUSION

As all of the opposition and criticism may attest, the Rule is not perfect. But it is legally and scientifically sound, and it is essential to maintaining clean water in America. The language of the rule itself provides the necessary clarifications that were sought by Congress and hundreds of stakeholders alike. The issues posed by the Rule arising under the CWA will likely be settled soon by the Supreme Court, and will hopefully be implemented, making America's waters great again.

Footnotes

a1 Elizabeth Mylin is a 2017 Juris Doctor candidate at Duquesne University School of Law. She graduated summa cum laude from Virginia Tech with a Bachelor's Degree in Political Science and National Security Policy Studies. The author would like to thank Dean Nancy Perkins for her helpful insights. All errors and opinions expressed herein are the author's own.

1 William L. Andreen, *The Evolution of Water Pollution Control in the United States--State, Local, and Federal Efforts, 1789-1792: Part I*, 22 STAN. ENVTL. L.J. 145, 172 (2003).

2 *Id.* at 191.

3 JOHN COPELAND NAGLE, LAW'S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE 144 (2010) (discussing the history of the Susquehanna River, the channels it flows through, and geological and geographical features).

4 *See, e.g.*, Erin Fitzsimmons, *Resources Protecting Resources*, 41 MD. B.J. 18, 19 (2008).

5 NAGLE, *supra* note 3, at 144.

6 *See, e.g.*, *America's Most Endangered Rivers for 2016*, AMERICAN RIVERS, https://www.americanrivers.org/threats-solutions/endangered-rivers (last visited Feb. 17, 2017) (identifying the threat of pollution from the Conowingo Hydroelectric Dam, "which alters river flow, blocks fish and impacts water quality").

7 *See America's Most Endangered Rivers of 2005*, AMERICAN RIVERS, https://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/02/24220916/2005-mer-report.pdf (last visited Apr. 10, 2017).

8 *See* AMERICAN RIVERS, *supra* note 6. The Susquehanna River delivers over half of the freshwater supply into the Chesapeake Bay. In addition, "[t]he river contributes 41 percent of the bay's nitrogen, 25 percent of its phosphorus and 27 percent of its sediment load." *Id.*

9 Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948).

10 In 1977, Congress renamed the Federal Water Pollution Control Act of 1972 to the Clean Water Act. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

11 33 U.S.C. § 1311(a) (2015). The Act originally intended to curb water pollution by 1985. *See id.* § 1251.

12 Another goal is the "achievement of a level of water quality which provides for the protection and propagation of fish, shellfish and wildlife" and "for recreation in and on the water." *Id.* § 1251(a)(1)-(2).

13 *See generally* Rapanos v. United States, 547 U.S. 715, 722-23 (2006).

14 33 U.S.C. §§ 1311(a), 1362(12)(A). The 1972 Amendment also granted Congress authority to regulate interstate waters and navigable waters through the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. The legal issues surrounding the Commerce Clause and the Clean Water Rule will not be discussed in this article.

15 33 U.S.C. § 1362(7). While the term "territorial seas" is defined in the statue, the term "waters of the United States" is not.

16 *Id.* § 1344.

17 *Id.* § 1342.

18 *Id.* § 1313.

19 *Id.* § 1321. Congress left it to the EPA and the Corps to define the term "waters of the United States." *Id.*

20 *See generally id.* §1342(a). Congress has charged the EPA and the Corps with implementing and enforcing the CWA.

21 33 C.F.R. § 328.3(a)(1)-(7) (2015). These waters include: (1) All waters which are currently used, or were used in the past, or may be susceptible to use; (2) All interstate waters; (3) All interstate waters including interstate wetlands; (4) 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; (5) Tributaries of waters identified [above]; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands). *Id.*

22 U.S. EPA & U.S. ARMY CORPS OF ENG'RS, Draft Guidance on Identifying Waters Protected by the Clean Water Act (2011), http://nafsma.org/sites/default/files/shared-files/documents/stormwater-committee/wous_guidance_4-2011.pdf.

23 33 C.F.R. § 329.4.

24 *See* THEODORE ROOSEVELT CONSERVATION P'SHIP, THE CLEAN WATER ACT GUIDANCE: WHAT IT DOES AND DOES NOT DO 1, http://www.trcp.org/assets/pdf/Clean_Water_Act_Guidance_Explanation.pdf (last visited Oct. 17, 2015) (quoting Tennessee Senator Howard Baker in a 1977 floor statement). Hydrologic connection refers to the water-

mediated transport of matter, energy, and organisms within or between elements of the hydrologic cycle. *See* Clean Water Rule, 80 Fed. Reg. 37,056 (June 29, 2015) (preamble) (to be codified at 33 C.F.R. pt. 328) (Clean Water Rule).

25 Though, the EPA and the Corps have generally supported the broadest possible interpretation of the scope of the CWA's coverage that would be allowed under the Commerce Clause of the United States Constitution. *See* Leslie Salt Co. v. U.S., 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (holding that seasonal ponding in pits formerly used for salt production has also been held to be within the scope of waters of the United States).

26 The Supreme Court addressed the scope of "waters of the United States" protected under the CWA in three cases. *See* Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159 (2001); United States v. Riverside Bayview Homes (*Riverside*), Inc. 474 U.S. 121 (1985).

27 *See* Kristen Clark, Note, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295, 306 (2014).

28 The agencies proposed the 370-page rule on April 21, 2014. *See* Clean Water Rule at 37,054.

29 *Id.*

30 *Id.*

31 *See, e.g.*, *In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015). Opponents of the Rule claim that it improperly grants the EPA and the Corps broad new authority. *Id.*

32 *See* Rapanos v. United States, 547 U.S. 715, 738-39 (2006) (plurality opinion); *SWANCC*, 531 U.S. 159, 172-74 (2001); *Riverside*, 474 U.S. 121,134 (1985).

33 Clark, *supra* note 27, at 306.

34 This case is often viewed as the Supreme Court acknowledging that waters do not have to be navigable to be considered jurisdictional under the CWA. *Riverside*, 474 U.S. at 125.

35 *Id.* at 134.

36 *Id.* at 133-34 (citing S. REP. NO. 92-414, at 75 (1972)).

37 *SWANCC*, 531 U.S. at 159.

38 *Id.* at 170-71.

39 U.S. EPA & U.S. ARMY CORPS OF ENGINEERS, Memorandum on Coordination on Jurisdictional Determinations under Clean Water Act Section 404 in Light of the SWANCC and Rapanos Supreme Court Decisions (June 5, 2007), https://www.epa.gov/sites/production/files/2016-04/documents/rapanosmoa6507.pdf.

40 *SWANCC*, 531 U.S. at 168.

41 *Id.* at 167.

42 *Rapanos* concerned the issue of whether four Michigan wetlands lying near ditches or man-made drains that eventually empty into navigable waters constituted "waters of the United States." Rapanos v. United States, 547 U.S. 715, 715-16 (2006) (plurality opinion).

43 *Id.* at 733 (determining that the CWA did not extend to "transitory puddle or ephemeral flows of water").

44 *Id.* at 731.

45 *Id.* at 717. Neither the plurality opinion nor the Justice Kennedy concurrence invalidated any of the regulatory provisions defining waters of the United States.

46 *Id.* at 716.

47 Justice Kennedy determined that the Agencies had not shown the requisite nexus. *Id.* at 717-18 (Kennedy, J., concurring).

48 *Id.* at 787-88 (Stevens, J., dissenting).

49 *Id.* at 757 (Roberts, J., concurring); *Id.* at 811 (Breyer, J., dissenting). Since there is no majority opinion in *Rapanos*, controlling legal rules may be drawn from principles championed by five or more Justices. *See* EPA & ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* AND *CARABELL V. UNITED STATES* 3 (2008) [hereinafter CWA JURISDICTION FOLLOWING *RAPANOS*].

50 *Compare* N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007) *with* United States v. Cundiff, 555 F.3d 200, 210 (6th Cir. 2009). (applying the significant nexus test and the test iterated in the plurality opinion).

51 Clark, *supra* note 27, at 306.

52 CWA JURISDICTION FOLLOWING *RAPANOS*, *supra* note 49.

53 Clark, *supra* note 27, at 319.

54 *Id.*

55 Kimberly Bick, *Untangling 'Waters of the US' Web in 6th Circ.*, LAW360, (Oct. 15, 2015), https://www.law360.com/articles/714760/untangling-waters-of-the-us-web-in-6th-circ.

56 The agencies proposed the 370-page rule on April 21, 2014. *See* Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

57 Under the jurisdiction of the Clean Water Act, 33 U.S.C. § 1252 (2015).

58 Clean Water Rule, 80 Fed. Reg. 37,054.

59 *See* Robert Daguillard, *Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy*, U.S. ENVTL. PROT. AGENCY (May 27, 2015), https://www.epa.gov/newsreleases/clean-water-rule-protects-streams-and-wetlands-criticalpublichealth-communities-and.

60 One judge found that the EPA did not give the public a "fair chance" to comment on the rule. There are also jurisdictional issues over which court can hear cases challenging the rule. *See* North Dakota v. U.S. E.P.A., 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015).

61 The Sixth Circuit issued a nationwide stay blocking the new Rule pending the Circuit's decision on whether it has original jurisdiction. *See, e.g.*, *In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

62 *See, e.g.*, Georgia *ex rel* Olens v. McCarthy, No. CV-215-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), *appeal held in abeyance*, 833 F.3d 1317, 1320, 1321 (11th Cir. 2016); North Dakota v. U.S. EPA, 127 F. Supp. 3d 1047, 1051-52 (D.N.D. 2015); Murray Energy Corp. v. U.S. EPA, No. 1:15CV110, 2015 WL 5062506, at *2 (N.D. W. Va. Aug. 26, 2015).

63 *See North Dakota v. U.S. EPA*, 127 F. Supp. 3d at 1051.

64 *Id.* at 1055.

65 *See In re* EPA, 803 F.3d 804, 809 (6th Cir. 2015) (Keith, J., dissenting).

66 *Id.*

67 33 U.S.C. § 1369(b)(1)(E)-(F) (emphasis added).

68 *Id.* § 1369(b)(1)(E)-(G).

69 Clean Water Rule, 80 Fed. Reg. 37,082 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

70 *See, e.g.*, North Dakota v. U.S. EPA, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015).

71 *See* Georgia v. McCarthy, No. CV-215-79, 2015 WL 5092568, at *2 (S.D. Ga. Aug. 27, 2015); Murray Energy Corp. v. U.S. EPA, No. 1:15CV110, 2015 WL 5062506, at *3 (N.D. W. Va. Aug. 26, 2015); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d at 1051-52.

72 *In re* EPA, 803 F.3d 804, 806-07 (6th Cir. 2015). The Sixth Circuit stayed the Rule's implementation nationwide based on twelve petitions challenging it in eight different appellate courts, including the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. These petitions were consolidated by the Judicial Panel on Multidistrict Litigation (JMPL). JPML randomly selected the Sixth Circuit to hear the consolidated cases. *Id.*

73 *Id.* at 808. There are two parts to the decision made by the Sixth Circuit: (1) to decide if the court has the subject matter jurisdiction to hear the case and (2) to decide the validity of the Rule based on its merits. *Id.* at 806. This means that the Rule will not be implemented across the United States until the Sixth Circuit determines that it does not have jurisdiction to hear the petitioners' case or it determine that the Rule is valid. *Id.* at 808.

74 *Id.* at 807.

75 *Id.* (citing *Nat'l Cotton Council of Am. v. U.S. EPA*, 553 F.3d 927, 933 (6th Cir. 2009)).

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.* at 809 (Keith, J., dissenting).

80 *Id.*

81 *Id.* at 806 (majority opinion).

82 Amena H. Saiyid, *Sixth Circuit to Hear Oral Arguments on Water Rule*, BLOOMBERG BNA (Dec. 7, 2015), https://www.bna.com/sixth-circuit-hear-n57982064688/.

83 *Id.*

84 *See* Georgia v. McCarthy, No. CV-215-79, 2015 WL 5092568, at *3 (S.D. Ga. Aug. 27, 2015); Murray Energy Corp. v. U.S. EPA, No. 1:15CV110, 2015 WL 5062506, at *6 (N.D. W. Va. Aug. 26, 2015).

85 North Dakota v. U.S. EPA, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015).

86 *Id.* at 1051.

87 *Id.* at 1056.

88 *Id.* at 1051, n.1. (Staying operation of the Rule in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico).

89 *See McCarthy*, 2015 WL 5092568, at *2; *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d at 1051; *Murray Energy Corp.*, 2015 WL 5062506, at *6.

90 *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d at 1052.

91 *McCarthy*, 2015 WL 5092568, at *2. The court in West Virginia used similar reasoning--in rejecting an injunction request by Murray Energy Corporation. *See Murray Energy Corp.*, 2015 WL 5062506, at *2.

92 The Rule may be clarified in the future because on January 25, 2017, the United States Supreme Court granted a petition for certiorari challenging the decision of the divided Sixth Circuit. *In re* U.S. Dep't of Def. & U.S. E.P.A. Final Rule: Clean Water Rule: Definition of "Waters of the United States," 817 F.3d 261 (6th Cir. 2016), *cert. granted sub nom.* Nat'l Ass'n of Mfrs. v. Dep't of Def., 137 S. Ct. 811 (Mem) (2017).

93 Federal Water Quality Protection Act, S. RES. 1140, 114th Cong. (2015). However, the Obama administration indicated that it would veto the resolution and Congress would need a supermajority for the resolution to pass. James McClammer, *Up the Creek Without a Paddle: Navigating New Clean Water Rule*, THE LEGAL INTELLIGENCER (Nov. 13, 2015), http://www.thelegalintelligencer.com/id=1202742303002/Up-the-Creek-Without-a-PaddleNavigating-New-Clean-Water-Rule?slreturn=20151131123145.

94 Waters of the United States Regulatory Overreach Protection Act of 2015, H.R. RES. 594, 114th Cong. (2015).

95 *See* Regulatory Integrity Protection Act of 2015, H.R. RES. 1732, 114th Cong. (2015). There were more than 100 anti-environmental provisions Republican leaders tried to attach to spending bills during the 114th session of Congress. Some of the proposals would have blocked action on climate, clean air, clean water, land preservation, wildlife protection, and stripped essential programs of needed resources. *Id.*

96 See *id.*

97 *Id.*

98 Saiyid, *supra* note 83.

99 On January 25, 2017, the United States Supreme Court granted a petition for certiorari challenging the decision of the divided Sixth Circuit. *In re* Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States," No. 15-3751, (6th Cir. Jan. 25, 2017) (order granting motion to hold briefing in abeyance).

100 *In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

101 *Id.* at 809.

102 *Id.* at 806-07.

103 *Id.* at 806.

104 *Id.*

105 *Id.* at 807.

106 *Id.* (quoting United States v. United Mine Workers of Am., 330 U.S. 258, 291 (1947)).

107 *See id.* at 809.

108 *Id.*

109 *Id.* at 806.

110 *See id.* at 808.

111 *Id.*

112 *Id.*

113 *Id.* at 804, 807. For example, intermittent streams process nutrients, process carbon, provide the basis for food chains throughout river systems, and provide a host of other water quality benefits through river systems. Clean Water Rule, 80 Fed. Reg. 37,057 (June 29, 2015) (preamble) (to be codified at 33 C.F.R. pt. 328).

114 *See, e.g.*, Clean Water Rule, 80 Fed. Reg. at 37,076 (preamble).

115 *See* Rapanos v. United States, 547 U.S. 715, 723-24 (2006).

116 *Id.* at 719-21 (addressing whether wetlands adjacent to ditches or man-made drains that eventually empty into traditional navigable waters are within CWA jurisdiction).

117 Clean Water Rule, 80 Fed. Reg. at 37,061 (preamble).

118 *See* Oklahoma *ex rel.* Pruitt v. U.S. Envtl. Prot. Agency, Nos. 15-CV-0381-CVE-FHM, 15-CV-0386-CVE-PJC, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016).

119 Pruitt stated: "[t]he Sixth Circuit's decision does not control the outcome of this case, and the district court erred in holding that it does." Juan Carlos Rodriguez, *Okla. Urges 10th Circ. To Hear EPA Water Rule Challenge*, LAW360 (July 6, 2016, 7:19 PM), https://www.law360.com/articles/814326/okla-urges-10th-circ-to-hear-epa-water-rule-challenge

120 *See* Ohio v. EPA, No. 2:15-cv-02467 (S.D. Ohio Apr. 25, 2016), *appeal docketed*, No. 16-3564 (6th Cir. May 27, 2016).

121 Specifically: one case in the District of Minnesota, one case in the District of North Dakota, and four cases in the Southern District of Texas. To date, five district courts have concluded that they lack jurisdiction to review the Rule because jurisdiction is vested in the courts of appeal. *See Washington Cattlemen's Ass'n v. United States EPA*, No. 15-3058, 2016 WL6645765, at *3 (D. Minn. Nov. 8, 2016); *Ohio v.* EPA, 15-cv-02467 Docket entry No. 54, at 1 (S.D. Ohio Apr. 25, 2016); *Oklahoma ex rel. Pruitt v. United States EPA*, No. 15-cv-0381, 2016 WL 3189807, at *2; *Georgia v. McCarthy*, No. CV 215-79, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v U.S. EPA*, No. 15CV110, 2015 WL 5062506, at *1 (N.D. W. Va. Aug. 26, 2015).

122 Georgia v. McCarthy, 833 F.3d 1317, 1321 (11th Cir. 2016).

123 *Id.* at 1321.

124 *Id.*

125 *See, e.g.*, Order Denying Petitions for En Banc Rehearing, *In re* Dep't of Def. & EPA Final Rule, 817 F.3d 261 (6th Cir. 2016).

126 *Id.* at 270.

127 *See* Petition for Writ of Certiorari, *In re* U.S. Dep't of Def., U.S. Envtl. Prot. Agency Final Rule: Clean Water Rule: Definition of Waters of U.S., 817 F.3d 261 (6th Cir. 2016) (No. 16-299). The movant seeks interlocutory review of the Sixth Circuit panel's decision that jurisdiction lies with the court of appeals. *Id.* at *3.

128 Petition for Writ of Certiorari, *National Ass'n of Mfrs. v. Department of Defense*, 137 U.S. 811 (2017) (No. 16-299). The movants include seventeen petitioners and intervenor National Association of Manufacturers. *Id.*

129 *In re* Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States," No. 15-3751, (6th Cir. Jan. 25, 2017) (order granting motion to hold briefing in abeyance). The sole

contention in the petition for certiorari challenges the Sixth Circuit panel's holding that jurisdiction existed in the Court of Appeals under § 1369(b)(1)(F). *Id.*

130 Clark, *supra* note 27, at 319.

131 *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (2015).

132 *See What the Clean Water Rule Does*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does (last visited Apr. 11, 2017). The EPA and Corps relied on a science report summarizing findings from over 1,200 peer-reviewed and published scientific studies on water systems. *Id.*

133 As a result of exemptions and exclusions listed in the Rule. *See* Clean Water Rule, 80 Fed. Reg. 37,073 (preamble) (to be codified at 33 C.F.R. pt. 328).

134 *Id.* at 37,101.

135 *Id.*

136 The potential costs and benefits incurred as a result of the Rule are considered indirect, because the Rule involves a definitional change to a term that is used in the implementation of CWA programs. *Id.*

137 33 C.F.R. § 328.3(a).

138 Clean Water Rule, 80 Fed. Reg. at 37,073.

139 33 C.F.R. § 328.3(a)(1)-(6).

140 *Id.* § 328.3(a)(1).

141 *Id.* § 328.3(a)(2)-(4).

142 *Id.* § 328.3(a)(6).

143 *See, e.g.*, *id.* § 328.3(a)(7)-(8).

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.* § 328.3(a)(7).

148 *Id.* § 328.3(a)(8).

149 *Id.* § 328.3(b)(1)-(3).

150 *See id.* § 328.3(b)(3)(i)-(iii). The Rule also redefines excluded ditches. *Id.*

151 *Id.* § 328.3(b)(3)(i).

152 *See id.* § 328.3(b)(4)(i)-(vii).

153 *Id.* § 328.3(b)(4).

154 *Id.* § 328.3(b)(4)(ii).

155 *Id.* § 328.3(c)(1).

156 *Id.* § 328.3(c)(3).

157 *Id.*

158 Clean Water Rule, 80 Fed. Reg. 37,058 (to be codified at 33 C.F.R. pt. 328).

159 *See generally* ENVTL. PROT. AGENCY, CLEAN WATER RULE RESPONSE TO COMMENTS, CLEAN WATER RULE COMMENT COMPENDIUM TOPIC 3: ADJACENT WATERS (2015).

160 33 C.F.R. § 328.3(c)(2)(i)-(iii).

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* § 328.3(c)(1).

165 *Id.*

166 *Id.* § 328.3(c)(3) (defining tributaries as small, intermittent and ephemeral tributaries, tributary lakes, ponds and wetlands, man-made and man-altered tributaries).

167 *Id.* In the Technical Support documents accompanying the Rule, the science advisory board found that all tributary streams, regardless of size or flow regime, are physically, chemically, and biologically connected to downstream rivers by channels and associated alluvial deposits where water and other materials are concentrated. U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 1, 71 (2015) [hereinafter TECHNICAL SUPPORT DOCUMENT].

168 33 C.F.R. § 328.3(c)(3).

169 *Id.* § 328.3(c)(5); *see also* Rapanos v. United States, 547 U.S. 715, 759, 767 (2006) (Kennedy, J., concurring).

170 33 C.F.R. § 328.3(c)(5).

171 *Id.*

172 *Id.* The factors for significant nexus evaluation include: sediment trapping; nutrient recycling; pollutant trapping; transformation; filtering and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle-dependent aquatic habitat. *Id.* § (5)(i)-(ix).

173 Clean Water Rule, 80 Fed. Reg. 37,069 (preamble) (to be codified at 33 C.F.R. pt. 328).

174 *Id.* at 37,054.

175 33 C.F.R. §328.3(B)(4)(i)-(iii).

176 And all exemptions for agriculture stay in place. Clean Water Rule, 80 Fed. Reg. at 37,054 (preamble).

177 *Id.* at 37,079.

178 *See* U.S. DEP'T OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERV. *8*, *Wetlands Programs and Partnerships: RCA Issue Brief #8* (Jan. 1996), https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/nra/dma/?cid=nrcs143_014214.

179 *See* Clean Water Rule, 80 Fed. Reg. at 37,059.

180 33 C.F.R. § 328.3(b)(4)(i)-(iii) (2015).

181 33 C.F.R. § 328.3(b)(5) (2015).

182 *See* THEODORE ROOSEVELT CONSERVATION P'SHIP, *supra* note 24 (quoting Tennessee Senator Howard Baker in a 1977 floor statement).

183 *See In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

184 Clean Water Rule, 80 Fed. Reg. at 37,065 (preamble).

185 *See, e.g.*, 33 C.F.R. § 328.3(c)(2)(i)-(iii); (c)(5).

186 *See In re EPA*, 803 F.3d at 807. The Sixth Circuit noted the rulemaking process by which the distance limitations were adopted was "facially suspect" because the proposed rule did not include any proposed distance limitations in its use of terms like "adjacent waters" and "significant nexus" that are included in the Rule. *Id.*

187 *See* Clean Water Rule, 80 Fed. Reg. 37,074 (referring to the Technical Support Document). The Report is a scientific review and does not set forth legal standards for the Clean Water Act jurisdiction. TECHNICAL SUPPORT DOCUMENT, *supra* note 167, at 2. Rather, it summarizes current scientific understanding of the connections and functions by which small or temporary streams exert an influence on the chemical, physical, or biological integrity of waters protected by the CWA. *Id.* at 12.

188 Robert L. Glicksman & Matthew R. Batzel, *Science, Politics, Law and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 WASH. U. J.L. & POL'Y 99, 105 (2010).

189 TECHNICAL SUPPORT DOCUMENT, *supra* note 167, at 158. The definition of "adjacent" is important, for example, because where "adjacent" waters are determined affects the beginning of "other waters" that require a case-specific evaluation of jurisdiction.

190 *Id.* at 66.

191 Clean Water Rule, 80 Fed. Reg. 37,058.

192 *Id.* at 37,064-65.

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