CONTINUED TURBULENCE IN "WATERS OF THE UNITED STATES"

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INTRODUCTION

As a broad goal, Congress passed the Clean Water Act (CWA) to restore and maintain the "chemical, physical and biologic integrity of the Nation's waters."[1] Adapting the law to such a scientific-based policy has been difficult and the subject of dispute for forty years. Under the authority of the Constitution's Commerce Clause, Congress, acting through the CWA, asserted federal control over the nation's "*navigable waters*,"[2] which the statute defines as "waters of the United States …."[3] Finding the distinction between these two terms in describing the nation's water resources has since caused problems and, consequently, resulted in the expansion of federal environmental regulatory jurisdiction across the country. It has also been a long-time source of considerable tension across the nation as surprised citizens, industries, and organizations find that activities on their properties are subject to federal regulation.

Congress tasked the then-newly-formed Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with determining how extensive federal permitting and regulating activities of American waterways should be under the two systems.[4] The permitting mechanism and related regulations (i.e., the National Pollutant Discharge Elimination System (NPDES) permit), adopted to reduce pollution from point-source discharges under CWA Section 402, establishes the permittee's "end of pipe" water discharge quality.[5] Though the NPDES program is administered nationally by the EPA, the CWA allows

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[1] 33 U.S.C. § 1251(a) (1987).

[2] 33 U.S.C. § 1344(a) (1987) (emphasis added).

[3] 33 U.S.C. § 1362(7) (1987).

[4] *See* 33 C.F.R. § 320.1(a) (2000). The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890 and until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation, 33 U.S.C. § 1344(a)-(c) (1987).

[5] 33 U.S.C. § 1342 (2014).

states to administer certain aspects of the CWA, with EPA approval, under the principles of cooperative federalism.[6] In Kentucky, the NPDES program is administered by the Kentucky Energy and Environment Cabinet, Department of Environmental Protection, Division of Water Quality (KY DEP).[7]

Not only does the CWA regulate the quality of discharges into the waters of the United States, but it also regulates certain activities in water bodies that can obstruct or affect water quality.[8] Consequently, a permit from the Corps is required for a party wishing to "discharge dredged or fill material into navigable waters."[9] That is, under CWA Section 404,[10] any digging in or disposing of materials in the waters of the United States requires a permit, commonly known as a "404 permit." Although the CWA allows the states to assume jurisdiction of the "404 Program,"[11] Kentucky, like most states, does not administer the program.[12] Hence, any dredging or filling in the waters requires federal approval.[13]

Due to the difference between the terms "navigable waters" and "waters of the United States" within the statute itself, it is not surprising that there has been confusion across the nation regarding the reach of federal jurisdiction to the application of Section 404. To understand the legal dilemma, one must focus on the basic terms as defined by the agencies and the courts.

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[6] *See, e.g.,* 33 U.S.C. § 1342(b) (regarding the NPDES permitting program); *see also* 33 U.S.C. § 1318(c) (regarding inspections, monitoring and entry associated with point sources).

[7] *See* KY. REV. STAT. ANN. §§ 224.70–100 to –150 (West 2018); *see also* 401 KY. ADMIN. REGS. 5:002–5:310 (2018) (permitting program regulating point source discharges in Kentucky is referred to as the "KPDES" program).

[8] 33 U.S.C. § 1344(a).

[9] *Id.*

[10] *Id.*

[11] *Id.* at (g)–(h).

[12] The KY DEP does maintain some jurisdiction over activities resulting in permanent loss of streams and wetlands through what is referred to as the "401 Water Quality Certification" requirements. In its basic framework, the KY DEP is required to certify whether activities under a federal permit or license (i.e., 404 permit) will comply with other state water quality standards, 401 KY. ADMIN. REGS. 9:020 (2018).

[13] *See, e.g.,* 33 U.S.C. § 1341(a)(1) (1977).

A. *"Navigable Waters"*

"Navigable waters" historically only included those that were navigable in fact;[14] the term eventually found a statutory home in the Rivers and Harbors Act of 1899.[15] Over time, the term has expanded to include much smaller waterways. The Supreme Court has repeatedly held that "navigable waters" includes "all waters of the United States"—a legal fiction that Justice White acknowledged in reconciling the plain meaning of the term with the expanded regulatory reach.[16] He reasoned that Congress evidently intended to reject limits that had been placed on federal regulation by earlier water pollution control statutes and exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "'navigable' under the classical understanding of that term."[17] Following this expansive interpretation of the Commerce Clause, the federal agencies have defined "waters of the United States" to encompass not only traditional navigable waters used in interstate commerce, but also tributaries of those traditional navigable waterways and adjacent wetlands,[18] intermittent water channels, and even areas that would be perceived as dry lands to the untrained eye. Moreover, Congress left it to the agencies to determine just how far upstream bodies of water could be designated "water[s] of the United States" under federal regulation.[19] The agencies eventually followed the Commerce Clause upstream all the way to ephemeral streams and intrastate isolated wetlands.[20] This practice presented a critical question: What is the outer geographical limit of CWA jurisdiction?

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[14] *See Daniel Ball*, 77 U.S. 557, 563 (1870) (rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.").

[15] 33 U.S.C. § 401 (2016) (enacted March 3, 1899).

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

[17] *Id.*

[18] *See* 33 C.F.R. § 328.3(a)(1), (a)(5), (a)(7) (2017).

[19] *See* 33 U.S.C. § 1344(a)–(c) (2016).

[20] CLAUDIA COPELAND, CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS' RULE TO DEFINE "WATERS OF THE UNITED STATES" 3 (2017).

B. EPA and The Corps—Joint Jurisdiction?

Both the EPA and the Corps have jurisdiction under Section 404 and have broadly defined "waters of the United States."[21] Both agencies have also included wetlands adjacent to those waters in their definitions, despite the fact that wetlands are never expressly mentioned in the CWA.[22]

The CWA has two permitting schemes for protecting water quality: (1) the "Section 402" NPDES program administered by the EPA (and analogous KPDES program administered by KY DEP), regarding pollutant discharges; and (2) the "Section 404" program regarding certain "activities in the water bodies," primarily administrated by the Corps.[23] The Section 404 program provides an exception to the NPDES discharge requirements, allowing discharges of dredge or fill materials into waters requiring specific permitting criteria.[24] The 404 permittee must, however, minimize stream impacts and mitigate for unavoidable losses of stream or aquatic feature functions by restoring, recreating, or preserving other waters (i.e., mitigation).[25]

Although the Corps has the primary authority for approving 404 permitting activities regarding "waters of the United States," the CWA gives the EPA the ultimate authority to "prohibit the specification (including withdrawal of specification) of any defined area as a disposal site [for dredge or fill material]."[26] In other words, all 404 permits issued by the Corps are subject to the EPA's veto,[27] following notice and an opportunity for a public hearing to determine whether the permit will have an adverse effect.[28]

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[21] *Id.*

[22] *Id.*

[23] Environmental Protection Agency, *Clean Water Act (CWA) Compliance Monitoring*, U. S. ENVTL. PROT. AGENCY, https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring [https://perma.cc/2BFQ-MTTR].

[24] 33 C.F.R. § 322.3(a) (2017).

[25] 33 C.F.R. § 332.1(c)(2) (2017); 33 C.F.R. § 332.3(a) (2017).

[26] 33 U.S.C. § 1344(c) (2016); *but see* Nat'l Min. Ass'n v. Jackson, 856 F. Supp. 2d 150, 155 (D.D.C. 2012) (where the court held that the EPA exceeded its authority in assuming a broad role in reviewing 404 permits associated with surface coal mining).

[27] *See* 33 U.S.C. § 1344(b) (2016) (stating that permits are "subject to" 33 U.S.C. § 1344(c)); *see also* 40 C.F.R. § 231.1(a) (2017) (noting Administrator's "veto").

[28] 33 U.S.C. § 1344(c) (2016).

C. What Activities Require Permits?

A party must obtain a Section 404 permit from the Corps to conduct activities in the water courses subject to 404 jurisdiction.[29] The CWA generally describes 404 regulated activities as "the discharge of dredged or filled material into the navigable waters at specified disposal sites."[30] Notably, however, that statute captures almost any activity where one would disturb or change the bottom elevation of a water course or body, by dredging, filling, or conducting construction activities therein.[31] That includes constructing outfall and intake structures, pipeline crossings, road crossings, bank stabilization, hydropower projects, docks, submerged utility lines, harbor pile development, residential developments, de-watering agricultural land, and almost any activity that can be imagined *in* the "waters" of the Unites States. For clarification, "the term dredged material means material that is *excavated* or dredged *from* the waters of the United States."[32] The phrase "discharge of dredged or fill materials" means any "*addition* of dredged material into … the waters of the United States …,"[33] including any addition of *excavated material* into the waters of the United States from any activity, including mechanized land clearing, ditching channelization, or any other excavation.[34] The latter definition is broad, encompassing many activities especially in the land development, natural resource extraction, and agricultural businesses where landowners have "filled" wetlands for development; mining companies have filled ephemeral headwater drainage channels for mine spoil storage; and farmers have drained wetlands or built impoundments in surface drainage channels. Ultimately, almost any activity in the waters of the United States, whether on public or private property, requires approval from the federal government. Within this statutory and regulatory framework, the following discussions address the tension between environmental protection and private property

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[29] 33 U.S.C. § 1344(a) (2016); 33 C.F.R. § 320.3(f) (2017).
[30] *Id.*
[31] *Id.*
[32] 33 C.F.R. § 323.2(c) (2017) (emphasis added).
[33] 33 C.F.R. § 323.2(d)(1) (2017) (emphasis added).
[34] 33 C.F.R. § 323.2(d)(1)(iii) (2017).

rights resulting in frequent litigation across the country. This in turn presents a follow-up question: What are waters of the United States?

I. JURISDICTIONAL THRESHOLD ISSUES: THE GOVERNMENT REACH

A. Courts Define "Waters"

Following the agencies' adoption of broad definitions of jurisdictional waters, it was not surprising to see the reach of regulatory authority extend upstream to headwater, intermittent and wet weather ephemeral streams, and isolated intrastate-isolated impoundments and water bodies, and wetlands.[35] Consequently, it is also not surprising that the issue of federal CWA jurisdiction has been before the Supreme Court three times since 1985.[36] Property owners discovered jurisdictional waters of the United States on their tracts and became entangled in property rights disputes that complicated federal regulatory efforts.[37]

Each Supreme Court decision was followed by significant litigation in the lower federal courts.[38] The agencies attempted to conform their policies to the Court's congressionally inspired interpretation of what constituted "waters of the United States."[39] Akin to the complexity of an aquatic ecosystem, agencies and federal courts have continuously attempted to clarify this area of environmental law.[40] Although the regulatory framework surrounding potential 404 program activities affected many segments of the economy, certain industries, such as agriculture, natural resource extraction, and land development are particularly impacted.[41] Not only may these industries' private property rights be affected, but they may also be subject to civil

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[35] 33 C.F.R. § 328.3(a).

[36] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (rejecting "Migratory Bird Rule" basis for jurisdiction) [hereinafter "*SWANCC*"]; Rapanos v. United States, 547 U.S. 715, 757 (2006).

[37] *Riverside Bayview*, 474 U.S. 121, 135 (1985).

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.*

penalties of up to $25,000 per day for each violation.[42] Also, there are criminal enforcement actions, including imprisonment and fines, for violations of Section 404 and its permitting requirements.[43]

B. Adjacent Wetlands

In the first Supreme Court case, *United States v. Riverside Bayview Homes*, a Michigan land developer challenged the Corps' authority to restrict land development in wetlands that did not have a direct physical connection to a traditionally navigable waterway.[44] The developer was placing fill materials on his property adjacent to the shores of Lake St. Clair, Michigan.[45] Nevertheless, the Court held that CWA jurisdiction extends to intrastate wetlands adjacent to, but not directly connected with, a larger body of water that ultimately flows into a navigable waterway "if it performs a greater ecological function beyond the wetland."[46] The Court, in reviewing Congressional intent,[47] recognized that it is often difficult to determine where water ends and land begins.[48] The Court found that "the regulation of activities that cause water pollution cannot rely on … artificial lines … but must focus on all waters that together form the aquatic system."[49] The Court seemed to acknowledge both the functional values of the intact ecosystem and a broader view of environmental protection.[50] Perhaps foreshadowing the next case,

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[42] 33 U.S.C. § 1319(d).

[43] 33 U.S.C. § 1319(c); *see, e.g.,* Pozsgai v. United States, 999 F.2d 719, 723 (3rd Cir. 1993) (where landowner John Pozsgai was charged with forty counts of knowingly filling wetlands without a 404 permit in Bucks County, PA and was sentenced to, *inter alia*, three years in prison); *see also*, United States v. Lucas, 516 F.3d 316, 350 (5th Cir. 2008) (where the developer was sentenced to nine years in prison and significant fines for filling in wetlands and selling property to low-income families); *see also*, United States v. Robertson, 875 F.3d 1281, 1285–86 (9th Cir. 2017) (where Robertson built ponds on federal and private lands to facilitate his gold mining operation in Montana).

[44] 474 U.S. 121, 131 (1985).

[45] *Id.* at 124.

[46] *Id.* at 131; Jared Fish, *United States v. Robison: The Case for Restoring Broad Jurisdictional Authority Under the Federal Clean Water Act in the Wake of Rapanos' Muddied Waters*, 36 ECOLOGY L.Q. 561, 562 (2009).

[47] *See* 33 U.S.C. § 1251(a).

[48] 474 U.S. 121, 132 (1985).

[49] *Id.* at 133–34.

[50] *Id.*

the Court noted that isolated bodies of water do not have a continuous surface connection.

C. Isolated Water Bodies[51]

The agencies continued to expand their CWA jurisdiction to the point of regulating isolated, man-made ponds and land features until the Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC).[52] In that case, the Corps exerted jurisdiction over an abandoned sand and gravel pit containing isolated, non-navigable, intrastate, "permanent and seasonal ponds."[53] The site was being permitted as a landfill to serve the City of Chicago and, like many abandoned quarries, contained impounded water.[54] The Corps based its authority on its "Migratory Bird Rule," which extended jurisdiction under the Commerce Clause by finding a nexus to interstate commerce since migratory birds visited the site.[55] In SWANCC*,* the Supreme Court struck down the broad Migratory Bird Rule, noting that it was not within the scope of the CWA authority.[56] Although the SWANCC decision trimmed the Corps' reach under Section 404, the agency still maintained significant authority over navigable waters, tributaries to navigable waters, wetlands adjacent to navigable waters, and wetlands adjacent to the tributaries of navigable waters.[57] The Corps continued to assert jurisdiction broadly, ultimately reaching activities allegedly affecting the hydrologic regime far removed from traditionally navigable waters of the United States.[58] The Corps' extensive reach was challenged and came to

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[51] *See* 33 C.F.R. § 328.3(a)(3) (examples include intrastate lakes, rivers, streams, including intermittent streams, mud flats, sand flats, wetlands, sloughs or prairie potholes).

[52] Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

[53] *Id.* at 164.

[54] *Id.*

[55] *See* 51 Fed. Reg. 41.206, 41.217 (1986). The preamble of the regulation the Corps relied on said "waters of the United States" extended to waters that are used to irrigate crops sold in interstate commerce and waters that are or could be used as habitat by migratory birds or endangered species.

[56] SWANCC, 531 U.S. at 174.

[57] *Id.* at 173.

[58] United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004).

a head in 2006 for the third time in two consolidated Sixth Circuit cases in *United States v. Rapanos*.[59]

D. Remote Waters—The Rapanos *Decision*

John Rapanos was a land developer in Michigan who, in the late 1980s, began excavating earth and digging ditches on his property to drain moist areas which discharged into nearby wetlands.[60] These wetlands were adjacent to non-navigable waters and up to twenty acres from a recognized navigable waterway: Saginaw Bay.[61] Although Rapanos' property was connected to Saginaw Bay by twenty acres of ditches, the Corps charged that he was hydrologically connected to waters of the United States.[62] He was convicted on criminal charges, fined hundreds of thousands of dollars, and ordered to perform two hundred hours of community service.[63]

In *Rapanos*, once again, the Supreme Court addressed the jurisdictional reach of the CWA and, particularly, whether it extended to non-navigable wetlands that were not adjoined to navigable waters.[64] In what became a source of frustration for the environmental bar, the Court exacerbated confusion about the reach of federal authority by issuing five separate opinions:[65] one plurality opinion, two concurring opinions, and two dissenting opinions, with no single opinion commanding a majority of the Court.[66] A majority did find that the Corps' definition of "waters of the United States" was overly broad as it allowed, as a matter of course, jurisdiction over wetlands adjacent to non-navigable waters.[67] Accordingly, the Court vacated and remanded the

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[59] United States v. Rapanos, 547 U.S. 715 (2006) (this case was consolidated with Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004) at the Supreme Court and decided under *Rapanos*).

[60] *Rapanos*, 376 F.3d at 632.

[61] *Id.* at 634.

[62] *Id.* at 633.

[63] *Id.*

[64] *See id.* at 722.

[65] *Id.* at 715.

[66] *Id.*

[67] 33 C.F.R. § 328.3(a); *See Rapanos*, 547 U.S. at 739 (plurality opinion), 781–82 (Kennedy, J., concurring).

matter to the Sixth Circuit. The Court did so, however, after providing multiple definitions for the disputed phrase.[68]

E. Justice Scalia vs. Justice Kennedy

Most of the analysis of the *Rapanos* decision focused on the four-member plurality opinion authored by Justice Scalia,[69] and the concurring opinion authored by Justice Kennedy's.[70] The confusion induced by the complexity of the opinions regarding the post-*Rapanos* standard for Section 404 jurisdiction cannot be overstated.

Scalia limited jurisdiction to "relatively permanent standing or continuously flowing bodies of water" and "wetlands with a continuous surface connection" to such waters—that is, an "I know it when I see it" sort of definition.[71] Alternatively, Kennedy found that all waters possessing a "significant nexus" to navigable waters were jurisdictional waters—a definition more in line with ecological principles.[72] Kennedy further found that a determination of whether there is a significant nexus to navigable waters requires a case-by-case analysis of whether 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.[73]

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[68] 33 C.F.R. § 328.3(a); *see Rapanos*, 547 U.S. at 758–86, 793.

[69] *See Rapanos*, 547 U.S. at 719–57 (plurality opinion). In deciding how to interpret a plurality opinion, particularly one as splintered as *Rapanos,* many courts have studied the law regarding interpretation of fragmented court decisions. Several have cited *Marks v. United States* to discern the holding in *Rapanos*. Marks v. United States, 430 U.S. 188 (1977). The *Marks* case quotes *Gregg v. George*, where the Supreme Court instructed that "when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (quoting Gregg v. George, 428 U.S. 153 (1976)).

[70] *See Rapanos*, 547 U.S. at 758–86 (Kennedy, J., concurring).

[71] *Id.* at 732, 742.

[72] *Id.* at 779.

[73] *See id.* at 782 (citing the purpose of the CWA).

F. Lower Courts' Interpretation of Rapanos

Interpretations of Section 404 of the CWA under *Rapanos* have grown increasingly complex and only exacerbated the problem.[74] Chief Justice Roberts recognized the difficulty that *Rapanos* would cause: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the CWA. Lower courts and regulated entities now have to feel their way on a case-by-case basis."[75]

Since *Rapanos*, the courts of appeals have split on whether to follow the Scalia test, Kennedy test, or neither.[76] A Kentucky U.S. District Court case, *United States v. Cundiff*, illustrates this issue.[77] *Cundiff* involved a father-son farming team that drained a tract of land adjacent to abandoned coal mines and, consequently, affected by acid-mine-drainage, to convert the property to crop land.[78] The property drained into two small streams flowing into the Green River and then the Ohio.[79] Kentucky Division of Water, the Corps, and ultimately the EPA cited their administrative orders, but the Cundiffs ignored the agencies' administrative orders.[80] The District Court's opinion highlighted the tension between Justices Scalia and Kennedy by offering quotes by each: Scalia dismissed Kennedy's test as "simply rewrite[ing] the statute"[81] while Kennedy stated that

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[74] *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

[75] *Id.*

[76] The First Circuit noted in *United States v. Johnson* that either the Scalia test or Kennedy test would determine whether wetlands qualify as "waters of the United States." United States v. Johnson, 467 F.3d 56, 59 (1st Cir. 2006). The Seventh Circuit Court of Appeals found that Justice Kennedy's significant nexus test controlled. *See* United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006). The Eighth Circuit in *United States v. Bailey* joined the First Circuit and found that the Corps had Clean Water Act jurisdiction over wetlands if the wetlands met either of the tests cited in *Rapanos*. *See* United States v. Bailey, 571 F.3d 791, 794 (8th Cir. 2009). The Fourth Circuit in *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs* held that it would follow Justice Kennedy's significant nexus test, which governs and provides the formula for determining whether the Corps has jurisdiction over site wetlands. Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011).

[77] *See* United States v. Cundiff, 480 F.Supp.2d 940, 947 (W.D. Ky. 2007).

[78] *Id.* at 941.

[79] *Id.*

[80] United States v. Cundiff, 555 F.3d 200, 205 (6th Cir. 2009).

[81] *Rapanos*, 547 U.S. at 756.

Scalia read "nonexistent requirements into the Act."[82] The tension expressed between the two Justices embodies the uncertainty created by Congress in its original ambiguous definition of navigable waters in the United States.

G. Sixth Circuit Interpretation

Upon review of *Cundiff*, the Sixth Circuit spent considerable time and effort describing the *Marks* rule in an attempt to adopt the narrowest grounds of the *Rapanos* decision.[83] The Court found that it was almost impossible to find the narrowest grounds on which at least five members concurred in *Rapanos*.[84] The *Cundiff* Court, in a well-written description of the CWA's historical background and Section 404, explained the complexities of the *Rapanos* decision, noting that "parsing any one of *Rapanos* lengthy and statutory exegesis is taxing, but the real difficulty comes in determining which, if any, of the three main opinions lower courts should look to for guidance."[85] Finding that CWA jurisdiction was proper under both the Scalia and Kennedy tests, the Court noted that it did not need to reach a decision on whether either test applied.[86] Rather, the Court explained that the Supreme Court had recently denied *certiorari* in two cases presenting the same question.[87]

II. AGENCIES (ONCE AGAIN) TRY TO PROVIDE "GUIDANCE"

As in 2003,[88] and again in 2008 following *Rapanos*, the EPA and the Corps attempted to provide guidance to regulated communities regarding the jurisdictional water issue (i.e., 2008 Guidance).[89] The agencies' scientists attempted to incorporate

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[82] *Id.* at 778.
[83] *Cundiff*, 555 F.3d at 208–209.
[84] *Id.* at 208.
[85] *Id.* at 207.
[86] *Id.* at 210.
[87] *Id.* ("… we leave ultimate resolution of the *Marks*-meets-*Rapanos* debate to a future case that turns on which test in fact controls.").
[88] *See* Advance Notion of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States", 68 Fed. Reg. 1991-01, 1995 (proposed Jan. 15, 2003) (to be codified at 33 C.F.R. pt. 328).
[89] Environmental Protection Agency, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States,

technical definitions into the regulatory process with the primary goal of reconciling the various *Rapanos* standards.[90] The 2008 Guidance is especially focused on: (1) the protection of smaller waters which feed larger bodies of water; and (2) the protection of downstream water from upstream pollution. The Corps again took on the task of providing a framework for implementing a "legal standard" for complex hydrologic systems that would satisfy ecological protection standards and private property rights.[91] The thirty-eight-page 2008 Guidance attempted to weave a regulatory fabric covering all facts and circumstances in the hydrologic system.[92] While some waters are *de facto* jurisdictional waters, others require significant technical and scientific analysis. The agencies maintained that the 2008 Guidance was consistent with the principles established by Supreme Court precedent, and that it was supported by a scientific understanding of how water bodies and watersheds function.[93] It addresses six categories of waters subject to federal jurisdiction:

1. Traditional Navigable Waters: As discussed, traditional "navigable waters" include "all waters which are in use, were used, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."[94] Under the 2008 Guidance, "navigable waters" also include waters suitable for commercial waterborne recreation.[95]
2. Interstate Waters: Any waters that flow across state lines or form part of state boundaries are subject to Section 404 jurisdiction.[96] Under this definition, lakes, ponds, or other still-water features that cross state boundaries will be deemed interstate waters in their entirety.[97]

U.S. ENVTL. PROT. AGENCY (2008), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf [https://perma.cc/JNN9-HKEG] (hereinafter, "2008 Guidance").

[90] *See id.* at 1–2.

[91] *See id.*

[92] *See id.*

[93] *Id.*

[94] *Id.* at 4–5 (citing 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1)).

[95] *Id.*

[96] *See id.* at 4–5.

[97] *Id.*

3. Significant Nexus Analysis Waters: Presenting perhaps the most complicated situation, the agencies will assert jurisdiction over waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters or interstate waters. [98] Furthermore, the agencies have stated that they will apply the significant nexus standard in a manner that restores and maintains *any* of those three attributes.[99] Clearly, there are many variables in such an analysis that will likely require interpretation by the courts.
4. The Tributaries: The EPA and the Corps assert jurisdiction over a tributary when the tributary contributes to the flow of a traditional navigable or interstate water, either directly or indirectly by means of other tributaries. [100] The agencies have determined that a tributary can be a natural, human-altered, or human-made water body.[101] A tributary is physically characterized by the presence of a channel in a defined bed and bank.[102]
5. Adjacent Wetlands: Blending the Scalia and Kennedy opinions, the agencies will assert jurisdiction over "wetlands with a continuous surface connection" to relatively permanent, standing, or continuously flowing bodies of water connected to traditional navigable waters.[103] Further, the significant nexus test will require jurisdiction over adjacent wetlands if they, either alone or in combination with similarly situated wetlands, have an effect on the chemical, physical or biological integrity of traditional navigable waters or interstate waters, which is more than "speculative or insubstantial."[104] Interestingly, the term "similarly situated" adjacent wetlands includes all wetlands located in a particular watershed.[105] It

[98] *Id.* at 8.
[99] *See id.* at 9–10.
[100] *Id.* at 6–7.
[101] *Id.* at 6 n.24.
[102] *Id.* at 10.
[103] *Id.* at 6–7.
[104] *Id.* at 9, 11.
[105] *See id.* 8–9.

appears that this definition could lead to litigation regarding distinct water features contained within the same watershed, depending on the size of the watershed.[106]

6. Other Waters: This catch-all includes waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, if the use, degradation, or destruction of those waters could affect interstate or foreign commerce.[107] The agencies, recognizing that these "other waters" may be difficult to generalize, have announced that they will make a case-by-case, fact-specific determination of their jurisdiction over them.[108] Based on the history of litigation regarding jurisdiction over waters on private property, the catch-all provision is likely to spur additional litigation when an unsuspecting property owner finds that hydrologic features on his or her property have been determined to be "other waters."

Despite the agency's intent to provide clarification of the *Rapanos* decision, significant pressure continued from Congress, industry, trade organizations, environmental organizations, natural resource extraction companies, and state and local governments to replace the 2008 Guidance with a properly promulgated regulation defining the scope of waters protected by the CWA. Interestingly, although the 2008 Guidance instructs the Corps on how to make jurisdictional determinations that comply with the *Rapanos* decision, the 2008 Guidance itself expressly explains it "does not impose legally binding requirements … and may not apply to a particular situation depending on the circumstances."[109]

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[106] *See, e.g.*, Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011).

[107] *See* 2008 Guidance at 2–3.

[108] *See id.* at 4–5.

[109] *Id.* at 4 n.17.

III. THE 2015 "WOTUS" RULE

Following continued pressure and resistance to the 2008 Guidance, and to provide further certainty in developing regulations during the Obama administration, the EPA proposed and promulgated a final rule which further defined the scope of waters of the United States in June 2015.[110] In the "2015 WOTUS Rule," agencies attempted to refine the definition of "waters of the United States" through increased use of so-called bright-line boundaries "to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science."[111] The agencies explained that the 2015 WOTUS Rule was consistent with legal rulings and science concerning the inter-connectedness of tributaries, wetlands, and other waters to downstream waters and effects of those connections on the chemical, physical, and biological integrity of downstream waters.[112] The Rule also focused on clarifying the regulatory status of surface waters located in isolated places in a landscape, and small streams and rivers that flow for only part of the year. Acknowledging the difficulty in developing a succinct regulatory framework, the agencies noted that "science cannot in all cases provide bright lines to interpret and implement policy."[113] The 2015 WOTUS Rule, not surprisingly, was highly criticized by many parties and judicial review was sought in thirty-one states by multiple industry organizations and environmental groups across the United States.

A. A Jurisdictional Side Trip: Back to the Supreme Court

Due to ambiguity within the CWA's own provisions for venue and judicial review, regulatory challenges were brought in

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[110] *See* 80 Fed. Reg. 37054, at *37056-57 (June 29, 2015).
[111] *Id.*
[112] *Id.* at *37056.
[113] *See id.* at *37057 ("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 a period of over 40 years.").

federal District Courts and Circuit Courts of Appeal around the nation.[114] The federal district court of North Dakota issued a preliminary injunction on a petition by thirteen state challengers, finding they were likely to succeed on their claims that the proposed rule violated statutory authority and that the EPA failed to comply with the Administrative Procedure Act's rulemaking requirements.[115]

Following the decision, the Sixth Circuit received four actions that were transferred to and then consolidated by the Judicial Panel on Multi-District Litigation as a multi-circuit case involving a challenge by eighteen additional states to the validity of the 2015 WOTUS Rule.[116] Although the Sixth Circuit recognized it might not have jurisdiction to review the Rule, as discussed in the dissent of Judge Keith, it balanced all of the factors and concluded that the *status quo* should prevail pending jurisdictional review.[117] Illustrating the confusion regarding venue for judicial review under the CWA, the Sixth Circuit Court of Appeals stayed the 2015 WOTUS Rule nationwide and restored the "pre-2015 rule" pending further judicial review.[118] The court noted, "what is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal as well as private parties and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters."[119] As further acknowledgement and perhaps a repudiation of the *status quo,* the court acknowledged that "given that the definitions of 'navigable waters' and 'waters of the United States' have been clouded by uncertainty, in spite of (or exacerbated by) a series of Supreme Court decisions over the last thirty years, we appreciate the need for the new Rule."[120] The court noted "a stay temporarily silences the whirlwind of

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[114] There are two paths for judicial review: (1) parties may file challenges to final EPA actions in federal district courts, generally under the Administrative Procedures Act, 5 U.S.C. § 704; and (2) as described in the CWA, seven categories of EPA actions for which judicial review lies exclusively in the federal courts of appeal, 33 U.S.C. § 1369(b)(1).

[115] North Dakota v. U.S. Envtl. Prot. Agency, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015).

[116] *See In re* U.S. Dep't of Defense, 817 F. 3d 261, 263 (6th Cir. 2016).

[117] *In re* Envtl. Prot. Agency, 803 F.3d 804, 808 (6th Cir. 2015).

[118] *Id.*

[119] *Id.*

[120] *Id.* (emphasis added).

confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing."[121] Hence, the agencies continue to make jurisdictional determinations based on the 2008 Guidance.

B. Supreme Court Jurisdictional Holding

Following the stay and succinct expressions of the need for certainty across the nation, the matter was directed to the United States Supreme Court in *National Association of Manufacturers v. Department of Defense,* which was decided in January 2018. [122] The issue presented to the Supreme Court, diverting from the definition of "waters of the United States," concerned which federal court—the Districts Courts or the Courts of Appeal—challenges to the Rule would be heard.[123] In *National Association of Manufacturers,* the court again recited the complex and frustrating history of the CWA definitions and ultimately found, after significant parsing through the statute and ambiguous legislative history, that the Courts of Appeal did not have jurisdiction to hear challenges to rulemaking. [124] Nowhere does the CWA allow challenges to rulemaking to be heard in the Circuit Courts of Appeal, although they have original jurisdiction in seven defined areas.[125] The court failed to find that the CWA's judicial review provisions, cited by the government as allowing Circuit Court venue, applied to rulemaking.[126] Both provisions cited by the government related to approving or promulgating effluent limitations or denying NPDES permits.[127] Hinting that the venue provision in the CWA was questionable, in a final expression of frustration regarding the ambiguity in the statute, Justice Sotomayor stated, "jurisdiction is governed by the intent of Congress and not by any views we may have about sound policy."[128]

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[121] *Id.*

[122] Nat'l Ass'n of Manufacturers v. Dep't of Defense, 138 S. Ct. 617, 633–34 (2018).

[123] *Id.* at 624–25.

[124] *Id.* at 633–34.

[125] *Id.* at 632.

[126] *Id.* at 631–32.

[127] *Id.* at 629.

[128]*Id.* at 634 (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 745 (1985)).

IV. REVERSE DIRECTION

A. Executive Order

Notwithstanding the continued litigation regarding the 2015 WOTUS Rule, in February 2017, President Donald Trump issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."[129] The Order itself directed the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's interpretation in *Rapanos.*[130] The EPA proposed a two-step process to provide certainty across the country. Step one was an initial rulemaking to maintain the legal *status quo* by proposing to rescind the 2015 WOTUS Rule and recodify the regulation as it was in place prior to its issuance. [131] The new rule would in essence implement the Sixth Circuit stay results.[132] Step two was the agency's plan to propose a new definition interpreting the jurisdictional bounds of the CWA that would replace the much broader approach of the 2015 WOTUS Rule, which is consistent with Justice Scalia's view regarding "relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters."[133]

B. Latest Rulemaking: Maintaining Status Quo

Although the Sixth Circuit's nationwide stay halted implementation of the 2015 WOTUS Rule, the Supreme Court determined in *National Association of Manufacturers* that U.S. Courts of Appeal did not have original jurisdiction to review these challenges.[134] Therefore, the Sixth Circuit lacked the authority to issue the stay (as forecasted in the dissent). The status of other continuing cases over the 2015 WOTUS Rule are pending,

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[129] *See* Exec. Order No. 13778, 82 Fed. Reg. 12497 (March 3, 2017).

[130] *Id.* at 12497.

[131] *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899-01 (proposed July 27, 2017) (to be codified at 33 C.F.R. pt. 328).

[132] *Id.*

[133] *Id.*

[134] Nat'l Ass'n of Manufacturers v. Dep't of Defense, 138 S. Ct. 617, 633–34 (2018).

creating even more procedural confusion regarding the 2015 WOTUS Rule. To avoid the confusion in the lower courts regarding the applicability of the 2015 WOTUS Rule, the EPA promulgated its final rule on February 6, 2018, to thwart the possibility that the 2015 WOTUS Rule could be implemented in some states but not others following *National Association of Manufacturers.*[135] In the final rule, to provide continuity and regulatory certainty for regulated entities, the agencies intend to maintain the *status quo* by adding an applicability date of February 6, 2020.[136] Immediately after the publication of the "applicability date extension," litigation was filed opposing the new "applicability date" implementation of the 2015 WOTUS Rule across the nation.

Step one was completed with the publication of the Final Rule re-codifying the preexisting rule on February 6, 2018, which was intended to maintain the *status quo* by adding an applicability date to the 2015 WOTUS Rule of February 6, 2020.[137] Therefore, the regulations and related guidance documents stemming from the *Rapanos* decision were reinstated notwithstanding the ambiguity arising therefrom. Step two in the process of actually redefining the key terms, it appears, will be like the hydrologic cycle itself—another reiteration of the "rulemaking-litigation-rulemaking-litigation" processes that determine what Congress meant in defining "navigable waters" as "waters of the United States."

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[135] *See* Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200-01 (proposed Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

[136] *Id.*

[137] *Id.*