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An Attempt at Clearing the Muddied Waters of the United States

INTRODUCTION

Water affects a large portion of our daily lives, dictating where we live, what we eat, and ultimately what we drink. It should come as no surprise, then, that it is important that the quality of the water we rely on should be protected. Although Congress's intent was to do just that, what it may have done was open the floodgates to jurisdictional overreach and mixed interpretations. The Clean Water Act (the Act), a result of significant amendments in 1972 to the Federal Water Pollution Control Act, was intended to be the catalyst that would

* I would like to thank my parents, Alvaro and Francisca Ramirez; my sister, Maricela Ramirez; my brother in law, Ramiro Candela; and my "lobster," ARM, for their unwavering support and unequivocal confidence in me and everything I do. I would also like to thank all those who provided feedback on earlier drafts of this Article, those who consistently encourage me to seek opportunities to further develop myself, and those who constantly tell me I am destined for far greater things. The views and opinions expressed in this Article are solely mine and not those of my employer. (The author, originally from Houston, Texas, is currently a municipal government attorney practicing in Odessa, Texas.)

maintain our waters and ensure that they are clean and protected.[1] The main goal of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] However, the Act additionally indicates that

> [i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.[3]

It is my belief that this second provision is the culprit creating confusion regarding the jurisdictional reach that Congress intended. It is both the Act's objective and Congress's policy of recognition and rights of States that have left the courts and public perplexed, resulting in disagreements as to what waters are constitutionally protected under the Act. In an effort to clear the confusion on jurisdiction, the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE) issued a new Clean Water Rule (the Rule) that would take effect August 28, 2015.[4] The Rule's intent was to create "predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act."[5] However, the lack of clarity resulted in the United States Court of Appeals for the Sixth Circuit putting the Rule on a nationwide stay less than two months after the effective date.[6] Ironically, this came as no surprise since prior to the stay thirty-two states filed lawsuits against the EPA challenging the Rule's constitutionality.[7] Ultimately, the Trump administration sent the EPA back to the drawing board to reconsider the Rule,[8] and on July, 27, 2017, the EPA and USACE rescinded the

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1 *See* 33 U.S.C.A. §§ 1251–1275 (West 2011).

2 *Id.* § 1251(a).

3 *Id.* § 1251(b).

4 Clean Water Rule: Definitions of "Waters of the United States," 80 Fed. Reg. 124, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328) [hereinafter Clean Water Rule].

5 *Id.*

6 *In re* EPA, 803 F.3d 804 (6th Cir. 2015), *vacated*; *In re* U.S Dep't of Def., 713 F. App'x 489 (6th Cir. 2018).

7 Michael Bastasch, *Congress Poised to Strike Down EPA's Massive "Waters of the US" Rule*, THE DAILY CALLER (Jan. 13, 2016, 11:35 AM), http://dailycaller.com/2016/01/13/congress-poised-to-strike-down-epas-massive-waters-of-the-us-rule.

8 Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017) [hereinafter Exec. Order].

2015 Rule.[9] To fully understand how the Act and Rule that were intended to protect and keep our waters clean became "muddied," taking a hard look at the evolution of the Act and case law interpreting the Act is warranted.

I
CLOUDING THE WATERS

Initial efforts to protect and control water pollution can be dated back to the passing of the 1948 Water Pollution Control Act.[10] Although ideal in theory, the 1948 Act severely limited the authority by federal agencies to actually deter pollution. The premise of enforcement was based on the polluter affecting interstate waters and the health and safety of those in a state completely different from where the pollution was first discharged into the water.[11] As if this were not enough of a setback, successful enforcement efforts additionally had to follow stringent notice requirements, state acquiescence to bringing forth enforcement actions, and, finally, the polluter's financial ability to avoid committing the violation.[12] It is pretty plain to see that the main premise and guise of the 1948 Act left water quality protection in the hands of individual states and common law, which was not getting much of anything accomplished.[13] Congress amended the 1948 Act in 1956 and then again in 1961, both times aiming to extend federal jurisdiction for enforcement, yet both times falling extremely short.[14] With every amendment passed, more roadblocks seemed to appear. Whether it was time delays or state authorization requirements, the goals set out for the Act were far from reached. In 1965, however, Congress made incremental progress when its focus shifted to enforcing quality standards for interstate waters.[15] The caveat and

9 Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed Reg. 34,899 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328).

10 William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 210–11 (1987).

11 *Id.* at 211.

12 *Id.* at 211–12.

13 Jason Turner, *SWANCC: Effects on Federal Jurisdiction Under the Clean Water Act and the Expanded State Roles in Wetland Protection*, 56 BAYLOR L. REV. 281, 288 (2004).

14 Andreen, *supra* note 10, at 212.

15 Kayla A. Currie, *Clear Waters Ahead? The Clean Water Rule Attempts to Bring Clarity to the Scope of the Clean Water Act*, 47 CUMB. L. REV. 191, 200 (2016).

challenge with the Water Quality Act of 1965 was that wholly intrastate water quality was left to individual states unless they requested federal intervention.[16]

In the late 1960s, the Nation's waters became of heightened interest. On a Sunday morning in June of 1969, an oil slick—resulting from years of dumping industrial waste—on the Cuyahoga River in Cleveland, Ohio, caught fire.[17] The damage to nearby railroad bridges caused by the fire was estimated at about one hundred thousand dollars.[18] Although there had been previous fires, and some more serious, it was the 1969 fire that brought about the need for change.[19] Similarly, around this time Lake Erie was found to be the source of an abundant amount of dead natural life.[20] Due to the heavy pollution of the lake, it was pronounced "biologically dead" and became an eyesore for those around it.[21] It was at this point that Congress took action and completely revamped its mechanisms for pollution control, and the current Clean Water Act was born. The Federal Water Pollution Control Act Amendments of 1972, better known as the Clean Water Act, differed from previous amendments in that it shifted from avoiding pollution altogether to attempting to manage the type of pollution that entered the Nation's waters and supported major expansion of federal involvement.[22] The tactic adopted by the Act was to prohibit "the discharge of any pollutant by any person" into navigable waters, unless it fell within a certain exception or compliance with another section of the Act.[23] This allowed the federal government to control which pollutants could be deposited into the waters by means of permits and specifically carved-out exceptions. Additionally, the term "navigable waters" in the Act was the main tool the federal government would use to extend its reach and jurisdiction over much of the water of the United States.[24]

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16 *Id.*

17 Turner, *supra* note 13, at 289.

18 Michael Rotman, *Cuyahoga River Fire*, CLEVELAND HIST., https://clevelandhistorical.org/items/show/63 (last updated Apr. 27, 2017).

19 *Id.*

20 Turner, *supra* note 13, at 289.

21 *Id.*

22 *See* Currie, *supra* note 15.

23 33 U.S.C.A. § 1311(a) (West 2017).

24 Currie, *supra* note 15, at 196–97.

Even with the new approach in place, the EPA was extremely slow to enforce the provisions of the Act. Between 1977 and 1979, the number of enforcement actions that the EPA brought forth dropped by more than 51%, and by 1982 enforcement had dropped by 73.1%—an all-time low.[25] Although there was slight improvement in 1983, much due to open criticism by the press and Congress, [26] enforcement once again declined in 1984. [27] Enforcement eventually came as a consistent practice for the EPA. As of thirteen years ago, it was established that discharge from the public had decreased 46% while discharge from industrial sites decreased a total of 98%.[28] Also, two-thirds of the country's lakes once again were able to sustain recreational activities, coming a long way from more than forty years ago when only one-third was able to do so.[29] With such momentum in place, it seemed that the Act was a success; however, the very aspect of the Act that once gave the EPA its success was the same one that eventually began to "cloud" its enforcement.

II
THE SLIPPERY SLOPE

Although "navigable waters" was clearly defined by the Act as "waters of the United States, including territorial seas," the actual definition of "waters of the United States" became a highly debated topic and remains so today. The Supreme Court has attempted to clear up the confusion through three opinions, all issued between 1985 and 2004.[30] The last and most recently issued opinion left much more confusion with the lower courts as a concurring opinion followed the plurality with vastly different reasoning as to why the Federal Court of Appeals' judgments were vacated and the cases remanded.

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25 Andreen, *supra* note 10, at 204.

26 *Id.* at 206.

27 *Id.* at 207.

28 William L. Andreen, *Water Quality Today – Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 591 (2004).

29 Boer Deng, *Trench Warfare: The Feds Want to Define "Waters of the United States" Scientifically*, SLATE (Sept. 11, 2014, 12:27 PM), http://www.slate.com/articles/health_and_science/science/2014/09/waters_of_the_united_states_epa_s_proposed_update_to_the_clean_water_act.html.

30 *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

A. United States v. Riverside Bayview Homes, Inc.[31]

The Supreme Court made clear in the first of the trio of cases that wetlands adjacent to navigable waters were within the meaning of "waters of the United States" and, therefore, subject to federal jurisdiction.[32] In this case, Riverside Bayview Homes, Incorporated (respondent), started placing fill material into an eighty-acre marshy land it owned as part of a development it was constructing.[33] Because the respondent had done so without first seeking a permit from USACE, USACE filed suit for an injunction, believing that the land the respondent owned and was filling fell within the meaning of waters of the United States and, therefore, was within its jurisdiction.[34] The district court found for USACE, but upon the respondent's appeal to the Sixth Circuit, the court of appeals reversed, holding that USACE's interpretation of "waters of the United States" was overly broad and, if allowed, violated the takings clause of the Fifth Amendment.[35] Additionally, the court expressed concern over extending wetlands that "were not the result of flooding by navigable waters" into the definition of "waters of the United States."[36] The Supreme Court granted certiorari to determine if USACE properly categorized the land under its jurisdiction.[37]

Justice White, who delivered the unanimous opinion, pointed out that the plain language of the Act's regulations extended USACE's jurisdiction to "wetlands adjacent to navigable or interstate waters" and that, in turn, "wetlands" is defined as lands that are "inundated or saturated by surface or ground water," thereby refuting the suggestion of the court of appeals that the lands required flooding by the neighboring water.[38] Although the Court conceded to the arduous task of drawing a clear line that would separate land from water, it focused on the legislative intent of protecting the "aquatic ecosystem" that required controlling pollution at the closest point possible to the source.[39] For the first time ever, the Court interpreted the legislative

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31 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

32 *Id.* at 134.

33 *Id.* at 124.

34 *Id.*

35 *Id.* at 125.

36 *Id.*

37 *Id.* at 126.

38 *Id.* at 129.

39 *Id.* at 132–33.

intent of Congress as one of purposely defining the waters that would be covered under the Act broadly.[40] White went on to say that Congress used its authority under the Commerce Clause to exercise jurisdiction over some waters that prior to the implementation of the Act were limited—those that were not traditionally navigable.[41] Finally, the Court found USACE's judgment—considering wetlands adjacent to navigable waters as waters of the United States—to be reasonable.[42] These specific wetlands were close enough in proximity to play an integral role in the aquatic system, and pollution to these lands could easily "affect the water quality of the other waters within that aquatic system."[43] With such a win for USACE, it came as no surprise that this decision would entitle it to push the limits and boundaries of its authority further.

B. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers[44]

The Supreme Court changed USACE's almost unlimited authority in 2001. Solid Waste Agency of Northern Cook County (petitioner), was comprised of multiple Chicago cities and villages that were tasked with developing a solid waste site.[45] Upon locating a 533-acre parcel of land that would suit its needs, the petitioner began the process of purchasing and preparing the land.[46] The land was once a site for sand and gravel mining but had since been abandoned.[47] As a result of its vacant nature, the old site became scattered with permanent and seasonal ponds, all different sizes and depths.[48] In an attempt to comply with all necessary regulations, the petitioner began to contact the respective agencies and file for any permits required to fill the ponds.[49] Although USACE initially determined that the land the Petitioner intended to develop did not fall within its jurisdiction, upon

40 *Id.* at 133.

41 *Id.*

42 *Id.* at 135.

43 *Id.* at 134.

44 Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159 (2001).

45 *Id.* at 162–63.

46 *Id.* at 163.

47 *Id.*

48 *Id.*

49 *Id.*

reevaluation USACE later concluded it did have jurisdiction over the land pursuant to the Migratory Bird Rule.[50] The Migratory Bird Rule was developed in 1986 by USACE and indicated that its jurisdiction under the Act extended to waters that were intrastate in any of the following:

> a. [waters] [w]hich are or would be used as a habitat by birds protected by Migratory Bird Treaties; or b. [waters] [w]hich are or would be used as habitat by other migratory birds which cross state lines; or c. [waters] [w]hich are or would be used as habitat for endangered species; or d. [waters] [u]sed to irrigate crops sold in interstate commerce.[51]

Even though the petitioner successfully obtained all permits required from local and state agencies, USACE refused to issue a permit on the basis that the petitioner's proposed use of the land was not the "least environmentally damaging, most practicable alternative" for waste disposal.[52]

As a result of USACE's refusal, the petitioner sued under the Administrative Procedure Act noting four points, only two of which were of major concern: (1) challenging USACE's interpretation of its jurisdiction under the Act and, alternatively, (2) arguing that Congress exceeded its power under the Commerce Clause in granting USACE this authority.[53] The district court found for USACE on all points, and the petitioner appealed to the Court of Appeals for the Seventh Circuit.[54] The court of appeals upheld the district court's decision by first addressing the constitutionality of Congress's power under the Commerce Clause.[55] The court reasoned that under the Commerce Clause, Congress looks at the cumulative impact of any single activity that alone might not invoke a substantial effect on interstate commerce but taken as a class would substantially affect interstate commerce.[56] The court noted that each year millions of people travel across state borders and spend an enormous amount of money hunting and

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50 *Id.* at 164.

51 *Id.* (alteration in original) (quoting Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (to be codified at 33 C.F.R. pt. 328)).

52 *Id.* at 165 (quoting U.S. Army Corps of Eng'rs, Chicago Dist., Dept. of Army Permit Evaluation & Decision Document, Lodging of Petitioner, Tab No. 1, p. 87).

53 *Id.* at 165–66.

54 *Id.* at 165.

55 *Id.* at 166.

56 *Id.* at 166.

observing birds.[57] This practice would be greatly affected and possibly no longer available if bird habitats were destroyed.[58] Once it was determined that Congress had the power under the Commerce Clause to regulate the habitat of migratory birds, the question of USACE's interpretation as to its jurisdiction under the Act was logical. The court held that since the Act encompassed any water that was allowed under the Commerce Clause, and since the Migratory Bird Rule was already found by the court to be proper under the Commerce Clause, USACE had properly exercised its jurisdiction over petitioner's land under the Act.[59] The Supreme Court granted certiorari but declined to rule on the constitutionality of Congress's ability under the Commerce Clause to grant USACE authority.

Chief Justice Rehnquist delivered the 5–4 opinion that reversed the ruling of the court of appeals.[60] The Court's majority referenced its holding in *Riverside* early on and recognized its expansion of USACE's jurisdiction "over wetlands that actually abutted on a navigable waterway."[61] It made clear, however, that its ruling did not "express any opinion" on USACE's jurisdiction over isolated wetlands that were not adjacent to navigable waters.[62] In fact, it was in this opinion that the Court first synthesized its holding in *Riverside* to a single phrase: "significant nexus."[63] Rehnquist reasoned that it was the significant nexus between the specific wetlands found in *Riverside* and the navigable waters that fostered its conclusion that Congress intended for the Act to regulate at least some waters that were not "navigable."[64] The Court emphasized that although precedent may have given the term "navigable" a limited effect, it would not be so inclined to "give it no effect" whatsoever.[65] The Court believed that Congress's intent under the Act was to cover waters that were, had been, or were reasonably capable of being navigable in fact.[66]

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57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* at 162.

61 *Id.* at 167.

62 *Id.* (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131–32 (1985).

63 *Id.*

64 *Id.*

65 *Id.* at 172.

66 *Id.*

The final point that the Court made in this opinion spoke to its desire to avoid assuming that Congress intended to disturb the "federal-state framework by permitting federal encroachment upon a traditional state power."[67] To substantiate this point, the Court reiterated that Congress chose to retain a provision in the Act that "recognize[d], preserve[d], and protect[ed] the primary responsibilities and rights of States" to use their land and water.[68] This provision would undoubtedly become frustrated if the Court were to allow federal jurisdiction via the Act to reach land simply because it met the elements of the Migratory Bird Rule.[69] Although most following the evolution of the Act saw this as the Court reeling in the federal government, they recognized that the Court left unanswered questions as to whether wetlands that were not adjoining navigable waters yet still maintained a significant nexus to the aquatic ecological cycle would be covered under the Act and within the jurisdiction of USACE.[70]

C. Rapanos v. United States[71]

In 2006, the Supreme Court was given the opportunity to provide guidance on the questions its previous opinions left unanswered and, once again, bring clarity to what exactly was considered waters of the United States. The 4–1–4 opinion issued by the Court did quite the opposite, however, and created even more confusion as to which test to apply when determining federal jurisdictional reach—the plurality or the concurring opinion.[72] In the late 1980s, John Rapanos (petitioner Rapanos) decided to develop three parcels of land he owned near Midland, Michigan, into a shopping center.[73] Each parcel that petitioner Rapanos owned contained a portion of "sometimes-saturated soil conditions" or wetlands, which petitioner Rapanos needed to fill as a part of the development.[74] The closest navigable waters were found anywhere from eleven to twenty miles away.[75] All three of petitioner

67 *Id.* at 173.

68 *Id.* at 174 (quoting 33 U.S.C.A. § 1251(b) (West 2019)).

69 *Id.*

70 Joshua C. Thomas, *Clearing the Muddy Waters?* Rapanos *and the Post*-Rapanos *Clean Water Act Jurisdictional Guidance*, 44 HOUS. L. REV. 1491, 1498 (2008).

71 Rapanos v. United States, 547 U.S. 715 (2006).

72 Thomas, *supra* note 70, at 1493.

73 *Rapanos*, 547 U.S. at 763 (Kennedy, J., concurring).

74 *Id.* at 720 (plurality opinion).

75 *Id.*

Rapanos's parcels eventually drained into navigable waters (two of the parcels emptied into Lake Huron and the third eventually emptied into the Tittabawassee River) either via man-made drains or ditches.[76] Even though petitioner Rapanos was told that his parcels would more than likely contain wetlands that were regulated under the Act, he nonetheless proceeded to begin construction work consisting of filling in the wetlands without first obtaining a permit from USACE.[77] Consequentially, petitioner Rapanos found himself in years of criminal and civil litigation and owing thousands of dollars in fees.[78] The district court found that petitioner Rapanos's three parcels were "adjacent to other waters of the United States" and ruled in USACE's favor.[79] The Court of Appeals for the Sixth Circuit upheld the lower court's decision based on the findings that "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters."[80]

Like petitioner Rapanos, in the early 1990s, Keith and June Carabell (collectively petitioner Carabell) sought to develop a 19.6-acre parcel of land in Michigan into multifamily condos.[81] Petitioner Carabell's land contained a significant amount of wetlands and was about one mile away from Lake St. Clair, home to about 48% of the fishing activity that takes place in the Great Lakes.[82] Petitioner Carabell's parcel was bordered on one side by a man-made berm that separates it from a man-made drainage ditch.[83] The man-made drainage ditch eventually emptied into Lake St. Clair after traveling through various other channels.[84] USACE denied petitioner Carabell's permit based on its determination that the parcel "provide[d] water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality" in surrounding navigable waters.[85] Petitioner Carabell filed suit challenging the denial of the permit and

76 *Id.* at 729.

77 *Id.* at 763 (Kennedy, J., concurring).

78 *Id.* at 721 (plurality opinion).

79 *Id.* at 729.

80 *Id.* at 729–30.

81 *Id.* at 764–65 (Kennedy, J., concurring).

82 *Id.* at 764.

83 *Id.* at 730 (plurality opinion).

84 *Id.*

85 *Id.* at 765 (Kennedy, J., concurring).

USACE's jurisdiction over their land.[86] The district court ruled in favor of USACE, finding that petitioner Carabell's land was adjacent to navigable waters, and the Court of Appeals for the Sixth Circuit affirmed the ruling.[87] The Supreme Court consolidated the cases and granted certiorari to determine whether the specific parcels of land in both cases constituted waters of the United States under the Act.[88]

The plurality opinion, delivered by Justice Scalia, severely limited the waters that would fall within USACE's jurisdiction under the Act by starting the analysis with the most basic principle—the definition of "water" in the English dictionary.[89] Although he conceded that, based on prior opinions, "navigable waters" extended beyond the traditional term, Scalia reiterated that the Court was not willing to completely void the term of any meaning whatsoever.[90] Based on the definition, Scalia determined that waters of the United States "include only relatively permanent, standing or flowing bodies of water" versus land or areas where water runs only on an intermittent basis.[91] Regardless of the limited or broad effect that the Act gave to the term "navigable waters," the plurality argued that, at the very least, the "ordinary presence" of water was a necessity and made clear that the language set out in the Act did not "authorize [a] 'Land is Waters' approach."[92] The plurality also addressed which wetlands the Court believed properly fell within the meaning of waters of the United States under the Act.[93] In doing so, the determinative factor that Scalia highlighted was whether there was a continuous surface connection between the wetland and the adjoining waters of the United States such that there was no "clear demarcation between 'waters' and 'wetlands'" and not merely a hydrological connection.[94] Scalia reasoned that this is the "significant nexus"—the difficulty of defining a clear boundary between water and land.[95] Because the lower courts did not apply the appropriate standards in

86 *Id.* at 730 (plurality opinion).
87 *Id.*
88 *Id.*
89 *Id.* at 732.
90 *Id.* at 734.
91 *Id.* at 732.
92 *Id.* at 734.
93 *Id.* at 742.
94 *Id.*
95 *Id.*

determining USACE's jurisdiction over the four parcels of land in these cases, the Court remanded the cases back to the lower courts.[96]

Justice Kennedy agreed with the plurality's judgment to remand, but in an opinion he alone authored explained that it was for very different reasons.[97] Kennedy's concurring opinion set out a different standard to determine if wetlands were considered waters of the United States and thereby covered by USACE's jurisdiction under the Act.[98] The concurring opinion's main focus was the meaning and vitality of the "significant nexus" between the wetlands and adjacent navigable waters, which without would result in a lack of jurisdictional grounds under the Act.[99] In determining what exactly constituted the proper significant nexus, Kennedy looked to the legislative intent of Congress when enacting the Act.[100] In assessing congressional intent, the concurring opinion evaluated factors such as the "chemical, physical, and biological integrity of the Nation's waters" and acknowledged that since USACE is charged with enforcing the Act, its interpretation of the statute should be given deference so long as the legislative intent was not frustrated.[101] Kennedy criticized the plurality by asserting that its opinion "impose[d]" requirements on the jurisdictional reach of the Act that Congress never specifically intended: (1) the presence of permanent standing water or flow for a certain amount of time, and (2) a continuous connection between the wetlands and the adjoining navigable waters.[102] Kennedy's concurrence agreed the case should be remanded back to the lower court to reassess using the following "significant nexus" standard:

> [[W]etlands possess the requisite nexus . . . 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 . . . . in contrast, [when] wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[103]

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96 *Id.* at 757.

97 *Id.* at 759 (Kennedy, J., concurring).

98 *Id.* at 759.

99 *Id.*

100 *Id.* at 759–60.

101 *Id.* at 759.

102 *Id.* at 768–69.

103 *Id.* at 780.

Since Kennedy's and Scalia's opinions vastly differed from one another, the hope of having clear guidance on jurisdictional determination of waters of the United States fell short. With two completely opposite standards set forth by the Court, one seeming to limit federal jurisdiction while the other expanded it, even more confusion ensued.[104] Lower courts did not have a consistent message on which standard they were to apply, and based on where the case was heard, final rulings could differ from one circuit court to the next.[105]

III
MUDDIED OR TAINTED WATERS?

After recognizing that the Supreme Court's prior opinions created only more confusion as to which waters were jurisdictional under the Act, the EPA and USACE went back to the drawing board; in early 2014 they issued a proposed Waters of the Unites States Rule (the Rule).[106] In proposing the Rule, the agencies vehemently insisted that the Rule was necessary to create the consistency required to keep the Nation's waters safe and that it did not give the agencies any more authority than they already had nor implement additional permitting requirements.[107] According to the agencies, it simplified the jurisdictional determination of waters of the United States and was more agriculturally friendly.[108] These were not arguments that were easily bought, and the uneasiness of both Congress and the states was quite apparent.[109] It was this uneasy attitude that should have foreshadowed the amount of controversy and massive distrust in the federal government that the finalized Rule would cause.[110]

Prior to their proposal of the Rule, the EPA and USACE asserted that they did quite a bit of research and had several meetings with key people to get their input on the Rule.[111] In fact, the agencies really did

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104 Cameron Secord, *Uncertain Waters: The Legal Implications of the "New Waters of the United States" Rule on the Energy Sector and a Potential Remedy Within Administrative Law*, 54 HOUS. L. REV. 963, 973 (2017).

105 Currie, *supra* note 15, at 210.

106 Anna Ready, *WOTUS: A Controversial Rule*, NACS, Aug. 2015, at 27, http://www.nacsmagazine-digital.com/nacsmagazine/august_2015?pg=28#pg28.

107 Bastasch, *supra* note 7.

108 *Id.*

109 Deng, *supra* note 29.

110 *Id.*

111 Currie, *supra* note 15, at 213.

think that the Rule would be well accepted because they felt that not only did it make the permitting process and jurisdictional delineation easier but it was also backed by extensive scientific research.[112] While the agencies' Rule still provided for broad authority to protect the Nation's waters, the agencies frequently pointed out that they retained all exclusions previously listed in the Act and, moreover, added language that clearly stated certain waters the Act did not include

> (2) The following are not "waters of the United States" . . . .
>
> (iii) The following ditches:
>
> (A) Ditches with ephemeral flows that are not a relocated tributary or excavated tributary.
>
> (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
>
> (C) Ditches that do not flow, either directly or through another water, into a water identified [as navigable water, interstate water, or the territorial seas.][113]

Further expressions from the agencies to gain support and acceptance of the Rule were that (1) all the exclusions that the Act previously had for farmers and their activities were retained, (2) the agencies were not making an attempt to regulate any land use, (3) the Rule would change absolutely nothing in regard to private property rights, (4) the clarity of the Rule would actually increase federal jurisdiction over waters by only 3.2% versus the 60% that was currently in a "limbo" status, and (5) the Rule maintained Congress's intent that states retain their power to implement water laws complementary to the Act.[114] The EPA and USACE maintained that the Rule actually narrowed the scope of their jurisdiction. However, for every positive aspect of the Rule the agencies attempted to showcase, there were many who opposed arguing that there were twice as many drawbacks.

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112 *See* ENVTL. PROT. AGENCY & U.S. ARMY CORPS OF ENG'RS, QUESTIONS AND ANSWERS – WATERS OF THE U.S. PROPOSAL (2015).

113 Clean Water Rule: Definitions of "Waters of the United States," 80 Fed. Reg. 37,054, 37,105 (June 29, 2015).

114 *See* ENVIRONMENTAL PROTECTION AGENCY, FACTS ABOUT THE WATERS OF THE U.S. PROPOSAL FACTSHEET (2015); Meghan Bartels, *The Waters of the United States (WOTUS) Rule: What It Is and Why It's Important*, AUDUBON, Mar. 1, 2017, http://www.audubon.org/news/the-waters-united-states-wotus-rule-what-it-and-why-its-important.

During the comment period for the proposal of the Rule, the number of comments received well surpassed twenty thousand.[115] Supporting comments for the proposed Rule often aligned with what the EPA and USACE's main goal was—clarifying jurisdictional power to regulate waters and strengthen the Act, which through confusion and ambiguity had become less effective as the years went by.[116] Other supporting comments pointed out that the proposed Rule was simply closing up loopholes in the Act, allowing the agencies to fully carry out their mission.[117] Attempts to strike down the Rule by Congress were largely due to the negative effect that most farmers and ranchers would experience due to the changes.[118] Although these same groups would be the ones to call the Rule an attempt at a "power grab," there were some from the farming industry who claimed that the effect the Rule would have on them was not only minimal but needed.[119] Some called these arguments against the Rule irrational and ignorant, as most of the waters that opponents argued about were already regulated under the Act before the Rule's proposal.[120] There were even farmers who acknowledged that their activities contributed to the problem, that the Rule would ensure that everyone was respecting the water that would eventually flow to their neighbors, and that this was a problem on a much bigger scale that rightfully should be handled on a federal level.[121]

Despite what the EPA and USACE pointed out as benefits of the Rule, opponents of the Rule strongly and loudly asserted that what the agencies said would not match what the Rule's final written product

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115 U.S. Envtl. Prot. Agency, *Definition of "Waters of the United States" Under the Clean Water Act*, REGULATIONS.GOV, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=EPA-HQ-OW-2011-0880 (last visited Mar. 10, 2019).

116 Anonymous Public Comment, Comment to *EPA Proposed Rule: Clean Water Act; Definitions: Waters of the United States*, REGULATIONS.GOV (Nov. 8, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-11613.

117 Anonymous Public Comment, Comment to *EPA Proposed Rule: Clean Water Act; Definitions: Waters of the United States*, REGULATIONS.GOV (Nov. 28, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-16083.

118 *See* Natasha Geiling, *A Controversial EPA Rule Is Pitting Small Farmers Against Big Agribusiness*, THINK PROGRESS (Jan. 14, 2016, 1:00 PM), https://thinkprogress.org/a-controversial-epa-rule-is-pitting-small-farmers-against-big-agribusiness-650061605b8b/.

119 *Id.*

120 *Id.*

121 *Id.*

would be.[122] Although the Rule would provide clarity, it would do so at the expense of millions whose land would now be jurisdictionally covered under the Act by law.[123] Many aspects of the Rule were pointed out as contradictory to the agencies' stance that the Rule narrowed their jurisdiction, that they instead widened it.[124] One of those arguments was that the Rule expanded its jurisdiction to cover tributaries contrary to the Court's opinion in *Rapanos*.[125] For the first time, the Rule defined what a tributary would be and, under that definition, there was no requirement that there be a continuous or surface flow of water—both necessary requirements to adequately fall within the jurisdiction of waters of the United States per Scalia's plurality opinion.[126] However, if the land met the elements of the definition of a tributary, "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark," it would fall into federal jurisdiction regardless of the fact that there was not a continuous flow of water or had not been for years.[127]

Another aspect of the Rule that was argued would expand jurisdiction was the agencies' definitions of "adjacent" and "neighboring."[128] According to the Rule, all waters that were adjacent to navigable, interstate, territorial seas, and tributaries were also considered waters of the United States.[129] What the EPA and USACE did to ensure that they could regulate as many waters as possible was to clearly delineate that "adjacent" did not only mean connected laterally to waters of the United States but also described those which "neighbored" waters of the United States.[130] And to provide further clarity, the EPA and USACE defined "neighboring" to be waters that were within a certain distance (one hundred feet) of a high water mark.[131] Just so that there would be no confusion as to which portion of the body of water was adjacent to the preestablished waters of the United States, thereby giving rise to federal jurisdiction, the definition

122 Deng, *supra* note 29.

123 Secord, *supra* note 104, at 974.

124 *Id.*

125 *Id.* at 974–75.

126 *Id.*

127 Clean Water Rule, *supra* note 4, at 37,105.

128 *Id.* at 37,105.

129 *Id.*

130 *Id.*

131 *Id.*

stipulated that if *any* portion of the area fell within the distance requirement then the *entire* larger body of water was considered "neighboring" and thereby an "adjacent" body of water to the waters of the United States.[132] This resulted in the ability of the EPA and USACE to regulate that entire larger body of water under the Act.[133] Although the agencies claimed that the Rule was backed by research of scientific reviews, they had been unable to clearly articulate where or how they came up with the distance requirements for these definitions.[134]

Further, more opponents of the Rule focused on another facet that was prevalent, the need for states to retain their ability to control and regulate their land and water use via state and local laws.[135] Since states have the ability to implement laws, absent contradictions with federal laws, they can and should be allowed to regulate intrastate waters as they so please. A perfect example of state-enacted water regulations would be the water quality control act in the Texas Water Code (the Code).[136] Although Texas's water code mimics the same mechanism and objective as the Act, on a much smaller scale, it does have one major advantage—the clear and specific definition of "water in the state."[137] The broad definition in the Code makes it extremely simple for the Texas Commission on Environmental Quality, the entity responsible for enforcement of the Code, to regulate any water that falls outside (either unambiguously or not) the purview of the EPA and USACE.[138] According to the Code, water in the state includes "wetlands, marshes . . . all other bodies of surface water, natural or artificial . . . navigable or nonnavigable . . . ."[139] Although some see Texas as a perfect example of why federal jurisdiction should be limited, it should not go unnoted that roughly thirty-three states do not have any state-based water laws and rely solely on the Act to protect its waters against pollution.[140] This may be the precise reason why,

132 *Id.*

133 *Id.*

134 Charles C. Davis, *The Clean Water Rule: What It Is and Why It Needs To Go*, 43 J. LEGIS. 146, 163 (2016).

135 Turner, *supra* note 13, at 304.

136 *See* TEX. WATER CODE ANN. § 26.011 (West 2000).

137 *Id.* § 26.001(5).

138 *See* Turner, *supra* note 13, at 305.

139 TEX. WATER CODE ANN. § 26.001(5).

140 *See* Turner, *supra* note 13, at 304.

when Congress passed a resolution regarding the Rule in early 2016, Obama issued the ninth veto of his presidential career rejecting Congress's attempt to overturn and kill the Rule.[141]

With the overwhelming number of comments received, the EPA and USACE's main concern in issuing the Rule should have been the likelihood that the final Rule, as written, would be held unconstitutional and that its chances of withstanding such a challenge would be slim. Based on the Supreme Court's prior decisions, the crux of its opinions rested on the agencies' reasonable interpretation of the Act and whether it was in line with congressional intent. There is an established framework that comes into play when a court reviews the interpretation of a statute by the agency that administers it.[142] This framework presents the court with two questions. The first question is whether the statute is ambiguous on the particular topic at issue.[143] If the topic is ambiguous, then the court's second question is whether the agency's interpretation is "based on a permissible construction of the statute."[144] There is no question that the plain language of the statute prohibits anyone from discharging a pollutant, absent a permit, into "navigable waters" which, in turn, is defined as waters of the United States.[145] "Waters of the United States" is not defined anywhere in the statute, yet it is the very phrase that is integral to the statute as it would delineate the waters that are jurisdictionally covered under the Act. Since this confirms the presence of an ambiguity, the EPA and USACE should have focused their efforts on ensuring that the final Rule was a reasonable interpretation of the Act. To say that these efforts were nothing more than a losing battle would be an understatement.

One of the challenges that the agencies' Rule would face would be the contradiction between how the Rule extended jurisdiction to areas

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141 Gregory Korte, *Obama Vetoes Attempt to Kill Clean Water Rule*, USA TODAY (Jan. 19, 2016, 8:48 PM), https://www.usatoday.com/story/news/politics/2016/01/19/obama-vetoes-attempt-kill-clean-water-rule/79033958/.

142 *See* Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

143 *Id.*

144 *Id.* at 843.

145 33 U.S.C.A. § 1311(a) ("Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."); 33 U.S.C.A. § 1362(12) (West 2019) ("The term 'discharge of pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source. . . "); § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

that previous case law had specifically excluded. During the initial release of the proposed rule, the agencies included for comment the proposed definitions of "neighboring" (added into the existing definition of "adjacent") and "riparian area."[146] "Neighboring" included waters that were "within the riparian area or floodplain" of certain identified waters, and "riparian area" was defined as an "area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area."[147] These proposed definitions caused an uproar among oppositionists. Comments to these proposed definitions pointed out that the "riparian area," as defined, attempted to assert jurisdiction over areas where there may not necessarily be a surface connection to navigable waters but where the presence of an ecological relationship to the area and the habitat for plants or animals was enough to meet the definition.[148] This definition was contrary to the Supreme Court's opinion rejecting the very principle in *SWANCC*.[149] Strangely enough, the EPA and USACE did not address this contradiction in issuing the final Rule. Although the final Rule ultimately eliminated the definition of "riparian area," it did so not to avoid the contradiction but instead to avoid "unnecessarily complicat[ing]" the Rule.[150] The agencies concluded that whatever area was covered under the proposed "riparian area" would ultimately be found to be within the 100-year floodplain, which was included in the final Rule's definition of "neighboring."[151]

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146 Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,187, 22,263 (April 21, 2014).

147 *Id*. at 22,199.

148 *See* League of Nebraska Municipalities, Comment Letter on Proposed Definition of "Waters of the United States" Under the Clean Water Act (Nov. 3, 2014) (explaining that the proposed rule explicitly states that a hydrological connection is not necessary where they can show that migration patterns of animals or plants established a connection, contrary to the court's previous rejection of the same attempt with the Migratory Bird Rule); Pacific League Foundation, Comment Letter on Proposed Definition of "Waters of the United States" Under the Clean Water Act (Nov. 10, 2014) (expressing the agencies' "gross distortion" of the terms used with no legal basis and citing the court's previous opinion in *SWANCC* that the "Migratory Bird Rule" would infringe on States' power to regulate land and water use); Oregon Cattlemen's Association, Comment Letter on Proposed Definition of "Waters of the United States" Under the Clean Water Act (Aug. 12, 2014) (pointing out that the Supreme Court has previously held that an ecological relationship is only pertinent where there is an ambiguity as to where water ends and an abutting wetland begins).

149 *Id.*

150 Definition of "Waters of the United States," 80 Fed. Reg. 37,053,37,082 (June 29, 2015).

151 *Id.*

Even then, the agencies were able to perform a case-by-case analysis of a "significant nexus" connection for waters lying outside the 100-year floodplain.[152] The omission of the "riparian area" definition did not cure the agencies' blatant disregard for the Supreme Court's previous opinion that an interpretation encompassing areas solely because they had an ecological connection to an animal or plant's life cycle or habitat was unreasonable and against congressional intent.[153]

Another obstacle the Rule would face was the impingement on states' rights to regulate their own land and water use, a matter Congress made clear it wanted to avoid in the Act.[154] It was noted to the agencies that prior Supreme Court opinions specifically declined to allow an expansive interpretation of the Act's jurisdiction if that interpretation would infringe on the states' ability to regulate and control local land development.[155] This was the very issue that the plurality in *Rapanos* attempted to avoid when Scalia wrote that

> the expansive theory advanced by the [USACE], rather than "preserv[ing] the primary rights and responsibilities of the States," would have brought virtually all "plan[ning of] the development and use . . . of land and water resources" by the States under federal control.[156]

The more overreaching the Rule became, the more activities and areas would require permitting under the Act. This, too, was an act the Court previously regarded as a state and local power. For the Court to allow a disruption of the federal and state framework, it would "expect a 'clear and manifest' statement from Congress."[157] Because Congress had not changed the language of the Act since the Supreme Court's ruling in *Rapanos*, it is not hard to see that any attempt by the agencies to infringe on states' rights would likely have been considered an impermissible interpretation of the Act.

One final challenge worth noting is that if the Rule was challenged under the void for vagueness doctrine, then it likely would have failed

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152 *Id.*

153 *See* Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159 (2001).

154 33 U.S.C.A. § 1251(b).

155 *See* League of Nebraska Municipalities, Comment Letter 179 (indicating that asserting blanket jurisdiction would result in a clear violation of congressional intent and thereby would not be a permissible construction of the Act).

156 Rapanos v. United States, 547 U.S. 715, 737 (2006).

157 *Id.* at 738.

the challenge based on the confusion that resulted as to jurisdictional reach. Because the Act's enforcement allows for criminal penalties of up to $50,000 per day of violation and/or imprisonment of up to two years, the Act is subject to the doctrine.[158] The void for vagueness doctrine is founded on the principle that our Constitution requires due process and fair notice of criminal conduct that is prohibited with "sufficient definiteness" that a person of ordinary intelligence could understand.[159] The Supreme Court has held that vague laws deprive a person of ordinary intelligence the opportunity to freely steer between lawful and unlawful actions and that these laws "trap the innocent by not providing fair warning."[160] The Rule would be the essential element of the Act that would delineate which waters were covered, which activities were prohibited, and the areas where potential liability would exist.[161]

An important component of the void for vagueness doctrine is the "person of ordinary intelligence." The Court did not define or put parameters on the audience that laws must give fair notice to; therefore, it is safe to assume that the "person of ordinary intelligence" has evolved since moving into the twenty-first century.[162] In 2017, 26% of adult Americans had at least a high school diploma or general education degree, while only 21.3% held a bachelor's degree.[163] With these statistics in mind, would it be possible that a "person of ordinary intelligence" in today's world would have clear knowledge of the waters that fall under the Act's jurisdiction, the prohibited activity in those waters, and the resulting punishments for violations? The fact that the EPA and USACE used technical expertise and employed science-based research to determine what waters would be covered under the Act make it seem almost impossible that someone with only a high

158 33 U.S.C.A § 1319 (c) (West 2012) (penalizing negligent violations by a fine no less than $2,500 and not to exceed $25,000 per day and/or up to one year in prison, with penalties doubling for repeat offenders; knowingly committing a violation can be punished by a fine not to exceed $50,000 per day and/or up to two years in prison, also allowing for double the punishment for repeat offenders).

159 Kolender v. Lawson, 461 U.S. 352, 357 (1983).

160 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

161 Union Pacific Railroad Company, Comment Letter on Proposed Definition of "Waters of the United States" Under the Clean Water Act (Nov. 14, 2014).

162 *See Kolender*, 461 U.S. at 357; *Grayned*, 408 U.S. at 108 (failing to define or designate parameters describing the person of ordinary intelligence).

163 *See* U.S. Census Bureau, U.S. Dep't of Commerce, Educational Attainment in the United States: 2017, Tbl. 3. Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin: 2017 (Dec. 2017).

school diploma would go to the Federal Register to look up and fully understand the Rule.[164] Furthermore, the Rule's case-specific analysis in some instances leaves no question as to the vagueness of what waters are considered "waters of the United States."[165] Even a person of extraordinary intelligence would be unaware of the prohibited activity in one of these areas until the analysis was complete.

CONCLUSION

It is easy to see from the history of the Act, legislative intent, and the Court's multiple interpretations of "waters of the United States" how we ended up so far from any clear guidance as to how wide the EPA and USACE's jurisdiction extends. After the United States Court of Appeals for the Sixth Circuit issued the nationwide stay on the Rule, everyone resumed their prior methods of jurisdictional determination—the very ambiguous and "case-by-case" practice.[166] With his executive order, President Trump attempted to alleviate the controversy when he sent back the Rule for further review.[167] Although the order makes clear that the EPA and USACE are to consider the goal of the Act, the roles of Congress and individual states, and the interpretation of "navigable waters" in the *Rapanos* plurality, many are skeptical as to what the EPA and USACE will return with.[168] While it seems that Trump's executive order attempts to make things right, there is criticism that what the Trump administration is really doing is ensuring that there is clear reduction in federal jurisdiction over the Nation's waters.[169] President Trump openly opined that the Rule was "a horrible, horrible rule" and further went on to acquiesce that in

164 *See* Clean Water Rule, 80 Fed. Reg. 37,054, 37,055 (June 29, 2015).

165 *Id.* at 37,104–05 (indicating that waters determined, on a case-specific basis, to have a significant nexus to navigable waters, interstate waters, or territorial seas shall be considered Waters of the United States).

166 Chris Eaton, *Waters of the United States – Where Are They Flowing These Days?*, CORNERSTONE (July 26, 2017, 11:30 AM), http://www.cornerstoneeg.com/2017/07/26/waters-united-states-flowing-days/.

167 Exec. Order, *supra* note 8.

168 *See* Seth Jaffe, *The Executive Order on the WOTUS Rule: Will It Really Reduce Regulatory Uncertainty?*, LAW & ENV'T (Mar. 2, 2017), http://www.lawandenvironment.com/2017/03/02/the-executive-order-on-the-wotus-rule-will-it-really-reduce-regulatory-uncertainty/.

169 *Id.*

reality it was an underhanded method for a "massive power grab."[170] Even though the EPA and USACE rescinded the Rule, "…taking significant action to return power to the states and provide regulatory certainty to [the] nation's farmers and businesses," what the ultimate changes are and when they will take effect are still quite ambiguous.[171] Once the rescission of the Rule was officially published, the comment period opened for another round of insight, criticism, and critique. If the EPA and USACE decide to go with Scalia's plurality opinion, then it is easy to see what the new rule will likely include: only those areas with a continuous flow and surface connection to existing waters of the United States under the Act.[172] However, if the agencies consider and choose to reject Scalia's "navigable waters" interpretation in *Rapanos*, then the EPA and USACE's ultimate determination of jurisdictional reach remains unknown.[173] With so many factors to take into account—clear delineation of water and land, protection of state power, legislative intent, significant nexus, and the Act's objectives—the EPA and USACE's final revisions to the Rule must be truly substantiated by legal parameters, otherwise the Nation's waters could end up tainted far beyond remediation.

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170 Jillian K. Melchoir, *Stop Leaving Americans Out to Dry*, U.S. NEWS (July 6, 2017, 7:00 AM), https://www.usnews.com/opinion/op-ed/articles/2017-07-06/donald-trump-is-right-to-rescind-obamas-waters-of-the-united-states-rule.

171 *U.S. Army Move to Rescind 2015 "Waters of the U.S.,"* EPA.GOV, https://www.epa.gov/newsreleases/epa-us-army-move-rescind-2015-waters-us (last updated June 27, 2017).

172 Eaton, *supra* note 166.

173 *See* Jaffe, *supra* note 168.