

5-29-2020

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Recommended Citation

Stephen M. Johnson, *Killing WOTUS 2015: Why Three Rulemakings May Not Be Enough*, 64 St. Louis U. L.J. (2020).

Available at: <https://scholarship.law.slu.edu/lj/vol64/iss3/5>

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KILLING WOTUS 2015: WHY THREE RULEMAKINGS MAY NOT BE ENOUGH

STEPHEN M. JOHNSON*

The rules adopted by federal administrative agencies are influenced substantially by the politics of the President. Presidential control of agencies is an important factor that has motivated courts to defer to agencies when they review agencies' interpretations of statutes.¹ After all, the President, the head of the Executive Branch, is directly accountable to the American people through elections, whereas judges are not accountable.² So, when Presidents change, the rules and policies of agencies often change.³ Recognizing the important role of the President in influencing agencies' policies, former Supreme Court Chief Justice William Rehnquist counseled in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, "A change in administration brought about by the people casting their votes is a perfectly

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1. See *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 865–66 (1984). See also, *Fla. Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1577 (11th Cir. 1995); *Ransom v. Bowen*, 844 F.2d 1326, 1335 (7th Cir. 1988). For a seminal article discussing the Constitutional and policy justifications for strong Presidential control over agency decision-making, see Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 450, 451 (1979). Many other academics have focused on the appropriate scope of Presidential control over agency decision-making. See Stephen M. Johnson, *Disclosing the President's Role in Rulemaking: A Critique of the Reform Proposals*, 60 CATH. U. L. REV. 1003, 1004 (2011) [hereinafter, Johnson, *Disclosing the President's Role in Rulemaking*]; Peter L. Strauss, *Overseer, or The Decider? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 750–51 (2007); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372 (2001); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544–45, 636 (1994); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 6 (1994).

2. See *Chevron*, 467 U.S. at 865–66.

3. See Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 289 (2013); Ari Cuenin, *Mooting the Night Away: Postinauguration Midnight-Rule Changes and Vacatur for Mootness*, 60 DUKE L.J. 453, 476–77 (2010); Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. 352, 360 (2009); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1444 (2005).

reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."⁴

However, agencies are not merely the President's political playthings. Justice Rehnquist conditioned his support for politically-based policy changes in *State Farm* by stressing that "a new administration may not refuse to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions."⁵ In addition, while the Supreme Court has identified the political accountability of the President as one reason for deferring to an agency's interpretation of a statute, the other primary reasons that courts defer to agencies' interpretations of statutes are because agencies have expertise in the subject matter of the statutes and Congress intended agencies to exercise that expertise to interpret and administer statutes.⁶ While Congress occasionally enacts legislation that delegates rulemaking or decision-making power directly to the President,⁷ most statutes delegate such authority to administrative agencies, presumably because Congress wants agencies to exercise their expertise in the subject matter, rather than making decisions based on politics.⁸

Basic principles of administrative law limit the President's ability to change rules for purely political reasons. For instance, a rule that has been adopted through notice and comment rulemaking can only be repealed or changed through notice and comment rulemaking.⁹ This can be difficult, because adopting any rule through notice and comment rulemaking can be time consuming and resource intensive.¹⁰ Congress and the courts impose many procedural requirements on the rulemaking process to ensure that agencies engage in a transparent, deliberative process that involves public input and generates a rational decision.¹¹ Since agencies can anticipate that most major

4. 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring).

5. *Id.*

6. See *Chevron*, 467 U.S. at 865–66.

7. See Bruff, *supra* note 1, at 472. See, e.g., 42 U.S.C. § 9605 (2012) (delegating authority to the President to revise the national contingency plan under the Superfund law).

8. See Johnson, *supra* note 1, at 1008–10; Stack, *supra* note 1, at 266–67; Strauss, *supra* note 1, at 754. Academics who espouse a "Presidential control" model for administrative agencies, rather than an "expertise" model, disagree. See, e.g., Kagan, *supra* note 1, at 2251–52; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2, 6 (2009).

9. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992); *Env'tl. Def. Fund v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983).

10. See Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. 767, 773 (2008) [hereinafter Johnson, *Ossification's Demise?*]; Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992) [hereinafter "McGarity, *Some Thoughts*"].

11. See Johnson, *Ossification's Demise?*, *supra* note 10, at 774–78 (describing the variety of procedural requirements imposed by legislation, judicial decisions, and Executive Orders); McGarity, *Some Thoughts*, *supra* note 10, at 1400–12. See also Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 86–98 (2018) (describing several judicial limits, including

regulations will be challenged in court,¹² they have an incentive to take as much time as is necessary to create a “bulletproof” rule that can withstand judicial challenges.¹³ While many have criticized the modern notice and comment rulemaking process as “ossified,”¹⁴ others have recognized that the ossification creates “sticky regulations” on which the regulated community and the public can rely.¹⁵ If an agency follows the appropriate procedures and adopts a rule that is reasonable and within its statutory authority, the public and the regulated community can be assured that the rule cannot be changed based on a whim, but can only be changed after a time consuming, resource intensive, deliberative process with opportunities for public participation.¹⁶ As Professor Aaron Nielson notes, “the same procedures that make it hard to create policy also make it hard to rescind policy. . . . Ossification thus acts as a commitment mechanism. Almost by definition, the more difficult it is for an agency to change its policy, the less likely it is that the agency will do so.”¹⁷

“hard look” review, the “material comments” doctrine, the “logical outgrowth” doctrine, and the “good government” justification for many of the procedural limits on rulemaking); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1755 (2007); Caitlin McCarthy et al., *Dialogue: The Burden of Unburdening: Administrative Law of Deregulation*, 48 ELR 10767, 10768 (2018).

12. See Johnson, *Ossification’s Demise?*, *supra* note 10, at 768, 771–73 (discussing studies that have found that agency rules are invalidated in 30%–50% of the cases in which they are challenged and noting that former EPA Administrator William Ruckelshaus claims that 80% of the rules adopted by EPA while he was Administrator were challenged).

13. See Nielson, *supra* note 11, at 98–99.

14. See Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2328 (2015); Richard J. Pierce Jr., *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 283–84 (1998) [hereinafter Johnson, *Internet*]; Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528–36 (1997) [hereinafter McGarity, *Response*]; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483 (1997); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 64 (1995); McGarity, *Some Thoughts*, *supra* note 10, at 1428–29. One relevant definition of “ossify” is “to make callous, rigid, or inactive.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1597 (1993).

15. See Nielson, *supra* note 11, at 90, 131. See also McCarthy, et al., *supra* note 11, at 10768.

16. See Nielson, *supra* note 11, at 92. See also McCarthy, et al., *supra* note 11, at 10770.

17. See Nielson, *supra* note 11, at 116, 118. Justice Neil Gorsuch is less optimistic that administrative law principles can adequately prevent agencies from making knee-jerk political decisions. While he was a judge on the Tenth Circuit, Gorsuch authored a concurring opinion in *Gutierrez-Brizuela v. Lynch*, in which he criticized the deference accorded to agencies under the *Chevron* doctrine, arguing that de novo review was necessary because stakeholders “must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail.” 834 F.3d 1142, 1152 (2016) (Gorsuch, J., concurring). Later in the opinion, Gorsuch laments that “an agency can enact a new rule of

In addition to the procedural impediments referenced above, the Supreme Court has imposed other restrictions on agencies that prevent them from hastily changing rules based on political whims. For instance, when an agency changes a rule, the agency must “display awareness that it is changing position” and “show that there are good reasons for the new policy.”¹⁸ In addition, an agency must provide a reasoned explanation whenever it disregards facts and “circumstances that underlay or were engendered by its prior rule.”¹⁹ An agency rule can be held to be “arbitrary and capricious” if there is an “unexplained inconsistency” in agency policy.²⁰ Consequently, when an agency adopts a rule to repeal or replace a prior rule, to the extent that the agency is changing its interpretation of the facts or law underlying the prior rule, or, to the extent that the new rule conflicts with the agency’s prior interpretation of the facts or law underlying the rule, the agency must acknowledge that and rationally explain the reasons for the change in interpretation.²¹

In light of all of these restrictions, when an agency runs the procedural gauntlet of notice and comment rulemaking and adopts a rule that is within the agency’s statutory authority, a reasonable exercise of discretion, based on agency expertise, and supported by a strong factual record, it is very difficult to repeal the rule solely on political grounds, especially if the attempts to repeal the rule come shortly after the rule was initially adopted. Nevertheless, when there is a change in Administration and the incoming President is a member of a different political party than the outgoing President, it is quite common for the new President to attempt to repeal or replace rules adopted by the previous Administration.²²

This Article illustrates the manner in which the administrative law checks and balances work to limit a President’s ability to change a rule based on purely political factors, by focusing on a rule adopted in 2015 by the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) and the *three* rulemaking efforts initiated after the change in Administration in 2017 to repeal and replace the rule.

general applicability affecting huge swaths of the national economy one day and reverse itself the next.” *Id.* at 1154.

18. *See* *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

19. *Id.* *See also* *F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (Scalia, J. for the plurality). In a concurring opinion in *F.C.C. v. Fox TV Stations, Inc.*, Justice Kennedy wrote, “an agency’s decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient facts that it made in the past[.]” *Id.* at 537 (Kennedy, J., concurring).

20. *See* *Encino*, 136 S. Ct. at 2126.

21. *See* William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1396, 1401 (2018).

22. *See* Ari Cuenin, *supra* note 3, at 472. *See also* *infra* Part III.

The rule was initially adopted by EPA and the Corps in 2015 to define the scope of the federal government's jurisdiction over "waters of the United States" ("WOTUS") under the Clean Water Act.²³ The agencies' rules in effect prior to the 2015 rule had been interpreted in, and narrowed by, three Supreme Court decisions.²⁴ In the 2015 rule, the agencies crafted a new definition of "waters of the United States" based on the agencies' expertise and their long-standing interpretations of those three Supreme Court cases.²⁵ The agencies supported the 2015 rule with a scientific study that was based on more than 1200 other peer reviewed scientific studies²⁶ and an economic analysis that demonstrated that the benefits of the rule clearly outweighed the costs of the rule.²⁷ The agencies provided the public with more than six months to comment on the rule and finalized it after reviewing over a million public comments.²⁸

Since the American Farm Bureau had led the opposition to the 2015 rule and since middle American farmers were major supporters of the President in his 2016 election, President Trump acted quickly to attempt to eliminate the 2015 WOTUS rule after he took office in 2017.²⁹ In his second month in office, the President issued an Executive Order directing EPA and the Corps to rescind or revise the 2015 rule and to revise it in a way that narrowed the government's jurisdiction, based on an interpretation of one of the Supreme Court cases that conflicted with the agencies' prior interpretation of the case.³⁰

After that, EPA and the Corps initiated *three* separate rulemakings designed to prevent the 2015 rule from being implemented and to repeal and replace that rule. The first proposed rulemaking was initiated to repeal the 2015 rule and

23. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (to be codified 33 C.F.R. pt. 328).

24. See *Rapanos v. United States*, 547 U.S. 715, 716 (2006); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172, 175 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

25. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,054.

26. See *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA (Jan. 2015), <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414> [<https://perma.cc/S9C9-EWTB>] [hereinafter *Connectivity Study*]. See *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, 80 Fed. Reg. 2100, 2100 (Jan. 15, 2015).

27. See U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, *Economic Analysis of the EPA-Army Clean Water Rule*, ENVTL PROT. AGENCY (May 20, 2015), https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf [<https://perma.cc/DXW5-9VS8>].

28. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,057.

29. More than 75% of rural voters in the Farm Belt supported President Trump. See Ted Genoways, *Farmers voted heavily for Trump. But his trade policies are terrible for them*, WASH. POST (Oct. 24, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/10/24/farmers-voted-heavily-for-trump-but-his-trade-policies-are-terrible-for-them/> [<https://perma.cc/HW9D-K7BD>].

30. See Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

reinstate the regulatory landscape that existed prior to the 2015 rule, in order to give the agencies time to craft a new rule to replace the 2015 rule.³¹ When the agencies could not finalize that rule quickly enough, they adopted a second rule that delayed the implementation of the 2015 rule by two years.³² The third proposed rulemaking was initiated to develop the new definition of “waters of the United States” to replace the definition adopted in the 2015 rule.³³ However, the agencies made fundamental errors of administrative law and statutory law in each of those rulemakings. One of the agencies’ rules has already been invalidated for those errors and the other two will likely be invalidated as well, when they are finalized.

This Article will discuss the procedural and substantive flaws in the three rulemaking efforts by the agencies. One or more of the rules (or the 2015 rule) will likely be litigated for the next several years and, ultimately, it is likely that the question of the scope of the federal government’s jurisdiction over “waters of the United States” will return to the Supreme Court. However, since challenges to those rules must originate in Federal district courts,³⁴ it could take some time before the question returns to the Court.

Part II of this Article discusses the 2015 rule, including the motivation for the rule, the development of the rule, public and congressional reaction to the rule, legal challenges to the rule, and President Trump’s reaction to the rule when he took office. Part III of the Article discusses the limits imposed on agencies when they change regulations and briefly discusses the numerous instances when the Trump Administration has failed to comply with those limits. Part IV of the Article outlines the efforts taken by the Trump Administration to repeal and replace the 2015 rule and Parts V through VII examine the procedural and substantive flaws in each of the three rulemaking efforts. Finally, Part VIII ponders the fate of a WOTUS rule should one be ultimately reviewed by a Supreme Court that has added several new members since the Court last ruled on the scope of the Clean Water Act’s jurisdiction over “waters of the United States.”

I. THE 2015 RULE AND ITS ORIGIN STORY

EPA and the Corps of Engineers have adopted many regulations over the years to define the government’s jurisdiction over “navigable waters” under the Clean Water Act. Shortly after Congress enacted the Federal Water Pollution

31. *See* Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,899 (proposed July 27, 2017) (to be codified 33 C.F.R. 328).

32. *See* Definition of “Waters of the United States” —Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5200 (Feb. 6, 2018).

33. *See* Revised Definition of Waters of the United States, 84 Fed. Reg. 4154, 4154 (Feb. 14, 2019) (to be codified at 40 C.F.R. 110.1).

34. *See* Nat. Ass’n of Mfrs. v. Dep’t of Def., 138 S. Ct. 617 (2018).

Control Act Amendments of 1972, the Corps of Engineers adopted a narrow definition of “navigable waters” that only covered waters that were currently navigable, historically navigable, or potentially navigable.³⁵ That regulatory definition was quickly invalidated by the federal district court for the District of Columbia in *Natural Resources Defense Council, Inc. v. Callaway*.³⁶ In striking down the Corps’ definition, the court noted that “Congress by defining the term ‘navigable waters’ in Section 502(7) of the [Clean Water Act] to mean ‘the waters of the United States, including the territorial seas,’ asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability.”³⁷

Consistent with the court’s holding, the Corps amended its regulations in 1975³⁸ and 1982³⁹ to cover a much broader universe of waters as “navigable waters” or “waters of the United States.” The 1982 regulations asserted jurisdiction over the traditional navigable waters that were regulated in the 1974 regulations, but also regulated interstate waters and wetlands; intrastate waters the use, degradation, or destruction of which could affect commerce; tributaries of any of those waters; and wetlands adjacent to any of those waters.⁴⁰ The Corps amended the regulations again in 1986, but did not make any significant changes to the scope of jurisdiction over “waters of the United States” at that time.⁴¹ In 1988, EPA adopted a regulatory definition of “waters of the United States” that was substantially the same as the Corps’ definition.⁴²

Over the past thirty-five years, the Supreme Court reviewed the validity of portions of those regulations in three different cases. First, in 1985, in *United States v. Riverside Bayview Homes* the Court considered whether the Clean Water Act authorized the Corps of Engineers to regulate, as “waters of the

35. See Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) (defining “navigable waters” as “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”). This was the definition that the Corps used for the term in the Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1151 (current version at 33 U.S.C. §§ 403–407 (2012)).

36. 392 F. Supp. 685, 686 (D.D.C. 1975).

37. *Id.*

38. See Navigable Waters; Permits for Activities, 40 Fed. Reg. 31,319, 31,320 (July 25, 1975).

39. See Permit Regulations; Interim Rule and Request for Comment, 47 Fed. Reg. 31,794, 31,797–98 (July 22, 1982).

40. See Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323.2(a) (1982).

41. See Permit Regulations: Regulatory Programs, 51 Fed. Reg. 41,206, 41,210 (Nov. 13, 1986).

42. See Water Pollution Control: State and Federal 404 Programs, 53 Fed. Reg. 20,764, 20,764 (June 6, 1988).

United States,” wetlands that are adjacent to traditional navigable waters.⁴³ A unanimous Court upheld the Corps’ authority in that case, deferring to the Corps’ under the *Chevron* analysis, based on the expertise of the Corps and EPA.⁴⁴ The *Riverside Bayview Homes* Court held that regulation of adjacent wetlands was necessary to achieve the broad purposes of the Clean Water Act in Section 101(a) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”⁴⁵ and EPA and the Corps concluded that wetlands adjacent to navigable waters “play a key role in protecting and enhancing water quality.”⁴⁶ The Court noted that “the Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import,”⁴⁷ and the Court further supported its conclusion that the government could regulate waters that were not “navigable” in the traditional sense by citing legislative history that indicated that Congress intended to regulate as broad a category of waters as authorized under its Commerce Clause powers.⁴⁸

Sixteen years later, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, the Court reviewed the Corps’ assertion of jurisdiction under the Clean Water Act over isolated ponds based on the agency’s “migratory bird” test.⁴⁹ The Corps used the test as one way to determine whether a water was an intrastate water “the use, degradation or destruction of which could affect . . . commerce,” one of the categories of “waters of the United States” under the Corps’ regulations.⁵⁰ Under the test, the Corps asserted jurisdiction over intrastate waters which are or would be used by migratory birds.⁵¹ In a 5–4 decision, the Court rejected the agencies’ calls for *Chevron* deference and read the Clean Water Act narrowly, based on the constitutional avoidance canon.⁵² Under the canon, a court will interpret a statute to avoid an interpretation that raises serious constitutional issues unless the language of the statute clearly indicates that Congress intended the potentially unconstitutional interpretation.⁵³ The Court noted that similar concerns arise

43. 474 U.S. 121, 123 (1985).

44. *Id.* at 123, 131, 134.

45. *Id.* at 132.

46. *Id.* at 133.

47. *Id.*

48. *Riverside Bayview Homes*, 474 U.S. at 133, citing S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

49. 531 U.S. 159, 159 (2001).

50. *Id.* at 163.

51. *Id.* at 164. Although the court refers to the Corps’ “migratory bird rule,” the test used by the Corps was not a legislative rule, but was merely mentioned in the preamble to the Corps’ 1986 regulation defining “waters of the United States.” *Id.* at 184 n.12.

52. *Id.* at 174.

53. *Id.* at 172.

when a federal statute encroaches upon traditional state powers.⁵⁴ Since the Court was concerned that regulation of the waters in the case based on the migratory bird test raised constitutional issues and encroached on “the States’ traditional and primary power over land and water use,” the Court held that the Clean Water Act did not authorize such regulation because there was no clear statement in the statute that authorized the regulation.⁵⁵ To the contrary, the Court noted that Congress chose to “recognize, preserve and protect the primary responsibilities of States . . . to plan the development and use . . . of land and water resources” in Section 101(b) of the act.⁵⁶

The *SWANCC* Court distinguished the *Riverside Bayview Homes* case by noting that “the *significant nexus* between the wetlands and navigable waters” informed the Court’s reading of the Clean Water Act in that case.⁵⁷ In addition, contrary to the findings of the *Riverside-Bayview Homes* Court, the *SWANCC* Court concluded that nothing in the legislative history “signifie[d] that Congress intended to exert anything more than its commerce power *over navigation*,” which is presumably narrower than its commerce power generally.⁵⁸

Although there were statements in the Court’s opinion that could be read to suggest that the Court was doing more than simply invalidating the federal government’s regulation of waters based on the “migratory bird” test, EPA and the Corps read the opinion narrowly to allow them to continue to regulate isolated, intrastate waters on grounds other than the “migratory bird” test,⁵⁹ and most courts read the ruling narrowly to exclude only intrastate, non-navigable waters that lacked any connection to navigable waters.⁶⁰ However, guidance issued by EPA and the Corps after the decision required staff to obtain approval from Headquarters before asserting jurisdiction over isolated, intra-state, non-navigable waters⁶¹ and situations in which the agencies asserted jurisdiction over

54. *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172–73 (2001).

55. *Id.* at 174.

56. *Id.* (citing 33 U.S.C. § 1251(b) (2012)).

57. *Id.* at 167 (emphasis added).

58. *Id.* at 168 n.3.

59. See EPA & Corps, *Joint Memorandum*, 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003). Shortly after the *SWANCC* ruling, the EPA General Counsel and Corps Chief Counsel issued a joint memorandum that indicated that the agencies could regulate isolated, intrastate, non-navigable waters if the agencies could demonstrate, on a case by case basis, a nexus to interstate commerce other than the “migratory bird” test. See STEPHEN M. JOHNSON, *WETLANDS LAW: A COURSE SOURCE* 114–15 (eLangdell Press, 3d ed. 2018) [hereinafter “JOHNSON, *COURSE SOURCE*”]. That memorandum was superseded by the 2003 guidance, which required staff to take a more cautious approach to regulating isolated waters.

60. See Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *ECOLOGY L.Q.* 811, 811, 814, 866 (2003).

61. See EPA & Corps, *Joint Memorandum*, *supra* note 59, at 1996.

those waters declined significantly after *SWANCC*.⁶² The Court's decision raised considerable concern among environmental groups because, depending on how broadly the Court's decision was applied, between 40–80% of the Nation's wetlands could be excluded from coverage under the Clean Water Act, and many States were not choosing to regulate the waters excluded from federal protection.⁶³

The final Supreme Court case to address the scope of Clean Water Act jurisdiction over “waters of the United States” raised more questions than it answered. In *Rapanos v. United States*, the Court was reviewing the Corps' exercise of jurisdiction over non-navigable tributaries of traditional navigable waters and wetlands adjacent to those non-navigable tributaries.⁶⁴ While all of the Justices agreed that jurisdiction was not limited to traditional navigable waters,⁶⁵ they agreed on little else. Writing for a plurality of the Court, Justice Scalia asserted that the federal government could only regulate, as “waters of the United States,” “relatively permanent, standing or flowing bodies of water” and “wetlands with a continuous surface connection” to other “waters of the United States.”⁶⁶ Scalia relied on the plain meaning of the term “waters of the United States” and argued that it was necessary to interpret federal jurisdiction narrowly in light of the statute's policy, in Section 101(b), “to recognize, preserve and protect the primary responsibilities of States . . . to plan the development and use . . . of land and water resources.”⁶⁷ The plurality felt that the Corps' assertion of jurisdiction over non-navigable tributaries as defined in its regulations and wetlands without a continuous surface connection to other “waters of the United States” raised the same federalism and Commerce Clause concerns as the regulation of the isolated ponds in *SWANCC*.⁶⁸ The other five Justices on the Court rejected the plurality's narrow reading of Clean Water Act jurisdiction.

62. See Mank, *supra* note 60, at 814. The agencies significantly reduced the cases in which they asserted jurisdiction over vernal pools and playa lakes after *SWANCC*, despite their ecological value. *Id.*

63. See JOHNSON, *COURSE SOURCE*, *supra* note 59, at 114–15 (citing Jon Kusler, *State Regulation of Wetlands to Fill the Gap* 6 (Association of State Wetlands Managers, Inc., 2004), https://www.aswm.org/pdf/lib/swancc_decision_030404.pdf [<https://perma.cc/GK3Z-BTC2>]).

64. 547 U.S. 715, 728, 730 (2006).

65. See *id.* at 731 (Scalia, J., for the plurality) (noting that jurisdiction extends beyond traditional navigable waters); *id.* at 779–80 (Kennedy, J., concurring) (finding jurisdiction whenever a water has a significant nexus to a traditional navigable water); *id.* at 788 (Stevens, J., dissenting) (indicating that the Corps' regulations, which assert jurisdiction over a wide range of waters beyond traditional navigable waters, should have been upheld under *Chevron*).

66. *Id.* at 739, 742. Justice Scalia was joined by Justices Thomas and Alito and the Chief Justice. Scalia argued that the term “waters of the United States” does not include “channels through which water flows intermittently or ephemerally.” *Id.* at 739.

67. 547 U.S. at 737.

68. *Id.* at 759, 776.

Justice Kennedy, writing separately, concurred in the Court's decision to remand the case to the lower court, but he took issue with the plurality's reading of the statute. Kennedy argued that *Riverside Bayview Homes* and *SWANCC* both established the principle that regulation of waters is appropriate under the Clean Water Act when the waters have a "significant nexus" to traditional navigable waters.⁶⁹ He rejected the plurality's tests because they excluded regulation of some waters that have a "significant nexus" to traditional navigable waters and because they authorized regulation of some waters that lacked such a "significant nexus."⁷⁰ Addressing the plurality's concerns about the Clean Water Act policy in Section 101(b) to preserve traditional State responsibilities over land and water resource development, Kennedy argued that such concerns only arose in *SWANCC* because the federal government attempted to regulate waters that lack a "significant nexus" to traditional navigable waters.⁷¹ The "significant nexus," he reasoned, should be assessed in terms of the goals and purposes of the Clean Water Act in Section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁷²

Accordingly, he wrote that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"⁷³ Justice Kennedy indicated that the Corps could, by regulation, "identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system" to justify regulation as "navigable waters."⁷⁴ However, he felt that the Corps existing regulatory definition of tributaries was too broad, and allowed the Corps to assert jurisdiction over wetlands that were adjacent to tributaries in some cases where the wetlands, alone or in combination with similarly situated lands in the region, lacked a significant nexus to a traditional navigable water.⁷⁵ Consequently, he indicated that the Corps could regulate

69. *Rapanos*, 547 U.S. at 759, 767, 779 (Kennedy, J., concurring). Kennedy argued "to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779.

70. *Id.* at 767–78 (Kennedy, J., concurring).

71. *Id.* at 776, 782 (Kennedy, J., concurring). Kennedy reasoned that "in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty." *Id.* at 782.

72. *Id.* at 779 (Kennedy, J., concurring).

73. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

74. *Id.* at 781. (Kennedy, J., concurring).

75. *Id.*

wetlands adjacent to non-navigable tributaries, but that they could not rely on the existing regulation to do so, and would need to demonstrate, on a case-by-case basis, that the wetlands had a “significant nexus” to a traditional navigable water.⁷⁶

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer in dissent, argued that the Corps’ regulation of non-navigable tributaries and wetlands adjacent to non-navigable tributaries should have been upheld under *Chevron* as a reasonable interpretation of the statute, in light of its goals in Section 101(a).⁷⁷ Stevens reasoned that the Corps determined that wetlands adjacent to tributaries of traditional navigable waters preserve the quality of the Nation’s waters by providing habitat for aquatic animals, preventing excessive sediment and toxic pollutants from entering the adjacent waters, and reducing downstream flooding and that the Corps’ reasonable interpretation of the term “waters of the United States” was entitled to *Chevron* deference.⁷⁸ The dissenting Justices argued that the test for Clean Water Act jurisdiction should be broader than either the plurality test or the Kennedy “significant nexus” test. However, Justice Stevens noted that “[g]iven that all four Justices who have joined this opinion would uphold the Corps’ jurisdiction in . . . all . . . cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met.”⁷⁹

Chief Justice Roberts wrote a separate concurring opinion to add a few thoughts about the impact of the case and the agencies’ potential responses to the case. First, he chided the Corps and EPA for failing to amend their regulatory definition of “waters of the United States” after *SWANCC*, indicating that the agencies would have been given “generous leeway” by the courts under *Chevron* when reviewing the agencies’ amended regulatory definition.⁸⁰ Then, he lamented that since there was no majority opinion in *Rapanos*, “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis.”⁸¹ Roberts cited the Supreme Court’s decision in *Marks v. United States* as a guideline for determining the precedential value of a case with no majority opinion.⁸² In *Marks*, the Court suggested that “[w]hen 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.”⁸³

76. *Id.* at 782.

77. *Id.* at 787–88 (Stevens, J., dissenting).

78. *Rapanos*, 547 U.S. at 787–88.

79. *Id.* at 810 (Stevens, J., dissenting).

80. *Id.* at 757–58 (Roberts, C.J., concurring).

81. *Id.* at 758 (Roberts, C.J., concurring).

82. *Id.*

83. *Marks v. United States*, 430 U.S. 188, 193 (1977).

EPA and the Corps responded to the Court's fractured opinion in a 2008 guidance document that adopted the approach suggested by the dissenting Justices, asserting jurisdiction whenever *either* the Kennedy or plurality test was satisfied.⁸⁴ Despite the Chief Justice's concerns regarding the difficulty of interpreting *Rapanos*, lower courts have been fairly uniform in applying the Kennedy test as the decisive test for jurisdiction or in finding that jurisdiction exists whenever *either* the Kennedy or plurality test is met.⁸⁵ Nine circuits have now addressed the issue and *none* of the circuits has held that the plurality test is the exclusive test for jurisdiction.⁸⁶

Although the courts routinely upheld the agencies' interpretation of *Rapanos*, the agencies' 2008 guidance required them to undertake a time consuming, resource intensive process to evaluate, on a case-by-case basis, whether several categories of waters had a "significant nexus" to navigable waters to justify regulation.⁸⁷ The "guidance documents did not provide the public or agency staff with information to ensure timely, consistent and predictable jurisdictional determinations."⁸⁸ In light of Justice Kennedy's suggestion, in *Rapanos*, that the agencies could identify categories of waters that have a "significant nexus" to navigable waters, and the Chief Justice's suggestion, in his *Rapanos* concurrence, that the agencies would be afforded generous leeway by courts if they interpreted the Clean Water Act through regulations, EPA and the Corps initiated notice and comment rulemaking in

84. See U.S. EPA & U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) ("Rapanos Guidance"), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf [<https://perma.cc/3NW6-ZT72>].

85. See JOHNSON, *COURSE SOURCE*, *supra* note 59, at 141–42; Patrick Parenteau, *The Clean Water Rule; Not Dead Yet*, 48 ENVTL. L. 377, 399–400 (2018); J.B. Ruhl, *Proving the Rapanos Significant Nexus*, 33(1) NAT. RES. & ENVT. 1 (2018). The Seventh and Eleventh Circuits have held that the Kennedy test is the exclusive test for jurisdiction. See *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). The Fourth and Ninth Circuits have applied the Kennedy test and reserved the question whether the plurality test could be an alternative test for jurisdiction. See *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2011); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011). The First, Third, and Eighth Circuits have held that jurisdiction exists when either test is met. See *United States v. Donovan*, 661 F.3d 174, 180 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 65–66 (1st Cir. 2006). The Fifth and Sixth Circuits determined that it was unnecessary to identify the required test because the wetlands at issue in the cases they addressed met both tests. See *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 326–327 (5th Cir. 2008).

86. See JOHNSON, *COURSE SOURCE*, *supra* note 59, at 142; Parenteau, *supra* note 85, at 399–400; Ruhl, *supra* note 85, at 1.

87. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

88. *Id.*

2014 to clarify the scope of federal jurisdiction over “waters of the United States.”⁸⁹ The agencies proceeded through rulemaking in order to ensure clarity, predictability, and consistency in determining the scope of federal jurisdiction, developing categorical rules to replace case-by-case decision-making.⁹⁰

During the rulemaking process, the agencies held more than four hundred meetings with state and local officials, tribes, farmers, small businesses, and other stakeholders, provided a comment period of more than two hundred days, and reviewed and responded to more than one million public comments, most of which supported the agencies’ final rule.⁹¹ The agencies based the final rule on the statute, science, their interpretation of the Supreme Court decisions, and their experience and technical expertise in administering the statute.⁹² The primary scientific support for the agencies’ rule was provided by the “Connectivity Study,” an EPA report that synthesized more than 1200 peer reviewed scientific studies and that was reviewed by EPA’s Science Advisory Board.⁹³ The primary legal support for the agencies’ rule was the “significant nexus” test from the Supreme Court decisions, which Justice Kennedy counseled must be assessed in terms of the Clean Water Act’s objectives in Section 101(a) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁹⁴

The 2015 rule continued to regulate traditional navigable waters, interstate waters, the territorial seas, and impoundments of those waters as “waters of the United States.”⁹⁵ The rule also regulated “tributaries” of traditional navigable waters, interstate waters and the territorial seas as “waters of the United States.”⁹⁶ While prior agency regulations regulated tributaries, the agencies did not define “tributaries” in the earlier rules.⁹⁷ The 2015 rule defined “tributaries”

89. See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,188 (April 21, 2014) (to be codified at 33 C.F.R. pt. 328).

90. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,056 (to be codified at 33 C.F.R. pt. 328).

91. *Id.* at 37,057.

92. *Id.* at 37,054–55.

93. *Id.* at 37,057. See also *Connectivity Study*, *supra* note 26.

94. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,056, 37,060 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328). See also Parenteau, *supra* note 85.

95. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,073–76.

96. *Id.* at 37,073.

97. See Parenteau, *supra* note 85, at 389. See also William L. Andreen, *The Evolution of Water Pollution Control in the United States - State, Local, and Federal Efforts, 1789–1972: Part II*, 22 STAN. ENVTL. L.J. 215, 267 (2003); Congressional Research Service, “*Waters of the United States*” (WOTUS): *Current Status of the 2015 Clean Water Rule* (R45424) 2–3 (Updated Dec. 12, 2018) [hereinafter “CRS Report”]. Justice Kennedy, in his concurring opinion in *Rapanos*, expressed concern that the definition of tributaries used by the agencies at the time of the Court’s decision was likely too broad to serve as a categorical basis for regulating wetlands adjacent to

as waters that have a defined bed and banks and an identifiable ordinary high water mark and which flow directly or through another water body to a traditional navigable water, interstate water or the territorial seas.⁹⁸ The definition did not limit “tributaries” to perennially flowing waters.⁹⁹ The agencies defined “tributaries” as “waters of the United States” because they found that Justice Kennedy’s *Rapanos* opinion allowed the agencies to regulate tributaries as a category if they, either alone or in combination with similarly situated waters, significantly affect the chemical, physical, and biological integrity of traditional navigable waters¹⁰⁰ and because they determined that there was a scientific consensus in the Connectivity Study that tributaries, as defined in the final rule, had that significant effect.¹⁰¹ The 2015 rule also defined, as “waters of the United States”, “adjacent waters”, including wetlands, ponds, lakes, and similar waters that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of those waters.¹⁰² “Adjacent” was defined in the rule to mean “bordering, contiguous, or neighboring,” and was not limited to waters that physically abut

those tributaries. *See* 547 U.S. at 780–81. In light of that criticism, the 2015 rule adopted a narrower definition of “tributaries.” *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,058.

98. *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,076. “Ordinary high water mark” is defined as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” *Id.* at 37,126.

99. The agencies concluded that the Connectivity Study and SAB review confirmed that “[t]ributary streams, including perennial, intermittent and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.” *Id.* at 37,057.

100. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,061 (June 29, 2015) (to be codified at 33 C.F.R. 328). The agencies recognized that Justice Kennedy’s opinion only explicitly provided that *wetlands* adjacent to non-navigable tributaries could be regulated as “waters of the United States” if the *wetlands*, either alone or in combination with similarly situated wetlands in the region, significantly affect the chemical, physical, and biological integrity of traditional navigable waters. *Id.* However, they concluded that he only framed his analysis in terms of wetlands because the case before him involved adjacent wetlands, and they concluded that there was no indication in Kennedy’s opinion that the framework for evaluating the “significant nexus” for adjacent wetlands should not also apply to *tributaries* and other waters. *Id.*

101. *Id.* at 37,073. The agencies concluded that “peer-reviewed science and practical experience demonstrate that upstream waters . . . significantly affect the chemical, physical and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical and biological processes.” *Id.* at 37,055.

102. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,073.

other regulated waters.¹⁰³ As with tributaries, the agencies regulated “adjacent waters” in the rule based on a determination that there was a scientific consensus that those waters, either alone or in combination with similarly situated waters, significantly affected traditional navigable waters.¹⁰⁴ In addition to the waters that were categorically defined as “waters of the United States,” the 2015 rule provided that several other categories of waters could be regulated as “waters of the United States” if a case-by-case evaluation determined that they had a “significant nexus” to a traditional navigable water.¹⁰⁵ Finally, the rule

103. *Id.* at 37,080. “Neighboring” includes “all waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary”; “all waters within the 100-year floodplain of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary that is located in whole or in part within 1,500 feet of the ordinary high water mark of that jurisdictional water”; and “all waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas, and all waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.” *Id.* at 37,081.

104. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,073 (June 29, 2015) (to be codified at 33 C.F.R. pt. 382).

105. *Id.* The categories of waters included waters within the 100 year flood plain of traditional navigable waters, interstate waters or territorial seas, waters within 4000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, or territorial seas, and five types of isolated wetlands that are “similarly situated.” *Id.* The isolated wetlands subject to case-by-case analysis include prairie potholes, Delmarva and Carolina bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. *Id.* The agencies affirmed their long-standing narrow interpretation of *SWANCC* as invalidating the migratory bird test, but authorizing regulation of non-navigable intrastate “isolated” waters in appropriate instances. *Id.* at 37,056. The agencies chose to regulate the five categories of isolated waters identified in the rule on a case-by-case basis because they concluded that the wetlands were “similarly situated” for purposes of “significant nexus” evaluation, in light of Justice Kennedy’s suggestion, in his *Rapanos* concurrence, that “the significance of wetlands should be evaluated in the aggregate within the same region.” See Parenteau, *supra* note 85, at 393. In determining whether waters are “similarly situated”, the agencies consider whether the waters “function alike and are sufficiently close to function together in affecting the nearest traditional navigable water, interstate water, or the territorial sea.” See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,065–66. When evaluating whether the waters are similarly situated “in the region,” the agencies determined that “the single point of entry watershed is a reasonable and technically appropriate scale for identifying ‘in the region,’” and that a “single point of entry watershed is the drainage basin within whose boundaries all precipitation ultimately flows to the nearest single traditional navigable water, interstate water, or the territorial sea.” *Id.* at 37,066.

Functions to be considered for the purposes of determining significant nexus are sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of floodwaters, runoff storage, contribution of flow, export of organic matter, export of food resources, and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas.

Id. at 37,091.

categorically excluded several waters, including prior converted cropland, waste treatment systems, certain ditches, and groundwater.¹⁰⁶

In addition to the overwhelming scientific support for the rule, the agencies justified their final rule with an economic analysis that determined that the rule would decrease the scope of regulated waters compared to the existing regulations and historic practice of making jurisdictional determinations and that the annual benefits of the rule would range from \$338.9 million to \$554.9 million, compared to annual costs that would range from \$158 million to \$465 million.¹⁰⁷ The final rule was published on June 29, 2015, with an effective date of August 28, 2015.¹⁰⁸ Despite the strong scientific and economic basis for the rule, the broad public participation in development of the rule, and the potentially limited impacts of the rule, the American Farm Bureau Federation, Chamber of Commerce, National Association of Manufacturers, and dozens of States criticized the rule when it was adopted.¹⁰⁹ The critics were concerned that the rule would expand federal jurisdiction over “waters of the United States” and some States were concerned that the agencies did not adequately consult with them in finalizing the rule.¹¹⁰ While environmental groups generally supported the rule, some felt that the agencies could have identified additional waters categorically as “waters of the United States,” instead of subjecting them to a case-by-case “significant nexus” evaluation.¹¹¹

Within a few months after the rule was finalized, thirty one States, several industry and trade associations, regulated entities, and environmental groups

106. *Id.* at 37,059.

107. See Parenteau, *supra* note 85, at 387–88, 395–96. See also Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,054; EPA & Corps, *Economic Analysis*, *supra* note 27, at x–xi. The agencies acknowledged, though, that while the 2015 rule would reduce jurisdiction compared to the existing regulations and historic practice for determining jurisdiction, it would result in a slight increase (between 2.84% and 4.65%) in positive jurisdictional determinations when compared to the agencies’ recent practice, as opposed to historical practice. See Parenteau, *supra* note 85, at 387–88, 396. See also EPA & Corps, *Economic Analysis*, *supra* note 27, at 12. While EPA’s economic analysis projected benefits for the 2015 rule around \$550 million, a subsequent study by researchers at NYU suggested that the annual benefits of the rule could be as high as \$1 billion. See Derrick Z. Jackson, *Trump Swamp Threatens Waters of the United States*, UNION OF CONCERNED SCIENTISTS BLOG (Jan. 14, 2019, 12:33 PM), <https://blog.ucsusa.org/derrick-jackson/trump-swamp-threatens-waters-of-the-us> [https://perma.cc/E83P-8TBD].

108. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,054.

109. See Parenteau, *supra* note 85, at 379, citing Jenny Hopkinson, *Obama’s Water War*, POLITICO (May 27, 2015), <https://politico.com/story/2015/05/epa-waterways-wetlands-rule-118319> [https://perma.cc/L6ZE-7ZVQ] (last visited Nov. 9, 2019).

110. See CRS Report, *supra* note 97, at 4–6. The American Farm Bureau criticized the rule as a “nightmare” that would reduce the value of some farms by 40%, and John Boehner, then Speaker of the House, called it “a tyrannical power grab that will crush jobs.” See Jackson, *supra* note 107.

111. See CRS Report, *supra* note 97, at 4–6.

brought lawsuits to challenge the rule.¹¹² In light of ambiguity in the Clean Water Act regarding jurisdiction for challenging the WOTUS rule, the lawsuits were brought in federal district courts *and* in federal appellate courts.¹¹³ While the district court cases proceeded in several different courts, the appellate court challenges were consolidated in the U.S. Court of Appeals for the Sixth Circuit.¹¹⁴ On August 27, 2015, *the day before the rule was scheduled to take effect*, a federal district court in North Dakota issued an order that stayed the rule in the thirteen States that had brought the lawsuit.¹¹⁵ On October 9, 2015, *after the rule had been in effect for forty-two days*, the Sixth Circuit issued a nationwide stay of the rule.¹¹⁶ At that point, EPA and the Corps returned to enforcing the rules and guidance documents that were in force before the 2015 rule was adopted.¹¹⁷ As litigation proceeded in the district courts and appellate courts, the National Association of Manufacturers challenged the jurisdiction of the appellate courts to review the rule and the Supreme Court agreed to resolve the jurisdictional question.¹¹⁸

As challenges proceeded in the judicial arena, several bills were introduced in the House of Representatives, as free standing legislation or appropriations riders, to repeal the 2015 rule, to allow the agencies to repeal and replace the

112. See Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,901 (proposed July 27, 2017) (to be codified at 33 C.F.R. 328).

113. *Id.*

114. See *In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). The Judicial Panel on Multidistrict Litigation (“JPML”) denied the Government’s request to consolidate the district court challenges. See *Order Denying Transfer in In re Clean Water Rule*, 140 F. Supp. 3d 1340 (U.S. Jud. Pan. Mult. Lit. 2015).

115. See *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). The court enjoined enforcement of the rule in Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *Id.* The court concluded that the plaintiffs were likely to prevail on the merits because the agencies’ definition of tributary in the rule was too broad and, therefore, arbitrary and capricious and outside of the agencies’ statutory authority. *Id.* at 1055–58. In addition, the court concluded that the agencies’ definition of “neighboring” in the final rule was not a “logical outgrowth” of the definition in the proposed rule. *Id.* at 1058. Three years later, the court extended the scope of the injunction to include Iowa, which had intervened in the lawsuit. See *North Dakota v. U.S. EPA*, 2018 U.S. Dist. LEXIS 180503 (D.N.D. 2018).

116. See *In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015), *vacated by* *Murray Energy Corp. v. U.S. DOD*, 713 Fed. Appx. 489 (6th Cir. 2018). In a very cursory opinion, the court concluded that the challengers demonstrated a substantial possibility of success on their claim that the rule’s “treatment of tributaries, ‘adjacent waters,’ and waters having a ‘significant nexus’ to navigable waters is at odds with the Supreme Court’s ruling in *Rapanos*” and that the distance limitations in the final rule were not a “logical outgrowth” of the proposed rule. *Id.* at 807–08.

117. *Id.*

118. See *Nat’l Ass’n of Mfrs. v. Dept. of Def.*, 137 S. Ct. 811 (2017).

rule without going through notice and comment rulemaking, or to amend the Clean Water Act to narrow the statutory definition of “navigable waters.”¹¹⁹

While the agencies strongly defended the 2015 rule against judicial and legal challenges for several years, that changed abruptly after the election of President Trump. Less than two months after he took office, the President issued Executive Order 13778, entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”¹²⁰ While the President, in the Order, recognized that there is a national interest in keeping navigable waters free from pollution, he stressed that the goal should be achieved while “promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”¹²¹ He then directed the EPA and the Corps to review the 2015 WOTUS rule for consistency with the policies of the Executive Order and to rescind or revise the rule.¹²² Finally, although none of the federal appellate courts have adopted the plurality opinion of *Rapanos* as the appropriate test to serve as the sole basis for determining jurisdiction under the Clean Water Act, Section 3 of the President’s Executive Order directs the agencies, when revising the 2015 rule, to “consider interpreting the term ‘navigable waters’ [in the Clean Water Act] . . . in a manner consistent with the [plurality] opinion . . . in *Rapanos*.”¹²³

II. ADMINISTRATIVE LAW PRIMER: HOW TO REPEAL AND REPLACE A RULE; LESSONS NOT LEARNED BY THE TRUMP ADMINISTRATION

When a new President is elected, especially when the new President is a member of a different political party than the outgoing President, it is not unusual for the President to make major changes in policies and to attempt to revoke or replace regulations adopted by prior Administrations.¹²⁴ While it is relatively easy, at least procedurally, to change policies adopted in Executive Orders or through informal procedures such as non-legislative rulemaking and informal adjudication, it is much more difficult to change regulations that were adopted through notice and comment rulemaking.¹²⁵ There are significant

119. See *CRS Report*, *supra* note 97, at 9–10 (listing nine legislative proposals in the House of Representatives and a Senate resolution).

120. See Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

121. *Id.*

122. *Id.*

123. *Id.*

124. See *supra* note 3.

125. Non-legislative rules, such as interpretive rules and policy statements are exempt from the notice and comment rulemaking procedures of the APA, see 5 U.S.C. § 553(b)(3)(A) (2012), and the APA imposes few procedural limits on decisions made through informal adjudication, other than a requirement that agencies provide prompt notice when denying a written application, petition, or other request of an interested person in connection with an agency proceeding, and a

procedural *and* substantive hurdles that the new administration must overcome in order to rescind and replace legislative rules.

First, when an agency has adopted a legislative rule through notice and comment rulemaking, it can only change that rule by adopting a new rule through notice and comment rulemaking.¹²⁶ While the notice and comment procedures of the Administrative Procedures Act (“APA”) seem minimal when compared to the procedures required for formal rulemaking,¹²⁷ courts have interpreted the notice and comment procedural requirements in ways that make informal rulemaking quite rigorous. For instance, the APA requires agencies to publish proposed rules in the Federal Register and to provide an opportunity for the public to comment on the rules, but the law does not explicitly set a minimum length for the comment period.¹²⁸ Nevertheless, courts have read the statute to require agencies to provide a “meaningful” opportunity for comment¹²⁹ and have struck down agency rules when the agency establishes a comment period that does not provide the public with an adequate opportunity to evaluate the proposed rule and provide comments.¹³⁰ A “meaningful” opportunity to

brief statement of the grounds for the denial. *Id.* at § 555(e). Executive Orders can be changed by subsequent Executive Orders.

126. *See* *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *Nat’l Fam. Plan. & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992). Even if the agency only plans to repeal the rule, rather than replace the rule, it must use notice and comment rulemaking to repeal the rule. *See* *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987); *Env’tl. Def. Fund v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983) (highlighting APA Section 551(5)’s inclusion of “repeal of a rule” as a form of rulemaking).

127. *See* 5 U.S.C. §§ 556–57 (2011).

128. *See, e.g., North Carolina Growers Ass’n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012). Although the APA does not set a minimum length for comment periods, Executive Order 12866 suggests that “in most cases,” the comment period for a rule should be at least sixty days. *See* Exec. Order No. 12,866 § 6, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

129. *See North Carolina Growers Ass’n*, 702 F.3d at 764. *See also* *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (3d Cir. 2011); *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). As the Third Circuit recognized, the purposes of the notice and comment requirements are “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *See* *Prometheus Radio Project*, 652 F.3d at 449; *accord Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995).

130. *See North Carolina Growers Ass’n v. UFW*, 702 F.3d at 770. In *North Carolina Growers*, the court concluded that a ten-day comment period was inadequate in light of the complexity of the rulemaking. *Id.* The court suggested that the instances in which a ten-day comment period would be adequate were rare. *Id.* In addition, the court noted that the agency received 11,000 comments on the rule that was being amended in the case in an earlier rulemaking after a sixty day comment period, while the agency only received 800 comments on the proposal being reviewed by the court when the agency provided a ten-day comment period. *Id.*

comment has been held to mean “enough time with enough information to comment” in light of the complexity of a rule.¹³¹

In addition to requiring agencies to provide the public with a sufficiently long period of time to comment on a proposed rule, courts have required agencies, in order to provide a “meaningful” opportunity for comment, to remain open-minded during the comment period.¹³² If an agency has an “unalterably closed mind” during the comment period, courts have held that the agency has not provided the required “meaningful” opportunity for public comment.¹³³ As the United States Court of Appeals for the D.C. Circuit has noted, “[c]onsideration of comments as a matter of grace is not enough.”¹³⁴

Similarly, in order to provide a “meaningful” opportunity for comment, an agency must provide the public with the basic data and information necessary to provide them with an opportunity to comment¹³⁵ and may not refuse to allow comment on major policy issues that the agency will be considering in finalizing the rule.¹³⁶ In *North Carolina Growers Association v. United Farm Workers*, shortly after a change in Presidential administrations, the Department of Labor adopted a rule to suspend rules that the agency previously adopted addressing the temporary admission of foreign workers to engage in agricultural jobs and to reinstate the rules that were in place prior to the rules that would be suspended.¹³⁷ Although the agency allowed the public to comment on the agency’s decision to suspend the rules, the agency indicated that it would not consider comments on the merits of the rules that were being suspended *or* the rules that were being reinstated.¹³⁸ The United States Court of Appeals for the Fourth Circuit invalidated the agency’s suspension rule, finding that the agency violated the APA’s procedures when it “refused to receive comments on and to

131. See *Prometheus Radio Project*, 652 F.3d at 453.

132. See *id.*; *Advoc. for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1291 (D.C. Cir. 1994); *Alaska Factory Trawler Ass’n v. Baldrige*, 831 F.2d 1456, 1467 (9th Cir. 1987); *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985); *Ass’n of Nat’l Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

133. See *McClouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (finding that the EPA was applying a RCRA policy regarding computation of contamination levels as a rule and that the agency failed to provide an adequate opportunity for comment on the rule because the agency reacted to the comments with a closed mind); *Nat’l Tour Brokers Ass’n v. U.S.*, 591 F.2d 896, 902 (D.C. Cir. 1978). See also *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008); *Intl Snowmobile Mfrs Assoc v. Norton*, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004); *Air Transp. Assn of Am. v. Hernandez*, 264 F. Supp. 227, 231–32 (D.D.C. 1967).

134. See *McClouth*, 838 F.2d at 1323.

135. See *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

136. See *North Carolina Growers Ass’n*, 702 F.3d at 769–70.

137. *Id.* at 759–61.

138. *Id.* at 761.

consider or explain relevant and significant issues” in the rulemaking.¹³⁹ The court noted that the comments that were foreclosed were “integral to the proposed agency action and the conditions that such action sought to alleviate.”¹⁴⁰ When an agency forecloses consideration of such integral information, the agency is not only violating the APA procedural requirements,¹⁴¹ but the agency is acting arbitrarily and capriciously, as it is failing to “consider an important aspect of the problem,”¹⁴² as the Supreme Court recognized in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*¹⁴³

Beyond these procedural roadblocks imposed by the APA, agencies face substantive roadblocks when repealing or changing legislative rules. While a change in Presidential administration may be an appropriate reason for an agency to reassess its legal interpretations and policies, the change in administration is not a sufficient justification, in and of itself, for changes to those interpretations and policies.¹⁴⁴ The Supreme Court has clearly provided that when an agency changes a policy, it must acknowledge that it is changing the policy *and* it must provide “good reasons” or a “reasoned analysis”¹⁴⁵ for the change, or the agency’s change will be held to be arbitrary and capricious.¹⁴⁶ As the Court stressed in *Encino Motorcars, LLC v. Navarro*, in light of the “hard look” arbitrary and capricious review established in *State Farm*, an agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁴⁷ When an agency supports a rule with factual findings and legal conclusions, it cannot simply ignore those findings and conclusions when it repeals or changes the rule, but must explain the reasons for the changes.¹⁴⁸ An “unexplained inconsistency” in

139. *Id.* at 770.

140. *Id.* at 769–70.

141. The *North Carolina Growers Ass’n* court held that the Department of Labor did not provide a “meaningful” opportunity for comment on the suspension rule by foreclosing comment on the substance of the rules that would be suspended or reinstated. *See* 702 F.3d at 770 (*citing Prometheus Radio Project*, 652 F.3d at 450).

142. *See North Carolina Growers Ass’n*, 702 F.3d at 769–70.

143. *See* 463 U.S. at 43.

144. *See Buzbee*, *supra* note 21, at 1396; Lisa Heinzerling, *Laying Down the Law on Rule Delays*, REG. REV. 2 (June 4, 2018), <https://www.theregreview.org/2018/06/04/heinzerling-laying-down-law-rule-delays/> [<https://perma.cc/EU3N-BE7Y>].

145. *See State Farm*, 463 U.S. at 57.

146. *See Encino*, 136 S. Ct. at 2126. The APA “requires that the pivot from one administration’s priorities to those of the next be accomplished with at least some fidelity to law and legal process.” *See South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018).

147. *Encino*, 136 S. Ct. at 2125 (*citing Motor Vehicle Mfrs. Ass’n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

148. *Id.* at 2126. The *Encino* Court held that “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Id.* (*citing FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515–16 (2009)). As in *Fox*, the Court noted that the policy

agency policy is a reason for holding the change in policy to be arbitrary and capricious.¹⁴⁹

As Professor William Buzbee has noted, *Encino*, *State Farm*, and the Court's decision in *Massachusetts v. EPA*¹⁵⁰ require that agencies "engage with the 'facts and circumstances that under[lay]' earlier agency actions" and acknowledge and explain the reasons for changes in the agency's fact-finding, scientific conclusions, and legal conclusions that supported the earlier actions.¹⁵¹ He notes that "[a]gency policy is rarely . . . generated due to statutory language alone," but also on "contingencies," factors outside of the statutory text such as factual and scientific assumptions, political factors, and agency expertise, so agencies cannot simply reinterpret statutory language when there is a change in administration, but must explain why the contingencies have changed or why the agency is no longer motivated by the contingencies.¹⁵² Thus, he argues, in most cases, an agency cannot justify rescission and replacement of a rule solely by arguing that the agency has re-interpreted the scope of its statutory authority and concluded that it did not have the authority to issue the rule in the first place, but must also address the "contingencies" upon which the earlier rule was based.¹⁵³ In the context of the 2015 WOTUS rule, therefore, the EPA and the Corps will not be able to simply "re-interpret" the scope of the agencies' authority under the Clean Water Act and ignore the overwhelming body of scientific and economic support for the rule when repealing or replacing it. They

that the agency is changing "may have 'engendered serious reliance interests that must be taken into account.'" *Id.*

149. *Id.*

150. See 549 U.S. 497 (2007).

151. See Buzbee, *supra* note 21, at 1401.

152. *Id.* at 1360–62. As Justice Kennedy wrote in *Fox*, "an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." See 556 U.S. at 537 (Kennedy, J., concurring). Professor Buzbee argues that to the extent that statutes require agencies to consider various scientific factors or to exercise their expertise, courts may be less willing to uphold policy changes that are driven by political choices, as opposed to the science or agency expertise. See Buzbee, *supra* note 21, at 1362 (citing Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 565–66 (2011)); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6–8 (2009).

153. See Buzbee, *supra* note 21, at 1434–35. Professor Buzbee argues that an agency will need to engage with the contingencies underlying a rule that is being repealed or changed when the agency changes its statutory interpretation upon which the rule was based and both the old and new interpretations are tenable. *Id.* However, he acknowledges that there may be rare instances where an agency can convince a court that there was no support for its earlier statutory interpretation and the court will allow the agency to repeal or change the rule that was based on the invalid statutory interpretation without requiring the agency to engage with the contingencies underlying the prior rule. *Id.* at 1436–37.

will need to engage with it and explain why the scientific and economic assumptions that they made four years ago are no longer valid or why the agencies no longer feel that those assumptions support the rule.

In the first three years after President Trump took office, although the Administration aggressively pursued a de-regulatory agenda,¹⁵⁴ environmental and other agencies repeatedly failed to comply with the procedural and substantive requirements outlined above for repealing and replacing legislative rules, so courts repeatedly struck down their efforts to roll back those rules.¹⁵⁵ While federal agencies historically have prevailed in about 70% of the cases brought against them alleging violations of the Administrative Procedures Act, federal agencies in the Trump Administration only prevailed in about 6% of the cases decided by March, 2019.¹⁵⁶

Clean Air Council v. Pruitt is an example of the trend.¹⁵⁷ During the Obama Administration, EPA adopted regulations which went into effect in August 2017 for fugitive emissions of methane and other pollutants created by the oil and natural gas industries.¹⁵⁸ After the change in Administration, as the date that industries were required to conduct their first surveys under the regulations approached, EPA published a notice in the Federal Register, indicating that it

154. In the first two years after he took office, President Trump's Administration attempted to repeal or replace 24 environmental rules adopted during the Obama Administration. See Marissa Horn, *24 Environmental Rules Trump is Rolling Back*, BLOOMBERG ENV'T (Aug. 23, 2018, 7:59 AM), <https://news.bloombergenvironment.com/environment-and-energy/24-environmental-rules-trump-is-rolling-back-1> [<https://perma.cc/Y7TK-5HDW>]. The Brookings Institute maintains a de-regulatory tracker to document the broader efforts of the Trump Administration to repeal and or replace regulations from prior administrations. See Brookings Institution, *Tracking Deregulation in the Trump Era* (Sept. 23, 2019), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> (last visited Nov. 9, 2019).

155. Although this section of the Article is focusing on judicial invalidation of the Administration's efforts to roll back *environmental* rules, the Administration has faced similar obstacles in court when attempting to roll back regulations outside of the environmental context. See, e.g., *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615 (4th Cir. 2018) (invalidating HHS rule that changed the methodology for calculating financial assistance for hospitals); *Nat'l Venture Cap. Ass'n v. Duke*, 291 F. Supp. 3d 5 (D.D.C. 2017) (invalidating a rule to delay implementation of immigration regulations); *Open Communities All. v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017) (invalidating a HUD rule to delay a prior public housing regulation); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017) (invalidating rules modifying Affordable Care act regulations).

156. See Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST, Mar. 19, 2019.

157. 862 F.3d 1, 4 (D.C. Cir. 2017) (holding that the Clean Air Act did not allow the EPA to stay implementation of several provisions of a final rule regarding methane and other greenhouse gases, and granting motion to vacate the stay against the EPA's wishes).

158. Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824, 35,825 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60).

was staying the regulations for ninety days pending reconsideration.¹⁵⁹ Although the agency subsequently published a notice of proposed rulemaking to extend the stay for two years and to reconsider the regulations,¹⁶⁰ the agency did not use notice and comment rulemaking to stay the regulations for the initial ninety days. In response to challenges by several environmental groups, the U.S. Court of Appeals for the D.C. Circuit struck down the stay of the regulations, dismissing the agency's assertion that it had inherent authority to briefly stay regulations without going through notice and comment rulemaking while it reconsidered them¹⁶¹ and rejecting the agency's claim that the language of the Clean Air Act authorized the agency to stay the regulations pending reconsideration without going through notice and comment rulemaking.¹⁶²

A year later, in *Air Alliance Houston v. EPA*, the D.C. Circuit struck down another EPA rule that was designed to repeal and replace an Obama Administration Clean Air Act regulation.¹⁶³ On January 13, 2017, EPA adopted regulations to prevent the accidental release and to minimize the consequences of release of various hazardous substances (the "Chemical Disaster Rule").¹⁶⁴ After the change in administration, EPA issued a rule to delay the effective date of the accidental release regulations for almost two years, pending the agency's reconsideration of the rule.¹⁶⁵ Although the agency used notice and comment rulemaking to adopt the rule that delayed the accidental release regulations, the Clean Air Act only authorized the agency to stay such regulations pending reconsideration for ninety days.¹⁶⁶ When community groups, environmental groups, and states challenged the agency's action, the court invalidated the delay rule, finding that the agency lacked statutory authority to stay the rule beyond ninety days.¹⁶⁷ The court also held that EPA's promulgation of the delay rule

159. Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25,730, 25,730–31 (June 5, 2017).

160. See Emission Standards for New, Reconstructed, and Modified Sources; Stay of Certain Requirements, 82 Fed. Reg. 27,645 (proposed June 16, 2017) (to be codified at 40 C.F.R. pt. 60).

161. The court stressed that "it is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress.'" *Clean Air Council*, 862 F.3d at 8 (quoting *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014)).

162. *Clean Air Council*, 862 F.3d at 9–10. The Court noted that section 307(d)(7)(B) of the Clean Air Act authorized EPA to stay rules, but only when a petitioner presented an objection of "central relevance" that was "impracticable" to raise during the public comment period, and the court concluded that those pre-requisites were not met in the case. *Id.*

163. 906 F.3d 1049, 1053 (D.C. Cir. 2018). Justice Kavanaugh was a member of the panel when the case was argued, but did not participate in the decision. *Id.* at 1052.

164. See Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017) (to be codified at 40 C.F.R. pt. 68).

165. See Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017) (to be codified at 40 C.F.R. pt. 68).

166. 42 U.S.C. § 7607(d)(7)(B) (2012).

167. *Air All. Houston*, 906 F.3d at 1060–61.

was arbitrary and capricious because the agency didn't adequately explain its change in position, as required by *Encino*, *Fox*, and *State Farm*.¹⁶⁸ Specifically, the court noted that EPA failed to explain "its departure from [the agency's] previous conclusions regarding the appropriate and practicable timeline for implementing the Chemical Disaster Rule" and failed to "explain why the detailed factual findings . . . [supporting the Chemical Disaster Rule were] now only 'speculative.'"¹⁶⁹

The Second Circuit also struck down an effort by a different agency to roll back environmental protections in *Natural Resources Defense Council v. National Highway Traffic Safety Administration*.¹⁷⁰ On December 28, 2016, the National Highway Traffic Safety Administration ("NHTSA") issued a final rule to increase the civil penalties for violations of the corporate average fuel economy ("CAFE") standards.¹⁷¹ On July 12, 2017, after the change in Administration, NHTSA issued a final rule, without providing notice or an opportunity for comment on a proposed rule, to delay the December 2016 civil penalty rule "indefinitely" pending reconsideration.¹⁷² The Second Circuit held that the statute pursuant to which NHTSA acted did not authorize the agency to indefinitely delay the civil penalty regulations.¹⁷³ The court also found that NHTSA violated the APA in issuing its final rule, because the agency did not provide notice and an opportunity for comment on a proposed rule and because the agency's rule did not fit within the APA's "good cause" exemption from the notice and comment procedural requirements.¹⁷⁴

Attempts to roll back environmental regulations have also been invalidated at the federal district court level. For instance, in *California v. U.S. Bureau of Land Management*, the United States District Court for the Northern District of California struck down a rule issued by the Department of Interior ("DOI"), without going through notice and comment procedures, that would postpone the *compliance* deadlines for regulations that had gone into effect during the Obama Administration to regulate venting and flaring of natural gas, and royalties from those activities.¹⁷⁵ DOI argued that Section 705 of the APA authorized the agency to postpone the regulations' compliance deadlines, as it authorizes agencies, "when [they find] that justice so requires, [to] postpone the *effective*

168. *Id.* at 1066.

169. *Id.* at 1067 (citing *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date*, 82 Fed. Reg. at 27,139).

170. 894 F.3d 95, 100 (2d Cir. 2018).

171. NHTSA Civil Penalties, 81 Fed. Reg. 95,489 (Dec. 28, 2016) (to be codified at 49 C.F.R. pt. 578).

172. NHTSA Civil Penalties, 82 Fed. Reg. 32,139 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578).

173. *Nat. Res. Def. Council*, 894 F.3d at 108.

174. *Id.* at 113–15.

175. 277 F. Supp. 3d 1106, 1111–12 (N.D. Cal. 2017).

date of action taken by [them], pending judicial review.”¹⁷⁶ The court, however, held that while Section 705 authorizes the delay of the *effective* date of a regulation that is not yet in effect, it does not authorize the delay of the *compliance date* of a regulation.¹⁷⁷ The court also held that the indefinite postponement of the compliance dates in the prior regulation was tantamount to the repeal of that regulation, which could not be done without following notice and comment procedures.¹⁷⁸ The court’s decision was widely expected, because the same court issued an almost identical ruling against DOI in the prior year, in *Becerra v. United States DOI*.¹⁷⁹

These cases demonstrate a pattern of arrogance or simply indifference to the procedural and substantive requirements of the APA that apply to the repeal and replacement of legislative rules. As will be examined in Parts V through VII of this Article, that pattern continues with the Administration’s efforts to repeal and replace the 2015 WOTUS rule.

III. EPA AND THE CORPS’ EFFORTS TO RESCIND AND REPLACE THE 2015 WOTUS RULE

EPA and the Corps began their efforts to rescind and replace their 2015 rule shortly after President Trump issued Executive Order 13778 directing them to take those actions. Instead of moving ahead with a proposed rule to amend the definition of “waters of the United States” in the manner suggested by the Executive Order, though, the agencies decided to amend the rule through a two-step process. As a first step, the agencies planned to adopt a regulation that would rescind the 2015 regulation and would re-codify the regulatory definition of “waters of the United States” that existed prior to the adoption of the 2015 regulation.¹⁸⁰ Those regulations, and the agencies’ guidance interpreting those regulations, were being implemented in most of the country at the time because the Sixth Circuit had issued a nationwide stay of the 2015 rule.¹⁸¹ However, the agencies realized that the nationwide stay might be lifted if the Supreme Court,

176. *Id.* at 1117–18 (emphasis added) (quoting 5 U.S.C. § 705 (2012)).

177. *Id.* at 1118.

178. *Id.* at 1121.

179. See 276 F. Supp. 3d 953, 964–65 (N.D. Cal. 2017). In another case, *Pineros y Campesinos Unidos v. Pruitt*, the District Court for the Northern District of California invalidated EPA’s efforts, without going through notice and comment rulemaking, to delay the effective date of regulations addressing the certification and use of “restricted use pesticides.” 293 F. Supp. 3d 1062, 1062–64, 1066–67 (N.D. Cal. 2018). The court rejected EPA’s claim that the agency could finalize its delay rule by relying on the “good cause” exception to the notice and comment requirements. *Id.* at 1066–67.

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

181. See *supra* note 116 and accompanying text; *In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804, 807–08 (6th Cir. 2015), *vacated*, 713 F. App’x. 489 (6th Cir. 2018).

in the case before it at the time, ultimately concluded that the federal appellate courts lacked jurisdiction to hear the initial challenges to the 2015 rule. The agencies likely anticipated that the Step One (“repeal”) rulemaking would ensure that the pre-2015 regulations would be implemented during the time that it would take to develop a rule consistent with the Executive Order. As the second step of the agencies’ two-step process, the agencies planned to adopt a regulation that would replace the pre-2015 regulations and define “waters of the United States” in a manner consistent with Justice Scalia’s plurality opinion in *Rapanos*.¹⁸²

The agencies published a notice of proposed rulemaking for the “Step One” rule on July 27, 2017 and were, once again, flooded with comments.¹⁸³ It soon became apparent that the agencies would not be able to finalize the Step One rule to rescind the 2015 rule before the Supreme Court reached a decision that could trigger a vacation of the Sixth Circuit stay and reinstatement of the 2015 rule. As a result, on November 22, 2017, the agencies issued a notice of proposed rulemaking to add an “applicability date” to the 2015 rule that would delay implementation of the rule for two additional years.¹⁸⁴ In less than 3 months, on February 6, 2018, the agencies finalized that rule (“the suspension rule” or “applicability date” rule), which provided that the 2015 rule would not be applicable until February 6, 2020.¹⁸⁵

As the agencies anticipated, the Supreme Court reached a decision regarding the jurisdictional question before the Step One rule was finalized. On January 22, 2018, in *National Association of Manufacturers v. Department of Defense*, the Court held that challenges to the agencies’ regulations defining “waters of the United States” should be brought in federal district court.¹⁸⁶ Consequently, the United States Court of Appeals for the Sixth Circuit vacated its nationwide stay of the 2015 rule and dismissed all of the consolidated circuit court challenges to the rule.¹⁸⁷ Although the Sixth Circuit vacated its stay of the 2015 rule, the agencies’ applicability date rule prevented the 2015 rule from being implemented at that time.

182. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,902.

183. See Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,899. The agencies received more than 780,000 comments on the proposal. *Waters of the United States—Reinstatement of Preexisting Rules*, EPA Docket # EPA-HQ-OW-2017-0203, ENV’T PROT. AGENCY, <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0203> [https://perma.cc/ESZ9-APF7].

184. Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (proposed Nov. 22, 2017) (to be codified at 33 C.F.R. pt. 328).

185. Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

186. 138 S. Ct. 617, 621 (2018).

187. See *In re EPA & Dep’t of Def. Final Rule*, 713 F. App’x 489, 490–91 (6th Cir. 2018).

After the Supreme Court issued its ruling, several lawsuits challenging the 2015 rule that had been stayed pending the outcome of the Supreme Court's resolution of the jurisdictional issue moved forward.¹⁸⁸ The United States had no interest in defending the 2015 rule on the merits in those lawsuits, so the government urged the courts to continue to stay the litigation because the applicability date rule prevented enforcement of the 2015 rule until 2020, by which time the agencies would have adopted new rules to replace the 2015 rule, so the challenges would be moot.¹⁸⁹ Most courts rejected the government's pleas and continued the lawsuits, although the government did little to defend the rule on the merits.¹⁹⁰ Federal district courts in Georgia and Texas eventually stayed the enforcement of the 2015 rule in fourteen states.¹⁹¹

188. See, e.g., Order at 3, *North Dakota v. U.S. Env't Prot. Agency*, No. 3:15-cv-59 (D.N.D. Mar. 23, 2015), ECF No. 185; Order, *Georgia v. Pruitt*, No. 2:15-cv-79 (S.D. Ga. Mar. 9, 2015), ECF No. 144.

189. See Order, *North Dakota v. U.S. Env't Prot. Agency*, *supra* note 188, at 10–11; Order, *Georgia v. Pruitt*, *supra* note 188.

190. See Order, *North Dakota v. U.S. Env't Prot. Agency*, *supra* note 188, at 15–16; Order, *Georgia v. Pruitt*, *supra* note 188. While many of the district court challenges proceeded after the Supreme Court's decision, two cases in Oklahoma were "administratively closed" at EPA's request, while the agencies continued their rulemaking efforts. See Administrative Closing Order at 2–3, *Oklahoma v. U.S. Env't Prot. Agency*, No. 4:15-cv-381 (N.D. Okla. Mar. 9, 2018), ECF No. 56; Administrative Closing Order, *Chamber of Commerce of the U.S.A. v. U.S. Env't Prot. Agency*, No. 4:15-cv-386 (N.D. Okla. Mar. 9, 2018), ECF No. 64. As EPA refused to defend the 2015 rule on the merits in litigation, intervenors have stepped in to defend the rule. See Steven M. Sellers, *Environmental Groups Get Nod to Enter EPA Clean Water Suit*, BLOOMBERG L. (Feb. 4, 2019, 11:01 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/environmental-groups-get-nod-to-enter-epa-clean-water-suit> [<https://perma.cc/A4L4-AQQL>]. NRDC and the National Wildlife Federation are defending the rule in *Ohio v. EPA*, litigation proceeding in the Southern District of Ohio. *Id.*

191. See *Georgia v. Pruitt*, 326 F. Supp. 3d, 1356, 1370 (S.D. Ga. 2018); *Texas v. U.S. Env't Prot. Agency*, No. 3:15-CV-00162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018). The district court in Texas rejected the plaintiffs' request for a nationwide injunction and stayed enforcement of the rule in Texas, Louisiana, and Mississippi. *Texas v. U.S. EPA*, 2018 WL 4518230, at *1–2. The court did not directly address the merits of the plaintiffs' challenges but reasoned that, "[w]ere the Court not to temporarily enjoin the Rule now, it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review." *Id.* at *1. The district court in Georgia enjoined enforcement of the rule in Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. *Georgia v. Pruitt*, 326 F. Supp. 3d at 1370. That court concluded that the plaintiffs' were likely to prevail on their claims that the 2015 rule violated the APA procedures and was arbitrary and capricious. *Id.* at 1365. The United States was forced with a difficult choice when defending the rule in those cases, regarding the remedy. See Amanda Reilly & Ariel Wittenberg, *Supreme Court Ruling Complicates Next Steps on WOTUS*, E&E NEWS (Jan. 22, 2018), <https://www.eenews.net/stories/1060071583> [<https://perma.cc/8678-V8KB>]. Historically, the federal government has strongly contested the authority of federal district courts to issue nationwide injunctions. See Parenteau, *supra* note 85, at 403. However, the government wanted the 2015 rule to be struck down nationwide and the Supreme Court's decision funneled

While the lawsuits challenging the 2015 rule moved ahead, environmental groups and States brought lawsuits to challenge the agencies' applicability date rule.¹⁹² On August 16, 2018, the United States District Court for the District of South Carolina struck down the applicability date rule and issued a nationwide injunction against enforcement of the rule.¹⁹³ As a result, after that date, the 2015 rule was in force in twenty-two states, while the pre-2015 rules were in force in the twenty-eight states that were covered by the injunctions issued in North Dakota, Georgia, and Texas.¹⁹⁴

The agencies' quest to repeal and replace the 2015 rule continued on February 14, 2019, when EPA and the Corps published a notice of proposed rulemaking for the Step Two ("replacement") rule that would adopt the *Rapanos* plurality definition of "waters of the United States."¹⁹⁵ For those keeping score at home, that means that the agencies proposed or adopted *three* rules to repeal or replace the 2015 rule or to prevent it from being implemented. In each of those three rulemakings, though, the agencies ignored the lessons that the Administration should have learned from the plethora of failed rulemakings outlined in the preceding section, and the agencies failed to comply with the basic procedural and substantive requirements that must be followed when agencies repeal or replace regulations. The next sections of this Article explore the fundamental errors that the agencies made in the Step One rulemaking, Applicability Date rulemaking, and Step Two rulemaking.

IV. FLAWS IN THE STEP ONE ("REPEAL") RULEMAKING

A. *The Initial Notice of Proposed Rulemaking*

EPA and the Corps published their notice of proposed rulemaking for the Step One rule to repeal the 2015 rule and replace it with the pre-2015 regulations on July 27, 2017.¹⁹⁶ The agencies indicated that the purpose of the rulemaking was to provide consistency, clarity, and continuity.¹⁹⁷ While the agencies had adopted the 2015 rule to provide predictability, clarity and consistency, the Sixth

challenges to the rule to the federal district courts. Despite their interest in uniformity and a nationwide return to the pre-2015 rules, the agencies opposed requests in the district courts to enjoin the rule on a nationwide basis. For an interesting examination of nationwide injunctions, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

192. See *infra* notes 260–268 and accompanying text.

193. S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 969–70 (D. S.C. 2018).

194. On July 26, 2019, the U.S. District Court for the District of Oregon enjoined the enforcement of the 2015 rule in Oregon, as well. See Order, Or. Cattlemens Assn. v. U.S. Env't Prot. Agency, No. 3:19-cv-00564-AC (D. Or. July 26, 2019), ECF No. 58.

195. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4154–55 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

196. See *supra* note 180 and accompanying text.

197. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,902 (proposed July 27, 2017) (to be codified at 33 C.F.R. 328).

Circuit nationwide stay of the 2015 rule was in place at the time the agencies issued their Step One proposal, so the agencies were enforcing the pre-2015 regulations. If, however, the Supreme Court concluded, as it ultimately did, that the Sixth Circuit did not have authority to hear challenges to the 2015 rule and stay the rule, the agencies were concerned that, after the stay was lifted, the 2015 rule would be enforced in parts of the country, while the pre-2015 regulations would be enforced in other parts of the country, and it might be unclear which rules applied in which parts of the country.¹⁹⁸ The agencies argued that their proposal to reinstate the pre-2015 regulations nationwide would avoid that fractured scenario, thus promoting consistency, clarity and continuity.¹⁹⁹

While the agencies, in the 2015 rule, stressed the centrality of the objectives of Section 101(a), the agencies in the Step One proposal stressed, instead, the policy of Section 101(b) of the Clean Water Act 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.”²⁰⁰ While the agencies, in the 2015 rule, stressed the important role that science plays in determining which waters should be regulated to meet the objectives of Section 101(a), the agencies in the Step One proposal stressed that the “significant nexus” determination “is not a purely scientific determination” and that the determination of what waters should be regulated should be guided by the objectives and goals of the Clean Water Act, including Section 101(b).²⁰¹ Consequently, they spent very little time addressing the science supporting the 2015 rule in their Step One proposal.

While the agencies, in the 2015 rule, forecast that the economic benefits of the rule would clearly exceed the costs of the rule, the agencies, in the Step One rulemaking proposal, only two years later, determined that the costs that would be avoided by repealing the 2015 rule and returning to the pre-2015 regulatory regime, were between four and seven times as high as the benefits that would be lost by repealing the 2015 rule.²⁰²

The agencies set an initial comment period of thirty days, but the agencies limited the scope of the comments that they were willing to accept.²⁰³ Specifically, the agencies indicated that they were soliciting comments “as to whether it is desirable and appropriate to re-codify in regulation the *status quo*

198. *Id.* at 34,902–03.

199. *Id.* at 34,903.

200. *Id.* at 34,900.

201. *Id.* at 34,902.

202. *Economic Analysis for the Proposed Definition of “Waters of the United States”—Recodification of Pre-existing Rules*, U. S. ENVTL PROT. AGENCY, 8–12 (June 2017), https://www.eenews.net/assets/2017/07/07/document_gw_04.pdf [<https://perma.cc/KTE2-98RG>].

203. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. at 34,899, 34,903 (proposed July 27, 2017) (to be codified at 33 C.F.R. 328).

as an interim first step pending a substantive rulemaking to reconsider the definition of “waters of the United States” and that they would not consider comments addressing the pre-2015 regulatory definition of “waters of the United States” or any future changes to the definition of “waters of the United States.”²⁰⁴

1. Flaws in the Initial Notice of Proposed Rulemaking

If the agencies had finalized the Step One rule as proposed, based on the justifications in the notice of proposed rulemaking, the rule would very likely have been quickly invalidated.²⁰⁵ First, the agencies’ refusal to allow commenters to address the pre-2015 regulatory regime or any future changes to the definition of “waters of the United States” to replace the 2015 rule was precisely the type of action that the *North Carolina Growers Association* court held was “arbitrary and capricious” and deprived the public of their “opportunity to comment” under the APA.²⁰⁶ Similarly, the agencies’ limit on comments, coupled with the tone of the rulemaking, suggested that the agencies were proceeding with an “unalterably closed mind,” foreclosing the public’s opportunity for meaningful comment on the rule.²⁰⁷ In addition, as in the *Air Alliance Houston* case, the agencies ignored the mandates of *Encino*, *Fox*, and *State Farm* and failed to adequately address the reasons that they were abandoning the vast body of scientific, factual, and legal justifications for the 2015 rule that they relied on just two years earlier.²⁰⁸ Finally, as many have noted, the agencies’ re-evaluation of the economic costs and benefits of the 2015 rule appeared arbitrary and capricious.²⁰⁹ The change in the agencies’ calculation of the costs and benefits for the 2015 rule and for the repeal of the 2015 rule was driven primarily by the fact that the agencies significantly reduced their calculation of the economic benefits associated with wetlands conservation in the Step One rulemaking.²¹⁰ The agencies reduced their calculation because

204. *Id.* at 34,903.

205. *See* Parenteau, *supra* note 85, at 382.

206. *See supra* notes 137–143 and accompanying text.

207. *See supra* notes 132–134 and accompanying text.

208. *See supra* notes 163–169 and accompanying text. *See also* Parenteau, *supra* note 85, at 382. As Professor Parenteau notes, neither the data used to support the 2015 rule nor the caselaw supporting the 2015 rule nor the economic benefits of the 2015 changed in the two years between the adoption of the 2015 rule and the agencies’ proposed repeal. *Id.* at 406. The only justification provided by the agencies for their change in position is that the 2015 rulemaking did not include enough discussion of the importance of Section 101(b) of the Clean Water Act in determining jurisdiction under the Act. *Id.*

209. *Id.* at 396–97. *See also* McCarthy, et al., *supra* note 11, at 10,769; James Goodwin, *Practitioner Insights: Fuzzy Math to Assault Environmental Rules*, 48 ENV’T. REP. 1559, 1560 (Sept. 29, 2017).

210. *See* Parenteau, *supra* note 85, at 396. Those benefits accounted for almost 90% of the total economic benefits of the 2015 rule. *See* Goodwin, *supra* note 209, at 1559–61.

they argued that the calculation used to support the 2015 rule was based on outdated contingent valuation studies.²¹¹ However, in other areas of the Step One economic analysis, the agencies relied on studies of similar vintage, and critics argued that more recent studies of public attitude toward wetlands conservation would likely generate even greater economic benefits for conservation than found in the studies that were excluded.²¹²

While there were significant procedural and substantive flaws in the agencies' original Step One rulemaking proposal, the agencies did not finalize the proposal based solely on the original notice.

B. *The Supplemental Notice of Proposed Rulemaking*

After EPA Administrator Scott Pruitt resigned,²¹³ the agencies attempted to cure some of the flaws of the initial notice of proposed rulemaking by issuing a supplemental notice of proposed rulemaking for the Step One rule and providing

211. See Parenteau, *supra* note 85, at 396–97; McCarthy, et al., *supra* note 11, at 10,777; Goodwin, *supra* note 209, at 1559–61. The contingent valuation studies focus on the amount of money persons were “willing to pay” to protect an acre of wetlands. See Goodwin, *supra* note 209, at 1560. By eliminating those studies, and suggesting that the agencies could not place a value on those benefits, the agencies eliminated almost all of the expected benefits of the 2015 rule. *Id.* See also Parenteau, *supra* note 85, at 396.

212. See McCarthy, et al., *supra* note 11, at 10,777; Parenteau, *supra* note 85, at 396–397. Goodwin and Parenteau both note that studies would likely show that the public places a higher value on conserving wetlands today than they did at the time of the outdated studies, suggesting that the contingent valuation studies underestimated, if anything, the true benefits of the 2015 rule. See Goodwin, *supra* note 209 at 1561; Parenteau, *supra* note 85, at 397. Critics have also argued that the agencies inappropriately used the 1986 regulation landscape, rather than the 2015 rule, as the baseline for the economic analysis of the Step One repeal rule. See McCarthy, et al., *supra* note 11, at 10,769; Parenteau, *supra* note 85, at 397. Although the 2015 rule was stayed at the time the agencies issued the notice of proposed rulemaking for the Step One rule, the lifting of the stay was imminent and arrived before the Step One rule was finalized. In addition to those criticisms, Professor Parenteau notes that the Institute for Policy Integrity at New York University also criticized the agencies because their economic analysis assumed that states would protect wetlands that were left unprotected by repeal of the 2015 rule, which was an erroneous assumption because twenty-four states, including states containing the largest areas of wetlands to be left unprotected by the repeal rule, do not provide any additional protection for wetlands that are not protected by the federal government. Parenteau, *supra* note 85, at 397.

213. See Coral Davenport et al., *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html> [https://perma.cc/EYJ8-YDSR]; Brady Dennis & Juliet Eilperin, *Scott Pruitt Steps Down as EPA Head After Ethics, Management Scandals*, WASH. POST (July 5, 2018), https://www.washingtonpost.com/national/health-science/trump-epa-head-steps-down-after-wave-of-ethics-management-scandals/2018/07/05/39f4251a-6813-11e8-bea7-c8eb28bc52b1_story.html [https://perma.cc/SJK8-528S].

a thirty day comment period for the supplemental notice.²¹⁴ The agencies addressed the *North Carolina Growers Association* problem raised by their initial proposal by broadening the scope of comments solicited to include the merits of the 2015 rule and pre-2015 regulations.²¹⁵ As in the initial notice, the agencies re-asserted that the proposed action was necessary to provide regulatory certainty for States, regulated entities, and the public, as challenges to the 2015 rule created uncertainty regarding the scope of Clean Water Act jurisdiction.²¹⁶

The agencies also attempted to justify their decision to repeal the 2015 rule by advancing several criticisms to the rule based on their reinterpretation of the statute and case law supporting the 2015 rule.²¹⁷ Throughout the supplemental notice, the agencies repeatedly asserted that the 2015 rule was flawed because the agencies, in that rule, relied too heavily on science, rather than law, to determine the scope of waters regulated under Justice Kennedy's "significant nexus" test.²¹⁸ Further, the agencies argued, in the supplemental notice, that the 2015 rule inappropriately altered the balance between federal and State governments in contravention of Section 101(b) of the Clean Water Act.²¹⁹ Based on a narrower reading of Justice Kennedy's *Rapanos* opinion than the agencies adopted in the past, the agencies also argued, in the supplemental notice, that the 2015 rule inappropriately expanded the definitions of "tributaries" and "adjacent wetlands" to include waters that lack a "significant nexus" to jurisdictional waters and inappropriately defined the "region" to be evaluated when considering whether a water has a "significant nexus" to a traditional navigable water.²²⁰

214. See *Definition of "Waters of the United States"—Recodification of Preexisting Rule*, 83 Fed. Reg. 32,227, 32,227 (proposed July 12, 2018) (to be codified 33 C.F.R. pt. 328). The agencies ultimately received over 100,000 comments on the supplemental notice. *Id.* at 32,230.

215. *Id.* at 32,231.

216. *Id.* at 32,228. The agencies claimed that the substantial experience that they had in administering the pre-2015 regulations would advance regulatory certainty. *Id.*

217. *Id.* The agencies suggested that "[a]t a minimum, . . . the interpretation of the statute adopted in the 2015 rule is not compelled and raises significant legal questions." *Id.*

218. *Id.* at 32,240–41.

219. *Definition of "Waters of the United States"—Recodification of Preexisting Rule*, 83 Fed. Reg. 32,227, 32,228 (proposed July 12, 2018) (to be codified at 33 C.F.R. pt. 328). In the Step One rulemaking, the agencies continue to rely on the Kennedy "significant nexus" test as the basis for determining jurisdiction over "waters of the United States," rather than the *Rapanos* plurality test.

220. *Id.* at 32,228–29. (In describing the "significant nexus" test in his concurring opinion in *Rapanos*, Justice Kennedy wrote that "[A] water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest . . . [primary] water.") *Id.* at 32,240; See also *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). The agencies argued, in their supplemental rulemaking, that they interpreted Justice Kennedy's language too broadly in the 2015 rule when they defined "region" to encompass a "watershed" and when they focused, in the 2015 rule, on the contribution of all of the *waters* in the

1. Flaws in the Supplemental Notice of Proposed Rulemaking

While the agencies' supplemental notice of proposed rulemaking may have reduced, or eliminated, challenges to a final Step One rule based on failure of the agencies to provide the public with an opportunity to comment, there are still significant flaws in the rulemaking.²²¹ The agencies' supplemental notice did not modify the economic analysis that was prepared for the initial notice of proposed rulemaking, so the agencies' re-evaluation of the costs and benefits of the 2015 rule in the Step One rule is still likely arbitrary and capricious.²²² In

watershed, rather than simply the wetlands in the watershed. *See Definition of "Waters of the United States"—Recodification of Preexisting Rule*, 83 Fed. Reg. 32,227, 32,240 (proposed July 12, 2018) (to be codified at 33 C.F.R. pt. 328). In addition to the concerns outlined above, the agencies, in the supplemental notice, expressed concern that "many features that are categorically jurisdictional under the 2015 rule . . . test the limits of the scope of the Commerce Clause because they may not have the requisite effect on the channels of interstate commerce." *Id.* at 32,249.

221. EPA and the Corps finalized the Step One rulemaking in September 2019. *See* Lisa Friedman & Coral Davenport, *Trump Administration Rolls Back Clean Water Protections*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/climate/trump-administration-rolls-back-clean-water-protections.html> [<https://perma.cc/NKZ6-TP49>] A pre-publication version of the rule is available in *Definition of "Waters of the United States"—Recodification of Preexisting Rules*, 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328). In the final rule, the agencies relied heavily on many of the justifications that they set forth in the supplemental notice of proposed rulemaking. Specifically, the agencies argued that it was necessary to repeal the 2015 rule because the agencies (1) did not believe that the rule was authorized by the statute, in light of their reinterpretation of the statute and the *Riverside Bayview*, *SWANCC*, and *Rapanos* precedents; (2) felt that the 2015 rule did not adequately accord weight to the policies of Section 101(b) of the Clean Water Act; (3) were concerned that the rule could be unconstitutional and beyond statutory authority to the extent that it interferes with traditional state authority over land use; and (4) believed that there were procedural errors in the rulemaking and that a portion of the rule was not supported by an adequate record. *Id.* at 56,627, 56,629, 56,639. In addition, they repeated their assertion that regulatory certainty would be best served by repealing the 2015 rule and reinstating the pre-2015 regulatory regime. *Id.* at 56,659. Further, the Step One rule was challenged by several environmental groups in the U.S. District Court for South Carolina on October 23, 2019 and was challenged by fourteen states, the District of Columbia, and the City of New York in the U.S. District Court for the Southern District of New York on December 19, 2019. *See* South Carolina Coastal Conservation League v. Wheeler, No. 2:19-cv-03006, 2019 U.S. Dist. (D.S.C. Oct. 23, 2019); New York v. Wheeler, No. 19-11673, 2019 U.S. Dist. (S.D.N.Y. Dec. 20, 2019).

222. *See supra* notes 209–212 and accompanying text. When the agencies finalized the Step One rule, they modified the economic analysis that they prepared for the Step One rule and the economic analysis that was prepared for the 2015 rule. *See Definition of "Waters of the United States"—Recodification of Preexisting Rules*, 84 Fed. Reg. at 56,662. However, they did not cure the deficiencies in the wetland valuation studies noted above. *See supra* notes 209–212 and accompanying text. The agencies dismiss any concerns that are raised over the legitimacy of their economic analyses, though, by arguing that the analyses are provided for information purposes only, as the agencies must repeal the 2015 rule because it is beyond their statutory authority. *See Definition of "Waters of the United States"—Recodification of Preexisting Rules*, 84 Fed. Reg. at 56,663.

addition, the criticisms that the agencies made to the 2015 definitions of “region,” “tributaries,” and “adjacent waters” are based on a flawed reading of Justice Kennedy’s *Rapanos* concurrence.²²³ Since the agencies are relying on those flawed interpretations and a claim that the repeal of the 2015 rule is necessary to ensure regulatory certainty, which is not true, the agencies have not provided a reasonable explanation for their decision to repeal the 2015 rule.²²⁴ Finally, in the supplemental notice, the agencies failed to adequately and reasonably address the reasons that they were abandoning the vast body of scientific evidence that supported the 2015 rule, arguing, instead, that the determination of a “significant nexus” should not be based on science, but on law and policy.

a. Regulatory Certainty

The agencies suggested, in the supplemental notice of proposed rulemaking, that the 2015 rule should be repealed and replaced with the pre-2015 regulatory framework because there have been several lawsuits filed challenging the 2015 rule and there could be confusion created if some of those lawsuits invalidate

223. The agencies argued, in the supplemental notice, that it was inappropriate for them to define the “region” to be examined when determining whether a water has a “significant nexus” to jurisdictional waters to include all of the similarly situated waters, rather than just wetlands, in the watershed. *See* 83 Fed. Reg. at 32,240. However, the agencies noted, in the 2015 rule, that nothing in Justice Kennedy’s opinion suggested that the “significant nexus” determination should only focus on wetlands in a region, rather than waters in a region, and that the determination should focus on evaluating impacts of waters in light of the goals and purposes of Section 101(a) of the Clean Water Act. *See* 80 Fed. Reg. at 37,061, 37,066. The agencies criticized the 2015 definition of “tributary,” in their supplemental notice, on the grounds that the definition failed to consider volume, duration, and frequency of flow of water in a tributary, which made it possible to regulate small waters that may lack a “significant nexus” to jurisdictional waters. *See Definition of “Waters of the United States”—Recodification of Preexisting Rule*, 83 Fed. Reg. at 32,241 (proposed July 12, 2018) (to be codified at 33 C.F.R. pt. 328). However, the 2015 rule defined tributary more narrowly than prior regulations (as Justice Kennedy suggested might be necessary), by requiring a bed and banks and additional indicators of an ordinary high water mark, to limit the term to waters where the agencies determined the science suggested that the volume, frequency, and flow was sufficient to provide a “significant nexus” to jurisdictional waters. *See* 80 Fed. Reg. at 37,058. Finally, the agencies, in their supplemental rulemaking notice, argued that it was inappropriate to regulate “adjacent waters” in the 2015 rule because the waters could be adjacent to very small tributaries, since the term “tributary” did not consider volume, duration, and frequency of flow of water. *See Definition of “Waters of the United States”—Recodification of Preexisting Rule*, 83 Fed. Reg. at 32,241. However, because the 2015 definition of “tributary” limits jurisdiction to waters with sufficient volume, frequency, and flow, *see id.* at 32,240–41, the concerns that the agencies raised in the supplemental notice are unfounded.

224. The arguments that the agencies made in the step One rulemaking regarding section 101(b) and the appropriate role of the federal and state governments in defining jurisdiction under the Clean Water Act are similar to the arguments that they made when they proposed the Step Two rule. Instead of addressing the flaws in those arguments here, they will be addressed in part VII of this Article.

portions of the rule while other lawsuits uphold the rule.²²⁵ However, most of EPA's "economically significant" rules are challenged in court.²²⁶ Taken to its logical end, the agencies' argument in support of repealing the 2015 rule would suggest that agencies should almost *never* adopt rules, since they are likely to be challenged so frequently. When Congress enacts statutes that require challenges to agency rules to be brought in federal district courts, as is the case with the "waters of the United States" rule,²²⁷ it is inevitable that there will be conflicting interpretations of the rule adopted by district courts and that there could be some confusion regarding the appropriate interpretation of the statute until the conflicting decisions are harmonized on appeal, ultimately in the Supreme Court, if necessary. The fact that a rule must be challenged in federal district courts that may reach contradictory interpretations of a statute is not, however, a reason for an agency to refrain from rulemaking.

In addition, while the agencies argued, in the supplemental notice, that they must repeal the 2015 rule to avoid the confusion that would be created by conflicting judicial opinions regarding the validity of the 2015 rule, the agencies would create precisely the same potentially confusing scenario by repealing the 2015 rule and reinstating the pre-2015 regulatory framework, as the repeal rule would likely be challenged in a variety of federal district courts that may issue conflicting decisions regarding whether the repeal is valid.²²⁸ That would create precisely the same confusion that the agencies claimed they were attempting to avoid by repealing the 2015 rule. Consequently, the agencies' attempt to repeal the 2015 rule will not reduce the confusion or increase consistency or uniformity of the interpretation of the Clean Water Act in any way.

225. See *Definition of "Waters of the United States"—Recodification of Preexisting Rule*, 83 Fed. Reg. at 32,229.

226. A review of the "economically significant" rules finalized by EPA between 2001 and 2005 found that 75% of those rules were challenged. See Johnson, *Ossification's Demise*, *supra* note 10, at 771. This is consistent with statements made by former EPA Administrator William Ruckelshaus, who indicated that 80% of the agency's major rules were litigated. *Id.* at 769.

227. See *Nat. Ass'n of Mfrs. v. Dept. of Defense*, 138 S. Ct. 617, 633 (2018).

228. Even before there are any challenges to the repeal rule, though, a return to the pre-2015 framework would revive a circuit split regarding the controlling opinion/test from *Rapanos*, with the net impact that the Clean Water Act—a national federal statute—would apply differently in different parts of the country. See *supra* notes 85–86 and accompanying text. Although the agencies, in their supplemental notice of proposed rulemaking, indicated that it was necessary to repeal the 2015 rule because it had been challenged and invalidated by some courts, but was still enforced in many areas of the country, see *supra* note 225 and accompanying text, the agencies, in their final Step One rule indicated that the fact that the Step One rule may be challenged and invalidated in some courts, while applied in many areas of the country, was not a reason to prevent the agencies from finalizing the rule. *Definition of "Waters of the United States"—Recodification of Preexisting Rules*, 84 Fed. Reg. 56,626, 56,629 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328).

Finally, the agencies asserted that reinstatement of the pre-2015 regulatory framework would provide for greater regulatory predictability, consistency, and certainty than the 2015 rule.²²⁹ However, one of the primary reasons that the agencies adopted the 2015 rule was a widespread perception that the pre-2015 regulatory framework was *not* providing regulatory predictability, consistency, or certainty.²³⁰ Regarding the difficulties with the pre-2015 regulatory framework, the agencies noted, in the 2015 rule, “[t]his rule replaces existing procedures that often depend on individual, time-consuming, and inconsistent analyses of the relationship between a particular stream, wetland, lake, or other water with downstream waters.”²³¹ The process of making those determinations was cumbersome and time-consuming in many cases and the decisions were fraught with litigation risk.²³² The agencies’ assertion that the repeal of the 2015 rule is necessary to ensure clarity, consistency, and predictability, therefore, is unreasonable.

b. Failure to Engage with the Scientific Justifications for the 2015 Rule

In the supplemental notice, the agencies spent very little time explaining why they believed that the science supporting the 2015 rule was invalid or why they did not believe that the science supported the rule. Instead of engaging with the science, they argued that calculation of “significant nexus” was a legal determination that required focus on Section 101(b) of the Clean Water Act.²³³

229. See Definition of “Waters of the United States”—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, 32,228 (proposed July 12, 2018) (to be codified at 33 C.F.R. pt. 328).

230. The agencies repeatedly discussed these perceptions in the preamble to the 2015 final rule. See 80 Fed. Reg. at 37,056–57. In particular, they noted, “Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster.” *Id.* at 37,056. When the agencies finalized the Step One rule, they acknowledged that the pre-2015 regulatory framework was not providing regulatory predictability, certainty or consistency, but the agencies stressed that they felt that they had to repeal the 2015 rule as it was beyond their statutory authority. Definition of “Waters of the United States”—Recodification of Preexisting Rules, 84 Fed. Reg. at 56,627.

231. *Id.* at 37,057.

232. The agencies even acknowledged, in the supplemental notice of proposed rulemaking, that “implementation difficulties” existed in the pre-2015 regulatory framework. See Definition of “Waters of the United States”—Recodification of Preexisting Rule, 83 Fed. Reg. at 32,240. Nevertheless, they argued that the pre-2015 regulatory framework would somehow provide more consistency and clarity than the 2015 rule, which established bright line rules for large categories of waters to reduce the likelihood that jurisdictional determinations would be made on an inconsistent basis. *Id.*

233. See *supra* notes 218–219 and accompanying text. In the final Step One rule, the agencies repeated their assertions that it was inappropriate to rely on the Connectivity Study in the 2015 rule because the determination of “significant nexus” is a legal, rather than scientific, determination. See Definition of “Waters of the United States”—Recodification of Preexisting Rules, 84 Fed. Reg. at 56,645.

The agencies attempted to downplay the importance of science to the determination of the “significant nexus” analysis by noting that Justice Kennedy, in *Rapanos*, wrote that scientific evidence provides “no reason to disregard limits in the statutory text.”²³⁴ However, Justice Kennedy’s *full* quote, edited by the agencies in the supplemental notice, provides, “[i]t is true, as the plurality indicates, that environmental concerns provide no reason to disregard limits in the statutory text, . . . but in my view the plurality’s opinion is not a correct reading of the text.”²³⁵ Justice Kennedy was merely acknowledging, as most judges would, that *if* a statute is clear, a court should not adopt an interpretation of the statute that is at odds with the clear language of the statute merely to advance the purposes of the statute. *However*, Justice Kennedy felt that the statute was *far* from clear in *Rapanos*. *Thus*, in the very next sentence, he wrote, “[t]he limits the plurality would impose, moreover, give insufficient deference to Congress’ purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.”²³⁶

Justice Kennedy’s statement in that sentence announced a theme that he raised repeatedly throughout his opinion. The “significant nexus” required for Clean Water Act jurisdiction “must be assessed in terms of the statute’s goals and purposes.”²³⁷ In describing what those goals and purposes were, Kennedy cited *Section 101(a)* of the statute and *not* Section 101(b). He wrote, “Congress enacted the law to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters’”²³⁸ He then outlined a science-based test that was drawn from the goals and purposes of the law. For instance, with regard to wetlands, he wrote that

the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. . . . Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.”²³⁹

Later in the opinion, he noted that it would be permissible for the Corps to

identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely,

234. See Definition of “Waters of the United States”—Recodification of Preexisting Rule, 83 Fed. Reg. at 32,236.

235. See *Rapanos v. United States*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring).

236. *Id.*

237. *Id.* at 779.

238. *Id.*

239. *Id.* at 779–780.

in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.²⁴⁰

It is *clear*, from Justice Kennedy's opinion, that he wanted EPA and the Corps to rely on science and their expertise to determine when waters, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other navigable waters.

In addition to mis-characterizing Justice Kennedy's statements in *Rapanos* regarding the importance of scientific justification for the agencies' application of the "significant nexus" standard, the agencies, in their supplemental notice of proposed rulemaking, mis-characterized the weight that they gave to science and the Connectivity Study in the 2015 rule. While the agencies, in the supplemental notice of proposed rulemaking, suggested that they placed too much emphasis on the Connectivity Study in developing the 2015 rule instead of focusing on the text of the Clean Water Act and Congressional intent, the preamble to the 2015 final rule repeatedly rebuts that claim. Although the agencies relied heavily on the Connectivity Study and the science to support their interpretation of the appropriate scope of Clean Water Act jurisdiction in the 2015 rule, the agencies repeatedly stressed that the determination of the scope of jurisdiction was based not only on science, but on *the law* and *their expertise*.

For instance, in the preamble to the 2015 final rule, the agencies wrote, the agencies' interpretive task in this rule—determining which waters have a "significant nexus"—requires scientific and policy judgment, as well as legal interpretation. 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.²⁴¹

More directly to the point, later in the preamble, the agencies wrote,

[s]ignificant nexus is not a purely scientific determination. The opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright line boundaries with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.²⁴²

240. *Rapanos*, 547 U.S. at 781.

241. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37,057 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

242. *Id.* at 37,060. On the following page, the agencies wrote, "[w]hile a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute's goals, objectives and policies, the case law, and the

As the agencies noted, “[t]he scientific literature does not use the term ‘significant’ as it is defined in a legal context, but it does provide information on the strength of the effects on the chemical, physical, and biological functioning of the downstream water bodies from the connections among covered tributaries, covered adjacent waters, and case specific waters and those downstream waters.”²⁴³ Thus, the agencies were relying on science to help apply the legal test articulated by Justice Kennedy. Later, in describing the exclusions from the definition of “waters of the United States,” the agencies wrote, “[t]he significant nexus standard arises from the case law and is used to interpret the terms of the CWA. Thus, a significant nexus determination is not a purely scientific inquiry, but rather is a determination by the agencies in light of the statutory language, the statute’s goals, objectives and policies, the case law, the relevant science, and the agencies’ technical expertise and experience.”²⁴⁴ It is incorrect, therefore, for the agencies to claim, in the supplemental notice of proposed rulemaking, that the agencies gave improper weight to the Connectivity Study in the 2015 final rule.

Since it was necessary to consider science, law, policy, and expertise in determining the scope of waters regulated under the Clean Water Act and since the agencies appropriately considered science in formulating the 2015 rule, failure to adequately discuss the agencies’ decisions to depart from the scientific findings that supported the 2015 rule when repealing it is arbitrary and capricious.

V. FLAWS IN THE APPLICABILITY DATE (“SUSPENSION”) RULEMAKING

A. *The Rulemaking*

The applicability date rule (or “suspension rule”), the second of the agencies’ three rules designed to repeal, postpone, or replace the 2015 rule, was the first rule that the agencies finalized. The agencies published a notice of proposed rulemaking for the rule on November 22, 2017, providing twenty-one days for public comment.²⁴⁵ As with the initial notice for the Step One rule, the agencies indicated, in the applicability date rulemaking notice, that the agencies would not consider comments, in the applicability date rulemaking, regarding the pre-2015 regulations, the 2015 rule, or the definition of “waters of the United States” that might be adopted in the future Step Two rulemaking.²⁴⁶ On February

agencies’ technical expertise and experience when interpreting the terms of the CWA.” *Id.* at 37,061.

243. *Id.* at 37,062.

244. *Id.* at 37,097.

245. See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542, 55,542 (proposed Nov. 22, 2017) (to be codified at 33 C.F.R. pt. 328).

246. *Id.* at 55,544–45.

6, 2018, less than three months after publishing the notice of proposed rulemaking, and after receiving fewer than 5000 comments, the agencies published a final rule that added an “applicability date” to the 2015 WOTUS rule to delay implementation of the rule until February 6, 2020.²⁴⁷

In the final rulemaking notice, the agencies indicated that the rule was being adopted to provide certainty for regulated entities, States, and the public and to preserve the status quo, because the rule would allow the agencies to continue to enforce the pre-2015 regulations that they were enforcing while the Sixth Circuit had stayed the 2015 rule even after the Supreme Court reached a decision that would lead the Sixth Circuit to lift that stay.²⁴⁸ Since courts had rejected several other efforts by the Trump Administration to rely on Section 705 of the APA or to rely on other statutory provisions to delay or postpone rules that had already gone into effect without repealing them through notice and comment rulemaking,²⁴⁹ the agencies attempted a new approach in the applicability date rulemaking. Since the 2015 rule included an “effective date” when it was published and since the rule went into effect in most of the country on August 28, 2015, until it was stayed by the Sixth Circuit, the agencies’ rulemaking added an “applicability date” to the 2015 rule. The agencies argued that an “effective date” was simply a term of art that refers to the date that the Office of the Federal Register amends the Code of Federal Regulations, while an “applicability date” refers to the date that the rule will be implemented and enforced.²⁵⁰ The agencies argued that an “applicability date” can be included in the rule when it is initially published or it can be added later.²⁵¹

For purposes of the economic analysis required for the rule, the agencies compared the effect of postponing the 2015 rule until 2020 to a baseline set by the implementation of the pre-2015 regulations during the nationwide stay of the 2015 rule, even though that stay was set to be lifted shortly after the rule was finalized.²⁵² Using that baseline, the agencies concluded that the rule would have

247. See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5200 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

248. *Id.* The agencies argued that the extensive experience that the agencies had in making jurisdictional determinations under the pre-2015 regulations would contribute to the regulatory certainty. *Id.* at 5204.

249. See *supra* notes 175–79 and accompanying text. The agencies clearly indicated, in the final rule, that they were not relying on Section 705 of the APA to justify their action to postpone the 2015 rule. See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. at 5204.

250. See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5203 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

251. *Id.* at 5204.

252. *Id.* at 5202.

no economic costs and some unquantifiable benefits (due to the regulatory certainty that would be created by the rule).²⁵³

B. *Flaws in the Rulemaking*

When the rule was finalized, it was clear that the rule suffered from many of the flaws that had sidetracked other Trump Administration efforts to delay, repeal, or replace rules adopted in prior administrations. The limitations that the agencies placed on the scope of public comment closely resembled those that the *North Carolina Growers Association* court struck down as arbitrary and capricious and violating the APA procedures for informal rulemaking.²⁵⁴ The very short comment period could be challenged as a failure to provide an opportunity for meaningful public comment as required by the APA.²⁵⁵ The short comment period, the limitations on the scope of public comment, and several comments made by EPA Administrator Pruitt could all demonstrate evidence that the agencies were not proceeding with an open mind in the rulemaking, thus depriving the public of an opportunity for meaningful comment.²⁵⁶ In addition, the justification provided by the agencies for the addition of the applicability date was unreasonable, as the rule would not lead to regulatory certainty, as the agencies claimed.²⁵⁷ Further, the economic analysis for the rule was unreasonable, since the agencies measured the effects of the rule against an inappropriate baseline.²⁵⁸ Finally, the agencies failed to adequately

253. *Id.* at 5202–03.

254. *See supra* notes 137–143 and accompanying text.

255. *See supra* notes 128–131 and accompanying text. The agencies argued that the twenty-one day comment period was appropriate because the APA does not establish a minimum length for the comment period, courts had upheld comment periods less than 30 days, the scope of the rulemaking was narrow, and there was an urgent need to finalize the rule expeditiously. Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. at 5204. In addition, the agencies argued that the fact that they received over 4,600 comments indicated that there was an adequate opportunity for the public to meaningfully comment on the proposal. *Id.*

256. *See supra* notes 132–134 and accompanying text. The agencies argued that the litigation that the Administrator brought to challenge the 2015 rule before he was appointed Administrator and the comments that he made criticizing the 2015 rule before and after being appointed Administrator were not sufficient evidence of a closed mind to overcome a presumption of objectivity for agency officials. *See* 83 Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, Fed. Reg. 5200, 5205 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

257. As noted above, the 2015 rule was initially adopted because the pre-2015 regulations did not provide uniformity, consistency, or clarity. *See supra* note 90 and accompanying text. In addition, if the applicability rule were challenged and invalidated in some district courts, but upheld in others, there would be no more regulatory certainty than there would have been if the rule was never adopted.

258. Since the Sixth Circuit’s stay of the 2015 rule would be lifted shortly after the applicability date rule took effect, the economic analysis should have used, as a baseline, the scenario that would

explain why they had departed from the scientific and factual findings and legal and policy conclusions that led them to determine that it was appropriate to adopt the 2015 rule just three years earlier.²⁵⁹

Not surprisingly, on the date that the agencies published the final rule, it was challenged in court. New York and nine other States sued EPA Administrator Pruitt in the U.S. District Court for the Southern District of New York, arguing that (1) the Clean Water Act did not give the agencies the authority to suspend the 2015 rule after its effective date passed; (2) the agencies did not provide a meaningful opportunity for comment because the comment period was too short and the agencies limited the scope of the comments; and (3) the agencies acted arbitrarily and capriciously by refusing to consider whether postponing the 2015 rule would meet the objectives of the Clean Water Act and by ignoring the factual and legal findings that supported the 2015 rule.²⁶⁰ The Natural Resources Defense Council brought a separate lawsuit in the same court on the same day against EPA, raising similar arguments as the States.²⁶¹

While those cases were brought in New York, a coalition of conservation groups led by the South Carolina Coastal Conservation League sued EPA and the Corps in the U.S. District Court for South Carolina and, on August 16, 2018, the court, in *South Carolina Coastal Conservation League v. Pruitt*, invalidated the rule and issued a nationwide injunction against its enforcement.²⁶² Citing the *North Carolina Growers Association* decision, which the court described as “almost identical” to the case brought by the conservation groups, the court held that the agencies’ refusal to allow public comment on the 2015 rule or the pre-2015 regulations deprived the public of the meaningful opportunity to comment

have been in place at that time, where the 2015 rule would be enforced in all states except for the states where the district court in North Dakota had stayed the rule.

259. The failure to address the prior factual, legal, and policy justifications for the 2015 rule renders the agencies’ rule arbitrary and capricious. *See supra* notes 147–153 and accompanying text.

260. *See* New York v. Pruitt, Case No. 1:18-cv-1030, Complaint (S.D.N.Y. filed Feb. 7, 2018). New York was joined in the lawsuit by California, Connecticut, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia. *Id.*

261. *See* NRDC v. Environmental Protection Agency, Case No. 18-cv-1048, Complaint (S.D.N.Y. filed Feb. 6, 2018). The plaintiffs argued that the agencies acted arbitrarily and capriciously by failing to repudiate or even discuss the scientific or other findings that supported the 2015 rule and by failing to provide a reasoned explanation for suspending the rule, as the only basis provided by the agency, regulatory certainty, had no record support and was contradicted by the evidence. *Id.* at 24–26. They also argued that the agencies did not provide a meaningful opportunity for comment on the rule because they engaged in the rulemaking with an unalterably closed mind and did not provide a sufficiently long period of time for comments. *Id.* at 26–27. In a separate action in the U.S. District Court for the Northern District of California, the Waterkeeper Alliance and several conservation groups added challenges to the applicability date rule to a lawsuit that they originally filed to challenge the 2015 rule. *See* Waterkeeper Alliance, Inc. v. Pruitt, Case No. 18-cv-3521, Complaint (N.D. Cal. filed June 13, 2018).

262. *See* 318 F. Supp. 3d 959, 969 (D.S.C. 2018).

required by the APA.²⁶³ The court indicated that the short duration of the comment period was also a factor that led it to find that the agencies failed to provide the public with a meaningful opportunity for comment.²⁶⁴ Finally, the court held that the agencies' failed to provide the "reasoned analysis" required by *State Farm* to justify their change in position regarding the 2015 rule and that the failure to allow comment on the 2015 rule or pre-2015 regulations was arbitrary and capricious.²⁶⁵ The court noted that "different administrations may implement different regulatory priorities, but the APA 'requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process.'"²⁶⁶ Even though the conservation groups' challenge was brought in federal district court, the court determined that a nationwide injunction was appropriate because (1) the environmental plaintiffs were located throughout the United States; (2) the plaintiffs brought a facial challenge to agency action under the APA; and (3) a nationwide injunction was necessary to provide complete relief for the plaintiffs.²⁶⁷ A few months later, in *Puget Soundkeeper Alliance v. Wheeler*, the United States District Court for the Western District of Washington issued a similar ruling, invalidating the rule and enjoining it nationwide after finding that the agencies acted arbitrarily and capriciously and failed to provide an opportunity for meaningful public comment by limiting the scope of public comment on the rule.²⁶⁸

The agencies initially appealed the *South Carolina Coastal Conservation League* decision, but later withdrew their appeal to focus on the Step One and Step Two rulemakings.²⁶⁹

263. *Id.* at 963.

264. *Id.* As in the *North Carolina Growers Association* case, the court noted that the suspension rule received significantly fewer comments during the abbreviated comment period than the 2015 rule which it was repealing received when it was issued with a sixty-day comment period. *Id.*

265. *Id.* at 967.

266. *Id.*

267. *Pruitt*, 318 F. Supp. at 968–69. The Court cited the Supreme Court's ruling in *Califano v. Yamaski*, 442 U.S. 682, 702 (1979) for the proposition that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *See id.* at 968. While recognizing that nationwide injunctions "have the potential for abuse," the court felt that a nationwide injunction was necessary because the effects of the suspension rule were felt nationwide. *Id.* at 969 n.4.

268. *See* No. C15-1342-JCC, 2018 WL 6169196, at *6 (W.D. Wash. 2018). The challengers also argued that the agencies acted arbitrarily and capriciously by failing to address the findings for the 2015 rule when postponing it and failing to provide a rational justification for the postponement, but the court determined that it was not necessary to resolve those claims since it was already enjoining the rule for other APA violations. *Id.* at *4.

269. *See* David Schultz, *Administration Drops Effort to Delay Obama's Waters Rule*, BLOOMBERG ENV'T (March 9), 2019, <https://news.bloombergenvironment.com/environment-and-energy/administration-drops-effort-to-delay-obamas-waters-rule> [<https://perma.cc/2XUW-GD8A>]

VI. FLAWS IN THE STEP TWO (“REPLACEMENT”) RULEMAKING

A. *The Proposed Rulemaking*

On February 14, 2019, the agencies published a notice of proposed rulemaking for the Step Two (“replacement”) rule, the third rulemaking initiated by the agencies to repeal, postpone, or replace the 2015 WOTUS rule.²⁷⁰ The agencies began the development of the proposed rule by meeting with representatives of states, local governments, and tribes in April 2017 and conducting a series of webinars with other stakeholders in the fall of that year, before conducting additional meetings with states.²⁷¹ As with the other two rules, the agencies asserted that the replacement rule was necessary to ensure clarity, consistency, and predictability, since litigation surrounding the 2015 rule had created inconsistent interpretation and application of the Clean Water Act.²⁷² Unlike the other two rules, though, in the Step Two rulemaking proposal, the agencies made significant changes to their prior legal interpretation of the Clean Water Act and their long-standing interpretations of the *Rapanos* and *SWANCC* decisions.

Although the agencies acknowledged that the regulatory definition of “waters of the United States” should advance the Section 101(a) objectives of restoring and maintaining water quality, the agencies stressed that the definition must also implement the policy of Section 101(b) to “recognize, preserve and protect the primary responsibilities of States to prevent, reduce and eliminate pollution,” and “to plan the development and use . . . of land and water resources.”²⁷³ Relying on dictionary definitions, the agencies argued that “policies” must be carried out, while “objectives” are merely aspirational.²⁷⁴ Proceeding from those assumptions, the agencies noted that Congress, in Section 101(a), established non-enforceable goals in addition to setting forth an overriding objective.²⁷⁵ To fulfill those goals, the agencies argued, Congress

270. See Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

271. *Id.* at 4162–63. The agencies held one public hearing on the proposed rule and received almost 150,000 comments on the proposal. See *Revised Definition of Waters of the United States*, EPA Docket # EPA-HQ-OW-2018-0149, ENVTL PROT. AGENCY (Feb. 14, 2019), <https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0149-0003> [<https://perma.cc/2TTL-R7TU>].

272. Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4154, 4197. The agencies also suggested that the narrowing of jurisdiction proposed by the rule was necessary to ensure that the agencies were operating within their Commerce Clause authority. *Id.* at 4156.

273. *Id.* at 4156. The agencies claimed that the proposed rule strikes a balance between the objectives of Section 101(a) and the policies of section 101(b). *Id.*

274. *Id.* at 4163–64. Thus, the agencies indicated that they must “pursue” the objectives of the statute, “aim to accomplish” the goals of the statute, but “implement” the policies. *Id.*

275. *Id.* at 4156. In Section 101(a), Congress set goals to eliminate the discharge of pollutants into the navigable waters by 1985 and to achieve water quality “which provides for the protection

created several *non-regulatory* programs in the Clean Water Act, including programs to address non-point source pollution, to provide infrastructure funding, and to require water pollution planning.²⁷⁶ The *non-regulatory* programs, they asserted, control pollution in the Nation's waters generally, while Congress created a *regulatory* permitting program to address discharges of pollutants into a *subset* of those waters identified as "waters of the United States."²⁷⁷ The regulatory and non-regulatory programs work together to achieve the objectives of Section 101(a), they argued, but the "waters of the United States" to be regulated under the permitting program must be defined in a way that preserves sovereignty of states over their land and water resources.²⁷⁸ According to the agencies, therefore, since non-regulatory programs apply to the Nation's waters generally and help achieve the objectives of Section 101(a), it is necessary to limit the scope of federal jurisdiction over "waters of the United States" subject to the regulatory permitting requirements in order to carry out the policy of Section 101(b). This was only the first of many legal re-interpretations advanced by the agencies in the notice of proposed rulemaking.

Unlike the 2015 rule or the pre-2015 regulations and guidance, the proposed Step Two rule relied heavily on the *Rapanos* plurality's test as the primary basis for determining the scope of "waters of the United States," as mandated by the President's Executive Order, and the agencies reversed several of their prior positions interpreting Justice Kennedy's *Rapanos* opinion in the proposed rulemaking.²⁷⁹ As a threshold matter, the agencies relied on the *Rapanos* plurality to indicate, as a baseline, that the agencies were regulating "waters" within the "ordinary meaning" of the term, including relatively permanent flowing and standing waterbodies, such as oceans, rivers, streams, lakes, ponds, and wetlands.²⁸⁰ As a consequence, the agencies defined "tributaries" in the proposed rule to exclude "ephemeral" streams²⁸¹ and requested comment on

and propagation of fish, shellfish and wildlife and provides for recreation in and on the water . . . by July 1, 1983" See 33 U.S.C. § 1251 (2012).

276. See Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4157 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

277. *Id.*

278. *Id.*

279. *Id.* at 4155. When the agencies finalized their Step One rule, they noted that they were not taking a position on whether Justice Kennedy's concurring opinion in *Rapanos* was the appropriate test for determining jurisdiction over "waters of the United States," but they were repealing the 2015 rule because it was based on that test and the agencies concluded that it exceeded the boundaries authorized by that test. See Definition of "Waters of the United States"—Recodification of Preexisting Rules, 84 Fed. Reg. 56,626, 56,629 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328).

280. See Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4169–70 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

281. *Id.* at 4173. The proposal defines a tributary as "a river, stream or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional

whether the definition should also exclude “intermittent” streams.²⁸² In adopting that definition, the agencies acknowledged that they were changing their long-standing interpretation of the *Rapanos* decision as authorizing regulation of intermittent and ephemeral streams that had a “significant nexus” to traditional navigable waters.²⁸³ They also suggested that they may have incorrectly interpreted Justice Kennedy’s *Rapanos* concurring opinion in the past by using the “significant nexus” test to determine jurisdiction over “waters of the United States” generally, as opposed to limiting its use to determining jurisdiction over wetlands similar to the wetlands at issue in *Rapanos*.²⁸⁴ The proposed rule frequently criticized the agencies’ prior reliance on their interpretation of Justice Kennedy’s “significant nexus” test, suggesting that the jurisdictional question should not be resolved based on “the opinion of a single justice in a complex case.”²⁸⁵

In addition to narrowing their definition of “tributaries,” the agencies narrowed their jurisdiction over adjacent wetlands in the proposed rule, regulating only wetlands that “abut” jurisdictional waters or have a direct hydrological *surface* connection to other jurisdictional waters in a typical year.²⁸⁶ Furthermore, the agencies proposed to eliminate the long-standing case-by-case analysis of waters under Justice Kennedy’s “significant nexus” test as a basis for determining jurisdiction²⁸⁷ and to eliminate the regulation of interstate waters, which had been regulated as a separate category of waters even in the pre-2015 regulations, unless those waters fit within another category of regulated waters.²⁸⁸

While the agencies spent a significant amount of time in the proposed rulemaking discussing the legal justifications for the changes in the Step Two rule from the 2015 rule, they spent very little time rebutting, challenging, discounting, or even discussing the Connectivity Study and the scientific findings that supported the 2015 rule. The agencies stressed that the proposed definition in the Step Two rule was “a legal and policy decision informed by the

navigable water or territorial sea in a typical year either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands” *Id.* at 4155. Later in the proposal, the agencies indicated “tributaries . . . do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features.” *Id.* at 4173. They based their exclusion on the *Rapanos* plurality opinion. *Id.* at 4170, 4174.

282. *Id.* at 4177.

283. *Id.* at 4175.

284. *Id.* at 4175, 4196.

285. Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4196 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

286. *Id.* at 4155. Once again, the agencies’ narrower definition was based on the *Rapanos* plurality opinion. *Id.* at 4188.

287. *Id.* at 4170.

288. *Id.* at 4171.

statute, its legislative history, Supreme Court interpretations, and the agencies' respect for the traditional power of States . . ." and that the Connectivity Study was "a science, not policy, document . . ." ²⁸⁹

While regulated entities and some states were pleased with the proposed rule, scientists and environmental groups strongly criticized the rule because the agencies were ignoring the science that supported the 2015 rule.²⁹⁰ The agencies' own data suggests that 18% of streams are ephemeral streams and would no longer be protected under the rule.²⁹¹ If intermittent streams are also excluded in the final rule, almost 59% of the streams in the continental United States would be left unprotected by the rule.²⁹² In addition, under the proposed definition of "adjacent" waters, the agencies' data suggests that almost 51% of wetlands would no longer be regulated as "waters of the United States."²⁹³ Some areas of the country would be affected particularly acutely. Scientists predict that more than 75% of Ohio's streams would no longer be regulated,²⁹⁴ 70% of South Carolina's wetlands would no longer be regulated,²⁹⁵ and 81% of the streams in the Southwest would no longer be regulated.²⁹⁶ Scientists are particularly concerned because they predict that ephemeral and intermittent streams will play a greater role in water quality protection and flood protection as climate change brings more storms and flooding.²⁹⁷ Critics of the rule have

289. *Id.* at 4175–76.

290. See, e.g., David M. Uhlmann, *Trump Wants to Weaken Clean-Water Rules*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/opinion/trump-clean-water-weaken-rules.html> [<https://perma.cc/3EGH-JYM4>]; Dave Owen, *The New WOTUS Proposed Rule and the Myths of Clean Water Act Federalism*, ENVTL LAW PROF. BLOG (Dec. 11, 2018), https://lawprofessors.typepad.com/environmental_law/2018/12/the-new-wotus-proposed-rule-and-the-myths-of-clean-water-act-federalism.html [<https://perma.cc/6SWQ-WNV3>]; Jackson, *supra* note 107; See Beth Burger, *Proposed Change Would Leave Most Ohio Streams Unprotected, Environmentalists Say*, COLUMBUS DISPATCH (Apr. 1, 2019), <https://www.dispatch.com/news/20190401/proposed-change-would-leave-most-ohio-streams-unprotected-environmentalists-say> [<https://perma.cc/2CSP-M9GD>].

291. See Ariel Wittenberg & Kevin Bogardus, *EPA Falsely Claims 'No Data' on Waters in WOTUS Rule*, E&E NEWS (Dec. 11, 2018), <https://www.eenews.net/stories/1060109323> [<https://perma.cc/88YY-KU73>].

292. See Jackson, *supra* note 107; Parenteau, *supra* note 85, at 383 (predicting 60% of stream miles would no longer be regulated, based on EPA and Corps data).

293. See Wittenberg & Bogardus, *supra* note 291.

294. See Burger, *supra* note 290.

295. See Chloe Johnson, *SC Wetlands—Prized for Habitat and Flood Buffer—Lose Protection under Trump Water Rule*, POST & COURIER (Jan. 18, 2019), https://www.postandcourier.com/news/sc-wetlands-prized-for-habitat-and-flood-buffer-lose-protection/article_e8b1b568-15e7-11e9-9f73-fb66dc7843a5.html [<https://perma.cc/VRH8-VKWX>].

296. See Jackson, *supra* note 107.

297. See Uhlmann, *supra* note 290. See also Owen, *supra* note 290 (outlining the benefits of intermittent and ephemeral streams).

also argued that the rule could jeopardize more than one hundred thousand jobs in the ecological mitigation industry.²⁹⁸

In addition to those concerns, during the comment period for the rulemaking, the Association of State Wetland Managers (“ASWM”) raised several policy concerns to the agencies regarding the impact of the proposal on States. While the agencies argued that the proposed rule would not eliminate protection for streams and wetlands, but merely transfer regulatory authority for those waters to States, ASWM pointed out that many of those waters would not be protected because some states have passed laws that prohibit the states from protecting waters that are not protected by the federal government and many states may lack the funding and resources to expand their programs to protect additional waters that are removed from federal jurisdiction.²⁹⁹ ASWM also raised concerns that (1) the proposed reduction in federal jurisdiction would reduce incentives for States to assume responsibility for administering the federal Section 404 permitting program; (2) waters that are no longer regulated by the federal government would no longer receive the protection they currently receive under the National Environmental Policy Act, the Endangered Species Act, and other federal laws triggered by the Section 404 permitting process; (3) the public may view waters that are not protected by the federal government as less valuable than “waters of the United States”; and (4) the proposed reduction in federal jurisdiction could create interstate disparity and inconsistency in protecting waters, as states “race to the bottom” in establishing water quality protection programs.³⁰⁰

298. See Jackson, *supra* note 107. In 2015, researchers at the University of North Carolina and Yale determined that ecological mitigation programs add up to \$9.5 billion and 126,000 jobs to the American economy every year. *Id.* An earlier University of Massachusetts study found that reforestation and land and watershed restoration work add thirty-nine jobs for every \$1 million invested, while the coal industry adds only six jobs for every \$1 million invested. *Id.*

299. See Association of State Wetland Managers, Inc., *Comments on the February 14, 2019 Notice of Proposed Rulemaking for “Revised Definition of Waters of the United States,”* 3–5 (Apr. 15, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4897> [<https://perma.cc/BY9G-FD3X>] [hereinafter *ASWM 2019 Comments*]. Thirty-six states have laws that could limit the authority of states to regulate waters that are removed from federal jurisdiction. See Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* (May 2013), <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf> [<https://perma.cc/KM32-7M8Q>]. According to a 2015 ASWM survey, only twenty-three states have laws that regulate activities that affect wetlands. See *Status and Trend Report on State Wetland Programs in the United States*, ASWM (2015), https://www.aswm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf [<https://perma.cc/VS8Y-5L95>].

300. See *ASWM 2019 Comments*, *supra* note 299 at 3–5.

B. *Flaws in the Proposed Rulemaking*

If the Step Two replacement rule is finalized in a form similar to the proposed rule, it would have serious flaws that should lead to its invalidation. In the proposed rulemaking, the agencies have (1) adopted an interpretation of the Clean Water Act that runs counter to the plain language and structure of the statute; (2) mis-read the Supreme Court's *Rapanos* decision and inappropriately relied on the plurality opinion to support the rule; (3) failed to rationally explain their departure from their prior legal interpretation of the Clean Water Act and the Supreme Court's *Rapanos* and *SWANCC* decisions; and (4) failed to provide a rational explanation for their change in interpretation of the science behind the 2015 rule.³⁰¹

1. Flawed Statutory Interpretation—Section 101(a) and 101(b)—Plain Meaning

The Clean Water Act should be interpreted in a manner that advances the goals and objectives of Section 101(a)³⁰² and should not be interpreted to give precedence to the policies of Section 101(b)³⁰³ over those goals and objectives. In the proposed rulemaking, the agencies inappropriately asserted that the statute should be interpreted to advance the policies of Section 101(b), even though such interpretation would frustrate the objectives of Section 101(a).

The very first sentence of Public Law 92-500, creating the modern Clean Water Act, establishes the objective of the statute in Section 101(a) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁰⁴ Section 101(a) also outlines some aspirational goals for the statute, including eliminating the discharge of pollutants into the navigable waters by 1985 and attaining water quality that provides for the protection and propagation

301. In addition to those flaws, the Attorneys General for fourteen States and the District of Columbia argued, in their comments to the agencies on the proposed rulemaking, that the agencies’ exclusion of interstate waters as a separate category of “waters of the United States” is contrary to the Clean Water Act, contrary to legal precedent, and that the agencies did not provide a rational explanation for changing their prior approach to regulating interstate waters as a category of “waters of the United States.” See Attorney Generals of New York, California, Connecticut, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia, *Comments on the February 14, 2019 Notice of Proposed Rulemaking for ‘Revised Definition of Waters of the United States’* (Apr. 15, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-tells-epa-and-army-corps-with-draw-proposal-eliminating> [<https://perma.cc/AH6N-629S>]. The Attorneys General and the Association of State Wetland Managers both also argued, in their comments on the proposed rulemaking, that the agencies acted arbitrarily and capriciously by relying on the economic studies provided to justify the Step Two rulemaking. *Id.* at 31–33; *ASWM 2019 Comments*, *supra* note 299, at 25–29.

302. See 33 U.S.C. § 1251(a) (2012).

303. *Id.* § 1251(b).

304. *Id.* § 1251(a).

of fish, shellfish and wildlife, and provides for recreation in and on the water by July 1, 1983.³⁰⁵ In a subsequent provision, Section 101(b), Congress outlined a policy of the statute “to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . . and to plan the development and use . . . of land and water resources.”³⁰⁶

In the proposed Step Two rulemaking, EPA and the Corps argued that the terms “policy,” “goal,” and “objective” have different meanings and that Congress acted intentionally when identifying policies, goals, and objectives separately.³⁰⁷ The agencies relied on dictionary definitions of the terms “policy” and “objective” to suggest that, based on the ordinary meaning of those terms, objectives and goals are not binding, while policies are binding.³⁰⁸ Following up on that line of argument, they suggested that the policy of Section 101(b) is superior to the goals and objectives of section 101(a), so that the Clean Water Act should be interpreted to advance the policy of Section 101(b) even though it may frustrate the objectives of Section 101(a).³⁰⁹ However, the agencies mischaracterized the relationship between goals, outcomes, and policies. Even though the *goals* of Section 101(a)(1) and (2) are not binding, neither are the *policies* of Section 101(b) or any other section of the statute that identifies policies. The *objectives* outlined in Section 101, though, are separate from the goals outlined in Section 101(a)(1) and (2). An *objective* is defined in Webster’s Dictionary as “something toward which effort is directed; an aim . . . or end of action,”³¹⁰ while a *policy* is defined as “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.”³¹¹ In light of those definitions, the *objective* is the end, while *policies* are the means to achieve the end. In examining ways to achieve an objective, a decision-maker may be guided by certain policies to choose among approaches that will achieve the objective. However, the policies are subservient to the objective. The decision-maker should not treat a policy as the end to which effort is directed. In the proposed rulemaking, the agencies correctly noted that there is a distinction between the

305. *Id.* §§ 1251(a)(1), 1251(a)(2).

306. *Id.* § 1251(b).

307. *See* Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4163 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

308. *Id.* at 4163–64.

309. *Id.* at 4164 (noting that the word choices of Congress require the agencies to “*aim* to accomplish the goals of the Act while *implementing* the specific policy directives of Congress”) (emphasis added).

310. *See Objective*, Merriam Webster (online edition), <https://www.merriam-webster.com/dictionary/objective> [<https://perma.cc/SF4W-CNPX>]. The agencies cited a similar definition for objective in their proposed rulemaking. *See* 84 Fed. Reg. at 4163.

311. *See Policy*, Merriam Webster (online edition), <https://www.merriam-webster.com/dictionary/policy> [<https://perma.cc/Y5HK-BLBF>]. The agencies cited a similar definition for policy in their proposed rulemaking. *See* 84 Fed. Reg. at 4163.

word choices made by Congress in identifying the outcomes of the Clean Water Act in Section 101(a) and policies in Section 101(b).³¹² However, the agencies incorrectly interpreted the difference between the priority of the terms.

A review of the legislative history of Public Law 92-500 demonstrates that the Conference Report for the legislation, in describing Section 101 of the Act, focuses on the objectives and goals of Section 101(a), but is silent regarding section 101(b).³¹³ Similarly, during Senate consideration of the bill reported from the Conference Committee, there were nine references to the objectives and goals of Section 101(a), but no references to Section 101(b).³¹⁴ The primary concern of the Congress that enacted the Clean Water Act was “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters,” and the agencies, in their proposed rulemaking, attempted to subordinate that concern to the “policy” of Section 101(b).³¹⁵ That is inconsistent with the ordinary meaning of the terms, “objectives,” “goals,” and “policies,” and is inconsistent with the intent of the enacting Congress.³¹⁶

Thus, in interpreting and administering the statute, the agencies should be guided first and foremost by the objectives of Section 101(a). If there are a variety of ways to achieve those objectives, some of which interfere with states’ abilities to prevent, reduce, and eliminate pollution, and plan the use and development of land and water resources and some of which do not, then the agency should implement the approaches that do not interfere with state authority. However, the agencies should not adopt an interpretation of the statute to advance states’ rights when it interferes with achieving the objectives of the statute. Since the proposed rule does that, it is outside of the agencies’ statutory authority.

2. Flawed Statutory Interpretation—Section 101(a) and 101(b)— Structure of the Statute

In the proposed Step Two rulemaking, the agencies argued that the term “waters of the United States” under the Clean Water Act should be interpreted

312. See Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4164 (citing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012)) (“[w]here Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally”).

313. See S. Rep. No. 92-1236, at 99-100 (reprinted in COMM. ON PUB. WORKS, 93d Cong., 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 281, 282-83 (Jan. 1973)).

314. See 118 Cong. Rec. S33692-718 (daily ed. Oct. 4, 1972) (debate on Conference Report) (reprinted in COMM. ON PUB. WORKS, 93d Cong., 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 161-223 (Jan. 1973)).

315. 33 U.S.C. § 1251(a) (2012); 33 U.S.C. § 101(b) (2012).

316. See *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019) (noting that words should be “interpreted as taking their ordinary meaning . . . at the time Congress enacted the statute”).

narrowly based on the structure of the statute. To the extent that there is any tension between Sections 101(a) and 101(b), the Supreme Court resolved the tension in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, when the Court held that EPA and the Corps could regulate, under the Clean Water Act, any waters that have a “significant nexus” to traditional navigable waters.³¹⁷ The proposed rulemaking should have included, in the definition of “waters of the United States,” all waters that have a “significant nexus” to traditional navigable waters.

EPA and the Corps argued, in the proposed rulemaking, that Congress intended to achieve the goals of Section 101(a) by creating non-regulatory programs that apply to all waters and a permit program that applies to a much narrower set of “navigable” waters.³¹⁸ They argued that, in order to carry out the policy of Section 101(b), and in recognition of the protection of State authority in Section 510, the statute should be interpreted narrowly to limit the scope of waters regulated under the federal permitting program, as waters can be protected without being regulated under the permitting program.³¹⁹

Although the grant programs, technical assistance programs, and watershed planning programs created for states under the Clean Water Act may apply to some waters that are not regulated under the Sections 402 or 404 permitting programs,³²⁰ that does not mean that federal jurisdiction over “waters of the United States” should be interpreted narrowly. Those state grant, technical assistance, and planning programs are designed to *supplement* the protections provided by the federal permitting program, rather than to *replace* them.³²¹

Narrowing the scope of federal jurisdiction over “waters of the United States” is not necessary to advance the policies of Sections 101(b) or 510.³²² The statute, as currently interpreted and implemented, recognizes and respects the

317. See 531 U.S. 159, 167–73 (2001).

318. See Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4157 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

319. *Id.* at 4157, 4169.

320. *Id.* at 4156.

321. In their notice of proposed rulemaking, EPA and the Corps argued that “[c]ontrolling all waters using the Act’s federal regulatory mechanisms would significantly reduce the need for the more holistic planning provisions of the Act and the state partnerships they entail.” See 84 Fed. Reg. at 4169. That assertion is erroneous for several reasons. First, neither the 2015 rule or any rule ever proposed or adopted by the agencies attempt to control “all waters” in the states. Even if the agencies interpreted the term “waters of the United States” broadly enough to include all waters in a state, though, the Section 402 and 404 permit programs only apply to *point source discharges*, see 33 U.S.C. § 1311 (2012), and the regulations adopted by EPA to implement the Section 402 and 404 programs do not target *all pollutants* that harm health or the environment. State planning and partnerships with the federal government would still be necessary to address those discharges or pollutants that are not regulated under the 402 and 404 permitting programs or to address other problems that are not being sufficiently prevented by the federal permitting programs.

322. See 33 U.S.C. § 1370 (2012).

important role of states while working to achieve the objectives of 101(a). Section 510 provides that the Clean Water Act does not preempt state regulation of water pollution and allows states to be more restrictive, but not less restrictive, than the federal government when protecting water quality.³²³ That provision allows states to adopt and implement their own water pollution control programs and envisions joint and cooperative federal and state regulation. Nothing in Section 510 should be read to *limit* the scope of federal authority over waters of the United States.

Sections 101(b) and 510 are advanced by several other provisions in the Clean Water Act that establish a cooperative federal/state regulatory program, including the 401 certification process and provisions regarding delegation or assumption of the federal permitting programs.

The Clean Water Act authorizes states to administer the federal Section 402 and 404 permitting programs (with the exception of permitting for Class I waters).³²⁴ Thus, even if the federal definition of “waters of the United States” is broad, states have the option of taking over the programs, which allows them to carry out their “responsibilities and rights . . . to prevent, reduce, and eliminate pollution . . . and to plan the development and use . . . of land and water resources.”³²⁵ A narrower definition of “waters of the United States” could increase the regulatory burden for states, as many states that currently choose to not take over the federal permitting program because the federal government is adequately protecting the waters in those states may need to regulate additional waters in their state permitting programs if federal jurisdiction is reduced.³²⁶

In addition to the delegation and assumption authorities provided to states under the Clean Water Act, Section 401 of the Act authorizes States to impose

323. *Id.*

324. *See id.* §§ 1342(b), 1344(g).

325. States may complain that, even if they take over the Section 402 and 404 permitting programs, a broader definition of “waters of the United States” limits their ability to approve permits for construction activities that result in a discharge of pollutants or addition of dredged or fill material into waters under federal jurisdiction. While the designation of waters as “waters of the United States” may impose some limits on the ability of States to allow land uses that harm the environment, Section 101(b) should not be read to provide that the federal government cannot impose *any* limits on States’ control of land use. After all, Section 101(b) refers to the “primary” rights and responsibilities of States, rather than the “exclusive” rights and responsibilities of States. Section 101(b) should be read to allow federal regulation of waters when necessary to achieve the objectives and goals of Section 101(a).

326. Admittedly, a broader definition of “waters of the United States” could impose regulatory costs on states because states are required to establish water quality standards, 33 U.S.C. § 1313 (2012), and total maximum daily loads (“TMDL”), *id.* § 1313(d), for jurisdictional waters. Thus, if the jurisdiction over “waters of the United States” is broad, there are more waters for which states must create water quality standards and TMDLs. However, under the Clean Water Act, EPA will establish those standards if States don’t. *See id.* §§ 1313(b), 1313(c). Therefore, States can avoid any additional costs if they do not wish to establish standards to protect those waters.

conditions on federal permits to protect the waters of their State, even when the State has not taken over a federal Clean Water Act permitting program.³²⁷ Once again, this is designed to advance the policies of Section 101(b). If the scope of federal jurisdiction over “waters of the United States” is narrowed, states lose that authority over those waters and will have to regulate them under state law to protect them. According to comments provided by the Association of State Wetland Managers on the supplemental notice of proposed rulemaking regarding the repeal rule, only twenty-four states have independent dredge and fill permitting authority.³²⁸ The rest rely on 401 certification.

Narrowing the definition of “waters of the United States” as proposed by the agencies would frustrate the objectives of Section 101(a) *and* the policies of Section 101(b) in another important way. Federal regulation of “waters of the United States” is important because it protects waters that impact more than one state and which cannot be controlled by states beyond their own boundaries.³²⁹ States cannot regulate upstream activities that occur in other states that can harm their water quality. The Supreme Court recognized the important role that the federal government plays in regulating water bodies that affect multiple States when it wrote, in *International Paper Company v. Oullette*, “[w]hile source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the . . . affected States.”³³⁰ Representative Gross discussed concerns regarding the lax nature of state pollution control prior to the enactment of the Clean Water Act when, during the House debate on the bill that became Public Law 92-500, he noted that “[t]hrough the years the States and the local subdivisions of government, including the municipalities, failed to enforce laws and ordinances

327. *See id.* § 1341.

328. *See* Association of State Wetland Managers, *Comments of the Association of State Wetland Managers to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers in Response to the July 12, 2018 Federal Register Supplemental Notice of Proposed Rulemaking Regarding Definition of ‘Waters of the United States’ - Recodification of Preexisting Rule* at 6 (Aug. 8, 2018), https://www.aswm.org/pdf_lib/comment_supplemental_notice_%20step_1_080818.pdf [<https://perma.cc/H9Z2-2NEY>] [hereinafter “*ASWM 2018 Comments*”].

329. *See ASWM 2019 Comments, supra* note 299, at 5. In its comments on the proposed Step Two rulemaking, the Association of state Wetland Managers argued that the federal role in administration of the Clean Water Act is essential to the states in protecting states and tribes from interstate impacts, in ensuring that national level concerns (such as hurricane protection, drought minimization prevention, minimization of flooding, etc.) are adequately considered, in avoiding potential impacts on water use allocations by states, in providing protection of habitat, in maintaining a level economic playing field, and in effectively addressing emerging pollutants as they are identified and as novel pollution control methods are developed. *Id.*

330. *See* 479 U.S. 481, 490 (1987). A long line of Supreme Court cases recognize that federal law can supersede state law to protect air and water quality even though federal law is regulating traditional state activities such as land use. *See, e.g.,* *Illinois v. Milwaukee*, 406 U.S. 91, 105–06 (1972); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

in the matter of pollution and especially the polluting of streams.”³³¹ When the scope of federal jurisdiction over “waters of the United States” is reduced, states become more vulnerable to pollution of their waters caused by lax regulation in other states. That result conflicts with the objectives of Section 101(a) and the policies of Section 101(b) to protect states’ rights and responsibilities.³³²

The narrowing interpretation that was proposed by the agencies in the Step Two rulemaking could also frustrate the objectives of Section 101(a) because it could lead states to adopt complex, confusing, and inconsistent programs to regulate the waters that are eliminated from federal protection. States raised these concerns in response to a 2003 advance notice of proposed rulemaking to redefine “waters of the United States” after the *Solid Waste Agency of Northern Cook County* decision.³³³

While there are many reasons why the term “waters of the United States” should not be interpreted narrowly to reconcile a tension between Sections 101(a) and 101(b) of the Clean Water Act, the primary reason, as noted above, is that the Supreme Court has already reconciled the tension in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. In that decision, the Court explicitly noted that interpreting the Clean Water Act to authorize the regulation of the isolated waters at issue in that case, based on the migratory bird test, could encroach on a traditional state power.³³⁴ In reading the statute narrowly to find that it did not authorize jurisdiction in the case, the Court stressed that the “significant nexus” between wetlands and traditional navigable waters that existed in *United States v. Riverside Bayview Homes*, informed the Court’s interpretation of the scope of “waters of the United States” under the Clean Water Act.³³⁵ The message provided by the Court is clear. When a water has a “significant nexus” to a traditional navigable water, federal regulation of the water under the Clean Water Act does not violate the policies of Section 101(b). Thus, in crafting their proposed rule to redefine “waters of the United States,” the agencies should have applied the “significant nexus” test, rather than attempting to reinterpret the relationship between Sections 101(a) and 101(b). Since they didn’t, they acted outside of their statutory authority.

331. See 118 Cong. Rec. H10203 (daily ed. Mar. 27, 1972) (statement of Rep. Gross) (*reprinted in* COMM. ON PUB. WORKS, 93d Cong., 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 349 (Jan. 1973)).

332. Justice Kennedy explained in his *Rapanos* concurrence that the Clean Water Act policy of respecting states’ rights under Section 101(b) includes respect for state water pollution policies that rely on the Clean Water Act to “protect[] downstream States from out-of-state pollution that they themselves cannot regulate.” See 547 U.S. at 777.

333. See *ASWM 2018 Comments*, *supra* note 328, at 4.

334. See *Solid Waste Agency*, 531 U.S. at 172–73.

335. *Id.* at 167.

3. Inappropriate reliance on the *Rapanos* plurality opinion

The agencies also inappropriately relied on Justice Scalia's plurality opinion in *Rapanos* as the basis for the proposed Step Two rulemaking. In reliance on the plurality opinion, they defined "waters of the United States" to be limited to relatively permanent waters and wetlands with a continuous surface connection to traditional navigable waters.³³⁶ In further reliance on the plurality opinion, they eliminated the case-by-case application of the significant nexus test from Justice Kennedy's concurring opinion in *Rapanos* as a means of determining jurisdiction over tributaries, adjacent wetlands, and other waters,³³⁷ they redefined "tributary" to eliminate jurisdiction for ephemeral streams,³³⁸ and they rejected subsurface hydrologic connections between waters as a basis for jurisdiction.³³⁹ The agencies inappropriately based the proposed rulemaking on the *Rapanos* plurality opinion, rather than Justice Kennedy's concurring opinion.³⁴⁰

The agencies refused to rely on Justice Kennedy's concurring opinion in *Rapanos* as the basis for the Step Two rule because they claimed it was "the opinion of a single Justice."³⁴¹ However, the four dissenting Justices in *Rapanos*, wrote that they would find jurisdiction under the Clean Water Act whenever a water would be regulated under Justice Kennedy's tests *or* under the plurality's tests.³⁴² Consequently, five of the nine Justices in *Rapanos* would utilize Justice

336. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4170 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

337. *Id.*

338. *Id.* at 4172–73.

339. *See Solid Waste Agency*, 531 U.S. at 4188.

340. As noted earlier, Justice Kennedy argued that the "significant nexus" test that was established in *SWANCC* was the appropriate test for determining jurisdiction over "waters of the United States." *See supra* notes 69–76, and accompanying text. As he wrote, "[t]aken together, these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking." *See Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring). The "significant nexus" test, he argued, "prevents problematic applications of the statute." *Id.* at 783. Justice Kennedy was concerned that the plurality's test did not give sufficient deference to Congress' purposes in enacting the Clean Water Act.

341. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4196 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

342. *See Rapanos*, 547 U.S. at 787, 810 (Stevens, J., dissenting). The dissenting Justices would have upheld broader regulation of waters than the plurality or Justice Kennedy, *id.* at 788, and would have upheld the government's regulations at issue in the case under *Chevron v. NRDC*, 467 U.S. 837 (1984), but nevertheless indicated that the waters identified in either the plurality or Kennedy opinions would be "waters of the United States" under their broader reading of Clean Water Act jurisdiction. *See Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

Kennedy's "significant nexus" test as one method of determining jurisdiction under the Clean Water Act.

From the time of the *Rapanos* decision until the proposed Step Two rulemaking, in light of the dissent's counsel, EPA and the Corps interpreted the *Rapanos* decision to authorize the federal government to regulate waters under the Clean Water Act if they satisfied either Justice Kennedy's "significant nexus" test or the plurality test.³⁴³ The agencies admitted, in their notice of proposed rulemaking for the Step Two rule, that they consistently adopted a broad interpretation of Justice Kennedy's "significant nexus" test to support findings of jurisdiction under the Act,³⁴⁴ and the agencies have been very successful defending their interpretation in court. All of the federal appellate courts that have ruled on the question have held that the agencies can rely on the Kennedy test exclusively³⁴⁵ or on the Kennedy and plurality tests to determine Clean Water Act jurisdiction over "waters of the United States."³⁴⁶ *None of the courts* has held that the agencies should rely *solely* on the plurality opinion. In addition, at oral argument before the Supreme Court in *Hughes v. United States*, while the agencies were finalizing the proposed Step One rulemaking, counsel for the United States cited the *Rapanos* decision and argued that divided opinions of the Supreme Court should be interpreted in the manner that the Corps and EPA consistently interpreted *Rapanos* until the proposed Step Two rulemaking.³⁴⁷ And yet, in the proposed Step Two rulemaking, the agencies rejected the interpretation that prevailed in all of the federal appellate courts and proposed an interpretation that has been rejected by all of those courts. To the extent that the agencies' proposed rule rejects the Kennedy test in favor of the *Rapanos* plurality, the rule is outside of the agencies' statutory authority.

4. Failure to Rationally Explain Departure from Prior Legal Interpretations

While the agencies' proposed rule is outside of their statutory authority, the agencies also acted arbitrarily and capriciously in changing their interpretation

343. See JOHNSON, *COURSE SOURCE*, *supra* note 59, at 140–43.

344. See Revised Definition of "Waters of the United States," 84 Fed. Reg. at 4167.

345. See, e.g., *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

346. See JOHNSON, *COURSE SOURCE*, *supra* note 59, at 142.

347. See Transcript of Oral Argument at 28–29, 35, 47–48, 50–52, *Hughes v. United States*, 138 U.S. 1765 (2018), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-155_g314.pdf [<https://perma.cc/3AHL-88K8>] [hereinafter "Transcript of Oral Argument"]. The Supreme Court granted cert in *Hughes* to decide "[w]hether [the] Court's decision in *Marks* means that the concurring opinion in a 4–1–4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other." See *Hughes*, 138 U.S. at 1772. Ultimately, the Court decided the case without resolving that question. *Id.*

of the Clean Water Act and the Supreme Court WOTUS decisions that supported the 2015 rule without rationally explaining the reasons for the change. As the Supreme Court noted in *Encino Motorcars*, “[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change . . . [b]ut the agency must at least ‘display awareness that it is changing its position’ and ‘show that there are good reasons for the new policy.’”³⁴⁸ “[A]n ‘[u]nexplained inconsistency’ in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”³⁴⁹

The agencies argued, in the notice of proposed rulemaking, that a revised rulemaking based on a change in policy is well within an agency’s discretion and that a change in administration brought about by people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of its regulations.³⁵⁰ While a change in administration may be a reasonable basis for a *reappraisal* of regulations, a change in administration *alone* cannot be a reasonable basis for a *change* in regulations.

The agencies acknowledged that they were changing their interpretation of their authority under the Clean Water Act and their interpretations of the Supreme Court’s decisions in *Rapanos* and *Solid Waste Agency of Northern Cook County* in several regards.³⁵¹ To support their changing positions, they argued that they “re-evaluated their legal authority and those policies that they deem most important in shaping the jurisdiction of the Clean Water Act: prioritizing the text of the statute, adherence to constitutional limitations, including the autonomy of the states, and providing clarity to the regulated community.”³⁵²

However, all of the Supreme Court decisions that the agencies claimed impacted their changed interpretation of the Clean Water Act were decided *before* the agencies adopted the interpretations of the Act that they were changing in the proposed rulemaking. The interpretations that were being changed were adopted by the agencies *in response* to those cases. Subsequently, all of the circuit courts that reviewed the agencies’ interpretations that were being changed *upheld* the interpretations that the agencies were changing. It is disingenuous, therefore, for the agencies to say that the change is rooted in the Court’s decisions.

In addition, although the agencies claimed to be changing the interpretations of the Clean Water Act to reduce confusion and provide clarity,³⁵³ the agencies

348. See *Encino*, 136 U.S. at 2125–26.

349. *Id.*

350. See Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4169 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 358).

351. See, e.g., Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4167, 4169.

352. *Id.* at 4169.

353. See *id.* at 4154.

adopted the 2015 rule to reduce confusion and provide clarity.³⁵⁴ The agencies claimed that the 2015 rule could not reduce confusion and provide clarity because it was challenged in several courts.³⁵⁵ However, if the agencies finalize the Step Two rule to replace the 2015 rule, it will be challenged in court as well and will not reduce confusion or provide clarity any more than the 2015 rule once it has been challenged. When the agencies, in 2018, adopted a rule that attempted to suspend the 2015 rule for two years (the “suspension rule”), they justified it on the grounds that it would reduce confusion and provide clarity.³⁵⁶ However, that rule was immediately challenged and, within three months, a federal district court in South Carolina held that it was invalid and issued a nationwide injunction against its enforcement.³⁵⁷ As a result of that ruling, at the time of the Step Two proposal, the 2015 rule was in force in twenty-two states, while being enjoined in the remaining states by a variety of district courts reviewing challenges to the 2015 rule.³⁵⁸ The suspension rule did not provide clarity or reduce confusion and neither will the agencies’ proposed Step Two rulemaking.

Looking beyond the facade of reasons provided by the agencies for the change in interpretation of the Clean Water Act, it is clear that the real reason for the agencies’ change in position was the Executive Order issued by President Trump,³⁵⁹ which, in essence, directed the agencies to repeal the 2015 rule and replace it with a rule that adopts the reasoning of the plurality opinion in *Rapanos*. Congress delegated *EPA and the Corps*, rather than the President, the authority to adopt regulations to administer the Clean Water Act.³⁶⁰ It wanted

354. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,055–57 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

355. See Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4197 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

356. See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5202 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

357. See *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018).

358. See Definition of “Waters of the United States”—Recodification of Preexisting Rules, 84 Fed. Reg. 56,626, 56,630 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 358).

359. See Exec. Order No. 13,778, 82 Fed. Reg. 12497 (Mar. 3, 2017).

360. See 33 U.S.C. § 1361(a) (2012). Congress occasionally delegates authority directly to the President, rather than administrative agencies. See, e.g., *Emergency Petroleum Allocation Act of 1973*, Pub. L. No. 93–159, 87 Stat. 627, (repealed); *Energy Policy and Conservation Act of 1975*, Pub. L. No. 94–163, 89 Stat. 817. However, Congress did not delegate the authority to define “waters of the United States” in the Clean Water Act to the President. For extended discussions regarding the power of the President to direct agency decision-making, see Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017); Johnson, *Disclosing the President’s Role in Rulemaking*, *supra* note 1; Strauss, *supra* note 1, at 696–97; Stack, *supra* note 1, at 264; Kagan, *supra* note 1; Calabresi &

the agencies to exercise their expertise to determine important scientific and policy questions like those intertwined in the statutory definition of waters of the United States. To the extent that the agencies' interpretation change was based solely on the Executive Order, the agencies' change in position is arbitrary and capricious.

Ultimately, the agencies justified their rulemaking changes on their incorrect reading of *Rapanos v. United States*. When an agency adopts a rule based on a mis-reading of precedent and fails to justify its rule on other grounds, a court will invalidate the agency's rule.³⁶¹ In *SEC v. Chenery Corporation*, the Supreme Court struck down a decision of the Securities and Exchange Commission because the agency had failed to exercise its expertise in interpreting and administering the Public Utility Holding Act, but relied, instead, on a flawed reading of judicial precedent interpreting the statute.³⁶² "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."³⁶³ Since the agencies proposed to make several changes to the 2015 rule based on their erroneous reading of the *Rapanos* case and did not provide any justification for the proposed rules based on their expertise or other rational grounds, the agencies' proposed changes, if adopted, will be void in light of the absence of a rational explanation to justify the changes.

5. Failure to Rationally Explain Changed Interpretation of the Science Behind the 2015 Rule

In their notice of proposed rulemaking, the agencies did not rationally explain why they changed their interpretation of the science that supported the 2015 rule. In the 2015 rule,³⁶⁴ and earlier, in the guidance applying the significant nexus test on a case by case basis,³⁶⁵ the agencies provided strong scientific support for their decisions to adopt a broad definition of tributaries,³⁶⁶ to regulate adjacent wetlands based on hydrological and ecological connections other than surface connections,³⁶⁷ and to assert jurisdiction over other waters

Prakash, *supra* note 1; Lessig & Sunstein, *supra* note 1; Bruff, *supra* note 1 (outlining the arguments in favor of, and opposing Presidential control over agency decision-making).

361. See *SEC v. Chenery Corp.*, 318 U.S. 80, 88–93 (1943).

362. *Id.*

363. See *Motor Vehicle Mfrs' Ass'n v. State Farm Ins.*, 463 U.S. 29, 50 (1983).

364. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. 328).

365. See U.S. EPA & U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf [<https://perma.cc/XK7M-B9HV>].

366. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,058–69.

367. *Id.* at 37,069–70.

that the agencies determine, on a case by case basis, have a significant nexus to waters of the United States.³⁶⁸ In their Step Two proposal, the agencies rejected those prior decisions and did not explain how the science changed or why the prior scientific conclusions could not be supported any more. Instead, they made a few passing references to comments of EPA's Science Advisory Board on the Connectivity Study as evidence that the proposal is "informed by science," but they stressed that the questions to be decided by the agencies are legal questions, rather than scientific questions.³⁶⁹ The agencies' failure to engage with the science and explain why the agencies no longer find the science to support the rule is unreasonable.

Although the definition of "waters of the United States" is a legal and policy decision, the Supreme Court resolved the legal question to a large degree in *Rapanos* and *Solid Waste Agency of Northern Cook County*, when it held that the "significant nexus" test is the test for determining jurisdiction over "waters of the United States" under the Clean Water Act. The determination of whether waters have a "significant nexus" to traditional navigable waters is predominantly a scientific question, rather than a legal question. In *Rapanos*, Justice Kennedy wrote that the "significant nexus" required for Clean Water Act jurisdiction "must be assessed in terms of the statute's goals and purposes . . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"³⁷⁰ As outlined in an earlier section of this Article, in Kennedy's opinion, he outlined a science-based test that was drawn from the goals and purposes of the law.³⁷¹ It is clear, from his opinion, that he believed that science is central to the determination of when waters, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other navigable waters.

The agencies recognized their responsibility to support their interpretation of the term "waters of the United States" with sound science when they adopted the 2015 rule and relied on the Connectivity Study to determine which waters have a "significant nexus" to traditional navigable waters.³⁷² If, in the Step Two rulemaking, they are rejecting positions that they took to apply that test in the past and justified based on science, they cannot ignore the scientific conclusions

368. *Id.* at 37,071–73.

369. See Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4175 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328) (definition of "waters of the United States" is a legal and policy decision). *Id.* at 4197 (noting that "the 2015 Rule may have failed to appropriately recognize that the science in the Connectivity Report . . . is not dispositive in interpreting the statutory reach of 'waters of the United States,' which is ultimately a legal determination.").

370. See *Rapanos*, 547 U.S. at 779.

371. See *supra* notes 233–40 and accompanying text.

372. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37, 054, 37,054–55 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

that they reached in the past, but must explain how the science supporting their decisions has changed or why the science no longer supports their prior decisions. The agencies failed to do that in the proposed rulemaking. The agencies cited individual statements from the Science Advisory Board's review of the Connectivity Study regarding degrees of connectivity to justify their decision to exclude regulation of ephemeral streams,³⁷³ and to support their definition of adjacent wetlands,³⁷⁴ but those isolated statements conflicted with the great weight of the science that the agencies relied on in crafting the 2015 rule.

VIII. WILL WOTUS RETURN TO THE SUPREME COURT?

In the past four years, EPA and the Corps have initiated and/or finalized four rulemakings to define, postpone, repeal, or redefine "waters of the United States" under the Clean Water Act. Two of the rulemakings that have been finalized have been challenged in court, and it is likely that the other two rulemakings will be challenged in court as well when finalized. Since the Supreme Court has addressed the scope of Clean Water Act jurisdiction three times in the last three and a half decades and since the Court's *Rapanos* decision has proved to be confusing in its application, it would not be surprising to see a challenge to one of the agencies' rulemakings eventually finding its way back to the Supreme Court, but it may be several years before that happens, in light of the Court's ruling in the *National Association of Manufacturers* case that challenging the rules must originate in the federal district courts.

It is clear that the *applicability date rulemaking* will not be challenged in the Supreme Court, as the agencies have abandoned defense of the rule, focusing instead on the Step One repeal and Step Two replacement rules. It is also very unlikely that a challenge to the 2015 rule will be heard by the Supreme Court. The agencies are refusing to defend the 2015 rule on the merits and the agencies finalized the rule that *repeals* the 2015 rule and will perhaps even finalize the rule that *replaces* the 2015 rule before challenges to the 2015 rule work their way up to the federal appellate courts, thus mooting out challenges to the 2015 rule.³⁷⁵ Similarly, it is unlikely that a challenge to the Step One repeal rule will be heard by the Supreme Court because the agencies plan to finalize the Step Two replacement rule shortly after finalizing the repeal rule, mooting out

373. See Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4176 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

374. *Id.* at 4187.

375. Forecasting in this area becomes very difficult, though, because judicial invalidation of the repeal and replacement rules could resurrect the 2015 rule, at which point, challenges to the 2015 rule would not be moot.

challenges to the repeal rule.³⁷⁶ Thus, *if* the Supreme Court decides to wade back in to resolve the scope of the “waters of the United States” under the Clean Water Act, it will most likely be in the context of reviewing challenges to the agencies’ Step Two replacement rule. Since the rule may not be finalized until 2020³⁷⁷ and challenges to the rule must work their way through the federal trial and appellate levels, it is unlikely that the Court will hear challenges to the rule before the end of the current Administration and there may be additional changes to the membership of the Court before a challenge to the rule reaches the Court. Even if the composition of the Court does not change before a challenge to the agencies’ Step Two rule reaches the Court, it is difficult to predict how the Court will rule on the challenge, especially since the agencies have not yet finalized the Step Two rule. Nevertheless, assuming that the agencies finalize the rule in a manner that is similar to the proposed rule, without addressing the flaws outlined above, it is likely that the outcome of the case will depend largely on the leanings of Justice Kavanaugh.

There have been four changes in the composition of the Court since the *Rapanos* decision. Justices Stevens, Souter, Scalia and Kennedy have been replaced, respectively, by Justices Kagan, Sotomayor, Gorsuch, and Kavanaugh. Justice Kennedy’s absence will be the most significant, since he will not be around to defend his *Rapanos* concurrence and clarify the manner in which he envisioned the “significant nexus” test should be applied. There is little in the voting history of Justices Kagan or Sotomayor that would suggest that they would support the agencies’ interpretation of the Clean Water Act in a Step Two rule if the interpretation ignored Justice Kennedy’s concurring opinion in *Rapanos* and ignored the purposes of Section 101(a) of the Act, so one might assume that they would join Justice Breyer and Justice Ginsburg’s call in the *Rapanos* dissent for an interpretation of the Act based on science that advances the objectives of section 101(a). The remainder of this part of the Article, therefore, focuses on the potential reactions of Justices Gorsuch and Kavanaugh to a challenge to the Step Two rule.

376. Once again, though, if the replacement rule is invalidated and the repeal rule has not already been invalidated, the pre-2015 regulations would be put back in place pursuant to the repeal rule and challenges to the repeal rule would not be moot.

377. See David Schultz, *Busy Summer Planned at EPA for New Water Regulations*, BLOOMBERG ENV’T (May 22, 2019), <https://news.bloombergenvironment.com/environment-and-energy/busy-summer-planned-at-epa-for-new-water-regulations> [https://perma.cc/LS5L-7LMS]. It is possible, though, that the agencies may never finalize the Step Two rule. When they finalized the Step One rule, they wrote, “[t]hough this final rule is intended to be the first step in a comprehensive, two-step rulemaking process, the agencies acknowledge that they cannot prejudge the outcome of the separate rulemaking on a proposed revised definition of ‘waters of the United States.’” Definition of “Waters of the United States”—Recodification of Preexisting Rules, 84 Fed. Reg. 56,626, 56,661 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328). At two other points in the preamble to the final Step One rule, the agencies noted that it is possible that the Step Two rule may not be finalized. *Id.* at 56,654, 56,665.

While the Court could use the occasion to clarify the weight that courts should give to a concurring opinion like Justice Kennedy's under the *Marks* test, the Court punted on that question in a similar case last term, *Hughes v. United States*, preferring, instead, to resolve the statutory interpretation question anew, without focusing on the precedent.³⁷⁸ Since they took that approach so recently in *Hughes*, it is likely that they will take a similar approach in a challenge to the Step Two rulemaking and resolve the statutory question in the case without determining the weight to accord to Justice Kennedy's *Rapanos* concurrence.

A challenge to the agencies' Step Two rule would likely include a challenge to the agencies' statutory interpretation, as well as a challenge to the agencies' change in position regarding the statutory interpretation and interpretation of the legal precedent in *Riverside-Bayview Homes*, *SWANCC*, and *Rapanos*, and maybe even a challenge to the agencies' change in position regarding the science supporting the 2015 rule. Although Justice Roberts encouraged the agencies in *Rapanos* to adopt a rulemaking to clarify the definition of "waters of the United States" and asserted that the agencies would receive "generous leeway" under *Chevron* if they followed that approach,³⁷⁹ it is hard to imagine that a majority of the Court would uphold the agencies' Step Two rule under *Chevron*, even if they ultimately upheld the rule. Justice Gorsuch has been an outspoken critic of *Chevron* even before he was appointed to the Court, suggesting that it violates separation of powers and the non-delegation doctrine,³⁸⁰ and he has continued his criticism of the doctrine while on the Court.³⁸¹

Justice Kavanaugh has not been as vocal as Justice Gorsuch, but Court watchers suggest that Kavanaugh generally views agencies' authority narrowly based on separation of powers concerns³⁸² and suggest that he is more likely than many judges to find a statute clear at step one of *Chevron* if the Court

378. See Transcript of Oral Argument, *supra* note 347, at 28–29, 35, 47–48, 50–52.

379. See *Rapanos*, 547 U.S. at 731 (Roberts, C.J., concurring).

380. See *Gutierrez-Brizuela*, 834 F.3d at 1149. Judge Gorsuch outlined his concerns in a concurring opinion that he authored separately, despite writing the majority opinion in the case.

381. See Evan A. Young, *Natural Resources Development and the Administrative State: Navigating Federal Agency Regulation and Litigation*, 10–2 Rocky Mt. Min. L. Fdn. 24–25 (2019). In his dissenting opinion in *BNSF Railway Co. v. Loos*, Justice Gorsuch questioned whether *Chevron* "retain[ed] any force" and congratulated the Court for deciding the statutory interpretation question on its own, without relying on *Chevron*. See 139 U.S. 893, 908 (2019). Justice Thomas was a member of the plurality in *Rapanos*, and is a vocal critic of *Chevron*, see *Michigan v. EPA*, 135 U.S. 2699, 2712–14 (2015) (Thomas, J., concurring), so, even if he were to support the agencies' Step Two rulemaking, he would also not likely do so based on according *Chevron* deference to the agency.

382. See Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUS BLOG (July 26, 2018), <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/> [<https://perma.cc/S5G7-AB5E>].

applies that test.³⁸³ In his own writings, Justice Kavanaugh has suggested that agencies might be accorded more deference in *Chevron* cases when Congress uses broad, open-ended terms like “reasonable,” “appropriate,” “feasible,” or “practicable,” than when agencies are interpreting a specific statutory term or phrase.³⁸⁴ If he applies that approach in a case examining the meaning of “waters of the United States,” one would assume that the agencies’ interpretation of that phrase would be an interpretation of a specific statutory term or phrase, to which little deference should be accorded.³⁸⁵ While there are indications, therefore, that neither Justice Gorsuch nor Justice Kavanaugh would be likely uphold the agencies’ Step Two rule under *Chevron*, that by no means suggests that they would invalidate the rule, as they could interpret the Clean Water Act on their own to find support for the agencies’ statutory interpretation. Based on Justice Gorsuch’s prior criticism of the breadth of the over-reach of federal agencies,³⁸⁶ it is not difficult to imagine that he could find textual support in the Clean Water Act for the narrowed definition of “waters of the United States” in the replacement rule.

Although Justice Kavanaugh would likely claim that the scope of federal jurisdiction over “waters of the United States” is a straightforward statutory interpretation question, it is not inconceivable that his statutory analysis could be influenced by his views on federalism and property rights. At this point, it is difficult to fully discern Kavanaugh’s views on federalism, but he is a frequent

383. See Walker, *supra* note 382. Walker noted that Kavanaugh suggested, in a lecture in 2018, that while some judges might only find that a statute is clear if they are ninety percent certain that the statute has a specific meaning, he probably applies “something approaching a 65/35 rule or 60/40 rule,” meaning that he could find that the statute is clear, so no deference to the agency interpretation is due, if he is 60–65 percent certain that the statute has a specific meaning (using the normal tools of statutory interpretation). *Id.* Justice Kavanaugh fears that judges may be swayed by policy considerations in determining whether a statute is ambiguous, such that deference to agencies is required, so he prefers to avoid finding ambiguity at Step One in light of the lack of a “neutral method to evaluate whether a text is clear of ambiguous.” See Young, *supra* note 381, at 27 (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2139 (2016)).

384. See Kavanaugh, *supra* note 383, at 2153–54. See also Walker, *supra* note 382.

385. Professor Christopher Walker also suggests that Justice Kavanaugh has “expressed a strong version of the major questions doctrine” and would be likely to join Chief Justice Roberts’ call “for a narrower, more context-specific *Chevron*.” See Walker, *supra* note 382. Although the hyperbole surrounding the “expansion” of Clean Water Act jurisdiction under the 2015 rule might be used to frame that rule as implicating a “major question,” see Dave Owen, *Myths, Realities and the Clean Water Rule Controversy*, CPR BLOG (Mar. 6, 2017), www.progressivereform.org/CPRBlog.cfm?idBlog=DD010B48-A4C0-DC67-13FC0F22E6E0C020 [https://perma.cc/732C-H5R3]. EPA and the Corps would likely argue that the rollback of jurisdiction in the Step Two rule was not a “major question,” so the agencies’ rule should not be exempt from *Chevron* on that ground.

386. See, e.g., *Gutierrez-Brizuela*, 834 F.3d at 1149–1158.

critic of federal regulation³⁸⁷ and the American Legislative Exchange Council³⁸⁸ and some commentators have suggested that he is a strong supporter of states' rights.³⁸⁹ It is similarly difficult to determine Justice Kavanaugh's views on property rights,³⁹⁰ but the Property Rights Alliance³⁹¹ and some commentators have suggested that he is a strong supporter of property rights.³⁹² If Kavanaugh proves to be a champion of states' rights and/or property rights, it is likely that he could be persuaded that Section 101(b) of the Clean Water Act should be read to narrow the agencies' jurisdiction over "waters of the United States" as they assert in the replacement rule.

However, even if Justice Kavanaugh were to agree with the statutory interpretation advocated by the agencies in the replacement rule, he could only vote to uphold their change in interpretation if he concluded that they rationally explained their change in the legal and factual basis for the 2015 rule. Professor Christopher Walker predicts that Justice Kavanaugh will "put a tighter leash on the regulatory state," whether agencies are regulating or de-regulating.³⁹³ He, and others, argue that Justice Kavanaugh's Circuit Court opinions demonstrate that he takes the *State Farm* hard look arbitrary and capricious analysis very seriously and requires agencies to fully justify their changes in regulatory approaches.³⁹⁴ If those predictions are correct, it will be very difficult for Justice

387. See Politico Staff, *Brett Kavanaugh's Track Record*, POLITICO (July 9, 2018), <https://www.politico.com/story/2018/07/09/brett-kavanaugh-track-record-675294> [https://perma.cc/4VXW-CMVB]; Jonathan H. Adler, *Will Kavanaugh Curb Sloppy White House Deregulation?*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/opinion/brett-kavanaugh-supreme-court-administrative-state.html> [https://perma.cc/2SWV-UHN8].

388. See Graham Vyse, *What Brett Kavanaugh Means for States*, GOVERNING (Sept. 4, 2018), <https://www.governing.com/topics/politics/gov-kavanaugh-states-confirmation-hearing-justice.html> [https://perma.cc/A8N7-VYZ3].

389. See Elaine S. Povich & Alayna Alvarez, *What Trump's Pick for Supreme Court Could Mean for States' Rights*, PEW: STATELINE (July 11, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/11/what-trumps-pick-for-supreme-court-could-mean-for-states-rights> [https://perma.cc/ZP4V-RFVA].

390. See Andrew Nolan & Caitlin Devereaux Lewis, *Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court* (R45293), CONG. RES. SERV. (Aug. 21, 2018), <https://fas.org/sgp/crs/misc/R45293.pdf> [https://perma.cc/59E5-XJNB].

391. See Brogan Feeley, *Brett Kavanaugh and Property Rights*, PROP. RTS. ALLIANCE (July 17, 2018), <https://www.propertyrightsalliance.org/news/brett-kavanaugh-and-property-rights/> [https://perma.cc/PJH7-BTVT].

392. See, e.g., Dick Patten, *Brett Kavanaugh Will Be Very Good For Property Rights*, WASH. EXAMINER (Sept. 1, 2018), <https://www.washingtonexaminer.com/opinion/op-eds/brett-kavanaugh-will-be-very-good-for-property-rights> [https://perma.cc/5FYK-87GB]; Post Opinions Staff, *What Does Kavanaugh's Paper Trail Say? Let's Ask the Experts*, WASH. POST (Aug. 31, 2018), https://www.washingtonpost.com/opinions/what-does-kavanaughs-paper-trail-say-lets-ask-the-experts/2018/08/31/beffd014-ad33-11e8-a8d7-0f63ab8b1370_story.html [https://perma.cc/GR63-7L5R].

393. See Walker, *supra* note 382.

394. *Id.* See also Young, *supra* note 381, at 25–26; Adler, *supra* note 387.

Kavanaugh to vote to uphold the agencies replacement rule, due to their lack of any explanation for their abrupt changes from the 2015 rule other than politics. As noted earlier, though, it could be several years before challenges to one of the agencies' WOTUS rules returns to the Court and there could be additional changes to the membership of the Court by then. One thing is clear, though. Unless Congress amends the Clean Water Act, which is unlikely, none of the agencies' WOTUS rulemakings are likely to provide clarity, consistency, or certainty to the regulated community and the public until the Supreme Court re-enters the fray.³⁹⁵

395. The EPA and Corps finalized their "Step 2" rule while this Article was going to press. Therefore, this Article does not address the changes made by the agencies between the proposed and final rulemaking.

