Waters of the United States: How the Governmental Branches Struggled to Settle the Jurisdiction of the Clean Water Act

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ABSTRACT

Water is a crucial and critical resource, and the United States government protects it from pollution and other threats through the Clean Water Act of 1972. However, the all-important Act has not been without controversy and has faced a gamut of obstacles to legislative finality and effectiveness. This Note seeks to determine why the 2015 Clean Water Rule was necessary to clarify the Clean Water Act's jurisdiction decades after its enactment. The Note argues that the Clean Water Act serves as an example of the governmental branches' failure to work together effectively to settle a jurisdictional puzzle concerning a critical resource. Finality is a critical end goal for legislation, but the extent of the Act's jurisdiction has been in flux for decades. The Note surveys the contribution of each of the governmental branches to settling the jurisdiction of the Clean Water Act and considers the gaps that each left behind. This Note delves into the passage of the Act, its legislative history, and potential sources of Congressional intent. It then explores the interpretational efforts of the two agencies with jurisdiction over the Act, as they both worked to understand Congressional intent. The Note next examines the Supreme Court's interpretational prism and impact through three major cases that forced it to weigh in on the Act's scope. The Note returns to the agencies to consider how they incorporated judicial feedback into their guidance. The Note discusses the agencies' Clean Water Rule of 2015 as a potential solution to the jurisdictional confusion left in the wake of their interpretational attempts. Finally, the Note explores some of the challenges and limitations the Rule faces after the presidential administration shift in 2017.

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INTRODUCTION

The waters of the United States have been making headlines lately, from the lead poisoning in Flint, Michigan's drinking water[1] to the protests against the Dakota Access Pipeline and its potential effects on the Standing Rock Sioux Tribe's drinking water supply.[2] These national, newsworthy controversies over clean water have highlighted the need for clear regulation of the waters that sustain the American people. Some believe a solution came in the form of the 2015 Clean Water Rule ("the Rule"), while others argue that the Rule only made matters worse.

The Clean Water Rule descends from the storied development of the Clean Water Act ("the Act"), the history of which involves interpretational input from all three branches of the United States government. Passed by Congress in 1972, the Clean Water Act,[3] allocates jurisdiction to regulate the country's "navigable waters," which Congress defined in the Act simply as the "waters of the United

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1. Merrit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at The Makings of a Crisis*, NPR (Apr. 20, 2016), http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis.

2. Michael Kennedy, *The Dakota Access Pipeline*, EARTHJUSTICE, http://earthjustice.org/cases/2016/the-dakota-access-pipeline (last visited February 14, 2018).

3. The Act was not known as the Clean Water Act until 1977, but for ease of reference, this Note will refer to each version as the Clean Water Act. *See* ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION 7 (2d ed. 2009).

States, including the territorial seas."[4] Because no further clarification was provided in the statute, the executive agencies that share jurisdiction over the waters, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Army Corps"), have played a large role in the post-enactment interpretation. Over the years, the two agencies have struggled to agree on and maintain a clear interpretational stance on the jurisdictional scope of "waters of the United States," or "WOTUS," and it took multiple attempts for the agencies' interpretations to align and gain long-term traction. Moreover, litigation has brought the Act before the judiciary on more than one occasion, so courts have also played an important role in determining and defining its jurisdictional scope.

While each branch has had opportunities to contribute to a coherent definition of WOTUS, the language and definitions utilized by each have failed to bridge the gaps; therefore, the enforcement, administration, and efficiency of the Act have suffered. Decades later, in 2015, after much debate about the Act's jurisdiction, the two executive agencies sharing interpretational jurisdiction over the Clean Water Act released a new Proposed Rule that was meant to settle the scope of WOTUS, its central term of art.[5]

This Note will argue that the more than four-decade struggle to clearly define the jurisdictional scope of the Clean Water Act is an example of the lack of finality that results from regulation when different branches of government fail to effectively communicate, coordinate, and share information with each other. It will begin by establishing the constitutional authority for the Act and tracing its historical path to passage by Congress. The bulk of this Note is devoted to an analysis of the specific language each branch chose to employ and the legally significant contributions each branch has hence made to the conundrum of the Rule's interpretation. This Note concludes by discussing the current posture of the Clean Water Rule, which was released in 2015 by the Obama administration but is now subject to revision by the agencies under the Trump administration.

I. CLEAN WATER ACT

A. BACKGROUND

The Clean Water Act of 1972 defines the central jurisdictional term navigable waters as "the waters of the United States, including the territorial seas."[6] However, the Act does not provide much of an explanation of what Congress

4. AM. WATER WORKS ASS'N, UNDERSTANDING THE PROPOSED DEFINITION OF WATERS OF THE UNITED STATES 4 (2014).

5. *See Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy*, ENVTL. PROT. AGENCY (May 27, 2015), https://archive.epa.gov/epa/cleanwaterrule/what-clean-water-rule-does.html.

6. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 886 (1972) (codified at 33 U.S.C.A. §§ 1 *et seq.*).

intended to be covered under "the waters of the United States."[7] Hence, the Act's nebulous definition and ambiguous jurisdictional reach have created a legislative history marred with contention and conflict.

The definitional scope of the WOTUS is important because it determines which waters within the country fall under the regulatory scheme of the Clean Water Act, and therefore need to fall within its requirements, standards, and limitations (such as those for pollutant discharges and water quality standards).[8] If waters do not fall within the regulatory scheme, they are not subject to federal regulation and remain within the purview of state and local governments.[9] Therefore, well-defined criteria for determinations, of which waters are under the purview of the Act, are essential for regulatory efficiency and clarity.

Sections 301, 402, and 404 of the Clean Water Act are the focal point of the controversy surrounding the Act's jurisdiction, as those sections regulate the "discharge of dredged or fill materials into the navigable waters."[10] Congress has the constitutionally-derived power to regulate only navigable waters, and if a body of water falls under the Act, any discharge into it will require a permit.[11] Therefore, compliance with the federal statute hinges on obtaining either a 402 or a 404 permit. Difficulty arises when determining if these federal permits are needed for activities in certain bodies of water.

Congress's authority over WOTUS flows from the constitutional allocation of power and the Act's provisions, both of which aid in beginning to understand how the jurisdictional landscape leaves open many interpretational gaps. Past interpretations have sewn confusion and ambiguity, thwarting any finality or settlement that America's waters need to be kept clean and safe under the Act. Because the cleanliness and safety of the waters of the country depend upon the jurisdiction of the Act, tracing the Act's interpretational history is both important and illuminating.

B. CONSTITUTIONAL AUTHORITY

While the Constitution never explicitly mentions regulation of the environment, constitutional concepts such as federalism, the Commerce Clause, and separation of powers weigh heavily on the limitations of environmental regulations, and particularly on the Clean Water Act.[12] The Clean Water Act of 1972 clearly demonstrated Congress's prioritization of the nation's waters, as pollution increasingly became a problem in the 20th century. The Act illustrated Congress's assertion that the best method of maintaining clean waters was through a baseline

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7. *See id.*

8. *Understanding the Proposed Definition of Waters of the United States*, AM. WATER WORKS ASS'N 4 (2014), https://www.awwa.org/portals/0/files/legreg/documents/wotusreportfinal.pdf.

9. *See id.*

10. 86 Stat. at 884.

11. *See id.*

12. *See* CRAIG, *supra* note 3, at 4, 7.

of federal regulation.[13] Congress's strategy was to create mandatory federal minimum standards, and only allow states discretion to regulate more stringently if each desired.[14] The Clean Water Act thus is an example of cooperative federalism: the Act divides regulatory authority over water quality between the United States and the several states.[15] In other words, the Act attempted to both advance federal control over certain waters while respecting the states' rights to regulate other, more localized bodies of water.[16]

Congress drew its power to alter the existing federal relationship between the states and the federal government in the 1972 Act from the Commerce Clause and the Supremacy Clause.[17] Article I, Section 8 of the United States Constitution allows the federal government "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[18] The Supremacy Clause establishes that the:

> Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[19]

The Commerce Clause, in cooperation with the Tenth Amendment, which reserves the powers not delegated to the United States by the Constitution to the states, establishes the outer limits of congressional authority with regard to the jurisdiction of the Clean Water Act over WOTUS, and the Supremacy Clause binds the states to follow the contents stated therein.[20] The Commerce Clause gives Congress great authority to regulate navigable waters, as the rights to control, improve, and regulate the navigation of waters are intertwined with the right to regulate commerce among the several states.[21] The Supremacy Clause guarantees that the standards set for states in the Clean Water Act supersede those set by the states themselves if there are conflicts between the two.[22] Constitutional authority then begins to sketch the limits and jurisdictional scope of the Act, but leaves much to be determined.

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13. *See id.* at 7.
14. *See id.* at 23.
15. *See id.* at 7.
16. *See id.*
17. *See id.* at 22, 39.
18. U.S. CONST., art. I, § 8, cl. 3.
19. U.S. CONST., art. VI, cl. 2.
20. *See* CRAIG, *supra* note 3, at 22, 39.
21. *See id.* at 142–43.
22. *See id.* at 39–41.

C. LEGISLATIVE HISTORY

In 1948, the Federal Water Pollution Control Act was passed as the first major piece of legislation to combat the growing problem of water pollution.[23] It illustrated Congress's first strategy for tackling pollutant regulation: it allowed the states to take the leading role in regulating water quality.[24] Out of respect for federalism, Congress gave the federal government only a secondary role in the protection of water quality.[25] The overriding purpose of the 1948 Act was to provide federal loans to states and local governments so they could establish the infrastructure, as they saw fit, to maintain clean water.[26] The 1972 version of the Act grew out of the original, but because Congress was disappointed with the several states' initiatives under the original Act, there was a perceptible shift in the federalism balance from the 1948 version to the 1972 version.[27]

In the 1960s, growing environmental crises taking place in the country's waters became more widely known and better documented.[28] In 1965, the Act was amended and expanded, but its new provisions affected only interstate waters, not all navigable waters.[29] Hence, water quality continued to deteriorate under the 1965 version of the Act because its influence and scope was not far-reaching or comprehensive enough.[30] However, the 1965 version clearly expressed Congress's disappointment with the states' lack of initiative in resolving the water pollution problem, correcting the problematic shortcomings of the state-based scheme utilized by the 1948 version.[31]

With the 1965 amendments, federal regulation over water quality began to move away from allowing states to regulate themselves and inched towards a more expansive federal role in the water regulatory scheme by setting national policy instead of solely deferring to the states.[32] Accordingly, in the 1965 version, an addition was included that if a state did not cooperate by setting standards in compliance with the Act, the Secretary of Health, Education, and Welfare could step in and establish standards for the non-compliant state.[33] The ability of the

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23. *See History of the Clean Water Act*, EPA, https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Mar. 25, 2018).

24. *See* CRAIG, *supra* note 3, at 7.

25. *See id.* at 12.

26. *See id.* at 13.

27. *See id.* at 17.

28. *See A Brief History of the Clean Water Act*, PBS (Dec. 20, 2001), http://www.pbs.org/now/science/cleanwater.html; *see also* Federal Water Pollution Control Act Amendments of 1965, Pub. L. No. 89-234, 79 Stat. 903.

29. *See* Andrew McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195, 200 (1973).

30. *See id.* at 199; *see also* 79 Stat. 903.

31. *See* CRAIG, *supra* note 3, at 17.

32. *See id.* at 18.

33. *See id.*

federal government to step-in where states failed was a precursor to the 1972 Act, which greatly elevated federal involvement.

The Clean Water Act, known officially as the Federal Water Pollution Control Act Amendments, was promulgated with the purpose of demonstrating the United States' commitment to restoring and maintaining the "chemical, physical, and biological integrity of the nation's waters."[34] The Clean Water Act, as it is now known, was passed in 1972 to amend earlier versions, essentially revamping previous statutes and implementing a new federal government-based strategy to correct the pollution problem that had not been effectively addressed by the states.[35] The amended Act implemented a blanket prohibition on the discharge of pollutants into navigable waters[36] and expanded the role of the federal government in water quality regulation by designating the Army Corps and EPA as the agencies tasked with enforcement.[37] Moreover, comprehensive federal standards and minimums for state water quality protection were added, which was a sizeable step forward in combatting water pollution.[38] The 1972 version of the Act established the basic structure for federal regulation of discharging pollutants into WOTUS, but Congress left much to be interpreted by the both the judicial and executive branches.[39]

II. LEGISLATIVE AMBIGUITY: FAILURE TO DEFINE THE CLEAN WATER ACT'S JURISDICTIONAL SCOPE

The breakdown in communication over the jurisdictional scope of the Act began with Congress, which neglected to provide the other branches (and the regulated community) with a clear, unambiguous definition of the various waters that fall under the Act. As discussed above, the relevant portion of the 1972 Act defines the central jurisdictional term navigable waters as "the waters of the United States, including the territorial seas."[40] The Act clarifies the definition of "territorial seas" as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles."[41] The Act, however, does not give further clarification of what Congress intended to be covered by WOTUS.[42]

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34. *See A Brief History of the Clean Water Act*, *supra* note 28.
35. *See* McThenia, *supra* note 29, at 202.
36. U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES (2015), https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf (last visited Mar. 20, 2018).
37. *See* CRAIG, *supra* note 3, at 7, 22.
38. *See id.* at 22.
39. *See History of the Clean Water Act, supra* note 23.
40. 86 Stat. at 886.
41. *See id.*
42. *See id.*

The controversy surrounding the Act's jurisdiction hinges on whether Congress intended for WOTUS to be broadly construed, covering the largest amount of water that can permissibly fall under federal regulation, or whether WOTUS should be limited, covering waters more readily understood as navigable.[43] During the 1972 conference report debate in the House of Representatives, Representative John Dingell said that the Act "clearly encompasses all water bodies, including streams and their tributaries, for water quality purposes."[44] His interpretation points toward a broad conception, but this language was not chosen to be included in the Act, as it would be administratively impractical, and perhaps outside constitutional bounds, for *all* waters to fall under the purview of the Act's permit requirements. House Committee Report 92-911 states that the Committee was "reluctant" to define navigable waters because its members feared that any interpretation would be construed more narrowly than Congress intended.[45] The Committee states that its intention was in fact the opposite: to convey a broad understanding of the waters included.[46]

The best interpretational guidance of Congressional intent provided by the legislative history is a portion of Senate Committee Report No. 92-1236, which clearly states that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[47] House Committee Report 92-1465 echoes the call for broad interpretation similar to the other side of Congress, using the same language as the Senate Committee Report.[48] The legislative history thus gives some guidance of congressional intent that the Act omits, and points interpretations toward a broad conception.

Legislative history may not furnish a clear, consistent definition of the jurisdictional waters, but it does plainly provide Congress' intent for the scope to be construed broadly. The problem, however, is that the language expressing this intention is tucked away in legislative history, and not included within the Act. If members of Congress wanted the scope to be broad, Congress should have stated so more expressly. Congress abdicated some of its interpretational responsibility by refraining from placing any statement of its broad interpretation in the Act and by failing to provide guidance to future interpreters over which waters are jurisdictional, leaving much work to be done by the other branches.

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43. *See* Stephen P. Mulligan, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, CONG. RESEARCH SERV. 1 (Aug. 8, 2016).

44. *See* 118 CONG. REC. 33757 (1972) (statement of Rep. Dingell).

45. H.R. REP. NO. 92-911, at 131 (1972).

46. *Id.*

47. *Id.*

48. *See* H.R. REP. NO. 92-1465, at 144 (1972).

III. AGENCIES' SUBSEQUENT REGULATORY CLARIFICATION

The executive agencies that share jurisdiction over the Act—the EPA and the Army Corps—used their expertise and worked with Congress's directives to issue clarifications and guidance, but they have not always been in agreement or internally consistent over time. Those who have studied the trajectory of the agencies' definitions of the jurisdictional waters disagree over whether agency interpretations have expanded the scope of jurisdictional waters or have construed the term more narrowly than was permitted under the Act.[49] Either way, it took time and multiple attempts for the agencies to come to an agreement about the definitional scope of the Act, which is problematic for the cleanliness and safety of the waters that depend on the Act's jurisdictional determinations.

A. EPA'S DEFINITION

The EPA first posited a definition for the scope of the waters under the Act's jurisdiction in 1973, through a memorandum from its Office of the General Counsel.[50] The memorandum stated that the Office of the General Counsel had "investigated the origin and history of the term 'navigable waters of the United States' in order to determine the significance of the deletion of the word 'navigable'" in the Act's definition of jurisdictional waters.[51] It found that, for the purpose of making administrative determinations, the following six categories would be defined as jurisdictional waters:

> (1) All navigable waters of the United States;
> (2) Tributaries of navigable waters of the United States;
> (3) Interstate waters;
> (4) Interstate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
> (5) Interstate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
> (6) Interstate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.[52]

The EPA adopted the above categorical approach because the agency realized that it would be a "major task to determine, on a case by case basis, what waters fall within the category 'waters of the United States.'"[53] This categorical approach is thus a step toward efficient determinations.

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49. *See* Mulligan, *supra* note 43, at 1.
50. *See* ENVTL. PROT. AGENCY, MEANING OF THE TERM "NAVIGABLE WATERS" (1973), *reprinted in* EPA, A COLLECTION OF LEGAL OPINIONS: VOL. 1 295 (1975).
51. *Id.*
52. *Id.*
53. *Id.*

The EPA was properly concerned with ascertaining Congressional intent through the precise scope of the Act's language, and undertook an examination to ensure congruence with Congressional intent.[54] The EPA concluded that the omission of "navigable" from the definition eliminated the requirement of navigability, at least of navigability-in-fact, leaving only the requirement that the waters covered by the Act must be capable of affecting interstate commerce under the Commerce Clause.[55] The categorical definition in the memorandum, though it was not formally implemented exactly as such, was a step towards clarity, as its categories are linear and it provides more lengthy and detailed explanations.[56] The first formal regulatory definition promulgated by the EPA revised categories four through six from the memorandum to also include intrastate lakes, rivers, and streams that are used for interstate activities, but retained the efficiency of categorical determinations.[57]

B. ARMY CORPS' DEFINITION

The Army Corps first defined navigable waters more narrowly than the EPA, limiting its jurisdiction to waters that were navigable-in-fact.[58] The Army Corps decided to limit jurisdiction because it equated the jurisdictional waters under the Clean Water Act with waters under its jurisdiction in the Rivers and Harbors Act.[59] However, in 1974, the Army Corps redefined navigable waters in another regulation to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[60] This definition aligned with the Congressional directive to construe WOTUS broadly, and appropriately drew its definition from the constitutional provision conferring authority for the Act: the Commerce Clause.

Yet, in 1974, the United States District Court for the District of Columbia struck down the Army Corps' initial attempts at a definition as too narrow and inconsistent with the Clean Water Act in *Natural Resources Defense Council v. Callaway,*[61] and the Army Corps had to expand its definition to comply with the ruling.[62] Thus, in 1975, the Army Corps first responded by issuing proposed regulations that contained alternatives for defining jurisdictional waters.[63] The

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54. *See id.*
55. *Id.*
56. Mulligan, *supra* note 43, at 7 (stating that the particular categorical approach included in the memo was not incorporated exactly into regulation as enacted later).
57. *See id.*
58. *See id.* at 7–8.
59. *See id.*
60. Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 1,2115, 1,2119 (Apr. 3, 1974).
61. 392 F.Supp. 685, 686 (D.C. 1975).
62. *See* Mulligan, *supra* note 43, at 8.
63. *See id.* at 8–9.

alternatives contemplated jurisdictions extending to "virtually every coastal and inland artificial or natural waterbody" or a more limited jurisdiction including coastal waters that are "subject to the ebb and flow of the tide shoreward to the mean high water mark . . . or the salt water vegetation line, whichever extends further shoreward."[64] The Army Corps' interim final regulations issued in 1975, however, fell into line with the EPA's 1973 version, and adopted much of their structure.[65]

In 1977, the Army Corps again restructured its definition of jurisdictional waters and provided the most expansive definition of its jurisdictional scope up until that point.[66] The EPA would also conform to this new conception.[67] The Army Corps formulated a new definition "to be consistent with the Federal Government's broad constitutional power to regulate activities that affect interstate commerce."[68] In 1977, the Army Corps started to refer to the jurisdiction as "waters of the United States" instead of "navigable waters," in order to avoid confusion with the jurisdictions of other statutes, to be more precise, and to conform to the broad scope intended by Congress.[69] The new definition was expounded in five jurisdictional categories:

> (1) The territorial seas with respect to the discharge of fill material;
> (2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;
> (3) Tributaries to navigable waters of the United States, including adjacent wetlands;
> (4) Interstate waters and their tributaries, including adjacent wetlands; and
> (5) All other waters of the United States not identified in the first three categories, such as isolated lakes and wetlands, intermittent, streams, prairie potholes, and other waters.[70]

After the Army Corps' 1975 and 1977 regulations, Congress discussed limiting the jurisdiction of the Act to constrict its scope. However, the Act was amended in 1977 with no jurisdictional alterations.[71] Congress might then have considered steering the agencies to better align their guidance with Congressional intent, but decided against it, granting tacit approval to the agencies' interpretation. Therefore, the definition, essentially shared by the EPA and the Army Corps, remained the same from 1977 until recently.[72]

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64. *See* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 1,9766, 1,9767 (May 6, 1975) (to be codified at 33 C.F.R. pt. 209).
65. *See* Mulligan, *supra* note 43, at 9.
66. *See id.* at 10.
67. *See id.*
68. Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 3,7122, 3,7127 (July 19, 1977).
69. *Id.*
70. *See* Mulligan, *supra* note 43, at 10.
71. *See id.* at 11.
72. *See* CRAIG, *supra* note 3, at 118.

The EPA and the Army Corps have struggled for some time with Congress's lack of clear guidance and came to some settlement, but did not strongly, clearly, and consistently define the jurisdictional waters enough to avoid the definitional issues in the judiciary that were still to come. While Congress may not have given the agencies the tools they needed to give the Act finality, it also seems that the agencies did not seize early opportunities to coordinate with each other to give the Act finality.

IV. THE SUPREME COURT'S INTERPRETATION OF THE CLEAN WATER ACT

After the agencies created a coherent and workable definition for WOTUS throughout the 1970s, the Supreme Court also became entrenched in the work of defining the jurisdiction of the Clean Water Act. Three Supreme Court cases would separately opine on the definition of WOTUS: *United States v. Riverside Bayview Homes* in 1985, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ["*SWANCC*"] in 2001, and *Rapanos v. United States* in 2006.[73] The cases did not follow a linear trajectory in their interpretation of the Act and its jurisdictional waters, perhaps because the cases tracked the development of the Court's Commerce Clause jurisprudence, which also shifted during the same time period.[74]

The EPA asserted that its 2015 Clean Water Rule was meant to clear up some of the confusing, complex, and time-consuming jurisdictional determinations that have resulted from the Court's jurisprudence. Thus, the Court played a critical role in creating the obstacles and the confusion that slowed the interpretational process of the Act, and thwarted its finality and clarity. The new Rule, meant to compel some finality, was promulgated more than four decades after the Act's original enactment in 1972. Some scholars thus make direct connections between the revisions made in 2015, and Supreme Court rulings in *SWANCC* and *Rapanos* which interpreted the regulatory scope of the Clean Water Act more narrowly than the agencies and lower courts previously had.[75]

A. UNITED STATES V. RIVERSIDE BAYVIEW HOMES

The first case of consequence, *United States v. Riverside Bayview Homes*, was decided in 1985 and gave deference to the Army Corps' definition of jurisdictional waters under the Act.[76] The dispute at the center of the litigation was whether eighty acres of low-lying, marshy land near Lake St. Clair in Michigan fell under the category of WOTUS.[77] Riverside Bayview Homes had started to fill the land with materials to prepare for construction of a housing development,

73. *See* AM. WATER WORKS ASS'N, *supra* note 4, at 4.

74. *See* Mulligan, *supra* note 43, at 3.

75. *See* Claudia Copeland, *EPA and the Army Corps' Rule to Define "Waters of the United States*," CONG. RES. SER. 1 (Jan. 5, 2017).

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

77. *See id*. at 123–24.

but failed to obtain a permit from the Army Corps.[78] The Army Corps believed the property to be an "adjacent wetland" that came under the purview of the Act's definition of WOTUS and sought to enjoin the group from continuing to fill the property without a permit.[79] The case made its way up to the Supreme Court for consideration of the "proper interpretation of the Army Corps' regulation defining 'waters of the United States' and the scope of the Army Corps' jurisdiction under the Clean Water Act."[80] The Court unanimously held that the permit requirement did not constitute a taking, that the regulation could "hardly state more clearly" that wetlands are covered by the Act, and that saturation by either surface or ground water is sufficient to bring an area within the Act's jurisdiction.[81] Justice White's opinion stated that he could not find that the Army Corps' conclusion that the adjacent wetlands are "inseparably bound up" with WOTUS was unreasonable, thus deferring to their interpretation.[82] Ultimately, the Court determined that the property at issue was a wetland adjacent to a navigable waterway and necessitated a permit for filling.[83]

The Court found that it was reasonable in light of the text, policies, and legislative history of the Clean Water Act for the Army Corps to exercise jurisdiction over wetlands that are adjacent to but not regularly flooded by waters.[84] However, the Court struggled to pinpoint Congress's exact intention under its Act: "it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of 'waters' and include in that term 'wetlands' as well."[85] The Court noted Congress's tacit approval of the agency's conception in deciding to defer to it: "[a]lthough we are [wary] of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction . . . ."[86] Even though the Court found the agency's interpretation to be reasonable, it struggled with the exact intent of Congress, signaling that inter-branch coordination had broken down.

B. SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS

In 2001, the Court again undertook an analysis of the jurisdiction of the Clean Water Act in *Solid Waste Agency of Northern Cook County v. United States Army*

78. *See id.* at 124.
79. *See id.*
80. *Id.* at 126.
81. *Id.* at 129–30.
82. *See id.* at 134.
83. *See id.* at 138–39.
84. *See id.* at 138.
85. *Id.* at 133.
86. *Id.* at 137.

Corps of Engineers ["*SWANCC*"].[87] The Court took the opportunity in *SWANCC* to limit the jurisdiction of the Clean Water Act: it found that the provision that required permits for discharge of fill material did not extend to an isolated, abandoned sand and gravel pit containing seasonal ponds, which provided a habitat for migratory birds.[88] Thus, the Army Corps' claim of jurisdiction was rejected, and the Court underscored the Army Corps' original definitional interpretation in which it limited the purview of the Act to "navigable-in-fact waters."[89] In its limitation of jurisdiction, the Court declared that "the text of the statute will not allow" the interpretation that jurisdiction extends to ponds that are not adjacent to open water.[90] In the opinion, the Court for the first time used the important phrase "significant nexus" to differentiate the ponds at issue in the case from the wetlands at issue in *Riverside Bayview Homes*: there was a "significant nexus" between the wetlands and navigable waters, but one failed to exist between the ponds in *SWANCC* and navigable waters.[91] The "significant nexus" language would later become crucial to the Court's future jurisdictional determinations.

In so holding, the Court states a rule that creates the potential for better inter-branch communication regarding the Act's jurisdiction: "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[92] In other words, if Congress's intent is to confer broad jurisdiction, it must say so explicitly so that the agencies with authority can legitimately claim expansive jurisdiction. The Court did not desire to purposefully disregard the intentions of Congress, but it simply stated that it was not given the clear indication it needed to conclude broad jurisdiction. If Congress had been clearer about its intentions for the Act within the Act itself, the Supreme Court might not have had to limit the agency's interpretation.

Stephen Mulligan argues that the lack of deference to the agency in this case is due, at least in part, to a series of cases in which the Court had limited the extent to which the Commerce Clause could justify Congress's statutory authority.[93] He concludes that the Court in *SWANCC* ruled along the lines of the already-existent trend to limit the federal Commerce Clause authority, as the case concerns a potential federal impingement of the states' power over land and water use.[94] In fact, in *SWANCC*, the Court notes "[t]wice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the

87. *See* Solid Waste Agency v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
88. *See id.* at 162.
89. *See id.* at 172.
90. *See id.* at 168.
91. *See id.* at 167.
92. *See id.* at 172.
93. *See* Mulligan, *supra* note 43, at 16.
94. *See id.* at 19.

Commerce Clause, though broad, is not unlimited."[95] Although Mulligan's argument illuminates the connections between the Court's general jurisprudence and motivations in the ruling in *SWANCC*, it does not mitigate the confusion that this case caused. The ruling discredited the Army Corps' mandate over the jurisdiction of the Act and further muddied the waters over which waters fell under the Act and who exactly was in charge of deciding.

C. RAPANOS V. UNITED STATES

Much of the jurisdictional confusion that necessitated the clarification of the Clean Water Rule in 2015 was ushered in by *Rapanos v. United States* in 2006. Some of the resulting confusion stems from the fact that the Court could not muster a majority opinion and only offered a plurality opinion with concurrences and dissents that fail to coalesce around a clear doctrine.[96] As Chief Justice Roberts captured in his concurrence: the consequence of a plurality opinion at such a critical juncture is that the Act's jurisdiction remains ambiguous and "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis."[97] After *Rapanos*, the agencies would eventually decide to establish jurisdiction over waters that are relatively permanent, standing or continuously flowing, or any wetland that had a continuous surface connection to another jurisdictional water through Justice Scalia's conception, or any water that satisfied the significant nexus threshold through Justice Kennedy's approach.[98]

1. Plurality Opinion

The plurality, authored by Justice Scalia and joined by two others (and Roberts in judgement), took a position that the Act narrowly constrains jurisdiction. The plurality limited WOTUS to only cover relatively permanent, standing or continuously flowing bodies of water, and excluded channels containing "merely intermittent or ephemeral flow."[99] Further, the plurality found that only wetlands with a "continuous surface connection to bodies that are 'waters of the United States' in their own right" are actually adjacent to such waters and therefore covered by the Act.[100] Justice Scalia commented that there had been an immense amount of expansion of the scope of the Clean Water Act "without any change in the governing statute . . . during the past five presidential administrations."[101] The plurality, although taking a clear position, did not garner enough votes to form a majority.

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95. *See* Solid Waste Agency v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
96. *See* Rapanos v. United States, 547 U.S. 715 (2006).
97. *See id.*
98. *See* Mulligan, *supra* note 43, at 23.
99. *See Rapanos*, 547 U.S. at 732–34 (Scalia, J., plurality opinion).
100. *See id.* at 742.
101. *Id.* at 722.

2. Justice Roberts' Concurrence: Lost Opportunities

In his concurrence, Justice Roberts placed blame on the agencies' failure to promulgate new regulations after the *SWANCC* decision.[102] He accused the Army Corps of relying upon its "essentially boundless view" of its own power and authority in dispensing jurisdiction, and suggested that he might have afforded deference to the agencies with authority, if they had promulgated a clear rule.[103] His concurrence regretted the lost opportunities for clarity that the agencies missed.

3. Justice Kennedy's Concurrence: Significant Nexus Doctrine

Justice Kennedy's concurrence also lamented the lost opportunity for a clear doctrine: he believed that the plurality should have underscored the importance of the significant nexus test first developed in *Riverside Bayview Homes*.[104] Justice Kennedy took issue with two of the plurality's key factual findings: that (1) relative permanence was a necessary component of navigable waters, and (2) the Act established jurisdiction only over those waters with a continuous surface connection.[105] Justice Kennedy reasoned that hinging the definition on permanence made little practical sense, as it would draw a jurisdictional barrier that included a permanent mere trickle but excluded a thundering torrent that rages at irregular intervals.[106] He also took issue with the continuous surface requirement for jurisdiction, reasoning that wetlands are indistinguishable from the waters with which they share a surface connection and finding that no support for this requirement can be found in the Act or its jurisprudence.[107]

Instead, he believed that under Clean Water Act jurisprudence, water or wetlands must possess a significant nexus to waters that are or were navigable in order to constitute navigable waters under the Act.[108] Accordingly, if wetlands, or wetlands in combination with similarly situated lands in the area, significantly affect the chemical, physical, or biological integrity of other navigable waters, they pass the significant nexus test and jurisdiction can be established.[109] Utilizing that test, he believed that the plurality could have reached the same conclusion about Rapanos' property but left a clearer precedent for future cases.[110] Justice Kennedy declared that the lack of settled doctrine left in the wake of this decision is regrettable and preventable, much like Justice Robert's lament.

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102. *Id.* at 758.
103. *Id.*
104. *See id.* at 759 (Kennedy, J., concurring).
105. *Id.* at 769–77.
106. *See id.* at 769.
107. *See id.* at 772–75.
108. *See id.*
109. *Id.* at 780.
110. *See id.* at 786–87.

4. The Dissent

Justice Stevens argued in his dissent, joined by three other justices, that the Army Corps' decision to treat wetlands adjacent to tributaries of traditionally navigable waters as WOTUS is reasonable, as they provide habitats for animals, keep toxic pollutants and sediment out of nearby waters, and reduce downstream flooding.[111] Justice Stevens accused the plurality of disregarding three important concerns in their decision: (1) the deference the court owes to executive agencies, (2) the Congressional acceptance of the executive agencies' position already established in *Riverside Bayview*, and (3) the Court's responsibility to interpret laws rather than making them.[112] Each of those concerns could result in jurisdictional uncertainty because the plurality ignored typical conventions or assumptions without due regard. Justice Stevens also notably argued that concerns about the appropriateness of the scope of the Army Corps' implementation of the Clean Water Act should be addressed not to the Judiciary, but to the agencies or Congress.[113] In Justice Stevens' perspective, it is the duty of the other two branches to properly interpret the jurisdiction of the Act, so that the Judiciary can focus on applying the law to the facts. He believed that this case resulted in improper judicial statutory interpretation and that the agency should have received deference.[114]

D. CURRENT JURISPRUDENCE

The competing tests in *Rapanos*, stemming from Justice Scalia's plurality opinion and Justice Kennedy's concurrence, have left lower courts with unclear precedent.[115] Different courts have applied various tests and have interpreted what Justice Scalia, Justice Kennedy, or even Justice Stevens wrote, in order to decide cases in accordance with the precedent.[116] The Court can only tackle the specific issues brought before it through litigation, so its ability to contribute to a clear doctrine is somewhat limited. However, while the Court has shown signs that it has been befuddled by the guidance provided by the other branches, its changing deference to the executive agencies, and the lack of a clear judicial test to determine jurisdictional waters have done little to settle the jurisdiction and establish finality.

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111. *See id.* at 787–811 (Stevens, J., dissenting).
112. *See id.* at 809–10.
113. *See id.* at 799.
114. *See id.* at 810.
115. *See* Kristen Clark, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295, 306–07 (2014).
116. *See id.*

V. SUPPLEMENTARY AGENCY REGULATORY CLARIFICATION

After their efforts in the 1970s to define jurisdictional waters, the Corps and the EPA again issued guidance on the Act's interpretation several times throughout the 2000s as a response to Supreme Court decisions and other lower court decisions.[117] However, some of this clarification has only caused confusion. Further, much of the agencies' follow-up guidance required inefficient and time-consuming case-specific review to determine whether jurisdiction exists and a permit is necessary.[118] For example, in 2000, the Army Corps issued guidance that clarified some of the non-traditional waters that the Army Corps considered under its jurisdictional waters: intermittent streams that have flowing water supplied by groundwater during certain times of the year; ephemeral streams that have flowing water only during and for a short period after precipitation events; and drainage ditches, except when the drainage was so complete that it converted the entire area to dry land.[119] While specific clarification is helpful for future interpreters of the Act, this guidance necessitated a fact-specific review of each land in controversy.

After *SWANCC* in 2001, the generals counsel of the Army Corps and the EPA issued a joint memorandum to clarify their position on jurisdiction and "describe which aspects of the regulatory definition of the 'waters of the United States' are and are not affected by *SWANCC*."[120] The agencies concluded that Clean Water Act jurisdiction existed over the jurisdictional waters established by the holding in *Riverside Bayview Homes* and jurisdiction could be established over isolated, intrastate, non-navigable waters as long as their use, degradation, or destruction could affect other jurisdictional waters.[121] The reasoning behind this guidance was that the effect on other jurisdictional waters by these isolated, intrastate, non-navigable waters established the "significant nexus" required by *SWANCC*.[122] The agencies' use of the Court ruling to update their guidance is admirable, as they sought to align WOTUS definitions.

Further, in 2003 the agencies issued an advance notice of proposed rulemaking that was intended to "develop proposed regulations that will further the public interest by clarifying what waters are subject to Clean Water Act jurisdiction."[123] This intent illustrates that the agencies were aware that the lack of finality was

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117. *See* Copeland, *supra* note 75.

118. *See id.*

119. *See* Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 1,2818, 1,2823, 1,2897–98 (March 9, 2000); *see also* Mulligan, *supra* note 43, at 18.

120. Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers 2-3 (Jan. 19, 2001), *available at* https://perma.cc/F3PE-XJ9M [hereinafter 2001 EPA/Army Memo].

121. *See id.*

122. *Id.*; *see also* Mulligan, *supra* note 43, at 20.

123. *See* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "'Waters of the United States'", 68 Fed. Reg. 1991 (Jan. 15, 2003).

limiting the potential benefits of the Act. Proposed regulations, however, did not result from that comment period, so no definitional progress was made.[124]

After *Rapanos*, the Army Corps and the EPA again tried to use their authority to clarify jurisdictional issues in the wake of confusion.[125] The guidance issued implemented both Justice Scalia's approach and Justice Kennedy's approach from the *Rapanos* case. Under Justice Scalia's reasoning, the guidance concluded that the Act established jurisdiction over any water that was a relatively permanent, standing or continuously flowing body of water, or any wetland that had a continuous surface connection to another jurisdictional water. The guidance further concluded that under Justice Kennedy's approach, the Act established jurisdiction over any water that satisfied the significant nexus threshold.[126] However, this guidance mandated that for certain categories of waters, "the agencies will decide jurisdiction over the . . . waters based on a fact-specific analysis," which meant that time-consuming case-by-case determinations would still be necessary.[127] Thus, this definition required that some decisions be made on a situational basis, instead of allowing for predictive outcomes. The guidance has therefore continued to thwart finality and jurisdictional clarity. This status quo of confusing jurisdiction set the stage for the Clean Water Rule, which would attempt to provide clarity, but would also face great political opposition.

VI. THE 2015 CLEAN WATER RULE

The EPA and the Army Corps jointly released the Clean Water Rule on May 27, 2015.[128] The news release for the Clean Water Rule declared that it would ensure that the waters protected under the Clean Water Act were more precisely defined and predictably determined, in order to increase efficiency.[129] This new Clean Water Rule was meant to succeed where the branches of government and their past interpretations had failed, by providing clear language that would cement which waters were regulated under the Clean Water Act. As discussed above, Supreme Court cases had muddied the definition of WOTUS in the years since 1972, and some interpret the Rule as a response to the cases that cabined the scope of the Act and narrowed it more than agencies or lower courts had previously.[130] Regardless, the Rule makes sense either as the agencies' attempt to clear the ambiguity left in the wake of conflicting interpretations, or as an attempt to

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124. *See* CRAIG, *supra* note 3, at 118.
125. *See* Memorandum from Benjamin H. Grumbles, Assistant Administrator for Water, Environmental Protection Agency to John Paul Woodley, Jr., Assistant Secretary of the Army (Civil Works), Department of the Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007), https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf.
126. *See* Mulligan, *supra* note 43, at 23.
127. *See* 2001 EPA/Army Memo, *supra* note 120, at 1.
128. *See* Copeland, *supra* note 75.
129. *See id.*
130. *See id.*

reconcile the leading interpretation with that of the Obama administration and agencies.

The impetus behind the agency's rule was to clear up the uncertainty and inefficiency created by previous guidance that called for case-by-case jurisdictional decisions.[131] The agencies stated that the rule does not exceed the lawful jurisdiction of the Clean Water Act, nor does it cover historically unprotected water. It would, however, increase the categorical reach of the Act's coverage.[132] Essentially, it increases the waters that fall definitively under the Act's jurisdiction, so as to decrease the inefficient case-by-case analysis.[133] The Rule would then shift the definition of WOTUS from its current iteration, although the agencies maintain that proper authority to do so exists.[134] The changes to the jurisdiction of the Act are accomplished via the definitions and clarifications in the Rule. These include the addition of a definition for "neighboring" waters, as well as the inclusion of a list of features that deem waters non-jurisdictional, such as erosional features, upland ditches, rills, and non-wetland swales.[135]

The EPA states the Clean Water Rule's purposes in six parts: (1) it clearly defines and protects tributaries that impact the health of downstream waters; (2) it provides certainty in how far safeguards extend to nearby waters; (3) it protects the nation's regional water treasures; (4) it focuses on streams, not ditches; (5) it maintains the status of waters within Municipal Separate Storm Sewer Systems; and (6) it reduces the use of case-specific analysis of waters.[136] These goals demonstrate that the agencies are now working towards finality and a settled jurisdictional doctrine. By coordinating their efforts to incorporate their past guidance, judicial tests, and Congress's intent to define jurisdiction under a clear doctrine, with fewer case-specific determinations, it appears that the agencies have learned some lessons over the years of Clean Water Act definitional development. While there was initially some hope that the Rule would provide clarity and finality to those who would need to interpret the Act in the future, a political shift in presidential administrations is dashing any optimism for the Rule's success.

VII. POLITICAL CHALLENGES FOR THE RULE

While a Republican Congress tried to block the Rule's implementation immediately after its release, opposition now also exists in the White House, with Donald Trump as President.[137] President Trump's EPA head, Scott Pruitt, is a vociferous critic of the Clean Water Rule, and he has sued the EPA several times in

131. *See* Mulligan, *supra* note 43, at 24.
132. *See* Copeland, *supra* note 75, at 10.
133. *See* Mulligan, *supra* note 43, at 24.
134. *See* AM. WATER WORKS ASS'N, *supra* note 4, at 4.
135. *Id.* at 6.
136. *See Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy, supra* note 5.
137. *See* Mulligan, *supra* note 43, at 25.

the past, including specifically against the promulgation of the Clean Water Rule in 2015.[138] In an op-ed he co-wrote with Senator Rand Paul, he called the Rule a "startling grab" and "unlawful."[139] Given that he is now the head of one of the two agencies given authority over the Clean Water Act, it seems he is a grave threat to the Rule's future. However, neither Pruitt nor President Trump can easily withdraw the Clean Water Rule because the agency must engage in a lengthy rulemaking process in order to publish another version.[140] Several groups have also vowed to vigorously defend the Rule.[141] Anyone fighting against the Rule would have to defy the scientific findings and data that has been unearthed in favor of protecting WOTUS.[142]

On February 28, 2017, President Trump ordered the EPA to reconsider the Clean Water Rule.[143] Because his order directed the agency to reconsider the rule, not repeal it, the process will likely take years, as a new framework will need to be developed and vetted.[144] The Order for Reconsideration is better for environmental advocates than a repeal would have been, and Gina McCarthy, head of the EPA from 2013 until 2017, remarked that this executive order allows Trump to tell constituents that he is fulfilling a campaign promise to eliminate the rule, while not superseding the old rule with a new one.[145] Thus, the fate of the Rule remains in legal purgatory until the agencies take action to promulgate an alternative.

The Rule also faces another threat: Congress could amend the Clean Water Act to overturn the Rule, effectively eliminating it.[146] When the House voted in 2016 to overturn the Rule, then-President Barack Obama vetoed the measure.[147] While President Trump likely would not veto a future measure to overturn it, environmental legal activists are hopeful the measure would still fail, because the "fight for clean water at this point is still very much alive," and avoiding constituent backlash might be a significant incentive for members of Congress to not overturn the Rule.[148]

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138. Joseph Erbentraut, *Donald Trump's EPA Pick is a Leading Foe of Clean Water Laws*, HUFFINGTON POST (Dec. 8, 2016), http://www.huffingtonpost.com/entry/donald-trump-epa-scott-pruitt_us_584875c7e4b0f9723cfff87e.

139. Sen. Rand Paul & Okla. Att'y Gen. Scott Pruitt, *EPA Water Rule is Blow to Americans' Private Property Rights*, THE HILL (Mar. 4, 2015), http://thehill.com/opinion/op-ed/234685-epa-water-rule-is-blow-to-americans-private-property-rights.

140. *See* Erbentraut, *supra* note 138.

141. *See id.*

142. *See id.*

143. Timothy Cama, *Trump Moves to Kill Obama Water Rule*, THE HILL (Feb. 28, 2017), http://thehill.com/policy/energy-environment/321610-trump-directs-epa-to-reconsider-obama-water-rule.

144. *See id.*

145. *Id.*

146. Erbentraut, *supra* note 138.

147. *Id.*

148. *Id.*

CONCLUSION

While the Clean Water Rule and the jurisdictional limits of the Clean Water Act await their fate, the story of how the governmental branches struggled for decades to define the Clean Water Act's jurisdiction and to bring finality to the Act is cemented in history. The language employed in their definitional attempts illustrates that the branches had trouble coordinating and communicating to solve a regulatory problem. They offered competing interpretations for more than forty years and did not provide future interpreters, or even each other, with the necessary tools to understand the Act. The Clean Water Rule was a large step in the right direction, as it synthesized expertise from all of the branches into a coherent and coordinated definition, and demonstrated that the branches had learned important lessons since the Act's enactment. However, politics threaten to get in the way and thwart the progress made. WOTUS suffer when they are not protected from the pollution that the Act was intended to combat, with Americans suffering the health and environmental repercussions.