

## ARTICLES

# “Waters of the United States” and the Agricultural Production Sector: Sweeping Change or More of the Same?

by Emily Taylor

Emily Taylor holds a 2016 J.D., Vanderbilt Law School. She will be starting as an Associate in the Environmental Practice Group at Porter Wright Morris & Arthur LLP in Columbus, Ohio, this fall.

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### Summary

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EPA and the Corps’ promulgation of a new definition of “waters of the United States” under the CWA has prompted a fierce rhetorical and legal debate. EPA maintains that the agencies’ jurisdiction may actually be limited by the new definition, while agricultural organizations maintain that jurisdiction is increased in violation of the agencies’ statutory authority. While heavily engaged in public dialogue, neither side has attempted to offer a systematic legal analysis comparing the scope of jurisdiction under the preexisting rule to its scope under the final rule. This Article engages in such an analysis and ultimately shows that the agencies’ jurisdiction under the new definition is, if at all changed, more limited than under the preexisting rule.

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Americans may now be at peak awareness of the importance and vulnerability of our nation’s water resources. The recent crisis in Flint, Michigan, illustrates just how central clean water is to the viability of a community. An entire city’s water supply was contaminated with lead from corroded pipes, with lead levels measured at above five parts per billion in some areas, posing an especially high health risk to children.<sup>1</sup> President Barack Obama’s declaration of a federal emergency in Flint highlights how vital it is to ensure access to safe drinking water.<sup>2</sup>

Additionally, the ongoing water shortage in the western states illustrates how important it is to have access to water for agricultural use as the key ingredient in the production of safe food. For example, farmers in California, “the nation’s biggest agricultural engine,” have suffered significantly as a result of the ongoing drought.<sup>3</sup> Just a few of the problems their inability to access water has caused include “farm layoffs, restrictions on residential and agricultural water use, and hard times for all manner of ancillary businesses, like tractor dealerships and roadside diners.”<sup>4</sup> Farmers and California state decisionmakers agree that “keeping California’s agricultural land in production depends on fixing its growing water problems.”<sup>5</sup>

Both of these stories illustrate a nationwide need to address how water resources should be protected. Both environmental groups and agricultural communities obviously agree water is central to the nation’s well-being, and both desire to preserve our nation’s waters to ensure access to safe drinking water and food production.<sup>6</sup> Their

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1. See Jeremy C.F. Lin, *The Reach of Lead in Flint’s Water Supply*, N.Y. TIMES (Jan. 15, 2016), <http://www.nytimes.com/interactive/2016/01/15/us/flint-lead-water-michigan.html>.
2. See Associated Press, *Federal Emergency Is Declared in Flint Over Contaminated Water*, N.Y. TIMES (Jan. 16, 2016), [http://www.nytimes.com/2016/01/17/us/federal-emergency-is-declared-in-flint-over-contaminated-water.html?\\_r=0](http://www.nytimes.com/2016/01/17/us/federal-emergency-is-declared-in-flint-over-contaminated-water.html?_r=0).
3. See Jesse McKinley, *On Parched Farms, Using Intuition to Find Water*, N.Y. TIMES (Oct. 8, 2008), <http://www.nytimes.com/2008/10/09/us/09water.html>.
4. *Id.*
5. Justin Gillis, *California Wants to Store Water for Farmers, but Struggles Over How to Do It*, N.Y. TIMES (Dec. 21, 2015), <http://www.nytimes.com/2015/12/22/science/california-wants-to-store-water-for-farmers-but-struggles-over-how-to-do-it.html>.
6. See U.S. Env’tl. Prot. Agency (EPA), *Statements on the Clean Water Rule*, 1, [https://www.epa.gov/sites/production/files/2015-05/documents/statements\\_clean\\_water\\_rule.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/statements_clean_water_rule.pdf) (last visited Mar. 27, 2016). (This resource quotes Prairie Fruits and Creamery co-owner Wes Jarrell from May 27, 2015. “Nobody appreciates the value of clean, abundant water more than a farmer[.] Clean water is absolutely essential to the success of our business. This rule levels the playing field so that responsible land managers are not competing with irresponsible managers.”). See also Robert Dagguillard, U.S. EPA, *Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy* (2015), <http://yosemite.epa.gov/opal>

views differ, however, on just how to protect these water resources, including wetlands, in order to keep them clean and safe, while not inhibiting the agricultural community's ability to use them in its very important task of providing the nation with its food supply.<sup>7</sup>

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (the Corps') recent promulgation of a new definition of "waters of the United States" under their Clean Water Act (CWA)<sup>8</sup> authority has brought to a head the debate over just how this balance should be struck. While the agencies maintain that the rule protects water resources, the agricultural production sector strongly opposes the rule, claiming the agencies have exceeded their statutory authority in their efforts to make these regulatory amendments.<sup>9</sup> The Clean Water Rule<sup>10</sup> is of particular importance to the agricultural sector, which has voiced the loudest and most ardent criticism of the changes that the final rule makes to the preexisting regulations. Its representatives argue that the agencies' jurisdiction to regulate waters used in agricultural production may have increased through changes to the definition of "waters of the United States." If the agencies' jurisdiction was increased in the final rule, agricultural production actors could be subject to more permitting requirements and operational limitations if waters on their lands or used in their operations are deemed jurisdictional under the new definition.<sup>11</sup>

The specific problem this Article addresses is the lack of systematic legal analysis of the changes the final rule does or does not make to the scope of the agencies' jurisdiction under the CWA. EPA maintains in its public statements, as well as throughout the text of the final rule, that the scope of the agencies' jurisdiction may actually be limited by the new definition of "waters of the United States," while agricultural organizations such as the American Farm Bureau

Federation (Farm Bureau) maintain that jurisdiction is increased in violation of the agencies' statutory authority.<sup>12</sup> Neither side of the conversation has attempted to offer a systematic legal analysis comparing the scope of the agencies' jurisdiction under the preexisting rule to its scope under the final rule. In fact, the rule has generated so much public dialogue that the conversation seems to have all but buried its legal underpinnings.

This Article engages in such a systematic legal analysis, and ultimately shows that the agencies' jurisdiction under the new definition of "waters of the United States" is, if at all changed, more limited than under the preexisting rule. The changes made in the final rule seem to have been motivated not by concerns over jurisdictional scope, but rather by other concerns related to jurisdictional determinations themselves, mostly the complexity and unpredictability of the preexisting rule's application, especially as related to the extremely high number of case-specific determinations made each year by various courts and agency authorities.<sup>13</sup> In the final rule itself, the most repeated justification for the changes is the intent to achieve greater "clarity" with respect to the bounds of jurisdiction, and the structure of the new definition reflects that aspiration with new, very specific categories of what waters are and are not jurisdictional by rule, and which waters can and cannot be subject to case-specific determinations at all.<sup>14</sup>

This Article will periodically return to the very important idea, largely absent in the public dialogue, that just because the final rule more clearly identifies which waters are jurisdictional as "waters of the United States" than was

admpress.nsf/0/62295CDD6C6B45685257E52004FAC97 ("Clean and reliable water is an economic driver, including for manufacturing, farming, tourism, recreation, and energy production.").

7. See Daguillard, *supra* note 6. EPA maintains that [t]he rule protects clean water necessary for farming, ranching, and forestry and provides greater clarity and certainty to farmers about coverage of the Clean Water Act. Farms across America depend on clean and reliable water for livestock, crops, and irrigation. The final rule specifically recognizes the vital role that U.S. agriculture serves in providing food, fuel, and fiber at home and around the world.
- American Farm Bureau Fed'n, *It's Time to Ditch the Rule*, [http://ditchtherule.fb.org/custom\\_page/its-time-to-ditch-the-rule/](http://ditchtherule.fb.org/custom_page/its-time-to-ditch-the-rule/) (last visited Mar. 27, 2016) [hereinafter Farm Bureau, *Time*] ("However, EPA's 'clarification' is also a broad expansion of the types of waters and lands that would be subject to federal permit requirements and limits on farming practices and other land-uses.").
8. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
9. See Daguillard, *supra* note 6; Farm Bureau, *Time*, *supra* note 7.
10. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).
11. See Timothy Cama, *Farm Bureau Pledges to Fight EPA's Water Rule*, THE HILL (Apr. 22, 2014, 5:14 PM), <http://thehill.com/policy/energy-environment/204096-farm-bureau-pledges-to-fight-epas-water-rule> ("The American Farm Bureau Federation has promised to fight the Environmental Protection Agency (EPA) through multiple avenues on its proposed new definition of which bodies of water are under its jurisdiction, saying the rule could 'impose unworkable regulations on the nation's farms.'").

12. See Daguillard, *supra* note 6 ("The rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features."); U.S. EPA, *Factsheet: The Clean Water Rule*, 1, <http://www2.epa.gov/cleanwater/clean-water-rule-factsheets> ("The rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered."); Farm Bureau, *Time*, *supra* note 7 (talking about "the agencies' attempt to expand their control over farmers' and other landowners' use of their land," and claiming "EPA's 'clarification' is also a broad expansion of the types of waters and lands that would be subject to federal permit requirements and limits on farming practices and other land-uses.").
13. See Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22191 (Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401):

The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as "waters of the United States," and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions.

14. See Clean Water Rule, *supra* note 10:  
The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories of tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

done in the preexisting rule, it does not necessarily mean the scope of jurisdiction has increased. The Article argues that under the preexisting rule, the agencies already had at least the scope of jurisdiction in the new rule, or perhaps even greater, and that it is actually just the clarity with which the rule newly defines that jurisdiction that has contributed to concerns over increased jurisdiction.

The Article is organized in six parts. Part I provides a short overview of the relevant regulations implementing the CWA that are affected by the new rule, as well as an overview of how “waters of the United States” has been interpreted over time, including the three most relevant U.S. Supreme Court decisions interpreting the preexisting definition.<sup>15</sup>

Part II introduces the proposed version of the rule,<sup>16</sup> as well as the reactions from both the agricultural sector and the agencies. This part identifies some of the most prominent actors in the debate over the validity of the proposed changes, as well as the specific objections and responses given by both sides during the notice-and-comment period.

Part III discusses how the new definition of “waters of the United States” determines if a water is jurisdictional under the CWA.<sup>17</sup> This section includes the changes incorporated into the final rule based on comments the agencies received during the notice-and-comment period from the agricultural production sector.

Part IV illustrates the changes made to the preexisting rule in the final rule, and analyzes the significance of those changes as they relate to the scope of the agencies’ jurisdiction. This part includes two distinct analyses to determine whether the final rule has expanded the agencies’ jurisdiction: by comparing the language of the preexisting rule itself to that of the final rule; and by comparing the three existing Supreme Court interpretations of the preexisting rule to the text of the final rule. In doing so, it addresses both ways of asking whether the agencies have unlawfully expanded their jurisdiction: first, whether the text of the final rule actually expanded the agencies’ jurisdiction at all; and second, if there has been an expansion, whether it exceeds the Supreme Court’s interpretation of the limits of the agencies’ statutory authority.

Part V tests the conclusion that the changes made in the final rule do not expand the agencies’ jurisdiction. This part assumes that a hypothetical, future administration will attempt to apply the final rule as aggressively as possible, and illustrates the limited effect such administrative action could have on the agricultural production sector. Special attention is paid to the idea that increased clarity in the definition of the agencies’ jurisdictional boundaries does not necessarily mean increased scope.

Part VI provides a summary of the final rule’s current legal status, as well as a short legal analysis of the likely failure of challenges to the rule’s validity as beyond the scope of the agencies’ statutory authority. The Article concludes with some thoughts about what the Clean Water Rule rule-making process says about the larger attitude toward agricultural and water policy in the United States.

## I. The Clean Water Act: Background and Preexisting Regulatory Definition of “Waters of the United States”

This part provides a brief history of the CWA and identifies the specific sections affected by the Clean Water Rule. The brief history includes an overview of the three Supreme Court cases that have interpreted the statutory and regulatory definitions of “waters of the United States.” This part also independently outlines the existing statutory definition of “waters of the United States,” as well as the agencies’ previous regulatory definition.

### A. Evolution of the CWA

The history of the CWA and its important Supreme Court interpretations lend valuable insight into understanding the debate about the scope of the agencies’ statutory authority. The original Federal Water Pollution Control Act was passed in 1948, and later significantly reorganized as the CWA in 1972.<sup>18</sup> This was the first major legislation focused on protecting and regulating the nation’s water resources.<sup>19</sup> Its purpose is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>20</sup> The statute does not set out to achieve this purpose by granting EPA and the Corps jurisdiction over *all* waters, but instead only over “navigable waters.”<sup>21</sup> The Act goes on to define “navigable waters” as “waters of the United States, including the territorial seas.”<sup>22</sup>

In 1985, the Supreme Court decided what was to become the first of three major cases interpreting the definition of “waters of the United States” put forth in agency regulations.<sup>23</sup> In *United States v. Riverside Bayview Homes*,

15. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 31 ELR 20382 (2001) (*SWANCO*); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 16 ELR 20086 (1985).

16. See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22188.

17. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37054.

18. See U.S. EPA, *Summary of the Clean Water Act*, <http://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Mar. 28, 2016) (“The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972. ‘Clean Water Act’ became the Act’s common name with amendments in 1972.”).

19. See U.S. EPA, *History of the Clean Water Act*, <http://www.epa.gov/laws-regulations/history-clean-water-act> (last visited Mar. 28, 2016) (“The Federal Water Pollution Control Act of 1948 was the first major U.S. law to address water pollution. Growing public awareness and concern for controlling water pollution led to sweeping amendments in 1972. As amended in 1972, the law became commonly known as the Clean Water Act (CWA).”).

20. See 33 U.S.C. §1251(a) (2015). See also *Rapanos*, 547 U.S. at 759.

21. For Corps jurisdiction, see 33 U.S.C. §1344(a), (c), (d) (2015). For EPA jurisdiction, see 33 U.S.C. §§1311(a), 1342(a), 1344(c) (2015).

22. 33 U.S.C. §1362(7).

23. See *Rapanos*, 547 U.S. at 765 (Kennedy, J., concurring) (Justice Anthony Kennedy’s characterization of the number of times the Supreme Court had previously construed the term “navigable waters”).

*Inc.*, the Supreme Court unanimously held that the Corps' regulatory definition of "waters of the United States" was within its statutory authority granted in the CWA.<sup>24</sup> In *Riverside Bayview*, the Corps had defined "waters of the United States" as including wetlands adjacent to traditional "navigable waters."<sup>25</sup> Looking to the U.S. Congress' intent "to define the waters covered by the Act broadly" and "the evident breadth of congressional concern for the protection of water quality," the Court held that the Corps' definition was reasonable and a valid exercise of its authority under the CWA.<sup>26</sup>

In 2001, the Supreme Court was tasked for the second time with interpreting the validity of the Corps' regulatory definition of "waters of the United States." In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,<sup>27</sup> the Court looked back to *Riverside Bayview* and interpreted its holding as requiring a "significant nexus" to a navigable water in order for the Corps to assert jurisdiction over a water resource.<sup>28</sup> In *SWANCC*, the Court concluded in a 5-4 opinion that the Corps had exceeded its statutory authority by asserting jurisdiction over an isolated pond not within the Corps' jurisdiction.<sup>29</sup> According to the Court, the pond, though used as a habitat by migratory birds, did not have a "significant nexus" to a "navigable water," and therefore was outside the scope of the Corps' authority to regulate.<sup>30</sup>

Five years later, in 2006, the Supreme Court issued its third major interpretation of "waters of the United States" in an important split opinion, with four Justices in the plurality, four in the dissent, and Justice Anthony Kennedy writing a separate concurring opinion that the agencies adopted as the law going forward.<sup>31</sup> In *Rapanos v. United States*, Justice Kennedy stated that the test for what is a "navigable water" had already been set out in *SWANCC*, that is, whether a water possesses a "significant nexus" to waters that were "navigable in fact or could rea-

sonably be made so."<sup>32</sup> Justice Kennedy made clear that in order for a water to have a "significant nexus," its effect on the jurisdictional water must be "more than speculative or insubstantial."<sup>33</sup>

Justice Kennedy rejected the plurality's requirement that a water have a "continuous surface connection" to be jurisdictional.<sup>34</sup> Justice Kennedy also rejected the dissent's view that essentially read the word "navigable" out of any requirement to be a jurisdictional water.<sup>35</sup> Instead, Justice Kennedy held that the Court had already, in *Riverside Bayview* and *SWANCC*, stated that the appropriate test to determine whether a wetland was jurisdictional was whether the wetland possessed a "significant nexus" to a "navigable water."<sup>36</sup> Therefore, Justice Kennedy would have remanded the issue to be decided under a "significant nexus" test, instead of the plurality's test focusing only on adjacency and the presence of surface connection.<sup>37</sup>

During and between these major decisions, the agencies sought to clarify the definition of "waters of the United States" by issuing a complicated series of memoranda and guidance documents.<sup>38</sup> EPA and the Corps adopted Justice Kennedy's "significant nexus" test as the law of the land, and attempted to clarify its application in the guidance it issued.<sup>39</sup> However, these documents proved less clarifying

24. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133, 16 ELR 20086 (1985) ("[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggest that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined.").

25. *Id.*

26. *Id.*

27. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 31 ELR 20382 (2001).

28. *Id.* at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

29. *Id.* at 175 ("We hold that 33 C.F.R. §328.3(a)(3) (1999), as clarified and applied to petitioner's baffle site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA.").

30. *Id.* at 171-72 ("We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds.").

31. See *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006). The plurality included Justice Antonin Scalia, Chief Justice John Roberts, Justice Clarence Thomas, and Justice Samuel Alito. The dissent included Justice John Paul Stevens, Justice David Souter, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer. Justice Kennedy wrote a separate concurring opinion.

32. *Id.* at 759 ("In [*SWANCC*], the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be made so.").

33. *Id.* at 718-19 ("When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term 'navigable waters.'"); 780 ("When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'").

34. *Id.* at 774 ("*SWANCC*, likewise, does not support the plurality's surface-connection requirement.").

35. *Id.* at 778 ("While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance.").

36. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring) ("In [*SWANCC*], the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be made so.").

37. *Id.* at 787 ("In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.").

38. See, e.g., U.S. EPA, *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S.* (2008) [hereinafter U.S. EPA, *Revised Guidance Following Rapanos*], available at [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/cwa\\_juris\\_2dec08.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf); U.S. EPA, *Revised Rapanos-Carabell Guidance, Response to Comments* (2008), available at [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/rapanos\\_comments\\_2dec08.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_comments_2dec08.pdf).

39. For an example of guidance following *SWANCC*, see U.S. EPA and Corps, *Memorandum for Director of Civil Works and US EPA Regional Administrators* (2007), available at [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/rapanos\\_moa\\_06-05-07.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_moa_06-05-07.pdf) ("Under this memorandum, case-by-case evaluations are required to determine if there is a 'significant nexus' to navigable waters for JDs involving the classes of waters listed in subparagraph 4.a.(2).") (Subparagraph 4.a.(2) says:

[d]eterminations based on a finding of a "significant nexus" with traditional navigable waters, which are required for the following waters: (i) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally (e.g., typically at least 3 months each year); (ii) wetlands that are adjacent to such

than the agencies had hoped, as many were inconsistently applied, confusing, or later withdrawn.<sup>40</sup>

In light of this time line, it makes sense that the agencies' most consistent justification for the changes made to the definition of "waters of the United States" in the Clean Water Rule is to create clarity in the definition, and thus consistency and predictability in its application.<sup>41</sup> While the agencies maintain that the increased clarity of definition in the new rule does not expand its jurisdiction, the agricultural production sector disagrees.<sup>42</sup> The agricultural production sector claims not only that the agencies have

expanded jurisdiction through the changes to the definition, but that they have *unlawfully* expanded that jurisdiction beyond their statutory authority.<sup>43</sup>

## B. Why It Matters to the Agricultural Production Sector: CWA Sections Affected by the Definition of "Waters of the United States"

The definition of "waters of the United States" is the jurisdictional key to the CWA. If a water resource falls under the definition, broadly defined by statute and refined by its implementing regulations, then EPA (and in certain cases the Corps) has authority to regulate activities affecting that water resource, including not only use of the resource directly, but also limits on development, upstream activities that contribute pollution, and anything else that could affect the "chemical, physical, and biological integrity" of that water resource.<sup>44</sup>

This jurisdictional key is important to all of the CWA's permitting requirements, reporting requirements, and effluent guidelines and standards.<sup>45</sup> Changes made to the regulatory definition of "waters of the United States" affect the Corps' definition of the "waters of the United

tributaries; and (iii) wetlands that are adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

For an example of guidance following *Rapanos*, see U.S. EPA, *Revised Guidance Following Rapanos*, *supra* note 38:

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water: Non-navigable tributaries that are not relatively permanent[;] Wetlands adjacent to non-navigable tributaries that are not relatively permanent[;] Wetlands adjacent to but that do not directly abut a relatively permanent nonnavigable tributary[.]

40. See, e.g., U.S. Fish & Wildlife Serv., *Letter to the Department of Interior* (Feb. 5, 2008), available at [http://www.fws.gov/habitatconservation/rapanos\\_carabell/DOI\\_comments\\_on\\_post\\_Rapanos\\_Guidance.pdf](http://www.fws.gov/habitatconservation/rapanos_carabell/DOI_comments_on_post_Rapanos_Guidance.pdf):

Discretionary Language and Potential for Regional Inconsistency. The Service is concerned that Corps Districts may implement the guidance inconsistently across the Nation due to language that appears open to subjective interpretation, potentially leading to increased degradation/destruction of waters. Again, the Service appreciates the challenge of converting discourse from the Justices' opinions into clear direction to Corps and EPA field staff, yet the guidance's fidelity to Justice Kennedy's description of significant nexus may not provide the consistency needed.

ENVIRONMENTAL LAW INST., *America's Vulnerable Waters: Assessing the Nation's Portfolio of Vulnerable Aquatic Resources Since Rapanos v. United States* (Aug. 2011), available at <https://www.eli.org/sites/default/files/eli-pubs/d21-06.pdf>:

Corps districts vary in their practice of applying the significant nexus test to "isolated" waters. Corps regulators also inconsistently applied various hydrologic and ecologic factors to support significant nexus determinations. For example, while some significant nexus evaluations included detailed, quantitative assessments of drainage areas, stream discharge, or macroinvertebrate counts, other evaluations from the same district disclosed less specific, qualitative descriptions of an aquatic resource's hydrological or ecological connectivity to a TNW. Further, many NJDs included cursory explanations of no significant nexus, such as solely reporting that a wetland was isolated, had no surface hydrologic connection to waters of the United States, or that no significant nexus existed.

41. See, e.g., Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37054 ("The rule will ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act" and claiming that the final rule "clarifies the scope of 'waters of the United States' consistent with the Clean Water Act (CWA), Supreme Court precedent, and science"); 37055 (stating that the rule will "clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case-specific analysis"); and 37058 (stating that the "rule further reduces existing confusion and inconsistency regarding the regulation of ditches").

42. For resources on EPA's stance, see, e.g., Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37054:

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories of tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permit-

ting programs, would need to make jurisdictional determinations on a case-specific basis.

For resources on the agricultural production sector's stance, see, e.g., American Farm Bureau Fed'n, *What Is Different Under the Final Rule?*, [http://ditchtherule.fb.org/custom\\_page/what-will-actually-be-different-under-the-proposed-rule/](http://ditchtherule.fb.org/custom_page/what-will-actually-be-different-under-the-proposed-rule/) (last visited Mar. 28, 2016) [hereinafter *Farm Bureau, Different*] ("EPA claims in its promotional materials that it is not broadening coverage of the Clean Water Act. However, the details of the rule itself say otherwise."); American Farm Bureau Fed'n, *EPA Proposed Expansion*, <http://ditchtherule.fb.org/wp-content/uploads/2014/10/FB-Wetland-Diagram.jpg> (last visited Mar. 28, 2016).

43. See, e.g., *Farm Bureau, Time*, *supra* note 7:

EPA and the Corps continually have tested the jurisdictional limits of the CWA over the last 40-plus years by issuing guidance documents and regulatory enforcement actions based on ever-broader interpretations of "waters of the U.S." Specifically, in 1986, EPA and the Corps used the "migratory bird rule" to assert authority over isolated waters by saying those waters that are or could be used by migratory birds, which cross state lines, are interstate waters or "waters of the U.S." The regulated community, including agriculture, has pushed back, resulting in precedent-making court decisions concerning the scope of the agencies' jurisdiction.

*Farm Bureau, Different*, *supra* note 42 ("It is clear from the language of the Clean Water Act that Congress did not intend for the law to extend federal regulations to such small, remote waters and land features; otherwise, Congress would not have used the term 'navigable.'").

44. For Corps jurisdiction, see 33 U.S.C. §1344(a), (c), (d) (2015). For EPA jurisdiction, see 33 U.S.C. §§1311(a), 1342(a), 1344(c) (2015). See also 33 U.S.C. §1251(a) (2015); *Rapanos v. United States*, 547 U.S. 715, 759, 36 ELR 20116 (2006).

45. The list of sections affected includes: 33 C.F.R. §328.3, Army Corps Definition of Waters of the United States (which would apply to dredge and fill permits under 33 C.F.R. ch. II, pt. 323); 40 C.F.R. §110.1, EPA Discharge of Oil; 40 C.F.R. §112.1, EPA Oil Pollution Prevention; 40 C.F.R. §116.3, EPA Designation of Hazardous Substances; 40 C.F.R. §117.1, EPA Determination of Reportable Quantities for Hazardous Substances; 40 C.F.R. §122.2, EPA NPDES Permits; 40 C.F.R. §230.3, EPA Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredge and Fill Material; 40 C.F.R. §232.2, EPA Exempt Activities Not Requiring 404 Permits; 40 C.F.R. §300.5, EPA National Oil and Hazardous Substances Pollution Contingency Plan; 40 C.F.R. pt. 300 App. E, EPA National Oil and Hazardous Substances Pollution Contingency Plan; 40 C.F.R. §302.3, EPA Superfund and EPCRA Designation, Reportable Quantities, and Notification; 40 C.F.R. §401.11, EPA Effluent Guidelines and Standards.

States” as it relates to dredge and fill permits, as well as 11 other sections of the Act administered by EPA.<sup>46</sup> These sections include: discharge of oil, oil pollution prevention, designation of hazardous substances, determination of reportable quantities for hazardous substances, national pollutant discharge elimination system (NPDES) permits, guidelines for specification of disposal sites for dredge and fill material, exempt activities not requiring CWA §404 permits (for the discharge of dredged or fill material into waters of the United States, including wetlands), the National Oil and Hazardous Substance Contingency Plan, EPA Superfund and Emergency Planning and Community Right-to-Know Act (EPCRA) designation and reportable quantities and notification, and effluent guidelines and standards.<sup>47</sup>

In other words, the definition of “waters of the United States” effectively determines, with respect to the agricultural production sector, the range of permits agricultural actors must obtain to engage in farming activities, including development of wetlands and the reports of pollutant discharges that must be submitted to EPA.<sup>48</sup> While the agricultural production sector’s public position seems to be that *any* increase in the scope of agencies’ jurisdiction would be harmful to the agricultural community, the legal argument that the sector must prove to defeat the Clean Water Rule sets a higher bar.<sup>49</sup> The agencies must not only have increased their jurisdiction under their regulatory definition, but that increase must have been, as the agricultural production sector claims, in excess of their *statutory* authority.<sup>50</sup>

### C. What Is the Statutory Definition of “Waters of the United States?”

The CWA’s main objective is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>51</sup> Under the CWA, the jurisdiction of both EPA and the Corps is limited to “navigable waters.”<sup>52</sup> The CWA grants EPA jurisdiction over “navigable waters” for the purpose of requiring permits to discharge pollutants.<sup>53</sup> For

the Corps, the CWA grants jurisdiction over “navigable waters” to require permits for the “discharge of dredged or fill material.”<sup>54</sup>

The CWA defines “navigable waters” as “waters of the United States, including the territorial seas.”<sup>55</sup> EPA and the Corps have issued a regulatory definition that interprets which water resources fall within their jurisdiction as “waters of the United States.”<sup>56</sup> It is this regulatory interpretation that the agencies seek to amend in the new Clean Water Rule.<sup>57</sup>

### D. What Was the Regulatory Definition of “Waters of the United States” Before the Clean Water Rule?

The first step in evaluating the changes made by the Clean Water Rule is to establish the preexisting definition of “waters of the United States.” Throughout the rest of this Article there will be references to the Appendix, which shows a comprehensive chart comparing the language of the preexisting, proposed, and final rules, using 33 C.F.R. §328.3 as a model (the language in all of the regulatory sections affected by the rule is the same).<sup>58</sup> The Appendix also includes precise indication of the exact language changed, as well as the implications those changes have on the scope of jurisdiction. However, for purposes of getting a general understanding of the preexisting definition, the central components are discussed here.

For the most part, the preexisting definition provided a list of seven types of waters and wetlands that *were* “waters of the United States,” and two types of “waters” that were *not*.<sup>59</sup> The jurisdictional waters included:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:

46. *Id.*

47. *Id.*

48. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37055 (EPA lists these types of agricultural activities: normal farming, ranching, silviculture activities, agricultural stormwater discharges, return flows from irrigated agriculture, and water transfers. These are respectively housed in CWA §§402(l)(1), 402(l)(2), 502(14), 40 C.F.R. 122.3(f), and 40 C.F.R. 122.2.).

49. See Farm Bureau, *Time*, *supra* note 7:

In releasing the new “waters of the U.S.” proposed rule, EPA (the lead agency on the rule) has said that it is clarifying the scope of the CWA. However, EPA’s “clarification” is also a broad expansion of the types of waters and lands that would be subject to federal permit requirements and limits on farming practices and other land-uses.

50. EPA has the authority to define “waters of the United States”; however, that power is limited such that it cannot define it in a way that exceeds a reasonable interpretation of the CWA “navigable waters” as “waters of the United States, including the territorial seas,” set out in 33 U.S.C. §1362(7) (2015).

51. 33 U.S.C. §1251(a) (2015).

52. *Id.* §1362(7).

53. *Id.* §§1311(a), 1342(a), 1344(c).

54. *Id.* §1344(a), (c), (d).

55. *Id.* §1362(7).

56. See the list of sections affected, *supra* note 45.

57. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37055.

58. See both 33 C.F.R. §§328.3 (2015) and (2016), Definition of Waters of the United States (Corps).

59. See, e.g., 33 C.F.R. §328.3 (2015). The definition of “waters of the United States” is the same in all affected sections listed *supra* in note 45; the Article uses §328.3 as a model, but it could have used any one of the affected sections, and the analysis would be identical. The following footnotes to the revised regulatory language all refer to the subsections 33 C.F.R. §328.3, either in its former version (2015), or the new version (2016).

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes, or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce, or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas; and
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.<sup>60</sup>

The only exclusions from what were considered “waters of the United States” were prior converted cropland and waste treatment systems.<sup>61</sup>

Following this list of waters, the preexisting rule offered five regulatory definitions for the following important terms used in the above list: wetlands, adjacent, high tide line, ordinary high watermark, and tidal waters.<sup>62</sup> These will be more thoroughly analyzed below; however, it is enough for now to understand the basic structure of the preexisting definition, that is, a list of seven types of waters that *were* jurisdictional and two types of waters that *were not*, as defined within the regulation.

## II. The Proposed Rule

This section outlines the most significant proposed changes to the regulatory definition of “waters of the United States” contained in the agencies’ Notice of Proposed Rulemaking. It explains how the agricultural production sector reacted to those proposed changes, enumerating six specific concerns raised by the sector in comments submitted to the agencies.

### A. What Were the Proposed Changes?

The proposed rule introduced a complete structural change to the definition of “waters of the United States.” Unlike the preexisting rule that vaguely identified seven types of waters that *were* jurisdictional and two types that *were not*, the proposed rule introduced new ways to categorize waters, not only as jurisdictional or nonjurisdictional, but also as to whether waters could be subject to jurisdictional determinations at all. Because the final rule did make important adjustments to the proposed text, the Article will avoid a

thorough investigation of the proposed text here (though it is available in the Appendix) in the interest of focusing on the changes actually retained in the final rule.

Certain changes, however, are worth noting in order to contextualize the agricultural production sector’s response to the proposed changes. First, the proposed rule heavily and transparently relied on Justice Kennedy’s “significant nexus” standard from *Rapanos* in rewriting the definition,<sup>63</sup> and for the first time offered an explicit regulatory definition of “significant nexus.”<sup>64</sup> In short, the proposed definition of “significant nexus” required that a water or wetland, either alone or in combination with similarly situated waters in a defined region, “significantly affect the chemical, physical, or biological integrity” of one of three types of waters, (1) a water currently used or susceptible to use in interstate or foreign commerce, (2) an interstate water or wetland, or (3) the territorial seas.<sup>65</sup>

Under the proposed rule, if a water or wetland, either alone or in combination with other “similarly situated” waters possessed a “significant nexus” to one of these three types of waters, then it was jurisdictional as a “water of the United States” *unless* it was one of the 11 listed waters explicitly excluded.<sup>66</sup> These exclusions retained the two from the preexisting rule, waste treatment systems and prior converted cropland, and added two types of ditches, specific types of artificially irrigated areas, artificial lakes and ponds, artificial reflecting pools, small ornamental waters, water-filled depressions incidental to construction activity, groundwater, and gullies and rills and non-wetland swales.<sup>67</sup>

Additionally, the proposed rule offered specific definitions of key terms in the new structure, including adjacent, neighboring, riparian area, floodplain, tributary, wetlands, and as mentioned, significant nexus.<sup>68</sup>

The proposed rule’s most substantial change from the preexisting rule was its attempt to clarify the reference to “all other waters . . . the use, degradation[,] or destruction of which could affect interstate or foreign commerce” in the preexisting rule’s definition of “waters of the United States.”<sup>69</sup> The objective, according to the agencies in the

63. See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22189 (“In light of the Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations.”); 22195 (“However, as Justice Kennedy found in *Rapanos*, a mere hydrological connection may not suffice in all cases to establish CWA jurisdiction and there needs to be ‘some measure of the significance of the connection for downstream water quality.’”) (quoting 547 U.S. at 784-85).

64. See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22263. See Appendix for proposed rule definition of “significant nexus” at §(c)(7).

65. See *id.*

66. See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22263. See Appendix for proposed rule §(b) listing waters that are *not* “waters of the United States.”

67. See *id.*

68. See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22263. See Appendix for proposed rule definitions of “adjacent,” “neighboring,” “riparian area,” “floodplain,” “tributary,” “wetlands,” and, as mentioned, “significant nexus.”

69. Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22192.

60. 33 C.F.R. §328.3 (2015).

61. *Id.* §328.3(a)(8) (2015).

62. *Id.* §§328.3(b) wetlands, (c) adjacent, (d) high tide line, (e) ordinary high mark, (f) tidal waters (2015).

preamble to the proposed rule, was to reduce the number of case-specific determinations needed to determine if waters were jurisdictional,<sup>70</sup> both as a way of reducing the administrative burden imposed by the high number of yearly jurisdictional determinations, and also in the interest of creating certainty and predictability for regulated, or potentially regulated, parties.<sup>71</sup>

## B. *How Did the Agricultural Production Sector Respond?*

The agricultural production sector responded very strongly to the proposed rule, and for the most part negatively. Perhaps the loudest, and definitely clearest, concerns about the proposal were voiced by the Farm Bureau, which launched a massive campaign self-titled “Ditch the Rule” during the notice-and-comment period in an effort to do just that. In essence, the Farm Bureau felt that the proposal was so flawed that merely offering comment to EPA during the comment period was not a sufficient response to the potentially, as they believed, “sweeping” changes proposed. Although the Farm Bureau was not the only agricultural production actor to raise concerns about the rule, it is the most far-reaching; therefore, the Article will rely, in identifying concerns from the agricultural production sector, more heavily on Farm Bureau resources.

The most prominent concern the sector voiced about the proposed rule was that its changes to the definition of “waters of the United States” created a huge expansion of the agencies’ jurisdiction. Congressman Lamar Smith (R-Tex.) was quoted in the *New York Times* as saying the proposed rule “could be the largest expansion of E.P.A. regulatory authority ever.”<sup>72</sup> He was not alone in that concern;

The most substantial change is the proposed deletion of the existing regulatory provision that defines “waters of the United States” as all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce.

(citing 33 C.F.R. §328.3(a)(3) and 40 C.F.R. §122.2 (2015)).

70. *Id.* at 22188:

Developing a final rule to provide the intended level of certainty and predictability, and minimizing the number of case-specific determinations, will require significant public involvement and engagement. Such involvement and engagement will allow the agencies to make categorical determinations of jurisdiction, in a manner that is consistent with the scientific body of information before the agencies—particularly on the category of waters known as “other waters.”

71. *Id.* at 22191:

The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as “waters of the United States,” and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions.

72. See Ron Nixon, *EPA’s Proposed Rules on Water Worry Farmers*, N.Y. TIMES (Mar. 13, 2014), <http://www.nytimes.com/2014/03/13/us/politics/envi->

the Farm Bureau voiced the same concern, claiming the proposal would “dramatically increase the number of so-called ‘waters’ (which don’t really look like water) that are subject to CWA jurisdiction.”<sup>73</sup> Importantly, however, the Farm Bureau maintained that the rule not only expanded the agencies’ jurisdiction, but that it did so *unlawfully* in excess of their statutory authority under the CWA.<sup>74</sup>

A key part of the Farm Bureau’s claim that the proposed rule unlawfully expanded the agencies’ jurisdiction is its position on the agency’s preexisting regulatory definition of “waters of the United States.” The Farm Bureau recognized that the “agencies’ [EPA’s and the Corps’] own historical *regulations* were very broad,” and in fact believed those preexisting regulations “*were also illegal*.”<sup>75</sup> Therefore, in order to determine whether the agricultural production sector’s concerns about the proposed and final rules have merit, analysis of the rules will need to consider the effect on agencies’ jurisdiction both in comparison to the preexisting rule (to see if there has been a jurisdictional expansion at all), and in comparison to the language of the CWA itself, as interpreted by the Supreme Court (to determine if the rule is in excess of the agencies’ statutory authority). The Article will proceed in this analysis after introducing the exchange between the agricultural production sector and EPA during the notice-and-comment period, in order to determine which of the sector’s concerns remain after the issuance of the final rule.

## C. *Notice-and-Comment Period: The Agricultural Production Sector’s Concerns and the Agencies’ Responses*

Throughout the notice-and-comment period, both the agricultural production sector and the agencies issued a number of public statements opposing and supporting the rule, respectively. This section will highlight a number of prominent topics covered in these public statements and identify the positions taken by each side; however, it is by no means meant to be an exhaustive list. Rather, these concerns about the proposed rule are being used to highlight what lingering concerns the agricultural production sector may or may not still have after the final rule, the merits of which will be analyzed later in the Article with respect to the rule’s current legal status.

### I. “Clarity”

The agencies’ most consistent justification, or explanation perhaps, for the proposed changes was the goal of providing “greater clarity regarding which waters are subject to

ronmental-protection-agency-water-rules.html?\_r=5.

73. American Farm Bureau Fed’n, *Trick or Truth? What EPA and the Army Corps of Engineers Are Not Saying About Their “Waters of the U.S.” Proposal 1* (2014) [hereinafter Farm Bureau, *Trick or Truth?*], [http://ditchtherule.fb.org/wp-content/uploads/2014/10/Trick\\_or\\_Truth.pdf](http://ditchtherule.fb.org/wp-content/uploads/2014/10/Trick_or_Truth.pdf).

74. *Id.* (“The Clean Water Act has never been as broad as what the agencies now propose.”).

75. *Id.*

CWA jurisdiction,” thus “reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-specific basis.”<sup>76</sup> EPA also believed that increased clarity in the proposed rule would “ensur[e] that waters protected under the Clean Water Act are more precisely defined and predictably determined, making permitting less costly, easier, and faster for businesses and industry.”<sup>77</sup>

The agricultural production sector was skeptical of the sincerity of EPA’s purported reason for proposing the rule, claiming “[a]gencies don’t fight so hard to achieve ‘clarity.’”<sup>78</sup> The sector also doubted whether clarity was actually achieved by the new structure of the rule, saying that the proposed rule “defines ‘tributaries’ and ‘adjacent’ in ways that make it impossible for a typical farmer to know whether the specific ditches or low areas at his or her farm will be ‘waters of the U.S.’” but “the language is certainly broad enough to give agency field staff plenty of room to find that they are[.]”<sup>79</sup>

## 2. Effect on Agricultural Exemptions in the CWA

Simply put, the agencies maintained that “nothing in this [proposed] rule changes the exemptions that Congress has provided for certain discharges from CWA permitting associated with farming, ranching, and forestry practices.”<sup>80</sup> The agricultural production sector disagreed, saying that although “[t]he categories of exemptions are still there, [b]ecause of the expansion of jurisdiction over more small, isolated wetlands and land features like ditches and ephemeral drains, fewer farmers will benefit from the exemptions.”<sup>81</sup>

## 3. Scientific Support

The preamble to the proposed rule stated that the agencies relied on “the best available peer-reviewed science, public input, and the agencies’ technical expertise and experience,”<sup>82</sup> as well as “practical experience” in structuring the new definition.<sup>83</sup> The agencies concluded these

resources proved that upstream waters “can significantly impact the chemical, physical, and biological integrity of downstream waters—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.”<sup>84</sup> The agricultural production sector disagreed with the integrity of the agencies’ scientific evidence, raising concerns that the “scientific report the agency and the Army Corps of Engineers relied on to justify the new rules had not been reviewed by other scientists.”<sup>85</sup>

## 4. Permitting Requirements

EPA focused on the important distinction between finding a water jurisdictional as a “water of the United States,” versus needing a permit under the CWA. In short, EPA made the point that “if an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture[,] or ranching operation.”<sup>86</sup> Then, as to whether permitting requirements would have increased under the proposed rule, the Agency maintained that they would not, because “[f]ewer waters will be defined as “waters of the United States” under the rule than under the existing regulations.”<sup>87</sup>

The agricultural production sector’s concerns revolved around the fact “[t]here is no ‘right’ to a [CWA] permit, even if your livelihood depends on doing something that may cause [a] ‘pollutant’ (like fertilizer, dirt, or herbicide) to fall into jurisdictional features.”<sup>88</sup> The sector focused on the concern that the preexisting exemptions for “normal” farming or ranching operations were themselves extremely limited.<sup>89</sup>

## 5. Regulating Ditches

The tension over ditches was purely a jurisdictional one. EPA maintained that the Agency has been regulating ditches under the CWA since the late 1970s,<sup>90</sup> but

76. U.S. EPA, *Clean Water Rule Comment Compendium, Mass Mailing Campaigns* 1, 4 (2015) [hereinafter U.S. EPA, *Comment Compendium*], available at [http://www.epa.gov/sites/production/files/2015-06/documents/cwr\\_response\\_to\\_comments\\_mass\\_mailing\\_campaigns.pdf](http://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_mass_mailing_campaigns.pdf).

77. Daguiard, *supra* note 6 (EPA maintains that: [t]he rule protects clean water necessary for farming, ranching, and forestry and provides greater clarity and certainty to farmers about coverage of the Clean Water Act. Farms across America depend on clean and reliable water for livestock, crops, and irrigation. The final rule specifically recognizes the vital role that U.S. agriculture serves in providing food, fuel, and fiber at home and around the world.

78. Farm Bureau, *Trick or Truth?*, *supra* note 73, at 1.

79. American Farm Bureau Fed’n, *Responses to Sections of Stoner Blog* 1 (2015) [hereinafter Farm Bureau, *Stoner Blog*], [http://www.fb.org/newsroom/nr/nr2014/07-16-14/Stoner\\_Blog\\_Response\\_long.pdf](http://www.fb.org/newsroom/nr/nr2014/07-16-14/Stoner_Blog_Response_long.pdf).

80. U.S. EPA, *Comment Compendium*, *supra* note 76, at 4.

81. Farm Bureau, *Stoner Blog*, *supra* note 79, at 1.

82. U.S. EPA, *Comment Compendium*, *supra* note 76, at 4.

83. *Id.*:

Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, can signifi-

cantly impact the chemical, physical, and biological integrity of downstream waters—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.

84. *Id.*

85. See Nixon, *supra* note 72.

86. U.S. EPA, *Comment Compendium*, *supra* note 76, at 35.

87. *Id.* at 18.

88. Farm Bureau, *Trick or Truth?*, *supra* note 73, at 3.

89. See *id.* at 4, n.16.

90. See U.S. EPA, *Comment Compendium*, *supra* note 76, at 94:

Ditches have been regulated under the Clean Water Act (CWA) as “waters of the United States” since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including “construction or maintenance of . . . irrigation ditches, or the maintenance of drainage ditches” (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted

the agricultural production sector maintained that pre-existing regulations did not include jurisdiction over ditches.<sup>91</sup> EPA maintained that the proposed rule clarified which ditches were jurisdictional and provided clearer exclusions for certain types of ditches.<sup>92</sup> However, the agricultural production sector raised concerns that “the new rule would categorically define almost all ditches as ‘tributaries.’”<sup>93</sup>

## 6. Regulating Farm Ponds

The proposed rule provided that “artificial lakes and ponds created in dry land” were not “waters of the United States.”<sup>94</sup> The agricultural production sector worried the proposed “rule makes the farm pond exemption meaningless, because the exemption does not apply to impoundments of ‘navigable waters.’ By regulating low spots as ‘navigable waters,’ the rule would prevent building a farm pond on a low spot without a Section 404 permit.”<sup>95</sup> Essentially, the sector was concerned that because farm ponds are not usually built in dry lands, the exemption would not do much for farmers in practice.<sup>96</sup>

## III. The Final Rule

This part explains the mechanics of the final rule, and how it determines if a water is jurisdictional as a “water of the United States”; highlights terms that are key to determining jurisdiction under the new rule and their respective definitions; and identifies the changes incorporated into the final rule from comments received on the proposed rule, both generally and specifically in response to the agricultural production sector.

specified activities taking place in them from the need for a CWA section 404 permit.

91. See Farm Bureau, *Stoner Blog*, *supra* note 79, at 2.

92. See U.S. EPA, *Comment Compendium*, *supra* note 76, at 94-95:

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The following types of ditches are excluded in the final rule: “(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule].” A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(4) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics developed in the bottom of the ditch.

93. Farm Bureau, *Stoner Blog*, *supra* note 79, at 2 (“Current rules do NOT INCLUDE ditches. Agencies have informally interpreted rules to include ditches as ‘tributaries.’ We disagree! Now, the new rule would categorically define almost all ditches as ‘tributaries.’”).

94. U.S. EPA, *Comment Compendium*, *supra* note 76, at 94.

95. Farm Bureau, *Stoner Blog*, *supra* note 79, at 5.

96. See *id.*

## A. Roadmap of the Final Rule: How to Determine If a Water Is Jurisdictional

### I. Structure of the Rule

The final rule creates a whole new scheme for categorizing waters in order to determine whether they are jurisdictional as “waters of the United States.” Broadly, the rule creates three basic *categories* of waters: waters that are jurisdictional by rule, waters that are not jurisdictional by rule, and waters that can be subject to case-specific jurisdictional determinations.<sup>97</sup>

As to jurisdictional waters, the rule creates eight exclusive *subcategories* of jurisdictional waters that can be put into three groups, as follows<sup>98</sup>:

- 1) Waters that are jurisdictional by rule
  - a. Traditional navigable waters
  - b. Interstate waters
  - c. Territorial seas
  - d. Impoundments of jurisdictional waters
- 2) Waters that are jurisdictional as defined
  - a. Tributaries
  - b. Adjacent waters
- 3) Waters found jurisdictional after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas
  - a. Alone
  - b. In combination with similarly situated waters in a defined region<sup>99</sup>

These eight subcategories of jurisdictional waters are exclusive by design, both in that if a water does not meet one of these subcategories it is not jurisdictional, but also because only specific *types* of water can be subject to a case-specific significant nexus analysis. Case-specific analysis for a water on its own can only occur for waters that are:

- 1) Within the 100 year floodplain of a traditional navigable water, interstate waters, or the territorial seas, or
- 2) Within 4,000 feet of the high tide line or the ordinary high waters mark of a traditional navigable water, interstate waters, the territorial seas, impoundments, or covered tributaries.<sup>100</sup>

97. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37057 (The “rule recognizes jurisdiction for three basic categories: [1] waters that are jurisdictional in all instances, [2] waters that are excluded from jurisdiction, and [3] a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional.”).

98. See *id.* at 37058.

99. See Appendix; Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37104-05; §328.3(a)(1)-(8) (2016).

100. *Id.* §328.3(a)(8).

Case-specific analysis in combination with other “similarly situated” waters in a specific region is only available for five types of waters specifically defined in the rule,<sup>101</sup> including:

- 1) Prairie potholes,
- 2) Carolina and Delmarva bays,
- 3) Pocosins,
- 4) Western vernal pools, and
- 5) Texas coastal prairie wetlands.

As to nonjurisdictional waters, a water can be nonjurisdictional either by not satisfying one of the eight jurisdictional subcategories, or by falling under one of the explicit exemptions in the rule. If a water falls under one of these exemptions, it is *not* subject to case-specific analysis, even if it otherwise meets the criteria to be subject to analysis, either alone or in combination with other “similarly situated” waters.<sup>102</sup> These exemptions<sup>103</sup> are as follows:

- 1) Waste treatment systems
- 2) Prior converted cropland
- 3) Three types of ditches
  - a. With ephemeral flow that are not a relocated tributary or excavated in a tributary
  - b. With intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands
  - c. That do not flow, either directly or indirectly, through traditional navigable waters, interstate waters (including wetlands), and the territorial seas
- 4) Artificially irrigated areas
  - a. That would revert to dry land should application of water in that area cease
- 5) Artificial constructed lakes and ponds
  - a. Created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds
- 6) Artificial reflecting pools or swimming pools
  - a. Created in dry land
- 7) Small ornamental waters
  - a. Created in dry land
- 8) Water-filled depressions
  - a. Created in dry land incidental to mining or construction activity, including pits exca-

vated for obtaining fill, sand, or gravel that fill with water

- 9) Erosional features
  - a. Including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways
- 10) Puddles
- 11) Groundwater
  - a. Including groundwater drained through sub-surface drainage systems
- 12) Stormwater control features
  - a. Constructed to convey, treat, or store storm-water that are created in dry land
- 13) Wastewater recycling structures
  - a. Created in dry land and includes detention and retention basins, groundwater recharge basins, percolation ponds, and water distributary structures

## 2. Key Terms and Their Definitions

The structure of the new rule relies heavily on a number of key terms that are specifically defined in the rule. While all the new regulatory definitions, close to 15 of them, are available in the Appendix, only the most critical and significant are introduced here.

First, the definition of “adjacent,” though not new to the definition of “waters of the United States,” is significantly expanded in the new rule. The definition is now limited by virtue of the fact that only waters that are traditional navigable waters, interstate waters or wetlands, territorial seas, impoundments, or tributaries (or waters that contain segments or are located at the head of one of those waters) can be “adjacent” for the purposes of determining jurisdiction. Additionally, the new definition explicitly states “[w]aters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. §1344(f)) are not adjacent.”<sup>104</sup>

Second, the definition of “neighboring” is a new addition to the rule. Generally, it determines if waters are “neighboring” by use of geographical distances from “ordinary high water marks,” 100-year floodplains, and “high tide lines” of traditional navigable waters, interstate waters or wetlands, territorial seas, impoundments, or tributaries.<sup>105</sup>

Third, the definition of “tributary” is also newly added to the rule. The definition is very detailed, though at heart its basic requirements are that it “contribute flow, either directly or through another water” to a traditional navigable water, interstate water or wetland, or territorial sea

101. *Id.* §328.3(a)(7).

102. *Id.* §328.3(b).

103. *Id.* §328.3(b)(1)-(7).

104. *Id.* §328.3(c)(1).

105. *Id.* §328.3(c)(2).

that “is characterized by the presence of physical indicators of a bend and banks and an ordinary high water mark.” The definition also lists a number of natural or man-made “breaks” that would not disqualify a water as a tributary. Importantly, a tributary also does not lose its status as such *even if* the water through which it “contributes flow” is itself a nonjurisdictional water.<sup>106</sup>

Fourth, and perhaps most importantly, the term “significant nexus” is given its first regulatory definition in the new rule. The definition closely tracks Justice Kennedy’s opinion in *Rapanos*, providing that a water has a “significant nexus” to a jurisdictional water if it “significantly affects the chemical, physical, or biological integrity” of that water.<sup>107</sup> In order “[f]or an effect to be significant, it must be more than speculative or insubstantial.”<sup>108</sup> The rule goes on to provide a list of “aquatic functions” to be considered in determining whether a water has a “significant effect.” There are nine listed functions, including functions like sediment trapping, nutrient recycling, runoff storage, contribution of flow, and provision of life-cycle-dependent aquatic habitat. A water will be deemed to have a “significant nexus” if at least one of these functions “contributes significantly to the chemical, physical, or biological integrity” of the nearest traditional navigable water, interstate water or wetlands, or territorial sea.<sup>109</sup>

Finally, the terms wetland, ordinary high water mark, and high tide line remain critical under the new rule, and are retained unchanged from the language in the preexisting rule.

## B. Changes Incorporated Into the Final Rule After Notice and Comment

### I. Substantive Changes From the Proposed Rule

After the notice-and-comment period, the language in certain sections of the rule were edited to reflect the agencies’ reactions to the comments. A thorough indication of every change made from the proposed to the final version of the rule is available in the Appendix. For example, the Agency rewrote the description of exempt ditches, elaborated on the list of nonjurisdictional waters, and significantly revised the definitions of “adjacent,” “neighboring,” “tributary,” and “significant nexus.” The general takeaway, however,

is that the Agency *did* make changes based on comments received from the agricultural production sector.

## 2. Changes and Explanations Included in the Final Rule in Response to Agricultural Production Sector Comments

EPA included a significant number of responses to the concerns raised during the notice-and-comment period in the regulatory language of the rule itself, as well as a significant amount of discussion in the preamble. Overall, the Agency reacted by clarifying a few definitions and exclusions that were especially important to the agricultural production sector, and memorialized in *numerous* instances throughout the preamble that no existing agricultural exemptions were touched or changed at all by the final rule.

One repeated comment submitted by the agricultural production sector was that “the agencies should exclude ephemeral streams from the definition of tributary, expressing concern that ephemeral waters that flow very rarely would be considered a jurisdictional tributary.”<sup>110</sup> The agencies responded by explaining “[t]he rule includes ephemeral streams . . . because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.”<sup>111</sup> The agencies, however, noted this was not a new interpretation, and that “the agencies have historically considered ephemeral tributaries to be ‘waters of the United States.’”<sup>112</sup>

The agricultural production sector also raised concerns about how the definition of “adjacent” would expand jurisdiction to essentially all waters used in farming. EPA explicitly stated that “adjacent” as defined in the final rule “does not include those waters in which established, normal farming, silviculture, and ranching activities occur. Wetlands and farm ponds in which normal farming activities occur, as those terms are used in CWA §404(f) and its implementing regulations, are not jurisdictional under the Act as an ‘adjacent’ water.”<sup>113</sup> In other words, waters used in agricultural production “will continue to be subject to case-specific review, as they are today.”<sup>114</sup>

Another very specific set of concerns raised in the notice-and-comment period was about the possible jurisdictional reach over ditches related to farming.<sup>115</sup> The first concern is about whether all ditches will be jurisdictional under the new rule. The agencies address that concern by stating that “the agencies believe the exclusions included in

106. *Id.* §328.3(c)(3).

107. *Id.* §328.3(c)(5); 80 Fed. Reg. at 37106 (quoting *Rapanos*: the “opinion is clear that a significant nexus is the basis for jurisdiction to protect non-navigable waters and wetlands under the CWA”); 37065 (relying on *Rapanos* to state that “[u]nder the significant nexus standard, waters possess the requisite significant nexus if they ‘either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’”).

108. See Appendix. See also Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37091 (“Paragraph (c)(5) of the rule defines ‘significant nexus’ to mean a significant effect (more than speculative or insubstantial) on the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas.”); §328.3(c)(5).

109. 80 Fed. Reg. at 37106; §328.3(c)(5).

110. *Id.* at 37079.

111. *Id.*

112. *Id.*

113. *Id.* at 37080.

114. *Id.*

115. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37097 (explaining that “agencies received many comments asking that roadside ditches be addressed, and more specifically excluded in the final rule”).

the final rule will address the vast majority of roadside and other transportation ditches . . . including certain ditches on agricultural lands. . . .<sup>116</sup> The second major concern was about the possibility that a ditch, if considered jurisdictional, could *also* be considered a point source under the CWA.<sup>117</sup> Though not assuaging those concerns, EPA pointed out that although that is true, “the approach that ditches can be considered both reflects the CWA itself as well as longstanding agency policy.”<sup>118</sup> However, the agencies did rewrite the regulatory section on ditches that are excluded from jurisdiction in an effort to clarify the agencies’ jurisdiction over ditches generally.<sup>119</sup>

Another concern about the new rule was about the clarity of the new rule as it relates to farmers’ ability to know whether waters on their properties are jurisdictional under the new definition.<sup>120</sup> This concern was especially augmented with the new definition’s possibility of case-specific analyses in combination with similarly situated waters.<sup>121</sup> EPA responded with essentially a reminder that any water, including those used in agricultural production, cannot be subject to a case-specific analysis unless it is within the geographic boundaries of another jurisdictional water, or it is one of the five types of waters that can be subject to analysis in combination with other “similarly situated” waters.<sup>122</sup>

The agricultural production sector was also concerned, as most clearly articulated in the Farm Bureau “Ditch the Rule” campaign, with the possible expansion of jurisdiction being so broad as to regulate “puddles.” EPA noted the wide concern over possible puddle jurisdiction, and included both an explicit exemption in the rule itself and a specific response in the preamble, stating that the proposed rule did not explicitly exclude puddles “because the agencies have never considered puddles to meet the minimum standards for being a ‘water of the United States,’ and it is an inexact term[;] . . . [h]owever, numerous commenters

asked that the agencies expressly exclude them in a rule. The final rule does so.”<sup>123</sup> On a similar note, concerns were also raised about possible expansion of jurisdiction to farm ponds, so the Agency also included an explicit exemption for specific farm ponds in the rule.<sup>124</sup>

The agricultural production sector also expressed concern about the newly added definition for “significant nexus.” The concern was largely about the use of geographic distance to determine whether a water “significantly affects” another jurisdictional water. EPA replied by pointing out that while “[t]he likelihood of a significant connection is greater with increasing size and decreasing distance” from the jurisdictional water,<sup>125</sup> “[d]istance is by no means the sole factor.”<sup>126</sup> The agencies gave an example, saying that while “a hydrological connection increases the strength of the impact,” that “a hydrological connection is not necessary to establish a significant nexus.”<sup>127</sup> The agencies even went so far as to reiterate that the rule “recognize[s] that not all waters have the requisite connection . . . to be determined jurisdictional.”<sup>128</sup> The definition of “significant nexus” did undergo some alteration from the proposed rule; however, it is not clear whether the motivation for those edits was directly in response to agricultural comments received.<sup>129</sup>

Lastly, the agricultural production sector voiced general comment and concern about possible increase in jurisdiction over agricultural waters in the new definition of “waters of the United States.” Here, the agencies took special care to address agricultural concerns in the preamble, explaining at length their reasoning and understanding of how the rule affects the agricultural community. The agencies began by explaining the CWA has traditionally exempted the agricultural community from permitting requirements for certain farming activities in “[r]ecognizing the vital role of farmers in providing the nation with food, fiber, and fuel.”<sup>130</sup> These exemptions “reflec[t] the intent of the agencies to minimize potential regulatory burdens on the nation’s agriculture community.”<sup>131</sup> The agencies were also sure to point out that instead of making waters used in normal farming, silviculture, or ranching practices jurisdictional by rule,

116. *Id.* at 37097-98.

117. *See id.* at 37098.

118. *Id.*

119. *See id.* at 37058:

[the] rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation. Further the rule explicitly excludes from the definition of “waters of the United States” erosional features, including gullies, rills, and ephemeral streams that do not have a bed and banks and ordinary high water mark.

*See also id.* at 37096 (“[B]y rule [ . . . ] certain ditches are excluded from jurisdiction. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies’ intent.”); *id.* at 37107 (one instance of the final rule excluding ditches from the definition of “waters of the United States”). *See also* Appendix for a direct comparison of the language used in the proposed versus final rule on the ditches exemption.

120. *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37095.

121. *Id.* (“Similarly, several commenters expressed concern that landowners would not know which waters bodies on their property are subject to CWA jurisdiction due to aggregation, as waters on their property may be considered with waters located off-site.”).

122. *Id.* (providing that “waters that are not either one of the five identified sub-categories in paragraph (a)(7) or within the threshold in paragraph (a)(8) cannot be subject to a case-specific nexus analysis under the rule”).

123. *Id.* at 37099.

124. *Id.* (“The agencies have also added farm ponds, log cleaning ponds, and cooling ponds to the list of excluded ponds in the rule based on public comments.”).

125. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37093.

126. *Id.* at 37090.

127. *Id.* at 37093.

128. *Id.*

129. *See* Appendix for a literal comparison of the language in the proposed rule versus in the final rule. *See also* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37115 (one instance of the final rule providing the definition of “significant nexus”).

130. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37080.

131. *Id.* (“This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation’s agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands.”).

the “agencies believe[d] that such determination should be made based on a case-specific basis.”<sup>132</sup>

Then, after speaking specifically to the scope of jurisdiction over agricultural waters, the agencies moved on to address the more general concern about increased jurisdiction under the rule overall. One set of comments raised the concern that “the proposed rule was an expansion of jurisdiction because it would change the provision from ‘adjacent wetlands’ to ‘adjacent waters.’”<sup>133</sup> The agencies replied that those “waters,” including “intrastate rivers, lakes[,] and wetlands” could already have been deemed jurisdictional by case-specific analysis under the preexisting rule.<sup>134</sup>

The agencies also made clear that they believed the final rule, and the preexisting rule, are “permissible under the Commerce Clause of the Constitution,”<sup>135</sup> as well as under CWA statutory authority.<sup>136</sup> The agencies concluded, then, that “while the language of the specific adjacency provision in the final rule may have changed from wetlands to waters, that does not represent an expansion of jurisdiction.”<sup>137</sup> Additionally, the agencies reiterated that even if it were true that the rule expanded jurisdiction, preexisting agricultural exemptions “remain substantively and operationally unchanged” in the new rule.<sup>138</sup>

132. *Id.* (“While waters in which normal farming, silviculture, or ranching practices occur may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule.”).

133. *Id.* at 37083-84.

134. *Id.* at 37084 (providing that “under the existing regulation, ‘other waters’ (such as intrastate rivers, lakes and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional”).

135. *Id.* (“The provision of the existing regulation reflected the agencies’ interpretation at the time of the jurisdiction of the CWA to extend to the maximum extent permissible under the Commerce Clause of the Constitution.”).

136. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37061 (relying on *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006), in stating that “agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer,” and that “the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority”).

137. *Id.* at 37084.

138. *Id.* at 37055:

[T]he rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 C.F.R. 232.3; 33 C.F.R. 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusion from the definition of “waters of the United States” to make it clear that this rule *does not add any additional permitting requirements on agriculture*

and

the rule also does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers.

(emphasis added); *id.* at 37080 (“The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional as ‘adjacent.’”); *id.* at 37096 (“Prior converted cropland and waste treatment systems have been excluded from this definition since 1992 and 1979, respectively, and they remain substantively and operationally unchanged.”).

## IV. Preexisting Versus Final Rule: Scope of Jurisdiction

This part analyzes the final rule in two distinct ways to determine whether the Clean Water Rule expanded the agencies’ jurisdiction. First, this part compares the actual texts of the preexisting and final rules, and concludes that there is no expansion based on textual analysis alone. Second, it compares the text of the final rule to the holdings in the three Supreme Court cases that have determined some limits of what the definition of “waters of the United States” can include, ultimately concluding that the changes made do not exceed those limits.

### A. Textual Changes: Expansion of Jurisdiction?

The final rule made a significant number of textual changes to the preexisting rule. A full indication of every change, deletion, or addition is available in the Appendix (using 33 C.F.R. §328.3 as a model). The more significant changes are analyzed here.

#### I. “Other Waters”

The preexisting rule used a catchall provision for waters that were considered jurisdictional by listing six specific types of waters that were jurisdictional and a provision for “all other waters . . . the use, degradation[,] or destruction of which could affect interstate or foreign commerce,” which included a list of three examples of such waters.<sup>139</sup> The final rule removes this catchall “other waters” provision and replaces it with a provision for “significant nexus” analysis available only for waters specified in the rule.<sup>140</sup>

Only waters that are one of the five types that can be subject to analysis with “similarly situated” waters (each of which has their own regulatory definition) or are within the geographical boundaries of waters that can be analyzed on their own can be subject to “significant nexus” analysis.<sup>141</sup> If a water falls outside of these boundaries and is not otherwise jurisdictional under the rule, then not only is it not jurisdictional, but it cannot be subject to a jurisdictional determination *at all*.<sup>142</sup> From a purely linguistic view, this replacement of the preexisting catchall provision seems to limit the agencies’ authority to conduct jurisdictional determinations on waters that do not satisfy the new specifications listed in the rule.

139. See Appendix; §328.3(a)(3) (2015).

140. See Appendix; §328.3(a)(7) (2016).

141. See Appendix; §328.3(a)(8) (2016).

142. See §328.3(a) (2016); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37096 (There is no way for a water not specifically accounted for in (a) to be subject to a jurisdictional determination. The preamble to the final rule provides that

[w]aters are covered under this rule only where they are identified as jurisdictional in paragraphs (a)(1) through (a)(6), where they are not excluded under paragraph (b), or where they are within the limited number of subcategories listed in paragraphs (a)(7) and (a)(8) and have a case-specific significance to a traditional navigable water, interstate water, or the territorial seas.

## 2. “Adjacent” and “Neighboring”

One of the six specific types of waters that were listed as jurisdictional under the preexisting rule were “wetlands adjacent to” other jurisdictional waters.<sup>143</sup> The new rule changes that phrase to “all waters adjacent to” other jurisdictional waters.<sup>144</sup> At first glance, this obviously seems like an expansion in the scope of the agencies’ jurisdiction, as now not only wetlands, but also other waters can be deemed jurisdictional if they are adjacent (as defined)<sup>145</sup> to another jurisdictional water.

However, as noted above in the agencies’ response to comments, that does not necessarily indicate that this is the first time these waters are becoming subject to possible jurisdictional analysis.<sup>146</sup> Rather, at least some of these waters would have been subject to analysis under the catchall provision in the preexisting rule<sup>147</sup>; those “all other waters” included “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds.”<sup>148</sup> Additionally, others of these waters could also have been found jurisdictional as tributaries, a term that was completely undefined in the preexisting rule.<sup>149</sup>

The definition of “adjacent” itself received significant additions in the final rule.<sup>150</sup> The definition was much shorter under the preexisting rule, basically amounting to “bordering, contiguous, or neighboring,” and none of those terms were defined.<sup>151</sup> The preexisting rule also included that wetlands were still considered “adjacent” even if they were separated from a jurisdictional water by “man-made dikes or barriers, natural river berms, beach dunes[,] and the like.”<sup>152</sup> The new definition essentially retains the preexisting language and makes five significant additions to it.<sup>153</sup>

First, the term “neighboring” is given its own definition relying on specific geographical distances from different types of jurisdictional waters. Second, the definition of “adjacent” provides that for purposes of determining adjacency, any open water includes any wetlands within its “ordinary high water mark,” the definition of which is retained unchanged from the preexisting rule. Third, the new definition states that “[a]djacency is not limited to waters located laterally” to another jurisdictional water. Fourth, the definition gives examples of waters that *would*

be considered “adjacent,” including waters that connect segments, or are located at the head, of other jurisdictional waters. Lastly, the new definition explicitly states that “waters being used for established commercial farming, ranching, and silviculture activities” cannot be “adjacent” for the purposes of determining jurisdiction.<sup>154</sup>

The first four additions to the definition of “adjacency” could, on their own, be read as possible expansions of jurisdiction, depending on whether those waters could have been jurisdictional under other parts of the preexisting rule, such as “other waters” or undefined “tributaries.”<sup>155</sup> However, thorough analysis of each suggests they are not an expansion of jurisdiction. First, providing a definition for “neighboring” at all necessarily limits the agencies’ authority. Under the preexisting regime, the agencies could have implemented any interpretation of “neighboring,” limited only by what a court would determine was a “reasonable” interpretation of the statutory language.<sup>156</sup> However, by providing an explicit definition for the term, the agencies must abide by the limits set forth in their own rule going forward.<sup>157</sup>

Second, the fact that the new rule explicitly states that wetlands within the “ordinary high water mark” of an open water can be “adjacent” is essentially just a new way of saying what the preexisting rule already provided, that wetlands can be considered “adjacent” to a jurisdictional water.<sup>158</sup> In other words, the second addition only matters if the open water the wetland is sitting in is determined “adjacent” itself, in which case it would make sense to assume that if the water the wetland is *in* is “adjacent” to a jurisdictional water, then of course the wetland would be too.

Similarly, the third addition that explicitly states adjacency is not limited to waters “lateral” to other jurisdictional waters does not increase jurisdiction if nonlateral waters could have been jurisdictional under the preexisting rule, which, because there were no limits on where the catchall “other waters” needed to be located in order to sub-

143. See Appendix; §328.3(a)(7) (2015).

144. See Appendix; §328.3(a)(6) (2016).

145. See §328.3(c)(1) (2016).

146. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37084 (stating that “under the existing regulation, ‘other waters’ (such as intrastate rivers, lakes and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional” and that “while the language of the specific adjacency provision in the final rule may have changed from wetlands to waters, that *does not represent an expansion of jurisdiction*”) (emphasis added).

147. See *id.*

148. §328.3(a)(3) (2015).

149. See §328.3(a)(5) (2015).

150. See Appendix to compare §328.3(c)(1) (2015) and (2016).

151. §328.3(c) (2015).

152. *Id.*

153. See Appendix; §328.3(c)(1) (2016).

154. §328.3(c)(1)-(2), (6) (2016).

155. See §328.3(a)(3), (5) (2015).

156. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 14 ELR 20507 (1984) (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”); *Morton v. Ruiz*, 415 U.S. 199 (1974):

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

157. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (Mar. 15, 1954) (On how the agency has to follow its own regulations in a proceeding considering appeals: “We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board’s decision.”). See also Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2005-2006) (“Agencies must comply with their own regulations.”).

158. See Appendix to compare §328.3(a)(7) (2015) to §328.3(a)(6), (c)(1) (2016).

ject to jurisdictional analysis, and because the words used in the broad definition of “adjacency” went undefined, it seems likely at least some nonlateral waters could have been jurisdictional under the preexisting definition.<sup>159</sup>

Lastly, the fourth addition merely gives examples of waters that would be “adjacent,” and both of these examples are clearly closely hydrologically connected to the water in question; therefore, it is not much of a stretch to assume these connecting segments and headwaters would have been jurisdictional under the preexisting rule if the water in question was deemed jurisdictional.<sup>160</sup>

Not only do the above four additions seem not to expand jurisdiction generally, even if they did, the rule’s fifth addition to the definition of “adjacency” explicitly provides an exemption for “waters being used for established farming, ranching, and silviculture activities.”<sup>161</sup> Thus, the agencies have explicitly preserved any exemption for waters being used for agricultural production that may have existed under the preexisting rule, no matter what the rest of the new definition of “adjacency” provides.

### 3. “Tributaries”

Another type of waters specifically listed as jurisdictional under the preexisting rule were “tributaries” of traditional navigable waters, interstate waters, the “all other waters,” and impoundments of other jurisdictional waters.<sup>162</sup> The term “tributaries” was undefined in the preexisting rule, but is given a very detailed and precise definition in the final rule.<sup>163</sup> The essence of the definition is that a water “contributes flow, either directly or through another water[,]” to a traditional navigable water, an interstate water, or the territorial seas *and* “is characterized by the presence of physical indicators of a bend and banks and an ordinary high water mark.” A water that is a tributary under those standards does not lose its status as a tributary if there is a natural or man-made break at some point along the tributary, so long as the indicators of a bed and banks and ordinary high watermark are still able to be “identified upstream of the break.” Neither does a tributary lose its status if it is a water through which it “contributes flow” is not jurisdictional itself.

It is not entirely clear simply by comparing the text of the preexisting and final rules whether this newly added definition of “tributary” expands the scope of “waters of the United States.” One way to read the new definition is as limiting jurisdiction. For one thing, defining the word “tributary” at all creates a measurable definition that the agencies have to abide by.<sup>164</sup> Then, within the definition itself, the tributary must not only “contribute flow,” but it

must also have physical indicators of “volume, frequency, and duration” sufficient to create a “bed and banks and an ordinary high water mark.”<sup>165</sup> That requirement is an addition to the preexisting rule, and at least textually it seems to impose some limitation not previously in the rule.<sup>166</sup>

As to the two scenarios that do not change a tributary’s status, breaks or flowing through a nonjurisdictional water, just because the new rule explicitly provides for them, it is not clear that they would not otherwise have been jurisdictional under the preexisting rule anyway. For example, if there is a tributary that “the use, degradation[,] or destruction of which could affect interstate or foreign commerce,” then that tributary would have been jurisdictional as an “other water” under the preexisting rule. But the provision about a tributary flowing through a nonjurisdictional water remaining jurisdictional is not a familiar notion from the preexisting rule, so it is not completely clear how those tributaries would have fared under a jurisdictional analysis.<sup>167</sup> It is possible that those tributaries would not have been jurisdictional, and thus based on textual analysis alone, the definition of “tributary” could be more expansive than under the preexisting rule.

### 4. Waters That Are Not “Waters of the United States”

The last significant addition in the final rule is the edited and expanded list of waters that are not “waters of the United States.”<sup>168</sup> The preexisting rule only listed two excluded waters: waste treatment systems and prior converted cropland.<sup>169</sup> The final rule retains these two exclusions and adds three different types of ditches, seven different types of hydrological “features” (including puddles), groundwater, stormwater control features, and wastewater recycling structures.<sup>170</sup>

Granted, in the same way that the agencies listing what *is* jurisdictional does not necessarily expand jurisdiction, listing what *is not* jurisdictional does not necessarily limit jurisdiction either. These added exemptions are surely limiting in that it is much easier to hold the Agency to them; however, this is not a limit on jurisdiction if these would already have been excluded under the preexisting rule. However, the issue of importance to the agricultural production sector is about expanding jurisdiction, and these added exclusions obviously do not suggest any such expansion.

The rest of the text in the preexisting rule is largely retained unchanged, except for the definition of “tidal waters,”<sup>171</sup> which was deleted from the final rule because it

159. See Appendix to compare §328.3(c)(1) (2016) to §328.3(a)(3) (2015).

160. See *id.*

161. §328.3(c)(1) (2016).

162. §328.3(a)(5) (2015).

163. §328.3(c)(3) (2016).

164. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (on how the agency has to follow its own regulations in a proceeding considering appeals: “We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the

Board’s decision.”). See also Merrill, *supra* note 157, at 569 (“Agencies must comply with their own regulations.”).

165. §383.3(c)(3) (2016).

166. See Appendix to compare §328.3(a)(5) (2015) to §383.3(c)(3) (2016).

167. See §328.3(c)(3) (2016), for exact text of the provision.

168. See §328.3(b) (2016).

169. See §328.3(a)(8) (2015).

170. §328.3(b) (2015).

171. See §328.3(f) (2015).

no longer plays any role in the definition of “waters of the United States.”

## B. Final Changes: Consistent With the Three Supreme Court Interpretations of the Scope of the Agencies’ Statutory Authority?

### I. Riverside Bayview

In *Riverside Bayview*, the Supreme Court held that the Corps’ interpretation of the CWA’s jurisdiction as extending over wetlands adjacent to traditional navigable waters was a reasonable interpretation of its statutory authority.<sup>172</sup> The preexisting rule recognized that jurisdiction, with its explicit provision for “wetlands adjacent to waters (other than waters that are themselves wetlands)” that were traditional navigable waters, interstate waters, “other waters” the “use, degradation[,] or destruction of which could affect interstate or foreign commerce[,]” impoundments of jurisdictional waters, tributaries, and the territorial seas.<sup>173</sup>

As discussed above, the final rule’s revision to now “all waters” adjacent to one of these listed waters<sup>174</sup> is likely consistent with *Riverside Bayview* because it does not substantively increase the number of waters that could be subject to jurisdictional analysis. The final rule is at least consistent with *Riverside Bayview* in its treatment of wetlands adjacent to traditional navigable waters as jurisdictional under the rule.<sup>175</sup> *Riverside Bayview* emphasized congressional intent to “define the waters covered by the Act broadly”<sup>176</sup>; therefore, it is likely that the final rule does not run afoul of *Riverside Bayview* as to the treatment of other adjacent waters either.

### 2. SWANCC

The Supreme Court in *SWANCC* interpreted *Riverside Bayview* as requiring a “significant nexus” between the water sought to be regulated and a traditional navigable water in order for the Corps to assert jurisdiction.<sup>177</sup> Specifically, the Court held that the water in question, an isolated pond serving as migratory bird habitat, did not have a significant nexus sufficient to be regulated as a “water

of the United States.”<sup>178</sup> The decision overruled the Corps’ Migratory Bird Rule that would have expanded jurisdiction over waters *solely because* they were being used as habitat for migratory birds, endangered species, or to irrigate crops sold into interstate commerce.<sup>179</sup>

The final rule heavily relies on the “significant nexus” standard,<sup>180</sup> consistency with which will be analyzed below with respect to *Rapanos*. As to the Migratory Bird Rule, the final rule does not attempt to resurrect it in violation of the Supreme Court’s decision. The only reference the final rule makes to “habitat” is within its new regulatory definition of “significant nexus,” “provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for *species located in*” a traditional navigable water, interstate water or wetland, or territorial sea.<sup>181</sup>

In other words, the species has to be one that actually lives in water, such as a fish, and it would be pretty hard for a species of fish to be using another water as an “aquatic habitat” if it wasn’t clearly hydrologically connected (otherwise, how would the fish have gotten there?). Additionally, just the presence of a species using a water as an aquatic habitat does not mean a water per se has a significant nexus; instead, the impact that waterway has on the other jurisdictional water by virtue of using the aquatic habitat must be “more than speculative or insubstantial.”<sup>182</sup> Therefore, it seems that the final rule is consistent with the Supreme Court’s decision and ultimate overturning of the Migratory Bird Rule in *SWANCC*.

### 3. Rapanos

Justice Kennedy’s opinion in *Rapanos* stated that the “significant nexus” test from *SWANCC* was the appropriate standard to determine if a water could be regulated under the CWA.<sup>183</sup> In order for EPA or the Corps to exert jurisdiction over a water, it must have a “significant nexus” to a water that is “navigable in fact or could reasonably be made so.”<sup>184</sup> The only definition, again, the Court offered for “significant nexus” was that the effect on the jurisdictional water be “more than speculative or insubstantial.”<sup>185</sup>

172. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133, 16 ELR 20086 (1985) (“[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”).

173. §328.3(a)(7) (2015), referring to §328.3(a)(1)-(6) (2015).

174. See §328.3(a)(6) (2016).

175. See *Riverside Bayview*, 474 U.S. at 462 (stating that “together they do support the reasonableness of the Corps’ approach of defining adjacent wetlands as ‘waters’”).

176. *Id.* (“[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggest that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”).

177. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 167, 31 ELR 20382 (2001) (“It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”).

178. *Id.* at 175 (“We hold that 33 C.F.R. §328.3(a)(3) (1999), as clarified and applied to petitioner’s landfill site pursuant to the ‘Migratory Bird Rule,’ 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA.”).

179. See *Migratory Bird Rule*, 51 Fed. Reg. 41217 (Nov. 13, 1986); also available in *SWANCC*, 531 U.S. at 164. The four ways to assert jurisdiction under the Migratory Bird rule relied on either the actual presence of migratory birds, endangered species, or of irrigation of crops sold into interstate commerce.

180. See §328.3(c)(5) (2016).

181. §328.3(c)(5)(ix) (2016) (emphasis added).

182. See §328.3(c)(5) (2016).

183. *Rapanos v. United States*, 547 U.S. 715, 759, 36 ELR 20116 (2006) (Kennedy, J., concurring) (“In [*SWANCC*], the Court held, under the circumstances presented there, that to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be made so.”).

184. *Id.*

185. See *id.* at 780 (Kennedy, J., concurring) (“When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”).

Justice Kennedy's opinion specifically rejected the notion that the "nexus" must be based on a "continuous surface connection" to the traditional navigable water, but also limited the potential expansiveness of the test by refusing to read the word "navigable" out of importance.<sup>186</sup> The opinion does not say that EPA may not rely on surface connection to establish jurisdiction, but that it is not *required* to only rely on that. Therefore, the final rule could only run afoul of *Rapanos* by asserting jurisdiction over waters that have no affect that is "more than speculative or insubstantial" on a water that is either "navigable in fact or could reasonably be made so."<sup>187</sup>

Resolution of this issue is the most central and contentious source of the agricultural production sector's claim that the final rule was promulgated in excess of the agencies' statutory authority under the CWA. For that reason, it should be clear that the answer is not clear-cut, and it should also be noted that, like any regulation, this rule will likely benefit by way of clarity from courts applying it over time. However, since the final rule's validity is being litigated *before* any court will have an opportunity to apply it to a real factual scenario,<sup>188</sup> resolution

of this issue in the abstract is the best option available. Therefore, this Article argues that the final rule does not run afoul of *Rapanos* and is within the agencies' statutory authority under the CWA.

Under the final rule, there are eight subcategories of jurisdictional waters.<sup>189</sup> Each will be reviewed separately for consistency with *Rapanos*, including analysis of the agencies' arguments for jurisdiction over each. Additionally, the Article briefly engages in analyzing the consistency even of provisions simply retained from the preexisting rule in order to address the agricultural production sector's concerns about the statutory validity of the preexisting rule itself.

Lastly, the validity of the agencies' jurisdiction over many of these types of waters relies on the integrity of the scientific research used. The Article recognizes this is a concern the agricultural production sector generally holds, but the ability to evaluate this concern is outside the scope of the legal analysis here.<sup>190</sup> The sector can likely expect to find such an evaluation during the upcoming litigation in the U.S. Court of Appeals for the Sixth Circuit over the validity of the final rule.<sup>191</sup>

186. See *id.* at 774 (Kennedy, J., concurring) ("SWANCC, likewise, does not support the plurality's surface-connection requirement"), and 778 (Kennedy, J., concurring) ("While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance.").

187. See *id.* at 780 (Kennedy, J., concurring) ("When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"); 759 (Kennedy, J., concurring) ("In [SWANCC], the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be made so.").

188. See American Farm Bureau Fed'n, *Statement by Bob Stallman, President, American Farm Bureau, Regarding Injunction Against EPA Water Rule*, [http://www.fb.org/newsroom/news\\_article/345/](http://www.fb.org/newsroom/news_article/345/) (last visited Mar. 30, 2016):

Last night Chief Judge Ralph Erickson of the District Court of North Dakota issued an order to stop the EPA's Waters of the U.S. rule in its tracks. . . . We applaud the court's decision. The so-called Clean Water Rule is yet another example of EPA's reckless and unlawful behavior in the face of science, economics and the law. Whether you're a farmer, a rancher, a homebuilder or landowner of any stripe, the evidence is clear: This rule simply has to be stopped.

Jeremy P. Jacobs & Tiffany Stecker, *Obama Admin Wins Jurisdiction Fight Over Contentional Rule*, GREENWIRE (Feb. 22, 2016), <http://www.eenews.net/greenwire/2016/02/22/stories/1060032763>:

A federal appeals court panel today said that it will rule on challenges to the Obama administration's hot-button Clean Water Rule. A divided 6th U.S. Circuit Court of Appeals panel in Cincinnati ruled 2-1 that it has jurisdiction to hear numerous lawsuits challenging the U.S. EPA-Army Corps of Engineers rule. The decision is a small victory for the agencies, who sought to keep the cases in the appeals court and avoid fights in scattered federal district courts that might be sympathetic to the challengers' arguments. The 6th Circuit has put the rule on hold while the lawsuits play out. That stay remains in effect after today's ruling.

Tiffany Stecker, *N.D. Judge Will Let Higher Courts Act First on WOTUS*, GREENWIRE (May 25, 2016), <http://www.eenews.net/greenwire/2016/05/25/stories/1060037854>:

A federal district judge in Fargo, N.D., said yesterday [May 24, 2016] he would halt proceedings in his court on the Obama administration's contentious Clean Water Rule pending an outcome in a higher court. Judge Ralph Erickson's decision is a victory for the administration, which sought to have the lawsuit in Erickson's U.S. District Court for the District of North Dakota dismissed in

light of a recent 6th U.S. Circuit Court of Appeals decision to hear the challenges.

Tiffany Stecker, *Supreme Court Ruling Offers Clues on Fate of Obama Rule*, GREENWIRE (June 1, 2016), <http://www.eenews.net/greenwire/2016/06/01/stories/1060038146>. The Supreme Court recently decided a separate case that may have implications on the outcome of the upcoming Clean Water Rule litigation:

The Supreme Court ruled 8-0 yesterday [May 31, 2016] in the case *Army Corps of Engineers v. Hawkes Co. Inc.* to allow landowners to challenge corps decisions on what is a federally protected wetland. Traditionally, landowners had to wait until they began the application process for permits to dredge and fill in wetlands before challenging the Army Corps in court. Justice Anthony Kennedy wrote in his opinion that "the reach and systemic consequences of the Clean Water Act remain a cause for concern," adding that the law raised "troubling questions" on the government's influence on private property rights.

Tiffany Stecker, *Challengers Urge Appeals Court to Allow Lower Courts to Proceed*, GREENWIRE (June 8, 2016), <http://www.eenews.net/greenwire/2016/06/08/stories/1060038493> (illustrating ongoing debate about whether states may "litigate their challenges to the Clean Water Rule in two federal courts at the same time," namely the U.S. Court of Appeals for the Eleventh Circuit and U.S. Court of Appeals for the Sixth Circuit); Tiffany Stecker, *Litigation Schedule Will Keep Fight Going Beyond Obama*, GREENWIRE (June 14, 2016), <http://www.eenews.net/greenwire/2016/06/14/stories/1060038792>:

The Cincinnati-based 6th U.S. Circuit Court of Appeals released the schedule for filings and responses today [June 14, 2016] for *Murray Energy Corp. v. U.S. EPA*. Challengers of the rule . . . have until Sept. 30 to file briefs against the standards, which define which waterways and wetlands receive automatic protection under the Clean Water Act. The Department of Justice, representing EPA and the Army Corps of Engineers, must respond in the rule's defense by Nov. 30. Intervenor in support of revoking the rule have until Dec. 14 to submit their arguments in writing. The court will schedule oral arguments next February or later.

See [http://www.eenews.net/assets/2016/06/14/document\\_gw\\_08.pdf](http://www.eenews.net/assets/2016/06/14/document_gw_08.pdf), for a copy of the briefing schedule.

189. See §328.3(a)(1)-(8) (2016).

190. See Nixon, *supra* note 72 (The agricultural sector disagreed with the integrity of EPA's scientific evidence, raising concerns that "scientific report the agency and the Army Corps of Engineers relied on to justify the new rules had not been reviewed by other scientists.").

191. See American Farm Bureau Fed'n, *Statement by Bob Stallman, supra* note 188; Jacobs & Stecker, *supra* note 188.

### a. Traditional Navigable Waters

These waters are themselves “navigable in fact”<sup>192</sup>; therefore, they are clearly within EPA’s statutory authority to regulate under the plain language of the CWA.

### b. Interstate Waters, Including Interstate Wetlands

Jurisdiction over interstate waters and wetlands is not a change from the preexisting rule, nor is it being directly disputed by the agricultural production sector.<sup>193</sup> EPA has asserted jurisdiction over interstate waters since the enactment of the CWA over 40 years ago.<sup>194</sup> Essentially, the CWA sets water quality standards for interstate waters, and those provisions, read in conjunction with the definition of “navigable waters” as “waters of the United States, including the territorial seas,” provide historical congressional intent for the agencies to assert jurisdiction over interstate waters and wetlands.<sup>195</sup>

### c. Territorial Seas

These waters are themselves “navigable in fact”<sup>196</sup>; therefore, they are also clearly within EPA’s statutory authority to regulate under the plain language of the CWA, which also includes “territorial seas” in its statutory definition of “navigable waters.”<sup>197</sup>

### d. Impoundments of Jurisdictional Waters

Jurisdiction over impoundments of waters deemed “waters of the United States” is not a change from the preexisting rule.<sup>198</sup> The agencies explain that “impoundments” include structures like dams, set off from the original water sources by “berms, dikes, and similar features used to create impoundments.”<sup>199</sup> According to the agencies, an impoundment scientifically “does not cut off a connection

between upstream tributaries and a downstream traditional navigable water, interstate water, or territorial sea.”<sup>200</sup> In other words, the devices used to create an impoundment do not, and are structurally not meant to, completely seal off the hydrological connection between the impoundment and the jurisdictional water.<sup>201</sup> Therefore, it is consistent with the goal of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”<sup>202</sup> for the agencies to assert jurisdiction over impoundments of otherwise jurisdictional waters.

### e. Tributaries (as Defined)

Put simply, a tributary as defined under the rule is a water that “contribute[s] flow” to a jurisdictional water.<sup>203</sup> Therefore, almost by definition of the thing itself, it satisfies the “more than speculative or insubstantial” test from *Rapanos* for having a “significant nexus” to a jurisdictional water.<sup>204</sup> To that end, its definition also serves the goal of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”<sup>205</sup> because it makes little sense to expect that Agency to achieve that goal without the agencies having jurisdiction over the tributaries delivering water into them.

The agricultural production sector’s concern about tributaries is more about what *is* a tributary for purposes of regulation.<sup>206</sup> Namely, the sector is concerned that almost all ditches will become jurisdictional as tributaries under the final rule.<sup>207</sup> The agencies’ response is, without so many words, that, yes, it is possible that a ditch may be jurisdictional, but *only if* the ditch (or other kind of tributary) not only “contribute[s] flow,” but also has physical indicators of “volume, frequency, and duration” sufficient to create a “bed and banks and an ordinary high water mark.”<sup>208</sup> Additionally, the final rule explicitly exempts three types of ditches from regulation as “waters of the United States.”<sup>209</sup>

Therefore, because the final rule, unlike the preexisting rule, puts qualifiers based on hydrological connection, vol-

192. See 33 U.S.C. §251(a) (2015). See also *Rapanos v. United States*, 547 U.S. 715, 759, 36 ELR 20116 (2006).

193. See Appendix to compare §328.3(a)(2) (2015) to §328.3(a)(2) (2016).

194. U.S. EPA, *Technical Support Document for the Clean Water Rule 1*, 197 (2015) [hereinafter U.S. EPA, *Technical Support*], available at [https://www.epa.gov/sites/production/files/2015-05/documents/technical\\_support\\_document\\_for\\_the\\_clean\\_water\\_rule\\_1.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf) (“The CWA was enacted in 1972. EPA’s contemporaneous regulatory definition of “waters of the United States,” promulgated in 1973, included interstate waters. The definition has been EPA’s interpretation of the geographical scope of the CWA for approximately 40 years.”).

195. *Id.* at 198 (“Congress clearly intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be water that is navigable for purposes of federal regulation under the Commerce Clause themselves or be connected to a water that is navigable for purposes of federal regulation.”); and (“The text of the CWA, specifically the CWA’s provision with respect to interstate waters and their water quality standards, in conjunction with the definition of navigable waters, provides clear indication of Congress’ intent.”).

196. See 33 U.S.C. §1251(a) (2015). See also *Rapanos*, 547 U.S. at 759.

197. See 33 U.S.C. §1362(7) (2015).

198. See Appendix to compare prior §328.3(a)(4) to §328.3(a)(4).

199. U.S. EPA, *Technical Support*, *supra* note 194, at 225.

200. *Id.* at 224.

201. See *id.* at 225 (“Indeed, even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself.”) (citing the U.S. Bureau of Reclamation and the Federal Energy Regulatory Commission).

202. See 33 U.S.C. §1251(a) (2015). See also *Rapanos v. United States*, 547 U.S. 715, 759, 36 ELR 20116 (2006). For more discussion explaining the agencies’ reason for asserting jurisdiction over impoundments, see U.S. EPA, *Technical Support*, *supra* note 194, at 224-32.

203. See §383.3(c)(3) (2016).

204. See *Rapanos*, 547 U.S. at 780, 718-19 (“When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”) and (“When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term ‘navigable waters.’”).

205. See 33 U.S.C. §1251(a) (2015). See also *Rapanos*, 547 U.S. at 759. For more discussion explaining the agencies’ reason for asserting jurisdiction over impoundments, see U.S. EPA, *Technical Support*, *supra* note 194, at 224-32.

206. See Farm Bureau, *Stoner Blog*, *supra* note 79, at 2.

207. See *id.*

208. §383.3(c)(3) (2016).

209. §328.3(b)(3)(i)-(iii) (2016).

ume, and frequency on what can be regulated as a tributary under the rule,<sup>210</sup> the agencies' jurisdiction over tributaries (as defined) is consistent with the "significant nexus" requirement in *Rapanos*,<sup>211</sup> at least as it relates to tributaries that flow directly into jurisdictional waters.

The final rule provides for jurisdiction of tributaries in two scenarios where the contribution of flow is somewhat indirect. The first is that a tributary does not lose its status as such even if there are any breaks between the tributary and the jurisdictional water, so long as "a bed and bank and ordinary high water mark can be identified upstream of the break."<sup>212</sup> As confusing as that may sound, the distinction may be more linguistic than anything else. The examples given in the definition of such "breaks" include bridges, culverts, pipes, dams, wetlands, debris piles, boulder fields, or underground streams.<sup>213</sup> These are less what a common understanding of the word "break" would suggest, and more just reflect a change in the method in which the tributary continues to contribute flow. Under that understanding of a "break," it makes sense that the agencies would still assert jurisdiction over the tributary because it is still, despite the presence of the break, contributing flow to a jurisdictional water. Thus, "the significant nexus between a tributary and a traditional navigable water or interstate water is not broken," and therefore jurisdiction consistent with *Rapanos* over the tributary still exists.<sup>214</sup>

The second scenario is that a tributary also does not lose its status if it "contributes flow" either through another "water of the United States," or through a "non-jurisdictional water."<sup>215</sup> Just looking at the plain text alone, the first part of this provision, contributing through another "water of the United States," seems redundant. If a tributary is contributing flow to "water of the United States" A, and it does so by flowing into "water of the United States" B, then it seems the tributary would still be jurisdictional as a tributary of "water of the United States" B, without ever needing to consider A in the analysis. Therefore, that part of the provision seems consistent with *Rapanos*, as it is the same analysis as above for tributaries that flow directly into jurisdictional waters.

As to the second part of the provision, flowing through a nonjurisdictional water, consistency with the "significant nexus" test from *Rapanos* is less clear. As mentioned earlier, this type of provision is a new species to the definition

of "waters of the United States," and presents some challenges in identifying its consistency with *Rapanos*. Part of the challenge is first just imagining situations where this occurs. The simplest is probably to start with the waters that are expressly exempted as nonjurisdictional in the rule itself.<sup>216</sup>

To take some examples, imagine a tributary that flows through a stormwater control feature or through groundwater to a jurisdictional water; both of these features are not "waters of the United States" by rule, but it makes sense to imagine that the Agency would need to retain jurisdiction over the tributary in order to "restore and maintain the chemical, physical, and biological integrity" of the receiving jurisdictional water.<sup>217</sup> So in one way, as to the exempted "waters of the United States," it seems similar to the "break" provision, in the way that just because the water serving like a "break" is not subject to jurisdiction, the tributary is still contributing flow that "significantly affects" the downstream jurisdictional water, and is thus consistent with *Rapanos*.

However, the thought exercise gets trickier when trying to imagine a scenario where there is a nonjurisdictional water between the tributary and the jurisdictional water that is *not* one of the types expressly excluded in the rule. This is challenging, ironically, because the final rule is so detailed in listing almost every type of water imaginable, listed either as jurisdictional or nonjurisdictional. However, it is possible that the rule simply is trying to target those waters that are determined, on a case-specific basis, not to have a "significant nexus" to a jurisdictional water, and therefore are nonjurisdictional.<sup>218</sup> If this is true, then the agencies may well have exceeded their statutory authority by claiming jurisdiction over tributaries that flow into waters that themselves do not have a "significant nexus" to a jurisdictional water.

On imagining this situation, however, this is a practical impossibility. By definition, a "tributary" must "contribute flow" to a traditional navigable water, an interstate water, a territorial sea, or an impoundment of any of these three.<sup>219</sup> If the nonjurisdictional water the proposed tributary flows into does not have a "significant nexus" to any jurisdictional water, then how would it be possible for the proposed tributary to be contributing any flow to any jurisdictional water? Therefore, this provision that retains Agency jurisdiction over tributaries flowing through nonjurisdictional waters is likely just referring to those defined nonjurisdictional waters, and even if it is not, it would be hard to imagine what else the rule meant to cover (though a slightly cynical view would be that the agencies meant to retain jurisdiction in scenarios where the agencies disagreed with a jurisdictional determination, but could still prove

210. See §383.3(c)(3) (2016).

211. For more discussion of support for EPA's jurisdiction over tributaries, see U.S. EPA, *Technical Support*, *supra* note 194, at 232-75.

212. §328.3(c)(3) (2016).

213. *Id.*

214. See U.S. EPA, *Technical Support*, *supra* note 194, at 256:

The agencies' rule clarifies that man-made and man-altered tributaries as defined in the rule are "waters of the United States" because the significant nexus between a tributary and a traditional navigable water or interstate water is not broken where the tributary flows through a culvert or other structure. The scientific literature indicates that structures that convey water do not affect the connectivity between streams and downstream rivers. Indeed, because such structures can reduce water losses from evapotranspiration and seepage, such structures likely enhance the extent of connectivity by more completely conveying the water downstream.

215. See §328.3(c)(3) (2016).

216. See §328.3(b) (2016).

217. See 33 U.S.C. §1251(a) (2015). See also *Rapanos v. United States*, 547 U.S. 715, 759, 36 ELR 20116 (2006). For more discussion explaining the agencies' reason for asserting jurisdiction over impoundments, see U.S. EPA, *Technical Support*, *supra* note 194, at 224-32.

218. See §328.3(a)(8) (2016).

219. §328.3(c)(3) (2016).

the tributary contributes flow to a jurisdictional water, which are themselves few and far between possibilities).

If this analysis is correct, the definition of “tributary” is likely consistent with *Rapanos*, because the “significant nexus” requirement is never abandoned, at least in practice, though the rule may linguistically leave room for an impossible scenario that *could* be beyond the scope of the agencies’ authority.

#### f. Adjacent Waters (as Defined)

The agencies’ authority to regulate wetlands that are “adjacent” to traditional navigable waters, interstate waters, the territorial seas, impoundments of any of those, and tributaries is not a change from the preexisting rule.<sup>220</sup> The only change is the final rule now provides that “all waters” that are adjacent, not just wetlands, can be regulated as “adjacent” to any of those listed jurisdictional waters.<sup>221</sup> These other types of waters include “ponds, lakes, oxbows, impoundments, and similar waters.”<sup>222</sup>

As to wetlands, the Supreme Court has already unanimously established in *Riverside Bayview* that it is within the agencies’ statutory authority to regulate wetlands that are “adjacent” to traditional navigable waters.<sup>223</sup> Additionally, the agencies have already established jurisdiction over impoundments of jurisdictional waters (see above). Therefore, the only separate analysis of the validity of the agencies’ jurisdiction under this section is as to wetlands adjacent to something other than traditionally navigable waters, and the other “waters” adjacent to any listed jurisdictional water. Resolution of this question will hinge on the regulatory definition of “adjacent” provided in the rule itself.<sup>224</sup>

As discussed above, the final definition of adjacency retains the preexisting language and adds to it, essentially asserting jurisdiction over waters that are “bordering, contiguous, or neighboring” a jurisdictional water.<sup>225</sup> If a water borders a jurisdictional water, it seems clear that the Agency would have jurisdiction over it due to simple hydrological connection and fairly certain “significant nexus” to it. As to contiguous, the same theory applies, that if the water sought to be regulated is so close as to be described as “contiguous,” it seems obvious it would have a “significant nexus” to the jurisdictional water.

The term “neighboring” is newly defined as waters within specific distances from jurisdictional waters, specifically within 100 feet of the ordinary high watermark, within the 100-year floodplain and not further than 1,500 feet

from the ordinary high watermark, or within 1,500 feet of the high tide line of a jurisdictional water.<sup>226</sup> The same sort of reasoning as to the validity of “bordering” and “contiguous” applies; that if a water is so geographically close to a jurisdictional water, then it pretty clearly would satisfy the *Rapanos* “significant nexus” test. The validity of the exact distances the agencies chose in the definition of neighboring is dependent on the agencies’ scientific research suggesting these neighboring waters are “integrally linked to the chemical, physical, or biological functions” of the adjacent traditional water.<sup>227</sup>

Therefore, these three defining marks of adjacency, “bordering, contiguous, or neighboring,” are consistent with the *Rapanos* “significant nexus” test. However, even if the agricultural production sector’s concerns about the expansion of jurisdiction specifically under the “adjacent” provision are not assuaged under the previous analysis, the definition of “adjacent” itself provides an exemption for “normal farming, ranching, and silviculture activities” that retains any protections these waters would have enjoyed under the preexisting rule, regardless of changes to the rest of the definition.<sup>228</sup>

#### g. Floodplain and High Watermarks (as Defined)

This category includes waters that are either (1) within the 100-year floodplain of a traditional navigable water, interstate waters, or the territorial seas or (2) waters that are within 4,000 feet of the high tide line or ordinary high watermark of a traditional navigable water, interstate waters, the territorial seas, impoundments, or jurisdictional tributaries, that are found on a case-specific basis to have a “significant nexus” on their own.

As is clear from the text of the rule itself, these waters are themselves individually subject to case-specific analysis for whether they have a “significant nexus” to a traditional navigable water, interstate water, territorial sea, impoundments of these, or a jurisdictional tributary.<sup>229</sup> Therefore, this provision is plainly consistent with *Rapanos*, as it simply provides that in order for the Agency to assert jurisdiction over these waters, it must apply the standard put forth by Justice Kennedy in *Rapanos* itself.<sup>230</sup>

226. See §328.39(c)(2)(i)-(iii) (2016).

227. See U.S. EPA, *Technical Support*, *supra* note 194, at 294 (“Science demonstrates that these wetlands function as a single wetland matrix and ecological unit having clearly hydrophytic vegetation, hydric soils, and wetland hydrology.”); 295:

Based on a review of the scientific literature and the agencies’ expertise and experience, the agencies determined that such neighboring waters are integrally linked to the chemical, physical, or biological functions of waters to which they are adjacent and downstream to the traditional navigable waters, interstate waters or the territorial seas.

228. See §328.3(c)(1) (2016).

229. See §328.3(a)(8) (2016).

230. See *Rapanos v. United States*, 547 U.S. 715, 759, 36 ELR 20116 (2006) (“In *SWANCC*, the Court held, under the circumstances presented there, that to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be made so.”). For more discussion supporting the

220. See Appendix to compare §328.3(a)(5) (2015) to §328.3(a)(6) (2016) on wetlands.

221. §328.3(a)(6) (2016).

222. *Id.*

223. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133, 16 ELR 20086 (1985) (“[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggest that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”).

224. See §328.3(c)(1) (2016).

225. See Appendix to compare §328.3(c) (2015) to §328.3(c)(1) (2016).

#### h. Prairie Potholes, Regional Bays, Pocosins, Vernal Pools, and Coastal Prairie Wetlands

This category includes prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands that are determined on a case-specific basis to have a “significant nexus” in combination with “similarly situated” waters. This provision is clearly consistent with the “significant nexus” test from *Rapanos* as far as the case-specific analysis of whether one of these five types of waters *on its own* has a “significant nexus” to a traditional navigable water, interstate water, or territorial sea.<sup>231</sup> The only question, then, is whether *combining* “similarly situated” waters for the purposes of determining jurisdiction is in excess of the agencies’ statutory authority.

The meaning of “similarly situated” comes from the agencies’ scientific research, which essentially determined these five types of waters are especially likely to have a similar hydrological connection to a jurisdictional water as all other like waters with it in a particular watershed.<sup>232</sup> On the one hand, it seems that the agencies are just making an efficient administrative choice to make one jurisdictional determination over, for example, pocosins, for an entire watershed, rather than conducting a separate analysis for every reoccurring like body in that watershed.

On the other hand, it is also true that the scientific analysis revealed these types of waters tend to be hydrologically connected to like kinds of each other, and that in the aggregate, for example, a group of pocosins, may have a “significant nexus” to a jurisdictional water, where a single pocosin may not.<sup>233</sup> Certainly, based on the scientific analysis of the hydrological connection between these waters, it seems consistent with the goal of the CWA for the agencies to have authority to make jurisdictional determinations for these waters looking at the aggregate effect of these “similarly situated” waters. It is important to remember that the final rule *only* allows agencies to look at this aggregate effect for these five types of waters, and that only these five types can be “similarly situated.”<sup>234</sup>

The agencies make clear that these five specific types of waters act, hydrologically, almost like wetlands, in that their formation, proximity, and similar functions work

together to “significantly affect” the jurisdictional water.<sup>235</sup> Therefore, if the scientific analysis supports that these five types of waters act as wetlands that significantly affect a jurisdictional water, and the agencies have jurisdiction to regulate wetlands that have a “significant nexus,”<sup>236</sup> then allowing the Agency to make jurisdictional determinations over these five types of waters in combination with each other seems consistent with *Rapanos*.

### V. Testing the Conclusions: Bounds of Possible Future Effects on the Agricultural Production Sector

While this Article argues that the final rule does not expand the agencies’ jurisdiction under the CWA, the agricultural sector may still harbor concerns about the rule’s future effects. Therefore, it is worth hypothesizing the maximum possible effects on the sector, assuming the rule goes into effect as-is and a later, hypothetical administration applies the new rule as aggressively as possible. The Article proposes that, because of the language in the preamble to the final rule, exemptions in the final rule itself, and principles of agency deference in administrative law, the agricultural production sector would still not be subject to any more regulatory requirements under the final rule than under the preexisting rule.

#### A. Language in the Preamble to the Final Rule Memorializing Agency Intent

The preamble to the final rule includes, at the very least, over a dozen provisions specifically memorializing the agencies’ intent to retain all preexisting agricultural exemptions in the final rule. These provisions are not vague; for example, one passage clearly states, “[t]his rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of ‘waters of the United States’ to make it clear that this rule does not add any additional

agencies’ jurisdiction over these water, see U.S. EPA, *Technical Support*, *supra* note 194, at 349-81. These pages also address the authority of the agencies to *limit* their scope of authority to the geographical boundaries set in the rule; however, the validity of the agencies’ ability to limit the span of their jurisdiction is beyond the scope of this Article.

231. See §328.3(a)(7) (2016).

232. See U.S. EPA, *Technical Support*, *supra* note 194, at 331 (“[T]he agencies have determined that waters in each of the five subcategories function alike and are sufficiently close to function together in affecting downstream waters when in the same point of entry watershed.”).

233. See *id.* at 330 (For instance, the Scientific Advisory Board in its review of the technical basis of the rule concluded, “[t]he scientific literature has established that ‘other waters’ can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define ‘other waters’ as waters of the United States on a case-by-case basis, either alone or in combination with similarly situated waters in the same region.”).

234. See §328.3(a)(7) (2016).

235. See, e.g., U.S. EPA, *Technical Support*, *supra* note 194, at 336 (“Prairie potholes have been determined to be similarly situated based on the characteristics of this resource type, including their density on the landscape, their interaction and formation as a complex of wetlands and open waters, their connections to each other and the tributary network, and their similar functions.”); 339 (“The agencies conclude that Carolina and Delmarva bays are similarly situated based on their close proximity to each other and the tributary network, their hydrologic connections to each other and the tributary network, their density on the landscape, and their similar functions.”); 342 (“The agencies conclude that pocosins are similarly situated based on their close proximity to each other and the tributary network, their hydrologic connections to each other and the tributary network, their density on the landscape, and their similar functions.”); 347:

The agencies conclude that western vernal pools are similarly situated based on their close proximity to each other and the tributary network, their interaction and arrangement as a complex of wetlands, their hydrologic connections to each other and the tributary network, their density on the landscape, and their similar functions.

349 (on Texas coastal prairie wetlands, stating there is “interaction and formation as a complex of wetlands, their density on the landscape, and their similar functions”).

236. This authority is found in §328.2(a)(2) (2016) as to interstate wetlands, and §328.3(a)(6) (2016) for “adjacent” wetlands.

permitting requirements on agriculture.”<sup>237</sup> The preamble makes clear that the agencies specifically considered the interests and importance of the agricultural community in making the final rule, and illustrates that the agencies have traditionally “exempt[ed] many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirements,” and that the final “rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional as ‘adjacent.’”<sup>238</sup>

The preamble makes clear that the final rule retains all existing exclusions, and that “several exclusions reflecting longstanding agency practice are added to the regulation for the first time.”<sup>239</sup> Some of these new exclusions include certain ditches, groundwater, and erosional features.<sup>240</sup> The agencies also “added farm ponds, log cleaning ponds, and cooling ponds to the list of excluded ponds in the rule based on public comments.”<sup>241</sup> The preamble also explicitly

provides that the preexisting exclusions for waste treatment systems and prior converted cropland remain unchanged in the final rule.<sup>242</sup>

## B. Language in the Final Rule Specifically Retaining Agricultural Exemptions

The final rule retains all preexisting agricultural exemptions in the text of the rule itself in at least seven specific instances,<sup>243</sup> some of which may create arguably greater, and at least clearer, exemptions than under the preexisting rule. First, the final rule retains the exact language from the preexisting rule that excludes “prior converted cropland” from “waters of the United States.”<sup>244</sup> Second, the final rule adds three specific types of excluded ditches. Third, “artificially irrigated areas that would revert to dry land should application of water to that area cease” are not “waters of the United States.” Fourth, “farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds” are exempted if “created in dry land.” Fifth, the agencies included an exemption for “puddles” in direct response to agricultural production sector concerns submitted during the notice-and-comment period. Sixth, the final rule exempts “stormwater control features” that are “created in dry land.” Lastly, the rule specially provides that “[w]aters being used for established farming, ranching, and silviculture activities” cannot be “adjacent” for the purpose of determining jurisdiction.

## C. Limits on Agency Interpretation Under *Mead*, *Chevron*, *Auer*, and *Smithkline*

Even if the agencies decided to apply the final rule, as is, as aggressively as possible to the agricultural production sector, administrative law principles limiting agency interpretation would prohibit the agencies from engaging in any regulation that the agencies could not have engaged in under the preexisting rule.

For example, if EPA decided to engage in an enforcement action against a farmer requiring an NPDES permit for discharge into her farm pond, the farm owner could challenge the validity of the Agency’s interpretation of its own regulation as including the authority to require NPDES permits for discharges into farm ponds. A reviewing court would apply *United States v. Mead Corp.* to determine what level of deference the court should give

237. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37055:

[T]he rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 C.F.R. 232.3; 33 C.F.R. 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusion from the definition of “waters of the United States” to make it clear that this rule does not add any additional permitting requirements on agriculture.

238. *Id.* at 37055:

[The] rule also does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers.

*Id.* at 37080:

Recognizing the vital role of farmers in providing the nation with food, fiber, and fuel, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional as “adjacent.”

239. *See id.* at 37059. *See also id.* at 37073 (“All existing exclusions from the definition of ‘waters of the United States’ are retained, and several exclusion reflecting longstanding agencies’ practice are added to the regulation for the first time.”); 37096 (The new regulations “add exclusions for all waters and features identified as generally exempt in preamble language from Federal Register documents by the Corps. . .”).

240. *See id.* at 37059:

[A]gencies for the first time also establish by rule that certain ditches are excluded from jurisdiction, including ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands

and

[t]he agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies’ intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land.

*See also id.* at 37073 (“This final rule provides clear exclusions for certain types of ditches. The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land.”).

241. *Id.* at 37099.

242. *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37059 (“Prior converted cropland and waste treatment systems have been excluded . . . and continue to be excluded.”); 37073 (“[N]o substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA and makes no change to the existing exclusion for prior converted cropland.”); 37096 (“Prior converted cropland and waste treatment systems have been excluded from this definition since 1992 and 1979, respectively, and they remain substantively and operationally unchanged.”); 37097 (“The existing exclusion for prior converted cropland moves to paragraph (b)(2) of the rule and is unchanged.”).

243. §328.3(b)(3)-(4), (6); §328.3(c)(1) (2016).

244. *See* Appendix to compare §328.3(a)(8) (2015) to §328.3(b)(2) (2016).

to EPA's interpretation that the regulations give them authority to require this permit.<sup>245</sup> Under *Mead*, a court will inquire (1) whether Congress delegated EPA authority to make a rule carrying the force of law, and (2) whether the interpretation that EPA is relying on was made in exercise of that authority.<sup>246</sup>

In this example, the answers to both prongs of the test would be yes: EPA was delegated authority to make regulations enforcing the CWA, and the definition of "waters of the United States," from which EPA would be drawing its authority to regulate farm ponds, was promulgated through a regulation in exercise of that law making authority. Therefore, because the answer to both prongs of *Mead* would be yes, the court would apply *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* to determine whether the court should defer to the Agency's interpretation.<sup>247</sup>

Under *Chevron*, the court will make two inquiries.<sup>248</sup> First, the court will ask whether Congress has directly spoken to the specific issue; in other words, whether the statute is ambiguous, here as to the specific issue whether farm ponds can be regulated as "waters of the United States." If the answer is yes, and Congress has directly spoken on this precise issue, then the inquiry ends and Congress' word is the final word on the issue. In this example, Congress has not spoken precisely to this issue, as the CWA itself does not provide whether farm ponds can be jurisdictional as a "water of the United States." Therefore, the court will move on to the second inquiry under *Chevron*: whether the Agency's interpretation is permissible, or reasonable, under the statute.

For the second step of analysis under *Chevron*, the court can look to any number of resources to determine the consistency of EPA's interpretation with the CWA. The court may look to the purposes and goals of the CWA,<sup>249</sup> specifi-

cally to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>250</sup> The court may also look to any past judicial interpretations of the statute on this specific provision; however, those judicial constructions will only be binding on the present reviewing court if both the previous court was superior and it specifically stated that its interpretation was the *only* possible interpretation of the statute (in other words, that the statute was not ambiguous, thus Congress had already directly spoken to the issue).<sup>251</sup>

In this example, the court may look to *Riverside Bayview*, *SWANCC*, and *Rapanos*, the three Supreme Court cases that have interpreted the "waters of the United States" provision of the CWA. *Riverside Bayview* and *Rapanos* do not speak directly to the issue at stake in this example, whether "navigable waters" and "waters of the United States" can be reasonably interpreted to include farm ponds. However, *SWANCC* explicitly provides that the CWA is unambiguous as to "nonnavigable, isolated, intrastate waters," and provides that the Corps cannot reasonably interpret the CWA as granting jurisdiction over such waters.<sup>252</sup> Therefore, *SWANCC* may provide precedent specifically applicable to the farm pond at issue, depending on the specific hydrological and geographical characteristics of the pond. If the pond is a "nonnavigable, isolated, intrastate" water, then EPA would lose under *Chevron* because the statute unambiguously spoke to, and forbade, EPA from asserting jurisdiction over this type of farm pond. However, if the reviewing court were to find that *SWANCC* did not apply to the specific hypothetical farm pond, the Agency will likely still lose, because *Chevron* is not necessarily the end of the inquiry.

In this hypothetical, the interpretation at stake is EPA's interpretation of its own "waters of the United States" regulation. Therefore, the reviewing court will also judge the consistency of EPA's enforcement action with the regulation itself under *Auer v. Robbins*.<sup>253</sup> Under *Auer*, a court will consider whether EPA's interpretation (that they can take this enforcement action against this farm pond) is "plainly erroneous or inconsistent" with the regulation.<sup>254</sup>

245. 533 U.S. 218 (2008).

246. See *id.* at 226-27:

We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

247. See *id.*

248. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 14 ELR 20507 (1984):

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

249. See, e.g., *id.* at 845 (the Court engages in "examination of the legislation and its history" to identify congressional intent as to the specific issue in

*Chevron*, the applicability of a "bubble concept" under the Clean Air Act).

250. See 33 U.S.C. §1251(a) (2015). See also *Rapanos v. United States*, 547 U.S. 715, 759, 36 ELR 20116 (2006).

251. See *National Cable & Telecomm'n Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

252. See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172, 31 ELR 20382 (2001):

Respondents . . . contend that, at the very least, it must be said that Congress did not address the precise question of §404(a)'s to nonnavigable, isolated, intrastate waters, and that, therefore, we should give deference to the "Migratory Bird Rule." See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 [14 ELR 20507] (1984). We find §404(a) to be clear. . . .

253. 519 U.S. 452 (1997).

254. See *id.* at 461 ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "plainly erroneous or inconsistent with the regulation.")

In determining this issue, *Christopher v. Smithkline Beecham Corp.* provides that the court should pay specific attention and give considerable weight to the information provided by the Agency itself in the preamble to the regulation.<sup>255</sup> If the Agency's interpretation is not inconsistent with the regulation, and does not show any evidence of post-hoc rationalization or reason to suspect the interpretation does not represent the Agency's "fair and considered judgment" on the matter, then the Agency's interpretation will be given controlling deference.<sup>256</sup>

Here, the language in the text of the regulation itself specifically retains the preexisting exemptions for agriculture, provides that "waters being used for established normal farming" cannot be deemed jurisdictional as "adjacent" waters, and specifically exempts farm ponds "created in dry land."<sup>257</sup> Additionally, as discussed above, the preamble to the final rule is riddled with passages specifically memorializing the agencies' intent to retain all exemptions under the final rule that were available to the agricultural production sector under the preexisting rule.

Therefore, even if the language of the final rule is ambiguous in some way that would permit EPA or the Corps to attempt aggressive enforcement actions against the agricultural sector, such enforcement actions likely would not be upheld under judicial review. In this example, EPA's interpretation of its own regulation as allowing it to take the enforcement action against a farmer for discharges into her farm ponds would likely fail, though in different ways depending on the nature of the pond itself. If the pond is "created in dry land," then the text of the regulation itself forbids the agencies from asserting jurisdiction over it, and the Agency action would fail under *Auer* and *Smithkline* as such action plainly contradicts both the text of the regulation itself, and the dozen or more provisions in the final rule preamble specifically prohibiting such an interpretation.<sup>258</sup> Additionally, EPA is required to act consistently with its own regulations under the *Accardi* principle, and EPA's action in this case would similarly fail under that principle.<sup>259</sup>

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S. Ct. 1835, 1850, 104 L. Ed. 2d 351 [19 ELR 20743] (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

255. 132 S. Ct. 2156, 2173 (2012): "Our holding also comports with the apparent purpose of the FLSA's exemption for outside salesmen. The exemption is premised on the belief that exempt employees 'typically earned salaries well above the minimum wage' and enjoyed other benefits that 'se[t] them apart from the nonexempt workers entitled to overtime pay.'" Preamble 22,124. 2163 ("Additional guidance concerning the scope of the outside salesman exemption can be gleaned from reports issued in connection with the DOL's promulgation of regulations in 1940 and 1949, and from the preamble to the 2004 regulations.").

256. See *Auer*, 519 U.S. at 462:

The Secretary's position is in no sense a "post hoc rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212, 109 S. Ct. 468, 474, 102 L. Ed. 2d 493 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.

257. §328.3(b)(4)(ii), (c)(1).

258. See *Auer*, 519 U.S. at 461; *Smithkline*, 132 S. Ct. at 2163, 2173.

259. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (Mar. 15, 1954) (on how the agency has to follow its own regulations in a proceeding considering appeals: "We think the petition for habeas corpus charges

If, on the other hand, the farm pond is not "created in dry land," and thus the Agency engages in and concludes in a case-specific analysis that the pond is jurisdictional, the Agency will be limited in its jurisdictional determination by the precedent in *SWANCC*, the text in the preamble memorializing traditional agricultural exemptions (under *Auer* and *Smithkline* analysis), text in the regulation itself that prevents the Agency from asserting jurisdiction based on "adjacen[cy]," and the goals of the CWA itself (under *Chevron* analysis). Thus, while it is true that it is not, at least linguistically, *impossible* for the agencies to require an NPDES permit for discharges into a specific farm pond, the agencies are *extremely limited* in their ability to do so, and depending on the physical characteristics of most farm ponds, may not practically be able to assert jurisdiction at all.

Alternatively, if instead of first taking an enforcement action EPA had issued a guidance or interpretative document stating that it *could* require such permitting requirements as it attempted to enforce in this hypothetical, upon acting on that guidance, EPA's action would not be upheld under judicial review for similar reasons. Under *General Electric Co. v. EPA*, an agency cannot rely on guidance documents alone for its source of authority to act.<sup>260</sup> Therefore, the court would be forced to engage in the same analysis provided above, and the Agency would likely still be precluded from such an enforcement action despite the existence of the guidance, depending on the nature of the specific farm pond.

## VI. Where We Are Now and Where We Might Go

This final part outlines the legal status of the Clean Water Rule as of this writing, and evaluates how the final rule did, or did not, respond to concerns raised by the agricultural production sector. The Article concludes with some parting thoughts on what this experience with the Clean Water Rule says about the nation's larger attitude toward agricultural policy as it relates to the CWA.

### A. Legal Status of the Clean Water Rule

Despite the changes made to the final rule in response to comments submitted, the agricultural production sector reacted to the final rule with the same negative vigor as it

the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision." See also Merrill, *supra* note 157, at 569 ("Agencies must comply with their own regulations.").

260. See *General Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002):

This common standard has been well stated as follows: "If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures."

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1355 (1992).

did to the proposed rule. The Farm Bureau, for example, supported a bill through the U.S. House of Representatives (that ultimately failed in the U.S. Senate), that would have completely thrown out the Clean Water Rule and restarted the rulemaking process.<sup>261</sup> The Farm Bureau also clearly supported the Congressional Disapproval resolution that passed in the House and Senate.<sup>262</sup> The bill was vetoed by President Obama and did not receive enough votes to overcome the veto.<sup>263</sup>

Aside from its work in getting the bill pushed through Congress, the Farm Bureau also took part in one of the major lawsuits in the country challenging the validity of the Clean Water Rule. Briefly, the case resulted in an injunction in a North Dakota district court, but has been stayed while other appellate-level challenges are being consolidated in the Sixth Circuit.<sup>264</sup> The Sixth Circuit granted a controversial stay of the Clean Water Rule pending reso-

lution of the litigation, meaning that for now the country is still operating under the old *Rapanos* regime.<sup>265</sup>

## B. How Did the Final Rule Respond to the Agricultural Production Sector's Concerns?

The agricultural production sector's overarching concern was that the agencies, by making the changes in the final rule to the preexisting rule, were illegally expanding the scope of their jurisdiction beyond their statutory authority granted in the CWA. This Article argues that the final rule does not increase, and may actually limit, the scope of the agencies' jurisdiction. At the outset, the Article identified six more specific concerns within the overarching jurisdictional concern held by the sector about the changes being made to the definition of "waters of the United States." Now, after having analyzed exactly what the final rule does and does not do, each specific concern will be revisited to determine whether the final rule adequately responded to each.

### I. "Clarity"

The agricultural production sector's greatest issue with the agencies' repeated justification for the rule as clarifying the bounds of its jurisdiction was that "agencies don't fight so hard to achieve 'clarity.'"<sup>266</sup> However, after analyzing the rule and finding that it does not, in fact, increase the agencies' jurisdiction, another explanation presents itself. There are instances, and this is likely one, where an agency may fight this hard for clarity in order to relieve an enormous administrative burden such as what EPA and the Corps face with the sheer number of jurisdictional determinations that are made each year.<sup>267</sup>

Additionally, courts are the arena where challenges to jurisdictional determinations are resolved. Under the preexisting rule, the definition was much more vague; thus, application by individual courts was unpredictable and inconsistent. Therefore, in this instance, the agencies did have ample reason to fight for "clarity" in the final rule, both for the benefit of regulated parties and the agencies themselves, without needing a secondary objective of broadening the scope of its jurisdiction.

261. See Annie Snider, *New Ad Campaign Targets 4 Senators for Votes to Kill WOTUS*, GREENWIRE (Nov. 13, 2015), <http://www.eenews.net/greenwire/2015/11/13/stories/1060027941> ("S. 1140 failed to garner the 60 votes necessary to proceed[,] and S. 1140 as 'a stand-alone measure to scrap and then rewrite the Waters of the U.S. rule.'"); Farm Bureau, *Statement by Bob Stallman*, *supra* note 188:

Thus, for much of the nation, this unlawful rule will continue to create uncertainty and legal risk for commonplace land uses like farming and ranching. It's clear that now is the time for Congress to act and pass S. 1140 to send EPA back to the drawing board. We won't stop until this rule is finished.

262. See Tiffany Stecker, *House Handily Clears Bill to Block WOTUS*, GREENWIRE (Jan. 13, 2016), <http://www.eenews.net/greenwire/2016/01/13/stories/1060030564>:

A disapproval resolution aimed at killing the Obama administration's contentious water rule sailed through the House this morning in its last step before reaching the president's desk. The House voted 253-166 in favor of S.J. Res. 22, a resolution under the Congressional Review Act to block the U.S. EPA and Army Corps of Engineers' Clean Water Act jurisdictional rule—better known as the Waters of the U.S. rule, or WOTUS.

The text of the resolution, S.J. Res. 22, is available at <http://www.eenews.net/bills/114/Senate/070116194623.pdf>.

263. See Geof Koss, *Senate Not Done With WOTUS Fight*, Greenwire (Jan. 21, 2016), <http://www.eenews.net/greenwire/2016/01/21/stories/1060030976>:

The Senate today fell far short of moving forward with overriding President Obama's veto of legislation to block the administration's contentious Clean Water Act jurisdiction rule, but a key GOP senator said the issue may return to the floor as early as next week. The chamber voted 52-40 on a procedural motion meant to move forward with overriding the veto, coming up eight votes shy of the 60 needed to invoke cloture on the resolution (S.J. Res. 22).

264. See Farm Bureau, *Statement by Bob Stallman*, *supra* note 188:

Last night Chief Judge Ralph Erickson of the District Court of North Dakota issued an order to stop the EPA's Waters of the U.S. rule in its tracks. . . . We applaud the court's decision. The so-called Clean Water Rule is yet another example of EPA's reckless and unlawful behavior in the face of science, economics and the law. Whether you're a farmer, a rancher, a homebuilder or landowner of any stripe, the evidence is clear: This rule simply has to be stopped.

Jacobs & Stecker, *supra* note 188:

A federal appeals court panel today said that it will rule on challenges to the Obama administration's hot-button Clean Water Rule. A divided 6th U.S. Circuit Court of Appeals panel in Cincinnati ruled 2-1 that it has jurisdiction to hear numerous lawsuits challenging the U.S. EPA-Army Corps of Engineers rule. The decision is a small victory for the agencies, who sought to keep the cases in the appeals court and avoid fights in scattered federal district courts that might be sympathetic to the challengers' arguments. The 6th Circuit has put the rule on hold while the lawsuits play out. That stay remains in effect after today's ruling.

265. See Jacobs & Stecker, *supra* note 188 ("The 6th Circuit has put the rule on hold while the lawsuits play out. That stay remains in effect after today's ruling."); Stecker, *supra* note 188, *N.D. Judge Will Let Higher Courts Act First on WOTUS*; Robin Bravender, *Appeals Court Halts WOTUS Rule Nationwide*, GREENWIRE (Oct. 9, 2015), <http://www.eenews.net/greenwire/stories/1060026144> ("Judges on the 6th U.S. Circuit Court of Appeals in Cincinnati issued an order granting states' request to stay the Waters of the U.S. rule while the court considers its legality.")

266. Farm Bureau, *Trick or Truth?*, *supra* note 73, at 1.

267. See Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22191:

The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as "waters of the United States," and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions.

## 2. Effect on Agricultural Exemptions in the CWA

The final rule could not have been clearer that there are no changes made to any preexisting agricultural exemptions. However, even if language of the regulation somehow does covertly change or eliminate an exemption, any enforcement action relying on such authority would not withstand judicial review in light of the dozens of passages in the preamble memorializing the agencies' intent to retain all preexisting exemptions unchanged.<sup>268</sup>

## 3. Scientific Support

Agricultural production organizations voiced concerns about the integrity of scientific research used by the agencies as the basis for the final rule.<sup>269</sup> While the validity of the research is outside the scope of this Article, the sector will have an opportunity to address this concern when the Sixth Circuit analyzes the legal validity of the rule.<sup>270</sup>

## 4. Permitting Requirements

The agricultural production sector explained that the reasoning behind their larger concern about the expansion of Agency jurisdiction was grounded in the fact that “[t]here is no ‘right’ to a [CWA] permit, even if your livelihood depends on doing something that may cause [a] ‘pollutant’ (like fertilizer, dirt, or herbicide) to fall into jurisdictional features.”<sup>271</sup> While that is true to an extent, the sector has historically positioned itself very close to having a “right” to the equivalent of a permit, which is to be exempt from needing a permit at all. Additionally, even if it is true there is no “right” to a permit, that issue is not at all addressed by the changes made to the final rule, which does not expand the agencies’ jurisdiction, and even if it did, the exemptions are still in place. Alternatively, the law makes policy choices about when individual activity yields to public use or interest all the time, so just because a policy

choice *could* consider, outside of an exemption, requiring an agricultural production actor to seek a permit, that does not mean the agencies have illegally expanded the scope of their jurisdiction.

The agricultural production sector also complained that the preexisting exemptions were themselves too narrow.<sup>272</sup> That issue, however, is not encompassed in this rulemaking; the final rule does not expand or limit any preexisting exemptions, and arguments as to increased exemptions were not part of this rulemaking.

## 5. Regulating Ditches

The agricultural production sector was concerned that the agencies’ jurisdiction under the final rule would expand to basically regulate all ditches.<sup>273</sup> However, the text of the regulation itself exempts three specific types of ditches that are built in dry land.<sup>274</sup> As to the specific concern about the agencies regulating “ephemeral” ditches, the final rule requires that there must be volume and frequency of water flow sufficient to create a recognizable bed and banks and an ordinary high watermark for any ephemeral body to be regulated as a “water of the United States.”<sup>275</sup>

While these provisions do regulate some ditches, the agencies clearly cannot regulate any or all kinds of ditches. In fact, the clarity with which the final rule exempts certain ditches, and requires specific features in order to regulate others, likely decreases the amount of jurisdiction under the final rule compared to what the agencies might have asserted under the vague “other waters” provision in the preexisting rule.<sup>276</sup>

## 6. Regulating Farm Ponds

The agricultural production sector voiced concern that the agencies’ jurisdiction would expand under the final rule to regulate farm ponds.<sup>277</sup> The agencies responded by including a specific exemption for farm ponds “created in dry land” specifically in the text of the regulation itself.<sup>278</sup> Additionally, even if in an individual case there was some dispute over what qualifies as a “farm pond,” the text of the regulation preventing the agencies from asserting jurisdiction based on “adjacen[cy]” and *SWANCC* would also

268. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997):

Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless “plainly erroneous or inconsistent with the regulation.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S. Ct. 1835, 1850, 104 L. Ed. 2d 351 [19 ELR 20163] (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

See, e.g., *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2163 (2012) (“Additional guidance concerning the scope of the outside salesman exemption can be gleaned from reports issued in connection with the DOL’s promulgation of regulations in 1940 and 1949, and from the preamble to the 2004 regulations.”); 2173 (“Our holding also comports with the apparent purpose of the FLSA’s exemption for outside salesmen. The exemption is premised on the belief that exempt employees ‘typically earned salaries well above the minimum wage’ and enjoyed other benefits that ‘se[t] them apart from the nonexempt workers entitled to overtime pay.’” Preamble 22,124.).

269. See *Nixon*, *supra* note 72 (The agricultural production sector disagreed with the integrity of the EPA’s scientific evidence, raising concerns that “scientific report the agency and the Army Corps of Engineers relied on to justify the new rules had not been reviewed by other scientists.”).

270. See *Stecker*, *Litigation Schedule Will Keep Fight Going Beyond Obama*, *supra* note 188.

271. Farm Bureau, *Trick or Truth?*, *supra* note 73, at 3.

272. See *id.* (“It is true that moving dirt in a jurisdictional feature is sometimes exempt from section 404 (‘dredged or fill material’) permitting, if it is part of ‘normal’ farming or ranching activities. But the agencies’ Q&A fails to mention that they have severely limited what they consider ‘normal.’”).

273. However, the agricultural sector is concerned that “the new rule would categorically define almost all ditches as ‘tributaries.’” See *Farm Bureau*, *Stoner Blog*, *supra* note 79, at 2.

274. See §328.3(b)(3)(i)-(iii) (2016).

275. See definition of tributary under §328.3(c)(3) (2016).

276. §328.3(a)(3) (2015).

277. See *Farm Bureau*, *Stoner Blog*, *supra* note 79, at 5 (the agricultural sector is worried the proposed “rule makes the farm pond exemption meaningless, because the exemption does not apply to impoundments of ‘navigable waters.’ By regulating low spots as ‘navigable waters,’ the rule would prevent building a farm pond on a low spot without a Section 404 permit.”).

278. §328.3(b)(4)(ii) (2016) (“artificially constructed lakes and ponds constructed in dry land such as farm and stock waters ponds. . .”).

prevent the agencies from asserting jurisdiction over a farm pond that is a “nonnavigable, isolated, intrastate” water.”<sup>279</sup>

### C. What Does the Clean Water Rule Rulemaking Process Say About the Nation’s Agricultural Policy as It Relates to the CWA?

If this Article is even half correct in asserting that the changes made to the final rule do not increase the scope of the agencies’ jurisdiction, and may in fact limit it, that raises a perhaps more important question as to why and how the agricultural production sector responded with such a huge negative campaign effort.

Part of the phenomenon might be explained by an underlying, and still unresolved, dispute on the integrity of the scientific data used. While this issue lies outside the scope of the Article, it should not be discounted as insignificant, especially because hydrological connection is the key to many jurisdictional definitions within the rule. However, scientific dispute does not account for the majority of the agricultural production sector’s response. This is because the biggest concerns voiced in the sector’s comments were about expansion of jurisdiction *at all*, not about flawed expansion due to scientific inaccuracies.

Another piece of the reaction can be explained by simple negotiating tactics used by the agencies and regulated parties during the notice-and-comment period. True, it makes tactical sense for the agencies to advertise the changes as small, and the agricultural production sector to advertise them as large; however, the distance between those two estimations of change was not just small versus large, it was “no change” versus “massive expansion.” Therefore, the country’s larger attitude toward regulation of agriculture in general is left to account for the sector’s reaction in full.

The agricultural production sector has historically enjoyed many exemptions from federal regulation. For example, just in the CWA, agriculture enjoys exemptions from the §402 definition of “point source,” §404 permits required to fill wetlands, and §§208 and 303 nonpoint source pollution regulation.<sup>280</sup> The exemption for non-

point source pollution from agricultural production is perhaps the most meaningful exemption, as “agricultural nonpoint source pollution is the leading cause of impairments to surveyed rivers and streams.”<sup>281</sup> These existing exemptions for agriculture in the CWA reflect the nation’s tendency to avoid regulating waters used in or around agricultural production.

This attitude, on its own, is not necessarily a poor policy choice; in fact, that’s all it is, a policy choice. As a nation, we have historically favored agriculture and its necessity of using water resources as priority over other goals in the CWA.<sup>282</sup> However, this attitude has hit a tipping point, as illustrated by the agricultural production sector’s reaction to the proposed changes in the Clean Water Rule. The massive gap between the actual changes made and the size of the campaign launched to throw out the rule shows that the policy choice to prioritize agriculture has turned into something else, something much more than a priority and much closer to an unregulated industry. For an industry that already enjoys so many exemptions from federal regulation, it is very telling about the nation’s attitude toward regulating agriculture that when EPA and the Corps attempted to make changes not to these exemptions, but to a regulation that would retain these exemptions unchanged, the response mustered by the agricultural production sector was largely disproportionate to the agencies’ action.<sup>283</sup>

281. Melissa K. Scanlan, *Adaptive Trading: Experimenting With Unlikely Partners*, 62 U. KAN. L. REV. 971, 976 (referring generally to information available at <http://water.epa.gov/polwaste/nps/agriculture.cfm>).

282. See J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 265 (2000):

Farms and farming are intrinsically linked with human civilization, and have had a dramatic impact on our planet’s landscape and environmental systems. Environmental regulation in the United States, though young when compared to other fields of law, is a highly developed body of law. Unfortunately, a wide chasm exists between these two social endeavors—farms are virtually unregulated by the expansive body of environmental law that has developed in the United States in the past 30 years.

Scanlan, *supra* note 281, at 971 (“[N]onpoint source pollution is the largest persistent category of water pollution in the US, which by definition is diffuse, varied, and unregulated at the federal level” and “pollution sources not traditionally regulated, most notably non-point pollutants from agriculture, are the primary source of water quality impairment in many watersheds.”); Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 Vt. L. REV. 1033, 1033 (2012):

The EPA’s influence is problematic when it comes to addressing this unregulated pollution source. Compared to point source controls, the EPA does not wield any significant statutory authority to compel states to develop adequate NPS control measures. Both Sections 208 and 319 only ask that states attempt to control NPS pollution, but neither section induces nor compels states to adopt such NPS regulatory programs. Since money is the primary incentive for states to adopt an effective BMP program for agricultural sources, and since federal funds have been absent or limited, neither the Section 208 nor 319 programs has made progress in reducing NPS pollution. Agricultural nonpoint source pollution remains one of the last great contributors to America’s water pollution problem.

283. See Eubanks, *supra* note 280, at 249–51, fig. 6; Ruhl, *supra* note 282, at 265; Peter C. Carstensen, *Agricultural Cooperative and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 462 (2013) (“Agriculture has always had a special place in American politics and public policy. This was even truer in the first third of the last century when farmers were more numerous.”); J.B. Ruhl, *Three Questions for Agriculture About the Environment*, 17 J. LAND USE & ENVTL. L. 395, 396 (2002):

279. See §328.3(c)(1) (2016); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172, 31 ELR 20382 (2001) (*SWANCC*):

Respondents . . . contend that, at the very least, it must be said that Congress did not address the precise question of §404(a)’s scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, we should give deference to the “Migratory Bird Rule.” See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 [14 ELR 20507] (1984). We find §404(a) to be clear. . . .

280. See William S. Eubanks, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health With Our Nation’s Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 249–51, fig. 6 (2014) (quoting CWA §402 (exempts “agricultural stormwater discharges and return flows from irrigated agriculture”), §404 (excludes “normal farming” activities with incidental discharges of dredged material or fill material, and §§208 and 303 (only states can determine what nonpoint source pollution to regulate). Additionally, William Eubanks describes other major agricultural exemptions under the Clean Air Act (CAA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Toxic Substances Control Act (TSCA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA), and Endangered Species Act (ESA).

Calls to reimagine the way the nation regulates its agricultural production sector as it relates to water resources are by no means new, and they vary widely in suggesting ways to deal with the biggest issues, such as nonpoint source pollution.<sup>284</sup> These suggestions often propose working within the existing regulatory framework, and creating new or amending existing regulations to fit the realities of agriculture's effects on its surrounding environment.<sup>285</sup> Others suggest creating a whole new regulatory system specifically for agriculture, basically starting from scratch.<sup>286</sup>

However, as evidenced by the response to the Clean Water Rule, neither of these proposals seems likely to make any progress. The nation's attitude toward exempting agricultural production from federal water resource regulation seems too deeply steeped in the political dialogue for any type of proposal to survive past the conversation stage, much less to make it to implementation. This pat-

tern of agricultural water policy exemption has evolved to the point where the agencies and agricultural production sector cannot even agree whether and what changes are being made at all. This strongly suggests that the nation's agricultural water policy needs to be seriously analyzed as to whether it is still serving the nation's policy choices, or whether it has morphed into something else altogether.

In conclusion, the agricultural production sector's concerns about the changes in the Clean Water Rule were overstated. While language in the text of the regulation itself changed significantly, the actual effect of those changes is only to increase specificity and clarity as to which waters are jurisdictional under the rule. That increased clarity does not increase the scope of jurisdiction; if anything, it may actually decrease the scope by providing a clearer definition of what waters the agencies may regulate as "waters of the United States."

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Recently, EPA Administrator Christine Whitman summed it up as concisely as I've ever heard in a speech before a forum sponsored by the Farm Journal, proclaiming that "[w]e can't harm food production to implement food protection." Substitute "environmental protection" for "food protection" and you have our national environmental policy for agriculture, as well as that of most states. In fact, substitute just about anything in there—worker safety, taxes, antitrust laws, minimum wage laws, labor laws, bankruptcy laws—and that pretty much sums up our policy on the topic for agriculture. And this "no harm" premise has been the bedrock of agriculture policy for decades regardless of which party was in control of Congress or the White House.

284. See U.S. GEOLOGICAL SURVEY, *Nutrients in the Nation's Streams and Groundwater, 1992-2004* 1, 26 (2010), available at <http://pubs.usgs.gov/circ/1350/pdf/circ1350.pdf>:

Nationally, commercial fertilizer is the largest single nonpoint source of nutrients. More than 10 million tons of nitrogen and nearly 2 million tons of phosphorus are applied each year as commercial fertilizer (fig. 2-2). Most of the applications are for agricultural purposes, although a small portion, about 2 to 4 percent, of the total nitrogen fertilizer is used in nonagricultural settings such as city parks, golf courses, and residential lawns.

U.S. EPA, *Nonpoint Source: Education and Outreach*, <http://water.epa.gov/polwaste/nps/outreach/point1.cfm> (last visited Mar. 30, 2016) ("Today, nonpoint source (NPS) pollution remains the Nation's largest source of water quality problems. It's the main reason that approximately 40 percent of our surveyed rivers, lakes, and estuaries are not clean enough to meet basic uses such as fishing or swimming[.]" and

[t]he latest *National Water Quality Inventory* indicates that agriculture is the leading contributor to water quality impairments, degrading 60 percent of the impaired river miles and half of the impaired lake acreage surveyed by states, territories, and tribes. Runoff from urban areas is the largest source of water quality impairments to surveyed estuaries (areas near the coast where seawater mixes with freshwater).

285. See, e.g., Scanlan, *supra* note 281, at 972 ("Now, the EPA, some states, and regulated point sources are pushing to bridge this regulatory gap by setting up water quality trading programs," and [n]otably, the trading activity has mainly taken place between regulated point sources. Only ten programs have experienced any trading between point and nonpoint sources, and some of these involved only one exchange. Trading nutrients with unregulated farms is so untested in the field that when Pennsylvania, a Chesapeake Bay state, approved a policy of point to nonpoint source water quality trading in December 2006, a Sea Grant report described this as the "first state to embrace point-nonpoint source exchanges on a wide scale." As of 2013, this Pennsylvania program has not yet produced any actual trades with nonpoint sources.
286. See, e.g., Ruhl, *supra* note 282, at 265-66 ("Yet the absence of an environmental regulation program for farms presents us with the opportunity to create one from scratch. The time for taking advantage of that opportunity is long overdue.").

## Appendix

**Key:** *Italics:* where language in the final rule differs from language in the preexisting rule.

Underline: where language in the final rule differs from language in the proposed rule.

SMALL CAPS: where language in the preexisting rule was changed in the final rule.

**Note:** This Appendix uses 33 C.F.R. §328.3 as a model of the language in the preexisting, proposed, and final rules. The language in the final rule also makes identical changes to: 40 C.F.R. §§110.1, 112.1, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, pt. 300 app. E, 302.3, and 401.11.

Final Rule	Proposed Rule	Preexisting Rule
§328.3 Definitions	§328.3 Definitions	§328.3 Definitions
For the purpose of this regulation these terms are defined as follows:		For the purpose of this regulation these terms are defined as follows:
(a) §328.3(a) <i>For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:</i>	(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et. seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:	(a) THE TERM WATERS OF THE UNITED STATES MEANS
(1) §328.3(a)(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) §328.3(a)(2) All interstate waters, including interstate wetlands;	(2) All interstate waters, including interstate wetlands;	(2) All interstate waters including interstate wetlands;
(3) §328.3(a)(3) The territorial seas;	(3) The territorial seas;	(3) ALL OTHER WATERS SUCH AS INTRASTATE LAKES, RIVERS, STREAMS (INCLUDING INTERMITTENT STREAMS), MUDFLATS, SANDFLATS, WETLANDS, SLOUGHS, PRAIRIE POTHOLE, WET MEADOWS, PLAYA LAKES, OR NATURAL PONDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE OR FOREIGN COMMERCE INCLUDING ANY SUCH WATERS: (i) WHICH ARE OR COULD BE USED BY INTERSTATE OR FOREIGN TRAVELERS FOR RECREATIONAL OR OTHER PURPOSES; OR (ii) FROM WHICH FISH OR SHELLFISH ARE OR COULD BE TAKEN AND SOLD IN INTERSTATE OR FOREIGN COMMERCE; OR (iii) WHICH ARE USED OR COULD BE USED FOR INDUSTRIAL PURPOSE BY INDUSTRIES IN INTERSTATE COMMERCE;
(4) §328.3(a)(4) <u>All impoundments of waters otherwise identified as waters of the United States under this section;</u>	(4) All impoundments of waters <u>identified in paragraphs (a)(1) through (3) and (5) of this section;</u>	(4) All impoundments of waters otherwise defined as waters of the United States under the DEFINITION;
(5) §328.3(a)(5) <u>All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;</u>	(5) All tributaries of waters <u>identified in paragraphs (a)(1) through (4) of this section;</u>	(5) Tributaries of waters IDENTIFIED IN PARAGRAPHS (A)(1) THROUGH (4) OF THIS SECTION;
(6) §328.3(a)(6) <u>All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;</u>	(6) All waters, including wetlands, adjacent to a <u>water identified in paragraphs (a)(1) through (5) of this section;</u> and	(6) The territorial seas; [author note: RETAINED AT: §328.3(A)(3)]

Final Rule	Proposed Rule	Preexisting Rule
<p><u>(7) §328.3(a)(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.</u></p> <p><u>(i) §328.3(a)(7)(i) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.</u></p> <p><u>(ii) §328.3(a)(7)(ii) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.</u></p> <p><u>(iii) §328.3(a)(7)(iii) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.</u></p> <p><u>(iv) §328.3(a)(7)(iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.</u></p> <p><u>(v) §328.3(a)(7)(v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.</u></p>	<p>(7) On a case-specific basis, <u>other waters</u>, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.</p>	<p>(7) WETLANDS adjacent to waters (other than waters that are themselves wetlands) IDENTIFIED IN PARAGRAPHS (A)(1) THROUGH (6) OF THIS SECTION. [author note: "WETLANDS" CHANGED TO "ALL WATERS"]</p>

Final Rule	Proposed Rule	Preexisting Rule
<u>(8) §328.3(a)(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.</u>		
<u>(b) §328.3(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.</u>	(b) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section—	
<u>(1) §328.3(b)(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. [the comma was intentionally removed from the proposed rule]</u>	(1) Waste Treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.	
<u>(2) §328.3(b)(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.</u>	(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.	(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. [author note: RETAINED AT: §328.3(b)(2)] Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. [author note: RETAINED AT: §328.3(b)(1)]
<u>(3) §328.3(b)(3) The following ditches:</u>	<u>(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.</u>	
<u>(i) §328.3(b)(3)(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.</u>	(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.	
<u>(ii) §328.3(b)(3)(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.</u>		

Final Rule	Proposed Rule	Preexisting Rule
(iii) §328.3(b)(3)(iii) <i>Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.</i>		
(4) §328.3(b)(4) <i>The following features:</i>	(5) The following features:	
(i) §328.3(b)(4)(i) <i>Artificially irrigated areas that would revert to dry land should application of water to that area cease;</i>	(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;	
(ii) §328.3(b)(4)(ii) <i>Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;</i>	(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;	
(iii) §328.3(b)(4)(iii) <i>Artificial reflecting pools or swimming pools created in dry land;</i>	(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;	
(iv) §328.3(b)(4)(iv) <i>Small ornamental waters created in dry land;</i>	(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;	
(v) §328.3(b)(4)(v) <i>Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;</i>	(v) Water-filled depressions created incidental to construction activity; [additions in the final rule]	
(vi) §328.3(b)(4)(vi) <i>Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and</i>	(vi) Groundwater, including groundwater drained through subsurface drainage systems; and	
(vii) §328.3(b)(4)(vii) <i>Puddles.</i>	(vii) Gullies and rills and non-wetland swales. [not in the final rule]	
(5) §328.3(b)(5) <i>Groundwater, including groundwater drained through subsurface drainage systems.</i>		
(6) §328.3(b)(6) <i>Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.</i>		
(7) §328.3(b)(7) <i>Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.</i>		
(c) §328.3(c) Definitions. In this section, the following definitions apply:	(c) Definitions—	

Final Rule	Proposed Rule	Preexisting Rule
<u>(1) §328.3(c)(1) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.</u>	(1) Adjacent. The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.” [additions in the final rule]	
<u>(2) §328.3(c)(2) Neighboring. The term neighboring means:</u>	(2) Neighboring. The term neighboring, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water.	
<u>(i) §328.3(c)(2)(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;</u>	(3) Riparian area. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems. [removed in the final rule]	
	(4) Floodplain. The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows. [removed in the final rule]	
<u>(ii) §328.3(c)(2)(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;</u>		

Final Rule	Proposed Rule	Preexisting Rule
<p><u>(iii) §328.3(c)(2)(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.</u></p>		
<p><u>(3) §328.3(c)(3) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.</u></p>	<p><u>(5) Tributary. The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.</u></p>	
<p><u>(4) §328.3(c)(4) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.</u></p>	<p><u>(6) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.</u></p>	<p><u>(b) The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. [author note: RETAINED AT: §328.3(c)(4)]</u></p>

Final Rule	Proposed Rule	Preexisting Rule
<p><u>(5) §328.3(c)(5) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. 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 water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:</u></p> <p><u>(i) §328.3(c)(5)(i) Sediment trapping,</u></p> <p><u>(ii) §328.3(c)(5)(ii) Nutrient recycling,</u></p> <p><u>(iii) §328.3(c)(5)(iii) Pollutant trapping, transformation, filtering, and transport,</u></p> <p><u>(iv) §328.3(c)(5)(iv) Retention and attenuation of flood waters,</u></p> <p><u>(v) §328.3(c)(5)(v) Runoff storage,</u></p> <p><u>(vi) §328.3(c)(5)(vi) Contribution of flow,</u></p> <p><u>(vii) §328.3(c)(5)(vii) Export of organic matter,</u></p> <p><u>(viii) §328.3(c)(5)(viii) Export of food resources, and</u></p> <p><u>(ix) §328.3(c)(5)(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.</u></p>	<p><u>(7) Significant nexus. The term significant nexus means that water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.</u></p>	<p>(c) THE TERM ADJACENT MEANS BORDERING, CONTIGUOUS, OR NEIGHBORING. WETLANDS SEPARATED FROM OTHER WATERS OF THE UNITED STATES BY MAN-MADE DIKES OR BARRIERS, NATURAL RIVER BERMS, BEACH DUNES AND THE LIKE ARE “ADJACENT WETLANDS.” [author note: CHANGED AT §328.3(c)(1)]</p>
<p>(6) §328.3(c)(6) Ordinary high water mark. The term ordinary high water mark means 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. [was not in the proposed rule]</p>		

Final Rule	Proposed Rule	Preexisting Rule
<p>(7) §328.3(c)(7) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. <u>[was not in the proposed rule]</u></p>		<p>(d) The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. [author note: RETAINED AT: §328.3(c)(7)]</p>