# 'WATERS OF THE UNITED STATES': NEARLY 50 YEARS OF JURISDICTIONAL UNCERTAINTY, AND MORE TO COME

RICHARD M. GLICK
*Davis Wright Tremaine LLP*

OLIVIER F. JAMIN
*Davis Wright Tremaine LLP*

## 1 INTRODUCTION

With the enactment in 1972 of the Clean Water Act ('the CWA'), the United States embarked on a mission to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'.[1] The Act was a reaction to spectacular reports of highly contaminated waterways. It established a regulatory programme over 'waters of the United States', an undefined term. Over the following decades, the reach of federal jurisdiction has been the subject of ongoing debate and controversy. In this article, we attempt to provide a measure of clarity to this confusing regulatory programme.

In 1969, the Cuyahoga River, one of the most polluted rivers in the United States, spontaneously ignited and captured national attention. The river was described as a place that 'oozes rather than flows' and in which a person 'does not drown but decays'.[2] In fact, there was a minimum of 13 fires on the Cuyahoga River from pollution-related causes between 1868 and 1969, with the largest causing more than $1 million in damages.[3] The 1969 fire was among the events that precipitated enactment of the CWA.

Passage of the CWA was part of a broad effort in the United States to engage in stronger environmental regulation. From the late 1960s to the early 1980s, the U.S. enacted most of the major environmental statutes that still govern the area today.[4] These laws sought to restrict air and water pollution, clean up contaminated lands, protect endangered species, and establish a permanent, federal agency charged with the administration of most of the new environmental laws, the Environmental Protection Agency ('the EPA').[5]

The first major U.S. law to address water pollution was the Federal Water Pollution Control Act of 1948, which, as amended in 1972, became known as the CWA.[6] The 1972 amendment significantly restructured the previous act by establishing a framework for regulating pollutant discharges into the 'waters of the United States'. Among its key provisions, the CWA allows the states, under EPA supervision, to adopt water quality standards for all contaminants in surface waters, and made it unlawful to discharge pollutants from a point source into navigable waters without a permit.[7]

Nearly 50 years after its enactment, the CWA has enjoyed a fair amount of success in addressing water pollution in the United States. Most water bodies have seen significant improvements in water quality, and the health of aquatic ecosystems has steadily increased.[8] But the CWA still faces many challenges.[9] One of these challenges concerns the law's jurisdictional trigger. The statute protects 'navigable waters', which it defines somewhat unhelpfully as 'the waters of the United States, including the territorial seas'.[10] However, the scope of the term 'waters of the United States', which became known as 'WOTUS', was not defined in the CWA and has since enactment been the subject of much debate at the agency level, in legislatures and in court. For much of the past few decades, and despite recurrent efforts to issue new interpretations of the term, regulations promulgated by the U.S. Army Corps of Engineers and the EPA in 1986 and 1988 have been in effect, with most of the action taking place in court.[11]

Defining the term 'waters of the United States' is fundamental to the scope of the CWA. Depending on how broadly or narrowly it is defined, a person or business will or will not be regulated under the Act for activities that affect a body of water, whether a river, lake, wetland or others. Uncertainty in this area is negative for at least two reasons: the lack of predictability makes it difficult for businesses to plan accordingly; and it forces those businesses and people to take jurisdictional disputes to court to resolve the lingering uncertainty. The scope of jurisdictional waters under the CWA has become over the

1 33 U.S.C. § 1251.

2 Environmental Protection Agency, *Introduction to the Clean Water Act*, at 3.

3 ibid.

4 Environmental Protection Agency, *EPA and a Brief History of Environmental Law in the United States*. Available at https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=319430.

5 *See* Environmental Protection Agency, *About EPA*. Available at https://www.epa.gov/aboutepa.

6 Environmental Protection Agency, *History of the Clean Water Act*. Available at https://www.epa.gov/laws-regulations/history-clean-water-act.

7 ibid.

8 See Glenn Watkins, 'Clean Water Act Turns 45 – Let's Keep It Strong', National Wildlife Federation, 18 October 2017. Available at https://blog.nwf.org/2017/10/clean-water-act-turns-45-lets-keep-it-strong/ ('Over the past four decades, the rate of wetland loss slowed, rivers stopped catching fire, and the number of waters that meet clean water goals nationwide has doubled').

9 See generally 'Clean Water Act Enforcement: Challenges and Opportunities in the 21st Century', December 2009. National Association of Clean Water Agencies White Paper. Available at http://www.nacwa.org/docs/default-source/news-publications/White-Papers/2009-12-14enforcm-wp.pdf?sfvrsn=2.

10 Act to Amend the Federal Water Pollution Control Act, P L 92-500 § 502, 86 Stat 816, 886 (1972).

11 See sections II(B) and III below.

years the source of much political, legislative and environmental discussion, as evidenced by the recent Trump administration rescission of its predecessor's attempt at a new rule, and the promulgation of its own interpretation of 'waters of the United States'.

This article provides an analysis of the meaning of 'waters of the United States' and its evolution through the life of the CWA; it takes a deeper look at recent developments under the Obama administration and the Trump administration; and it concludes, somewhat unsatisfyingly, that uncertainty is likely to remain a guiding principle of WOTUS for the years to come.

## 2 'WOTUS': A HISTORY OF JURISDICTIONAL UNCERTAINTY

For the past 47 years, agencies, legislators and courts have struggled with the absence of a clear definition in the CWA for 'waters of the United States'. In implementing the CWA, the U.S. Army Corps of Engineers and EPA have tried to define the term through rulemaking, but judicial challenges and back-and-forth between different administrations have left regulations promulgated in 1986 and 1988 mostly intact. We first take a look at these regulations and how they came to be, before diving into two pivotal Supreme Court cases that did little to clarify the intended scope of the waters protected under the statute.

### 2.1 'WOTUS': the early years and the 1986 and 1988 rules

Historically, federal laws regulating water exercised jurisdiction over 'navigable waters' of the United States, which was literally interpreted to mean only waters navigable-in-fact. However, the CWA's legislative history made clear that the intended jurisdiction of the Act would extend beyond just navigable waters.[12] In 1973, the EPA issued regulations defining 'waters of the U.S.' for the first time as the following:

(1) All navigable waters of the United States;
(2) Tributaries of navigable waters of the United States;
(3) Interstate Waters;
(4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
(5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.[13]

This new interpretation differed significantly from the previous, narrow approach limited to waters navigable-in-fact. Almost immediately it became clear that agreeing on a definition of WOTUS would not be a simple task. The Corps' initial implementation of the CWA significantly differed from EPA regulations by reverting to the previous 'navigable-in-fact' definition, but this interpretation was struck down in 1975.[14] After some back-and-forth, the Corps finally adopted regulations in 1977 that mostly mirrored the EPA's and became the most expansive definition of the Corps for jurisdictional waters at that time.

Congress amended the CWA in 1977 in an effort to restrict federal jurisdiction, but with limited success, as the amendment generally retained the existing definition of 'navigable waters'.[15] The 1977 amendment resolved some of the disagreement over the reach of the CWA, but it would take another ten years of back-and-forth between the Corps and the EPA, with the U.S. Attorney General's involvement,[16] to finalise regulations that still govern the CWA's jurisdictional reach today.[17]

### 2.2 Key Supreme Court rulings

Beginning in 1985, a badly divided United States Supreme Court issued a string of opinions concerning the jurisdictional limits of the CWA. The outcomes of these cases offer limited direction to practitioners.

#### 2.2.1 *Riverside Bayview* and *SWANCC*

Most of the disputes around the meaning of WOTUS were focused on wetlands because they are often targeted as potential development areas, and development would become significantly more difficult if the CWA applied to them. Additionally, while wetlands can be broadly defined, clearly delineating the physical boundaries of wetlands on the ground presents obvious difficulties and requires applying specific criteria for each site. The

12 See S REPT NO 92-1236, at 144 (1972) (Conf Rep) (The conferees 'fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes').

13 See National Pollutant Discharge Elimination System, 38 Fed Reg 13528, 13,529 (1973) (codified at 40 C.F.R. § 125.1(p) (1974)).

14 See *Nat Res Def Council, Inc v Callaway* 392 F.Supp 685 (D.D.C. 1975).

15 See *Evolution of the Meaning of 'Waters of the United States' in the Clean Water Act* 10-11, Congressional Research Service (updated 5 March 2019). Available at https://fas.org/sgp/crs/misc/R44585.pdf.

16 The U.S. Attorney General published a legal opinion in 1979 providing that EPA had final administrative authority to determine the reach of the term 'navigable waters' under section 404. See Dep't of the Army & Envtl Prot Agency, Mem of Agreement: Exemptions Under Section 404(F) of the Clean Water Act (1989). Available at http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf.

17 ibid p 16. The Corps' 1986 regulations defined 'waters of the United States' to mean:

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:
   a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
   b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
   c. Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
6. The territorial sea;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. 40 C F R § 230.3(s) (1988).

Supreme Court of the United States first reviewed a legal challenge to the Corps' interpretation of 'waters of the United States' in 1985.[18] A property owner had challenged the Corps' determination that the CWA applied to wetlands abutting Black Creek, a navigable waterway.[19] The Supreme Court gave deference to the Corps' position and agreed that including the wetlands at issue in the jurisdictional scope of the CWA was reasonable because of the interconnectedness of navigable waters and adjacent wetlands: water 'moves in hydrological cycles' and not in 'artificial lines'. The case established the principle that wetlands adjacent to a navigable waterway are within the definition of WOTUS, regardless of whether flooding by the navigable waterway creates the wet conditions supporting CWA jurisdiction. In other words, following the Corps' guidelines, if the adjacent wetlands are wet enough often enough to support plants requiring wet conditions, they will be subject to regulation, even if the wet conditions are not caused by the abutting waterway. While the trend of the late 1980s was to extend the scope of the CWA, the late 1990s brought a series of cases limiting the jurisdictional reach of the statute. In *United States v. Wilson*, the Fourth Circuit U.S. Court of Appeals overturned the conviction of three defendants found to have violated the CWA for knowingly discharging fill material into wetlands located approximately ten miles from the Chesapeake Bay and six miles from the Potomac River in Maryland.[20] The Corps' regulatory definition of 'waters of the United States' included waters 'the use, degradation or destruction of which could affect interstate or foreign commerce'.[21] The court ruled this was a violation of the Commerce Clause because the regulated conduct had to 'substantially affect' interstate commerce.[22] In the *Wilson* case, the court held that the Corps' interpretation 'intolerably stretches the ordinary meaning of the word "adjacent" […] to include wetlands remote from any interstate or navigable waters'.[23]

In reaction to the *Wilson* case, the Corps published guidance in 2000 to clarify that, in the Fourth Circuit, isolated waters must have an actual connection to interstate or foreign commerce to be regulated under the CWA.[24] As part of the guidance, the Corps provided clarifications regarding other waters that the agency considered to be covered under the CWA. This included 'intermittent streams', with flowing water supplied by groundwater during some times of the year only, and 'ephemeral streams' that result from precipitation events.[25]

The Corps and EPA once again engaged in rulemaking and interpreted the CWA to apply to waters and wetlands that were used or may have been used by migratory birds crossing state lines, which became known as the Migratory Bird Rule.[26] That rule was challenged in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ('SWANCC')*.[27] The SWANCC had selected an abandoned sand and gravel pit as a solid waste disposal site. Former excavation trenches at the site had previously become ponds and had been used by migratory birds.[28] The SWANCC contacted the Corps for a determination of whether a fill permit was required to discharge dredged or fill material into the trenches. The Corps determined that a permit was in fact needed and subsequently denied the permit.[29] In a 5–4 ruling, the Supreme Court rejected the Corps' arguments and held that assertion of jurisdiction over isolated waters based purely on migratory birds' use exceeded its statutory authority.[30] Allowing such a broad interpretation would raise 'serious constitutional questions' and result in 'significant impingement of States' traditional and primary power of land and water use'.[31] The court relied on the Corps' original interpretation of the 1972 CWA in which the agency had limited its jurisdiction to waters navigable-in-fact, and explained that Congress had in mind 'traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be made so'.[32]

*SWANCC* added to the WOTUS vocabulary the notion that isolated ponds and waters needed a 'significant nexus' to traditionally navigable waters to be subject to CWA jurisdiction.[33] While the *SWANCC* ruling focused on the Migratory Bird Rule, its reasoning was broader and in turn generated much litigation to refine the scope of the CWA. The agencies tried to react to the *SWANCC* ruling and acknowledge the 'significant nexus' language, and concluded that they could continue to exercise jurisdiction over isolated waters if their degradation or destruction could affect other jurisdictional waters, which would constitute a 'significant nexus'.[34]

### 2.2.2 *Rapanos* and agencies' reactions

The most recent attempt by the Supreme Court to clarify the scope of WOTUS was *Rapanos v. United States*.[35] *Rapanos* consolidated two cases from the Sixth Circuit U.S. Court of Appeals questioning jurisdiction over wetlands that were physically separated from navigable waters.[36] In the *Carabell* case, landowners challenged the Corps' jurisdiction over 'wetlands that are hydrologically isolated from any of the "waters of the United States" '.[37]

18 *United States v. Riverside Bayview Homes, Inc* 474 U.S. 121 (1985).
19 ibid pp 124–125.
20 *United States v Wilson* 133 F 3d 251 254 257 (4th Cir 1997).
21 n 18.
22 *Wilson* (n 20) at 256. For a more detailed discussion of how the Commerce Clause jurisprudence influenced the *Wilson* decision, see Congressional Research Service (n 16) at 17.
23 ibid 258.
24 See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed Reg 12,818, 12,824 (March 9, 2000).
25 ibid pp 12,823, 12,897.
26 See Final Rule for Regulatory Programs of the Corps of Engineers 51 Fed Reg 41,206, 41,217 (Nov 13, 1986).
27 531 U.S. 159 (2001).
28 ibid p 163.
29 ibid p 164. The Corps had initially concluded that it had no jurisdiction over the site, but an environmental organisation informed the Corps about the use of the ponds by migratory bird species, which led the Corps to eventually exercise jurisdiction.
30 ibid pp 173–174.
31 ibid.
32 ibid pp 172–174.
33 ibid p 167.
34 Joint Memorandum from Gary S. Guzy, General Counsel, U.S. Envtl Prot Agency, and Robert M Andersen, Chief Counsel, U.S. Army Corps of Eng'rs on Supreme Court Rule Concerning CWA Jurisdiction Over Isolated Waters (January 19, 2001). Available at https://www.environment.fhwa.dot.gov/ecosystems/laws_swepacoe.asp ('the 2001 Joint Memorandum').
35 547 U.S. 715 (2006).
36 *Rapanos v United States* 376 F 3d 629 (6th Cir 2004), *cert granted*, 546 U.S. 932-33 (2005); *Carabell v U.S. Army Corps of Eng'rs* 391 F 3d 704 (6th Cir 2004), *cert. granted* 546 U.S. 932-33 (2005).
37 Questions Presented, *Carabell v. U.S. Army Corps of Eng'rs* No 04-1384, 547 U.S. 715 (2006). Available at http://www.supremecourt.gov/qp/04-01384qp.pdf.

In *Rapanos*, a similar question asked whether CWA jurisdiction applied to non-navigable wetlands 'that do not even abut a navigable water'.[38] The court set aside the Corps' determination of jurisdiction, but a 5–4 split decision, with no majority opinion, prevented the case from providing the clarity needed after *SWANCC*. Instead, a plurality of the court joined an opinion authored by Justice Scalia, while Justice Kennedy authored a separate concurring opinion in which he proposed an alternative test.

In his opinion, Justice Scalia expressed the court's concerns with the Corps' increasingly broad interpretation of the term 'waters of the United States' and its routine application to tributaries.[39] The plurality found that the Corps' interpretation of jurisdiction in the *Rapanos* case 'stretches the outer limits of Congress's commerce power and raises difficult question about the ultimate scope of that power'.[40] This led the court to hold that the only plausible interpretation of the phrase 'waters of the United States' includes 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams, […] oceans, rivers, [and] lakes". The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall'.[41] While wetlands were not completely excluded from the Corps' jurisdiction, the court's plurality opinion limited jurisdiction to wetlands with a 'continuous surface connection to bodies of water that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands'.[42] This holding constituted a clear rebuke of the Corps' interpretation of 'waters of the United States' from the previous decade or so.

Justice Kennedy, while concurring in the judgment that the Corps had abused its authority in this case, disagreed as to the test to apply to jurisdictional determinations under the CWA. More specifically, Justice Kennedy took issue with the Corps' ability to regulate wetlands. Citing *SWANCC*, he argued that the Corps should determine, on a case-by-case basis, whether the water at issue possessed a 'significant nexus' to waters that are navigable-in-fact.[43] Justice Kennedy explained that a significant nexus exists when the wetland, alone or in connection with similarly situated properties, significantly impacts the chemical, physical and biological integrity of a traditional navigable water.[44]

The two tests articulated by Justice Scalia and Justice Kennedy left lower courts with the question of which analysis to apply to CWA jurisdictional disputes. Generally, when a majority of the Supreme Court agrees only on the outcome of a case but not on the reason for the outcome, lower courts will follow the Justices' opinion that rests on the narrowest grounds.[45] One problem is that the 'narrowest ruling' is not always evident. In the aftermath of *Rapanos*, some lower courts have applied Scalia's test, while others followed Kennedy, and still other circuits held that waters that satisfy either of Justice Scalia's test or the 'significant nexus' test are regulated under the CWA.[46]

Following the *Rapanos* decision, the Corps and EPA published guidance in 2008.[47] The agencies' guidance took the approach that waters meeting either test would qualify as 'waters of the United States', and established three categories of waters. First, the agencies would assert jurisdiction over traditional navigable waters, wetlands adjacent to these waters, 'relatively permanent' tributaries, and wetlands that directly abut such tributaries.[48] Second, the agencies would decide jurisdiction on a case-by-case basis, following the significant nexus test, for non-navigable tributaries that are not relatively permanent, wetlands adjacent to those tributaries, and wetlands adjacent to relatively permanent tributaries.[49] Third, the agencies would decline to assert jurisdiction over swales or erosional features, and ditches.[50]

This guidance provided some clarity post-*Rapanos* but did not provide a long-term solution to the jurisdictional issues associated with the term 'waters of the United States'. In 2011, the agencies engaged in a new rulemaking effort that would have increased the jurisdictional scope of the CWA, but was quickly abandoned because of congressional opposition.[51] These efforts would resume in 2015.

## 3 'WOTUS' UNDER PRESIDENT OBAMA, PRESIDENT TRUMP, AND MOVING FORWARD

In 2015, the Obama administration attempted to modernise the rules governing this interpretation, but the 'Clean Water Rule' would be short-lived, as President Obama's successor, President Trump, repealed the 2015 rule before engaging in his own rulemaking efforts to define WOTUS.

### 3.1 The 2015 Clean Water Rule

After the agencies failed to adopt a new WOTUS rule in 2011, a new rulemaking effort eventually led to the adoption of the 2015 Clean Water Rule during President

38 Questions Presented, *Rapanos v United States* No 04-1034, 547 U.S. 715 (2006). Available at http://www.supremecourt.gov/qp/04-01034qp.pdf.

39 *Rapanos*, 547 U.S. at 726–727.

40 ibid p 738.

41 ibid p 739.

42 ibid p 742.

43 ibid.p 782 (Kennedy, J concurring).

44 ibid p 780.

45 See CRS Legal Sidebar LSB10113, 'What Happens When Five Supreme Court Justices Can't Agree?' by Kevin M Lewis. Available at https://fas.org/sgp/crs/misc/LSB10113.pdf.

46 *United States v Gerke Excavating, Inc* 464 F.3d 723, 725 (7th Cir. 2006) ('[A]s a practical matter the Kennedy concurrence is the least common denominator') *cert. denied* 552 U.S. 810 (2007); *United States v Robison* 505 F 3d 1208 1222 (11th Cir. 2007); *United States v Bailey* 571 F 3d 791, 799 (8th Cir 2009).

47 Revised Mem from Envtl Prot Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (December 2, 2008) ('the 2008 Memorandum') available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

48 ibid p 1.

49 ibid.

50 ibid.

51 See EPA and Army Corps of Eng'rs Guidance Regarding Identification of Waters Protected by the Clean Water
Act 76 Fed Reg 24,479 (May 2, 2011); Letter from Sen James Inhofe *et al.* to Lisa P Jackson and Jo-Ellen Darcy (June 30, 2011). Available at http://www.epw.senate.gov/public/_cache/files/ec609d07-a036-49e8-a8a0-c46652b479bd/110630-jackson-darcy-cwa-guidance.pdf.

Obama's second term in office. The new rule did not revolutionise the meaning of 'waters of the United States' and generally kept the structure of the post-*Rapanos* 2008 interpretation in place, but aimed at reducing the number of waterbodies subject to the case-by-case significant nexus test, and increasing the number of categorical jurisdictional determinations.[52] Among the new rule's categorically jurisdictional waters were traditionally navigable waters, all interstate waters and wetlands, the territorial seas, tributaries, impoundments, and all waters adjacent to those listed waters. The rule also added that a water was 'adjacent' if it met the definition of 'neighbouring': if it is located in whole or in part within 100 feet of the ordinary high water mark of a jurisdictional water, or within the 100-year flood plan and not more than 1,500 feet from such waters.[53]

The comment period leading up to the adoption of the rule drew over a million comments, an indication of the increasingly controversial nature of the term 'waters of the United States' over the years.[54] The rule drew criticism from environmental groups (for not being protective enough of waterbodies) and industry groups (for being too protective) alike. Perhaps the most notable showing of the controversial nature of the rule was Congress's efforts to block its promulgation. In January 2016, the Senate and House of Representatives passed a resolution of disapproval to nullify the rule.[55] President Obama vetoed the resolution and a procedural vote failed to override the veto.[56] Despite EPA's and the Corps' efforts to defend the rule, court challenges came quickly. The Clean Water Rule ended up being officially repealed in the summer of 2019, but the path to get there was far from simple.

The Clean Water Rule immediately drew challenges across the country, making it likely that plaintiffs would eventually find a sympathetic court. The first blood came from a federal court in North Dakota, where Judge Ralph R. Erickson preliminarily enjoined the 'exceptionally expansive view' of the agencies' interpretation.[57] Some courts looking at similar cases concluded that they lacked jurisdiction to review challenges to the rule based on language in the Clean Water Act that conferred jurisdiction on the district courts for some matters, and on the circuit courts for others. Judge Erickson found he had jurisdiction and concluded that the agencies' interpretation went beyond the discretion granted by Congress in the CWA.[58] Another interesting aspect of this decision is that Judge Erickson relied on internal documents showing disagreement between EPA and the Corps over the technical support and policy choices that led to the adoption of the rule.[59] In another somewhat bizarre procedural twist, the Sixth Circuit issued a stay of the rule despite acknowledging that it may not have jurisdiction, and after the petitioners (18 states) moved to dismiss their own petition for lack of jurisdiction.[60]

### 3.2 WOTUS under Trump

A fierce critic of President Obama, President Trump lost no time in attacking the 2015 rule. Shortly after taking office, Trump signed Executive Order No. 13,778,[61] aimed at dismantling the rule and encouraging EPA and the Corps to interpret the term 'waters of the United States' consistently with Justice Scalia's opinion in *Rapanos*.[62] To achieve this goal, EPA and the Corps first sought comment on a proposed rule to rescind the 2015 rule and replace it with the text that existed before its promulgation.[63] Second, the agencies released a new proposed rule in December 2018 that would substantively redefine the term 'waters of the United States'.[64] Trump's attack on the 2015 Clean Water Rule fits within one of the current president's priorities: dismantling his predecessor's environmental legacy and removing regulatory barriers to development to place himself as a champion for businesses and economic growth.[65]

Again, the agencies' efforts to adopt a new rule were far from smooth sailing. The first step of the process, rescinding the new rule, was invalidated by a federal judge in *South Carolina Coastal Conservation League v. Pruitt*,[66] because the notice-and-comment opportunity was too narrow and violated the Administrative Procedure Act ('APA').[67] At the time of the ruling, the 2015 WOTUS rule had been stayed in 24 states, and striking down the Trump administration rescission of the rule meant that the other 26 states would still be subject to the 2015 rule, pretty much splitting the country in half regarding how to interpret 'waters of the United States'.[68] Far from ideal, this situation meant that once again, clarity in this field would have to wait. In September 2019, the Trump

52 Clean Water Rule 80 Fed Reg at 37,057 ('The agencies have greatly reduced the extent of waters subject to this individual review ….'); Richard M Glick and Diego Atencio, 'Waters of the United States' Not Quite Clear Yet', WATER REP, July 15, 2016 at 3 ('The new rule increases categorical jurisdictional determinations, and is intended to minimize the need for case-specific analyses.').

53 80 Fed Reg 37,081.

54 ibid p 37,057.

55 See S J Res 22, 114th Cong (2016).

56 See U.S. President (Obama) Veto Message from the President—S J 22 (Jan 19, 2016). Available at https://obamawhitehouse.archives.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22.

57 *See* Rick Glick, *First Blood: North Dakota Federal Court Strikes WOTUS Rule* Aug 31, 2015 American College of Environmental Lawyers. Available at http://www.acoel.org/post/2015/08/31/First-Blood-North-Dakota-Federal-Court-Strikes-WOTUS-Rule.aspx.

58 *North Dakota v EPA* 127 F Supp 3d 1047, 1053 (D.N.D. 2015).

59 ibid p 1055.

60 Consolidation Order, In re EPA and Dept of Defense Final Rule MCP No 135 Doc. 3 (J P M L July 28 2015). The Sixth Circuit also held that it had exclusive jurisdiction over challenges to the rule and that the district courts did not have jurisdiction, a position later struck down by the Supreme Court. *Nat'l Ass'n of Mfrs v Dep't of Def*, 538 U.S. __, 138 S Ct 617, 634 (2018).

61 Executive Order 13,778, Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the 'Waters of the United States' Rule 82 Fed Reg 12497 (issued Feb 28, 2017).

62 ibid para 3.

63 Proposed Rule: Definition of 'Waters of the United States' – Recodification of Pre-Existing Rule 82 Fed Reg 34,899, 34,899 (July 27, 2017).

64 See Envtl Prot Agency & U S Army Corps of Eng'rs, Revised Definition of 'Waters of the United States,' 84 Fed Reg 4,154 (Feb 14, 2019).

65 For a summary of the Trump administration's actions relating to public lands, see Michael C Blumm and Olivier Jamin, 'The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law' (May 14 2018) *Environmental Law* vol 48, No 2. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051026.

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

67 5 U.S.C. § 500 et seq.

68 American Bar Association, 'WOTUS and the Reach of CWA Jurisdiction'. Available at https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/.

administration finalised the repeal of the 2015 rule, ending 'the previous administration's overreach in the federal regulation of U.S. waters and recodifying the long-standing and familiar regulatory text that previously existed'.[69] The repeal meant that, until a new rule defining WOTUS is adopted, the old 1986 rule would govern the field, more than 30 years after its enactment.

While defending the rescission of the 2015 rule in court and working to finalise its repeal, the Trump administration also started working on a new interpretation of 'waters of the United States'. Just like all of the previous attempts, it has generated a lot of controversy.[70] The approach chosen by the administration seeks an easy solution to a complex problem.[71] The problem is that the interconnection of natural systems is by nature complex. Recall that the CWA was enacted 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters'.[72] This is not an easy goal, and it should not be surprising that achieving this goal would require a complex and comprehensive strategy.

The Trump administration's proposed rule adopts Justice Scalia's position in *Rapanos*, where he explained:

> In sum, on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, […] oceans, rivers, [and] lakes'. See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.[73]

This means that if you can see water and your feet get wet when you stand on it, the CWA applies. This simplistic interpretation stands in sharp contrast to Justice Kennedy's approach, adopted in the 2015 rule, which requires a complex analysis and grants agencies a certain amount of discretion that makes many uncomfortable. While Justice Kennedy's approach might inject too much agency judgment to determine when a significant nexus exists, the Trump administration's proposed rule ignores the basic principles of interconnectedness of the natural systems.

When it is promulgated, the new WOTUS rule is sure to draw fierce opposition and challenges in court, much like previous rules. If a new Democratic president is elected in 2020, we could see a return to a broader jurisdictional scope under the CWA, which itself will surely draw challenges in court. Does this sound familiar?

## 4 CONCLUSION

Nearly 50 years ago, Congress enacted the Clean Water Act to restore the quality of the nations' waters. The CWA would apply to 'navigable waters', unhelpfully defined as 'waters of the United States'. Early on, jurisdiction was limited to waters that were 'navigable-in-fact', meaning capable of carrying interstate commerce. Over time, regulations adopted by the U.S. Army Corps of Engineers and the EPA extended jurisdiction to tributaries and adjacent wetlands, because degradation of these waters would result in degradation of the navigable waters, and to some intermittent streams.

After 30 years of court decisions and failed attempts to clarify the reach of the CWA, the definition WOTUS remains mostly identical to the definition adopted in the second half of the 1980s. The Trump administration's effort in repealing the 2015 rule and enacting its own rule will likely not bring the clarity that many are seeking. As policy decisions have become increasingly partisan, WOTUS will also be at the mercy of changes of administration as the Obama-Trump transition illustrates. In other words, WOTUS has been a mess, and will probably remain a mess for the foreseeable future.

The best solution to the constant uncertainty that has surrounded the definition of 'waters of the United States' would come from Congress through an amendment of the CWA, although that seems unlikely in the near term. In the meantime, regulated entities will have to remain flexible, understanding that their status under the CWA could change based on judicial decisions or a change in administration. This uncertainty is not good for businesses or for the environmental community but until Congress acts, that uncertainty will continue.

69 84 Fed Reg 56,626 (Oct 22, 2019); Monica Samayoa, 'Trump Administration Finalizes Plan To Repeal Obama-era Water Protection's, OBP Sept 12, 2019. Available at https://www.opb.org/news/article/trump-administration-repeal-obama-era-water-protections/.

70 Rick Glick, '2019 WOTUS Rule Seeks to Make the Complex Simple – It Won't Work', American College of Environmental Lawyers June 6, 2019. Available at http://acoel.org/post/2019/06/06/2019-WOTUS-Rule-Seeks-to-Make-the-Complex-Simple—It-Won't-Work.aspx.

71 ibid.

72 33 U.S.C. § 1251(a).

73 *Rapanos* p 739.