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WATER, WATER, EVERYWHERE, AND PLENTY OF DROPS TO REGULATE: WHY THE NEWLY PUBLISHED WOTUS RULE DOES NOT VIOLATE THE COMMERCE CLAUSE

SAMUEL WORTH*

Abstract: On June 29, 2015, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers jointly published a final rule, “Definition of ‘Waters of the United States’ Under the Clean Water Act,” to clearly delineate how the Clean Water Act protects streams and wetlands. The new Waters of the United States rule (“WOTUS Rule” or the “Rule”) abrogated the previous definition of waters of the United States under Clean Water Act jurisdiction. To the great displeasure of many private landowners, the Rule entered into effect on August 28, 2015. In particular, several critics have argued that the new WOTUS Rule’s regulation of “other waters,” its definition of “adjacent,” and its expanded construction of the term “tributary” violate the Commerce Clause of the U.S. Constitution. Examining select, representative challenges by the National Association of Homebuilders, the Kansas Livestock Association, and the National Cattlemen’s Beef Association, this Note argues that those three features of the new WOTUS Rule do not, as alleged, contravene the Commerce Clause. As a matter of Commerce Clause jurisprudence, the new WOTUS Rule is a legal tool to aid the federal government in its fight against the degradation and pollution of our nation’s waters.

INTRODUCTION

On June 29, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the “Corps”) jointly published a final rule, “Definition of ‘Waters of the United States’ Under the Clean Water Act” (“WOTUS Rule” or the “Rule”), that according to those agencies will clarify how streams and wetlands are protected under the Clean Water Act (CWA or the “Act”).¹ The Rule entered into effect on August 28, 2015.²

* Executive Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

¹ See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.); *The Final Clean Water Rule*, ENVTL. PROT. AGENCY, <https://www.epa.gov/cleanwater/final-clean-water-rule> [<https://perma.cc/9SX6-MBEQ>].

The Rule has elicited many challenges and significant criticism, predominantly from private landowners and agents of industry.³ Arguably the most common nexus of these attacks is that the Rule unconstitutionally allows the federal government to regulate waters that, as a matter of Commerce Clause jurisprudence, should be considered purely intrastate.⁴ Specifically, several critics have alleged that the new WOTUS Rule's regulation of "other waters," its definition of "adjacent," and its expanded construction of the term "tributary" directly violate the Commerce Clause.⁵

This Note argues that the above three changes to the definition of "Waters of the United States" do not cause the new Rule to violate the Commerce Clause as argued in comments submitted by several industrial and agricultural parties in opposition to the WOTUS Rule.⁶ This Note examines Commerce Clause challenges articulated in three representative opposition comments submitted by the National Association of Homebuilders ("NAHB"), the Kansas Livestock Association ("KLA"), and the National Cattlemen's Beef Association ("NCBA").⁷

Isolating the NAHB's opposition to the new Rule's regulation of "other waters," the KLA's criticism of the proposed scope of the term "adjacent," and the NCBA's condemnation of the proposed definition of "tributaries," the Note argues against the groups' claims that the WOTUS Rule violates the Commerce Clause.⁸ Part I of this Note addresses the statutory and regulatory history of clean water, and the subsequent evolution of the WOTUS Rule.⁹ Part II addresses the specific parts of the new Rule that

² *The Final Clean Water Rule*, *supra* note 1.

³ See Kansas Livestock Association, Comment Letter on Proposed Definition of "Waters of the United States," at 4 (Nov. 13, 2014) [hereinafter KLA Comment], http://www.kla.org/CMDocs/KansasLA/Library/KLA_WOTUS.pdf [perma.cc/7T4N-2FNV]; National Association of Home Builders, Comment Letter on Proposed Definition of "Waters of the United States," at 22 (Nov. 14, 2014) [hereinafter NAHB Comment], <http://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2011-0880-19540&attachmentNumber=1&disposition=attachment&contentType=pdf> [perma.cc/4CEN-6JUU]; National Cattlemen's Beef Association & Public Lands Council, Comment Letter on Proposed Definition of "Waters of the United States," at 5 (Oct. 28, 2014) [hereinafter NCBA Comment], <http://portal.criticalimpact.com/go.cfm?a=1&eid=d14cf387088f64853947229f28c3afba&c=25397&jid=bef689c00f8ee2a5&d=4b334dad04bb2deb> [perma.cc/2XW6-SUZW].

⁴ See KLA Comment, *supra* note 3, at 4; NAHB Comment, *supra* note 3, at 22; NCBA Comment, *supra* note 3, at 5.

⁵ See KLA Comment, *supra* note 3, at 12; NAHB Comment, *supra* note 3, at 36; NCBA Comment, *supra* note 3, at 5 & n.11.

⁶ See *infra* notes 142–201 and accompanying text.

⁷ See *infra* notes 174–201 and accompanying text.

⁸ See *infra* notes 174–255 and accompanying text.

⁹ See *infra* notes 12–141 and accompanying text.

have instigated Commerce Clause arguments.¹⁰ Part III evaluates the legality of the WOTUS Rule with respect to the Commerce Clause.¹¹

I. BACKGROUND

A. *The Development of the Clean Water Act*

In 1899, President William McKinley signed into law the Rivers and Harbors Act, the first federal water pollution law.¹² The Act was meant to ensure unobstructed passage along U.S. water bodies, and specifically addressed dumping and discharge into navigable territorial waters.¹³ Section 10 of the Act outlawed any obstructions that impeded navigation of any waters without congressional approval.¹⁴ Section 13 prohibits the discharge of substances from shore or floating craft into navigable waters or tributaries.¹⁵ Through Section 12, the Rivers and Harbors Act became a way to penalize those polluting the nation's waterways.¹⁶ In 1960, the United States Supreme Court applied Section 13 in *United States v. Republic Steel Corp.*, holding that a steel company could not discharge wastewater into the Calumet River.¹⁷ The Court in *Republic Steel* held that the discharge of wastewater and industrial solids had reduced the depth of the river's channel, which impaired its navigable capacity.¹⁸

By 1948, an increase in industrialization heightened the concern that communicable diseases could be spread by the discharge of sewage into or near drinking water intakes.¹⁹ Protecting drinking water from contamination became a national priority, culminating in the passage of the Federal Water Pollution Control Act ("FWPCA").²⁰ The FWPCA delegated the task of controlling water pollution to the individual states, but allowed for formal

¹⁰ See *infra* notes 142–201 and accompanying text.

¹¹ See *infra* notes 202–255 and accompanying text.

¹² Robyn Kenney, *Rivers and Harbors Act of 1899*, *United States*, ENCYCLOPEDIA OF EARTH (Sept. 3, 2006, 9:05 PM), <http://www.eoearth.org/view/article/155764/> [perma.cc/7679-8QJB]; see *River and Harbor Act of 1899*, Pub. L. No. 55-425, 30 Stat. 1151 (codified in scattered sections of 33 U.S.C.).

¹³ JOEL M. GROSS & KERRI L. STELCEN, *CLEAN WATER ACT* 5 (2012).

¹⁴ 33 U.S.C. § 407 (2012); *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service: Rivers and Harbors Appropriations Act of 1899*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/laws/lawsdigest/RIV1899.HTML> [https://perma.cc/4T7E-ESDJ].

¹⁵ 33 U.S.C. § 407; *Rivers and Harbors Appropriation Act of 1899*, U.S. ARMY CORPS OF ENGINEERS, <http://www.sam.usace.army.mil/Missions/Regulatory/RegulatoryFAQ/RiversandHarborsAppropriationActof1899.aspx> [https://perma.cc/LT3J-S5G4].

¹⁶ 33 U.S.C. § 406; see *United States v. Republic Steel Corp.*, 362 U.S. 482, 485 (1960).

¹⁷ See 362 U.S. at 485.

¹⁸ See *id.* at 489, 492–93.

¹⁹ See GROSS & STELCEN, *supra* note 13, at 6.

²⁰ See *Federal Water Pollution Control Act of 1948*, Pub. L. No. 845, 62 Stat. 1155 (codified at 33 U.S.C. §§ 1251–1376); GROSS & STELCEN, *supra* note 13, at 6.

hearings before the FWPCA administrator if the state could not resolve the problem on its own.²¹ However, by 1971 “only 50 informal conferences had been held[,] . . . only four matters [had] proceeded . . . to the administrative hearing stage,” and only one case had gone to court.²² Regardless of Congress’s intent in passing the FWPCA, the legislation was lacking in enforcement.²³

In late 1972, Congress enacted a heavily revised version of the FWPCA, aptly named the Clean Water Act.²⁴ By enacting the CWA, Congress sought to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”²⁵ The CWA represented a series of amendments that substantively overhauled the FWPCA and established a new national focus on clean water by instituting uniform technology-based standards.²⁶ The CWA sought to attain a national water quality that could protect fish and wildlife habitat, as well as humans’ ability to use water recreationally.²⁷ It also sought to increase federal funding of publicly-owned treatment works, and to develop and implement waste treatment management planning in the individual states.²⁸

Further, the Act endeavored to fund discharge-eliminating technology, and programs for so-called non-point source pollution control.²⁹ To achieve these goals, the Act expressly prohibited discharges of any pollutant into the waters of the United States without specific authorization via National Pollutant Discharge Elimination System (“NPDES”) permitting, and established “pretreatment standards” for “indirect dischargers.”³⁰ Additionally, the Act became federally enforceable by EPA.³¹ The Act set uniform, tech-

²¹ See 33 U.S.C. §§ 1251–1376; GROSS & STELCEN, *supra* note 13, at 6.

²² See GROSS & STELCEN, *supra* note 13, at 6.

²³ See *id.*

²⁴ See 33 U.S.C. §§ 1251–1274; GROSS & STELCEN, *supra* note 13, at 7.

²⁵ GROSS & STELCEN, *supra* note 13, at 7; see 33 U.S.C. § 1251(a).

²⁶ GROSS & STELCEN, *supra* note 13, at 7–8.

²⁷ See *id.* at 8.

²⁸ See *id.*

²⁹ See *id.*

²⁹ See *id.*; *What Is Nonpoint Source Pollution?*, ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/nps/whatis.cfm> [<https://perma.cc/2BMQ-R9F4>] (“[N]onpoint source pollution generally results from land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification Nonpoint source (NPS) pollution, unlike pollution from industrial and sewage treatment plants, comes from many diffuse sources.”).

³⁰ U.S. ENVTL. PROT. AGENCY, INTRODUCTION TO THE NATIONAL PRETREATMENT PROGRAM, at iii (2011), http://www.epa.gov/sites/production/files/2015-10/documents/pretreatment_program_intro_2011.pdf [<https://perma.cc/YEH8-RQ5L>] (stating that indirect dischargers are non-point source dischargers of pollutants to waters of the United States); *National Pollutant Discharge Elimination System (NPDES)*, ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/npdes/> [<https://perma.cc/LW93-NV7W>]; see 33 U.S.C. § 402 (2012).

³¹ GROSS & STELCEN, *supra* note 13, at 8.

nology-based effluent limitations to be determined by EPA administrators, and included a comprehensive water quality program.³² Furthermore, the Act authorized states, the federal government, and individual citizens to enforce its provisions.³³ EPA and the Corps were made jointly responsible for monitoring compliance through on-site investigations and enforcement of penalties for unpermitted discharges.³⁴

The CWA was amended in 1977 to require that Best Available Technology (“BAT”) limitations for toxic pollutants and Best Available Conventional Pollutant Control Technology (“BCT”) limitations for conventional pollutants be achieved by July 1, 1984.³⁵ BAT limitation standards were also extended to cover toxic pollutants with an establishment deadline of July 1, 1984, and nonconventional pollutants with a deadline of July 1, 1987.³⁶ The 1977 amendments further stressed that while EPA should have “ultimate enforcement authority,” the individual states should bear the initial responsibility for managing and enforcing the CWA.³⁷ The CWA was amended once again in 1987 to include, among other additions, the Water Quality Act of 1987, to bolster regulation of point source storm-water discharges.³⁸

Since the passage of the CWA, the quality of U.S. water has measurably improved.³⁹ Additionally, an EPA study of U.S. lakes revealed that more than half of the lakes surveyed achieved reductions in nutrient concentrations, and more than twenty-five percent showed improved trophic status.⁴⁰

³² See *id.* at 9.

³³ See *id.*

³⁴ *Clean Water Act (CWA) Compliance Monitoring*, ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> [<https://perma.cc/Z364-DGJZ>].

³⁵ JEROME G. ROSE, *LEGAL FOUNDATIONS OF ENVIRONMENTAL PLANNING* 323 (1983) (stating that the CWA lists 65 toxic pollutants and “authorizes EPA to add or delete [pollutants] from that list,” and defining nonconventional pollutants as pollutants other than conventional and toxic pollutants).

³⁶ See ENVTL. PROT. AGENCY, *NPDES PERMIT WRITERS’ MANUAL 1-1 to -8* (2010), http://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf [<https://perma.cc/TUV5-3TPD>] (defining “toxic pollutants” as those 65 listed by EPA, “conventional pollutants” as those generally found in “sanitary waste from households, businesses, and industries,” and “nonconventional pollutants” as those that fit into neither category).

³⁷ GROSS & STELCEN, *supra* note 13, at 10.

³⁸ See *id.*

³⁹ See *Protecting the Clean Water Act*, AM. RIVERS, <http://www.americanrivers.org/initiatives/pollution/clean-water-act/> [<https://perma.cc/BT6P-2HF6>].

⁴⁰ See Mary Mazzoni, *Earth Day 2012: Successes Since the Beginning of the Movement*, HUFFPOST GREEN (Apr. 22, 2012), http://www.huffingtonpost.com/2012/04/22/earth-day-2012-successes_n_1434352.html [<https://perma.cc/HD3C-Y3NR>] (defining “trophic status” as “a useful means of classifying lakes and describing lake processes in terms of the productivity of the system,” and explaining that a waterbody with a strong trophic status is “well-nourished” with high nutrient levels and high plant growth); Mark D. Munn & Pixie D. Hamilton, *New Studies Initiated by the U.S. Geological Survey—Effects of Nutrient Enrichment on Stream Ecosystems*, U.S. GEO.

The CWA has significantly improved the health of rivers, lakes, and coastal waters, preventing billions of pounds of pollution from contaminating U.S. waters, and doubling the number of waterways available for fishing and swimming.⁴¹ While the Act has driven substantial progress for our clean water, continued implementation and enforcement is necessary for future success.⁴² EPA has asserted that the new WOTUS Rule will help effectuate the goals of the Clean Water Act by reducing confusion about CWA protection.⁴³

B. The Scope of the Commerce Clause Power

Congress derives its legal authority to regulate the nation's water largely from four areas of the Constitution: the Treaty Clause, the Property Clause, the Spending Clause, and the Commerce Clause.⁴⁴ As it pertains to the Clean Water Act, the Treaty Power—found in Article II, Section 2 of the Constitution—is rooted in the Senate's power of advice and consent to the President in making international treaties.⁴⁵ The Property Clause of Article IV, Section 3 allows Congress to make rules and regulations with respect to property belonging to the federal government.⁴⁶ The power of Congress to tax and spend found in Article I, Section 8 allows it to levy taxes and spend money to benefit the general welfare, and the Commerce Clause, found in Article I, Section 8, authorizes Congress to regulate interstate commerce among the several states.⁴⁷

The Commerce Clause was the principal legal basis for Congress's power to enact the CWA, and is frequently invoked as legal justification for the

SURVEY (Dec. 2003), <http://pubs.usgs.gov/fs/fs11803/> [<https://perma.cc/NK6R-YNVE>] (“Elevated concentrations of nutrients can lead to excessive, often unsightly growth of aquatic plants . . . [which] reduces dissolved oxygen in water and alters stream habitat, both of which are critical for fish and other aquatic life.”); James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012, 5:20 AM), http://www.slate.com/articles/health_and_science/science/2012/12/clean_water_act_40th_anniversary_the_greatest_success_in_environmental_law.html [<https://perma.cc/L24E-YQ3H>]; *Understanding Lakes*, LAKE ACCESS, <http://www.lakeaccess.org/ecology/lakeecologyprim15.html> [<https://perma.cc/V69A-XDLN>] (defining “trophic status” as “a useful means of classifying lakes and describing lake processes in terms of the productivity of the system”).

⁴¹ See *Protecting the Clean Water Act*, *supra* note 39.

⁴² See *id.* (“[M]any of our rivers remain polluted by urban and agricultural runoff and sewer overflows . . .”).

⁴³ *What the Clean Water Rule Does*, ENVTL. PROT. AGENCY, <http://www.epa.gov/cleanwater/rule/what-clean-water-rule-does> [<https://perma.cc/YR68-XW4B>].

⁴⁴ See U.S. CONST. art. I, § 8, cl. 1, 3; *id.* art. II, § 2, cl. 2; *id.* art. IV, § 3, cl. 2; John Laumer, *U.S. Congress's Constitutional Authority for Clean Water Protection*, TREEHUGGER (July 26, 2007), <http://www.treehugger.com/corporate-responsibility/us-congressatms-constitutional-authority-for-clean-water-protection.html> [<https://perma.cc/6JG7-ZELQ>].

⁴⁵ U.S. CONST. art. II, § 2; Laumer, *supra* note 44.

⁴⁶ U.S. CONST. art. IV, § 3.

⁴⁷ *Id.* art. I, § 8.

Act.⁴⁸ Notably, “neither the Supreme Court nor federal appellate courts” have ever declared an environmental statute unconstitutional for “exceeding Congress’s power under the Commerce Clause.”⁴⁹ Rather, courts have affirmed that the Commerce Clause grants Congress regulatory authority over three types of commercial activity.⁵⁰ First, Congress has the authority to regulate “channels” of interstate commerce.⁵¹ Second, it can also regulate “instrumentalities” of interstate commerce.⁵² Finally, Congress is also permitted to regulate “activities that substantially affect interstate commerce.”⁵³ The Commerce Clause has allowed Congress to legislate seemingly non-economic issues of a social, moral, or public health character so long as the legislation is shown to remedy some burden on interstate commerce.⁵⁴

C. Legal Background: Commerce Clause

Under the Commerce Clause, Congress has the authority to regulate commerce with foreign nations, among the several states, and with the Indian tribes.⁵⁵ In *United States v. Lopez*, the Supreme Court considered whether the Gun-Free School Zones Act—designating as a federal offense firearm possession in any area the possessor has reasonable cause to believe is a school zone—exceeded Congress’s Commerce Clause authority.⁵⁶

Specifically, the Court answered the question of whether gun possession in school zones is an activity that substantially affects interstate commerce.⁵⁷ The Court held that gun possession in school zones is too indirect-

⁴⁸ Cameron Smith, *Far-Reaching “Waters of the United States” Rule Could Be the Most Significant EPA Regulation You Have Never Heard About: Opinion*, ALABAMA.COM (Oct. 18, 2014, 9:09 AM), http://www.al.com/opinion/index.ssf/2014/10/far-reaching_waters_of_the_uni.html [https://perma.cc/N6NV-NKXU].

⁴⁹ JAY AUSTIN & BRUCE MYERS, ENVTL. L. INST., ANCHORING THE CLEAN WATER ACT: CONGRESS’S CONSTITUTIONAL POWER TO PROTECT THE NATION’S WATERS 2 (2007), http://www.eli.org/sites/default/files/eli-pubs/d17_07.pdf [perma.cc/568E-G8X5].

⁵⁰ See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (holding that Congress can regulate instrumentalities of interstate commerce under the Commerce Clause); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (holding that Congress can regulate channels of interstate commerce under the Commerce Clause); *United States v. Royal Rock Co-op*, 307 U.S. 533, 544 (1939) (holding that the Commerce Clause authorizes the regulation of activities that interfere with interstate commerce).

⁵¹ *Heart of Atlanta Motel, Inc.*, 379 U.S. at 256; *United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003).

⁵² *Lopez*, 514 U.S. at 558.

⁵³ *Id.* at 559.

⁵⁴ See *Heart of Atlanta Motel, Inc.*, 379 U.S. at 256–57 (holding that Congress could use its Commerce Clause authority to force private enterprises to comply with the Civil Rights Act of 1964).

⁵⁵ See U.S. CONST. art. I, § 8, cl. 3.

⁵⁶ *Lopez*, 514 U.S. at 551–52.

⁵⁷ *Id.*

ly related to interstate commerce for Congress to legislate the activity using its Commerce Clause authority, and in so doing, clarified the scope of that authority by holding that Congress is limited to regulating the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that “substantially affect interstate commerce,” that are themselves “economic in nature.”⁵⁸

Since *Lopez*, courts have further clarified standards of Commerce Clause review.⁵⁹ For example, courts have held that it is appropriate to conduct Commerce Clause analysis on a case-by-case basis, using scientific evidence.⁶⁰ In *United States v. Alderman*, the U.S. Court of Appeals for the Ninth Circuit considered whether Congress’s Commerce Clause authority would allow them to criminalize the possession of body armor by convicted felons.⁶¹ The Ninth Circuit held that the law in question did not exceed Congress’s Commerce Clause authority, and further held that questions of Commerce Clause application should be answered using case-specific analysis, avoiding “bald assertions.”⁶²

Clarifying the practice of fact-specific analysis, in *National Association of Home Builders v. Babbitt* (“*NAHB*”), the U.S. Court of Appeals for the District of Columbia Circuit held that Commerce Clause analysis should consider available scientific evidence.⁶³ In *NAHB*, the D.C. Circuit considered whether Congress’s Commerce Clause authority allowed the Endangered Species Act to prohibit the taking of an endangered species of fly.⁶⁴ The court concluded that prohibiting the taking of the endangered fly was an appropriate exercise of Commerce Clause power vis-à-vis the Endangered Species Act.⁶⁵ In its decision, the court further stated that it relied on scientific evidence to establish the fly’s importance to commercial actors.⁶⁶

Courts have also expanded the scope of the *Lopez* regulatory categories, in relevant part, channels of interstate commerce.⁶⁷ In *United States v.*

⁵⁸ *Id.* at 551–52, 558–59; see *United States v. Morrison*, 529 U.S. 598, 612 (2000) (holding that Congress’s power to regulate activities that substantially affect interstate commerce is limited to activities that are economic in nature).

⁵⁹ See *Lopez*, 514 U.S. at 558–59; *United States v. Alderman*, 565 F.3d 641, 658 (9th Cir. 2009); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1054 (D.C. Cir. 1997).

⁶⁰ See *Alderman*, 565 F.3d at 658; *Nat’l Ass’n of Home Builders*, 130 F.3d at 1054 (stating that a question of Commerce Clause jurisprudence should be resolved with any available fact-specific scientific evidence relevant to the determination of whether or not an action would have a substantial effect on interstate commerce).

⁶¹ See *Alderman*, 565 F.3d at 644–45.

⁶² See *id.* at 658.

⁶³ See *Nat’l Ass’n of Home Builders*, 130 F.3d at 1043.

⁶⁴ See *id.* at 1054.

⁶⁵ *Id.*

⁶⁶ See *id.*

⁶⁷ *United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003); see *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

Deaton, the U.S. Court of Appeals for the Fourth Circuit considered whether Congress's Commerce Clause powers allowed it to regulate the flow of polluted water from privately owned wetlands to an adjacent roadside ditch and into a navigable river.⁶⁸ The Fourth Circuit held that the regulatory action was indeed within Congress's power, and further extrapolated that Congress's authority to regulate channels of interstate commerce extended to the channel's use or misuse.⁶⁹

Additionally, in *United States v. Royal Rock Co-op*, the Supreme Court considered whether the federal government could use the Commerce Clause to compel a New York milk producing cooperative association to comply with an order by the Secretary of Agriculture regarding the marketing and pricing of milk.⁷⁰ The Court held that by not complying with the order, the cooperative was affecting the farmers' purchasing power, destroying the value of agricultural assets, and interfering with channels of interstate commerce.⁷¹ According to the Court, in addition to regulating channels of interstate commerce themselves, the Commerce Clause also authorizes Congress to regulate activities that interfere with those channels.⁷²

D. The Scope of "Waters of the United States"

While the CWA regulates "navigable waters of the United States," the statute defines "navigable waters" as "the waters of the United States including territorial seas," a definition that applies to all provisions of the Act.⁷³ The lack of clarity of the statutory definition of "navigable waters" has provoked considerable litigation, including three significant Supreme Court decisions.⁷⁴ Consideration of the CWA's legislative history supports the contention that "waters of the United States" was meant to cover more than waters of navigable size and character.⁷⁵

⁶⁸ See *Deaton*, 332 F.3d at 701–02.

⁶⁹ See *id.* at 706–07.

⁷⁰ *United States v. Royal Rock Co-op*, 307 U.S. 533, 539–41 (1939).

⁷¹ See *id.* at 541–45.

⁷² See *id.* at 544.

⁷³ 33 U.S.C. § 1362(7) (2012); Donna M. Downing, *Scope of "The Waters of the United States" Protected by the Clean Water Act*, in *THE CLEAN WATER ACT HANDBOOK* 11, 12 (Mark A. Ryan ed., 2011).

⁷⁴ See *Rapanos v. United States*, 547 U.S. 715, 763 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) (noting that Congress intended the CWA to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985); Downing, *supra* note 73, at 11–18 (discussing important cases that outlay the historical statutory jurisdiction of the CWA).

⁷⁵ See Downing, *supra* note 73, at 12.

The 1972 amendments that created the CWA were a direct response to serious degradation of America's waters.⁷⁶ Moreover, the stated purpose of the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁷⁷ Congress was in fact hesitant to define the term "navigable waters," for fear that the term would be interpreted narrowly, and the CWA would be rendered ineffectual as the prior Rivers and Harbors Act had been.⁷⁸ The House Report stated:

One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends 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.⁷⁹

The Senate Public Works Committee expressed a similar sentiment, stating that the CWA requires a broad geographic scope due to water's natural ecological connectedness, finding that "water moves in hydrologic circles, and it is essential that discharge of pollutants be controlled at the source."⁸⁰ EPA and the Corps are the administrative agencies charged with enforcing the CWA.⁸¹ Following the 1972 amendments, both agencies worked to define "waters of the United States" more accurately by providing specific details.⁸² The old rule 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: (i) Which are or could be used by interstate or foreign travelers for recreational or other

⁷⁶ See *id.* at 11.

⁷⁷ 33 U.S.C. § 1251(a); see Downing, *supra* note 73, at 11.

⁷⁸ Downing, *supra* note 73, at 12; see GROSS & STELCEN, *supra* note 13, at 6 (explaining that a rapid increase in industrial waste necessitated more stringent clean water legislation).

⁷⁹ See H.R. REP. NO. 92-911, at 131 (1972); Downing, *supra* note 73, at 12.

⁸⁰ See S. REP. NO. 92-414, at 77 (1977); Downing, *supra* note 73, at 12.

⁸¹ *Clean Water Act—An Overview*, NAT'L AGRIC. L. CTR., <http://nationalaglawcenter.org/overview/cw/> [<http://perma.cc/KG9N-HVFX>].

⁸² Downing, *supra* note 73, at 12.

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 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 (a)(1) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.⁸³

This definition established by EPA and the Corps is clearly quite broad and drew concern regarding what was seen as expanded federal jurisdiction over potentially any body of water.⁸⁴ To assuage some of these concerns, the agencies generally do not consider certain types of water-bodies to be “waters of the United States,” including drainage and irrigation ditches, artificially irrigated areas, man-made lakes and ponds, artificial reflecting and swimming pools, and water-filled depressions.⁸⁵ The agencies stated that they would reserve the right on a case-by-case basis, however, to determine if such a water falls within their jurisdiction under the CWA.⁸⁶

E. Judicial Determinations of the Clean Water Act’s Jurisdictional Limits

It is well settled that navigable-in-fact waters are under the jurisdiction of the CWA.⁸⁷ The Supreme Court has spent considerable time contemplating whether non-navigable waters fall under the CWA jurisdiction, as well.⁸⁸ While the Court has held that federal agencies may interpret the CWA broadly, often non-navigable waters must have a substantial connection to a navigable water, a requirement that can be satisfied by a hydrologic connection between a non-navigable water and a navigable one.⁸⁹

In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court considered a challenge to the scope of the definition of “waters of the United States.”⁹⁰ In *Riverside Bayview Homes, Inc.*, the Corps sued to enjoin a

⁸³ See 33 C.F.R. § 328.3 (2015).

⁸⁴ See Downing, *supra* note 73, at 13 (citing concerns about the jurisdictional status of temporary pooling areas such as construction excavation sites).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Theodore L. Garrett, *Overview of the Clean Water Act*, in THE CLEAN WATER ACT HANDBOOK, *supra* note 73, at 7.

⁸⁸ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 763 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 162 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 & n.9 (1985).

⁸⁹ See *Rapanos*, 547 U.S. at 742; *Riverside Bayview Homes, Inc.*, 474 U.S. at 139 n.9.

⁹⁰ *Riverside Bayview Homes, Inc.*, 474 U.S. at 123.

property owner from filling wetlands without the Corps's authorization.⁹¹ In a unanimous opinion, the Court held that wetlands adjacent to navigable waters are so interconnected with those waters that they must be included in the regulatory definition of "waters of the United States."⁹² The Court noted that when faced with a challenge to define the scope of Congress's regulatory authority, it should look to the relevant legislative history for guidance.⁹³

The Court stated that the overall objective of the CWA is to restore the integrity and viability of the nation's waters, and that in keeping with that objective, Congress needed broad-reaching jurisdiction to accomplish its clean-water goals.⁹⁴ Specifically, the Court held that policy makers cannot draw "artificial lines" to regulate water-polluting activities because "water moves in hydrologic cycles," which causes waters traditionally thought of as non-jurisdictional to affect conventionally jurisdictional water quality.⁹⁵

Although the Act defines its authority as extending over "navigable waters," the definition of "waters of the United States" clearly demonstrates that a water need not necessarily be navigable-in-fact to be regulated.⁹⁶ The Court held that the Corps has authority to interpret the CWA broadly, and the agency's decision that adjacent wetlands are inseparably bound to "waters of the United States" was not unreasonable.⁹⁷

Additionally, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Supreme Court addressed the question of isolated ponds that had been created at the bottom of a proposed solid waste bale-fill site in Cook County, Illinois.⁹⁸ The Corps argued that while the ponds in question were isolated, they could be regulated by the CWA under the Commerce Clause because they provided a habitat for migratory birds that crossed state lines.⁹⁹ The Corps argued that because the birds cross state lines, they affect interstate commerce and thus the ponds they use as habitats can be regulated under the Commerce Clause.¹⁰⁰

⁹¹ *See id.*

⁹² *Id.* at 139.

⁹³ *Id.* at 132.

⁹⁴ *Id.* at 133.

⁹⁵ *Id.* at 133–34.

⁹⁶ *See id.* at 123–24.

⁹⁷ *See id.* at 139.

⁹⁸ 531 U.S. 159, 162 (2001).

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 164–65; *see also* TIMOTHY BISHOP ET AL., MAYER, BROWN & PLATT, ONE FOR THE BIRDS: THE CORPS OF ENGINEERS' "MIGRATORY BIRD RULE" 1–2 (n.d.), <http://www.mayerbrown.com/files/Publication/feb527-f5eb-4dfd-852e-1d23ea30da63/Presentation/PublicationAttachment/1a8720a1-8405-4c2f-b4cd-74d226c899e2/migrabirdrule.pdf> [<https://perma.cc/476J-2NSE>] (commenting on the Corps's Commerce Clause argument in *Solid Waste Agency of Northern Cook County*).

The U.S. Court of Appeals for the Seventh Circuit had held that the Corps properly exercised its authority under the Commerce Clause by denying a permit to fill in seasonal ponds at the base of an abandoned gravel pit that was to be converted into a solid waste disposal site.¹⁰¹ In an apparent rejection of the so-called “migratory bird rule,” however, the Supreme Court reversed the Seventh Circuit, holding that the Corps had overstepped its authority.¹⁰² The Court reasoned that while the CWA implicitly allows a broad construction of the term “navigable waters,” “it is one thing to give the word [navigable] limited effect, and quite another to give it no effect whatever.”¹⁰³ The Court held that because the isolated seasonal ponds did not have a significant nexus to “navigable waters,” their regulation was outside the scope of the CWA.¹⁰⁴

In *Rapanos v. United States*, the petitioner had filled in isolated wetlands on his private property to construct a shopping mall.¹⁰⁵ The wetlands were connected to Saginaw Bay and Lake Huron through roughly eleven miles of man-made ditches and natural streams.¹⁰⁶ In a split decision, the Supreme Court held that the wetlands did not qualify as waters of the United States.¹⁰⁷ Justice Antonin Scalia wrote that “waters of the United States” extends beyond traditional navigable waters to include “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.’”¹⁰⁸ Justice Scalia further stated that the definition of “relatively permanent” does not necessarily exclude water bodies that might occasionally dry up.¹⁰⁹

With regard to the wetlands, specifically, the Court found that only wetlands with “a continuous surface connection to bodies . . . considered ‘waters of the United States’ in their own right” are covered by the CWA.¹¹⁰ Therefore, for a wetland to be covered, it must be “relatively permanent,” and must have a “continuous surface connection” to traditional waters of the United States, essentially “making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”¹¹¹

¹⁰¹ *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 162.

¹⁰² *See id.* at 196–97.

¹⁰³ *See id.* at 172.

¹⁰⁴ *See id.* at 167–68.

¹⁰⁵ 547 U.S. 715, 763 (2006).

¹⁰⁶ *See id.* at 720, 729.

¹⁰⁷ *See id.* at 786–88.

¹⁰⁸ *See id.* at 732–33, 739.

¹⁰⁹ *See id.* at 732–33.

¹¹⁰ *Id.* at 742.

¹¹¹ *Id.*

Justice Anthony Kennedy, in a concurring opinion, wrote that the *Rapanos* case turned on the interpretation of the phrase “significant nexus.”¹¹² Justice Kennedy opined that for a non-navigable water to be jurisdictional under the Commerce Clause, a significant nexus must be present to connect it to a navigable water.¹¹³ The presence of a significant nexus, he wrote, must be determined on a case-by-case basis, and hinges on whether a non-navigable water “significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”¹¹⁴ This interpretation of how to judge jurisdictional boundaries in the Commerce Clause context of the CWA broke from the precedent laid out in *Riverside Bayview Homes, Inc.* and *Solid Waste Agency of Northern Cook County*, neither of which emphasized a case-by-case “significant nexus” determination.¹¹⁵

F. The Newly-Passed WOTUS Rule

On April 21, 2014, EPA and the Corps proposed the new Rule, entitled “Definition of Waters of the U.S. Under the Clean Water Act,” which addressed the types of water-bodies that fall within the agencies’ jurisdiction under the CWA.¹¹⁶ The agencies published the Rule on June 29, 2015, and it officially took effect on August 28, 2015.¹¹⁷ In relevant part, the new Rule redefines “waters of the United States.”¹¹⁸ A possible reflection of Justice Kennedy’s call for a case-by-case analysis, and an evidence-based significant nexus determination as detailed in his *Rapanos* concurrence, the new definition relies heavily on a comprehensive EPA report entitled “Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.”¹¹⁹ The report synthesizes and focuses over 1000 scientific reports that demonstrate how tributaries, wetlands, and

¹¹² See *id.* at 759 (Kennedy, J., concurring).

¹¹³ *Id.* at 782.

¹¹⁴ See *id.* at 780–82.

¹¹⁵ See *id.* at 753–54 (plurality opinion).

¹¹⁶ Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).

¹¹⁷ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,056, 37,073, 37,104 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.); *The Final Clean Water Rule*, *supra* note 1.

¹¹⁸ See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,073.

¹¹⁹ See *id.* at 37,056 (noting the proposed rule’s reliance on case-by-case scientific analysis to determine a relational nexus between waters traditionally regarded as jurisdictional and non-jurisdictional); ENVTL. PROT. AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE, at ES-1- to -15 (2015), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523020 [https://perma.cc/4JJJ-CRCG].

other waters are interconnected, and related biologically, chemically, and physically.¹²⁰

The draft report concluded that streams, wetlands, and open waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers have a significant effect on downstream waters.¹²¹ Even open waters in landscape settings without bidirectional hydrologic mixing with downstream waters, such as prairie potholes, vernal pools, and playa lakes can appreciably effect downstream waters if connected through surface or shallow-subsurface water.¹²² These connections occur on such a wide and unpredictable gradient that they must be analyzed on a case-by-case basis.¹²³ The new Rule defines “waters of the United States” as:

(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; [2] All interstate waters, including interstate wetlands; [3] The territorial seas; [4] All impoundments of waters otherwise identified as waters of the United States under this section; [5] All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section; [6] 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; [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),

¹²⁰ ENVTL. PROT. AGENCY, *supra* note 119, at ES-1 to -15; see NAT’L ASS’N OF CTYS., COUNTY ACTION NEEDED: NEW “WATERS OF THE UNITED STATES” DEFINITION RELEASED 1 (2014), www.naco.org/sites/default/files/Waters-of-the-US-County-Analysis.pdf [<https://perma.cc/4UMB-U362>].

¹²¹ ENVTL. PROT. AGENCY, *supra* note 119, at ES-2 to -3.

¹²² See ENVTL. PROT. AGENCY, *supra* note 119, at ES-3 to -4; *Playa Lakes*, ENVTL. PROT. AGENCY, <http://water.epa.gov/type/wetlands/playa.cfm> [<https://perma.cc/CF86-XNEK>] (defining “playa lakes” as “round hollows in the ground in the Southern High Plains of the United States”).

¹²³ See ENVTL. PROT. AGENCY, *supra* note 119, at ES-3 to -4.

they are an adjacent water and no case-specific significant nexus analysis is required.¹²⁴

The WOTUS Rule has been criticized—primarily by small business owners, property owners, and farmers—for expanding the federal government’s regulatory reach to cover bodies of water not originally contemplated by the CWA, and not permitted under the Constitution.¹²⁵ Critics argue that the new definition of “waters of the United States” will give EPA and the Corps jurisdiction over “puddles, ponds, ditches, ephemerals (land that collects water during a heavy rain but is dry most of the time),” and land adjacent to those waters.¹²⁶

Opponents of the Rule believe that it will give the federal agencies control over land-use decisions and farming or business practices near water.¹²⁷ It has also been alleged that the new Rule would expose citizens to civil lawsuits pushing for ditches or similarly temporal water-bodies to be similarly regulated.¹²⁸ The WOTUS Rule has prompted arguments from business and agricultural organizations, such as the National Pork Producers Council, who contend that the Rule will expand CWA permitting jurisdiction over “millions of miles of streams and adjacent lands” and activities such as “applying fertilizers and pesticides and (potentially) planting crops.”¹²⁹

Lawmakers have also voiced objections, characterizing the Rule as a “land-grab” by federal agencies against private property owners.¹³⁰ More than two hundred and sixty lawmakers on both sides of the aisle in the House and Senate have objected to the Rule.¹³¹ Two hundred and thirty-one members of the House sent a letter to both EPA and the Corps requesting that the Rule be withdrawn.¹³² In June 2014 Republican lawmakers intro-

¹²⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,104.

¹²⁵ See Ron Arnold, *Proposed Water Rule Could Put ‘Property Rights of Every American Entirely at the Mercy’ of EPA*, DAILY SIGNAL (Nov. 12, 2014), <http://dailysignal.com/2014/11/12/proposed-water-rule-put-property-rights-every-american-entirely-mercy-epa/> [https://perma.cc/BG8T-8SPD]; *NPCC Wants ‘Waters of the U.S.’ Rule Withdrawn*, NAT’L PORK PRODUCERS COUNCIL (Nov. 17 2014), <http://www.nppc.org/2014/11/nppc-wants-waters-of-the-u-s-rule-withdrawn/> [https://perma.cc/3EP9-CMQJ].

¹²⁶ *It’s Time to Ditch the Rule*, DITCH THE RULE, <http://ditchtherule.fb.org/> [https://perma.cc/N57V-DUL7]; *NPCC Wants ‘Waters of the U.S.’ Rule Withdrawn*, *supra* note 125.

¹²⁷ See *It’s Time to Ditch the Rule*, *supra* note 126.

¹²⁸ See *National Pork Producers Council: Existing Rules Protect Water Quality*, GROWING PA. (Mar. 30, 2015), <http://growingpennsylvania.com/news/2015/03/national-pork-producers-council-existing-rules-protect-water-quality/> [https://perma.cc/F227-69WD].

¹²⁹ *NPCC Wants ‘Waters of the U.S.’ Rule Withdrawn*, *supra* note 125.

¹³⁰ Timothy Cama, *Fears of EPA ‘Land Grab’ Create Groundswell Against Water Rule*, THEHILL.COM (June 21, 2014, 1:01 PM), <http://thehill.com/policy/energy-environment/210130-fears-of-epa-land-grab-create-groundswell-against-water-rule> [https://perma.cc/Q5QX-MKQV].

¹³¹ *Id.*

¹³² *Id.*

duced a bill signed by thirty senators that would stop EPA and the Corps from proceeding with the Rule.¹³³ Moreover, on June 18, 2014, the House Appropriations Committee passed a bill to stop the Corps from proceeding with the Rule.¹³⁴

Business owners have also voiced their concerns: the Small Business Association Office of Advocacy (“SBA”) requested that EPA and the Corps scuttle the new Rule, citing that the agencies failed to consider the impacts on small businesses.¹³⁵ Specifically, the SBA cited the fact that the Rule will directly impact the permitting process, which could encumber business.¹³⁶ For instance, the SBA has said that because utility power lines frequently cross areas such as wetlands and floodplains, small utility companies would have to apply for numerous permits to “construct and maintain roads that provide access to the utility grid.”¹³⁷ The SBA also cited the estimate that the new Rule would increase permitting costs by as much as \$52 million annually, and mitigation costs by as much as \$113.5 million.¹³⁸

While the WOTUS Rule has certainly amassed its share of detractors, EPA contends that most of the criticism is unfounded.¹³⁹ EPA has stated that the Rule merely reduces confusion about clean water protection by clarifying the types of waters covered under the CWA to help states better comply with the Act’s provisions.¹⁴⁰ EPA further states that the Rule does not cover any new types of water, does not extend coverage of the CWA, does not regulate groundwater, and does not expand the jurisdiction of EPA and the Corps over ditches as claimed.¹⁴¹

II. ELEMENTS OF THE PROPOSED RULE PROVOKE COMMERCE CLAUSE CHALLENGES

Since 1972, the Clean Water Act’s (“CWA”) declaration of purpose has been to regulate and eventually eliminate the discharge of pollutants into navigable waters.¹⁴² Under the CWA, the term “navigable waters” means

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ Sean Hackbarth, *Small Business Administration Advocate Tells EPA to Ditch Water Rule*, U.S. CHAMBER OF COMMERCE (Oct. 2, 2014, 12:15 PM), <https://www.uschamber.com/blog/small-business-administration-advocate-tells-epa-ditch-water-rule> [<https://perma.cc/Q2DQ-BJPJ>].

¹³⁶ *See id.*

¹³⁷ *See* Gary Baise, *SBA to EPA: Ditch the Waters of the U.S. Proposal*, FARM FUTURES (Dec. 10, 2014), <http://farmfutures.com/blogs-sba-epa-ditch-waters-proposal-9257> [<https://perma.cc/YP9D-QQ29>]; Hackbarth, *supra* note 135.

¹³⁸ Hackbarth, *supra* note 135.

¹³⁹ *See Clean Water Rule*, *supra* note 43 (noting EPA’s denial of common criticisms of the rule).

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *See* 33 U.S.C. § 1251(a)(1), (6) (2012); GROSS & STELCEN, *supra* note 13, at 7.

“waters of the United States.”¹⁴³ The term “waters of the United States” is quite broad, and has traditionally included waters used for interstate and foreign commerce, and also those waters with a significant nexus to navigable interstate waters with a traditional commercial use.¹⁴⁴

A. Differences Between the Current Rule and the Newly Passed WOTUS Rule

According to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the “Corps”), the new waters of the United States rule (“WOTUS Rule” or the “Rule”) has revised the current definition of “waters of the United States” to be more consistent with recent legal rulings, and to align with the latest science regarding “the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters.”¹⁴⁵ Critics of the Rule argue that it grants the federal government limitless authority to regulate any water in the United States to exceed the CWA’s statutory limits, violate principles of federalism, and breach the Commerce Clause of the U.S. Constitution.¹⁴⁶

The new Rule’s definition of “waters of the United States” contains several significant differences from the former definition.¹⁴⁷ Three changes in particular have attracted considerable criticism and elicited attacks to the WOTUS Rule as violations of the Commerce Clause: (1) the definition of “other waters,” (2) the scope of the term “adjacent,” and (3) the construction of the term “tributaries.”¹⁴⁸

1. The Definition of “Other Waters”

The old rule stated that “waters of the United States” includes:

“[A]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, ‘wetlands,’ sloughs, prairie potholes, wet meadows, playa lakes, or natural

¹⁴³ See 33 U.S.C. § 1362(7).

¹⁴⁴ J.W. LOONEY, NAT’L AGRIC. L. CTR., HOW THE CONCEPT OF NAVIGABILITY MAY DETERMINE THE RIGHTS OF LANDOWNERS ALONG STREAMS 5 (2002), http://nationalaglawcenter.org/wp-content/uploads/assets/articles/looney_streams.pdf [perma.cc/3GBV-7L5Q].

¹⁴⁵ CLAUDIA COPELAND, CONG. RESEARCH SERV., EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 3 (2016), <https://www.fas.org/sgp/crs/misc/R43455.pdf> [https://perma.cc/9X56-K7S5].

¹⁴⁶ See KLA Comment, *supra* note 3, at 4, 12; NAHB Comment, *supra* note 3, at 22, 36; NCBA Comment, *supra* note 3, at 5 n.11.

¹⁴⁷ See COPELAND, *supra* note 145, at 15, CRS-16 to -20 (providing table summarizing differences between the new and current rules).

¹⁴⁸ See *id.*

ponds the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (1) [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes; or (2) [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) [w]hich are used by or could be used for industrial purposes by industries in interstate commerce.”¹⁴⁹

The new Rule alters this definition by eliminating the non-exclusive list of “other waters” and instead proffers that “other waters” be deemed subject to regulation on a “case-specific” basis depending, in critical part, on whether they have a “significant nexus” to traditionally jurisdictional waters (navigable waters, interstate waters (including wetlands), and the territorial seas).¹⁵⁰ The new Rule eliminates the prior rule’s non-exclusive list of “other waters,” and replaces it with a case-by-case “significant nexus” test.¹⁵¹ A significant nexus could amount to a hydrologic connection, or could be the result of some other function, such as sediment trapping.¹⁵²

The final Rule, however, does limit to two areas the types of “other waters” that can be subject to a case-specific, significant nexus analysis.¹⁵³ The first new category includes five subcategories of waters: prairie pot-holes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands.¹⁵⁴ The second category includes “waters located in whole or in part within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and within 4,000 feet of the high tide line or [ordinary high water mark] of a jurisdictional water.”¹⁵⁵ While the new construction of “other waters” expands on the old rule by incorporating a case-specific significant nexus analysis, it also limits the types of “other waters” that can be deemed jurisdictional to two specific water-body categories.¹⁵⁶

¹⁴⁹ 33 C.F.R. § 228.3 (2015).

¹⁵⁰ See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,075 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.); COPELAND, *supra* note 145, at CRS-16 to -17.

¹⁵¹ See COPELAND, *supra* note 145, at CRS-16 to -17.

¹⁵² COPELAND, *supra* note 145, at 6; see *Sediment Traps*, WEAVER EXPRESS, <http://www.weaverexpress.com/index.php/project-solution/sediment-traps> [<https://perma.cc/CN4C-2VWM>] (defining sediment traps as “small impoundments that allow sediment to settle prior to discharge into streams, lakes, drainage systems and surrounding areas”).

¹⁵³ COPELAND, *supra* note 145, at 7–8.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 8.

¹⁵⁶ *Id.* at 7–8.

2. The Scope of the Term “Adjacent”

The old rule’s regulatory language provided that “waters of the United States” also includes “[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.”¹⁵⁷ The new Rule dramatically expands the types of water-bodies eligible to be considered waters of the United States by virtue of their adjacency to waters used in interstate or foreign commerce currently, previously, or possibly in the future.¹⁵⁸

The new Rule describes adjacent waters as “bordering, contiguous, or neighboring.”¹⁵⁹ A water will be considered “neighboring” if it is: (1) located within 100 feet of the ordinary high water mark (“OHWM”) of a jurisdictional water; (2) located in whole or in part within the 100-year floodplain and is not more than 1500 feet from the OHWM of a jurisdictional water; or (3) located in whole or in part within 1500 feet of the high tide line of a jurisdictional water and within 1500 feet of the OHWM of the Great Lakes.¹⁶⁰ Even if only a portion of a water is located within the defined boundaries, the entire water body will nonetheless be considered “neighboring.”¹⁶¹ Additional adjacent waters—those that lie within the 100-year floodplain and are located more than 1500 feet and up to 4000 feet from the OHWM—will be considered jurisdictional if they satisfy a significant nexus test.¹⁶²

Indeed, under the new Rule, adjacent waters that are bordering, contiguous, or within specified boundaries to a jurisdictional water are considered jurisdictional.¹⁶³ If the adjacent water is located within the 100-year floodplain, but between 1500 and 4000 feet from the OHWM, it will be considered jurisdictional if it satisfies the significant nexus test.¹⁶⁴ The agencies have determined that a significant nexus can be established by a hydrologic connection between waters, but one is not necessary.¹⁶⁵ In fact, alternative functions that might establish a significant nexus include pollutant trapping and retention of flood waters.¹⁶⁶

¹⁵⁷ See *id.* at CRS-20.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* at CRS-23.

¹⁶⁰ *Id.* at CRS-24 to -25.

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.* at CRS-23 to -24.

¹⁶⁴ See *id.* at CRS-25.

¹⁶⁵ See *id.* at 6.

¹⁶⁶ See *id.*

Whereas the old regulatory language limited adjacent waters to wetlands, the new Rule unambiguously expands the types of water eligible to be considered “adjacent.”¹⁶⁷

3. The Definition of “Tributaries”

The old rule limited the regulation of tributaries to “tributaries of waters identified in paragraphs (a)(1) through (4) of this section.”¹⁶⁸ Thus, it limited regulation to tributaries of traditionally jurisdictional waters.¹⁶⁹ The term “tributary” was undefined in the old rule.¹⁷⁰ The new Rule defines tributary to mean “a water that contributes flow, either directly or through another water . . . to a [traditionally navigable] water . . . that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.”¹⁷¹ Indeed, the new Rule explicitly clarifies the meaning of tributary under the CWA.¹⁷²

The reconstruction of “other waters,” the broadening of the term “adjacent,” and the new definition of “tributaries” have indeed provoked a significant outcry from Rule opponents alleging Commerce Clause violations.¹⁷³

B. Commerce Clause Based Challenges

On April 21, 2014, a “182-day public comment period opened” for the proposed WOTUS Rule, and on October 20, due to an unusually high number of submissions, EPA extended the period for an additional twenty-five days.¹⁷⁴ The agencies received 20,238 comments between April 21 and November 14, 2014.¹⁷⁵ Many of the comments came in the form of objections by vocal groups of the proposed Rule’s detractors, the majority of whom

¹⁶⁷ *Id.* at 4, CRS-19. Compare 33 C.F.R. § 328.3 (2015) (limiting adjacent waters to wetlands), with Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,080–82 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.) (stating that many different types of waters can henceforth be considered adjacent under the rule).

¹⁶⁸ COPELAND, *supra* note 145, at CRS-19.

¹⁶⁹ *Id.* at CRS-16 to -19 (defining jurisdictional waters of the United States).

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at CRS-25.

¹⁷² *See id.*

¹⁷³ *See id.* at 15, CRS-16, -18 to -20, -25 to -26; KLA Comment, *supra* note 3, at 4; NAHB Comment, *supra* note 3, at 22; NCBA Comment, *supra* note 3, at 5.

¹⁷⁴ Extension of Comment Period for the Definition of “Waters of the United States” Under the Clean Water Act Proposed Rule and Notice of Availability, 79 Fed. Reg. 61,590 (proposed Oct. 14, 2014); *Proposed WOTUS Rule Now Open for Public Comment*, STORMWATER REPORT (May 15, 2014), <http://stormwater.wef.org/2014/05/proposed-wotus-rule-now-open-public-comment/> [<https://perma.cc/3EQC-Q8JA>].

¹⁷⁵ *See* Extension of Comment Period for the Definition of “Waters of the United States” Under the Clean Water Act Proposed Rule and Notice of Availability, 79 Fed. Reg. at 61,590–91.

represent the nation's agricultural and industrial interests.¹⁷⁶ One of the most common objections levied at the WOTUS Rule, and the focus of this Note, is the criticism that it violates the Commerce Clause of the U.S. Constitution.¹⁷⁷

1. The New Construction of "Other Waters"

On November 14, 2014, The National Association of Home Builders ("NAHB") submitted its comments on the new WOTUS Rule.¹⁷⁸ In its comments, the NAHB argues that the federal agencies' jurisdiction is bound by Congress's authority to regulate "channels" of commerce, and does not extend to activities that "substantially effect" interstate commerce.¹⁷⁹ Furthermore, the NAHB contends that the new Rule's regulation of "other waters" on a case-specific basis using a "significant nexus" test violates the Commerce Clause.¹⁸⁰

Specifically, the NAHB argues that allowing the Corps and EPA to use scientific evidence to make case-by-case regulatory designations of "other waters" would give the federal agencies enough latitude to permit them to regulate the entire country as "waters of the United States."¹⁸¹ The NAHB characterizes the "other waters" provision as a "catch-all," allowing the agencies to "expand[] the potential scope of the CWA to any waters *in* the United States."¹⁸²

The NAHB objections rely principally on *Rapanos v. United States*.¹⁸³ The NAHB argues that the *Rapanos* decision limits regulation of "marginal waters or wetlands" to those that function as "channels" of interstate commerce, and does not authorize regulation of those waters that may merely have a "substantial effect" on interstate commerce.¹⁸⁴ In *Rapanos*, the United States Supreme Court stated in a plurality opinion: "On its only plausible

¹⁷⁶ See Stephen Bruckner, *Choppy Water: An Update to the Turbulent Environment Between the EPA and Agricultural Opponents of the WOTUS Rule*, AM. COLL. OF ENVTL. LAW. (Aug. 11, 2014), <http://acoel.org/post/2014/08/11/Choppy-Water-An-Update-to-the-Turbulent-Environment-Between-the-EPA-and-Agricultural-Opponents-of-the-WOTUS-Rule.aspx> [<https://perma.cc/VYG5-KUT2>]; *Deadline for Comments on Feds Water Rule Extended Again*, ASSOC. GEN. CONTRACTORS OF AM. (Nov. 3, 2014), <https://www.agc.org/news/2014/11/03/deadline-comments-feds-water-rule-extended-again> [<https://perma.cc/3Q7Z-FHCE>].

¹⁷⁷ See KLA Comment, *supra* note 3, at 4; NAHB Comment, *supra* note 3, at 22; NCBA Comment, *supra* note 3, at 5.

¹⁷⁸ NAHB Comment, *supra* note 3, at 1.

¹⁷⁹ See *id.* at 23.

¹⁸⁰ See *id.* at 36.

¹⁸¹ See *id.* at 92–95, 142–43.

¹⁸² See *id.*

¹⁸³ See 547 U.S. 715, 759 (2006) (Kennedy, J., concurring); NAHB Comment, *supra* note 3, at 94–95.

¹⁸⁴ NAHB Comment, *supra* note 3, at 22–23.

interpretation, the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water”¹⁸⁵ The NAHB comments also state that this interpretation of the CWA is affirmed by the Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, which held that permitting “respondents to claim federal jurisdiction over ponds and mudflats” because they may have substantial effects on interstate commerce “would result in a significant impingement of the States’ traditional and primary power over land and water use.”¹⁸⁶

2. The Broadening of the Term “Adjacency”

On November 13, 2015, the Kansas Livestock Association (“KLA”) submitted comments in opposition to the new WOTUS Rule.¹⁸⁷ The organization argued that the new definition of “adjacent” violates the Commerce Clause because it “captures every open water in a floodplain and riparian area, despite whether they are isolated or have a significant connection to downstream waters”¹⁸⁸ The KLA argued that the new WOTUS Rule expands the definition of the word “adjacent” into a “virtually limitless” category.¹⁸⁹

The organization juxtaposes the new Rule with the case *United States v. Riverside Bayview Homes, Inc.*¹⁹⁰ In that case, the Court held that wetlands that abut navigable-in-fact waters can be regulated under the CWA because they are “inseparably bound up” with those waters.¹⁹¹ Isolated waters, however, lack a significant nexus to any navigable-in-fact water, and are therefore not subject to CWA regulation.¹⁹² The KLA contends that the definition of “adjacent” has been expanded to include “any open water within a floodplain or riparian area,” and that the scope of those terms is left to the “‘best professional judgment’ of the regulator,” a provision that the KLA says will make the category of adjacent waters virtually uncapped.¹⁹³

¹⁸⁵ See *Rapanos*, 547 U.S. at 739.

¹⁸⁶ See 531 U.S. 159, 174 (2001); NAHB Comment, *supra* note 3, at 24–28.

¹⁸⁷ KLA Comment, *supra* note 3, at 1.

¹⁸⁸ *Id.* at 11–12.

¹⁸⁹ *Id.* at 12.

¹⁹⁰ See 474 U.S. 121, 134 (1985); KLA Comment, *supra* note 3, at 12.

¹⁹¹ *Riverside Bayview Homes, Inc.*, 474 U.S. at 134.

¹⁹² See *Rapanos*, 547 U.S. at 741–42 (citing *Riverside Bayview Homes, Inc.*’s holding that waters “inseparably bound” to navigable waters have a “significant nexus” and are therefore jurisdictional and contrasting those waters with those that are isolated).

¹⁹³ KLA Comment, *supra* note 3, at 12.

3. The New Definition of “Tributaries”

On October 28, 2014, the National Cattleman’s Beef Association (“NCBA”) filed its comments in response to the new WOTUS Rule.¹⁹⁴ In its comments, the organization argues that the new Rule’s expanded definition of “tributary” gives the agencies impermissibly sweeping regulatory power in violation of the Commerce Clause.¹⁹⁵ The NCBA argues that according to the decision in *Solid Waste Agency of Northern Cook County*, allowing the agencies to regulate contributing flow through any type of water source is a Commerce Clause violation.¹⁹⁶ In *Solid Waste Agency of Northern Cook County*, the Supreme Court held that isolated ponds entirely located within two Illinois counties could not be regulated under the CWA simply because they served as habitat for migratory birds travelling across state lines.¹⁹⁷

Petitioners in the *Solid Waste Agency of Northern Cook County* case argued that intrastate migratory bird habitats fell within the regulatory authority of the CWA because, under the Commerce Clause, Congress has the authority to regulate activities that significantly affect interstate commerce.¹⁹⁸ The Court found that the CWA extends to “navigable waters” or “waters of the United States,” and that interpreting the statute to extend to isolated water-body destinations for migratory birds impermissibly construes the statute by reading out the word “navigable” completely.¹⁹⁹

The NCBA argues that, similarly to the migratory bird rule in *Solid Waste Agency of Northern Cook County*, allowing EPA and the Corps to regulate “contributing flow” through any type of water to a traditional “waters of the United States” water-body is an illegal violation of Congress’s delegated Commerce Clause authority.²⁰⁰ The NCBA contends that, like the isolated ponds in *Solid Waste Agency of Northern Cook County*, tributaries of contributing flow through any type of water should not be subject to regulation because they read the term “navigable” out of the CWA.²⁰¹

¹⁹⁴ NCBA Comment, *supra* note 3, at 12.

¹⁹⁵ *See id.* at 6–12.

¹⁹⁶ 531 U.S. 159, 174 (2001); NCBA Comment, *supra* note 3, at 8–12.

¹⁹⁷ *See* 531 U.S. at 162.

¹⁹⁸ *Id.* at 165–66.

¹⁹⁹ *Id.* at 174.

²⁰⁰ *See* 531 U.S. at 173–74; NCBA Comment, *supra* note 3, at 12.

²⁰¹ *See* 531 U.S. at 173–74; NCBA Comment, *supra* note 3, at 12.

III: THE LEGALITY OF THE NEW RULE UNDER THE COMMERCE CLAUSE

A. Case-by-Case Regulatory Determinations Using the Latest Science Can Be Used to Find “Substantial Nexus” Connectivity to “Other Waters”

The new Waters of the United States rule (the “WOTUS Rule” or the “Rule”) authorizes the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the “Corps”) to regulate, on a case-specific basis, other waters (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 traditional navigable water, interstate water, or the territorial seas.²⁰² The Rule permits EPA and the Corps to use scientific evidence in case-specific determinations of whether other waters satisfy this “substantial nexus test.”²⁰³ The Rule has been challenged, by the National Association of Home Builders and others, for its implementation of case-specific regulatory determinations and the use of scientific analysis to determine whether a source of “other water” bears a substantial nexus to a navigable-in-fact water.²⁰⁴

In *United States v. Alderman*, the U.S. Court of Appeals for the Ninth Circuit considered whether a statute prohibiting a felon from purchasing, owning, or possessing body armor in interstate commerce exceeded Congress’s authority under the Commerce Clause.²⁰⁵ In the court’s analysis, it concluded that questions of Commerce Clause jurisprudence should be evaluated using case-specific analysis, and in fact, “bald assertions” of Commerce Clause application should be viewed with skepticism.²⁰⁶ Indeed, case-specific, individualized analysis is a legally permissible—in fact preferred—manner of evaluating Commerce Clause jurisdiction.²⁰⁷

Furthermore, the U.S. Court of Appeals for the District of Columbia Circuit has held that it is also appropriate to use scientific evidence in a Commerce Clause analysis.²⁰⁸ In *National Ass’n of Homebuilders v. Bab-bitt*, the D.C. Circuit considered whether the extinction of animals substantially affects interstate commerce.²⁰⁹ The court held that it was appropriate to consider scientific evidence, stating:

²⁰² Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,096 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

²⁰³ See *id.* at 37,057 (noting that scientific analysis is used to determine water connectivity to determine whether a “substantial nexus” exists).

²⁰⁴ See KLA Comment, *supra* note 3, at 14, 22; NAHB Comment, *supra* note 3, at 36; NCBA Comment, *supra* note 3, at 14, 21.

²⁰⁵ 565 F.3d 641, 642–43, 658 (9th Cir. 2009).

²⁰⁶ *Id.* at 658.

²⁰⁷ See *id.*

²⁰⁸ See 130 F.3d 1041, 1054 (D.C. Cir. 1997).

²⁰⁹ *Id.* at 1043.

Scientific evidence that is currently available provides sufficient support for Congress' conclusion that regulation of the 'taking' of endangered animals is within its Commerce Clause power because such takings, if permitted, would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource—biodiversity.²¹⁰

While the National Association of Home Builders (“NAHB”) contends that a scientific, case-by-case approach to designating waters as jurisdictional would untenably expand the agencies' regulatory authority by making the category of “waters of the United States” unlimited, there is ample case evidence to support the proposition that such an individualistic approach not only works, but is legally permissible under the Commerce Clause.²¹¹

B. Regulation of “Other Waters” with a “Substantial Nexus” to Navigable-in-Fact Waters Qualifies as Regulating a “Channel” of Interstate Commerce

The “case-specific” analysis to determine whether an “other water” has a significant nexus to a water that is navigable focuses on the degree to which the “other water” affects the chemical, physical, or biological integrity of the navigable-in-fact water.²¹² The WOTUS Rule has been challenged by opposition groups, including the NAHB, for impermissibly regulating under the Clean Water Act (“CWA”), activities that substantially affect interstate commerce, rather than “channels” of interstate commerce.²¹³ Indeed, the power of Congress to regulate activities that substantially affect interstate commerce is limited, as the NAHB suggests, to activities that are economic in nature.²¹⁴

In *United States v. Deaton*, the U.S. Court of Appeals for the Fourth Circuit considered whether the CWA could prohibit private property owners from discharging fill material into wetlands adjacent to traditional navigable waters.²¹⁵ The Fourth Circuit held that the Commerce Clause can be used to

²¹⁰ *Id.* at 1054.

²¹¹ See *Alderman*, 565 F.3d at 658; *Nat'l Ass'n of Home Builders*, 130 F.3d at 1054; NAHB Comment, *supra* note 3, at 142–43 (stating that using scientific reports to determine regulatory jurisdiction would “improperly assert[] that the scope of the CWA is essentially unlimited”).

²¹² See COPELAND, *supra* note 145, at CRS-27.

²¹³ See NAHB Comment, *supra* note 3, at 23 (“[F]ederal CWA jurisdiction cannot be justified by simply showing that an activity ‘affects interstate commerce’ . . .”).

²¹⁴ See *United States v. Morrison*, 529 U.S. 598, 612 (2000); *United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003) (explaining that while Congress's power to regulate activities that “substantially affect” interstate commerce must be economic in nature, no such requirement applies to its regulation of “channels” of interstate commerce).

²¹⁵ 332 F.3d at 701–02.

regulate not just channels of interstate commerce themselves, but also their use or misuse.²¹⁶ Additionally, in *United States v. Royal Rock Co-op*, the United States Supreme Court addressed the question of whether the Secretary of the U.S. Department of Agriculture had overstepped his Commerce Clause authority by issuing an order regulating the handling of milk in the New York metropolitan area.²¹⁷ The Court found that the Commerce Clause, in addition to regulating channels of interstate commerce themselves, also authorizes the regulation of activities that interfere with interstate commerce.²¹⁸

The regulatory determinations called for by the new Rule focus on the degree to which the “other water” affects the chemical, physical, or biological integrity of the navigable-in-fact water.²¹⁹ Therefore, it effectually focuses on several ways in which the “other water” could interfere with the way a navigable-in-fact water is used.²²⁰ Thus, the regulation prescribed in the new WOTUS Rule could reasonably be described as a controlling interference with, or the use or misuse of, a “channel” of interstate commerce.²²¹ The NAHB’s argument that “other water” regulation under the new Rule is an impermissible stretch of Commerce Clause power to regulate activities that “substantially affect interstate commerce” is unsound, because the regulation can be understood as preventing misuse and interference with navigable-in-fact “channels” of interstate commerce that might be “misused” through pollution, or otherwise chemically, physically, or biologically interfered with via flow connectivity.²²²

²¹⁶ *Id.* at 706.

²¹⁷ 307 U.S. 533, 540–41 (1939).

²¹⁸ *Id.* at 544.

²¹⁹ COPELAND, *supra* note 145, at CRS-27.

²²⁰ *See id.* (describing the significant nexus test); *id.* at CRS-26 (noting that a case-specific “significant nexus” analysis depends on the functions that the waters perform to affect the chemical, physical or biological integrity of traditionally in-fact navigable waters); *Various Water Pollution Facts*, CONSERVE ENERGY FUTURE, <http://www.conserve-energy-future.com/various-water-pollution-facts.php> [perma.cc/QRP8-J9J8] (stating pollution of navigable-in-fact waters is misuse of those waters).

²²¹ *See Royal Rock Co-op*, 307 U.S. at 544; *Deaton*, 332 F.3d at 706; *Various Water Pollution Facts*, *supra* note 220.

²²² *See Royal Rock Co-op*, 307 U.S. at 544 (holding that Congress’s allowance to regulate the “channels” of interstate commerce extends to regulating “interference” with those channels); *Deaton*, 332 F.3d at 706 (holding that Congress’s allowance to regulate the “channels” of interstate commerce extends to regulating “misuse” with those channels); *Various Water Pollution Facts*, *supra* note 220 (stating that water pollution is aptly characterized as the resources’ “misuse”).

C. Holding That Adjacent Waters Are Categorically Jurisdictional for Having a “Significant Nexus” to Navigable-in-Fact Waters Is a Permissible Formulation of “Adjacency” Under the Commerce Clause

The new WOTUS Rule considers “adjacent waters” to be categorically jurisdictional, and defines “adjacent” to mean “bordering, contiguous or neighboring.”²²³ A water-body that is bordering, or contiguous with a traditionally jurisdictional water, is itself jurisdictional by virtue of a physical, chemical, or biological hydrologic connection that occurs through actual contact.²²⁴ A water will also be categorically jurisdictional if it is considered neighboring, meaning that it is close enough in proximity to a traditional navigable water, interstate water, or the territorial seas.²²⁵

EPA and the Corps have emphasized that the best currently available science supports that waters within the proximity limits establishing adjacency “possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters.”²²⁶ Other waters that are adjacent but less hydrologically connected must pass a significant nexus test to be considered jurisdictional.²²⁷ While the scope of the term “adjacent” is certainly broader than before, it still requires that the adjacent water have either some form of hydrologic connection to water that is navigable-in-fact, or alternatively, a significant enough nexus so as to influence the quality of the jurisdictional water.²²⁸ This inter-

²²³ COPELAND, *supra* note 145, at CRS-20, CRS-23.

²²⁴ See *United States v. Lamplight Equestrian Ctr., Inc.*, No. 00-C-6486, 2002 WL 360652, at *8 (E.D. Ill. Mar. 8, 2002) (holding that a “drainage connection” between wetlands and a creek tributary established adjacency under the Clean Water Act because the water was in actual contact, and the dictionary definition of contiguous means “being in actual contact: touching along a boundary or at a point”); COPELAND, *supra* note 145, at 23 (explaining that within the term adjacent, the terms bordering and contiguous are well understood); *Border*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/border> [<https://perma.cc/LAT3-U554>] (also defining bordering to mean actual contact, specifically “to touch at the edge or boundary”).

²²⁵ COPELAND, *supra* note 145, at CRS-16 to -19, CRS-24.

²²⁶ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,058 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

²²⁷ COPELAND, *supra* note 145, at CRS-24 to -25 (“[W]aters within the 100-year floodplain that are located more than 1,500 feet and up to 4,000 feet from the ordinary high water mark, or high tide line, are subject to a case-specific, significant nexus analysis . . .”).

²²⁸ See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,058, 37,080–82 (describing adjacent waters that do not require a significant-nexus test: those that are located within 100 feet of the ordinary high water mark, those that are located within 1500 feet of the ordinary high water mark but within 100 feet of the floodplain, and those that are located within 1500 feet of the high tide line of a traditionally navigable water and within 1500 feet of the ordinary high water mark of the great lakes, have been deemed to be physically, chemically, and biologically connected to their downstream waters by the latest available science); COPELAND, *supra* note 145, at 4–5, CRS-29 (explaining that an adjacent water is either bordering, continuous, or neighboring, and that the agencies have deemed some neighboring waters to be categorically jurisdictional for having being

pretation is consistent with prevailing judicial interpretations.²²⁹ Courts have held that, to establish CWA jurisdiction of waters, there must be “some measure of the significance of the connection for downstream water quality.”²³⁰

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Supreme Court heard a challenge to the Corps’s exercise of jurisdiction over an abandoned gravel pit.²³¹ The Court held that the presence of a “hydrologic connection” to a navigable-in-fact water is sufficient to establish CWA jurisdiction over “other waters.”²³² The Court clarified this point in *Rapanos v. United States*, in which the federal government alleged in an enforcement action that developers dumped fill material into protected wetlands in violation of the CWA.²³³ The Court held that not every hydrologic connection could satisfy the significant nexus requirement, because “the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.”²³⁴

Because the definition of “adjacent” requires a hydrologic link or significant nexus between adjacent waters and navigable-in-fact waters, it eliminates the need for federal agencies to demonstrate separate Commerce Clause jurisdiction over the adjacent water body.²³⁵ A significant nexus means that separate waters affect one another, and therefore the waters can be “evaluated as a single landscape unit with regard to their effect on the chemical, physical and biological integrity” of navigable-in-fact waters used as channels of interstate or foreign commerce.²³⁶

In *United States v. Cundiff*, the U.S. Court of Appeals for the Sixth Circuit considered whether or not wetlands located on private property were sufficiently adjacent to a navigable-in-fact river.²³⁷ The Sixth Circuit deter-

physically, chemically, and biologically connected to their downstream waters, or for having a significant nexus to a traditional navigable water, interstate water, or the territorial seas).

²²⁹ COPELAND, *supra* note 145, at 5.

²³⁰ *Rapanos v. United States*, 547 U.S. 715, 784–85 (2006); *see also* COPELAND, *supra* note 145, at 3–4 (explaining that other courts have followed the legal conclusion in *Rapanos* that close connectivity establishes CWA jurisdiction).

²³¹ 531 U.S. 159, 162–63 (2001).

²³² *See id.* at 176 (holding that no hydrologic connection existed, but the presence of one would have established CWA jurisdiction).

²³³ 547 U.S. 715 at 720–22.

²³⁴ *See id.* at 784–85.

²³⁵ DAVID PETERSON, COASTAL PROT. & RESTORATION AUTH., EPA/CORPS OF ENGINEERS “WATERS OF THE U.S.” REGULATION UPDATE (n.d), <http://coastal.la.gov/wp-content/uploads/2013/12/david-CPRA-Presentation-WOTUS-09172014-David-Peterson.pdf> [<https://perma.cc/HB9P-D45J>] (stating that establishing jurisdiction through a significant nexus determination streamlines the traditional test of commerce clause jurisdiction).

²³⁶ *See id.*

²³⁷ *See* 555 F.3d 200, 205–06 (6th Cir. 2009).

mined that due to a significant nexus between two tributaries, the wetlands were in fact adjacent, and thus fell within CWA jurisdiction.²³⁸ Specifically, the court found that the Cundiff family's alterations consisting of "unauthorized ditch digging, the mechanical clearing of land, and the dredging of material and using it as filler" had affected the wetlands' water storage capacity, which in turn affected the regularity and extent of flooding, and augmented the flood peaks in the river.²³⁹ Due to the hydrologic connection between the wetlands and the river, the court described a potential Commerce Clause challenge as "tenuous."²⁴⁰ Furthermore, in *United States v. Robinson*, the U.S. Court of Appeals for the Eleventh Circuit held that it was "well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce."²⁴¹

The KLA argues that the scope of "adjacent waters" in the new WOTUS Rule is contrary to Justice Anthony Kennedy's concurring opinion in *Rapanos v. United States* because it would allow geographically isolated waters to fall under CWA regulation.²⁴² Justice Kennedy's concurrence, however, did not construe adjacency to depend exclusively on geographic locality, but also on whether the water in question "affects water quality" of a navigable-in-fact water.²⁴³ Furthermore, there is ample legal support for the proposition that adjacency can properly be determined on the basis of a significant nexus test.²⁴⁴

D. The "Migratory Bird Rule" Does Not Apply to the New Definition of "Tributaries" as Alleged by the NCBA

The new WOTUS Rule defines "tributary" to mean a waterbody that contributes flow to a navigable-in-fact water.²⁴⁵ This definition has been challenged by opposition groups, including the NCBA, which argues specifically that the regulation of tributaries falls within the scope of the "migra-

²³⁸ See *id.* at 210–11.

²³⁹ See *id.* at 211.

²⁴⁰ See *id.* at 218 n.6.

²⁴¹ 505 F.3d 1208, 1215–16 (11th Cir. 2007).

²⁴² KLA Comment, *supra* note 3, at 12 (stating that the scope of the term "adjacent" in the proposed rule is "virtually limitless"); see *Rapanos v. United States*, 547 U.S. 715, 772–73, 782–83 (2006) (Kennedy, J., concurring).

²⁴³ *Rapanos*, 547 U.S. at 772–73, 782–83 (Kennedy, J., concurring) (finding that if an agency seeks to regulate "adjacent waters" on the basis of close relational adjacency, it may do so under the Act, but it may otherwise regulate a water if it "affects water quality" of a navigable-in-fact water, a determination he characterizes as a "significant nexus").

²⁴⁴ See *Cundiff*, 555 F.3d at 210–11; *Robinson*, 505 F.3d at 1215–16.

²⁴⁵ Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,058 (June 29, 2015); COPELAND, *supra* note 145, at CRS-25.

tory bird rule” discredited in the *Solid Waste Agency of Northern Cook County* decision.²⁴⁶ The “migratory bird rule” in *Solid Waste Agency of Northern Cook County*, however, served as an example of when an “activit[y] that ‘substantially affect[s]’ interstate commerce,” is itself too tenuously related to commerce to allow for Commerce Clause regulatory jurisdiction.²⁴⁷ By contrast, the expanded definition of tributary allows for federal regulation over non-navigable waters that flow into navigable-in-fact waters.²⁴⁸ The new Rule expands the definition of tributary with the understanding that their flow-connectivity to navigable-in-fact waters affects those waters chemically, physically, and biologically.²⁴⁹

The expanded definition subjects all significantly connected tributaries to federal regulation under CWA jurisdiction.²⁵⁰ As the Eleventh Circuit held in *Robinson*, it is “well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce.”²⁵¹ Furthermore, as the Supreme Court held in *Royal Rock Co-op*, the Commerce Clause also authorizes the regulation of activities that interfere with channels of interstate commerce.²⁵²

The Supreme Court discredited the “migratory bird rule” as an overextension of Congress’s Commerce Clause authority to regulate an activity insufficiently related to interstate commerce, but that is not the case here.²⁵³ The WOTUS Rule seeks to regulate tributaries on the basis of flow connectivity.²⁵⁴ As the Supreme Court established in *Royal Rock Co-op*, the Commerce Clause extends to activities that interfere with channels of interstate commerce, and flow connectivity, as the Eleventh Circuit articulated in

²⁴⁶ NCBA Comment, *supra* note 3, at 5 & n.11.

²⁴⁷ *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 193 (2001).

²⁴⁸ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,058; COPELAND, *supra* note 145, at CRS-25.

²⁴⁹ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,058; COPELAND, *supra* note 145, at CRS-25.

²⁵⁰ *See United States v. Royal Rock Co-op*, 307 U.S. 533, 544 (1939); *United States v. Robinson*, 505 F.3d 1208, 1215 (11th Cir. 2007); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,058 (June 29, 2015).

²⁵¹ 505 F.3d at 1215–16.

²⁵² 307 U.S. at 544.

²⁵³ *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 160–61 (2001); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,058 (stating that flow connectivity is the basis for determining what is or is not a tributary under the proposed rule).

²⁵⁴ Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).

Robinson, clearly falls within the categories of activities “affecting interstate commerce” if regulated to preserve water quality.²⁵⁵

CONCLUSION

Many parties in opposition to the “Waters of the United States” rule (the “Rule”) have expressed in public comment that the Rule violates the Commerce Clause of the U.S. Constitution—specifically, that the new construction of “other waters,” the expanded definition of the term “adjacent,” and the revised definition of “tributary,” allow the federal government to use unconstitutional, broad-based authority to regulate purely intrastate matters with no legally allowable link to interstate commerce. In relevant part, the National Association of Home Builders, the Kansas Livestock Association, and the National Cattleman’s Beef Association have been particularly vocal in opposition to the Rule on Commerce Clause grounds. For the above-stated reasons, the three major revisions of the new Rule are not unconstitutional under the Commerce Clause, as argued in the comments submitted by those three opposition parties.

²⁵⁵ See *Royal Rock Co-op*, 307 U.S. at 544; *Robinson*, 505 F.3d at 1215 (“Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce . . .”).