CAN ANYONE DEFINE WOTUS? A CRANKY HISTORY OF CLEAN WATER ACT JURISDICTION

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It has now been more than 45 years since Congress decided to regulate the "waters of the United States" in the Clean Water Act without defining the term. Those left to fill in the void are getting understandably cranky.

"Waters of the United States," or "WOTUS," is the term of art that governs the scope of the act.[1] Most obviously, a typical industrial facility cannot discharge its treated wastewater (i.e., pollutants) into a river without first obtaining a permit from the U.S. Environmental Protection Agency (EPA) or a state or tribal authority with delegated authority.[2] There appears to be a broad consensus that our rivers should not catch fire.[3] Likewise, the act prohibits placement of fill material into a waterway without a § 404 permit issued by the U.S. Army Corps of Engineers.[4] Those are the easy examples of the act's reach.

Less obviously, uncertainty over the definition of WOTUS is particularly problematic in the arid West, where regulated "waters" aren't necessarily wet all the time. A disproportionate amount of land in the American West is under federal[5] or tribal control, causing many developments to be subject to the National Environmental Policy Act's (NEPA) requirement that federal actors evaluate whether their proposed actions may significantly impact the environment.[6] To the extent WOTUS is defined broadly to include normally dry washes and the like, the need for a federal approval under NEPA can generate a cascading series of regulatory complications. The NEPA environmental impact statement process is where complicated projects go to die. The high stakes associated with being in or out of a WOTUS designation explains why the definition of "waters of the United States" has dominated five decades of Clean Water Act debate.

Congress Sets the Stage for Uncertainty

One might assume that, when it decided to get into the business of regulating "waters of the United States," the first order of business for Congress would have been to explain what sorts of waters were subject to its regulation. One would be wrong. In its infinite wisdom, Congress has never opted to draft its own definition of WOTUS, leaving the Army Corps, the EPA, and the courts to take on the task, doing their best to decipher the plain language of the statute and its murky legislative history.

That task has been an exceedingly thankless one. The agencies' most recent attempt in 2014 was first stayed by the courts and subsequently has been disavowed by the Trump administration, although the agencies' authority to rescind a rule that virtually everyone claimed to hate is now itself the subject of litigation, as discussed further below. But first, let's examine how Congress put us in this bind.

The Clean Water Act arose out of early legislation and litigation dealing only with navigable-in-fact waters. From a constitutional perspective, the earliest cases addressing Congress' ability to regulate waterways under the Commerce Clause focused primarily on navigability. The U.S. Supreme Court opined in 1865, for instance, that:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie.[7]

Congress' first significant water pollution legislation was the Federal Water Pollution Control Act.[8] That act authorized the surgeon general to step in when state authorities failed to adequately address "pollution of interstate waters." In turn, the act defined "interstate waters" as "all rivers, lakes, and other waters that flow from, across, or form a part of, state boundaries." Although the authority given to the surgeon general was mostly of a wheedling, naming-and-shaming variety, it was at least clear over what he had jurisdiction.

Clarity prevailed again in the Water Pollution Control Act Amendments of 1956.[9] These amendments retained the existing definition of "interstate waters" but clarified that enforcement measures could be taken in the event of pollution of interstate waters," whether the "pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters." So far, so good: both impeding navigation along interstate rivers and polluting them to the detriment of such navigation fit squarely within Congress' Commerce Clause authority.

The trouble begins with the 1972 amendments.[10] Much of what we think of today as the Clean Water Act was adopted in the 1972 amendments, although the name change to "Clean Water Act" did not surface until 1977.

The 1972 act announced that the "objective of the act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters." That objective remains codified today in 33 U.S.C. § 1251(a). To that end, the EPA administrator was assigned the task of supervising the National Pollutant Discharge Elimination System (NPDES) program and the secretary of the Army the job of § 404 dredge-and-fill permitting.

Congress also proclaimed that "to the maximum extent possible the procedures utilized for implementing this act shall encourage the drastic minimization of paperwork and interagency decision procedures … so as to prevent needless duplication and unnecessary delays at all levels of government."[11] After 45 years without an agreed understanding of the universe of regulated waters, perhaps it's time to concede that the goal of unnecessary delays has not been met.

Alas, Congress immediately set about sabotaging this goal by opting not to define the sorts of "waters" the act was intended to reach. Congress merely stated that the act applies to "navigable waters," which it unhelpfully defined as "waters of the United States." Congress did not define "waters of the United States," then or since.

The 1972 amendments predated the invention of the correcting electric typewriter. One can imagine an exasperated congressional secretary, working on a black, cast-iron Royal Standard typewriter, sensibly refusing to retype the entire bill in order to change references to "navigable waters" to "waters of the United States," since they meant the same thing anyway.

> Congressperson: "I know it's 5:30, but I need you to retype this entire bill, and change all references to 'navigable waters' to 'waters of the United States.'"
>
> Secretary: "Although you forgot again, it's my birthday, and I have plans. But if it's necessary to clarify the statute, then I'll do it."
>
> Congressperson: "Actually, they mean the same thing, although they are not further defined anyway."
>
> Secretary: "How about if I just say in § 502 that 'navigable waters' means the same thing as 'waters of the United States?' That way, I can still make dinner with my wife."
>
> Congressperson: "Close enough."

That all of the definitions in § 502 of the act, 33 U.S.C. 1362, are in random, non-alphabetical order lends further support to this theory.

EPA and the Army Corps Struggle to Define WOTUS

Left to muddle their way with the barest of instruction, the Corps and EPA dutifully attempted to promulgate their own definitions via rulemaking.

The Corps' efforts, in particular, got off to a rocky start. Since 1899, § 13 of the Rivers and Harbors Appropriation Act[12] has prohibited discharge of refuse into navigable waterways and their tributaries, unless permitted by the Department of War or, later, the Army. That prohibition, commonly known as the Refuse Act, was largely ignored until the Corps launched on April 7, 1971, a program for permitting discharges of pollutants into navigable waters and their tributaries.[13] The permitting program as to discharge into tributaries was enjoined by the District Court for the District of Columbia in *Kalur v. Resor*[14] on the grounds that the statute expressly gave the Corps authority only to regulate discharges directly into navigable water.

The Corps' Refuse Act permitting program remained stayed until passage of the 1972 amendments, when it was expressly superseded by the NPDES program. The Corps missed the mark again when it published its final § 404 dredge-and-fill regulations—covering only navigable-in-fact waters—on April 3, 1974.[15] Finding Congress had intended to regulate waters of the United States to the full extent of the Commerce Clause—whatever that may be—the District Court for the District of Columbia struck down the limitation in *NRDC v. Calloway.*[16]

The third time was more or less the charm, and the Corps issued on July 19, 1977, final regulations expanding its definition of "waters of the United States" beyond navigable-in-fact waters, setting forth in 33 CFR Part 329 a new definition of "waters of the United States."[17]

Subsequently the EPA and the Corps got on the same page, adopting identical definitions of "waters of the United States" to include, subject to certain exceptions, "traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands."[18] The achievement of harmony did not allow everyone to live happily ever after.

The US Supreme Court Joins the Fray

The U.S. Supreme Court first reviewed the results of the agencies' efforts in *United States v. Riverside Bayview Homes*.[19] In *Riverside Bayview*, a unanimous Court found that it was not unreasonable for the Army Corps to include within the act's definition of "waters of the United States"—that is, "navigable waters"—a wetland adjacent to a navigable-in-fact waterway that was typically marshy only because of groundwater.

Peering deeply into the cloudy legislative history, Justice Byron White divined that Congress had intended to regulate "navigable waters" to the full extent allowed by the Commerce Clause. That

intent, he observed, was sufficient to conclude that the term "navigable" was merely of "limited import," even when used to classify lands. "Congress evidently intended … to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term," he stated. With that, he left it to the Corps and the EPA to further carry on with the "far from obvious" job of defining WOTUS.[20]

Alas, the agencies' efforts to implement the ill-defined intent of Congress did not please everyone, and in 2001 the Court took another stab at doing so itself in *Solid Waste Agency of Northern Cook County* (*SWANCC*) *v. U.S. Army Corps of Engineers*. A 5-4 majority in *SWANCC* ruled that the Corps had unreasonably attempted to regulate "a seasonally ponded, abandoned gravel mining depression," shooting down the Corps' argument that the depression was subject to regulation because when it was wet migratory birds could land there while traveling between states.[21]

Studying the same legislative history as Justice White, Justice William Rehnquist decided that Congress had intended that the statutory term "navigable" be given "limited effect" rather than "no effect whatsoever."[22] As best we can tell, the holding of the case did not turn on characterization of the term "navigable" as having "limited effect" rather than "limited import." It is likely, nevertheless, that at this moment some unfortunate big law firm associate is drafting a memorandum on the distinction between the two phrases.

In any event, that statutory interpretation allowed the 5-4 majority to avoid opining on the limits of Congress' Commerce Clause authority. Unfortunately, while attempting to harmonize the *SWANCC* result with *Riverside Bayview*, Justice Rehnquist casually described the prior holding as premised on the existence of a "significant nexus" between the marshy adjacent wetland and a navigable-in-fact waterway. That unfortunate and offhand formulation came to dominate Clean Water Act litigation, agency practice, and legislative efforts.

The "significant nexus" phrase came to the fore in round three of the Court's WOTUS decisions, *Rapanos v. United States*.[23] *Rapanos* produced a 4-4-1 split, arguably the Court's crabbiest set of opinions, and several thousand law review articles.[24] All of the justices again agreed that Congress had intended to regulate as "waters of the United States" more than navigable-in fact waters. Justice Antonin Scalia, writing for himself and Justices John Roberts, Clarence Thomas, and Samuel Alito, helpfully clarified that the term "navigable" was "not devoid of significance." "Unlike most of the words Congress uses," he did not add.

Justice Scalia's opinion went on to assert that "waters of the United States" should be defined to include only "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters, plus wetlands that feature a continuous surface connection to them.[25] "Seasonal rivers" and rivers that might dry up in severe drought, Justice Scalia added, could still qualify. Justice Scalia's opinion drew four votes to remand the case to the Sixth Circuit for application of a more narrowly defined jurisdictional test.

In addition to joining Justice Scalia's opinion, Chief Justice Roberts wrote separately to chide the EPA and the Corps for failing to undertake a new rulemaking effort after the Court's ruling in *SWANCC* had rejected the Corps' "essentially boundless" view of its regulatory authority. "Rather than refining its view of its authority in light of our decision in *SWANCC,* and providing guidance meriting deference under our generous standards," the Chief Justice added, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."

That rebuke did not, as it turns out, leave as much of a mark as you might have guessed. Why not?

First, four justices (Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer) voted to affirm, on the grounds that the Corps' interpretation of the statute was *not* unreasonable. Justice Stevens noted that Congress had not stepped in to draft its own definition to displace that of the agencies when it enacted other amendments to the act in 1977.

That left Justice Anthony Kennedy—you were expecting someone else?—with the controlling vote. Justice Kennedy agreed with the Scalia foursome that the Sixth Circuit ruling needed to be vacated and the case remanded, but otherwise found little to recommend either foursome's opinion. He did begrudgingly concede that "the plurality's opinion begins from a correct premise"—namely, that Congress intended for the Clean Water Act to regulate more than navigable-in-fact waters. And he did allow that "Congress' choice of words creates difficulties, for the act contemplates regulation of certain 'navigable waters' that are not in fact navigable."

Beyond that, Justice Kennedy faulted the plurality's opinion for being "inconsistent with the act's text, structure, and purpose." Taking issue with Justice Scalia's formulation, Justice Kennedy stressed that the term "waters of the United States" includes at least wetlands that have a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made," explaining further that:

> The Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes.

For his part, Justice Scalia lambasted the dissent's proposition that Congress had silently approved the Corps' interpretation of waters because it opted not to draft its own definition in 1977 while amending other provisions of the statute. This, he opined, was a "curious appeal to entrenched executive error":

> What the dissent refers to as "Congress' deliberate acquiescence" should more appropriately be called Congress' failure to express any opinion. We have no idea whether the members' failure to act in 1977 was attributable to their belief that the Corps' regulations were correct, to their belief that the courts would eliminate any excesses, or simply to their unwillingness to confront the environmental lobby.

In truth, by this time Congress' record of sloth was manifest. Justice Scalia was even more dismissive of Justice Kennedy's "significant nexus" test, which he called the proposition that "whatever effects waters is waters," writing:

> One would think, after reading Justice Kennedy's exegesis, that the crucial provision of the text of the [Clean Water Act] was a jurisdictional requirement of "significant nexus" between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the act, but is taken from

SWANCC's cryptic characterization of the holding of *Riverside Bayview.*

Justice Kennedy got the last laugh, however. In a curious extension of *Marks v. United States*,[26] both the courts of appeal and the agencies have clung to the "significant nexus" test. In *Marks*, the Court advised that the binding legal rule in a split decision is the narrowest concurring grounds that is the "logical subset" of the other opinions.

While Justice Kennedy agreed with the Scalia foursome that the Corps had interpreted "waters of the United States too broadly, it is hard to view his opinion as a "logical subset" of anyone else's opinion. Justice Stevens' quartet found no error in the Corps interpretation. Justice Scalia's foursome did, but also contended that Justice Kennedy "simply rewrites the statute, using for that purpose the gimmick of 'significant nexus.'" Indeed, in a Sixth Circuit brief on the merits filed before the change in administration, the federal respondents acknowledged that "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the act."[27]

The absurdity of trying to find a clear decision in *Rapanos* under the *Marks* test was hilariously illustrated by Judge Robert Propst of the Northern District of Alabama in *U.S. v. Robison*,[28] a § 404 criminal case. After a two-month jury trial produced a guilty verdict, the Eleventh Circuit reversed on the grounds that the district court had improperly failed to instruct the jury that Justice Kennedy's "significant nexus" was, under *Marks*, controlling. On remand, Judge Propst asked the clerk to reassign the case on the grounds that he was "so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try again."

Judge Propst's opinion, however, reveals that the confusion lies elsewhere. At the outset, he noted the curious fact that the definition of WOTUS "has been determined to be what one justice of the United States [Supreme Court] has written which was not agreed to by any of the other eight Supreme Court justices in *Rapanos*."

The opinion goes on to give a play-by-play of the dismissive opinions, in which the justices variously characterized their disparate opinions as using a "gimmick," "flouting of the statutory command," constituting the "last resort of extravagant interpretation," endorsing an "arbitrary jurisdictional line," and "mystifying." Those old enough to remember George Foreman knocking out Joe Frazier in their classic 1972 heavyweight title fight can be forgiven for imagining ABC's Howard Cosell calling the exchange of blows in *Rapanos*: "Down goes Stevens! Down goes Stevens! Down goes Stevens."

Rapanos was the last time the Court squarely addressed the definition of WOTUS, although Justice Alito did take the opportunity to lament Congress' lack of action in *Sackett v. EPA*.[29] In *Sackett*, the Court held that the Administrative Procedure Act allows the recipients of a Clean Water Act compliance order to challenge in district court the basis for the order—that is, the allegation that they had illegally filled in a wetland regulated under § 404. Concurring in the unanimous decision, Justice Alito lamented the "notoriously unclear" reach of the Clean Water Act and laid blame squarely at the feet of Congress:

> Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided that the act covers "the waters of the United States."[30] But Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate.[31]

The Agencies Try Again

Rebuked by the Chief Justice for failing to try again to define WOTUS, the EPA and the Army Corps tried again during the Obama administration. Their final rulemaking, *Clean Water Rule: Definition of Waters of the United States,*[32] modified the agencies' identical WOTUS definitions.[33] The proposed rule, first published informally on April 21, 2014, attracted 1.2 million comments.[34] Many were insightful. Even more had the full persuasive power of grunts and boos, and the agencies opted to substantively respond to a mere 20,567. Slackers.

The WOTUS Rule and its preamble totaled 297 pages and was supported by a 423-page *Technical Support Document*, a 78-page *Economic Analysis of the EPA-Army Clean Water Rule*, and a 62-page *Final Environmental Assessment*. The agencies adopted wholesale Justice Kennedy's "significant nexus" test, referencing it 438 times in the rule and the preamble and mentioning the justice himself another 27 times. Save us, Justice Kennedy!

The last two years or so of the WOTUS battle has focused not on the complex statutory and constitutional limits of Clean Water Act regulation, but rather on a host of procedural issues. That dispute, at least, has now been resolved, with the Supreme Court ruling as expected on Jan. 22, 2018, that challenges to the Clean Water Rule must be brought in the district courts.[35] The decision reversed a Feb. 22, 2016, ruling by the U.S. Court of Appeals for the Sixth Circuit that it had jurisdiction pursuant to § 509(b)(1) of the act.[36] The Sixth Circuit also stayed the rule on a nationwide basis, finding the rule's opponents were likely to succeed on the merits.[37]

Section 509 gives the courts of appeal original and exclusive jurisdiction over seven categories of actions by the EPA, including "approving or promulgating any effluent limitation or other limitation" or "issuing or denying any permit." Otherwise, challenges to EPA action typically are pursued in the district court under the Administrative Procedure Act.[38]

The Court, in a delightfully clear and unanimous opinion by Justice Sonia Sotomayor, rejected the government's argument that the Clean Water Rule effectively imposed effluent limitations and hence authorized direct appeal in the courts of appeal. Rather, the Court stated, the effect of the rule is merely to "define a jurisdictional prerequisite of the EPA's authority to issue or deny a permit."

The Court likewise rejected the argument that Congress could not have intended to establish a "truly perverse" system of bifurcated review under which district courts entertain challenges to rules of broad applicability while individual permit disputes go straight to the courts of appeal.

Acknowledging that she might have written the statute differently, Justice Sotomayor noted that "the bifurcation that the government bemoans is no more irrational" than other provisions of the Clean Water Act. Stated another way, Congress does odd things all the time, and if it does so clearly, it's not the Court's place to second-guess it.

So, back to the district courts it is. Some 94 district court challenges were filed before the Sixth Circuit stayed everything, with the District of North Dakota staying the rule in 13 states before the Sixth Circuit stepped in to impose a nationwide stay.[39]

Much of the focus now has turned to two consolidated Southern District of Texas cases, *Texas v. EPA* and *American Farm Bureau v. EPA*.[40] Plaintiffs sought a declaration that the Clean Water Rule purports to regulate waters beyond the scope authorized by the Clean Water Act and beyond the permissible limits of the Commerce Clause. On Feb. 7, 2018, plaintiffs in *American Farm Bureau* moved for a nationwide preliminary injunction.[41]

Although the government defendants' initial Sixth Circuit briefs in *In re EPA & Department of Defense Final Rule* had defended the Clean Water Rule on the merits, their Feb. 14 opposition argued only that recent administrative developments make injunctive relief improper.[42] For starters, the agencies noted, after the change in administrations, President Donald Trump issued Executive Order No. 13,778[43] directing the EPA and the Corps to review the rule.

Second, the agencies subsequently issued a notice of proposed rulemaking proposing to rescind the Clean Water Rule, undertake a new rulemaking, and reinstate the 1986 regulatory definitions of "waters of the United States" in the meantime.[44]

Finally, after notice and comment the agencies retroactively established an applicability date for the original Clean Water Rule—namely, Feb. 6, 2020—in order to preserve the status quo.[45]

As intervenors Natural Resources Defense Council and the National Wildlife Federation put it, these developments mean that plaintiffs are now demanding a preliminary injunction "to enjoin a rule that has been suspended, will not be implemented for some time, and may never be implemented."[46] Put that way, irreparable harm does not seem imminent.

Alas, there is, as always, one additional procedural complication: on Feb. 6, 2018, ten states and the District of Columbia sued the EPA and the Army Corps, asserting that suspension of the Clean Water Rule violated the Administrative Procedures Act.[47] Plaintiffs allege that the federal agencies' actions to rescind or suspend the rule violates the act in a variety of ways. If suspending the rule was a violation of the act, then whether the reinstated rule should be enjoined becomes a live controversy again. The Southern District of Texas took the issue under advisement.

One should never underestimate the ability of attorneys to bollox things up with procedural arguments for years or decades. And in March the Supreme Court heard arguments in *Hughes v. United States*,[48] a case in which the petitioner calls for abandonment of the *Marks* rule and a number of amici assert that the post-*Rapanos* morass illustrates why. After a few more twists and turns, however, the Supreme Court will undoubtedly need to address again the statutory and constitutional constraints on the agencies' ability to regulate "waters of the United States." ⊙

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Endnotes

[1] 33 U.S.C. §§ 1251 *et seq.*

[2] *See* 33 U.S.C. §§ 1311(a) (prohibiting discharges of pollutants except as expressly authorized) *and* 1342 (establishing national permitting program, the National Pollutant Discharge Elimination System).

[3] A reported fire in 1969 on Cleveland's Cuyahoga River is commonly cited as a catalyst for passage of the Clean Water Act, and Congress did fund a study of the Cuyahoga in the River and Harbor and Flood Control Acts of 1970, Pub. L. 91-611, 84 Stat. 1818 (Dec. 31, 1970). Rumors about the flammability of the river as of 1969, at least, may have been greatly exaggerated. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection,* 14 Fordham Envtl. L.J. 89 (2002).

[4] 33 U.S.C. § 1344.

[5] The federal government owns approximately 28 percent of the 2.27 billion acres of land in the United States, but its ownership is heavily concentrated in 11 western states (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming). In those states, the government owns 46.4 percent of the land, compared to 4.2 percent in the rest of the country. Congressional Res. Serv., Federal Land Ownership: Overview And Data (7-5700) (Mar. 3, 2017), https://fas.org/sgp/crs/misc/R42346.pdf.

[6] 42 U.S.C. § 4332(2)(C).

[7] *Gilman v. Philadelphia*, 70 U.S. 713, 724-25 (1865).

[8] Federal Water Pollution Control Act, Pub. L. 845, c. 758, 62 Stat. 1155 (June 30, 1948).

[9] Water Pollution Control Act Amendments of 1956, Pub. L. 660, c. 518, 62 Stat. 1155 (July 9, 1956).

[10] Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (Oct. 18, 1972).

[11] Still codified at 33 U.S.C. § 1251(f).

[12] Rivers and Harbors Appropriation Act, 33 U.S.C. § 407.

[13] 42 Fed. Reg. 37122, at 37133 (July 19, 1977).

[14] *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

[15] 33 Fed. Reg. 12119 (Apr. 3, 1974).

[16] *NRDC v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975).

[17] Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977).

[18] *See* 79 Fed. Reg. at 22,195. 33 C.F.R. § 328.3 (Corps); 40 C.F.R. § 230.3(s) (EPA).

[19] *United States v. Riverside Bayview Homes*, 474 U.S. 212 (1985).

[20] *Id.* at 132-33.

[21] *Id.* at 171.

[22] *Id.* at 173.

[23] *Rapanos v. United States,* 547 U.S. 715, 721 (2006).

[24] This is, sadly, no exaggeration. A search for "Rapanos" in the Westlaw Law Journals library returns 2,218 results.

[25] *Rapanos*, 547 U.S. at 738.

[26] *Marks v. United States,* 430 U.S. 188 (1977).

[27] Brief for Respondents, *Murray Energy Corp. et al v. U.S. EPA et al.,* 15-3751 (6th Cir.) (Doc. 149-1) (Jan. 13, 2017), 45-48.

[28] *U.S. v. Robison,* 521 F.Supp.2d 1247 (N.D. Ala. 2007).

[29] *Sackett v. EPA,* 566 U.S. 120 (2012).

[30] 33 U.S.C. § 1362(7).

[31] *Id.* at 132.

[32] 80 Fed. Reg. 37054 (June 29, 2015).

[33] *See* 40 CFR Part 230.3 (EPA) and the Corps (33 CFR Part 328.3).

[34] *See also* Christopher D. Thomas, *Defining "Waters of the United States:": A Mean-Spirited Guide*, *Natural Resources & Environment* Volume 30, Number 1, Nat. Res. & Envir. (Summer 2015).
[35] *National Ass'n of Mfr. v. U.S. Dep't of Def.,* 583 U.S._____, 2018 WL 491526, No. 16-299 (Jan. 22, 2018).
[36] 33 U.S.C. § 1369(b)(1).
[37] *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2018).
[38] Administrative Procedures Act, 5 U.S.C. § 704.
[39] *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1052-53 (D. N.D. 2015).
[40] *Texas v. EPA*, No. 3-15-cv-162 (S.D. Tex.); and *American Farm Bureau v. EPA*, No. 15-cv-165 (S.D. Tex.).
[41] *Id.* at Doc. 61.
[42] *Id.* at Doc. 67.
[43] Executive Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).
[44] *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34,899 (July 27, 2017).
[45] *Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule,* 82 Fed. Reg. 55,542 (Nov. 22, 2017); 83 Fed. Reg. 5,200 (Feb. 6, 2018).
[46] *Texas v. EPA, supra n* 40, at Doc. 66, p. 11.
[47] *New York et al. v. EPA et al.,* 2018 WL 739544, No. 1:18-cv-1030 (Feb. 6, 2018).
[48] *Hughes v. United States*, No. 17-155 (U.S. 2018).