

# REDEFINING THE WATERS OF THE UNITED STATES: DID GOVERNMENT OVERREACH JUST GET TRUMPED?

*Travis L. Schilling*<sup>†</sup>

I. WOTUS Under Obama.....	131
II. What is at Stake?.....	133
III. Development of the New Rule.....	134
IV. WOTUS Before Obama.....	136
V. Projected Impacts of the 2015 Rule.....	137
A. Farmers.....	138
B. Local Governments.....	138
C. Commercial Developers.....	138
D. Environmental and Conservation Advocacy.....	139
E. Communities.....	139
VI. Trumped?.....	140
A. A New Administrator.....	141
B. Reversing Course.....	141
1. Losing in Court.....	142
VII. Continuing the Fight.....	143
VIII. Conclusion.....	146

## I. WOTUS UNDER OBAMA

Since the 2008 Waters of the United States Rule (WOTUS) was issued, stakeholders, including farmers, local governments, commercial developers, environmental advocacy groups, and states, have expressed dissatisfaction with the rule’s lack of clarity.<sup>1</sup> In response to numerous requests for clarification,<sup>2</sup> the Obama Administration chose to elucidate the rule by extending the reach of 33

---

<sup>†</sup> Juris Doctor from Drake University Law School, 2018, Bachelor of Science in Civil Engineering from Iowa State University of Science and Technology, 2008. Dedication: To my parents Denis and Cheryl Schilling for love and support as well as my engineering mentor and law school inspiration Regina Kogen.

1. U.S. ENVTL. PROT. AGENCY, PERSONS AND ORGANIZATIONS REQUESTING CLARIFICATION OF “WATERS OF THE UNITED STATES” BY RULEMAKING 1-15 (2016) [hereinafter CLARIFICATION REQUEST OF “WATERS OF THE UNITED STATES”], [https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

2. *See id.*

U.S.C. § 1362(7)—better known as the Clean Water Act (CWA) navigable waters definition—beyond historical limits.<sup>4</sup> On March 25, 2014, the United States Environmental Protection Agency (EPA) and Army Corps of Engineers (Army Corps), collectively known as “the government,” issued a proposed rule change governing the specific CWA definition of WOTUS.<sup>5</sup> The government justified the change as a clarification to simplify the rule in the wake of a 2006 Supreme Court ruling, while aligning the rule with the latest scientific findings.<sup>6</sup> The announcement sparked a steady and ongoing backlash from stakeholders newly burdened by the rule’s extended reach.<sup>7</sup> Undeterred, the government methodically advanced through the rule-making process before finally announcing a strategic retreat.<sup>8</sup>

Although the government officially announced the suspended enforcement of the new rule,<sup>9</sup> it reaffirmed its continuing intention to doggedly defend the rule’s ultimate implementation.<sup>10</sup> Opponents claimed the EPA continues to enforce the new rule<sup>11</sup> despite a Sixth Circuit temporary injunction prohibiting enforcement nationwide.<sup>12</sup> Environmental and conservation advocates joined the government in court, bolstering the government’s effort to ultimately enforce the rule.<sup>13</sup>

---

3. 33 U.S.C. § 1362(7) (2012).

4. Press Release, U.S. Evtl. Prot. Agency, EPA & Army Corps of Engineers, Clarify Protection for the Nation’s Streams and Wetlands: Agriculture’s Exemptions and Exclusions from Clean Water Act Expanded by Proposal (Mar. 25, 2014), [https://archive.epa.gov/epa-pages/newsroom\\_archive/newsreleases/ae90dedd9595a02485257ca600557e30.html](https://archive.epa.gov/epa-pages/newsroom_archive/newsreleases/ae90dedd9595a02485257ca600557e30.html).

5. *Id.*

6. *Id.*

7. Paul J. Beard II, Attorney at Alston & Bird, Am. Agric. Law Ass’n Annual Agric. Law Symposium: Reinterpretation of the Clean Water Act (Oct. 7, 2016) [hereinafter Beard, Reinterpretation of the Clean Water Act] (unpublished lecture).

8. See U.S. ENVTL. PROT. AGENCY & ARMY CORPS OF ENG’RS, MEMORANDUM, ADMINISTRATION OF CLEAN WATER PROGRAMS IN LIGHT OF THE STAY OF THE CLEAN WATER RULE; IMPROVING TRANSPARENCY AND STRENGTHENING COORDINATION 1-3 (Nov. 2015) [hereinafter IMPROVING TRANSPARENCY AND STRENGTHENING COORDINATION], [https://www.epa.gov/sites/production/files/2017-12/documents/2015-11-16\\_signed\\_cwr\\_post-stay\\_coordination\\_memo.pdf](https://www.epa.gov/sites/production/files/2017-12/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf).

9. *Id.*

10. *Id.*

11. Beard, Reinterpretation of the Clean Water Act, *supra* note 7.

12. *In re* Evtl. Prot. Agency, 803 F.3d 804, 806 (6th Cir. 2015).

13. *Id.* (Environmental and conservation groups and a handful of states filed with the Sixth Circuit as intervening parties).

Numerous states and various pecuniary and proprietary interest groups opposed the rule.<sup>14</sup> Categorical exceptions promulgated by the EPA since the injunction<sup>15</sup> led other stakeholders such as agricultural advocacy groups to drop out of the main litigation.<sup>16</sup> Despite claimed exceptions, the battle still left uncertainty for landowners such as farmers, state agencies, local governments, and developers.<sup>17</sup> Similarly, the same uncertainty stifled the agendas of clean water advocates and communities relying on surface water who stand to benefit from the new rule.<sup>18</sup> The Obama Administration's efforts to explicate created even greater uncertainty for those involved—leaving the courts to resolve mounting disputes. Since taking over, President Trump's EPA has methodically moved to replace the 2015 Rule and provide clarity.<sup>19</sup>

## II. WHAT IS AT STAKE?

Through the CWA, Congress sought to eliminate “the discharge of pollutants into the [nation's] navigable waters.”<sup>20</sup> The plain language of the CWA's navigable waters clause appears at first glance to govern a mundane, hyper technical, natural

14. *Id.* (The States of Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, and Wisconsin join as parties with private stakeholders like the National Association of Manufacturers joined as intervening parties).

15. Beard, Reinterpretation of the Clean Water Act, *supra* note 7; see U.S. ENVTL. PROT. AGENCY, FACT SHEET: THE CLEAN WATER RULE FOR: AGRICULTURE 1-3 (2015) [hereinafter THE CLEAN WATER RULE FOR AGRICULTURE], [https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact\\_sheet\\_agriculture\\_final.pdf](https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_agriculture_final.pdf); U.S. ENVTL. PROT. AGENCY, FACT SHEET: THE CLEAN WATER RULE FOR: DEVELOPERS 1-3 (2015) [hereinafter THE CLEAN WATER RULE FOR DEVELOPERS], [https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact\\_sheet\\_developers\\_final\\_1.pdf](https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_developers_final_1.pdf) (despite the promulgated exceptions, groups advocating for developers have remained active); U.S. ENVTL. PROT. AGENCY, FACT SHEET: THE CLEAN WATER RULE FOR: LOCAL GOVERNMENT 1-3 (2015) [hereinafter THE CLEAN WATER RULE FOR LOCAL GOVERNMENT], [https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact\\_sheet\\_local\\_gov\\_final\\_0.pdf](https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_local_gov_final_0.pdf).

16. *In re Env'tl. Prot. Agency*, 803 F.3d at 804 (noting the absence from current litigation).

17. Beard, Reinterpretation of the Clean Water Act, *supra* note 7.

18. See U.S. ENVTL. PROT. AGENCY, FACT SHEET: THE CLEAN WATER RULE FOR: COMMUNITIES 1-3 (2015) [hereinafter THE CLEAN WATER RULE FOR COMMUNITIES], [https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact\\_sheet\\_communities\\_final\\_0.pdf](https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_communities_final_0.pdf).

19. Press Release, Env'tl. Prot. Agency, EPA and the Army Propose to Amend the Effective Date of the 2015 Rule Defining “Waters of the United States” (Nov. 16, 2017), <https://www.epa.gov/newsreleases/epa-and-army-propose-amend-effective-date-2015-rule-defining-waters-united-states>.

20. 33 U.S.C. § 1251(a)(1) (2012).

boundary long established in maritime tradition.<sup>21</sup> Indeed, Congress paid little attention to the provision back in 1972, writing only “[t]he term ‘navigable waters’ means the waters of the United States, including the territorial seas.”<sup>22</sup> Whether intentional or not, Congress’s failure to elaborate and amend the definition and has left the task to government experts like the Army Corps and the EPA.<sup>23</sup>

The government has ventured to fill the void left by the CWA several times only to meet rebuke by the Supreme Court of United States (SCOTUS).<sup>24</sup> Each time the government acts in this area, it asserts the same compelling governmental interest,<sup>25</sup> to keep the nation’s waters free from pollutants for the benefit of the citizenry and the creatures that depend on those waters.<sup>26</sup> On this ground, the government commands strong footing. Even if the memories of pre-CWA disasters have faded, the more recent crisis in Flint, Michigan, reignited public interest in clean water.<sup>27</sup>

Those who oppose the government, however, have equally compelling interests. Those interests are two venerable rights enshrined in our national founding and Constitution: the right of a landowner to use his or her property and the privacy of a resident to pursue personal happiness without government encroachment.<sup>28</sup>

### III. DEVELOPMENT OF THE NEW RULE

The proposed 2014 Rule interchanged the existing ad hoc test in favor of regulation leading all drainage areas, such as ditches, swales, dry runs, and flood-

21. See 33 U.S.C. §§ 1251(a)(1), (6) (2012); see also 33 U.S.C. § 1362(7) (2012).

22. 33 U.S.C. § 1362(7) (2012).

23. See 33 C.F.R. § 328 (2015); 40 C.F.R. §§ 110, 112, 116, 117, 122, 230, 232, 300, 302, 401 (2015) (33 C.F.R. provides an example of the Army Corps asserting rule making authority, and 40 C.F.R. provide an example of the EPA exercising the same rule making authority); see also Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

24. See generally *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

25. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,054 (the citation gives the most recent assertion of the government interest).

26. *Id.*

27. NBC News, FLINT WATER CRISIS, <https://perma.cc/86MR-C5S2> (archived Jan. 17, 2018) (NBC News has devoted an entire section of its webpage to compile links to the ongoing story of the Flint water crisis).

28. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1 (The property right is found within the regulatory takings line of cases, while the substantive due process line of cases establishes various privacy rights although not extended so far as to cover the issue at hand).

connected surface water, to be categorically classified as WOTUS.<sup>29</sup> The proposal included a ninety-day public commentary period.<sup>30</sup>

After receiving public comment, the government issued the final rule on June 29, 2015.<sup>31</sup> According to EPA guidance, the 2015 Rule does not regulate drainage areas such as ditches, swales, dry runs, and flood-connected surface water to be categorically classified as WOTUS.<sup>32</sup> Opponents, including the U.S. House of Representatives, maintain the 2015 Rule, just like the 2014 proposed rule, “seek[s] to assert federal control over puddles, ditches, areas that are occasionally wet and other large sections of private or state land in violation of the intent of the Clean Water Act.”<sup>33</sup>

After announcement of the proposed 2014 Rule, grumblings about its impact sprang up almost overnight.<sup>34</sup> Numerous legal challenges quickly followed.<sup>35</sup> Despite opposition, the government pressed forward, beginning effective enforcement of the rule on August 28, 2015.<sup>36</sup> Shortly after, on October 9, 2015, the Sixth Circuit issued a stay on such enforcement.<sup>37</sup>

The Sixth Circuit acknowledged its potential lack of subject matter jurisdiction<sup>38</sup> but issued the stay nonetheless.<sup>39</sup> A standoff between the government and the

---

29. U.S. ENVTL. PROT. AGENCY & ARMY CORP OF ENG'RS, ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES 5, 9, 32, 51 (2014) [https://19january2017snapshot.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_economic\\_analysis.pdf](https://19january2017snapshot.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf).

30. Press Release, U.S. Evtl. Prot. Agency, *supra* note 4.

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

32. U.S. ENVTL. PROT. AGENCY, FACT SHEET: THE CLEAN WATER RULE 2-4 (2015) [https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact\\_sheet\\_summary\\_final\\_1.pdf](https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf).

33. Timothy Cama, *House Votes to Overturn Obama Water Rule*, HILL (Jan. 13, 2016, 11:58 AM), <https://perma.cc/6KL7-6YVX>.

34. Lawrence R. Liebesman et al., *Obama Administration Releases Proposed Rule on “Waters of the United States”: Proposal Would Expand the Universe of “Waters” Subject to Federal Regulation*, HOLLAND & KNIGHT (Apr. 7, 2014), <https://perma.cc/F59E-M4JJ>.

35. *In re* Evtl. Prot. Agency, 803 F.3d 804, 805 (6th Cir. 2015).

36. *Id.* at 806.

37. *Id.* at 804.

38. *Id.* at 806 (holding subject-matter jurisdiction was not a threshold issue to issuing the stay); *id.* at 809 (Keith, J., dissenting on the grounds that subject-matter jurisdiction serves as a threshold matter to issuing the stay).

39. IMPROVING TRANSPARENCY AND STRENGTHENING COORDINATION, *supra* note 8, at 1-3.

forces opposing the 2015 Rule resulted.<sup>40</sup>

The standoff continued, but the positions evolved.<sup>41</sup> The government returned to the 2008 Rule on November 16, 2015,<sup>42</sup> and the Sixth Circuit found it had subject matter jurisdiction to decide the eventual legality of the 2015 Rule.<sup>43</sup> In the government's memorandum, it vowed to continue to defend the 2015 Rule.<sup>44</sup> The government claimed the 2015 Rule maintained the status quo for most stakeholders and retracted the reach of the CWA for some. The 2015 Rule fulfilled the twin goals of removing uncertainty in the definition and comporting with the latest science.<sup>45</sup>

#### IV. WOTUS BEFORE OBAMA

Three SCOTUS cases interpreted the definition of WOTUS and developed the framework the rule seeks to clarify.<sup>46</sup> First, *United States v. Riverside Bayview Homes, Inc.* established the government's authority to require landowners apply for a permit without compensation.<sup>47</sup> Second, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* expressly restricts the use of the CWA against waters not adjacent to WOTUS.<sup>48</sup> Most recently, in 2006, *Rapanos v. United States* created confusion by restricting WOTUS to relatively permanent standing or flowing water and adjacent waters with a continuous surface connection.<sup>49</sup> The confusion arising after *Rapanos* was the question of what constituted a "continuous" connection, and what bodies of water were "relatively" permanent.

Following *Rapanos*, the Bush Administration temporarily suspended

---

40. *Id.*

41. *Id.*

42. *Id.*

43. *Murray Energy Corp. v. U.S. Dep't of Def.*, 817 F.3d 261, 274 (6th Cir. 2016), *rev'd sub nom.*, *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, 138 S. Ct. 617, 617 (2018).

44. IMPROVING TRANSPARENCY AND STRENGTHENING COORDINATION, *supra* note 8, at 1-3.

45. *Id.*; Press release, U.S. Env'tl. Prot. Agency, *supra* note 4 (The government asserts scientific evidence for the nexus between areas it seeks to regulate and undisputed WOTUS bodies, but the government does not provide any evidence such regulation would lead to cleaner water).

46. See *Rapanos v. United States*, 547 U.S. 715, 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

47. *Riverside Bayview Homes, Inc.*, 474 U.S. at 127.

48. *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 168.

49. *Rapanos*, 547 U.S. at 733.

WOTUS enforcement until issuing new guidance in 2008.<sup>50</sup> However, those regulations left a confusing ad hoc determination of WOTUS by the Army Corps.<sup>51</sup> The process required landowners making use of drainage areas that were potentially connected to WOTUS to apply to the Army Corps for a determination of the status of the drainage area.<sup>52</sup> If the area qualified under WOTUS according to the discretion of the Army Corps, then the CWA rules applied to that drainage area.<sup>53</sup>

Two criticisms of the 2008 Rule arose after the Rule change that lead to the 2014 proposed rule.<sup>54</sup> First, the government, landowners, and environmental groups all considered the 2008 Rule too discretionary—the results would likely depend on which Army Corps engineer drew the assignment.<sup>55</sup> Secondly, both landowners and environmental groups disliked the definition’s reach.<sup>56</sup> Landowners preferred a narrower definition, while environmental groups advocated for a greater scope.<sup>57</sup>

#### V. PROJECTED IMPACTS OF THE 2015 RULE

With the stay issued by the Sixth Circuit<sup>58</sup> and the government issuing nationwide guidance to return to the 2008 Rule while pending a final judgment,<sup>59</sup> the courts attempted to limit the financial and regulatory impacts on landowners. Landowners remain impacted by uncertainty due to continuing enforcement of the CWA, which requires defining WOTUS limits.<sup>60</sup> The duration of delay, the result of a pending SCOTUS case,<sup>61</sup> and any intervening actions by the Trump Administration are the elements still in flux creating uncertainty. The uncertainty will likely be felt in various ways by stakeholders including farmers, local governments, commercial developers, environmental and conservation advocates, and communities.

50. U.S. ENVTL. PROT. AGENCY & ARMY CORP OF ENG’RS, MEMORANDUM, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES* (Dec. 2, 2008) [hereinafter CLEAN WATER ACT JURISDICTION], [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

51. CLARIFICATION REQUEST OF “WATERS OF THE UNITED STATES,” *supra* note 1, at 1-15.

52. CLEAN WATER ACT JURISDICTION, *supra* note 50.

53. *Id.*

54. Press Release, U.S. Env’tl. Prot. Agency, *supra* note 4.

55. CLARIFICATION REQUEST OF “WATERS OF THE UNITED STATES,” *supra* note 1, at 1-15.

56. *Id.*

57. *Id.*

58. *In re* Env’tl. Prot. Agency, 803 F.3d 804, 809 (6th Cir. 2015).

59. IMPROVING TRANSPARENCY AND STRENGTHENING COORDINATION, *supra* note 8.

60. Beard, Reinterpretation of the Clean Water Act, *supra* note 7.

61. *See* Murray Energy Corp. v. U.S. Dep’t of Def., 817 F.3d 261, 261 (6th Cir. 2016), *rev’d sub nom.*, Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Def. 138 S. Ct. 617, 617 (2018).

*A. Farmers*

Although the real results remain to be seen, according to the government, the Rule's impact on agricultural practice will remain the same as before the rule change.<sup>62</sup> Given the 2008 Rule already excluded most farming practices from regulation under the CWA, the government's assertion appears credible.<sup>63</sup> Two major questions remain for farmers with regard to the new WOTUS definition.<sup>64</sup> First, did the 2008 Rule include more farming activity than had previously been regulated?<sup>65</sup> Second, can the government now claim no change in the limits of the rule while at the same time enforcing it onto activities previously ignored?<sup>66</sup> Those in opposition to the 2015 Rule argue "no" to the first question, or at the very least, "no" to the second question.<sup>67</sup>

*B. Local Governments*

Much like agriculture, the government-maintained 2015 Rule preserved the status quo for local governments.<sup>68</sup> Additionally, it appears the clarity offered in the definition would remove uncertainty in future improvement projects,<sup>69</sup> as well as remove costly and time consuming regulatory paperwork.<sup>70</sup> Opponents again argue the government has extended the traditional reach of the rule despite claims to the contrary.<sup>71</sup>

*C. Commercial Developers*

Mirroring farming<sup>72</sup> and local government,<sup>73</sup> the government claimed the impact on commercial developers would be negligible,<sup>74</sup> focusing on the 2015 Rule's exclusion of regulation on surface water collecting on construction sites.<sup>75</sup> The government also touted the benefits provided by removal of the ad hoc determination

---

62. THE CLEAN WATER RULE FOR AGRICULTURE, *supra* note 15, at 1-3.

63. *Id.*

64. Beard, Reinterpretation of the Clean Water Act, *supra* note 7.

65. *Id.*

66. *Id.*

67. *Id.*

68. THE CLEAN WATER RULE FOR LOCAL GOVERNMENT, *supra* note 15, at 1-3.

69. *Id.*

70. *Id.*

71. Beard, Reinterpretation of the Clean Water Act, *supra* note 7.

72. THE CLEAN WATER RULE FOR AGRICULTURE, *supra* note 15, at 1-3.

73. THE CLEAN WATER RULE FOR LOCAL GOVERNMENT, *supra* note 15, at 1-3.

74. THE CLEAN WATER RULE FOR DEVELOPERS, *supra* note 15, at 1-3.

75. *Id.*



process found in the 2008 Rule.<sup>76</sup> Commercial developers—the opposition—argue the addition of categorical exclusions not found within previous versions of the Rule signal an expansion of the definition’s reach.<sup>77</sup> They argue this is true because the exclusions cover bodies of water such as “ditches excavated in upland, artificial ponds and lakes, swimming pools, puddles, storm water and wastewater facilities, and groundwater” that have never been included previously.<sup>78</sup> The opposition argues the result of these exclusions is to imply inclusion of all previously excluded waters that are not now currently within the express exclusions.<sup>79</sup>

#### *D. Environmental and Conservation Advocacy*

Although several environmental and conservation groups have taken an active part on behalf of the government in the opposition litigation, they have mainly relied on the government to defend the regulation as enacted in June of 2015.<sup>80</sup> However, history suggests environmental and conservation groups will take an active role in either defending the Rule or pushing for stricter water quality protection policy depending on if the Rule survives.<sup>81</sup>

#### *E. Communities*

Communities for the purposes of WOTUS discussion are sometimes coextensive with local governments. More commonly, communities consist of metropolitan areas, neighborhoods within megacities, or loosely connected rural districts. The interest invoked and the impact felt by communities as a result of the WOTUS rule vary from those of local governments.<sup>82</sup> Communities would benefit from the 2015 Rule primarily in three ways.<sup>83</sup> First, clean, unpolluted water will provide improved recreational use of water sources.<sup>84</sup> Second, preventing pollution from entering surface water sources will improve the quality of drinking water

76. *Id.*

77. Beard, Reinterpretation of the Clean Water Act, *supra* note 7.

78. *Id.*

79. *Id.*

80. *In re* Env’tl. Prot. Agency, 803 F.3d 804, 809 (6th Cir. 2015) (limiting involvement to intervening participation in lieu of filing separate actions).

81. See BENJAMIN KLINE, *FIRST ALONG THE RIVER: A BRIEF HISTORY OF THE U.S. ENVIRONMENTAL MOVEMENT* 175 (4th ed. 2011).

82. See *THE CLEAN WATER RULE FOR COMMUNITIES*, *supra* note 18, at 1-3. *But see* *THE CLEAN WATER RULE FOR LOCAL GOVERNMENT*, *supra* note 15, at 1-3. In the case of a city serving as both a local government and community, the interest and impacts would be in addition to those of local governments.

83. *THE CLEAN WATER ACT FOR COMMUNITIES*, *supra* note 18, at 1-3.

84. *Id.* (Lakes and reservoirs are often closed to recreational activities such as swimming due to high levels of contamination).

supplies.<sup>85</sup> Finally, preventing pollution from entering surface water sources will reduce the costs communities incur to produce potable water.<sup>86</sup> All of these benefits are consistent with the CWA and are not disputed by opponents of the 2015 Rule.<sup>87</sup>

#### VI. TRUMPED?

On November 8, 2016, Donald J. Trump rode a wave of Rust Belt state upsets to a controversial election victory.<sup>88</sup> Candidate Trump made the WOTUS rule litigation a campaign issue, clearly voicing his opposition to the government's position.<sup>89</sup> His often used slogan "drain the swamp" applies ironically to the WOTUS fight where the EPA and farmers often argue over the definition of a wetland—resolution of such arguments determined the landowner's right to drain the disputed land feature. Before even taking office, then President-Elect, Trump disrupted WOTUS litigation by nominating, then Oklahoma Attorney General, Scott Pruitt to lead the EPA.<sup>90</sup> On the President's first day in office, he signaled his new agenda by issuing a freeze on new regulations and performing a complete revamp of the White House website.<sup>91</sup> The WOTUS rule received special mention, "[f]or too long, we've been held back by burdensome regulations . . . President Trump is committed to eliminating harmful and unnecessary policies such as . . . the Waters of the U.S. rule."<sup>92</sup>

---

85. *Id.*

86. *Id.*

87. 33 U.S.C. §1251(a) (2012); *see* Beard, Reinterpretation of the Clean Water Act, *supra* note 7 (memorandum accepts the merits of CWA legislation and questions only the scope of enforcement).

88. Karen Tumulty et al., *Donald Trump Wins the Presidency in Stunning Upset Over Clinton*, WASH. POST (Nov. 9, 2016), <https://perma.cc/8S8D-5D7U>.

89. Jenna Johnson, "I Will Give You Everything." *Here Are 282 of Donald Trump's Campaign Promises*, WASH. POST (Nov. 28, 2016), <https://perma.cc/M4P5-94PH>.

90. Andrew Kaczynski, *What Donald Trump's EPA Pick Says the Role of the EPA Is*, CNN POL. (Dec. 9, 2016, 4:50 PM), <https://perma.cc/U24R-MGA3>. As Attorney General of Oklahoma, Pruitt acted as the tip of the spear against the 2015 Rule.

91. David Jackson & Gregory Korte, *Trump Begins with Action on Obamacare, Regulation Freeze and Confirmations*, USA TODAY (Jan. 20, 2017, 12:44 PM), <https://perma.cc/3RVQ-FN59>.

92. *Id.*

*A. A New Administrator*

Pruitt's nomination confirmation in the Senate was not a foregone conclusion.<sup>93</sup> Senate Democrats who support environmental causes, including the expanded WOTUS rule,<sup>94</sup> lined up to attempt to block Pruitt's nomination.<sup>95</sup> As Attorney General, Pruitt challenged the WOTUS rule in both the Federal District Court of Oklahoma and the Tenth Circuit Court of Appeals.<sup>96</sup> Pruitt also lead Oklahoma to joining thirty other states in the Sixth Circuit.<sup>97</sup> Both the actions in the Sixth and Tenth Circuits are stayed pending SCOTUS review of a jurisdictional question.<sup>98</sup>

*B. Reversing Course*

With Pruitt's confirmation,<sup>99</sup> his direct involvement in WOTUS litigation created an interesting ethical dilemma.<sup>100</sup> At his confirmation hearing, Senate Democrats attempted to force Pruitt to agree to recuse himself from EPA litigation he previously participated in,<sup>101</sup> but Pruitt replied, "[i]f directed to do so [by agency ethics attorneys], I will do so."<sup>102</sup> Whether or not personally involved, Pruitt has guided the EPA in pursuing the agency's options for removing "unwarranted regulation."<sup>103</sup>

93. See Burgess Everett, *Breakthrough on Trump's Cabinet After 2 A.M. Vote*, POLITICO (Feb. 10, 2017), <https://perma.cc/TW4B-PL86>.

94. *Democratic Party on Environment: Party Platform, ON ISSUES*, <https://perma.cc/HT4S-6582> (archived Jan. 17, 2018).

95. Everett, *supra* note 93 ("Democrats may press for more all-nighters in protest[] of . . . Scott Pruitt's selection to lead the EPA.").

96. Michael Nordskog, *Pruitt and the EPA*, WESTLAW ENERGY & ENVTL. DAILY BRIEFING, Feb. 6, 2017, 2017 WL 470830, at \*2 (citing Brief of Petitioners at \*3, *Murray Energy Corp. v. U.S. Env'tl. Prot. Agency*, (No. 15-3887), 2016 WL 6566251 (6th Cir. Nov. 1, 2016)).

97. *Id.* at \*1 (citing Brief of Petitioner-Appellant at \*2, *Oklahoma v. U.S. Env'tl. Prot. Agency*, (No. 1-5039), 2016 WL 3626745 (10th Cir. July 1, 2016)).

98. *Murray Energy Corp. v. U.S. Dep't of Def.*, 817 F.3d 261, 261 (6th Cir. 2016), *rev'd sub nom.*, *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, 138 S. Ct. 617, 617 (2018).

99. Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), <https://perma.cc/L9F7-NBG8>.

100. See Brady Dennis & David Weigel, *EPA Nominee Scott Pruitt Won't Say if He Would Recuse Himself from His Own Lawsuits Against the Agency*, WASH. POST (Jan. 18, 2017), <https://perma.cc/PQB3-65BJ>.

101. *Id.* ("If you don't agree to recuse yourself,' [Sen. Edward J.] Markey, [Democrat from Massachusetts], said, 'then you become plaintiff, defendant, judge and jury on the cases you are bringing right now as attorney general of Oklahoma against the EPA.'").

102. *Id.*

103. *Id.*

### *I. Losing in Court*

The government has several options to rid the EPA of the new WOTUS regulation permanently.<sup>104</sup> The government can pursue the case in the Sixth Circuit,<sup>105</sup> bringing forward no new arguments than those that could not prevent the temporary injunction. Given the criteria for a temporary injunction, this defense likely will fail to prevent the government's case to succeed on the merits.<sup>106</sup> Once the government has lost in the Sixth Circuit, ensuring the demise of the new WOTUS rule becomes as simple as declining to appeal the final judgment.<sup>107</sup>

If the government prevails in court, the executive branch has the possibility to assert executive discretion to essentially stop enforcement of the rule. The most recent attempt by the executive to use executive discretion to void a regulation involved, then President, Barack Obama's executive order shielding five million "DREAMers" from deportation.<sup>108</sup> The Trump Administration chose to delay enforcement of the 2015 Rule until November 16, 2019.<sup>109</sup>

---

104. Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017) (President Trump stopped short of proscribing a litigation stance but did signal future government actions will be taken in the Sixth Circuit by the Department of Justice).

105. The possibility remains that SCOTUS could determine original jurisdiction lay in the Federal District Court for Oklahoma. *Murray Energy Corp. v. U.S. Dep't of Def.*, 817 F.3d 261, 261 (6<sup>th</sup> Cir. 2016), *rev'd sub nom.*, *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.* 138 S. Ct. 617, 617 (2018).

106. *In re Envtl. Prot. Agency*, 803 F.3d 804, 807 (6th Cir. 2015) ("[W]e conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims.").

107. *Hollingsworth v. Perry*, 570 U.S. 693, 693 (2013) (California refused to appeal an adverse district court ruling to an anti-gay marriage ballot initiative that state officials did not support. SCOTUS held that without the State, the third parties defending the law in the district court lacks standing to appeal).

108. Eyder Peralta, *Obama Goes It Alone, Shielding Up To 5 Million Immigrants From Deportation*, NPR (Nov. 20, 2014, 6:00 PM), <https://perma.cc/T7RQ-3AA7>.

109. Press Release, U.S. Envtl. Prot. Agency, *supra* note 19. The Trump Administration may be able to side step the rule making process entirely by issuing an interpretive rule that would change the enforcement of the law with binding effect. The government could only do so if the change could be done while merely explaining and not amending the Obama WOTUS Rule. *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

The government has moved to repeal and replace the rule, but it has not precluded the prospect of further litigation.<sup>110</sup> Repealing a rule requires the same procedures used in enacting a new rule.<sup>111</sup> Enacting a new rule can be done through a public hearing if required by statute or through notice and comment.<sup>112</sup> Given the politically explosive nature of the WOTUS rule, the government has chosen to use both public meetings and a notice and comment period.<sup>113</sup> The procedural requirements of notice and comment are extensive and time consuming.<sup>114</sup> Failure in any step in the procedural process makes the government vulnerable to defeat in a challenge by proponents of the 2015 Rule.<sup>115</sup>

#### VII. CONTINUING THE FIGHT

The mere fact that opponents of the 2015 Rule are now in a position of power in the executive branch does not render the 2015 Rule's proponents defeated. The Trump Administration has promised the most extensive rollbacks of federal regulations since the Reagan Administration.<sup>116</sup> Much like Reagan, Trump will face resistance and will need perfect execution of regulatory maneuvering and legal action or face defeat. For each of the options available to the Trump Administration to remove the rule, proponents possess options to continue to fight.

To prevent the Trump Administration from pursuing a weak defense in the current litigation, proponents of the rule could file for dismissal for mootness.<sup>117</sup> The mootness doctrine requires an actual case or controversy.<sup>118</sup> Given the fact that the government, led by Administrator Pruitt, now stands ideologically aligned with the majority of states opposing the new rule, proponents of the rule can avoid a

---

110. See generally Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017); U.S. Env'tl. Prot. Agency, *Rulemaking Process*, WATERS U.S. (WOTUS) RULEMAKING, <https://perma.cc/DZ63-NNUQ> (archived May 26, 2018) [hereinafter *Rulemaking Process*].

111. See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 41 (1983).

112. 5 U.S.C. § 553 (2012).

113. *Rulemaking Process*, *supra* note 110.

114. See generally 5 U.S.C. § 553 (2012).

115. See generally *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 57 (SCOTUS found the National Highway Traffic Safety Administration's actions to be arbitrary or capricious because the agency only addressed problems with passive restraints and did not express a reason to remove the airbag requirement).

116. Lydia Wheeler & Lisa Hagen, *Trump Signs '2-for-1' Order to Reduce Regulations*, HILL (Jan. 30, 2017, 10:23 AM), <https://perma.cc/5PPQ-7J8V>.

117. See U.S. CONST. art. III, § 2.

118. *U.S. Parole Comm. v. Geraghty*, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).").

binding adverse ruling by arguing that no case or controversy exists between the parties.<sup>119</sup> Proponents could intervene and defend the rule themselves but would then run the risk of losing the ability to appeal.<sup>120</sup> Dismissal is a less risky strategy. Since mootness depends on Article III jurisdiction, the court must dismiss if it finds the case moot even if both parties petition to keep fighting.<sup>121</sup>

If proponents successfully petition for dismissal, the next step would be to refile the case. To achieve standing in the new case, proponents would need to rely on either association standing<sup>122</sup> or convince at least one state to support the Rule. Given the broader standing that is afforded to states, the addition of a state would bolster the proponents' case.<sup>123</sup>

Like standing, refileing the case also brings up the question of venue. A new filing in the Sixth Circuit would put proponents in a poor position given that Circuit's previous ruling.<sup>124</sup> Other circuits, such as the Second Circuit, may react more favorably to stronger environmental regulations.<sup>125</sup> The Ninth Circuit also seems particularly willing to take on the new Trump Administration.<sup>126</sup> One potential

119. See generally *In re* Env'tl. Prot. Agency, 803 F.3d 804 (6th Cir. 2015).

120. See *Hollingsworth v. Perry*, 570 U.S. 693, 693 (2013) (Intervening supporters of anti-gay marriage ballot initiative lacked standing to appeal an adverse district court ruling after having defended the law in the district court).

121. *Defunis v. Odegaard*, 416 U.S. 312, 319-20 (1974) (SCOTUS dismissed the case because the plaintiff would graduate law school regardless of the outcome of the case despite both sides asking to continue).

122. *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (citations omitted) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.").

123. See *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 497 (2007) (Massachusetts and other states granted standing to challenge the EPA's lack of enforcement of carbon emission restrictions); *Washington v. Trump*, 844 F.3d 1151, 1151 (9th Cir. 2017) (Washington and Minnesota granted third party standing to assert the interests of foreign nationals facing a travel ban).

124. *In re* Env'tl. Prot. Agency, 803 F.3d at 807 (The Sixth Circuit ruled that the opponents of the Obama WOTUS rule are likely to prevail on the merits).

125. *Univ. of Ariz., Court Sides With Power Plants on EPA Cost-Benefit Water Rule*, WATER RESOURCES RES. CTR., <https://perma.cc/C2JR-PQ8T> (archived Jan. 17, 2018) (In 2007, the Second Circuit ruled in favor of a CWA rule tightening regulations before being overturned by SCOTUS).

126. See generally *Trump*, 844 F.3d at 1151.

drawback to selecting the Ninth Circuit would be the Republican-led movement in the Senate to split the circuit.<sup>127</sup> Depending on how the split occurs, the Ninth Circuit could lose favorability for proponents of the new WOTUS Rule.<sup>128</sup> Regardless of a Ninth Circuit split, a clever choice of venue could put proponents of the new WOTUS Rule in a significantly improved position despite the Trump Administration showing caution by attempting to remove the rule through the regulatory process.<sup>129</sup> However, the proponent's case would rely mainly on finding a procedural mistake by the Administration rather than the merits of the Trump Rule.<sup>130</sup>

If proponents prevail by using clever venue choice in an intermediate court of appeals, the case would most likely head to SCOTUS for ultimate determination similar to the Obama Administration's immigration order.<sup>131</sup>

Gorsuch, the newest Supreme Court Justice, could be the deciding vote. Gorsuch's record on the Tenth Circuit leaves room for speculation on how he would rule on the WOTUS litigation. In 2016, as a member of the Tenth Circuit, Gorsuch wrote a concurrence where he very plainly voiced his dislike for broad executive and agency authority.<sup>132</sup> However, he based much of his displeasure with executive authority on an agency's ability to change course suddenly when a new administration comes to power.<sup>133</sup>

Such a stance applied to the WOTUS battle would seem to favor proponents of the rule who merely seek to maintain the status quo. If Justice Gorsuch chooses to side with the other conservatives, the Sixth Circuit left him an out to reconcile his stated beliefs with a pro-government ruling when it enjoined the new rule last

---

127. "Republican Sens. Jeff Flake and John McCain of Arizona introduced legislation last month to carve six states out of the San Francisco-based court circuit and create a brand new 12th Circuit." Barnini Chakraborty, *Republicans Push Bill to Split up 'Nutty 9th Circuit,'* FOX NEWS (Feb. 9, 2017), <https://perma.cc/BT4U-N7J9>.

128. *Id.* (Republicans "argue that the 9th is too big, too liberal and too slow resolving cases. If they succeed, only California, Oregon, Hawaii and two island districts would remain in the 9th's judicial fiefdom.").

129. See Exec. Order No. 13778 82 Fed. Reg. 12497 (Feb. 28, 2017).

130. See generally 5 U.S.C. § 553 (2016); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

131. Josh Gerstein & Seung Min Kim, *Supreme Court Impasse on Immigration Threatens 'Dreamers,' too*, POLITICO (June 23, 2016, 6:30 PM), <https://perma.cc/J26P-TGPE> (SCOTUS, divided four to four, left in place a 5th Circuit ruling adverse to the government).

132. Petition for Review of an Order of the Board of Immigration Appeals at 15, *Gutierrez-Brizuela v. Lynch*, No. 14-9585 (10th Cir. Aug. 23, 2016) (Gorsuch, J., concurring) (Justice Gorsuch concurring with the Tenth Circuit rules to limit the authority of an administrative agency to issue guidance on an ambiguous law where such guidance carries the force of law).

133. *Id.*

year.<sup>134</sup> No one knows how Justice Gorsuch would rule on the WOTUS rule, but his presence could signal a transition away from the longstanding deference to executive authority.<sup>135</sup>

#### VIII. CONCLUSION

Despite years of dispute over the breadth of the WOTUS Rule in the wake of the 2006 *Rapanos* decision,<sup>136</sup> the battle seems far from over. Both opponents and proponents of the 2015 WOTUS Rule have numerous legal and procedural obstacles remaining before a resolution can be reached. Although SCOTUS could end up being the referee of a final resolution, it would be foolish to think a controversy that has raged during three separate administrations could not continue on through another.

---

134. *In re* Envtl. Prot. Agency, 803 F.3d 804, 808 (6th Cir. 2015) (“[T]he sheer breadth of the ripple effects caused by the Rule’s definitional changes counsels strongly in favor of maintaining the status quo for the time being.”).

135. *See generally* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

136. *See generally* *Rapanos v. United States*, 547 U.S. 715, 719-20 (2006).