NORMAL FARMING AND ADJACENCY: A LAST MINUTE GIFT FOR THE FARM BUREAU?

BY

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In this Article, we argue that, in their new Clean Water Rule, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers illegally precluded waters being used by agricultural interests from being deemed "adjacent" to other jurisdictional waters under the Clean Water Act (CWA). In so doing, the Agencies deny these waters the benefit of a conclusive presumption that they are themselves jurisdictional waters. Instead, in order to establish jurisdiction it is incumbent on the Government to show that these agricultural waters have a significant nexus with core jurisdictional waters, regardless of their proximity to those waters. This dynamic illegally injects into the statute the idea that the jurisdictional status of a water may depend on the use to which it is put. Further, such treatment of agricultural waters is inconsistent with the more limited favorable treatment that agricultural interests already receive under section 404(f) of the CWA.

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I. INTRODUCTION

On June 29th of last year, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) published in the Federal Register a joint new regulation—known as the "Clean Water Rule"—governing which waters they view as being protected under the Clean Water Act (CWA).[1] Judging from the initial press accounts, one might have thought that the Rule constituted on balance at least a strong assertion of federal jurisdiction, or perhaps even an unqualified environmental triumph.[2] The reality, though, is more complicated.

First, as Professor Blumm and Mr. Thiel note, EPA and the Corps (collectively, the Agencies) for the first time expressly disclaim jurisdiction over groundwater, even where it may have a close hydrological connection with a nearby jurisdictional water.[3] And second, as Professor Parenteau describes, the Agencies inserted several last-minute changes to the rule, weakening it significantly as compared to what had been in their original proposal.[4] Professor Parenteau correctly identifies as one of the worst of these concessions the arbitrary cut off of 4,000 feet,[5] beyond which most waters are deemed, as a matter of law, to be incapable of having a jurisdiction-conferring "significant nexus" with either a traditional navigable water,[6] an interstate water, or the territorial seas (which we will collectively refer to as "core jurisdictional waters").[7]

This Article will focus on another important last-minute change, involving how the Agencies propose to address agriculture, silviculture, and ranching. Even before the new Rule, many of those who engaged in these activities received special treatment under section 404(f), with many of their otherwise-jurisdictional discharges being exempted from regulation under

1 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012); Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) [hereinafter Clean Water Rule] (codified at 30 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

2 *See, e.g.*, Coral Davenport, *Obama Announces New Rule Limiting Water Pollution*, N.Y. TIMES, May 27, 2015, http://nyti.ms/1KzZUba (last visited Apr. 9, 2016) (discussing the Clean Water Rule and its intent to restore federal authority over water pollution); David Jackson, *Obama Team Ramps Up Water Regulations*, USA TODAY, May 27, 2015, http://www.usatoday.com/story/news/nation/2015/05/27/obama-water-regulations-environmental-protection-agency/28003199/ (last visited Apr. 9, 2016) (discussing the Obama administration's expansion of authority under the Clean Water Rule).

3 Michael C. Blumm & Steven M. Thiel, *(Ground)Waters of the United States: Unlawfully Excluding Tributary Groundwater from Clean Water Act Jurisdiction*, 46 ENVTL. LAW 333, 334–35 (2016).

4 Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 ENVTL. LAW 379, 388 (2016).

5 *Id.*

6 EPA and the Corps use the phrase "traditional navigable waters" to describe waters in their first regulatory category, meaning those that are, were, or could be used in either interstate or foreign commerce, including waters subject to the tide. *See* 80 Fed. Reg. at 37,058; 33 C.F.R § 328.3(a)(1) (2015) (describing this category).

7 80 Fed. Reg. at 37,087–90; 33 C.F.R. § 328.3(a)(1)–(6).

specified circumstances.[8] Additionally, in 1993 EPA and the Corps promulgated a regulation excluding "prior converted cropland" from their definitions of "waters of the United States," based in part on their conclusion that these croplands had lost so many of their ecological values that "they should not be treated as wetlands for purposes of the CWA."[9]

In issuing the Clean Water Rule, the Agencies created a third significant relief valve for agricultural interests. Like section 404(f), this new mechanism also extends to their silvicultural, and ranching brethren.[10] The Agencies did this in the context of redefining which waters would be deemed to be jurisdictional on a per se basis by virtue of their being adjacent to other specified types of jurisdictional waters.[11] While defining adjacent with more specificity than ever before—and in an otherwise seemingly expansive way—EPA and the Corps specifically precluded any waters from being deemed to be adjacent, no matter how close they may be to the other waters, if they are being used for normal farming, ranching, or silvicultural activities (collectively referred to as being subject to the normal farming exception).[12]

As shown below, the effect of excluding waters subject to normal farming from the definition of adjacent is to preclude those waters from ever benefitting from the categorical presumption that they have a significant nexus, as defined under the rule, with either a traditional navigable water, an interstate water, or a territorial sea—a trio of water types that the rule seems to treat as the core jurisdictional waters, and we will refer to them as such.[13] In turn, this denies the relevant (farming) water—no matter how close it is to the qualifying jurisdictional water—a conclusive presumption that it is itself a water of the United States, which otherwise attaches to all waters that are adjacent to the qualifying jurisdictional waters.[14] It is still possible that these waters may qualify as waters of the United States, but only if the Government shows, on a case-specific basis, that a farmed water does indeed have a significant nexus with a core jurisdictional water.[15] If the

8 33 U.S.C. § 1344(f) (2012).

9 Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,031–32 (Aug. 25, 1993).

10 It is worth pointing out here that the "prior converted cropland" exclusion applies only to agricultural concerns, and indeed, only to a subset of them. *Id.* at 45,031 (providing that the prior converted cropland exclusion applies only to areas that "were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible"). It does not apply to those who grow perennial crops (such as hay or cranberries), and it does not apply to either silvicultural or ranching activities. *See id.*

11 CONG. RESEARCH SERV., EPA AND THE ARMY CORPS' RULE TO DEFINE "WATERS OF THE UNITED STATES" 7 (2016).

12 *See* 80 Fed. Reg. at 37,055, 37,105 (exemption codified at 40 C.F.R. § 232.3(c) (2015); 33 C.F.R. § 323.4 (2015)).

13 *See, e.g.*, *id.* at 37,060 (discussing the agency's determination that "adjacent waters as defined have a significant nexus to downstream traditional navigable waters, interstate waters, and territorial seas and therefore are "waters of the United States" (citing 40 § C.F.R. 232.3; 33 C.F.R. § 323.4).

14 *See id.* at 37,105.

15 *See* 33 C.F.R. § 328.3(a)(8) (2015) (providing that waters proximate to other qualifying jurisdictional waters should be analyzed for jurisdiction on a case-specific basis if they do not

Government is unable to make this showing, the net result could be a finding that there is no jurisdiction;[16] this could free the relevant area from "normal farming" constraints, even if the property still exhibits wetland characteristics.[17]

II. AGRICULTURE AND ITS IMPACT ON WETLANDS

The United States Fish and Wildlife Service (FWS) estimates that the area that now comprises the lower forty-eight states contained almost 221 million acres of wetland in the colonial period.[18] Its most recent estimate is that there are 110.1 million acres of wetlands in that same area, meaning that we have lost slightly more than half of these resources.[19] At the same time, however, FWS notes that our rate of loss has declined radically over time. Its analysis indicates that, on a net basis, we lost approximately 458,000 acres of wetlands per year between the 1950s and the 1970s, 290,000 acres per year between the1970s and the 1980s, 58,550 acres per year between the 1980s and the 1990s, and, most recently, only 13,800 acres per year between 2004 and 2009.[20]

This dramatic overall improvement, however, can obscure significant losses for some types of wetlands. For example, even though FWS estimates that we had a net loss of only 62,000 acres between 2004 and 2009, during that same period it concluded that we had a net loss of approximately 633,000 acres of freshwater forested wetlands.[21]

Throughout all of these relevant time periods, agriculture (especially when considered together with silviculture) has been by far the largest cause of our wetland losses. As far as the historical sources of these losses are concerned, FWS determined that agriculture was responsible for approximately 87% of the losses between the mid-1950s and the mid-1970s.[22]

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meet the definition of "adjacent"). It is also possible that a citizen-plaintiff could show that such a nexus exists in the context of a citizen suit, but this is not likely to happen very often.

16 *See* 80 Fed. Reg. at 37,060–61 (explaining that waters analyzed on a case-specific basis must possess a significant nexus to core waters in order for the agencies to assert jurisdiction); Rapanos v. United States, 547 U.S. 715, 767 (Kennedy, J., concurring) ("Absent a significant nexus, jurisdiction under the Act is lacking.").

17 *See infra* notes 41–45 and accompanying text (discussing the Agencies' definition of "normal farming," which generally requires continuous qualifying activity to maintain an exemption).

18 THOMAS E. DAHL, U.S. FISH & WILDLIFE SERV., WETLANDS LOSSES IN THE UNITED STATES: 1780S TO 1980S 5 (1990), *available at* https://www.fws.gov/wetlands/Documents/Wetlands-Losses-in-the-United-States-1780s-to-1980s.pdf.

19 THOMAS E. DAHL, U.S. FISH & WILDLIFE SERV., STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES: 2004 TO 2009 16 (2011), *available at* http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.

20 *Id.* at 40. Interestingly, that same figure indicates that the United States gained, on a net basis, an average of 32,000 acres of wetlands per year from 1998 to 2004. *Id.*

21 *Id.*

22 RALPH W. TINER, JR., U.S. FISH & WILDLIFE SERV., WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 31 (1984), *available at* http://www.arlis.org/docs/vol2/hydropower/APA_DOC_no._2417.pdf.

It later estimated that agriculture was responsible for 54% of the losses from the 1970s to the 1980s.[23] Most recently, it indicated that agriculture and silviculture combined were responsible for 51% of the losses of forested wetlands between 2004 and 2009.[24]

III. A BRIEF OVERVIEW OF HOW SECTION 404 APPLIED TO AGRICULTURE LEADING UP TO THE CLEAN WATER RULE

Section 404 traces its jurisdictional roots to section 301(a) of the CWA, which prohibits "the discharge of any pollutant" without a permit.[25] Section 502(12) defines the phrase "discharge of a pollutant" to require an addition of a pollutant to navigable waters from a point source.[26] In turn, section 502(7) defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas."[27]

In the agricultural context, the courts consistently have found that using earthmoving equipment to redistribute significant amounts of earthen materials into jurisdictional wetlands—through such activities as land-clearing or ditching—can constitute a jurisdictional addition of pollutants to those waters. The courts' analysis has been fairly straightforward. First, they have found that earth-moving equipment, such as bulldozers, backhoes, and the like, can constitute a "point source" under section 502(14).[28] And second, they have found that the redeposit of non-de minimis amounts of earthen materials constitutes an addition of a pollutant within the meaning of section 502(12).[29]

Putting aside for the moment any consideration of the issues posed by the Supreme Court's opinions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)[30] and, especially, *Rapanos v. United States*,[31] in most adjacent wetland situations,[32] the question whether a particular wetland is jurisdictional has been fairly

23 THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. FISH & WILDLIFE SERV., WETLANDS STATUS AND TRENDS IN THE CONTERMINOUS UNITED STATES MID-1970'S TO MID-1980'S 12–14 (1991), *available at* http://www.nwrc.usgs.gov/wdb/pub/others/wetstatus.pdf.

24 *See* DAHL, *supra* note 19, at 42.

25 CWA, 33 U.S.C. § 1311(a) (2012).

26 *Id.* § 1362(12).

27 *Id.* § 1362(7).

28 *See, e.g.*, Avoyelles Sportsmen's League, Inc. v. Marsh (*Avoyelles*), 715 F.2d 897, 922 (5th Cir. 1983) (involving bulldozers and backhoes); Borden Ranch P'ship v. U.S. Army Corps of Eng'rs (*Borden Ranch*), 261 F.3d 810, 815 (9th Cir. 2001) (involving a substantial plow referred to as a "deep ripper").

29 *See, e.g.*, *Borden Ranch*, 261 F.3d at 814–15 (holding that the act of "deep ripping" can constitute the discharge of a pollutant); United States v. Deaton, 209 F.3d 331, 335–36 (4th Cir. 2000) (holding that redeposits of preexisting soil dredged by excavation constitute an addition of a pollutant); *Avoyelles*, 715 F.2d at 923, 923 n.41 (finding that "addition[s]" may include "redeposit[s]," and noting that the activities at issue in the case were clearly non-de minimis).

30 531 U.S. 159 (2001).

31 547 U.S. 715 (2006).

32 While, in light of *SWANCC*, the issues regarding nonadjacent wetlands are complex, our focus in this Article is on adjacent wetlands.

straightforward legally.[33] EPA and the Corps have long asserted jurisdiction over almost all adjacent wetlands,[34] whether they are adjacent to traditional navigable waters, to their tributaries, or to other jurisdictional waters.[35] Additionally, they have long defined "wetlands" as:

> [T]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[36]

In applying this narrative standard, EPA and the Corps generally use what is referred to as the Corps' 1987 Wetlands Delineation Manual.[37] On the key criterion of hydrology, that manual requires that the relevant area be "inundated or saturated to the surface continuously for at least 5% of the growing season in most years (50% probability of recurrence)."[38]

As mentioned, two other unique twists in the agricultural context involve section 404(f)[39] and the regulatory exclusion of prior converted cropland from the definition of "waters of the United States."[40] Section 404(f) generally exempts "normal farming, silviculture and ranching activities" (collectively, "normal farming") from the reach of section 404.[41] Under the Agencies' regulations, in order to qualify as normal farming the activity must "be part of an established (i.e., ongoing)" operation.[42] Additionally, the area

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33 *See, e.g.*, Alan Copelin, *Focusing on the Wetland Definition*, 23 ST. B. TEX. ENVTL. L.J. 34, 41 (1992) ("[V]irtually all wetlands are under the Corps's authority, regardless of geography or manner of creation.").

34 Historically, the Agencies have defined "adjacent" to mean "bordering, contiguous, or neighboring," without further elaborating as to what "neighboring" met. *Compare* 33 C.F.R. § 328.3(c) (2015) (defining "adjacent wetlands" as "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like"), *with* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,251 (Nov. 13, 1986) (providing the same definition).

35 *See, e.g.*, 33 C.F.R. § 328.3(a)(7). The sole exception to this has been that the agencies have not asserted jurisdiction over wetlands that are adjacent solely to other wetlands. *Id.*

36 *See* 33 C.F.R. § 328.3(c)(4) (current definition); U.S. Envtl. Prot. Agency, *Section 404 of the Clean Water Act: How Wetlands Are Defined and Identified*, http://www.epa.gov/cwa-404/section-404-clean-water-act-how-wetlands-are-defined-and-identified (last visited Apr. 9, 2016) (indicating that the same definition of wetlands has been used by the Corps and EPA since the 1970s for regulatory purposes).

37 *See* Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program, 58 Fed. Reg. 4,995 (Jan. 19, 1993) (noting that "it has also been EPA's practice in judicial enforcement actions to confirm the jurisdictional status of a property under the 1987 [Wetlands Delineation] Manual"); ENVTL. LAB., U.S. ARMY CORPS OF ENG'RS, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL 30 (1987), *available at* http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.

38 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL, *supra* note 37, at 30.

39 33 U.S.C. § 1344(f) (2012).

40 33 C.F.R. § 328.3(b)(2).

41 33 U.S.C. § 1344(f)(1).

42 33 C.F.R. § 323.4(a)(1)(ii).

on which the activity is conducted cannot have "lain idle so long that modifications to hydrologic regime are necessary to resume operations."[43] Even if an activity otherwise qualifies as normal farming, it may lose that status if the relevant discharge is "recaptured" under section 404(f)(2).[44] A discharge is recaptured if it is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters may be reduced."[45]

The Agencies promulgated the regulatory exclusion for prior converted cropland in an effort to harmonize section 404 with the approach that the Natural Resources Conservation Service (NRCS) had taken under the "Swampbuster Program," which the NRCS administers under Subtitle B of the Food Security Act.[46] Under that program, the NRCS had created an exclusion with the very same name—"prior converted cropland."[47] Here, the Agencies not only adopted both the concept and the name, they embraced the NRCS's definition verbatim. That definition provides:

> Prior-converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:
>
> (i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
>
> (ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season in most years (50 percent chance or more).[48]

This exclusion has dramatic effects. In 1996, the NRCS itself exclaimed that it would ensure "that approximately 53 million acres of prior-converted

43 *Id.*

44 *See* 33 U.S.C. § 1344(f)(2).

45 *Id.*

46 Food Security Act of 1985, 16 U.S.C. §§ 3801, 3821–3824 (2012); Memorandum from the USDA-Nat. Res. Conservation Serv. to the Field, Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and section 404 of the Clean Water Act (Feb. 25, 2005) (addressing the intention of the regulatory exemptions to harmonize the section 404 wetland delineation process). At its heart the Swampbuster Program denies farmers certain agricultural subsidies if they destroy wetlands in producing agricultural commodities. 16 U.S.C. § 3821; *see also* Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,031 (Aug. 25, 1993) ("[W]e are excluding [prior converted] cropland from the definition of waters of the U.S. in order to achieve consistency in the manner that various federal programs address wetlands.").

47 *See* 7 C.F.R. § 12.5(b)(1)(i) (exempting prior converted cropland).

48 *Id.* § 12.2(a)(8).

(PC) cropland [would] not be subject to wetland regulation."[49] While, as noted, the Agencies argue that these areas have been degraded to the point where they no longer perform the same ecological functions or provide the same values,[50] they may still have hydrological characteristics that would allow for full recovery if farming activities were to cease.[51] While EPA and the Corps interpret their prior converted cropland exclusion as including an "abandonment" dynamic if 1) the land is not used for farming for five years, and 2) it thereafter qualifies as a wetland,[52] this outcome is hardly assured. Because prior converted cropland does not constitute a water of the United States while it is being farmed, and won't for at least another five years after farming ceases, there is nothing that prevents a landowner from completely draining its property or discharging as much fill as it chooses during this extended time period.[53] Thus, with planning, the abandonment dynamic, at least in many cases, may be readily subverted.

While this topic is beyond the scope of this Article, there is a fairly strong argument that the prior converted cropland exemption is inconsistent with the CWA. As the Agencies pointed out in the preamble, its purported authority rests on their interpretation of the "normal circumstances" language in their regulatory definition of "wetlands,"[54] which, again, requires that the relevant area support, "under normal circumstances . . . a prevalence of vegetation typically adapted for life in saturated soil conditions."[55] EPA and the Corps construe this as meaning these normal circumstances occurred "in the present and recent past."[56] Thus, they conclude that under this interpretation, "cropped areas [do] not constitute wetlands where hydrophytic vegetation has been removed by the agricultural activity."[57]

Given how this reading overrides the much more measured special treatment that Congress provided to normal farming in section 404(f), there is an argument that this reading of the definition of "wetlands" is

49 U.S. Dep't of Agric., *Wetlands Programs and Partnerships: RCA Issue Brief #8 January 1996*, http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/nra/dma/?cid=nrcs143_014214 (last visited Apr. 9, 2016).

50 Clean Water Act Regulatory Programs, 58 Fed. Reg. at 45,032.

51 *See id.* at 45,033–34 (discussing the potential for prior converted cropland to convert back to wetlands should they meet the "abandonment" standard under the pre-existing Soil Conservation Service provisions).

52 *Id.* at 45,034; *see also* Huntress v. U.S. Dep't of Justice, No. 12–CV–1146S, 2013 WL 2297076, at *10–11 (W.D.N.Y. May 24, 2013) (holding that the Agencies' abandonment dynamic still applies under the CWA despite the fact that Congress invalidated the NRCS's rule upon which it was based through 16 U.S.C. § 3822(a)(6)).

53 *See* Kristine A. Tidgren, *Prior Converted Cropland: A 2015 Review*, IOWA STATE UNIV. CTR. FOR AGRIC. LAW AND TAX'N, Aug. 27, 2015, https://www.calt.iastate.edu/article/prior-converted-cropland-2015-review (last visited Apr. 9, 2016) (discussing the exclusion of prior converted cropland from the definition of "waters of the United States" and the ability of owners of such property to dredge and fill the land without having to obtain a permit).

54 58 Fed. Reg. at 45,032.

55 33 C.F.R. 328.3(b) (2015).

56 58 Fed. Reg. at 45,032.

57 *Id.*

inconsistent with the statute.[58] This argument is strengthened by the fact that the exclusion, on its face, extends its safe harbor to circumstances where the relevant landowner may have engaged in illegal ditching and/or filling at any point up to December 23, 1985.[59]

Finally, we should say a few words about the three Supreme Court cases addressing "waters of the United States" issues under the CWA: *United States v. Riverside Bayview Homes, Inc.* (*Riverside Bayview*),[60] *SWANCC*, and *Rapanos*. For our purposes, the first key point is that in *Riverside Bayview*, the Court unanimously upheld the Corps' categorical assertion of jurisdiction over wetlands that are adjacent to traditional navigable waters, based on the Corps' conclusion that these wetlands are "inseparably bound up" with the waters to which they are adjacent.[61] In *SWANCC*, by contrast, the Court determined that the Corps could not regulate nonadjacent waters based solely on the presence of migratory birds.[62] Introducing the now-famous phrase, Chief Justice Rehnquist, writing for the majority, distinguished *Riverside Bayview* by noting that "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed" its reading in that case.[63] In the end, the Court concluded that the phrase "waters of the United States" must be read in light of the statutory terms—"navigable waters"—it was used to define.[64] Accordingly, it rejected the Corps' interpretation of the relevant subsection of the old rule,[65] pursuant to which the Government could establish jurisdiction merely by showing that the relevant water was used by migratory birds.[66]

58 *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 302–04 (2009) (Ginsburg, J., dissenting) (rejecting a similar attempt to "hide elephants in mouseholes" in the context of dredge and fill material from mining excavation); United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986) (denying landowner's claim that his activities fell within the normal farming exemption because the consequences of his actions would result in upland crop production in an area where hydrophytic crop production had historically occurred, therefore representing "a new operation in the wetlands").

59 *See* 7 C.F.R. § 12.2(a)(8) (excluding from regulation wetlands converted to cropland before 1985). In the preamble, the Agencies asserted that the prior converted cropland exclusion is unavailable if land were converted through unauthorized discharges between 1972 and 1985, 58 Fed. Reg. at 45,034, but it is by no means clear that this is the law. Indeed, there certainly don't appear to be any cases in which the Agencies have asserted this limitation since promulgating the rule.

60 474 U.S. 121 (1985).

61 *Id.* at 134.

62 *SWANCC*, 531 U.S. 159, 171–72 (2001).

63 *Id.* at 167 (emphasis added).

64 *Id.* at 172.

65 Under the old rule, the "waters of the United States" included all "other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1999).

66 *SWANCC*, 531 U.S. at 173; Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (asserting jurisdiction over waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines").

The third case of this troika, *Rapanos*, involved the jurisdictional status of wetlands that are adjacent to nonnavigable tributaries.[67] The Court's decision in *Rapanos* is harder to briefly summarize, in significant part because the case resulted in a fractured opinion, with no clear points of agreement on the majority side between Justice Scalia's plurality opinion—which garnered the votes of three other Justices[68]—and Justice Kennedy's concurring opinion, with respect to which he wrote for himself.[69] To keep things simple, we will assume, as the vast majority of circuits have concluded, that at least one rule that emerges from *Rapanos* is that these wetlands are jurisdictional at least where they meet the test established in Justice Kennedy's concurring opinion.[70]

In *Rapanos*, Justice Kennedy embraced Chief Justice Rehnquist's characterization (in *SWANCC*) of the operative significant nexus principle in *Riverside Bayview*.[71] He determined that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[72]

Applying this principle, Justice Kennedy found that the Corps' old definition of "tributary"—which required only a showing that the relevant water course possessed an "ordinary high water mark"[73]—was insufficient to support a categorical determination that most or all wetlands adjacent thereto would have a significant nexus with downstream navigable waters.[74] As such, he determined that, in the short run, the Corps would have to

67 *Rapanos*, 547 U.S. 715, 729–30 (2006) (plurality opinion).

68 *Id.* at 719.

69 *Id.* at 759 (Kennedy, J., concurring).

70 *See, e.g.*, United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011) (agreeing that either Justice Kennedy's test or the plurality's test should be used to test jurisdiction); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009) (holding that the Corps has jurisdiction over wetlands meeting either Justice Kennedy's or the plurality's test); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999–1000 (9th Cir. 2007) (holding that Justice Kennedy's test provides the rule of law); United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) (adopting Justice Kennedy's test as the governing rule of *Rapanos*); United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (holding that the federal government can establish jurisdiction by meeting either the plurality's test or Justice Kennedy's test); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (holding Justice's Kennedy's test is the narrowest holding of *Rapanos*, hence to be followed); *see also* Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288 (4th Cir. 2011) (where the parties stipulated that Justice Kennedy's test was the appropriate test); United States v. Cundiff, 555 F.3d 200, 208 (6th Cir. 2009) (where the court determined that there was jurisdiction under *either* Justice Scalia's test or Justice Kennedy's test, and that it therefore did not need to resolve the issue).

71 *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring) (citing to Chief Justice Rehnquist's opinion in *SWANCC* and the "significant nexus" requirement as the controlling standard for jurisdiction over wetlands).

72 *Id.* at 780.

73 *See* 33 C.F.R. § 328.3(e) (2005) ("The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank.").

74 *Rapanos*, 547 U.S. at 781–82 (Kennedy, J., concurring).

"establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[75] At the same time, however, Justice Kennedy specifically invited the Corps to take further actions that might support the establishment of a categorical approach to these issues:

> Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.[76]

IV. A SHORT SUMMARY OF THE MOST RELEVANT PORTIONS OF THE CLEAN WATER RULE

The Clean Water Rule has dozens of important features.[77] For our purposes, though, we should take quick note of five of them. First, the new Rule uses the significant nexus test as its central organizing principle:

> The key to the agencies' interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: Waters are "waters of the United States" if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.[78]

Second, with regard to adjacency, the rule is based on the conclusion that all waters that are adjacent—within the meaning of the new Rule[79]—to any of the five categories of waters covered under the rule (including tributaries)[80] have a significant nexus with a core jurisdictional water, and thus are categorically entitled to protection.[81] There are two important underlying points here. The first is that the new Rule, for the first time, extends this favorable treatment that flows from adjacency to all waters that

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75 *Id.* at 782.

76 *Id.* at 780–81.

77 *See* U.S. ENVT'L. PROT. AGENCY, CLEAN WATER RULE FACTSHEET (2015), *available at* http://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf (discussing several reasons why the Clean Water Rule is important).

78 Clean Water Rule, 80 Fed. Reg. 37,054, 37,060 (June 29, 2015).

79 *See infra* notes 86–88 and accompanying text (explaining how the new Rule defines "adjacent" and the changes as compared to the old rule).

80 The five categories include traditional navigable waters, interstate waters, the territorial seas, impoundments of other jurisdictional waters, and tributaries. 33 C.F.R. §328.3(a)(1)–(5) (2015).

81 *See id.* § 328.3(a)(6); 80 Fed. Reg. at 37,071 ("[T]he agencies determine it is appropriate to protect all covered adjacent waters because those waters are functioning as an integrated system with the downstream navigable waters, interstate waters, or the territorial seas and significantly affect such downstream waters.").

have the requisite proximity, not just wetlands.[82] Thus, for example, adjacent ponds are categorically deemed to be jurisdictional.[83] And, on the subject of tributaries, the Agencies took Justice Kennedy up on his invitation, finding that—given their new definition of tributary[84]—all waters adjacent thereto have the requisite nexus:

> Waters adjacent to . . . covered tributaries are integrally linked to the chemical, physical, and biological functions of the waters to which they are adjacent *and, through those waters, are integrally linked to the chemical, physical, and biological functions of the downstream traditional navigable waters, interstate waters, or the territorial seas*.[85]

Third, the new Rule defines the term "adjacent" with more specificity than ever before and, as a general matter, somewhat expansively. Like the old rule, the new Rule grounds the principle of adjacency by reference to the words "bordering, contiguous, or neighboring."[86] Significantly, however, the Agencies for the first time define the word "neighboring."[87] Specifically, they make clear that it includes all waters "located in whole or in part within 100 feet of the ordinary high water mark" of any water in the relevant five categories, or any water within 1,500 feet of any of those waters, if also within the 100-year floodplain of such water.[88]

Fourth, the new Rule adds the sentence that is the focal point of this Article: "Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent."[89] Despite the newness of this idea—again, there was no mention of even the possibility of such a change in the proposed rule[90]—the preamble contains only two

82 *Id.* at 37,058. This essentially corrects an oversight under the old rule, which came to light in *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 705 (9th Cir. 2007) (determining that only wetlands were defined as waters of the United States by reason of adjacency under then-controlling regulations). For an explanation of the Agencies' legal theory as to why this is permissible, see U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT FOR CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 53–60 (2015) [hereinafter TECHNICAL SUPPORT DOCUMENT].

83 33 C.F.R. § 328.3(a)(6).

84 *See id.* § 328.3(c)(3) (the core of this definition is that there must be a "volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark").

85 80 Fed. Reg. at 37,070 (emphasis added).

86 *Compare* 33 C.F.R. § 328.3(c) (2015), *with* 33 C.F.R. § 328.3(c) (2014) (both the new version and the prior version of the regulation use the language "bordering, contiguous, or neighboring").

87 *See* 33 C.F.R. § 328.3(c)(2)(2015) (defining "neighboring"); 80 Fed. Reg. at 37,058 (indicating that the new Rule establishes a definition for "neighboring").

88 80 Fed. Reg. at 37,058.

89 *Id.* at 37,105.

90 *See* NAT'L ASSOC. OF CTYS., POLICY BRIEF: NEW "WATERS OF THE UNITED STATES" DEFINITION RELEASED 5–8, 9–12, 16 (2014), *available at* http://www.naco.org/sites/default/files/Waters-of-the-US-County-Analysis.pdf (analyzing the proposed rule).

paragraphs addressing these revisions.[91] In the first of those paragraphs, the Agencies explained the effect of this new language in the following terms:

> Wetlands and farm ponds in which normal farming activities occur, as those terms are used in [Section 404(f)] and its implementing regulations, are not jurisdictional under the Act as an "adjacent" water. Waters in which normal farming, ranching, and silviculture activities occur instead will continue to be subject to case-specific review, as they are today. These waters may be determined to have a significant nexus on a case-specific basis [under the provisions dealing with non-adjacent waters]. . . . The rule [clarifies] the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional as "adjacent."[92]

In the second paragraph, the Agencies go on to explain the reasoning underlying this change in the following terms:

> This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters in which normal farming, silviculture, or ranching practices occur may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule. The agencies also recognize that waters in which normal farming, silviculture, or ranching practices occur are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination.[93]

Finally, although this is beyond the scope of this Article, it is worth noting that the Agencies have sought to extend Justice Kennedy's significant nexus formulation—on a case-by-case basis—to many, but not all, nonadjacent waters.[94] In some instances, the Agencies identified the nonadjacent waters that are deemed to be eligible for these case-specific showings by type (e.g., prairie potholes);[95] in other instances they did so by distance (e.g., all waters within 4,000 feet of a core jurisdictional water, a jurisdictional impoundment, or a tributary).[96]

Thus, from an overview perspective, the new Rule may be seen as establishing a three-tiered system. First, there are some waters that are deemed to be categorically jurisdictional, including traditional navigable

91 *See* 80 Fed. Reg. at 37,080.

92 *Id.*

93 *Id.*

94 *See* 33 C.F.R. § 328.3(a)(7), (8) (2015). For a summary of the Agencies' legal argument as to why this is permissible, see TECHNICAL SUPPORT DOCUMENT, *supra* note 82, at 77–78.

95 *See* 33 C.F.R. § 328.3(a)(7).

96 *Id.* § 328.3(a)(7).

waters, their tributaries, and the wetlands adjacent to either of them.[97] Second, there are waters that are subject to case-by-case significant nexus analyses, such as prairie potholes and nonadjacent wetlands that are still within 4,000 feet of either traditional navigable waters or their tributaries.[98] And lastly, there are some waters that are deemed to be nonjurisdictional as a matter of law, regardless of whether they may have a significant nexus in fact;[99] these include, for example, most wetlands that are more than 4,000 feet from any qualifying waters.[100]

V. ANALYSIS

Before we discuss the legal issues involved in determining the legality of this new accommodation of normal farming activities, it is worth considering what is at stake. Again, the regulatory language at issue consists of a single sentence: "Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent."[101]

Based on this language, we think we can assume that the relevant farming or forestry entity would need to meet at least the requirements of section 404(f)(1), meaning that it would need to show 1) that its activities are "part of an established (*i.e.*, on-going)" operation;[102] and 2) that, if there has been any cessation, there is no need for any modifications to the hydrologic regime in order for the activities to continue.[103]

We think we can also assume that the area in which the relevant activity is occurring would otherwise be an adjacent water, and is not subject to the prior converted cropland exemption (otherwise, the relevant agricultural concern would have no need to invoke this exception).

What, then, does the relevant entity gain, beyond being able to keep growing its crops or engaging in its forestry management practices—both of which it could already do under the auspices of section 404(f), regardless of the jurisdictional status of the water?

What the farmer or forester seems to gain is the ability to seek a jurisdictional determination, and to have to have the area's jurisdictional status be subject to a different test than would otherwise apply. Imagine that a hypothetical farming company, FarmCo, has been routinely growing corn

97 *Id.* § 328.3(a)(1)–(3), (5)–(6); 80 Fed. Reg. at 37,073, 37,080–81.

98 33 C.F.R. § 328.3(a)(7)–(8); 80 Fed. Reg. at 37,071.

99 *See* 33 C.F.R. § 328.3(a)(8), (b).

100 *Id.* § 328.3(a)(8).

101 *Id.* § 328.3(c)(1).

102 *See id.* § 323.4(a)(1)(ii).

103 *See id.* (indicating that "an operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations"). It is unclear whether the entity would also need to avoid being "recapture[d]" under section 404(f)(2), which would entail showing that that the discharges are not "part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of the waters may be impaired or the reach of such waters reduced." 40 C.F.R. § 232.3(b) (2015).

in a wetland adjacent to, say, a traditional navigable water. Without this new change, if FarmCo were to seek a jurisdictional determination from the Corps, the only question would be whether the water still qualified as a wetland.[104] If so, it would conclusively be presumed to be jurisdictional because of its adjacency to the relevant river.[105]

Under the new Rule, by contrast, FarmCo would be entitled to a case-specific determination regarding whether the relevant area has a significant nexus with the river.[106] Moreover, the preamble to the new Rule strongly suggests that this determination would take into account any degradation that FarmCo's activities have wrought on the relevant wetland: "The agencies . . . recognize that waters in which normal farming . . . practices occur are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination."[107] It is always possible, of course, that in such a situation the Corps' jurisdictional determination would determine that there is still a significant nexus. It is also possible, however, that it would not. If the Corps were to issue a jurisdictional determination indicating that the property is not a water of the United States, Corps guidance indicates that, in general, such a determination must "include a statement that the determination is valid for a period of five years from the date of the letter, unless new information warrants revision of the determination before the expiration date."[108] Absent affirmative revision, however, it would seem that the relevant wetland would simply lose all protection under the CWA. FarmCo could ditch the property in an effort to fully drain it so that it could grow different crops,[109] or it could even bring in massive amount of fill to construct a subdivision.

Beyond this hypothetical, the new Rule might also pose issues in enforcement cases. If a farmer has filled in a wetland adjacent to a traditional navigable water, under the old rule all the Government would need to show is that the relevant area was in fact what it was purported to be—that it met the legal tests for both whether it was a "wetland" and

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104 *See* 33 C.F.R. 328.3(a)(6) (providing the default rule that a wetland adjacent to a traditional navigable water is jurisdictional).

105 *Id.*

106 Clean Water Rule, 80 Fed. Reg. 37,054, 37,080 (June 29, 2015) ("Waters in which normal farming, ranching, and silviculture activities occur instead will continue to be subject to case-specific review, as they are today. These waters may be determined to have a significant nexus on a case-specific basis under paragraph (a)(7) or (a)(8).").

107 *Id.*

108 U.S. ARMY CORPS OF ENG'RS, REGULATORY GUIDANCE LETTER 05-02: EXPIRATION OF GEOGRAPHIC JURISDICTIONAL DETERMINATIONS 2 (2005), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_f_rgl05-02.pdf.

109 Absent the new rule, this would trigger "recapture" under section 404(f)(2) and its implementing regulations. *See* 33 C.F.R § 323.4(a)(3) (2015) (indicating that the construction of drainage ditches is not a normal farming activity subject to the section 404(f) exemption, and thus this activity would constitute a new functional exemption under the new Rule if the Corps found a farmed wetland to have no significant nexus to a core jurisdictional water).

whether it was "adjacent."[110] Under the new Rule, by contrast, the Government would need to prove that the relevant wetland had a significant nexus with the river.[111] This may be difficult, especially if recent changes in drainage and/or vegetation need to be taken into account. How would the Government be able to show what the relevant area's status was right before the filling occurred?

VI. BUT IS THIS ASPECT OF THE NEW RULE ILLEGAL? DOES IT VIOLATE THE CWA?

We believe it does.[112] As an initial matter, it helps here to remember what is being interpreted. As the Supreme Court reminded us in *SWANCC*, the Agencies, when defining the waters of the United States, are really defining the phrase "navigable waters," which is defined to mean the waters of the United States.[113] Actually, we are another layer down here, because the relevant sentence is actually being used in the definition of "adjacent,"[114] which is a component of the regulatory definition of "waters of the United States,"[115] but this cannot make any difference. No matter how many layers down we go, it is all in service of fleshing out the statutory phrase "navigable waters."

If this is true, the question becomes whether it is permissible for the Agencies to decline to regulate a water that otherwise qualifies as a navigable water because of the use to which it is put. On this point, the answer would appear to be no. This is the very problem that Lance Wood, the Corps' longtime Assistant Chief Counsel for Regulatory Affairs, identified when he reviewed the draft final rule that EPA sent to the Office of Management and Budget to begin the interagency review process.[116] Although he spoke of it in terms of defining "adjacent," rather than "navigable waters," the principle is the same. After first quoting the relevant sentence, Mr. Wood criticized it in the following terms:

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110 Definition of Waters of the United States, 51 Fed. Reg. 41,250–51 (Nov. 13, 1986) (providing that "adjacent wetlands" are themselves "waters of the United States" and defining the terms "adjacent" and "wetlands").

111 80 Fed. Reg. at 37,080; 33 C.F.R § 328.3(a)(8).

112 It seems that this portion of the new Rule suffers from the same procedural infirmities that Professor Parenteau cites in his discussion of the 4,000 feet line, meaning the violation of the Administrative Procedure Act's notice and comment requirement and the violation of the National Environmental Policy Act's environmental impact statement requirement. Parenteau, *supra* note 4, at 388–92.

113 *SWANCC*, 531 U.S. 159, 172 (2001). *See also* CWA, 33 U.S.C. § 1362(7) (2012) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

114 *See* 33 C.F.R § 328.3(a)(6) (defining "adjacent" waters as waters of the United States for the purposes of the Clean Water Act).

115 *See id.* ("Waters adjacent to a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, are 'waters of the United States.'").

116 Memorandum from Lance Wood, Assistant Chief Counsel for Regulatory Affairs, U.S. Army Corps of Eng'rs, to Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Eng'rs, Legal Analysis of Draft Final Rule on Definition of "Waters of the United States", at 5 (April 24, 2015).

> On its face, the sentence is indefensible: it is a textbook example of rulemaking that cannot withstand judicial review. This is true because a wetland is, by definition, "adjacent" to a tributary stream if, as a matter of geographical fact, that wetland is "bordering, contiguous, or neighboring" to the stream, regardless of whether farming, forestry, or ranching activities are taking place on that wetland.[117]

The D.C. Circuit long ago rebuked EPA when it tried something very similar under section 402 of the CWA. In *Natural Resources Defense Council v. Costle* (*NRDC v. Costle*),[118] EPA had written a rule exempting agricultural point sources from the National Pollutant Discharge Elimination System (NPDES) program based on its view that it did not make sense to force those sources to get NPDES permits.[119] The D.C. Circuit invalidated the exemption, finding that "[t]he wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402."[120]

In defending this aspect of the new Rule, the Agencies may argue that this situation is different than *NRDC v. Costle* because, as the Supreme Court recognized in *Riverside Bayview*, the term "navigable waters," as defined to mean "the waters of the United States," is ambiguous,[121] whereas the agricultural ditches in *NRDC v. Costle* were indisputably point sources.[122] This argument should not help the Agencies, however. As Justice Scalia pointed out in his plurality opinion in *Rapanos*, the fact that the phrase "waters of the United States" is in some respects ambiguous does not mean that it is ambiguous with respect to all possible interpretations.[123] Indeed, this is the combined teaching of *Riverside Bayview* and *SWANCC*. In the former case, the Court found that the jurisdictional two-step of navigable water being defined to mean "the waters of the United States" was ambiguous with respect to whether it covered wetlands adjacent to traditional navigable waters.[124] In the latter, however, the Court held that the very same definitional construct unambiguously precluded its application to nonadjacent ponds based solely on the presence of migratory birds.[125]

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117 *Id.* It is interesting to note, however, that the Corps signed on to the new Rule despite Mr. Wood's objections (he raised several additional concerns beyond this one). *See id.* at 5–6 (discussing additional concerns over the proposed final rule's definition of "neighboring" and classifications of "isolated waters"); *see also* Clean Water Rule, 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) ("The Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) are publishing a final rule . . . .").

118 568 F.2d 1369 (D.C. Cir. 1977).

119 *Id.* at 1372–73.

120 *Id.* at 1377.

121 *Riverside Bayview*, 474 U.S. 121, 131–34 (1985).

122 *See NRDC v. Costle*, 568 F.2d at 1372 (indicating that the term 'point source' unquestionably includes agricultural ditches).

123 *See Rapanos*, 547 U.S. 715, 752 (2006) (plurality opinion) (noting that the term is ambiguous in some respects, but rejecting Corps' interpretation).

124 *Riverside Bayview*, 474 U.S. at 131–34.

125 *See SWANCC*, 531 U.S. 159, 172–73 (2001) (holding that the jurisdictional term is "clear" and declining to extend deference to the Migratory Bird Rule).

Here, the plain fact is that nothing in section 502(7) gives any indication that whether a water should be deemed to be a navigable water should in any way hinge on the use to which it is put.[126] Some provisions of the CWA do allow activities to be taken in account. Indeed, in 1977, when Congress passed the same set of amendments pursuant to which it established section 404(f), it responded to *NRDC v. Costle* by amending section 502(14)'s definition of "point source" to completely exempt two forms of agricultural discharges from regulatory jurisdiction.[127]

In the farmed wetlands context, by contrast, Congress chose not to create a blanket exemption, but rather a limited exception that contains ongoing requirements designed to ensure minimal harm to the environment. As Senator Muskie, one of the Act's primary sponsors, explained:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.[128]

Here, the Agencies do not even pretend that they are interpreting section 404(f). As discussed above, they already have issued regulations interpreting that provision, and they have identified no further ambiguities within it that would warrant further interpretation.[129]

There is a strong argument that the relevant portion of the new Rule is actually inconsistent with section 404(f). On its face, section 404(f) assumes the relevant area is still a navigable water.[130] Its goal is to grandfather in some limited activities that will cause limited harm.[131] The "recapture" provision underscores this by expressly precluding any changes in use that will harm the relevant waters.[132]

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126 *See* CWA, 33 U.S.C. § 1362(7) (2012) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

127 Steven T. Iverson, *Plugging the Drain: Using* Northwest Environmental Defense Center v. Brown *to Reach Other Point Source Discharges Under the Clean Water Act*, 57 S.D. L. REV. 477, 482–85 (2012) (explaining that Congress amended the CWA while *NRDC v. Costle* was pending in the D.C. Circuit, which resulted in a revised silviculture rule); *see* 33 U.S.C. § 1362(14) (exempting "agricultural stormwater discharges and return flows from irrigated agriculture").

128 CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977: A CONTINUATION OF THE LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT 474 (1978) [hereinafter LEGISLATIVE HISTORY OF THE CLEAN WATER ACT].

129 *See* discussion *supra* Part III.

130 *See* 33 U.S.C. § 1344(f)(2) (providing that any discharge of dredged or fill material "into the navigable waters" to convert farmed land to a new use would require a permit, but established normal farming in the same "navigable" water would not require a permit).

131 *See id.* § 1344(f)(1) (describing specific exempted activities); LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 128, at 474.

132 33 U.S.C. § 1344(f)(2).

And finally, the Agencies' expressed rationales for creating this new provision are wholly unconvincing. The Agencies articulated essentially three reasons for making this change: 1) to minimize the regulatory burden on the agricultural community; 2) to recognize the work of farmers to protect and conserve natural resources and water quality; and 3) to allow a mechanism for factoring into the significant nexus calculus the damage that their normal farming activities may have caused to the wetlands or other waters.[133]

With regard to the first two rationales, the Agencies have no statutory basis allowing them to freely pursue policies designed to "be kind to farmers," unmoored to any statutory text. In the wetlands context, the only provision that even speaks to this concern is section 404(f), and that provision creates a specific and limited relief valve that was carefully tailored by Congress to ensure that there would be no significant damage to our nation's waters.[134]

The Agencies' third justification is equally weak. In the very same preamble underlying the new Rule, the Agencies speak at length about the way in which adjacent wetlands work together in a given system to protect the waters to which they are adjacent:

> The agencies conclude that all waters meeting the definition of "adjacent" in the rule are similarly situated for purposes of analyzing whether they have a significant nexus to a traditional navigable water, interstate water, or the territorial sea. Based on a review of the scientific literature, the agencies conclude that these bordering, contiguous, or neighboring waters provide similar functions and function together to significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. . . .
>
> Covered adjacent waters function together to maintain the chemical, physical, or biological health of traditional navigable waters, interstate waters, and the territorial seas to which they are directly adjacent or to which they are connected by the tributary system. This functional interaction can result from hydrologic connections or because covered adjacent waters can act as water storage areas holding damaging floodwaters or filtering harmful pollutants.[135]

Although these comments refer carefully to "covered" adjacent waters, there is absolutely nothing in the record to indicate that farmed wetlands

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133 Clean Water Rule, 80 Fed. Reg. 37,054, 37,080 (June 29, 2015).

134 *See* Lawrence R. Liebesman, *The Farming Exemption Under §404(f) of the Clean Water Act–Congressional Intent and Judicial Construction,* NAT'L WETLANDS NEWSL., July–Aug. 1985, at 14 ("In 1977, Congress responded to widespread concern that many activities normally considered routine would be subject to the permitting process by enacting §404(f) of the Clean Water Act, which carves out a narrow exemption for agricultural activities."); *see also* LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 128, at 474 ("New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively.").

135 80 Fed. Reg. at 37,069–70.

within the meaning of the new provision are so damaged that they play no role in these integrated wetland systems.

VII. CONCLUSION

The net effect of the Agencies' last-minute modification to the definition of "adjacent" is to deny waters that are subject to normal farming—no matter how close they may be to other jurisdictional waters—the benefit of a categorical presumption that they have a significant nexus with core jurisdictional waters, a presumption to which all other physically adjacent waters are entitled under the new Rule. Thus, under the Rule, the Government must show, on a case-specific basis, that these farmed waters have such a nexus in order to establish jurisdiction.[136] If a particular wetland (or other water) has been damaged, it may be deemed to be nonjurisdictional, despite the fact that it may still possess aquatic features.

This new approach has no basis in the CWA. For the first time, it grafts onto the CWA the possibility that an otherwise jurisdictional water may be exempted due to the use to which it has been put.[137] Moreover, it opens the door to the conversion of the property to other uses, free of the regulatory constraints the CWA would otherwise impose.[138]

Congress carefully crafted an activity-based exemption of the agricultural community in section 404(f) of the CWA.[139] The Agencies long ago generously supplemented this through the addition of their favorable—and arguably illegal—treatment of prior converted cropland.[140] The new Rule suffers from the same legal infirmities that plagued the prior converted cropland exception: it is waters-based (instead of activities-based), it contains no protections to ensure that minimal damage is done, and it can result in waters being deemed non-jurisdictional even though they may have important aquatic features. For these reasons, it will likely be deemed to be illegal.

136 *Id.* at 37,080.

137 *See* 33 C.F.R. § 328.3(c)(1) (2015) (providing that wetlands adjacent to qualifying jurisdictional waters are themselves categorically jurisdictional unless used for "established normal farming, ranching, and silviculture activities").

138 *See supra* notes 107–109 and accompanying text.

139 CWA, 33 U.S.C. § 1344(f) (2012).

140 *See supra* notes 54–59 and accompanying text.