

## A BRIGHT LINE MISTAKE: HOW EPA BUNGLED THE CLEAN WATER RULE

BY

PATRICK PARENTEAU\*

*In the final Clean Water Rule, the Environmental Protection Agency (EPA) and the Department of the Army established, for the first time in the history of the Clean Water Act (CWA), a “bright line” rule excluding all lakes, ponds, and wetlands lying more than 4,000 feet from the ordinary high water mark or mean high tide line of jurisdictional waters. This artificial boundary was adopted over the strenuous objections of the Army Corps of Engineers, in contravention of the advice of EPA’s Science Advisory Board, without preparing an environmental impact statement to consider the potentially significant consequences for aquatic resources, and without any opportunity for public comment. All of these issues and more have been raised in the litigation challenging the legality of the rule. There is a high likelihood that the courts will strike down the rule on the ground that the 4,000-foot line is arbitrary for both procedural and substantive reasons. Procedurally, the line is not the “logical outgrowth” of the rulemaking process and was adopted in violation of the National Environmental Policy Act (NEPA). Substantively, the line lacks any scientific support and is not required by any of the Supreme Court decisions interpreting the jurisdictional scope of the CWA. EPA would be well advised to concede error on this point and request a voluntary remand to fix the rule before even greater damage is done.*

I.	INTRODUCTION.....	380
II.	THE 4,000-FOOT LINE IS NOT SUPPORTED BY THE ADMINISTRATIVE RECORD .....	382
III.	THE 4,000-FOOT LINE EXCLUDES WETLANDS, LAKES, AND PONDS THAT HAVE HISTORICALLY BEEN REGULATED AS WOTUS. ....	385
IV.	THE 4,000-FOOT LINE WAS ADOPTED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT’S NOTICE AND COMMENT REQUIREMENT .....	388

---

\* Professor of Law, Vermont Law School.

V.	THE 4,000-FOOT LINE WAS ADOPTED IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT'S ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT .....	390
VI.	CONCLUSION .....	392

## I. INTRODUCTION

In their joint rulemaking to develop a revised definition of the vexed statutory term “waters of the United States” (WOTUS), the Environmental Protection Agency (EPA) and the Department of the Army, which oversees the Corps of Engineers, faced a Sisyphean task: crafting a methodology for determining the geographic scope of the Clean Water Act (CWA)<sup>1</sup> that was scientifically sound, legally defensible, and politically viable. The proposed rule that EPA published on April 24, 2014 scored well on the first two counts.<sup>2</sup> It was backed up with the most comprehensive, peer-reviewed synthesis of watershed science ever conducted,<sup>3</sup> and it was built on a solid legal foundation keyed to Justice Kennedy’s “significant nexus” test in *Rapanos v. United States (Rapanos)*<sup>4</sup> which has been adopted by nine circuit courts as the controlling standard for judging what constitutes a WOTUS.<sup>5</sup>

Not surprisingly, however, the proposed rule ran into a firestorm of political opposition from a number of states, the farm lobby, and a coalition of developers and extractive industries.<sup>6</sup> Much of the opposition was based on a misunderstanding, and in some cases, deliberate misrepresentation of what the proposed rule did and did not do.<sup>7</sup> EPA’s outreach efforts, though unprecedented for CWA rulemaking,<sup>8</sup> failed to calm the waters, and its

<sup>1</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

<sup>2</sup> See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 30 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

<sup>3</sup> See U.S. ENVTL. PROT. AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE 1-1 (2015), available at [http://ofmpub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=523020](http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523020).

<sup>4</sup> 547 U.S. 715, 767 (2006) (Kennedy, J., concurring).

<sup>5</sup> See U.S. ENVTL. PROT. AGENCY & U.S. DEP’T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 41–42 (2015).

<sup>6</sup> See Emily Atkin, *Why the EPA’s Clean Drinking Water Rule is so Controversial*, CLIMATE PROGRESS, Sept. 1, 2015, <http://thinkprogress.org/climate/2015/09/01/3697012/why-is-everyone-celebrating-the-clean-water-rule-injunction> (last visited Apr. 9, 2016).

<sup>7</sup> Jon Devine, *Phony Objections to Clean Water Protection Rule: Myths and Facts About Agriculture and the Proposal*, SWITCHBOARD: NAT. RES. DEF. COUNCIL STAFF BLOG, May 6, 2015, [http://switchboard.nrdc.org/blogs/jdevine/phony\\_objections\\_to\\_clean\\_wate.html](http://switchboard.nrdc.org/blogs/jdevine/phony_objections_to_clean_wate.html) (last visited Apr. 9, 2016); see also U.S. ENVTL. PROT. AGENCY, THE CLEAN WATER RULE FACT CHECK (2015), available at [http://www.epa.gov/sites/production/files/2015-05/documents/fact\\_sheet\\_fact\\_check\\_clean\\_water\\_rule.pdf](http://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_fact_check_clean_water_rule.pdf) (clarifying the scope of the Clean Water Rule).

<sup>8</sup> EPA conducted over 400 “stakeholder” meetings on the draft rule, twice extended the public comment period to a total of 120 days, received over one million comments, and made unprecedented use of social media to educate the public on various aspects of the rule. See News Release, U.S. Env’tl. Prot. Agency, Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy (May 27, 2015), <http://yosemite.epa.gov/>

aggressive use of social media to counter the “#DitchtheRule” propaganda of the opponents<sup>9</sup> with EPA’s own “#DitchtheMyth” campaign ultimately led to a critical report by the Government Accountability Office accusing the agency, perhaps unfairly, of engaging in its own brand of “covert propaganda.”<sup>10</sup>

The intense political battles, and a close call on a vote in Congress to halt the rulemaking,<sup>11</sup> may have played a role in EPA’s eleventh hour decision to make major changes in the final Clean Water Rule published on June 29, 2015.<sup>12</sup> The most dramatic change involves drawing, for the first time in the history of the CWA, “bright-line boundaries” limiting the reach of jurisdictional waters.<sup>13</sup> The final rule includes a number of bright lines<sup>14</sup> but the one that is the focus of this paper is the 4,000-foot cutoff that categorically excludes wetlands, lakes, ponds, and other water bodies that are more than 4,000 feet from a stream’s “ordinary high water mark”

---

opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97 (last visited Apr. 9, 2016); Eric Lipton & Michael D. Shear, *E.P.A. Broke Law with Social Media Push for Water Rule, Auditor Finds*, N.Y. TIMES, Dec. 14, 2015, <http://www.nytimes.com/2015/12/15/us/politics/epa-broke-the-law-by-using-social-media-to-push-water-rule-auditor-finds.html> (last visited Apr. 9, 2016) (describing EPA’s social media campaign for the Clean Water Rule); Definition of “Waters of the United States” Under the Clean Water Act; Extension of Comment Period, 79 Fed. Reg. 35,712, 35,712–13 (June 24, 2014) (extending the end of the comment period from July 21, 2014 to October 20, 2014); Extension of Comment Period for the Definition of “Waters of the United States” Under the Clean Water Act Proposed Rule and Notice of Availability, 79 Fed. Reg. 61,590, 61,590–91 (Oct. 14, 2014) (extending the end of the comment period from October 20, 2014 to November 14, 2014).

<sup>9</sup> See, e.g., Am. Farm Bureau Fed’n, *It’s Time to Ditch the Rule*, <http://ditchtherule.fb.org/> (last visited Apr. 9, 2016).

<sup>10</sup> Letter from Susan A. Poling, Gen. Counsel, U.S. Gov’t Accountability Office, to Senator James M. Inhofe, Chairman Comm. on Env’t and Pub. Works (Dec. 14, 2015), available at <http://www.gao.gov/products/B-326944>. EPA has vigorously contested the Government Accountability Office (GAO) findings and defended its “Thunderclap” campaign as a legitimate use of social media to communicate the truth about the Clean Water Rule. Kevin Bogardus, *EPA Comes Out Swinging Against “Covert Propaganda” Charge*, GREENWIRE, Dec. 18, 2015, <http://www.eenews.net/stories/1060029769> (last visited Apr. 9, 2016).

<sup>11</sup> Nick Juliano, *Lessons from the “Vote-a-rama,”* ENV’T & ENERGY DAILY, Mar. 27, 2015, <http://www.eenews.net/stories/1060015889> (last visited Apr. 9, 2016) (noting that Senator Barrasso (R-Wyo.) sponsored and passed an amendment to the fiscal year 2016 budget resolution that would have blocked the rule by a 59–40 vote, one vote short of the 60 needed to ensure passage by the full Senate).

<sup>12</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (codified at 30 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401) (noting that the rule would be effective on August 28, 2015).

<sup>13</sup> In the Preamble to the final rule EPA stated: “The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case specific analysis.” *Id.* at 37,055.

<sup>14</sup> For example, the rule provides a new definition of the term “neighboring,” which declares “jurisdictional by rule” all water bodies within 1,500 feet of an ordinary high water mark (OHWM) or high tide line (HTL) so long as the water body is located within a 100-year flood plain. *Id.* at 37,058.

(OHWM) or “high tide line” (HTL).<sup>15</sup> This artificial cutoff has no basis in science, law, or the history of the CWA. It caught everyone off guard, including the Army Corps of Engineers,<sup>16</sup> EPA’s erstwhile partner in administering the section 404 permit program, which has been the catalyst for all three of the Supreme Court cases involving the definition of WOTUS.<sup>17</sup> The Clean Water Rule is under attack from all sides in courtrooms all over the country.<sup>18</sup> It will take years to sort out all of the issues that have been raised with perhaps no final resolution until the Supreme Court has spoken. For the following reasons, this bright line rule is likely to be struck down as arbitrary and capricious under the Administrative Procedure Act<sup>19</sup> by whichever court ends up deciding the question.

## II. THE 4,000-FOOT LINE IS NOT SUPPORTED BY THE ADMINISTRATIVE RECORD

There is no scientific basis or explanation for where EPA chose to draw the line. What is the hydrological, geological, or ecological significance of 4,000 feet? Why not 3,000, or 5,000, or 10,000? Why pick a number at all? Indeed, that was the view of EPA’s Science Advisory Board (SAB), which cautioned EPA that “adjacent waters and wetlands should not be defined solely on the basis of geographical proximity or distance to jurisdictional waters.”<sup>20</sup> The views of the SAB are particularly salient. The SAB was

---

<sup>15</sup> See, e.g., *id.* at 37,105 (codified at 33 C.F.R. § 328.3(a)(8)) (4,000-foot cutoff applied to section 404 permit program). The terms OHWM and HTL are also defined in the final rule. *Id.* at 37,106 (codified at 33 C.F.R. § 328.3 (c)(6)–(7)).

<sup>16</sup> In a Memorandum dated April 24, 2015, the Chief of Operations and Regulatory Programs for the Corps stated:

It was unknown to the Corps until early February that Army and EPA were contemplating a “bright-line” cut off of CWA jurisdiction either 5,000 or 4,000 linear feet from the Ordinary High Water Mark (OHWM)/High Tide Line (HTL) and a robust interagency discussion of the potential effects of the “bright-line” on currently jurisdictional water bodies has continued since that time.

Memorandum from Jennifer A. Moyer, Regulatory Program Chief, U.S. Army Corps of Eng’rs, to Major Gen. John W. Peabody, Deputy Commanding Gen. for Civil and Emergency Operations, U.S. Army Corps of Eng’rs 1–2 (Apr. 24, 2015) (on file with *Environmental Law*) [hereinafter “Technical Memo”].

<sup>17</sup> The cases are *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *Rapanos*, 547 U.S. 715 (2006) (plurality opinion).

<sup>18</sup> Nine lawsuits, involving fifteen states as well as numerous industry and environmental groups, have been filed in seven different federal district courts. The government moved to consolidate and transfer all of the cases to the District of Columbia but on October 13, 2015 the Judicial Panel on Multidistrict Litigation denied the motion. See *In re Clean Water Rule Definition of “Waters of the United States,”* MDL No. 2663, 2015 WL 6080727 (J.P.M.L. Oct. 13, 2015). Meanwhile, the Sixth Circuit issued a nationwide stay of the rule pending its determination of whether the case should be heard in the Court of Appeals under section 509 of the CWA. *In re U.S. Env’tl. Prot. Agency*, 803 F.3d 804, 809 (6th Cir. 2015) (order granting stay).

<sup>19</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

<sup>20</sup> Letter from Dr. David T. Allen, Chair, U.S. Env’tl. Prot. Agency Sci. Advisory Bd., to Gina McCarthy, Adm’r, U.S. Env’tl. Prot. Agency 3 (Sept. 30, 2014), available at <http://yosemite.epa.gov>.

established in 1978 by the Environmental Research, Development, and Demonstration Authorization Act.<sup>21</sup> The statutory purpose of the SAB is to review and provide EPA “advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation” under the CWA and other statutes.<sup>22</sup> The SAB is a formal body subject to the public meeting, transparency, representational, conflict of interest, and other requirements of the Federal Advisory Committee Act.<sup>23</sup> Its charter must be renewed every two years by Congress.<sup>24</sup> Membership is by appointment and consists of “independent experts in the fields of science, engineering, economics, and other social sciences to provide a range of expertise required to assess the scientific and technical aspects of environmental issues.”<sup>25</sup>

The SAB does its work through panels and workgroups. To review the “Connectivity Report” that provided the scientific basis for the Clean Water Rule, the SAB convened a special panel composed of a wide range of experts in the fields of hydrology, geomorphology, ecology, and other relevant disciplines.<sup>26</sup> Though the panel’s detailed peer review of the Connectivity Report confirmed all of its major findings on the importance of headwater streams and wetlands to the “physical, chemical and biological integrity”<sup>27</sup> of downstream navigable waters, the panel was more critical of EPA for its narrow definition of tributaries; exclusion of groundwater, shallow subsurface connections, and ditches; and limited definitions of adjacent waters.<sup>28</sup> In the preamble to the final rule, EPA acknowledges the SAB’s critique but dismisses it with this terse response:

Significant nexus is not a purely scientific determination. The opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright line boundaries with respect to

---

gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/\$File/EPA-SAB-14-007+unsigned.pdf

<sup>21</sup> 42 U.S.C. § 4365 (2012).

<sup>22</sup> *Id.* § 4365(c).

<sup>23</sup> See Federal Advisory Committee Act, 5 U.S.C. app. § 10 (2012).

<sup>24</sup> U.S. Env’tl. Prot. Agency Sci. Advisory Bd., *History of the SAB*, <http://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/SABHistory> (last visited Apr. 9, 2016).

<sup>25</sup> U.S. Env’tl. Prot. Agency, *EPA Science Advisory Board Charter*, § 11, <http://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/currentcharter> (last visited Apr. 9, 2016).

<sup>26</sup> See Memorandum from Thomas M. Armitage, Designated Fed. Officer, U.S. Env’tl. Prot. Agency Sci. Advisory Bd. Staff Office, to Christopher S. Zarba, Acting Dir., U.S. Env’tl. Prot. Agency Sci. Advisory Bd. Staff Office, on Formation of Science Advisory Board (SAB) Panel for the Review of EPA’s Water Body Connectivity Report (July 29, 2013), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/Final%20Determination%20memo\\_connectivity%20panel%20\(unsigned\).pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/Final%20Determination%20memo_connectivity%20panel%20(unsigned).pdf).

<sup>27</sup> Letter from Dr. David T. Allen, Chair, U.S. Env’tl. Prot. Agency Sci. Advisory Bd., and Dr. Amanda D. Rodewald, Chair, SAB Panel for the Review of the U.S. Env’tl. Prot. Agency Water Body Connectivity Report, to Gina McCarthy, Adm’r, U.S. Env’tl. Prot. Agency, (Oct. 17, 2014), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/fedgrstr\\_activites/AF1A28537854F8AB85257D74005003D2/\\$File/EPA-SAB-15-001+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedgrstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf).

<sup>28</sup> Letter from Dr. David T. Allen to Gina McCarthy, *supra* note 20, at 2–4.

where “water ends” for purposes of the CWA. Therefore, the agencies’ interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.<sup>29</sup>

EPA also noted the SAB’s admonition that “the available science supports defining adjacency or determination of adjacency on the basis of functional relationships,’ rather than ‘solely on the basis of geographical proximity or distance to jurisdictional waters.’”<sup>30</sup> Nevertheless, EPA maintained that the jurisdictional call was a mixed question of science and law imbued with considerable agency discretion:

The agencies have determined which waters are adjacent, and thus jurisdictional under the rule, based on both functional relationships and proximity because those factors identify the waters that have a strong influence on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. . . . The agencies’ determination is informed by the science, and consideration of proximity is reasonable in interpreting the scope of adjacency.<sup>31</sup>

This explanation is, to put it mildly, underwhelming. EPA fails to explain why proximity is critical as a legal or policy matter, or how the 4,000-foot line was arrived at, or what implications it has for removing protection for important aquatic resources. Proximity of wetlands to nonnavigable tributaries was not a major factor in Justice Kennedy’s significant nexus test in *Rapanos*.<sup>32</sup> In fact, Justice Kennedy acknowledged the potential cumulative significance of geographically isolated wetlands with no direct hydrologic connection to navigable waters provided they were “similarly situated lands in the region”—by which he presumably meant the watershed.<sup>33</sup> Proximity was not a decisive factor in the majority of cases that have adjudicated disputes over the lateral extent of CWA jurisdiction over adjacent wetlands, ponds, and other water bodies.<sup>34</sup> That is not to say that proximity is irrelevant to considerations of the functional relationship between streams and adjacent wetlands, only that picking an arbitrary number like 4,000 feet as the point at which federal jurisdiction ends without

---

<sup>29</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,060 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

<sup>30</sup> *Id.* at 37,064.

<sup>31</sup> *Id.* (internal citations omitted).

<sup>32</sup> *Rapanos*, 547 U.S. 715, 779–80 (2006) (Kennedy, J., concurring) (“[W]etlands 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.’”).

<sup>33</sup> *Id.* at 780.

<sup>34</sup> See Donna M. Downing, Cathy Winer & Lance D. Wood, *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 WETLANDS 475, 490 (2003) (“Courts similarly have found distance not a barrier to jurisdiction where flows travel from the water in question through a series of connections into a navigable water.”).

articulating a convincing reason for doing so is a questionable exercise of agency discretion.

### III. THE 4,000-FOOT LINE EXCLUDES WETLANDS, LAKES, AND PONDS THAT HAVE HISTORICALLY BEEN REGULATED AS WOTUS

The evidence that the 4,000-foot line excludes waters historically regulated as WOTUS comes from a very unlikely but authoritative source—the Corps of Engineers. An unlikely source because the Corps was initially resistant to including wetlands within the ambit of its section 404 regulatory authority. It took a court order to convince the Corps that Congress intended wetlands to come within the definition of “navigable waters.”<sup>35</sup> An authoritative source because the Corps has made over 400,000 jurisdictional determinations<sup>36</sup> since 2008 under the post-*Rapanos* guidance (2008 *Rapanos* Guidance) issued by EPA and the Army Corps of Engineers.<sup>37</sup> Of these, over 120,000 involved case-specific significant nexus determinations.<sup>38</sup>

In a series of internal interagency documents that were never intended to be made public, the senior counsel, regulatory staff, and commanding officers of the Corps detailed the flaws in the data and reasoning underlying the bright line test EPA adopted. In a scathing memo the Assistant Chief Counsel for the Corps’ Environmental Law and Regulatory Programs wrote:

The draft final rule excludes from jurisdiction of the CWA large areas of lakes, ponds, and similar water bodies that are important components of the tributary system of the navigable waters and that the Federal government has been regulating as jurisdictional from 1975 to the present moment. Those water bodies are important to the physical, chemical, and biological integrity of the entire tributary system of the navigable waters and to the navigable waters themselves. However, those lakes, ponds, and wetlands would lose all federal CWA protection under the draft final rule merely because they happen to lay outside and beyond a distance of 4000 feet from a stream’s ordinary high water mark (OHWM) or high tide line (HTL).<sup>39</sup>

Another document, prepared by the Corps’ Chief of Operations and Regulatory Programs, provides specific examples of the types of wetlands and water bodies previously determined to be jurisdictional that would be

---

<sup>35</sup> Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>36</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,065 (June 29, 2015).

<sup>37</sup> Memorandum from the U.S. Env’tl. Prot. Agency & U.S. Army Corps of Eng’rs on Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008), available at [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/cwa\\_juris\\_2dec08.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf).

<sup>38</sup> 80 Fed. Reg. at 37,065.

<sup>39</sup> Memorandum from Lance D. Wood, Assistant Chief Counsel, Env’tl. Law and Regulatory Programs, U.S. Army Corps of Eng’rs, to John W. Peabody, Deputy Commanding Gen. for Civil and Emergency Operations, U.S. Army Corps of Eng’rs, on Legal Analysis of Draft Final Rule on Definition of “Waters of the United States” (Apr. 24, 2015) (on file with *Environmental Law* [hereinafter “Legal Memo”]).

excluded under the final Clean Water Rule. The memo stresses that the examples were quickly pulled together under tight time constraints and represent only a small sample of the thousands of jurisdictional determinations that the Corps has performed on adjacent waters across the country.<sup>40</sup> Nevertheless, the examples reveal the arbitrary nature of the 4,000-foot cutoff, to wit:

- A 300-acre wetland containing state listed endangered plants located 10,000 feet to 15,000 feet from the OHWM of the Red River in Tennessee;
- A 45-acre wetland located 36,000 feet from the Sequatchie River in Tennessee;
- A complex of wetlands totaling over 500 acres located about 7,000 to 12,000 feet from the OHWM of two channels in Alaska;
- A complex of wetlands consisting of over 500 acres located 5,700 feet from the OHWM of the South Branch of Two Rivers in Minnesota—the wetlands are part of an approved wetland compensation mitigation bank;
- Another approved wetland mitigation bank of over 150 acres of wetlands that abut roadside ditches located approximately 15,000 feet from the OHWM of the Upper Red Lake in Minnesota;
- A 50-acre wetland located approximately 4,500 to 10,000 feet from the OHWM of English Creek in Florida;
- Over 40 acres of wetlands approximately 10,000 feet from the OHWM of Chickasawhatchee Creek in Georgia;
- Over 9 acres of backwater slough approximately 8,000 feet from the OHWM of Mississippi River.<sup>41</sup>

The Chief of Operations also cited Corps data indicating that approximately 10% of all waters over which the Corps has asserted CWA jurisdiction under the 2008 *Rapanos* Guidance are “non-abutting” adjacent wetlands, and that 98% of these wetlands have been determined to have a significant nexus with navigable waters.<sup>42</sup> She also explained that the 2008 *Rapanos* Guidance does not require the Corps’ field offices to indicate the distance that an adjacent wetland is located from the jurisdictional tributary’s OHWM or HTL when evaluating whether a significant nexus exists and in making a jurisdictional determination concerning such waters. In fact, as the Chief of Operations notes, the 2008 *Rapanos* Guidance’s accompanying instructions to the field offices state: “[I]t is not appropriate to determine significant nexus based solely on any specific threshold of

---

<sup>40</sup> Technical Memo, *supra* note 16, at 1.

<sup>41</sup> *Id.* at app. A.

<sup>42</sup> *Id.* at 2.



distance (e.g. between a tributary and its adjacent wetland or between a tributary and the [traditionally navigable water]).<sup>43</sup> The Chief concludes:

To remove from CWA jurisdiction what is potentially as much as 10% of the currently jurisdictional aquatic resources without the benefit of a detailed analysis, such as one that would be performed as part of an EIS, would present the potential for significant adverse effects on the natural and human environment. In its permit evaluations, the Corps is charged with keeping in perspective the functions and values of any given aquatic resource, recognizing that the functions and values of those resources rely heavily on their geographic location in relation to (as well as their hydrologic connection to) other waters, and to balance the need for the proposed use with the need for conservation of the resource. Nowhere in this process is it considered that important aquatic resources that are traditionally and legitimately part of the tributary system to navigable waters, contributing water to traditionally navigable waters of the U.S., are not within the jurisdiction of the CWA.<sup>44</sup>

The Corps also expressed serious concerns with the changes to the definition of tributary between the proposed and final rule.<sup>45</sup>

The final shot came in an April memorandum from Major General John Peabody, the Deputy Commanding General for Civil and Emergency Operations, to Jo Ellen Darcy, the Assistant Secretary of the Army for Civil Works (who signed off on the final rule).<sup>46</sup> Expressing “serious concerns” with the draft final rule, General Peabody stated:

[T]he draft final rule continues to depart significantly from the version provided for public comment, and . . . the Corps’ recommendations related to our most serious concerns have gone unaddressed. Specifically, the current draft final rule contradicts long-standing and well-established legal principles undergirding Clean Water Act (CWA) Section 404 regulations and regulatory practices, especially the decisive *Rapanos* Supreme Court decision. The rule’s contradictions with legal principles generate multiple legal and technical consequences that, in the view of the Corps, would be fatal to the rule in its current form.<sup>47</sup>

EPA’s decision to adopt the bright line of 4,000 feet is in clear conflict with its own Connectivity Report and with the SAB comments. The best available science demonstrates the connectivity of waters along a “connectivity gradient” that serves to maintain, to varying degrees, the structure and function of downstream waters.<sup>48</sup> The appropriate conclusion

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 3.

<sup>45</sup> Legal Memo, *supra* note 39, at 8–9.

<sup>46</sup> Memorandum from Major Gen. John W. Peabody, U.S. Army Deputy Commanding Gen. for Civil and Emergency Operations, to Assistant Sec’y of the Army for Civil Works, on Draft Final Rule on Definition of “Waters of the United States” 1 (Apr. 27, 2015) (on file with *Environmental Law*).

<sup>47</sup> *Id.*

<sup>48</sup> U.S. ENVTL. PROT. AGENCY, *supra* note 3, at 1-4 to 1-8.

would be that a significant nexus analysis should be performed for all waters not categorically designated as adjacent to determine where they fall along this connectivity gradient and whether that nexus is significant. However, the final Clean Water Rule takes the opposite approach foreclosing the use of significant nexus analysis for waters lying beyond 4,000 feet from the OHWM or HTL of waters designated as jurisdictional under section 328.3(a)(1)–(5), even if they are within an area that lies along the connectivity gradient of the tributary and may be providing important functions to the downstream waters.<sup>49</sup> This is classic arbitrary decisionmaking lacking support in the facts of record or the logic of EPA's own methodology.

#### IV. THE 4,000-FOOT LINE WAS ADOPTED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT'S NOTICE AND COMMENT REQUIREMENT

As discussed, the 4,000-foot line appeared at the last minute, taking everyone outside EPA's inner circle by surprise. Naturally, the lawsuits challenging the final rule, from both sides, have raised the lack of opportunity for notice and comment.<sup>50</sup> The courts have likewise been quick to seize on this issue to put a hold on the rule right out of the box. First it was Judge Erickson in North Dakota who issued a preliminary injunction against implementation of the rule in the thirteen states that brought that challenge.<sup>51</sup> Judge Erickson found that the plaintiff states were likely to succeed on a number of their claims<sup>52</sup> including the argument that the 4,000-foot line lacked any scientific support and that the final rule was not the "logical outgrowth" of the rulemaking process:

When the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule. Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance.<sup>53</sup>

Similarly, in issuing the nationwide stay of the rule, the Sixth Circuit said:

---

<sup>49</sup> See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,086–88 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

<sup>50</sup> See, e.g., Complaint at 19, *Texas v. U.S. Env'tl. Prot. Agency*, No. 15-cv-00162 (S.D. Tex. June 29, 2015).

<sup>51</sup> *North Dakota v. U.S. Env'tl. Prot. Agency*, No. 3:15-cv-59, 2015 WL 5060744, at \*8 (D.N.D. Aug. 27, 2015).

<sup>52</sup> *Id.* at \*1. For the record, I do not agree with many of the rulings made by Judge Erickson, and in particular his view that EPA has exceeded the scope of its authority under the CWA as interpreted by Justice Kennedy in *Rapanos*. To the contrary, in my view EPA has unlawfully narrowed its authority under the CWA. But a full discussion of that must await another day.

<sup>53</sup> *Id.* at \*6.

Although the record compiled by respondent agencies is extensive, respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered. Respondents maintain that the notice requirements were met by their having invited recommendations of “geographical limits” and “distance limitations.” Perhaps. But whether such general notice satisfies the “logical outgrowth” standard requires closer scrutiny. Nor have respondents identified specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose. Their argument that “bright-line tests are a fact of regulatory life” and that they used “their technical expertise to promulgate a practical rule” is undoubtedly true, but not sufficient.<sup>54</sup>

Granted, these were preliminary decisions that could change once the full administrative record is submitted and the issues are fully briefed and argued.<sup>55</sup> But it is very hard to imagine what argument EPA could make to convince a court that the 4,000-foot line was a logical outgrowth of this rulemaking. Indeed, it has all the hallmarks of the kind of “switcheroo” routinely condemned by the courts.<sup>56</sup> Under section 553(c) of the Administrative Procedure Act, an “agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,” and also must ensure “consideration of the relevant matter presented.”<sup>57</sup> The “opportunity to comment” is designed to give affected parties and the public a chance to persuade agencies to make changes from their original proposal or to adopt alternatives to their original proposal.<sup>58</sup> But “an agency does not have complete discretion to change radically a proposed rule simply in response to adverse comments.”<sup>59</sup> Nor can the agency perform a *volte face* simply because political winds shifted after the rule was proposed. The logical outgrowth doctrine strikes a balance “between the agency’s need to change its rules because of what it learns during the comment period and the public’s right to participate

---

<sup>54</sup> *In re* Env’tl. Prot. Agency, 803 F.3d 804, 807–08 (6th Cir. 2015).

<sup>55</sup> Of course the threshold question of which court (or perhaps courts) gets to decide the case must be resolved first. In February 2016, the Sixth Circuit panel took jurisdiction notwithstanding some compelling arguments for why this rule does not fit within any of the categories of actions subject to CWA section 509. See *In re* U.S. Dep’t of Defense, No. 15-3751 (6th Cir. Feb. 22, 2016); Joint Reply of Nat’l Ass’n of Mfrs. and Am. Farm Bureau Fed’n to Respondents’ Combined Opposition to Motion to Dismiss for Lack of Subject-Matter Jurisdiction at 1, *In re* Env’tl. Prot. Agency, 803 F.3d 804 (6th Cir. 2015) (No. 15-3751), ECF No. 63.

<sup>56</sup> See *Env’tl. Integrity Project v. U.S. Env’tl. Prot. Agency*, 425 F.3d 992, 996 (D.C. Cir. 2005) (“[W]e have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities.”); see also *Shell Oil Co. v. U.S. Env’tl. Prot. Agency*, 950 F.2d 741, 747 (D.C. Cir. 1991) (holding that adequate notice has been provided for Administrative Procedure Act purposes “so long as the final rule is a ‘logical outgrowth’ of the one proposed”).

<sup>57</sup> 5 U.S.C. § 553(c) (2012).

<sup>58</sup> RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.3 (5th ed. 2010).

<sup>59</sup> JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 285 (4th ed. 2006).

meaningfully in the promulgation of the final rule.”<sup>60</sup> Here, not only were the regulated parties and the public denied any meaningful opportunity to comment on the bright line rule, but the agency (the Corps) that has the statutory authority and responsibility for implementing the rule was cut out of the final decision.<sup>61</sup>

V. THE 4,000-FOOT LINE WAS ADOPTED IN VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT’S ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT<sup>62</sup>

Adoption of the Clean Water Rule is obviously a major federal action subject to the National Environmental Policy Act (NEPA).<sup>63</sup> EPA prepared a pro forma Environmental Assessment (EA) concluding that no Environmental Impact Statement (EIS) was necessary because the rule would have (mostly) positive benefits for the aquatic environment and no significant adverse consequences.<sup>64</sup> However, as the Corps’ documents make clear, the 4,000-foot limit would leave many important wetlands, ponds, and lakes, and their associated ecological and socioeconomic values, without federal protection and in many cases without any protection at all.<sup>65</sup> The

---

<sup>60</sup> Philip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 215 (1996).

<sup>61</sup> See *supra* note 16 and accompanying text.

<sup>62</sup> There is also an argument that EPA violated section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012), by failing to consult with the Fish and Wildlife Service and the National Marine Fisheries Service on potential effects on listed species. See *id.* § 1536(a)(2). However, to date none of the lawsuits have raised that issue perhaps because of the difficulty of showing impacts on specific species at specific locations that would be necessary to establish standing to bring an Endangered Species Act (ESA) challenge.

<sup>63</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012); see 40 CFR § 1508.18 (2015) (Major federal actions include: “Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*”).

<sup>64</sup> U.S. ARMY, OFFICE OF THE ASSISTANT SEC’Y OF THE ARMY FOR CIVIL WORKS, FINDINGS OF NO SIGNIFICANT IMPACT: ADOPTION OF THE CLEAN WATER RULE: DEFINITION OF “WATERS OF THE UNITED STATES” 2, 28 (2015), available at [http://www.epa.gov/sites/production/files/2015-05/documents/finding\\_of\\_no\\_significant\\_impact\\_the\\_clean\\_water\\_rule\\_52715.pdf](http://www.epa.gov/sites/production/files/2015-05/documents/finding_of_no_significant_impact_the_clean_water_rule_52715.pdf).

<sup>65</sup> Though opponents of the rule like to argue that the states will fill any gap created by reduction of federal protection, the reality on the ground tells a different story. According to a comprehensive study by the Environmental Law Institute:

Over two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal Clean Water Act. These restrictions take the form of absolute or qualified prohibitions that require state law to be “no more stringent than” federal law; property rights limitations; or a combination of the two. Such provisions constrain, and in some instances eliminate, the authority of state or local regulators to protect aquatic resources whose Clean Water Act coverage has disappeared or been rendered uncertain as a result of the *SWANCC* and *Rapanos* decisions.

ENVTL. LAW INST., STATE CONSTRAINTS: STATE IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT (2013), available at <http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>.

legal analysis prepared by the Corps' Chief Counsel's office paints a very damning portrait:

To abandon existing Federal CWA jurisdiction over ecologically important water bodies that significantly affect the biological, physical, and chemical integrity of the downstream waters would lead to significant adverse effects on the environment, because, shorn of CWA protection, those lakes, ponds, and wetlands can be polluted, filled, drained, and degraded at will, with no Federal regulation to prevent, regulate, or mitigate for those destructive activities. Pollutants dumped into no-longer-jurisdictional water bodies would flow downstream to the navigable waters, polluting drinking water supplies and killing or harming fish, shellfish, and wildlife, and harming human populations. Consequently, the abandonment of CWA jurisdiction over important parts of the tributary system of the navigable waters cannot be done without first preparing an environmental impact statement (EIS) to identify precisely what water bodies would lose CWA protection under the final rule and what significant adverse environmental effects would result from that loss of jurisdiction.<sup>66</sup>

Nor can EPA rationalize the failure to do an EIS on the ground that “on balance” the rule provides net benefits to aquatic resources. Council on Environmental Quality (CEQ) regulations, which are binding on all federal agencies, specifically state that “[e]ffects may . . . include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”<sup>67</sup> While it is true, for example, that the final rule includes five specific categories of geographically isolated wetlands<sup>68</sup> that are now classified as “similarly situated”—meaning that they could potentially be protected as “(a)(7)”<sup>69</sup> waters—each of those subcategories must still be analyzed under a case-specific significant nexus analysis and it is unclear how such analyses will play out. Moreover, even assuming that either the Corps, or in certain circumstances EPA,<sup>70</sup> determines that such waters are jurisdictional under the significant nexus test, they will face court challenges with uncertain outcomes.<sup>71</sup>

---

<sup>66</sup> Legal Memo, *supra* note 39, at 2.

<sup>67</sup> 40 C.F.R. § 1508.8 (2015).

<sup>68</sup> The five categories are prairie potholes, western vernal pools, Carolina bays and Delmarva bays, Texas coastal prairie wetlands, and pocosins. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,059 (June 29, 2015).

<sup>69</sup> 33 C.F.R. § 328.3(a)(7) (2015).

<sup>70</sup> See Robert W. Page & Rebecca W. Hanmer, *Memorandum of Agreement: Exemptions Under Section 404(f) of the Clean Water Act* (Jan. 19, 1989), <http://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act> (last visited Apr. 9, 2016).

<sup>71</sup> Indeed, the Supreme Court has granted certiorari in *United States Army Corps of Engineers v. Hawkes Construction, Inc.* to decide the question of whether the Corps' jurisdictional determinations are reviewable under the APA as final agency actions. See Supreme Court of the United States, *Granted and Noted List—Cases for Argument in October Term 2015* (Jan. 26, 2016), <http://www.supremecourt.gov/grantednotedlist/15grantednotedlist> (last visited Apr. 9, 2016). This is a follow-on case to *Sackett v. U.S. Env'tl. Prot. Agency*, 132 S.

Another flaw in the EA is that it only considers the pro forma “no action” alternative to the proposed rule.<sup>72</sup> The alternatives analysis is the “linchpin” of the NEPA process.<sup>73</sup> The alternatives to be assessed should serve the essential purpose of the action and provide a reasonable range sufficient to present a reasoned choice.<sup>74</sup> The stated purpose of the Clean Water Rule is to “ensure protection for the nation’s public health and aquatic resources, and increase CWA program predictability and consistency by clarifying the scope of ‘waters of the United States’ protected under the Act.”<sup>75</sup> Yet the EA for the Clean Water Rule does not even mention the 4,000-foot limit on jurisdiction, let alone consider the environmental consequences of the waters excluded by it, and also fails to consider any other alternative to clarifying the scope of the Act without sacrificing important aquatic resources, as recommended by the SAB. NEPA case law requires that an EA or EIS consider a “reasonable range” of alternatives.<sup>76</sup> Consideration of a single phantom alternative of “no action” which cannot accomplish the stated purpose of the rulemaking is presumptively unreasonable.<sup>77</sup>

## VI. CONCLUSION

As crazy as it may sound, EPA’s best defense might be to confess error on the bright line rule and request a remand to fix it, and maybe a few other things.<sup>78</sup> EPA could request a remand without vacatur of the entire rule.<sup>79</sup> The

---

Ct. 1367 (2012), where the Court held that compliance orders under the CWA were subject to review under the Administrative Procedure Act and that the CWA did not preclude such review. *Id.* at 1374.

<sup>72</sup> See 40 C.F.R. § 1502.14(d) (2015). According to Council on Environmental Quality, the no action alternative is designed to provide “a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives.” CEQ, NEPA’S FORTY MOST ASKED QUESTIONS, available at [http://www.fws.gov/r9esnepa/NEPA\\_Handbook/40\\_Asked\\_Questions.pdf](http://www.fws.gov/r9esnepa/NEPA_Handbook/40_Asked_Questions.pdf).

<sup>73</sup> *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286–87 (1st Cir. 1996) (internal citations and quotation marks omitted).

<sup>74</sup> See *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 431–32 (10th Cir. 1996).

<sup>75</sup> Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,054, 37,054–88 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

<sup>76</sup> CEQ Regulations require that the EA or EIS “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a) (2015). *E.g.*, *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1051 (10th Cir. 2014).

<sup>77</sup> See *Nat. Res. Def. Council, Inc. v. Evans*, 232 F. Supp. 2d 1003, 1041 (N.D. Cal. 2002) (“[P]laintiffs have shown a likelihood of establishing that defendants acted arbitrarily in only considering in effect one alternative—the chosen one—and not considering [other feasible alternatives].”); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1088–89 (E.D. Cal. 2004) (finding the range of options in EA too narrow).

<sup>78</sup> There are many issues raised in the litigation that are beyond the scope of this Paper. These include the blanket exclusion of “tributary” groundwater that courts have found to constitute WOTUS in some situations; the exclusion of ditches that may function as tributaries; the exclusion of waters covered by the prior converted croplands exemption; the exclusion of tributaries that lack a defined bed and bank in the upper reaches of many watersheds especially

D.C. Circuit recently did this with respect to the mercury rule which the Supreme Court invalidated on procedural grounds.<sup>80</sup>

Granted, this would leave it to the next president to finish the job, and there is obvious risk in that. On the other hand, it is virtually certain that EPA is going to lose on this issue, and fighting it out may actually lead to more of the rule being struck down depending on where the case finally ends up. A voluntary remand allows the Agency to cut its losses and regain some control over events that are spinning out of control. It probably does make sense for EPA to wait and see what the Sixth Circuit does on the jurisdictional review issue. If the circuit court rules that it has exclusive jurisdiction, that will at least give EPA one bite at the apple and it might be tempting to take its best shot. But if the court rules that it does not have exclusive jurisdiction then EPA is facing a madhouse of litigation in seven different district courts, one of which—the District Court of North Dakota—has already ruled that it is ready to strike the rule down on several grounds. Sometimes the most prudent thing is to quit the battlefield and live to fight another day. Painful as it may be for EPA to accept after all the work it has put into this rulemaking, this may be one of those times.

---

in the arid West. *See* Complaint for Declaratory and Injunctive Relief at 35–38, *Waterkeeper Alliance v. U.S. Evtl. Prot. Agency*, No. 15-cv-03927 (N.D. Cal. Aug. 27, 2015).

<sup>79</sup> *See* STEPHANIE J. TATHAM, *THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 1* (2014), available at <https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf>.

<sup>80</sup> *White Stallion Energy Ctr., LLC, v. U.S. Evtl. Prot. Agency*, No. 12-1100, slip op. at 2 (D.C. Cir. Dec. 15, 2015) (per curiam) (order remanding rule without vacatur).