COMMENT

UNCERTAIN WATERS: THE LEGAL IMPLICATIONS OF THE "NEW WATERS OF THE UNITED STATES" RULE ON THE ENERGY SECTOR AND A POTENTIAL REMEDY WITHIN ADMINISTRATIVE LAW*

ABSTRACT

This Comment examines the struggle surrounding the meaning of "Waters of the United States" in the context of the Clean Water Act (CWA) and recent efforts by the Environmental Protection Agency and Army Corps of Engineers to define the term through the notice and comment rule making process. The Comment proceeds in Part I to discuss the evolution of case law surrounding the meaning of WOTUS and highlights the contrast between the Court's approach to interpreting the CWA and the agencies' approach. These conflicting approaches leave private parties uncertain of the CWA's jurisdictional reach. In Part II, the effects of this uncertainty are applied in an oil and gas context to reveal grave resulting economic consequences. The Comment concludes in Part III by evaluating one legal option within administrative law, which if followed, could remedy these economic concerns and restore regulatory certainty for the energy sector.

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I. INTRODUCTION

The Federal Water Pollution Control Act of 1948 (FWPCA) aimed to give the federal government the authority to investigate and suppress sources of water pollution.[1] What was a seemingly small step would serve as the legislative forerunner of the modern environmental movement.[2] In the years that followed, the federal government racked up billions in investigatory costs with scant success in identifying polluters and little cooperation from the states.[3] In response, Congress enacted a series of amendments to the FWPCA in 1972 with the resulting statute becoming known as the Clean Water Act (CWA).[4] The CWA

1. Water Pollution Control Act, Pub. L. No. 845, § 1, 62 Stat. 1155, 1155 (1948); *See* Sharon Nelson Kahn, Comment, *Criminal Prosecution under the Federal Water Pollution Control Act*, 56 CHI.-KENT L. REV. 983, 994–96 (1980) (discussing the importance of the FWPCA as a starting point for environmental protection on which the Clean Water Act builds).

2. ANDREW DZURIK WITH DAVID A. THERIAQUE, WATER RESOURCES PLANNING, 51–55 (2d ed. 1996).

3. *Id.* at 51; William Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act*, G.W. ENRG. & ENVTL. L. Winter 2013, at 25–28 (recapping the earlier years of Clean Water Act enforcement efforts).

4. DZURIK *WITH* THERIAQUE, *supra* note 2, at 51–52; Andreen, *supra* note 3, at 25–26; *see generally* Clean Water Act, 33 U.S.C. ch. 26 (2012). Since the CWA was a series of amendments to the existing FWPCA, the codified statute still bears that moniker and

intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and has since facilitated a significant reduction of water pollutants yielding improved water quality.[5]

Once the law survived initial legal challenges, private parties who opposed the law realized the CWA was here to stay and sought Congressional amendments to ensure private property rights were not unduly encumbered by potential regulation.[6] Commonly, these parties argued that several activities incidental to their operations could be construed as water pollutants.[7] Such a classification requires that various permit obligations be met, regardless of the cost to the private party.[8] Since each phase of the petroleum development cycle is uniquely affected by CWA requirements, the energy sector is one of the industries most impacted by CWA jurisdiction.[9] Congress embraced the primary thrust of the energy sector's concerns through specific statutory exemptions, but several CWA provisions still apply.[10] Notably, CWA Section 311, focuses on spill prevention, and Sections 402 and 404, addresses the discharge of by-products from oil and gas exploration and production.[11] Also, depending on the topography and hydrology of a site and the type of drilling operation, it is possible that the

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not the title of "Clean Water Act." *See* 33 U.S.C. ch. 26; DZURIK *WITH* THERIAQUE *supra* note 2, at 51–52; Andreen, *supra* note 3, at 25–26.

5. Clean Water Act, 33 U.S.C. § 1251(a) (2012); Andreen, *supra* note 3, at 28–30.

6. *See* Janis Snoey, Comment, *Water, Property and the Clean Water Act*, 78 WASH. L. REV. 335, 344–49 (2003) (providing an overview of the property arguments against Clean Water Act jurisdiction); *see also* Jan G. Laitos, *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901, 916–17 (1989).

7. *See* Adam Kron, *EPA's Role in Implementing and Maintaining the Oil and Gas Industry's Environmental Exemptions: A Study in Three Statutes*, 16 VT. J. ENVTL. L. 586, 591–95, 624 (2015) (describing the EPA's practice of exempting the energy sector from portions of the CWA because the harm from restricting production outweighs the environmental benefit).

8. *See* U.S. ENVTL. PROTECTION AGENCY & U.S. DEP'T OF THE ARMY, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE 32–34 & fig.8 (2015); *see also* Kron, *supra* note 7, at 591–95, 624 (discussing the oil and gas industry and the CWA); Robert B. Moreno, Casenote, *Filling the Regulatory Gap: A Proposal for Restructuring the Clean Water Act's Two-Permit System*, 37 ECOLOGY L.Q. 285, 294–96 (2010) (discussing the fill context under the CWA).

9. Carol Clayton et. al., *Minimizing Risk Under the Clean Water Act*, 36 ENERGY L.J. 69, 92–94 (2015) (detailing how the increasing geographic realm subject to CWA jurisdiction uniquely challenges the upstream, midstream and downstream aspects of energy development).

10. Kron, *supra* note 7, at 596–97. For a discussion of how the energy sector is and is not exempt from other portions of major environmental regulations see *id.* at 594–98.

11. Michael Goldman, *Drilling into Hydraulic Fracturing and Shale Gas Development: A Texas and Federal Environmental Perspective*, 19 TEX. WESLAYAN L. REV. 185, 191–94 (2012) (outlining how the CWA affects the energy sector).

CWA's regulations on point source pollution may apply.[12] In response, energy companies developed and maintained rigorous compliance programs that frequently go beyond the CWA's statutory requirements to ensure compliance and avoid administrative penalties.[13]

While it would seem that both government and private parties maintain a balanced approach to the enforcement of the CWA, an enduring conclusion to that effect would preclude the reason for this Comment.[14] It should be noted that the CWA is unique in that Congress charged its administration to both the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACOE) within the Department of Defense.[15] While such an approach can bring the unique expertise of each agency to bear on an issue, it can hamper efficiency in carrying out Congressional mandates and effective enforcement.[16] From the outset of the CWA in the 1970's, the drawbacks of this tandem enforcement model have been on display as the separate agencies began asserting jurisdiction over certain development projects based on claims of indirect effects on "navigable waters."[17]

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12. The Clean Water Act defines "point source" of pollution as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2012). A likely application of this requirement is in the hydraulic-fracking context. *See* John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Goverance*, 63 CASE W. RES. L. REV. 995, 1005–06 (2013). Another, less predictable alternative is that roads to access drill sites could qualify as point sources requiring permitting compliance. See Mark Cecchini-Beaver, Casenote, *"Tough Law" Getting Tougher: A Proposal For Permitting Idaho's Logging Road Stormwater Point Sources After* Northwest Environmental Defense Center v. Brown, 48 IDAHO L. REV. 467, 468–70 (2012) (proposing a permitting regime for logging roads in the wake of recent Supreme Court precedent holding water run-off from such camp roads can be considered point sources of pollution under CWA).

13. Clayton, *supra* note 9, at 73–77. The desire to avoid penalties is further incentivized via the broad discretion given to federal prosecutors to pursue criminal proceedings against individuals within a polluting company. *See id.* at 78–86. For a discussion of the costs of these compliance programs, see Karen Fisher-Vanden & Shelia Olmstead, *Moving Pollution Trading from Air to Water: Potential, Problems, and Prognosis*, J. ECON. PERSP. Winter 2013, at 148–52.

14. Steve Louthan, *Federal Jurisdiction under the Clean Water Act after* Rapanos, COLO. LAW. Dec. 2006, at 47–49 (discussing the established norm among regulations pre-*Rapanos* and the confusion that it presents).

15. Clean Water Act, 33 U.S.C. § 1342(b)(6) (2012).

16. *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 33–35 (2009) (elaborating on the practical hurdles that multiple goal agencies face). In the case of WOTUS and the Clean Water Act, these thoughts are particularly applicable to the role played by the ACOE. *Id.*

17. Jamie Janisch; *Scope of Federal Jurisdiction Under Section 404 of the Clean Water Act: Rethinking "Navigable Waters" After* Rapanos v. United States, 11 U. DENV. WATER L. REV. 91, 95–99 (2007).

Congress did define "navigable waters" in the CWA as "waters of the United States, including the territorial seas" (herein after WOTUS).[18] However, as evident on its face, this definition lacks clarity.[19] The resulting ambiguity enabled the EPA and ACOE to develop broad interpretations of WOTUS via various administrative rule makings in the name of more concretely proscribing the definition.[20] However, the original intent of Congress reads the definition as intentionally vague, not to allow for far-reaching jurisdictional claims, but rather, to facilitate case-by-case flexibility in determining CWA jurisdiction.[21]

Support for this interpretation is evident in the Congressional Record, as both the variations in geography and hydrology across the United States and the desire to defer to agency expertise were cited as reasons for a flexible definition in the original statute.[22] If a geographic area did not clearly fall within the express definitions, the ACOE would make a jurisdictional ruling to determine if a given project could affect a WOTUS and thus be subject to CWA regulations.[23] Over time, these case-by-case determinations, made by the ACOE, formed a trend of expanded, rather than constrained, jurisdiction.[24] Consequently, what was and was not a WOTUS per the ACOE deviated from Congress's express intent in the CWA.[25] The

18. Clean Water Act, 33 U.S.C. § 1362(7) (2012).

19. Janisch, *supra* note 17, at 96–98.

20. James Murphy, Essay, *Muddying the Waters of the Clean Water Act*: Rapanos v. United States *and the Future of America's Water Resources*, 31 VT. L. REV. 355, 357–58 (2007) (discussing the widely accepted view that the choice of general terms in conjunction with the phrase "waters of the United States" were designed to give a much broader meaning to the navigable waters over which the CWA had jurisdiction when compared against the historical use of the term); *see* Jonathan H. Adler, *Reckoning with* Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, MO. ENVTL. L. & POL'Y REV., Fall 2006, at 2–4.

21. Adler, *supra* note 20, at 2–4.; Murphy, *supra* note 20, at 357–58.

22. This intent is further evidenced by Congress's inclusion of a case-by-case jurisdictional determination process to evaluate whether the CWA would apply to a given area. Janisch, *supra* note 17, at 99–101 (discussing Congress' intent to broaden federal jurisdiction over different types of hydrology and geography through agency interpretation of the term "navigable waters").

23. Clean Water Act, 33 U.S.C. § 1344(a), (d) (2006).

24. *See* Clifton Cottrell, *The "Wetlands Adjacent to Non-Navigable Waters" Less Traveled: Clean Water Act Jurisdiction and the Fifth Circuit*, 43 TEX. ENVTL. L.J. 19, 21–27 (2012) (succinctly detailing the progression of the ACOE making expanded jurisdictional claims through the jurisdictional determination process).

25. Janisch, *supra* note 17, at 113. As court precedent evolved, it became clear that the ACOE and EPA intended to assert jurisdiction to the full extent possible under the Commerce Clause (i.e. the federal government can claim jurisdiction over waters connected to interstate commerce even if they be non-navigable and intrastate). *See* Joint Memorandum Regarding *SWANCC* Decision, 68 Fed. Reg. 1995 (Jan. 15, 2003); U.S.

natural result was a series of legal challenges brought by various private parties who felt the ACOE abused the jurisdictional determination mechanism to expand their authority beyond legislative parameters.[26] This tension lead the ACOE and EPA to undertake a rule making action desigend to clarify WOTUS by issuing a new definition of the term (hereinafter "new WOTUS"), however, that definition perpetuates and exasperates the underlying dispute rather than ending it.

To fully appreciate the WOTUS struggle, this Comment proceeds in Part I to discuss the evolution of case law surrounding the meaning of WOTUS. The analysis reveals a contrast between the Court's approach to interpreting Congress and that of the agencies, which leaves private parties uncertain of the CWA's reach. The resulting legal uncertainty is then applied in an oil and gas context in Part II. By looking at the various duties under a standard oil and gas lease in light of the "new WOTUS rule," the potential for government enforcement actions, exponential regulatory costs, and lessee-lessor conflict is apparent. Such grave economic consequences necessitate a legal challenge to restore WOTUS to the meaning intended by Congress. The Comment concludes by evaluating one legal option within administrative law, which if followed, could lead to a successful challenge of the "new WOTUS" and a restoration of regulatory certainty for the energy sector.

ENVTL. PROT. AGENCY AND DEP'T OF THE ARMY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* (2008) (openly acknowledging the variations of the agency interpretation as falling beyond Congressional intent in light of Supreme Court precedent). The issue of how the federal government can act within the bounds of the Commerce Clause to regulate waters that are purely intrastate is another subject, which will only be briefly mentioned in this Comment. Cottrell, *supra* note 24, at 24–26.

26. Though uncertainty in the CWA often leaves courts grappling with the question of whether a Federal District or Federal Circuit Court is the correct forum in which to challenge ACOE or EPA actions under the CWA, the Author also leaves that subject to other authors. *See, e.g.*, Friends of the Everglades v. EPA, 699 F.3d 1280 (11th Cir. 2012) (holding that circuit courts of appeals lack original jurisdiction in CWA water transfer suits, and that the district court is the proper forum); Natalia Cabrera, Comment, *Plain Meaning or Pragmatics? Differing Interpretations of the Clean Water Act's Jurisdictional Provisions*, 41 BOS. C. ENVTL. AFF. L. REV. (E. Supp.) 1, 3–6 (2012) (detailing the vagueness in the CWA and discussing the challenges of determining the correct forum to contest jurisdictional determinations); Jonathan H. Adler, *North Dakota District Court Blocks Controversial "Waters of the Untied States" Rule*, WASH. POST, (Aug. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/28/north-dakota-district-court-blocks-controversial-waters-of-the-united-states-rule [https://perma.cc/P2LP-Y4B7] (describing how courts at different levels are interpreting the CWA differently to either give themselves or deny themselves jurisdiction to hear challenges to WOTUS).

A. Case Law

A review of the relevant case law begins with *United States v. Riverside Bayview Homes, Inc.,* where the court held it was not an unreasonable interpretation of the CWA WOTUS definition for the ACOE to expand their jurisdiction to all wetlands adjacent to navigable or interstate waters and their tributaries.[27] Consequently, a developer who began to fill marshland with plans to build a residential neighborhood had to first obtain a permit from the ACOE.[28] The court's reasoning rested on the fact that wetlands are lands that "are inundated or saturated by surface or ground water 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."[29] Thus, even though the water in a wetland does not originate in an adjacent body of water, the court concluded that defining WOTUS so as to encompass all wetlands adjacent to those bodies of water and expressly within the jurisdiction of the ACOE is a permissible interpretation of the CWA.[30] This holding expanded the permit requirement to wetlands for the first time and shifted the definition of navigable waters to include abutting wetlands, which often are non-navigable.[31] The result for private parties was uncertainty and increased costs, as landowners now ran the risk of their land falling subject to CWA jurisdiction under an expanded WOTUS definition.[32]

Efforts to advance an expansive interpretation of what should be considered a WOTUS by the ACOE continued in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[33] In this instance a group of municipalities attempted to develop a garbage dump for non-hazardous, solid waste at an abandoned gravel pit, which, if completed, would result in the filling of seasonal and permanent

27. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).

28. *Id.* at 124.

29. *Id.* at 129 (citing 33 C.F.R. § 323.2(c) (1985)).

30. *Id.* at 135.

31. *Id.*

32. *See* Michael K. Braswell & Stephen L. Poe, *Private Property vs. Federal Wetlands Regulation: Should Private Landowners Bear the Cost of Wetlands Protection?*, 33 AM. BUS. L.J. 179, 181 (1995) (evaluating from an eminent domain perspective if "private landowners or the public [should] bear the cost of preserving and protecting" wetlands); *see also* Scott L. Greeves, Note, *Federal Regulation of the Discharge of Dredged or Fill Material into Wetlands: Options and Suggestions for Land Developers*, 19 J. CORP. L. 135, 137–39, 166 (1993) (discussing the CWA's potential jurisdiction over a wetland as having "a significant impact on the land development industry").

33. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r (*SWANCC*), 531 U.S. 159 (2001).

ponds (formed as a result of rain fall accumulating in areas around the abandoned pit).[34] The municipalities sought a jurisdictional determination from the ACOE to determine if they needed to obtain permits under the CWA.[35] The ACOE, in keeping with *Riverside Bayview*, first concluded that it had no jurisdiction over the proposed disposal site, because there were no wetlands or areas that "support vegetation typically adapted for life in saturated soil conditions."[36] However, the ACOE then reversed course on its first decision and claimed it had jurisdiction (making a permit necessary) under the "Migratory Bird Rule."[37]

The Court denied the ACOE's claimed jurisdiction based on the "Migratory Bird Rule" and reasoned that should such ponds be classified as WOTUS, then the "navigable waters" wording in the statute would lack independent significance.[38] The Court went on to clarify the holding in *Riverside Bayview* as *limiting* the import of the phrase "navigable waters" by *"giv[ing] it no effect* whatever."[39] The majority continued "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[40] While this reasoning would appear to check the ACOE's efforts to expand its own jurisdiction via a return to the express meaning of the CWA, the court for the first time incorporated the phrase "significant nexus" to further explain the inclusion of wetlands within the interpretation of "navigable waters" in *Riverside Bayview*.[41] Though such phraseology may seem inconsequential, it became the bedrock for

34. *Id.* at 163.

35. *Id.*

36. *Id.* (citing 33 C.F.R. § 328.3(b) (1999)).

37. The Migratory Bird rule was a regulation passed by the ACOE and EPA in an effort to expand their own jurisdiction. *See SWANCC*, 531 U.S. at 164; *see also* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. § 328.3). This "rule" articulated that the ponds in question at the disposal site qualified as WOTUS because "(1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird *[sic]* which cross state lines." *SWANCC*, 531 U.S. at 164–65 (citing U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 6).

38. *SWANCC*, 531 U.S. at 167.

39. *Id.* at 171–72 (emphasis added).

40. *ld.* at 172 (citing United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407–08 (1940)).

41. *Id.* at 167 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131–32, n.8 (1985)).

subsequent legal challenges as the ACOE and EPA seized on that wording to issue new administrative rules that yielded even greater interpretative uncertainty of WOTUS.[42]

In 2006, the Court via a plurality decision in *Rapanos v. U.S.*, muddied the WOTUS waters by producing two different standards to determine whether a given area qualified as a WOTUS.[43] This case arose from a landowner who backfilled land that contained sometimes-saturated soil with the "nearest body of navigable water . . . eleven to twenty miles away."[44] Despite these facts, the ACOE claimed his saturated lands were a WOTUS and that he would need a permit to backfill the land.[45] The plurality standard concluded that channels that periodically allow drainage of rainfall or those that experience intermittent or ephemeral water flow are not WOTUS.[46] Rather, "on its only plausible interpretation, the phrase, 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams . . . oceans, rivers, and lakes.'"[47]

The second test that emerged was the "significant nexus" standard, which, as advanced by Justice Kennedy alone, returns to the question of "whether the term 'navigable waters' in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact."[48] In Justice Kennedy's view it is the "significant nexus," first mentioned in *SWANCC,* which is the determining factor, rather than geographical characteristics as in the plurality standard.[49] The greater the connectivity between non-navigable waters or

42. *Id.* at 172.

43. Rapanos v. United States, 547 U.S. 715, 767 (2006). The Court was split 4-1-4 with Justice Scalia, The Chief Justice, Justice Thomas, and Justice Alito with Justice Kennedy joining only in the decision to remand the case back to the 6th Circuit Court of Appeals; *see also* Murphy, *supra* note 20 (I cannot take credit for the illustrative word play).

44. *Rapanos*, 547 U.S. at 720. Rapanos was a consolidation of two cases challenging jurisdictional determinations made by the ACOE that were before the Court. *Id.* at 715 (noting consolodation at bottom of page). *See* Carabell v. United States, 547 U.S. 715 (2006).

45. *Rapanos*, 547 U.S. at 720–21 (2006).

46. *Id.* at 739.

47. *Id.* (citing Webster's Second 2882).

48. *Id.* at 759 (Kennedy, J., concurring) (citing Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r (*SWANCC*), 531 U.S. 159, 159 (2001)). Justice Kennedy refers back to the *SWANCC* decision's warrants as a fundamental issue undergirding his "significant nexus" approach. *Id.*

49. *Id.* at 767; *see also supra* note 26 (providing the essential warrants of Kennedy, the plurality and the Riverside Bayview Decision); *cf. SWANNC* 531 U.S. at 739.

wetlands and navigable waters, the more likely it is for the ACOE to establish jurisdiction over the area in question.[50] Thus, the efficacy of an ACOE jurisdictional determination under this approach must be analyzed in terms of the CWA's purpose and goals.[51] For instance, given the federally acknowledged benefits provided by wetlands—such as pollutant trapping, runoff storage and flood control—the ACOE can claim jurisdiction over an area if it can show the movement of water through it significantly affects the chemical, physical and biological integrity of other covered waters, i.e. navigable waters.[52] However, if the connection between the area in question and the covered water were speculative or inconsequential, then the area would fall beyond the jurisdiction of the ACOE under the CWA.[53]

One additional noteworthy impact of *Rapanos* is the dissent in the wake of the fractured application of the plurality holdings in the Circuit Courts.[54] Writing for the four dissenting Justices, Justice Stevens concluded that "[g]iven that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met."[55] Consequently, some circuits have now applied both the plurality and significant nexus standards with equal weight.[56]

From the outset of the *Rapanos* decision, it was clear that the plurality standard and significant nexus standard were in

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50. *Rapanos*, 547 U.S. at 767. Justice Kennedy opines:

> [a] connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.

Id.

51. The CWA articulates its purpose as "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," Clean Water Act, 33 U.S.C. § 1251(a) (2012). The goals to effectuate that purpose are to restrict dumping and filling in "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12) (2012).

52. *See* 33 C.F.R. § 320.4(b)(2) (providing the description of how the ACOE determines if an area is beyond CWA jurisdiction); *see also Rapanos*. 547 U.S. at 780 (providing the significant nexus test that on which 33 C.F.R. § 320.4(b)(2) relies).

53. *Rapanos*, 547 U.S. at 780.

54. *See* Cottrell, *supra* note 24, at 39–45 (describing the affect of the Rapanos dissent on various decisions made by the Circuit Courts).

55. *Rapanos*, 547 U.S. at 810.

56. *See* United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (becoming the first Circuit court to adopt Justice Steven's approach); *see also* United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009) (following the reasoning of the First Circuit in applying the Rapanos dissent).

competition with, rather than complimentary, to each other.[57] The plurality approach values a degree of certainty when it comes to applying WOTUS and consequently CWA jurisdiction.[58] The significant nexus standard, while designed to uphold the goals of the CWA, creates regulatory uncertainty because affected parties cannot clearly tell if they will be subject to CWA requirements until a case-specific hearing.[59] Further, despite Justice Kennedy's apparent contrary intention, the significant nexus standard provides a permissive pathway for the ACOE to assert jurisdiction over areas that clearly do not fall within those areas intended to be regulated by the statute.[60] The result is two-fold. First, there is continued litigation over an ill-defined CWA jurisdictional framework.[61] Second, agencies have cherry-picked their preferred tidbits from Court precedent as justification for the "new WOTUS rule" that gives rise to this Comment.

B. The "New WOTUS" Rule

The litany of varying case outcomes over the meaning of WOTUS in the wake of the *Rapanos* decision lead the EPA and ACOE to undertake notice and comment rule making in an effort to clear the now murky WOTUS framework.[62] Though some

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57. *See* Kron, *supra* note 17, at 108–09 (detailing the incompatibility of the two standards with different courts adopting different rules to determine if the ACOE has jurisdiction under the CWA).

58. *Id.* at 105–07 (describing the *de facto* bright line of the plurality opinion that the permanence of surface flow is necessary for a water to be subject to CWA regulation).

59. While this would appear to be the same jurisdictional determination process a private party would encounter pre-*Rapanos*, the growing lack of clarity of how the Rapanos' standards will be applied exacerbates the problem should a private party seek legal review of the ACOE's decisions. *See* Biber, *supra* note 16; *cf.* Murphy, *supra* note 20, at 366–69 (elaborating on the approaches taken by different Circuit Courts in applying *Rapanos*).

60. Justice Kennedy opined:

> Absent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries. Given the *potential overbreadth of the Corps' regulations*, this showing is necessary to avoid unreasonable applications of the statute.

Rapanos, 547 U.S. at 782 (emphasis added); *cf.* RONALD KEITH GADDIE & JAMES L. REGENS, REGULATING WETLANDS PROTECTION: ENVIRONMENTAL FEDERALISM AND THE STATES 37 (2000).

61. *See* Cottrell, *supra* note 24, at 35–39 (concluding that litigation is ongoing and will continue until the Court establishes a clear WOTUS framework), *see generally* Adler, *supra* note 20. (detailing how Rappanos raised several questions about the extent of Federal Jurisdiction under the CWA).

62. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056–58 (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, and 401). Notice and comment rulemaking is a

certainty comes from the new rule, the EPA and ACOE provide it in the course of reversing the trend toward a more constrained application of CWA jurisdiction advanced by the courts.[63] Under the new rule several bodies of water, which have been widely regarded as potentially being subject to the CWA, are now jurisdictional by rule.[64] At the same time, the rule also includes "all tributaries" and "all waters adjacent" to the other types of waters enumerated by rule as subject to CWA jurisdiction.[65] On the surface, this articulation does not appear abnormal because both of these waters could fall subject to the CWA via a jurisdictional determination prior to the new rule, but the new definitions for each of these provisions go beyond the established agency guidance.[66] The rule also provides for a new "Case Specific Waters" provision that widens the reach of the CWA by incorporating Justice Kennedy's significant nexus standard as a basis for establishing jurisdiction over other areas within the 100-year flood plain surrounding waters enumerated as jurisdictional by rule.[67] Each of these three "WOTUS widening" provisions and the problems they raise will be addressed in the subsequent paragraphs of this section.[68]

The new rule defines "tributary" for the first time in the Federal Register as:

> a water that contributes flow, either directly or through another [water enumerated by rule] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary

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variant of informal rulemaking through which agencies can develop regulations to administer the statutes assigned to them by Congress. Administrative Procedure Act 5 U.S.C. § 553 (2012).

63. Deborah Freeman & Steve Dougherty, *New Clean Water Act Rule Defining Waters of the United States*, COLO. LAW. Sept. 2015, at 43.

64. *Id.* at 44. This approach means that a jurisdictional determination is no longer needed for certain bodies of water, rather the rule itself proscribes them as being subject to the CWA.

65. *Id.* at 44–45; Clean Water Rule, 80 Fed. Reg. at 37,058.

66. *See* CLAUDIA COPELAND, CONG. RESEARCH SERV. R43455, EPA AND THE ARMY CORP'S RULE TO DEFINE "WATERS OF THE UNITED STATES" 10 (2016) (highlighting that "the agencies acknowledge that the rule would increase the categorical assertion of CWA jurisdiction, when compared to a baseline of current practices under the 2003 and 2008 EPA-Corps guidance").

67. Clean Water Rule, 80 Fed. Reg. at 37,059. (incorporating "significant nexus" as the essential element of what determines if an area falls under CWA jurisdiction as a "case specific water" and detailing the process of how the ACOE will determine if such a nexus exists).

68. *See* Copeland, *supra* note 66, at 7, 11 (supporting the characterization of the waters now jurisdictional under the CWA by rule as expansive).

> high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition.[69]

A close examination of this definition reveals that not only are tributaries expanded by rule to include man-made water features that meet the definitional characteristics (aside from those exempted), but there is no requirement that a tributary must have continuous flow or that such flow must be on the surface.[70] Prior to this rule, those land features that met the physical description of what is a tributary and lacked continuous flow fell under the "other waters" that could come under CWA jurisdiction only on a case specific jurisdictional determination.[71] Not only does this new interpretation run contrary to established agency practice, but it is a definition that runs contrary to the plurality holding in *Rapanos*.[72] While agencies are at liberty to adopt new interpretations to statutes as time passes, and even interpretations that run contrary to the holdings of the courts,[73] it does not mean the new interpretations are immune from legal challenge by adversely affected parties.[74] For instance, several of these "tributaries" that lacked continuous flow in the western United States fell beyond the CWA because of their lack of permanent surface flow.[75] The practical implication of the tributary definition is that areas leased for energy exploration or currently in development and production can now be subject to CWA jurisdiction because of the presence of a dried-out, potential

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69. Clean Water Rule, 80 Fed. Reg. at 37,107.

70. *Id.* Continued reading of the rule provides an additional expansion of WOTUS jurisdiction by stating that natural breaks between tributaries and other jurisdictional waters does not affect such a tributary's status as jurisdictional. *Id.* at 37,076, 37,078; *see* Freeman & Dougherty, *supra* note 63, at 44 (confirming this interpretation of the "new WOTUS"); *see also* Joint Memorandum Regarding *SWANCC* Decision, 68 Fed. Reg. 1995 (Jan. 15, 2003) (detailing how after *SWANCC* such areas would often be considered non-jurisdictional by the administering agencies).

71. PHILIP WOMBLE ET AL., AMERICAS VULNERABLE WATERS: ASSESSING THE NATION'S PORTFOLIO OF VULNERABLE AQUATIC RESOURCES SINCE *RAPANOS V. UNITED STATES* 72 (2011).

72. *See supra* notes 43, 49 and accompanying text (describing the composition of the plurality holding and the key elements that the court determined are necessary for a water to be jurisdictional by rule; i.e. an area must have flow that is both continuous and permanent to fall under CWA jurisdiction).

73. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 986, 989–91 (2005) (applying the *Chevron* test to an FCC interpretation that went expressly against an interpretative ruling by the 9th Circuit and holding that unless the Court defines the statute as unambiguous, the agency can alter their interpretation).

74. *Id.* at 979.

75. WOMBLE ET AL., *supra* note 71, at 71–72.

drainage area where water has not flowed in years but possesses the specified physical characteristics.[76]

The second broadening provision of the WOTUS rule is the incorporation of adjacent waters under CWA jurisdiction by rule. The "adjacent" provision of the new rule has two important elements that make it expansive. The first comes from the definition of "adjacent" applying to all jurisdictional waters enumerated in the WOTUS rule.[77] Previously, the application of adjacency in determining jurisdiction only applied to wetlands, not all water features jurisdictional under the CWA.[78] The second widening element comes from the use of the term "neighboring" within the adjacent definition. Neighboring is defined as:

> (i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark; (ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain . . . .[79]

Consequently, an entire area that was not covered when Congress first enacted the CWA is now subject to CWA jurisdiction because a portion of that larger area meets the definition and is within the described distance parameters.[80] The result is that private parties will face the administrative costs of meeting CWA requirements over vast areas of land implicated by the aforementioned distance parameters that prior to the WOTUS rule were not subject to CWA jurisdiction.[81] Though some would contend that such costs are foreseeable given the

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76. *See* WILLIAM L. GRAF, FLUVIAL PROCESSES IN DRYLAND RIVERS 104, 225 (1988) (explaining the prevalence of various topographical features in arid portions of the United States that in part or whole contain the same features of the new WOTUS definition of tributary; i.e. dry ephemeral gulches and arroyos).

77. Clean Water Rule, 80 Fed. Reg. at 37,054, 37,105 (defining adjacent as "mean[ing] bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like").

78. Freeman & Dougherty, *supra* note 63, at 45.

79. Clean Water Rule, 80 Fed. Reg. at 37,105 (defining "neighboring").

80. *Id.*

81. *See* Sean Hackbarth, *EPA Ignores Small Business Costs When Drafting Waters of the U.S. Rule*, U.S. CHAMBER OF COM., (Apr. 2, 2014, 10:30 AM), https://www.uschamber.com/above-the-fold/epa-ignores-small-business-costs-when-drafting-waters-the-us-rule [https://perma.cc/YHU5-7D24].

jurisdictional determination mechanism per prior WOTUS practice, the literal reach of the broadened "adjacent" provision yields a mandatory regulatory burden on an exponential scale that defies the conventional logic of risk-based prioritization of compliance activities.[82]

The third portion of the WOTUS rule that extends CWA jurisdiction beyond the traditional statutory limits of "navigable waters" is the "case specific waters" provision.[83] This portion of the rule borrows from Justice Kennedy's concurrence in *Rapanos* by codifying the significant nexus standard as the basis for determining "case specific waters," which would be subject to the CWA.[84] While this portion of the rule is limited in the types of geographical features it can reach, its definition raises uncertainty in two different ways.[85] First, within the definition of "significant nexus" the rule states "a hydrologic connection is not necessary to establish a significant nexus."[86] The natural consequence is that even though a private party may conduct due diligence based on observable geographic features and determine their land is not within the expanded WOTUS rule, the ACOE could later assert jurisdiction based on other factors and knowledge beyond the capacity of the private party.[87] Similarly, the definition of significant nexus provides for the combined

82. Clayton, *supra* note 9, at 92–94 (describing the traditional nature of government policies as one that encourages the prioritization of compliance based on risk). The new rule precludes such a risk calculus by expanding the area subject to compliance requirements well beyond the capacity of private parties without a full-fledged grandfather clause. *See infra* note 84 (grandfathering in the "new WOTUS rule").

83. *See* Freeman & Dougherty, *supra* note 63, at 46–47 (describing the new "Case Specific Waters" provision as working in place of the prior "other waters" provision). *See* Clean Water Rule, 80 Fed. Reg. at 37,104 (detailing that "all waters . . . where they are determined, on a case-specific basis, to have a significant nexus" as an additional category of waters are subject to the CWA).

84. *Cf.* Clean Water Rule, 80 Fed. Reg. at 37,108–16 (the "case specific waters" provision and the definition of significant nexus on which it relies); Rapanos v. United States, 547 U.S. 715 767, 780–82 (2006) (articulating the key warrants of Justice Kennedy's opinion that were adopted by the EPA and ACOE).

85. Clean Water Rule, 80 Fed. Reg. at 37,108–09 (listing geographic features included under the case specific waters provision as Prairie potholes, Carolina bays and Delmarva Bays, pocosins, western vernal pools, Texas coastal prairie wetlands). The "case specific waters" provision also contains language similar to the "adjacent" provision where distance parameters and 100-year floodplains act as an additional basis for areas within said parameters to possibly come within CWA jurisdiction pending a case specific analysis. *Id.*

86. Clean Water Rule, 80 Fed. Reg. at 37,093.

87. Sackett v. EPA, 132 S. Ct. 1367, 1374 (2012). The plaintiffs were landowners who faced an un-appealable order that they needed to comply with CWA requirements or face a fine of $75,000 per day due to backfilling their property when they did not know their land could be subject to CWA jurisdiction until after the fact. *Id.* at 1370–71.

analysis of all like-situated waters in a single watershed.[88] The problem with this provision is a private party's land, containing like-situated waters, could fall within a watershed subject to a case-specific analysis and CWA jurisdiction could be found without the private party ever participating in said case-specific analysis.[89] The result is a significant likelihood that compliance-minded private parties could face penalties under the CWA despite their intent to the contrary.[90] To avoid such outcomes, private parties will incur additional compliance costs by researching the full hydrological nature of their land, either to determine if the CWA applies or to adopt the default position that when in question CWA jurisdiction always applies.[91]

While some may feel that each of these widening provisions is a rational means to ensure environmental protection (i.e. the EPA), such emotional sentiments do not overcome the lack of Congressional intent for the CWA to produce such a result.[92] "New WOTUS" abandons established precedent and Congressional intent in favor of an executive agency expanding its own jurisdiction through self-generated rules.[93] As it now stands, "new WOTUS" positions the ACOE and the EPA to have even greater authority than imagined when Congress enacted the CWA in 1972.[94] This Comment now shifts to the implications of this executive overreach on the energy sector before looking to potential avenues affected parties could pursue to restore congressionally intended limits to what is and is not a WOTUS.

88. Clean Water Rule, 80 Fed. Reg. at 37,108.

89. Freeman & Dougherty, *supra* note 63, at 47–48.

90. *See* Clean Water Rule, 80 Fed. Reg. at 37,105; Clayton, *supra* note 9, at 78–81. The wide reaching uncertainty in response to WOTUS combined with the ease at which the Federal Government can pursue criminal sanctions with minimal or no intent show the likelihood of this issue occurring under the new WOTUS.

91. *See* Letter from Michael Pence, Governor of Indiana, to Gina McCarthy, EPA Administrator, (Nov. 14, 2014) (on file with the Author) (detailing the concerns that the costs of newly implemented regulations combined with those associated with the uncertainty from the proposed WOTUS, would be detrimental to state economies).

92. Jessica Karmasek, *House Passes Resolution Nullifying "Waters of the U.S." Rule*, W. VA. RECORD (Jan. 14, 2016), http://wvrecord.com/stories/510657897-house-passes-resolution-nullifying-epa-waters-of-the-u-s-rule [https://perma.cc/86D6-PY5Y] (detailing how the House of Representatives has now passed a Senate resolution which would force the EPA and ACOE back to the drawing board on the grounds the WOTUS rule goes beyond Congress' intention in the CWA).

93. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013) (granting *Chevron* Deference to an agency's own interpretation that its' statute meant it had jurisdiction over more areas than previously claimed by the agency).

94. Karmasek, *supra* note 92.

II. LEGAL UNCERTAINTIES FOR THE OIL & GAS INDUSTRY RESULTING FROM THE EXPANDED "NEW WOTUS"

Proponents of the "new WOTUS" are quick to assert that natural resource companies will be minimally impacted. In fact, should a private party be adversely affected, they can take advantage of WOTUS's grandfathering clause and avoid the concern of additional CWA compliance. Nothing could be further from the truth. The willingness of the EPA to reverse permitting decisions *ex post facto* regardless of cost to industry and the narrowness of the grandfathering provision leave industry liability to the CWA wide open. Further, such provisions do little to address the exponential compliance costs that come from the hundreds of square miles now within CWA jurisdiction. Not to mention the uncertainty the new WOTUS now imposes on oil and gas leases. These realities will now be discussed in turn.

A. New Liabilities Are a Reality

Though the final rule issued by ACOE and EPA contains a grandfather clause, there are important distinctions made by the agencies' word choice that fuel two major causes for concern.[95] First, a close reading of "new WOTUS" demonstrates that there are no exemptions from the rule for those projects already undergoing a jurisdictional determination (JD).[96] This means that projects submitted for JD before the agencies gave notice of "new WOTUS," or those submitted during the comment period for "new WOTUS," will be subject to the final WOTUS rule.[97] The ACOE's and EPA's own actions reinforce this interpretation when they announced no new JD would occur until after the

95. Clean Water Rule, 80 Fed. Reg. at 37,054. The proposed version of WOTUS did not have a grandfather clause. *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 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) [hereinafter "Proposed WOTUS"].

96. Clean Water Rule, 80 Fed. Reg. at 37,073–74. A "jurisdictional determination" (JD) is the process where ACOE evaluates whether a proposed project affects "waters of the United States." If the project does affect waters of the United States, then the project must comply with applicable CWA regulation. *See* U.S. ENVVTL. PROT. AGENCY AND DEPT., CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* 2–12 (Dec. 2, 2008).

97. Clean Water Rule, 80 Fed. Reg. at 37,073–74; *see* Letter from Lee O. Fuller et al., to Gina McCarthy et al., Re: Docket Id. No. EPA-HQ-OW-2011-0880, Definition of "Waters of the United States" Under the Clean Water Act, Proposed Rule 32–33 (Nov. 14, 2014) (detailing concerns by the energy industry about the insufficiency of WOTUS grandfathering language).

publishing of "new WOTUS" in the Federal Register.[98] The grandfather provisions disregard the ongoing costs and time invested in these JDs pursued under a *Rapanos* understanding of WOTUS.[99] While "new WOTUS" proponents would be quick to say that such costs are natural consequences of a significant rule change and the agency is within its discretion not to issue new rulings while a new rule is pending, it does little to undo the harm of lost investments.[100]

Second, the EPA and ACOE final rule provides that they will not review any previously established JD or permitted projects "unless new information warrants revision of the determination."[101] The vagueness of this language is the clasp to opening the Pandora's box of CWA jurisdiction.[102] The willingness of the EPA to find "new information" and make *ex-post facto* regulatory decisions is illustrated in the EPA's own statements and actions.[103] In the WOTUS notice of proposed rule, the EPA, in speaking of expanded jurisdiction for CWA § 311 permits, states

> [S]ome potentially regulated facilities believe that they are not covered by the applicable SPCC regulations because they do not have the potential to discharge to a water of the U.S. . . . it is reasonable to assume that a broader assertion of CWA jurisdiction may affect some of those facilities.[104]

An example of such a retroactive permitting decision occurred in 2011, when the EPA revoked a CWA permit four years after granting it.[105] Troubled by the government's ability to essentially reverse an active permit without notice and upon

98. Clean Water Rule, 80 Fed. Reg. at 37,073–74.

99. Freeman & Dougherty, *supra* note 63, at 48.

100. *See* Proposed WOTUS, 79 Fed. Reg. at 22,202 (describing the costs that naturally occur from rule change as being necessary and within discretion); *See* JOHN MACDONALD, CALLING A HALT TO MINDLESS CHANGE: A PLEA FOR COMMONSENSE MANAGEMENT 208 (1998) (addressing the costs that arise from changing federal regulation midcourse of a private party's compliance efforts); U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE, at vii–x (2015).

101. Clean Water Rule, 80 Fed. Reg. at 37,073.

102. *See infra* notes 106–07 (detailing how a similar ambiguity enabled the EPA to withdraw a CWA permit after millions of dollars of investment had already occurred).

103. *See infra* notes 106–07.

104. Proposed WOTUS, 79 Fed. Reg. at 22,202 (the agency's economic analysis of what could result from the new rule).

105. Jonathan Harsch, *Court Case: Coal Mine Gets Permit. Can EPA Take It Back Again?*, CHRISTIAN SCI. MONITOR (Mar. 14, 2013), http://www.csmonitor.com/Environment/Energy-Voices/2013/0314/Court-case-Coal-mine-gets-permit.-Can-EPA-take-it-back-again [https://perma.cc/8BKP-B77N].

which the corporation relied, the affected company filed suit.[106] The case made its way to the D.C. Circuit, which found the EPA acted within the express Congressional authorization of CWA subsection 404.[107] Given the now bona fide ability of the EPA to revoke permits under CWA and the zeal of the EPA and AOCE to expand their jurisdiction, private parties face legitimate concerns about uncertainty as to whether or not their current operations could run afoul of expanded CWA jurisdiction.[108]

B. Implications of New Liabilities on Oil & Gas Leases

Energy companies face several contractual obligations, which would suffer interference from additional CWA regulations, courtesy of an expansive "new WOTUS." Of particular concern in this context are the implied covenant to prevent drainage, the implied covenant to develop and the implied covenant to market.

As established in *Clifton v. Koontz*, the implied covenant to prevent drainage obligates the lessee to drill offset wells in the event a lessee on an adjoining tract is discovered taking advantage of the rule of capture at the expense of a lessor.[109] The problem under "new WOTUS" is the increased uncertainty of whether the CWA may apply to a proposed offset well project

106. Bebe Raupe, *EPA's Right to Rescind W. Va. Coal Mine's Clean Water Permit Upheld by Federal Court*, BLOOMBERG BNA (Oct. 2, 2014), http://www.bna.com/epas-right-rescind-n17179895643/ [https://perma.cc/64WW-5HEB].

107. Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 612 (D.C. Cir. 2013). It is important to note that the "new WOTUS rule's" grandfathering provision mirrors the express language in CWA 404. *Cf. id.*; *supra* notes 96–98 and accompanying text. While making a revised permitting decision based on a express congressional language is clearly within an agency's purview, it is another to apply that language in such a way that makes the same *ex post facto* decision-making power apply to the whole statute (i.e., the JD that determine the reach of the entire CWA can now be revisited in the same way as section 404). *See supra* notes 96–98 and accompanying text.

108. Jeffrey Jakob, Comment, *Agency Games: Why the EPA and Army Corps of Engineers Exceed Their Jurisdiction under the Clean Water Act, and What Can Be Done about It*, 31 TEMP. J. SCI. TECH. & ENVTL. L. 285, 290 (2012) (detailing the trend of jurisdictional expansion by the EPA and ACOE); *see* Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, Guidance to Identify Waters Protected by the Clean Water Act, https://www.epa.gov/cwa-404/guidance-identify-waters-protected-clean-water-act [https://perma.cc/D7ED-3ATK] (expanding the EPA's interpretation of "waters of the United States" to include small streams that flow into larger ones, waters that have less than a physical connection to each other, and a waters covered under a wider range of circumstances).

109. Clifton v. Koontz, 325 S.W.2d 684, 693 (Tex. 1959); *see* Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 568 (Tex. 1981) (reiterating that the lessor must first prove substantial drainage of their tract and the profitability of drilling an offset well in order to compel the lessee to undertake offset well drilling and elaborating). *Amoco Production* also elaborates on the extent of the duty to protect against drainage. 622 S.W.2d at 568.

that affects a "water of the United States."[110] The time and costs necessary to undergo the JD process could warrant a lessee to always assume CWA jurisdiction and undertake the expenses associated with CWA plans and permits regardless of whether or not CWA actually applies.[111] The choice between these two courses of action matters not only from an economic perspective, but from the perspective of legal liabilities as well. In all facets of operation, a lessee is obliged to act as any reasonable and prudent operator (RPO) would in a similar factual circumstances.[112] Given the pressure from the dual concerns of both maintaining profitability and satisfying the legal obligation to protect the tract from drainage, lessees would likely file for a JD under the CWA in hopes the process resolves quickly and would then rely on their action to comply with regulation as a shield from disgruntled lessors who suffer drainage.[113]

However, forcing compliance with a policy objective (protecting the environment as per the CWA) through an uncertain, agency-created rule does not equate to a Congressional mandate to do so.[114] The reality for energy producers in a drainage siuation is that for every moment an offset well is not drilled, the ultimate recovery from the leased tract decreases.[115] This scenario is unlike mining or development projects that could be delayed by CWA permitting requirements. The value of those projects remains *in situ* pending regulatory approval.[116] For an oil and gas lessee, once drainage occurs, the

110. Iowa League of Cities v. EPA, 711 F.3d 844, 868 (8th Cir. 2013) (referencing entities waiting for review of potential CWA regulation via a JD as having to "either immediately alter their behavior or play an expensive game of Russian roulette").

111. *See* Letter from Lee O. Fuller et al. to Gina McCarthy et al., *supra* note 97, at 8–9 (alluding to the multiplication factor that comes from ensuring CWA compliance programs across multiple well sites).

112. Shell Oil Co. v. Stansbury, 410 S.W. 2d 187, 188 (Tex. 1967) (articulating that in a drainage situation a lessee is liable if they had not drilled an offset well and "a reasonably prudent operator would have drilled a well on the . . . land to protect it from drainage").

113. *Amoco Prod. Co.*, 622 S.W.2d at 570 (finding that it was the lessee's failure to apply for a Railroad Commission permit that breached the RPO standard).

114. Jakob, *supra* note 108, at 294 (discussing the legal shortcoming of agencies acting beyond their Congressional mandate and the burden that places on the credibility of the legal system); Paul Quinlan, *Oil Industry Threatens Obama Admin Over Clean Water Act Guidance for Wetlands*, N.Y. TIMES, (Apr. 15, 2011), http://www.nytimes.com/gwire/2011/04/15/15greenwire-oil-industry-threatens-obama-admin-over-clean-96759.html?pagewanted=all [https://perma.cc/28SM-48BL] (indicating that the EPA has moved on with its guidance policy despite Congressional failure to solve the problem).

115. *Amoco Prod. Co.*, 622 S.W.2d at 565.

116. Precedent highlights the difference in migratory and in place minerals and the value they present to mineral interest owners. *See* Stephens Cty. v. Mid-Kansas Oil & Gas Co., 254 S.W. 290, 293–94 (Tex. 1923) (comparing the absolute ownership of solid minerals and applying ownership rights over oil gas as reality), *cf.* Elliff v. Texon Drilling

minerals are gone and the rule of capture shields the draining party from any liability to the drained lessee and lessor.[117] This scenario presents a very real and unrecoverable loss imposed by the expansive "new WOTUS."[118] Even assuming the lessee is diligent in seeking any applicable permits, the fact remains that energy companies in a drainage scenario will face unrecoverable losses that are contrary to the legislative intent of the CWA.[119]

Similarly, lessees could face delay challenges and potential liabilities under the implied covenant to develop, which has a relaxed damages standard that increases risks for the lessee.[120] This covenant aims to protect the interests of the lessor by requiring the lessee, absent a specific development plan in the lease, to continue developing the leased tract so as to maximize profit for both the lessee and lessor.[121] The regulatory interference with this covenant is significant, because depending on the circumstance, the lessor can seek a severance of the portion of the tract that is not in production from the portion that is.[122] The lessor can then seek another lessee despite the investments and other consideration tendered by the current lessee.[123] The expansiveness of CWA jurisdiction under "new WOTUS" places the subsequent development of numerous,

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Co., 210 S.W.2d 558, 561–62 (Tex. 1948) (elaborating how the migratory nature of oil and gas has lead to the rule of capture where title to oil and gas is established once it has been produced from a well head on the tract which overlays the minerals).

117. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 13–16 (Tex. 2008) (detailing how the rule of capture protects lessees who drain from other tracts from liability to the lessees and lessors of those tracts).

118. *See supra* notes 116–17 (illustrating that delay causes loss to the lessee and lessor without recourse).

119. *See supra* notes 116–17; *see* Karen Fisher-Vanden and Shelia Olmstead, *Moving Pollution Trading from Air to Water: Potential, Problems, and Prognosis*, 27 J. ECON. PERSP., 147, 148–49 (2013) (describing the intention for CWA to provide for industry specific considerations and supporting alternative avenues for CWA compliance).

120. Tex. Pac. Coal & Oil Co. v. Barker, 6 S.W.2d 1031, 1034–35 (Tex. 1928) (detailing that although a "mathematical demonstration" is typically required for a plaintiff to prove damages, reasonable certainty is sufficient to prove damages for breach of the implied covenant to develop).

121. W.T. Waggoner Estate v. Sigler Oil Co., 19 S.W.2d 27, 28–30 (Tex. 1929) (detailing the legal framework for determining a breach of the implied covenant to develop and the appropriate remedies). Without this covenant the lessee could hold the lease via production from a small portion of the tract. *See* Sand Springs Home v. Clemens, 276 P.2d 262 (Okl. 1954) (illustrating the plaintiff's concern that absent enforcement of the implied covenant to develop there is no protection for the lessor from the lessee which may withhold development given market consideration at the cost of the lessor).

122. *Tex. Pac. Coal*, 6 S.W.2d at 1038 (explaining that such forfeiture is only applicable when it is determined there is no other adequate remedy for the lessee).

123. *Id.*

already leased tracts in jeopardy.[124] Even though these regulations do not directly undo any oil and gas leases, as recent history has shown in the Marcellus Shale, the uncertainty that new and vague regulations bring to oil and gas development plans are enough for investment decisions to be significantly curtailed or abandoned in their entirety.[125] The reality is that the marginal costs of compliance with CWA exceeded the marginal benefits over two decades ago and "new WOTUS" appears to be an end run on this economic reality.[126] Combine this effort with the more flexible regimes adopted in the various states under the shared power provisions of CWA and there is an even greater incentive for energy firms to avoid investment in areas of regulatory uncertainty.[127]

Another implied covenant that is brought into question by the possibility of retroactive regulation is the obligation to market.[128] With the potential for retroactive regulatory enforcement, there is the very real scenario that midstream infrastructure that interacts with geographic features governed by "new WOTUS" could face new or expanded regulations that would interfere with their operations.[129] If this were to occur, there are two scenarios that could evolve hindering a lessee's ability to market oil and gas at the best possible rate.[130] First, a purchaser of oil and gas could realize that certain purchasing hubs in a given field could not accept oil and gas due to a CWA

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124. *Farm Bureau: Maps Show Massive Increase in EPA Authority, Regulatory Uncertainty for Everyone Else*, AM. FARM BUREAU (Aug. 12 2015), http://fbnews.fb.org/Templates/Article.aspx?id=39799 [https://perma.cc/SEF6-QQ88] (revealing the extent of WOTUS jurisdiction in seven states); *cf. Maps: Exploration, Resources, Reserves, and Production, Summary Maps: Oil- and gas-related maps*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/maps/maps.htm [https://perma.cc/F9KA-EMWD] (last visited Feb. 11, 2017) (showing thousands of well sites that would be included under CWA jurisdiction per WOTUS).

125. Hannah Wiseman, *Evolving Regulation in the New Energy Boom States*, ADMIN. & REG. L. NEWS, Fall 2010, at 5 (elaborating how regulatory efforts in the Marcellus Shale are causing energy companies to avoid regulated jurisdictions altogether).

126. A. Myrick Freeman III, *Water Pollution Policy*, 169, 169–85 *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION, (Paul R. Portney & Robert N. Stavins, eds., 2d ed. 2000).

127. Vanden & Olmstead, *supra* note 119, at 152–60 (detailing pollution trading programs established by various states in conjunction with the EPA under CWA and the effect of those programs on industries).

128. Amoco Prod. Co. v. First Baptist Church of Pyote, 579 S.W.2d 280, 284–87 (Tex. 1979) (establishing definitively after review of applicable case law that the lessee has a duty to market in good faith and obtain the best possible price for the oil and gas).

129. Hunton & Williams, LLP, *How Will EPA's New Definition of "Waters of the U.S." Affect Oil & Gas Pipelines?* (May 29, 2015), http://www.pipelinelaw.com/2015/05/29/will-epas-new-definition-waters-u-s-affect-oil-gas-pipelines/ [https://perma.cc/PKG2-ZFES].

130. *Id.*

permitting delay or revocation.[131] In turn, the purchaser with infrastructure unencumbered by the CWA, could artificially deflate the local market price for oil and gas, knowing she is the only available hub in the field and the lessee is obligated to sell.[132] The ultimate effect results in a decrease in royalty paid to the lessor, which the lessor could claim as a breach of the covenant to market.[133] While such a claim would likely prove futile, the lessor's chance of success drastically improves should the lessee own the pipeline infrastructure in the same scenario described above.[134]

A second scenario could be that the lessee owns the relevant midstream infastructure and only the lessee's assets are in a position to move the gas to market. Then like the first scenario, a CWA revocation or new permitting requirement forestalls the operation of the midstream assets.[135] The lessor would argue that the lessee is liable for its failure to ensure the compliance of its own pipeline infrastructure and the lessor does not bear the burden of the lessee's marketing decision.[136] This could lead to a literal "Schrodinger's cat" scenario where either CWA compliance would invite litigation from unsatisfied lessors or marketing oil and gas contrary to an ACOE permitting descion could lead to administrative penalties and litigation costs from the federal government.[137]

In sum, a lessee's efforts to fulfill each of these implied covenants (drainage, develop and market) could likely run afoul of expanded CWA jurisdiction. The natural response by those on the other side of the argument is to retort that if harm from government regulation rises to such an adverse level, then the *force majeure* clause ought to excuse the lessee's obligations.

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131. *See* Hunton & Williams, LLP, *supra* note 129 (describing the nature of the local gas market and the effects regulation can have on said market, which together lend support to this likely scenario).

132. Tex. Oil and Gas Corp. v. Vela, 429 S.W.2d 866, 873 (Tex. 1968) (illustrating how market value is determined based on the prices at other points of sale in the field).

133. Exxon Corp. v. Middleton, 613 S.W.2d 240, 242 (Tex. 1981) (exemplifying how the market choices by the lessee can be subject to suit by the lessor for underpayment of royalties under the implied covenant to market).

134. Amoco Prod. Co. v. First Baptist Church of Pyote, 579 S.W.2d 280, 288–90 (Tex. 1979) (warranting how, if the lessee's choice to make sales decisions based on factors in its control when alternative methods that ensure the best price are available, then the lessee is liable for those choices).

135. *See* Hunton & Williams, LLP, *supra* note 129.

136. *See Amoco Prod.*, 579 S.W.2d at 281–85 (detailing a parallel claim where the lessor contested the lessee's decision to enter into long-term sales contracts).

137. Melody Kramer, *The Physics Behind Schrodinger's Cat Paradox*, NAT'L GEOGRAPHIC, (Aug. 14, 2013), http://news.nationalgeographic.com/news/2013/08/130812-physics-schrodinger-erwin-google-doodle-cat-paradox-science/ [https://perma.cc/HTT5-3E33].

However, as we will see in the next section, such clauses are inadequate to protect the investments of energy companies in this context.

C. Contractual Shortcomings in Avoiding Regulatory Uncertainty

The common response to private party opposition to new regulation is that regulated parties were on notice of the potential of regulation given the nature of their business and should have been better prepared.[138] However not every possible outcome can be planned for and this stance does little to assuage the loss of contractually entitled benefits. Further still, since most government regulations do not expressly target certain assets, the majority of regulatory disruptions do not amount to a government "taking" with the government obligated to compensate the adversely-affected party.[139] Rather, the law regards such costs as no more than "frustrations."[140] Consequently, energy companies exert their best efforts to anticipate potential regulatory scenarios that could arise and contract accordingly.[141] But, as illustrated below, even the plans with the best intentions and forethought can fall victim to the uncertainties generated by expansive regulation.

A prime example of how best legal practices can still fall short of anticipating *ex-post facto* regulatory obligations plays out in the exculpatory clauses in oil and gas leases. These clauses are commonly used in oil and gas joint operating agreements (JOAs) and dictate that the operator will not be liable to the other parties of the JOA for losses or liabilities incurred in the course of carrying out the JOA.[142] The caveat is that this liability shield is premised on the operator acting as an RPO and upholding all

138. *See* Copeland, *supra* note 66, at 3 (demonstrating how affected industries have been aware that their operations have been potentially subject to CWA for over 40 years).

139. Omnia Comm. Co. v. United States, 261 U.S. 502, 510–11 (1923); *see* ROBERT MELTZ, CONG. RESEARCH SERV., R42635, WHEN CONGRESSIONAL LEGISLATION INTERFERES WITH EXISTING CONTRACTS: LEGAL ISSUES 13–16 (2012). Omnia became the seminal case in establishing a high standard for what would be required for a government regulation to equate to a taking and has resulted in private parties pursuing different legal arguments to opposed regulations they find unfavorable. *Id.*

140. *Id.* at 14.

141. Clayton, *supra* note 9, at 86 (discussing the practical impacts of the CWA on the operations of energy companies).

142. Hamilton v. Tex. Oil & Gas Corp., 648 S.W.2d 316, 322 (Tex. App.—El Paso 1982, writ ref'd n.r.e.) (explaining how JOAs are consolidations of interests as opposed to employer-employee relationships between the non-operator and operator); Scott Lansdown, *B. Reeder v. Wood County Energy LLC and the Application by Texas Courts of the "Exculpatory Clause" in Operating Agreements Used in Oil and Gas Operations*, 8 TEX. J. OIL, GAS & ENRG. L. 195, 204–05 (2012).

relevant regulations.[143] In a CWA enforcement action initiated either by the EPA or a citizen group under the expansive "new WOTUS," the operator could be in breach for not upholding this regulatory requirement found within the exculpatory clause.[144] Not only would the operator face indemnity suits from other JOA members, but would also face pushback from other parties to the JOA when it comes to covering the operator's litigation costs.[145] Though retroactive damages are unlikely given the detailed and multi-part standard that must be met for CWA enforcement penalties, the associated legal costs would stifle all the parties of the JOA.[146] The fact that parties could very likely end up litigating against each other over the lease provision that is supposed to shield an operator from such internal liability ought to give pause to consider the practical efficacy of "new WOTUS."[147]

Another, similar oil and gas lease clause designed to avoid liability due to changing circumstances is a savings clause, which allows the lessee to keep the lease in effect should certain circumstances occur.[148] In the face of prohibitive regulations, the automatic inclination is to rely on the *force majeure* clause found in most oil and gas leases.[149] However, the lessee's reliance on this type of savings clause to preserve the lease is easier said than done. The necessary requirements for proving *force majeure* due to government regulation dictate that the lessee must prove that the regulatory barrier was unforeseeable, that they abided by all the applicable notice requirements to the other parties, that the lessee attempted to obtain a permit, and proof that the relevant government agency will not give the permit despite

143. Lansdown, *supra* note 142, at 205–07.

144. *See id.*

145. *Id.* at 218–21 (explaining how the oil and gas field industry practice is for the other parties of the JOA to assent to covering the operator's litigation fees from suits initiated by third parties, but such assent is not automatic).

146. Clayton, *supra* note 9, at 81–84 (describing the elements necessary for a CWA enforcement claim to obtain damages); *See also* Michael Goldman, *Drilling into Hydraulic Fracturing and Shale Gas Development: A Texas and Federal Environmental Perspective*, 19 TEX. WESLAYAN L. REV. 185, 250–56 (2012) (illustrating that excessive costs posed by uncertainty of new regulations serve as dissuasive forces for energy companies).

147. *See* Goldman, *supra* note 146, at 261 (detailing the cost that new regulations impose despite contractual efforts to avoid such costs).

148. *See* Anadarko Petrol. Corp. v. Thompson, 94 S.W.3d 550, 555–56 (Tex. 2002) (elaborating on how a savings clause interacts with other clauses in an oil and gas lease to preserve the lessee's ability to develop the lease in the event certain circumstances interfere with development).

149. Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied) ("When the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, effect, and scope of force majeure [in an oil and gas lease]").

these efforts.[150] While it is likely that a RPO will be able to prove the first four elements, it is unlikely that sufficient proof exists that the agency will not grant the permit. The ACOE (if it is a JD) or the EPA (if it is a permit decision) will likely require more studies and documentation in response to inqurries concerning new exploration and production areas and the applicability of CWA jurisdiction under "new WOTUS" as opposed to outright rejection.[151]

The result is an extension of the costs in both up-front research and time lost as the review process goes forward with the lessee unable to claim *force majure*.[152] The process of bumbling through unclear regulations increases the sunk costs of exploration and production that cannot be passed onto the lessor, which saddles the lessee with an ever-increasing burden.[153] This expense does not even consider the cost of delay rentals or the possibility of shut-in royalties in the event approval for permits for a rework scenario or permit reconsideration gets hung up as the ACOE works through a JD.[154] The likely inability to prove the fifth element for *force majeure* inhibits the lessee from availing itself of the protection it is meant to receive even though circumstances beyond the control of the lessee interfere with its performance of the lease.[155]

Understandably, the multiplicity of legal questions raised by "new WOTUS" and the inability for current contract provisions to adequately address these issues generates detrimental uncertainty.[156] Combine these facts with courts approving the expansion of CWA jurisdiction over industry operations previously considered beyond agency reach and ever-expanding

150. Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244, 1245–55 (5th Cir. 1990).

151. Clean Water Rule, 80 Fed. Reg. at 37,101 (detailing the review process for JD and permit decisions under WOTUS and the estimated cost of compliance before official determinations are granted); Clayton, *supra* note 9, at 70–72 (providing anecdotal examples of the lengthy permitting process and impact the CWA has on planning prior to even obtaining an official ruling from EPA or ACOE).

152. Clayton, *supra* note 9, at 70–75.

153. Heritage Res., Inc. v. Nationsbank, 939 S.W.2d 118, 121–23 (Tex. 1996) (detailing how the royalties owed by the lessee to the lessor are to be free of production costs).

154. *See* Corley v. Olympic Petrol. Corp., 403 S.W.2d 537, 540–52 (Tex. App.—Texarkana 1966) (articulating the obligations of the lessee to the lessor associated with delay rentals to maintain an oil and gas lease); *see also* Hydrocarbon Mgmt. v. Tracker Exploration, 861 S.W.2d 427, 432–35 (Tex. App.—Amarillo 1993, no pet.) (reviewing the elements a lessor must prove to warrant shut-in royalties from the lessee).

155. *Perlman*, 918 F.2d at 1245–55.

156. *In re* EPA, 803 F.3d 804, 808 (6th Cir. 2015). In referencing the stay it issued, the Sixth Circuit opined "A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *Id.*

state regulatory regimes in response to unconventional exploration, it is clear that affected parties should avail themselves of legal remedies to restore regulatory certainty under CWA.[157] The penultimate section of this Comment now shifts to address a viable legal path to avoid the litany of pitfalls the "new WOTUS" will otherwise cause if unchallenged.

III. A POTENTIAL REMEDY IN ADMINISTRATIVE LAW

In considering the potential avenues to restore regulatory certainty, the affected parties could look to administrative law.[158] To guide such a challenge plaintiffs would attempt to discern what standard the courts would apply to the "new WOTUS." The standards of review used by the courts to evaluate agency action stem from the Administrative Procedure Act (APA).[159] In this instance, affected parties would argue that the ACOE's and EPA's WOTUS rulemaking is not sufficient to meet the statutorily-provided standard of review.[160] Court precedent reveals that such a challenge would turn on what level of deference the court would grant to the agencies' actions.

In making this decision, the court should look to the type of action being taken by the agency, the source of law that is being interpreted and consider the classification of the interpretation at issue.[161] Once the court determined which level of deference

157. *See* Cecchini-Beaver, *supra* note 12, at 489, 492 (providing an example where work affecting drainage in a logging project was once excluded from regulation but is now read to be subject to said regulation); *see* Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 186–87 (2013) (elaborating on the approaches of different states to regulate fracturing and a possible common framework to effectively streamline such litigation).

158. *See infra* note 161 (providing the opinion of an energy company's challenge to EPA regulations on the basis of availability of record to make the challenge under the APA). Given that a similar record appears here, it makes this approach likely. *See supra* note 51.

159. *See* High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 638 (9th Cir. 2004).

160. Bradley Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 CHI. L. REV. 447, 476–77, 86 (2013) (explaining *Chevron* deference for agency action against the other possible standards applied by the court and the necessity of identifying the correct standard of review or level of deference in making litigation decisions); *see* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 78–83 (2011) (explaining Chevron deference for agency action along with other doctrines used by courts and presenting how the difference in standard affects affirmance rates).

161. Shell Oil Co. v. EPA, 950 F.2d 741, 746–47, 751–52 (D.C. Cir. 1991) (detailing the logical outgrowth test that serves to limit final rules issued by agencies from varying significantly from the rule that was initially distributed during notice and comment as outlined in the Administrative Procedure Act 5 U.S.C. § 553 (2006)).

applies, it would then compare the "new WOTUS" against the corresponding standard of review to determine if the court should defer to the agency or substitute its own judgment.[162] Consequently, energy companies aiming to overturn the current rule would argue for a less deferential standard of review to increase the likelihood they could overturn "new WOTUS."[163]

For a court, arriving at the applicable standard of review is easier said than done.[164] "New WOTUS" involved two executive agencies interpreting a statute, which they were each expressly charged with administering.[165] At first glance this would seem like a slam-dunk for *Chevron* Deference.[166] The agencies are interpreting their own statute and are conducting statutory interpretation in the course of fulfilling their statutorily-obligated duties.[167] However, the text of the CWA does not explicitly grant authority to the EPA and ACOE to define "waters of the United States."[168] Rather, "waters of the United States" is expressly defined by statute.[169] These facts present the question of whether "new WOTUS" can survive the initial portions of the *Chevron* test in hopes of beng granted the very agency friendly *Chevron* standard of review.[170]

The lack of an express Congressional authorization to engage in the process of rulemaking or adjudication to produce regulations on a matter for which deference is claimed by the agency makes the question of whether or not the agency should

162. Richard W. Murphy, *Judicial Deference, Agency Commitment and Force of Law*, 66 OHIO ST. L.J. 1013, 1014–15 (2005).

163. *See* Hubbard, *supra* note 160, at 447–48.

164. *See* Murphy, *supra* note 162, at 1017–21 (detailing the convoluted process of arriving at the correct standard of review for judicial evaluation of agency action).

165. Clean Water Act, 33 U.S.C. § 1344(a), (c).

166. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 865–66 (1984) (setting out the test for courts to apply in evaluating what level of deference should be given to federal agency action).

167. *Id.* (detailing that if an agency is interpreting a statute it is expressly charged with administering, then the court should defer to that agency's interpretation rather than substitute its own judgment as long as said interpretation is not arbitrary and capricious).

168. *See* Clean Water Act, 33 U.S.C. §§ 1322, 1344 (2012) (defining waters of the U.S. in an ambiguous manner). Despite this ambiguity sections contain no delegation of rulemaking authority as it pertains to defining what constitutes a "water of the United States." *Id.*; *see also supra* notes 67–69 (discussing the ambiguity inherent in the former rule and agency efforts at reforming the definition via the WOTUS rule).

169. Clean Water Act, 33 U.S.C. §§ 1322, 1344 (2012).

170. *Chevron*, 467 U.S. at 842–44. The Chevron test sets forth two questions that the court must answer prior to deferring to the agency action: 1. Does the statute clearly describe Congress's intent? And 2. Is the agency's interpretation permissible? If the statute does not clearly preclude the agency from interpreting the statute, then the courts will go to Step 2. If the interpretation is found to be permissible under an arbitrary and capricious standard, then the courts will defer to the agency. *Id.*

receive *Chevron* treatment less clear.[171] One thing that is clear from a close reading of the CWA is that Congress did delegate legislative power to the EPA to establish both regulatory programs and make rules with the force of law to enforce the CWA.[172] Consequently, "*Chevron* Step 0" would be met because the CWA enables the EPA to engage in both formal and informal rule making.[173] Next, the court would likely proceed to analyze the "new WOTUS" action by asking whether an ambiguity was present in the statute that warranted agency interpretation.[174]

At first glance, it appears Congress spoke plainly when it included "waters of the United States" in the CWA's definition of "navigable waters."[175] In turn, if the court were to find that this language in the CWA is unambiguous on its face, then no interpretation would be necessary by any agencies and "new WOTUS" would fail Step 1 of *Chevron*.[176] However, that definition went no further than to assert that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."[177] Absent further definition, it is evident how an interpretive issue could arise given the diversity of geographical features throughout the United States.[178] The aforementioned background cases repeatedly demonstrate this uncertainty and the legal shortcomings surrounding the ACOE and EPA's attempts to bring clarity to this very issue.[179] Consequently, what appears to be an unambiguous term is not as simple as its plain meaning.[180]

Justice Scalia, in *Rapanos*, highlighted that there is more than meets the eye in reading the WOTUS definition and acknowledged Congress' choice to stray from the traditional "navigable waters" when identifying bodies of water subject to

171. *See* U.S. v. Mead Corp., 533 U.S. 218, 229 (2001) (describing EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991) as giving "no *Chevron* deference to agency guidelines where congressional delegation did not include the power to 'promulgate rules or regulations'").

172. Clean Water Act, 33 U.S.C. §§ 1322,1344 (2012).

173. *See Mead*, 533 U.S. at 226–27 (describing that "Step 0" of *Chevron* poses the question of whether or not the court intended to delegate its authority).

174. *See Chevron*, 467 U.S. at 843.

175. Clean Water Act, 33 U.S.C. § 1362(7) (2012).

176. *See Chevron*, 467 U.S. at 842.

177. Clean Water Act, 33 U.S.C. § 1362(7) (2006).

178. For a greater rationale as to why ambiguity is key in a *Chevron* analysis *see* I.N.S. v. St. Cyr, 533 U.S. 289, 320–21 n.45 (2001) (detailing how the court "only defers, however, to agency interpretations of statutes that, applying the normal 'tools of statutory construction' are ambiguous").

179. *See supra* notes 27, 33, 43.

180. Rapanos v. United States, 547 U.S. 715, 730–31 (2006).

federal regulation.[181] In line with this analysis and prior precedent, the court would likely find "waters of the United States" as it stands in the CWA to be ambiguous.[182] However, whether the court grants *Chevron* deference to the ACOE and EPA's effort to address this ambiguity via "new WOTUS" is another matter.[183]

To the chagrin of practitioners and law students alike, the Court's application of its own *Chevron* test has been inconsistent and ever evolving.[184] Instead of a clear-cut yes or no as to the question of the agencies' interpretative action rising to the level of arbitrary and capricious as in Step 2 of *Chevron*, the courts would likely mirror more recent precedent.[185] The emerging trend seems to be based more on judicial preference for certain administrative outcomes over a transparent legal test, which is surprisingly contrary to the original intent of *Chevron*.[186]

As a result, the espoused objective standard of arbitrary and capricious under the second prong of the *Chevron* test is becoming a means for Justices to cherry-pick certain issues and emphasize them in such a manner as to make the given action appear too unreasonable to receive judicial deference.[187] Drawing from the Court's recent decision in *Michigan v. EPA*, it appears that affected parties could make an argument mirroring that of the plaintiffs and argue for overturning the agency action despite the apparent applicability of *Chevron* deference.[188] At issue in that case was the expansion of regulated air pollutants to include CO2 emissions, which would have caused tens of thousands of entities to comply with Clean Air Act permitting requirements.[189]

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181. *Id.* at 738–39 (Justice Scalia noting the significance of Congress' choice to incorporate waters of the United States into the definition of navigable waters rather than leaving the phrase navigable waters alone as had been done in previous federal legislation regulating waterways).

182. U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001); *Rapanos*, 547 U.S. at 720–21.

183. *See* Murphy, *supra* note 162, at 1050–56 (detailing the convoluted process of arriving at the correct standard of review in order for judicial evaluation of agency action).

184. *Id.*

185. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 866 (1984).

186. Micheal Herz, *Chevron is Dead, Long Live Chevron*, 115 COL. L. REV. 1867, 1877–82 (2015) (contrasting the confusion caused by various Court decisions and the seemingly inexplicable warrants relied on by Justices in applying or withholding *Chevron* deference).

187. *See supra* note 149 and accompanying text.

188. Michigan v. EPA, 135 S. Ct. 2699, 2705 (2015) (acknowledging explicitly the legal challenge at issue as being subject to *Chevron* deference).

189. *Id.* at 2704–05.

Not wanting to have such a wide and adverse impact, the EPA created exemptions for CO2 emitters up until a certain emissions threshold.[190] Despite these limitations on the new rule, the court found that "even under this deferential standard, however, 'agencies must operate within the bounds of reasonable interpretation'" and that it was unreasonable for the EPA not to consider cost in considering finalizing "new WOTUS."[191]

This failure to consider cost in the course of interpreting a statute, even though Congress did not expressly require the agency to evaluate cost in administering the statute, would be applicable to a challenge of "new WOTUS."[192] Much like those parties affected in *Michigan v. EPA*, those affected by "new WOTUS" will face untold regulatory costs in an effort to ensure compliance given the sheer scale of land newly subject to the CWA.[193] Also, the economic analysis portion of "new WOTUS" does not show a consideration of the large costs the rule will incur on large landowners or on those private parties whose property interests span large geographic areas, i.e. exploration & production companies or pipeline companies.[194] Consequently, even though *Chevron* would likely apply, it appears that affected private parties may prevail in persuading the court that "new WOTUS" is arbitrary and capricious for its failure to consider economic cost.[195]

IV. CONCLUSION

A thorough analysis of case law and background surrounding "new WOTUS" reveals a litany of shortcomings. Not only does the new rule go beyond congressional intent, but it does so at a detrimental expense to the energy sector. The uncertainty the rule imposes on implied duties in oil and gas leases, combined with the nature of typical contract provisions, demonstrates an inability for even the best legal practice to protect against liabilities generated by the new regulation. It is

190. *Id.*

191. *Id.* at 2707 (quoting Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2442 (2014) ("EPA strayed far beyond those bounds when it read [the statute] to mean that it could ignore cost when deciding whether to regulate"). The Court struck down the EPA interpretation. *Id.*

192. *Id.* at 2726 (Justice Kagan describing how the EPA did take costs into consideration even though it was not obligated to do so under the statute).

193. *See supra* notes 73, 79 (providing examples of the costs private parties already face and the anticipated costs in the wake of "new WOTUS").

194. *See supra* notes 12, 89 (detailing the burdensome costs under current CWA regulation and the uncertainty created by new CWA costs on the energy sector).

195. *See supra* note 152 (striking down an EPA interpretation as unreasonable under *Chevron* deference).

evident that "new WOTUS" greatly expands the regulatory burden on private parties without fully considering the adverse consequences. The administrative costs of compliance coupled with the economic uncertainty oil and gas lessees now face understandably gives cause for a legal challenge. Fortunately, such a challenge is viable in administrative law. Even though such a challenge would have to go through *Chevron* deference, recent precedent indicates a positive likelihood that such a challenge would prove successful. In sum, the definition of waters surrounding WOTUS can likely return to the certainty indicated in the plurality of *Rapanos*.

Cameron Secord