

# LEGAL MEMORANDUM

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## The “Waters of the United States” Rule and the Void-for-Vagueness Doctrine

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### Abstract

*Because the Clean Water Act imposes criminal sanctions for violation of its terms, agency rules interpreting those terms must be precise. The breadth and complexity of the EPA–Army Corps of Engineers Waters of the United States Rule exceed what the law can demand of a “person of ordinary intelligence,” but “waters of the United States” can be construed in a manner that is faithful to its Commerce Clause origins and readily applicable by the average person. That construction—a body of water that can be used by ark, raft, or boat to reach a traditional navigable water—allows the federal government to protect navigation and water quality without putting the average American at risk of violating the criminal law.*

### Introduction: The Presidential Directive to Reconsider the “Waters of the United States” Rule

During his first 100 days in office, President Donald Trump issued numerous executive orders to implement his campaign promise to improve the nation’s economy by eliminating needless administrative regulations.<sup>1</sup> One such order directed the Administrator of the Environmental Protection Agency (EPA) and the Assistant Secretary of the Army for Civil Works to reconsider a 2015 regulation promulgated by the EPA and the U.S. Army Corps of Engineers (USACE or the Corps) defining the reach of the Clean Water Act (CWA).<sup>2</sup> The 2015 regulation, commonly known as the Waters of the United States Rule (WOTUS), seeks to define the reach of the CWA, particularly with regard to “wetlands,” in a manner that ensures the nation’s waters will not be needlessly polluted, the nation’s wetlands will not be needlessly trampled, and the nation’s public will

### KEY POINTS

- The Waters of the United States Rule seeks to define the reach of the Clean Water Act, but Supreme Court case law demonstrates that there is no clearly unmistakable interpretation of “waters of the United States.”
- This gives agencies discretion in choosing how to construe a statute, as the Court held in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.
- The WOTUS Rule is not sufficiently clear to the average person to withstand challenge under the Void-for-Vagueness Doctrine, which implements the Due Process Clause requirement that a criminal law must fairly notify a person where the line is drawn between legal and illegal conduct.
- Failure by the EPA and Army Corps of Engineers to consider the effect of those concerns on interpretation of the CWA would render the agencies’ new reading of that statute “an abuse of discretion” or “otherwise not in accordance with law” under the Administrative Procedure Act.

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not be needlessly confused about what is and is not a water for CWA purposes.<sup>3</sup> The 2015 rule is not currently in effect, having been stayed by the U.S. Court of Appeals for the Sixth Circuit pending a decision on the merits of challenges to its validity.<sup>4</sup>

The EPA–USACE rule has proved to be quite controversial,<sup>5</sup> principally because it effectively treated as one of the “waters of the United States” virtually any body of water, however remote the connection to navigable waters.<sup>6</sup> Responding to concerns that the rule is overbroad, President Trump directed the EPA and USACE to reconsider its interpretation of that term.<sup>7</sup> He also specifically directed the agencies to consider whether they should construe that term in light of the interpretation adopted by Supreme Court Justice Antonin Scalia in a plurality opinion in the Court’s 2006 case of *Rapanos v. United States*,<sup>8</sup> the most recent effort by the Supreme Court of the United States to define the term “waters of the United States.” The EPA and USACE now have the task of reexamining their 2015 interpretation of the CWA. It is uncertain when they will complete their reexamination.

The EPA and USACE have considerable room to maneuver in their reexamination. As explained below, the Supreme Court’s case law demonstrates that there is no clearly correct, unmistakable interpretation of the phrase “waters of the United States.” The lower federal courts also have not been able to come up with one in the 11 years since the *Rapanos* decision.<sup>9</sup> In those circumstances, an agency has discretion in choosing how to construe a statute, as the Supreme Court held in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.<sup>10</sup>

*Chevron* announced a new approach to judicial review of an agency’s statutory interpretation. In reviewing the validity of an agency’s interpretation of the statute, the Court wrote, a court should not follow the traditional approach to the construction of a law set forth by the Court’s 1803 decision in *Marbury v. Madison*,<sup>11</sup> which had explained that the courts have the responsibility “to say what the law is.”<sup>12</sup> Instead, in *Chevron*, the Court established a two-step test for judicial review of an agency’s interpretation of a statute. The first step is to ask whether Congress has answered the particular question in dispute in the statute itself.<sup>13</sup> If so, that answer (absent some constitutional flaw) is dispositive.<sup>14</sup> But if the statute is ambiguous on the issue, the next step for a reviewing court is to ask whether the agency’s

interpretation is reasonable.<sup>15</sup> If it is, that ends the controversy. The court may not disagree with the agency as long as its interpretation is a plausible construction of the act. The reason, the Court wrote, is that when a statute is ambiguous, there is a presumption that Congress implicitly delegated to the agency the authority to fill in the blanks,<sup>16</sup> which is a policymaking function.<sup>17</sup> Unlike courts, agencies may make policy judgments, and if Congress has empowered an agency to do so, the courts may not overrule the agency’s decision.<sup>18</sup>

In this case, the CWA’s definition of the term “navigable waters” may not clearly answer the potential reach of that term.<sup>19</sup> Given the federal courts’ inability to adopt one interpretation of the CWA, the agencies are free to consider not only the competing judicial interpretations of those terms, but also the effect of any legal issues raised by the WOTUS Rule that have not yet been considered by the courts.

This *Legal Memorandum* addresses one of those new issues. To date, most of the debate has been about (1) whether the statute should be read to focus on the federal government’s interest in protecting the navigability of the nation’s waterways and, if so, to what extent or (2) whether it should be interpreted to make pollution-avoidance the central feature of the law.<sup>20</sup> It turns out, however, that there is an additional consideration at play, one that arises because the CWA is a criminal statute. The WOTUS Rule is not sufficiently clear to the average person to withstand challenge under the Void-for-Vagueness Doctrine, a doctrine that implements the Due Process Clause requirement that a criminal law must fairly notify a person where the line is drawn between legal and illegal conduct.<sup>21</sup> The EPA and USACE should consider the effect that those concerns have on the proper interpretation of the CWA. In fact, failure to do so would render the agencies’ new reading of that statute “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under the Administrative Procedure Act.<sup>22</sup>

## The Clean Water Act

The CWA is the principal federal statute designed to “restore and maintain the physical, biological, and chemical integrity of the nation’s waters.”<sup>23</sup> The CWA generally prohibits anyone from discharging a pollutant without a permit into “navigable waters,”<sup>24</sup> which it defines as “the waters of the United States.”<sup>25</sup> To accomplish its goals, the CWA created

two permitting programs to regulate the discharge of pollutants. The National Pollutant Discharge Elimination System (NPDES) program authorizes the EPA or an approved state agency to issue a pollution-discharge permit.<sup>26</sup> NPDES permits address point-source discharges (e.g., pipes) by defining permissible rates, concentrations, and quantities of specified pollutants, as well as other appropriate limitations and conditions.<sup>27</sup> The CWA also empowers the USACE, in conjunction with the EPA, to issue permits to discharge dredged or fill material into navigable waters.<sup>28</sup>

The term “waters of the United States” plays a critical role in the operation of the CWA. Waters that do not qualify are unregulated by the CWA, although they may be the subject of state-law pollution controls. By contrast, the finding that a body of water fits within that term not only triggers the CWA’s permitting requirements, but also exposes a party to substantial administrative and civil liability, as well as criminal prosecution, for the unpermitted discharge of a pollutant.<sup>29</sup> With respect to criminal prosecution, negligent violations of the CWA can be punished by a fine of up to \$25,000 *per day* of violation, by imprisonment for not more than one year, or by both, with doubled penalties available for a repeat offender.<sup>30</sup> Knowing violations of the act are punished more severely: The maximum fine is \$50,000 per day, and the maximum term of imprisonment is three years.<sup>31</sup> The Department of Justice has not been reluctant to bring criminal prosecutions for CWA violations.<sup>32</sup>

The goal of the CWA—to improve and preserve water quality of the nation’s navigable waters—is laudatory and uncontroversial. What has spurred considerable disagreement, however, is the extremely broad interpretation of that concept adopted by the federal government, an interpretation that greatly exceeds what the average person would read “waters of the United States” to mean.

When seeing the term “waters of the United States,” most people would imagine a stream, river, or lake, all of which are continuously wet and all of which can also be used for transportation, fishing, swimming, and so forth. The Mississippi River, the Great Lakes, the Gulf of Mexico, the Chesapeake Bay—those are just some of the examples that would come to mind if you queried someone about the proper meaning of “waters of the United States.” A problem arises, however, because the federal government

does not interpret that term the same way that most people would. Instead, to the government, an area can be a “water of the United States” even if it cannot possibly be used for transportation, etc., because it is too small and, even more surprising, despite the fact that it is not always wet (and in some instances rarely is). Learning that a patch of dry land is “water of the United States” simply because it can hold water at some point, however ephemerally, is jarring to most people, and properly so.

But there is more. Two factors in particular infuriate landowners. One is that federal administrative officials have concluded that the CWA applies to activities (e.g., building homes)<sup>33</sup> that are unlike the ones that gave rise to the CWA (e.g., dumping pollution into a stream)<sup>34</sup> and in places that the average person would find it impossible to believe are “waters of the United States” (e.g., areas miles away from water).<sup>35</sup> Most people find bizarre the notion that they must obtain a permit from the federal government to construct a home, perhaps the quintessential American dream activity, when the area to be developed is miles from what is ordinarily understood to be a body of water. To those people, the federal government’s interpretation of “water of the United States” is so far divorced from the common understanding of that term as to suggest that the EPA and USACE are pursuing their own separate, peculiar, elitist agenda.<sup>36</sup>

Perhaps if a permit cost merely \$20 and took only a month to procure, people would be irritated but grit their teeth and put up with just another example of government overreach. What is infuriating, however, is the cost and delay of obtaining a permit to build a home. To find out whether you can take advantage of a “general” permit costs, on average, nearly \$30,000, and takes more than 300 days. But that is chicken feed and warp speed compared to obtaining an “individual” permit. On average, individual permits cost more than \$271,000 and take 788 days.<sup>37</sup> Even Super Bowl tickets do not cost that much. To most people, the CWA permitting process is really just a cheap lawyer’s trick. It creates a scheme that offers you in theory what the average person cannot obtain in fact: an inexpensive, straightforward way to obtain a permit to build a home. No wonder the EPA and USACE have made enemies.

The *Rapanos* case cited in President Trump’s executive order was the third in a trilogy of Supreme Court decisions interpreting the phrase “the waters

of the United States.” The first case, *United States v. Riverside Bayview Homes, Inc.*,<sup>38</sup> involved the question whether a particular wetland adjacent to a navigable waterway fell within that phrase. Finding that the area was “characterized by saturated soil conditions and wetland vegetation” that “extended beyond the boundary” of the owner’s property to a navigable waterway,<sup>39</sup> recognizing that “the transition from water to solid ground is not necessarily or even typically an abrupt one,”<sup>40</sup> and noting that the USACE “must necessarily choose some point at which water ends and land begins,”<sup>41</sup> the Court upheld the Corps’ interpretation of the CWA to include wetlands that “actually abut[ted] on” traditional navigable waters.<sup>42</sup>

The next case was *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*.<sup>43</sup> There, the Court rejected the Corps’ interpretation of the CWA as including the so-called Migratory Bird Rule, which purported to extend jurisdiction to any entirely intrastate body of water that is or could be used by migratory birds as a habitat.<sup>44</sup> Congress did not intend the CWA to reach that far, the Court concluded.<sup>45</sup>

Whatever one thought of the correctness of the Court’s decisions in *Riverside Bayview Homes* and *SWANCC*, they at least had the benefit of a majority opinion that worked toward a definition of “the waters of the United States.” Unfortunately, the third case, *Rapanos v. United States*, did not. A plurality of the Court in an opinion by Justice Scalia would have limited that phrase to a relatively permanent standing or flowing body of water of the type that the average person would understand as a stream, river, lake, or ocean.<sup>46</sup> By contrast, Justice Anthony Kennedy would have treated as “the waters of the United States” any body of water that could “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”<sup>47</sup> The result was confusion. Not only did the five Justices in the majority adopt two very different tests for deciding whether a body of water qualified under the CWA, but Scalia’s plurality opinion and Kennedy’s concurring opinion approached that inquiry from entirely different perspectives. The plurality defined the phrase in terms of Congress’s concern with navigability; Kennedy, in terms of Congress’s concern with pollution. That fundamental disagreement over the perspective from which to approach the issue virtually guaranteed

that the Scalia and Kennedy tests would lead to disjointed sets of “waters of the United States.”

Left with the task of trying to apply largely irreconcilable jurisdictional standards, the federal circuit courts of appeals have not fared well when it comes to defining “the waters of the United States.” In fact, they are all over the lot as to how to define that term consistently with *Rapanos*. The First, Third, and Eighth Circuits have concluded that CWA jurisdiction exists if the government can satisfy either Justice Kennedy’s standard or the Scalia test.<sup>48</sup> The Seventh and Ninth Circuits have applied the Kennedy standard to the facts of particular cases but did not foreclose the possibility that in some cases the Scalia test might apply instead.<sup>49</sup> The Fifth and Sixth Circuits declined to choose between the Scalia and Kennedy tests because the waters at issue in those cases qualified under both standards.<sup>50</sup> Only the Eleventh Circuit has concluded that the Kennedy standard is the exclusive jurisdictional test under the CWA,<sup>51</sup> even though that test largely ignores the statutory term “navigable waters,” which a majority of the Supreme Court made clear in *SWANCC* must play some limiting role in the CWA.<sup>52</sup>

Yet it turns out that there is an additional problem with the term “waters of the United States,” a problem that arises because the CWA is a criminal statute: The EPA and USACE have not defined that term in a manner that is readily understandable by the average person. (In fact, experts would have difficulty applying that rule in a consistent manner.) The need to clearly identify conduct prohibited by the criminal law is a critical element of what we know as the “rule of law”—the proposition that ours is a government ruled by the law, not by the dictates of men<sup>53</sup>—a concern that is at its zenith when Congress attaches a criminal punishment to a legal rule. Several related doctrines—such as the due process requirement that the government must clearly identify illegal conduct in advance, the rule of statutory construction that unclear or ambiguous terms in a law should be interpreted in a defendant’s favor, and the principle that vague criminal statutes are deemed void precisely because they do not afford the average person that notice—all become critically important at that point. Those rules exist to give effect to the principle that the government cannot use the criminal justice system to regulate conduct that it has not clearly defined so that everyone has the opportunity to choose whether or not to obey its commands.<sup>54</sup>

The WOTUS Rule does not adequately identify the conduct that is a crime and therefore, in its proposed form, is subject to challenge under the Void-for-Vagueness Doctrine.

### The WOTUS Rule

In 2015, the EPA and USACE promulgated the WOTUS Rule to clarify the meaning of the CWA term “waters of the United States.”<sup>55</sup> The rule “reflects the agencies’ goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA”<sup>56</sup> and “define[s] ‘waters of the United States’ to include eight categories of jurisdictional waters.”<sup>57</sup> Three of those categories are deemed “waters of the United States” as a matter of law. The other five categories can qualify under the facts and circumstances of each case. The rule carries forward existing exclusions for certain categories of waters and adds some additional categorical exclusions.<sup>58</sup>

The government can enforce the CWA and WOTUS Rule through the administrative, civil, or criminal processes.<sup>59</sup> Were the government limited to the first two options, it could be argued that the CWA should be construed broadly in order to promote its goal of protecting the integrity of the nation’s waters, but the government’s ability to use the criminal law to enforce that rule raises several problems that would not arise in an administrative or civil proceeding. Those problems make it virtually impossible for the WOTUS Rule to be applied both in the manner that the EPA and USACE intended and consistently with the Due Process Clause.

**The Need for a Uniform Reading of a Statute.** The first issue involves the proper approach to the interpretation of the CWA and WOTUS Rule. As the Supreme Court has explained, courts must begin statutory interpretation with the text of a statute or regulation, and they must read its terms in a consistent manner regardless of the penalties Congress has authorized.<sup>60</sup> As a result, if a law imposes both civil and criminal sanctions for a violation, the statute must be read as if the only authorized penalties are criminal. Whatever interpretation is appropriate for a criminal prosecution must also be applied in a civil suit. As Justice Scalia put it, “the lowest common denominator, as it were, must govern.”<sup>61</sup>

**The Void-for-Vagueness Doctrine.** The next problem is the Void-for-Vagueness Doctrine.<sup>62</sup> That century-old doctrine<sup>63</sup> requires that the terms of a

statute or regulation enforceable through the criminal law must be readily understandable by the average person without legal advice.<sup>64</sup> A statute that is unduly vague, so indefinite that the average person can only guess at its meaning, cannot qualify as a criminal law.<sup>65</sup> The reason is that vague laws are like ones that are kept secret or ones that, like the laws of Caligula, are published in a location that makes them unreadable, neither of which is much better than having no law at all.<sup>66</sup> As the Supreme Court explained in *Lanzetta v. New Jersey*, “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”<sup>67</sup>

Critical in this regard is the “target audience” about which the Void-for-Vagueness Doctrine is concerned. The focus is not on lawyers, judges, or law professors. Nor, in the case of a technical subject matter, does the doctrine focus on physicians, biochemists, geologists, structural engineers, hydrologists, or any other category of people with special education, knowledge, training, and experience. Rather, the relevant audience is the average member of the public. That follows from the way that the Supreme Court has defined the notice requirement. Justice Oliver Wendell Holmes set forth the basic rule in *McBoyle v. United States*<sup>68</sup> when he wrote that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed,” and that “[t]o make the warning fair, so far as possible the line should be clear.”<sup>69</sup> As the Court previously had explained in a case applying the Void-for-Vagueness Doctrine, “a statute which either forbids or requires the doing of an act in terms so vague that *men of common intelligence* must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”<sup>70</sup> Put differently:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give *a person of ordinary intelligence* fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.<sup>71</sup>

In sum, “a law that cannot be understood might as well not exist.”<sup>72</sup>

How can a court implement that approach in 21st century America? Consider this: The U.S. Census Bureau publishes various reports about “Population Characteristics” based on its data collection efforts. A March 2016 report entitled *Educational Attainment in the United States: 2015* reveals the following. In 2015, nearly 90 percent of adults had at least a high school diploma or a graduate equivalency degree (GED), and roughly 59 percent had completed at least some amount of college.<sup>73</sup> Only 42 percent, however, received an associate’s degree or higher, only 33 percent received a bachelor’s degree or higher, and only 12 percent received an advanced degree of some type.<sup>74</sup> It is important to keep those facts in mind when determining what can be demanded of “a person of ordinary intelligence.”

### **The Problems Created by the WOTUS Rule**

Consider now the interpretive problems that the WOTUS Rule creates for such a person.

Start with the fact that the WOTUS Rule is, quite literally, a *rule*, not a *statute*. That is significant. In 1911, in *United States v. Grimaud*, the Supreme Court ruled that it does not violate the so-called Delegation Doctrine for Congress to authorize an agency to promulgate regulations whose violation can be punished under the criminal law.<sup>75</sup> But that does not end the inquiry. The question whether Congress may enlist an agency to fill out a statute is materially different from the question whether the agency’s rules are readily understandable by the average person. The Supreme Court has never addressed the question whether “a person of average intelligence” can be tasked with the burden of knowing the contents of the Code of Federal Regulations (CFR) or the *Federal Register*. The WOTUS Rule would force the Court to face that issue.

It might seem odd to think that this issue remains an open one. After all, the *Grimaud* case predated the Administrative Procedure Act (APA) of 1946,<sup>76</sup> which now requires that legislative rules be published in the *Federal Register*. In addition, given the criticisms made during the pre-APA period about the difficulty of finding federal regulations,<sup>77</sup> it is unlikely that the Supreme Court failed to realize in *Grimaud* just how onerous it might be to find the pertinent rules. Perhaps that is true; perhaps not. What *is* true is that

*Grimaud* involved only the question whether Congress could delegate lawmaking power to a federal agency. The Court did not conclude that a person can be deemed to have knowledge of whatever rule an agency promulgates under its delegated authority. The two issues, moreover, are quite distinct. The former concerns the permissible allocation of governmental authority under Articles I, II, and III; the latter, the need to afford individuals notice of what the criminal law forbids under the Fifth Amendment’s Due Process Clause. The two different provisions address two very different concerns.

There is a powerful argument that regulations generally—not just technical or scientific ones—do not supply adequate notice of what the criminal law forbids. In the first place, it is unreasonable to expect that people read, are familiar with, or know how to find the Code of Federal Regulations. As Justice Lewis Powell once noted, it “is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation...would have knowledge of its promulgation or familiarity with or access to the Federal Register.”<sup>78</sup> People are generally aware of what the criminal law prohibits because everyone knows that the moral code forbids each of us to murder, rape, rob, or swindle another. Anglo-American criminal law grew out of pre-Norman customs<sup>79</sup> and hewed to those traditions until the Industrial Revolution in the 19th century.<sup>80</sup> No society, including this one, however, catalogues its customs and mores in a Code of Federal Regulations, nor is there a long-standing American tradition of referring to any such document to learn those norms.

Why, then, is it reasonable to expect that people should be required, on pain of a criminal sanction if they fail, to know what rules are found in the CFR? Yes, we indulge the fiction that people know what is in the criminal code,<sup>81</sup> principally because the code by and large (certainly at the state level) generally reflects the Decalogue, which we can reasonably expect everyone to know, and also because there is little else that we can do.<sup>82</sup> Justice Scalia accepted the necessity of the legal fiction that the public knows what is in the criminal code, but he blanched at the prospect of demanding that we know what is in congressional committee reports.<sup>83</sup> The same principle would apply to other materials like the CFR. To paraphrase what he wrote on this matter, “necessary fiction descends to needless farce” when the criminal law demands that people know the content of the CFR.

The problem is only worsened when a person of “common intelligence” is required to be conversant with a scientific or technical subject. Yet that is what happens here. In drafting the WOTUS Rule, the EPA and USACE relied principally on Justice Kennedy’s concurring opinion in the *Rapanos* case to devise a standard for defining a “water of the United States.” Justice Kennedy concluded that the term embraced any body of water that could “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”<sup>84</sup> That test focuses on the potential environmental effect of one water body on another, regardless of whether the former can be used for navigation. By contrast, the test that Justice Scalia put forward came at the matter from the direction of navigability, limiting a “water of the United States” to a body that would be readily understood as a river, lake, stream, or ocean.

The problem with Justice Kennedy’s test, however, is that it cannot readily be applied by someone of “common intelligence” to determine whether a particular body of water is covered by the CWA. The average person does not have the same knowledge as a scientist or technician, and it is unreasonable to rest the criminal law on propositions that are more science fiction than legal fiction. As one federal judge has noted, “This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.”<sup>85</sup>

Put yourself in the shoes of an average person trying to know whether a particular body of water satisfies Justice Kennedy’s “significant nexus” test. According to the WOTUS Rule, a “significant nexus” exists whenever a body of water, including a wetland, “either alone or in combination with other *similarly situated waters in the region*, significantly affects the *chemical, physical, or biological integrity* of a” traditional navigable water. Put aside the fact that the Rule requires that there be a “significant” effect for there to be a “significant” nexus; the rule demands that any body of water must be considered “in combination with” every other “similarly situated” (whatever that undefined term means) body of water “in the region.” No one armed with only “common intelligence” can know with certainty whether the creek in front of him is a “water of the United States.” Someone would need to investigate every other body of water in a watershed to learn whether any one

particular body of water qualifies. In deciding how far the relevant “region” extends, that person would need to realize that the agencies used that term in a “functional,” not simply “geographic,” sense—whatever “functional” means.<sup>86</sup>

Now turn to the text of the rule. The WOTUS Rule defines some waters as “waters of the United States” *as a matter of law*. Those waters are (1) all waters that “are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce”; (2) all interstate waters, including interstate wetlands; (3) the territorial seas; (4) all “impoundments of waters” (i.e., waters created by dams that otherwise constitute “waters of the United States”); (5) all tributaries of “waters of the United States”; and (6) all waters “adjacent to” any of the above waters. Other waters can constitute the “waters of the United States” if they are one of five specified bodies of water—“oxbows,” “prairie potholes,” “Carolina bays,” “Delmarva bays,” “western vernal pools,” and “Texas coastal prairie wetlands”—and “they are determined, on a case-specific basis, to have a significant nexus to” one of the waters classified as a “water of the United States” as a matter of law.

The WOTUS Rule is a mouthful. The base term in the CWA is “navigable waters,” which is defined to mean “the waters of the United States.” Those terms are, respectively, two and six words long. The original definition of “the waters of the United States” in the Code of Federal Regulations was longer, but it took only 52 words to do the job. That still is quite manageable. By contrast, the WOTUS Rule is more than 2,300 words long, or roughly the length of a Sunday *New York Times* op-ed. How often do we see a criminal statute written in the form of a short story?

Consider these comparisons. The Decalogue is 325 words long.<sup>87</sup> The Gettysburg Address is 264 words long; the Bill of Rights, 545 words; Abraham Lincoln’s Second Inaugural Address, 700 words; the Emancipation Proclamation, 1,000 words; and President John Kennedy’s Inaugural Address, 1,370 words. How many people of “common intelligence” can recite any of those documents? It took President Franklin Roosevelt only 535 words to persuade Congress to declare war on Japan in 1941, but the EPA and USACE needed more than four times as many words to define statutory terms that were just two and six words long. The length of the WOTUS Rule does not inspire confidence that “common intelligence” alone will get us through.

Now read what the WOTUS Rule asks a person to know. Some of those waters—“oxbows,” “prairie potholes,” “Carolina bays,” “Delmarva bays,” “western vernal pools,” and “Texas coastal prairie wetlands”—are scarcely household words. To some people, the term “oxbow” refers to a U-shaped bend in a river; to others, it denotes vigilantism.<sup>88</sup> Perhaps people in the Southwest know a “prairie pothole” when they see one,<sup>89</sup> but people in northern areas (especially in the spring) have an entirely different understanding of a “pothole,” whether one of the “prairie” or one of the “Gotham” varieties. Of course, those terms do not have the type of settled legal meaning that can limit a potentially vague term; if they did, the agencies would not have had to define them.

But the unfamiliarity of those terms to “ordinary folk” is not their worst feature. Under the terms of the WOTUS Rule, those terms constitute a “water of the United States” only “where they are determined, *on a case-specific basis*, to have a significant nexus to” a traditional navigable water, an interstate water, or the territorial sea. The italicized phrase requires a retrospective case-by-case determination whether a specific pond is a covered water. Consider for a second the implication of that requirement. It means that the average person may not know whether a particular body of water is a “water of the United States” until *after* being charged with a crime, because there may be no prior finding to that effect. As a result, that phrase is begging to be held unconstitutional under the Due Process Clause, which requires clarity in criminal laws, and also under the Ex Post Facto Clause, which prohibits retroactive criminal lawmaking. Why? Because the text of the rule admits that *some “waters of the United States” cannot be identified in advance*. But there is no need to rely simply on the implication of those terms, because the text of the rule makes that point expressly. The rule recites that it applies to “[a]ll waters which are currently used, *were used in the past*, or *may be susceptible to use* in interstate or foreign commerce.” The rule therefore requires an average person to be not just a hydrologist, but a historian and soothsayer to boot.

The rule treats “interstate wetlands” as “waters of the United States” in every instance. The parent term “wetland,” however, was not introduced into the lexicon by *McGuffey’s Readers*. The 1978 version of the EPA–Corps’ rule defined that term as “areas that are inundated or saturated by surface or

groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”<sup>90</sup> This seems straightforward—until you consider the subject more closely. It turns out that there are about two dozen types of “wetlands” depending on the part of the country at issue. As one scholar has noted:

Some common wetland types in North America include salt marsh, freshwater marsh, tidal marsh, alkali marsh, fen, wet meadow, wet prairie, alkali meadow, shrub swamp, muskeg, wet tundra, pocosin, mire, pothole, playa, salina, salt flat, tidal flat, vernal pool, bottomland hardwood swamp, river bottom, lowland, mangrove forest, and floodplain swamp.<sup>91</sup>

How many of those terms are familiar to the average American with only a high school diploma or a GED?

Even if you limit that term to its “common conception” of swamps, marshes, bogs, and similar areas,<sup>92</sup> you are still left with the problem of identifying what land is and is not a “wetland.”<sup>93</sup> That is no mean feat because of a host of factors, such as the following:

“Although water is present for at least part of the time, the depth and duration of flooding varies considerably from wetland to wetland and from year to year.”

“Wetlands are often located at the margins between deep water and terrestrial uplands, and are influenced by both systems.”

“Wetland species (plants, animals, and microbes) range from those that have adapted to live in either wet or dry conditions (facultative), which makes difficult their use as wetland indicators, to those that adapted to only a wet environment (obligate).”

“Wetlands vary widely in size, ranging from small prairie potholes of a few hectares in size to large expanses of wetlands several hundred kilometers in area.”

“Wetland location can vary greatly, from inland to coastal wetlands and from rural to urban regions.”



“Wetland condition, or the degree to which a wetland has been modified by humans, varies greatly from region to region and from wetland to wetland.”<sup>94</sup>

Consider what a law professor had to say about the usability of the above definition: “You could not take this definition out to the field and use it with any confidence to identify the dividing line between a wetland and an adjacent upland.”<sup>95</sup> And if that were not difficult enough, add the fact that different USACE offices can make very different determinations as to whether a parcel of land is a wetland and, if so, what its boundaries are:

The Corps is a decentralized agency, and individual districts (and individual regulators) may apply the “significant nexus” test broadly or narrowly. It depends on the amount of resources the agencies have, which in turn will influence how much data the agencies can collect. It depends on how aggressively the regulated community challenges assertions of jurisdiction. It also depends on whether the environmental community challenges decisions not to assert jurisdiction.<sup>96</sup>

As two scholars have explained:

A wetland definition that will prove satisfactory to all users has not yet been developed because the definition of wetlands depends on the objectives and the field of the user. Different definitions can be formulated by the geologist, soil scientist, hydrologist, biologist, ecologist, sociologist, economist, political scientist, public health scientist, and lawyer. This variance is a natural result of the differences in emphasis in the definer’s training and of the different ways in which individual disciplines deal with wetlands.<sup>97</sup>

What is more, when promulgating the WOTUS Rule, the EPA and USACE acknowledged that “science does not provide bright line boundaries with respect to where ‘water ends’ for purposes of the CWA.”<sup>98</sup> Use of a term in a criminal law that cannot reasonably be applied in an even-handed manner by a person of ordinary intelligence leaves that person at sea as to how the term will be applied and encourages the type of problematic disuniformity that violates the equal protection considerations incorporated into the Due Process Clause.<sup>99</sup>

Turn now to a critical phrase in the WOTUS Rule: “a significant nexus” to a “water of the United States.” That term does not have a settled common-law or contemporary meaning. If the terms in the definition in the rule were given their average, everyday meaning, the rule could treat as a “water of the United States” the rainwater collecting in the gutters of every home in America because that water, considered across the nation, certainly has a “significant nexus” with water found in a river or lake. If the phrase “waters of the United States” were read in some other manner, no one would know what it means, which guarantees that it fails the Void-for-Vagueness Doctrine. Yet it is impossible to believe that Congress empowered the EPA and USACE to tell homeowners how and how often to clean out their rain gutters because the water collecting in them has a hydrological tie to water that ends up in a river or lake.

The response from environmental groups to the above argument would go as follows: The relevant inquiry for purposes of the Void-for-Vagueness Doctrine is not whether it may be difficult to know what the law demands in a particular case, but rather whether the elements that the government must prove are themselves so opaque that no reasonable person would know what they mean. As Justice Scalia once explained, “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.”<sup>100</sup> Yes, knowing whether a particular body of water is a “water of the United States” might be difficult in some instances, but the question is whether there is sufficient evidence available to make that decision, not whether what is being asked of someone is to answer an unknowable issue. In any event, the argument goes, that term should be read broadly to ensure that the nation’s waterways are neither obstructed nor polluted.

While facially reasonable, that response is ultimately unpersuasive. Start from the back end. One problem with that response stems from the Rule of Lenity. One of the oldest canons of statutory interpretation,<sup>101</sup> the Rule of Lenity requires that ambiguous terms in criminal laws or regulations must be construed in favor of a defendant.<sup>102</sup> That is, when the government’s and a defendant’s interpretations of a criminal law are equally persuasive, the tie goes to the defendant.<sup>103</sup> The courts therefore cannot

read a criminal law broadly in order to ensure that no polluter can escape its terms. Moreover, the ex post facto problems raised by the second half of the WOTUS Rule—the five identified bodies of water that come under the CWA based on the facts and circumstances of each case—still remain. Those concerns are different from the ones underlying the Void-for-Vagueness Doctrine. In addition, the difficulty that even experts would have in uniformly applying the WOTUS Rule negates any likelihood that people of common intelligence can confidently apply that standard.

At the end of the day, the central problem raised by the WOTUS Rule is the average person's inability to know with confidence what is and is not a "water of the United States." There is a limit as to how far the government can push the boundaries of simple English in order to use the criminal law as an enforcement tool in a regulatory scheme. Society uses the criminal law to enforce the proscriptions that everyone knows by heart—"Do not murder, rape, rob, burgle, or swindle your fellow men and women"—not to punish individuals who cannot solve one of Hilbert's Problems.<sup>104</sup> To draft *Wetlands: Characteristics and Boundaries*, the National Research Council of the National Academy of Sciences brought together 17 experts, all of whom held master's degrees, law degrees, or PhDs (12),<sup>105</sup> advanced degrees that only 12 percent of adults possess. As argued elsewhere:

Administrative regimes do not necessarily correspond to ethical codes. Regulatory laws deal with the actual or potentially injurious sequelae of industrialization regardless of whether the risks are ones that the average person would know from his or her common experience. In fact, it may well be that only experienced subject matter experts know the most serious risks. Congress establishes administrative programs because it has identified an important social or economic subject in need of regular supervision (for example, pharmaceuticals). To monitor that conduct, Congress creates an administrative agency (for example, the Food and Drug Administration), authorizes the agency to hire expert staff (for example, biochemists), directs it to monitor and govern that field and its participants (for example, manufacturers), and empowers the agency to deal with old or new problems through moral suasion, legal rules, or

enforcement actions (for example, press releases, regulations, seizure of adulterated drugs). But the highly scientific or technical nature of the subjects involved, as well as the evidence that must be considered in deciding whether regulation is necessary and appropriate, demands a level of education and training far above what the ordinary person possesses. It is reasonable to expect that the average person knows not to murder, rape, rob, or swindle someone else. It is unreasonable to assume that that average person has the same legal knowledge as an attorney, let alone that he has as much scientific expertise as an agency official with a doctorate in biochemistry.

That knowledge differential becomes particularly acute when lawmakers seek to deal with scientific or technical issues through the criminal law. Congress may use expansive language in a regulatory statute in order to delegate broad implementing authority to an agency so that it has the flexibility to respond to ongoing advances in medical knowledge. To ensure that the regulated community knows exactly what is forbidden and demanded, the agency in turn frequently uses technical or scientific terminology in its implementing regulations. It may take a team of lawyers and scientists to understand exactly what those regulations mean and precisely how to comply with them. That burden may not be onerous for a Fortune 100 company that has ample resources to retain attorneys and technicians for advice-giving purposes, but the difficulty of finding and understanding the relevant regulations can unfairly tax a small firm or the average person. In many cases it may be too much to expect that a reasonable person would be able to comprehend exactly what is and is not a crime.<sup>106</sup>

Can anyone reasonably believe that the government can make it a crime to flunk an exam in botany, ecology, hydrology, or organic chemistry?

### **Possible Remedies for the WOTUS Rule's Shortcomings**

The Ex Post Facto Clause prohibits retroactive application of a new criminal law, so the second half of the WOTUS Rule could not be applied in any instance in which there has been no clear

determination that a particular body of water qualifies under the CWA as a “water of the United States.” By contrast, the Due Process Clause’s Void-for-Vagueness Doctrine would prohibit the second half of the WOTUS Rule from being applied in any case, retrospectively or prospectively, because it deems void any criminal law that an average person cannot understand. Ordinarily, therefore, because a statute or regulation must be read the same way in either a criminal or a civil case, the second half of the WOTUS Rule would be unenforceable in either type of action. But it might be possible to salvage that portion of the WOTUS Rule by interpreting it in a manner that the average person could readily understand.

That is the approach that the Supreme Court took in *Skilling v. United States*.<sup>107</sup> *Skilling* involved a prosecution under the federal mail fraud act, a statute that made it a crime to engage in “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>108</sup> The lower federal courts had transformed that statute into a general anticorruption act by making it a crime to engage in chicanery that had the effect of depriving the public of the “honest services” of a government official. The Supreme Court rejected that “honest services” theory in *McNally v. United States*,<sup>109</sup> but Congress amended the act to define the term “scheme or artifice to defraud to include a scheme or artifice to deprive another of the intangible right of honest services.”<sup>110</sup> The meaning of that term bedeviled the lower federal courts, and the Supreme Court in *Skilling v. United States*<sup>111</sup> took on the burden of defining it. Justice Scalia, joined by Justices Clarence Thomas and Anthony Kennedy, concluded that the term could not be reasonably defined and was unconstitutionally vague,<sup>112</sup> but the majority went down another route. The majority concluded that the statute could and should be construed in a manner that rendered it constitutional by limiting it to the “solid core” of pre-*McNally* case law, all of which involved bribery or kickbacks.<sup>113</sup> As the majority explained, “there is no doubt that Congress intended [the mail fraud act] to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.”<sup>114</sup> To sidestep vagueness problems, the majority held that the statute “criminalizes *only* the bribe-and-kickback core

of the pre-*McNally* case law”<sup>115</sup> and read the phrase “the intangible right of honest services” to mean only bribery and kickbacks even though neither of those terms appears in the statute.

Could the Supreme Court follow a similar path here? Is there a way to read the WOTUS Rule that avoids the ex post facto, vagueness, and equal protection problems noted above? It seems that there is: The Court could read the rule to contain a Canoe, Raft, or Ark requirement in order for a body of water to constitute a “water of the United States.” There also may be other constructions of the rule that avoid the constitutional problems discussed in this paper, but the Canoe, Raft, or Ark Rule should go a long way toward resolving the vagueness problem.

### **The Framers’ Understanding of the Term “Commerce”**

Much of the debate over the term “waters of the United States” parallels the debate over the proper interpretation of the Commerce Clause of Article I of the Constitution.<sup>116</sup> That debate has been ongoing for nearly two hundred years.<sup>117</sup> Today, however, there is a renewed interest in it.<sup>118</sup>

What we know for certain is that the Framers were familiar with commerce, both international and domestic.<sup>119</sup> Throughout the colonial period, England had a comparative advantage in manufactured goods and used the mercantile system to the mother country’s advantage.<sup>120</sup> By contrast, the colonies had a comparable advantage in certain foodstuffs (e.g., rice); raw materials (e.g., indigo); and, most important, lumber (e.g., pine trees). Some of the surplus food production went to cities, such as Philadelphia and New York City,<sup>121</sup> and some made its way to Caribbean markets.<sup>122</sup> “Flour did for the colonial and early American economy what oil does today for many Middle Eastern countries.”<sup>123</sup>

Nor was food the only profitable export. By the 17th century, England began to experience a shortage of wood for ships and home heating. To make up for the shortfall, England exploited the colonial forests, particularly ones with tall pine trees, which made excellent masts.<sup>124</sup> New England cities even developed a shipbuilding industry to compete with the one found in England.<sup>125</sup>

To reach an entrepôt or destination, food and timber generally had to be transported by river. Land transport was very costly, especially before invention of the Conestoga wagon, so only rural locations

near navigable waterways could market raw materials and foodstuffs.<sup>126</sup> In Pennsylvania, for example, “the only way farmers, millers, miners and lumbermen could move their products to market was to use the creeks and rivers.”<sup>127</sup> The colonists were familiar with the process of waterborne transportation, however, having learned it from the Swedes, Germans, and French, who developed the technique of moving heavy loads downstream, a practice that the early settlers brought with them to the New World.<sup>128</sup> Rafts, arks, and Durham boats were commonly used for transport; even dugout canoes could be brought into service if need be.<sup>129</sup>

Not every location, however, made river transport relatively easy. The rivers in the New England colonies were shallow and filled with rapids, but the waterways in the mid-Atlantic and Southern colonies were navigable upstream for 100 miles or more.<sup>130</sup> Some English and Scottish merchants travelled upstream to riverside plantations to purchase rice or tobacco and to leave behind manufactured goods ordered by the owner.<sup>131</sup>

The Framers’ generation fully understood that foreign-bound and domestically bound goods were transported by water. Speakers at the Constitutional Convention of 1787 and the state ratification debates often referred to the need to protect waterborne trade, and Alexander Hamilton referred to the combined value of the two enterprises in the *Federalist Papers*.<sup>132</sup> As Georgetown Law Professor Randy Barnett has concluded, those sources “make clear the [Framers’] intention to subject shipping and navigation to the regulation of Congress.”<sup>133</sup> That intent should help the EPA and USACE to devise a rule that would go a long way toward eliminating the proposed WOTUS Rule’s vagueness problems.

### **The Ark, Raft, or Dugout Canoe Rule**

The lesson of that history is that it is possible to interpret the term “waters of the United States” in a way that renders the concept readily understandable to the average person while remaining faithful to the Framers’ understanding of commerce: In order for a water to be a “water of the United States,” it must not only be connected to an interstate water and capable of contributing to international or interstate commerce, but also be navigable. One way to determine whether a water body qualifies is whether it will support the use of an ark, raft, or dugout canoe to reach one of the traditional forms of United States

waters such as the Ohio, Mississippi, or Missouri Rivers or one of the Great Lakes.

Those were the three waterborne devices that the colonists most often used to transport heavy goods downstream. At a time when there were few roads and the transportation of heavy goods by land was both cumbersome and slow, arks, rafts, and dugout canoes enabled settlers to bring with them the items necessary for survival in the wilderness and later to ship to market whatever produce they could raise or goods they could make where they landed. Americans from the late 17th to early 18th centuries would readily have associated navigability with arks, rafts, and dugout canoes because they could and did use them regularly where the water could be used for transportation.

That historical phenomenon is important for the issue confronting the EPA and Corps today. If a person can use an ark, raft, or dugout canoe to go from one particular water body (Water Body A) to a different one (Water Body B) that clearly *is* a traditional “water of the United States,” then the first body of water not only qualifies under the CWA, but also can be readily understood by the average person to constitute a navigable water. An Ark, Raft, and Dugout Canoe Rule would satisfy the requirements of both the Commerce Clause and the Due Process Clause and allow the federal government to protect from pollution the waters that the Framers would have understood as falling within federal regulatory authority.

### **Conclusion**

The breadth and complexity of the WOTUS Rule exceed the limitations that the law can demand of a “person of ordinary intelligence.” In fact, it may tax the ability of geologists, hydrologists, or botanists, let alone lawyers and judges, to define its scope. It is possible, however, to construe the term “waters of the United States” in a manner that remains faithful to its Commerce Clause origins and is readily applicable by the average person. That construction—a body of water that can be used by ark, raft, or boat to reach a traditional navigable water—allows the federal government to protect navigation and the water quality of much of the nation’s creeks, rivers, streams, and lakes without putting the average member of the public at risk of violating the criminal law.

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## Appendix

### **The Final 2015 Clean Water Rule: Definition of “Waters of the United States”**

For the purpose of this regulation these terms are defined as follows:

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a) (1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional

wetlands that occur along the Atlantic coastal plain.

(iii) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) Definitions. In this section, the following definitions apply:

(1) **Adjacent.** The term adjacent means 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. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not

limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) **Neighboring.** The term neighboring means:

(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;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) **Tributary and tributaries.** The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section 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 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 (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes,

or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) Sediment trapping,
- (ii) Nutrient recycling,
- (iii) Pollutant trapping, transformation, filtering, and transport,
- (iv) Retention and attenuation of flood waters,

- (v) Runoff storage,
- (vi) Contribution of flow,
- (vii) Export of organic matter,
- (viii) Export of food resources, and
- (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) High tide line. The term high tide line means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages [*sic*], or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(d) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

## Endnotes

1. See The White House, Executive Orders, WHITEHOUSE.GOV (last accessed Apr. 6, 2017) (collecting Executive Orders), <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>.
2. Exec. Order No. 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12,497 (Feb. 28, 2017).
3. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015).
4. *In re: EPA & DOD Final Rule; “Clean Water Rule: Definition of Waters of the United States,”* Nos. 15-3799 *et al.* (6th Cir. Oct. 9, 2015).
5. See, e.g., Amy Harder, *EPA Adds Smaller Waterways, Wetlands to Federal Supervision*, WALL. ST. J. (May 27, 2015) (“The Obama administration issued a rule on Wednesday putting more small bodies of water and wetlands under federal protection to ensure clean drinking supplies, a move that has riled some lawmakers and business and farming groups.... Lawmakers from rural states and a coalition of interest groups, including the American Farm Bureau and the Portland Cement Association that represents cement manufacturers, have criticized the water rule, saying it could ultimately apply to bodies of water as small as ditches. They called it evidence of what they claim is bureaucratic overreach by the administration. Lawsuits challenging the final rule are expected.... EPA officials say the rule is necessary to clarify which waters should fall under the protection of the federal Clean Water Act of 1972 after two Supreme Court rulings, in 2001 and 2006, called into question whether and to what extent 60% of U.S. waterways, especially streams and wetlands, should fall under federal jurisdiction.”), <https://www.wsj.com/articles/obama-administration-adds-waterways-wetlands-to-federal-control-1432740942>.
6. See, e.g., Ilan Wurman, *Toward Constitutional Administration*, 27 NAT’L AFF. 72, 72 (Spring 2016) (“[I]n May [2015], the Environmental Protection Agency unilaterally increased its own power by ruling that its regulations now apply to nearly any body of water in America that can influence waters downstream.”).
7. See WOTUS Exec. Order § 1 (“Policy. It is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”); *id.* § 2 (“(a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) shall review the final rule entitled ‘Clean Water Rule: Definition of “Waters of the United States,”’ 80 Fed. Reg. 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law. [¶] (b) The Administrator, the Assistant Secretary, and the heads of all executive departments and agencies shall review all orders, rules, regulations, guidelines, or policies implementing or enforcing the final rule listed in subsection (a) of this section for consistency with the policy set forth in section 1 of this order and shall rescind or revise, or publish for notice and comment proposed rules rescinding or revising, those issuances, as appropriate and consistent with law and with any changes made as a result of a rulemaking proceeding undertaken pursuant to subsection (a) of this section.”).
8. 547 U.S. 715 (2006); see WOTUS Exec. Order § 3 (“Definition of ‘Navigable Waters’ in Future Rulemaking. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).”).
9. See *infra* notes 46–52 and accompanying text.
10. 467 U.S. 837 (1984); see Paul J. Larkin, Jr., *The World After Chevron*, HERITAGE FOUND. LEGAL MEMORANDUM No. 186 (Sept. 8, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-186.pdf>.
11. 5 U.S. (1 Cranch) 137 (1803).
12. *Id.* at 177.
13. *Chevron*, 467 U.S. at 842.
14. *Id.* at 842–43 (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”) (footnote omitted).
15. *Id.* at 843.
16. *Id.* (“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”) (footnotes omitted).
17. *Id.* at 843–44 (“The power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.... If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”) (citation and footnotes omitted).



18. *Id.* at 865–66 (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).
19. That definition, however, does limit the range of permissible interpretations. See *infra* note 20; *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172 (2001) (quoted *infra* note 44).
20. The discussion to date regarding the proposed WOTUS Rule has focused on two issues: (1) whether the Rule is authorized by the CWA and (2) if so, whether the CWA exceeds Congress’s authority under the Commerce Clause of the Constitution, Article I, § 8, cl. 3. The CWA applies only to “navigable waters,” so the EPA and USACE cannot justify a rule that applies to “navigable and nonnavigable waters.” The WOTUS Rule, however, seeks to do just that because it stems from a pollution-prevention perspective rather than a navigability-protection perspective. In addition, the Rule would encompass waters that exist entirely within a state and therefore do not affect waters in other states. Those waters would not be a part of “Commerce...among the several States” under any reasonable interpretation of that phrase. Again, the Rule overreaches because of its mistaken perspective. There is no “Pollution Clause” in the Constitution, only a “Commerce Clause,” which means that Congress cannot invoke the latter to address the former without satisfying the latter’s requirements. It also means that “underground” waters—waters that by definition cannot be used for navigation and that the Framers could not even have dreamed could be used for transportation 90 years before the development of the first submarine—are not “waters of the United States.” Finally, even if the Commerce Clause were read to reach examples of pollution that do not affect interstate commerce, the WOTUS Rule is still overbroad. It purports to reach every body of water that, as the EPA and USACE repeatedly said in their *Federal Register* comments, might affect the “chemical, physical, or biological integrity” of downstream waters. The government ordinarily argues that Congress has the authority to regulate any item or activity that, considered in the aggregate, might affect interstate commerce. See *Ashcroft v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942). Given that approach, the WOTUS Rule could be used to regulate both how and how often homeowners clean out their rain gutters. That absurd result, however, is possible given the breadth of the WOTUS Rule.
21. Portions of the WOTUS Rule can be defined only retroactively, which also renders the Rule subject to challenge under the Ex Post Facto Clause of Article I. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”). Ex post facto considerations are related to due process notice concerns.
22. 5 U.S.C. § 706(2)(A) (2012).
23. 33 U.S.C. § 1251(a).
24. 33 U.S.C. § 1311(a), 1344(a) (“The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”). The CWA is the colloquial label given to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. 1251 *et seq.* (2012)).
25. 33 U.S.C. §§ 1311(a) (“Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”), 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”), (12) (“The term ‘discharge of a pollutant’ and the term ‘discharge of pollutants’ each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”); *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016).
26. 33 U.S.C. § 1342(a)(1) & (b).
27. 33 U.S.C. § 1342(a)(1)–(2); 40 C.F.R. §§ 122 & 125 (2016); *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).
28. 33 U.S.C. § 1344(a); 33 C.F.R. §§ 320–332 (2016); 40 C.F.R. §§ 230–232 (2016); *Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 557 U.S. 261, 266–269 (2009).
29. 33 U.S.C. §§ 1311(a), 1319(c), (d), 1344(a); *Hawkes Co.*, 136 S. Ct. at 1812.
30. 33 U.S.C.A. § 1319(c)(1). The maximum permissible penalties are doubled for a repeat offender. *Id.* The CWA initially authorized a per-day civil penalty of up to \$25,000. 33 U.S.C. 1319(d). Congress subsequently authorized the EPA to adjust the maximum penalty for inflation. 28 U.S.C. 2461 note. The current maximum per-day penalty is \$37,500. 74 Fed. Reg. 627 (Jan. 7, 2009).
31. 33 U.S.C.A. § 1319(c)(2). Again, the maximum permissible penalties are doubled for a repeat offender. *Id.*
32. See, e.g., *United States v. Caldwell*, 626 F. App’x 683 (9th Cir. 2015) (affirming convictions for violating the Clean Water Act); *United States v. Wilmoth*, 476 F. App’x 448 (11th Cir. 2012) (affirming convictions for violating the Clean Water Act); *United States v. Long*, 450 F. App’x 457 (6th Cir. 2011) (affirming defendant’s convictions for violating the Clean Water Act and conspiracy to violate the Clean Water Act); *United States v. Panyard*, 403 F. App’x 17 (6th Cir. 2010) (affirming defendant’s conviction for violating the Clean Water Act); *United States v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010) (vacating defendant’s convictions for violations of the Clean Water Act); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (affirming defendant’s convictions for violating the Clean Water Act); *United States v. Patrick*, No. 16-CR-20390, 2016 WL 6610983, at \*2 (E.D. Mich. Nov. 9, 2016) (denying defendant’s motion to dismiss a superseding indictment for violations of the Clean Water Act); *United States v. Giles*, No. 316CR0004GFVTREW, 2016 WL 5867421, at \*1 (E.D. Ky. Oct. 6, 2016) (denying defendant’s motion for a new trial following conviction for violating the Clean Water Act); *United States v. Kaluza*, No. CR 12-265, 2016 WL 740328,

- at \*3 (E.D. La. Feb. 24, 2016) (allowing a prosecution for a violation of the Clean Water Act to proceed); *United States Tribe v. Hubenka*, No. 10-CV-93-J, 2014 WL 12634287, at \*1 (D. Wyo. Oct. 22, 2014) (defendant was convicted on three counts of violating the Clean Water Act); *United States v. Acquest Dev., LLC*, 932 F. Supp. 2d 453 (W.D.N.Y. 2013) (granting a motion to dismiss indictment for violations of the Clean Water Act); *United States v. House of Raeford Farms, Inc.*, No. 1:09CR00395-1, 2010 WL 2199675, at \*10 (M.D.N.C. May 27, 2010) (denying defendant's motion to dismiss a superseding indictment for violations of the Clean Water Act).
33. See *Sackett v. EPA*, 566 U.S. 120, 124 (2012) ("The Sacketts are interested parties feeling their way. They own a 2/3-acre residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they received from the EPA a compliance order.").
  34. See ENVIRONMENTAL LAW HANDBOOK 317 (21st ed. Thomas F.P. Sullivan ed., 2011) ("Today's CWA traces its roots to the Federal Water Pollution Control Act (FWPCA) amendments of 1972. The 1972 amendments to the FWPCA required, for the first time, that EPA set nationwide limits for discharges from industrial sources and publicly owned treatment works in the navigable waters of the United States.").
  35. See *Hawkes Co.*, 136 S. Ct. at 1813 (noting that "the Corps issued an approved [jurisdictional determination] concluding that the [Hawkes Co.] property contained 'water of the United States' because its wetlands had a 'significant nexus' to the Red River of the North, located some 120 miles away.").
  36. See JENNIFER BACHNER & BENJAMIN GINSBERG, WHAT WASHINGTON GETS WRONG 153 (2016) ("[T]he rulemaking agenda more closely reflects the preferences of America's unelected government and, perhaps, the constellation of 'usual suspects' who influence rulemaking, than it mirrors the wishes of Congress, the president, or the American people.").
  37. *Hawkes Co.*, 136 S. Ct. at 1812.
  38. 474 U.S. 121 (1985).
  39. *Id.* at 131.
  40. *Id.* at 132.
  41. *Id.*
  42. *Id.* at 135.
  43. 531 U.S. 159 (2001).
  44. *Id.* at 171-72 ("We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that 'the use of the word navigable in the statute...does not have any independent significance.' ... We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute. We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited import'...and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. 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.") (citations omitted).
  45. *Id.* at 167.
  46. See *Rapanos*, 547 U.S. at 739 (plurality opinion) ("[T]he 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.'... The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.").
  47. See *id.* at 779-80 (Kennedy, J., concurring in the judgment) ("[J]urisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense...[which] must be assessed in terms of the statute's goals and purposes.... [W]etlands possess the requisite nexus, and...come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" (citations omitted).
  48. See *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011); *U.S. v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009).
  49. See *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).
  50. See *United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009).
  51. See *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).
  52. *SWANCC*, 531 U.S. at 172.
  53. See *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 163 (1803).
  54. See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (identifying "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct") (emphasis

- deleted); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 689-69 (1977) (“People ought in general to be able to plan their conduct with some assurance that they can avoid entanglement with the criminal law; by the same token the enforcers and appliers of the law should not waste their time lurking in the bushes ready to trap the offender who is unaware that he is offending. It is precisely the fact that in its normal and characteristic operation the criminal law provides this opportunity and this protection to people in their everyday lives that makes it a tolerable institution in a free society. Take this away, and the criminal law ceases to be a guide to the well-intentioned and a restriction on the restraining power of the state.”).
55. 80 Fed. Reg. 37,054 (June 29, 2015). The 2015 Rule replaced one that had been adopted in 1978. See 33 C.F.R. § 323.2(c) (1978) (“The term ‘wetlands’ means those areas 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. Wetlands generally include swamps, marshes, bogs and similar areas.”).
56. *Id.* at 37,057.
57. *Id.* at 37,055.
58. *Id.*
59. 33 U.S.C.A. § 1319(b), (c), (d), (g).
60. See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).
61. *Clark v. Martinez*, 543 U.S. 371, 380 (2005); see also, e.g., *Leocal*, 543 U.S. at 11 n.8 (“Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.”); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) (applying the rule of lenity to a tax statute litigated in a civil setting because the statute had criminal applications and therefore had to be interpreted consistently with its criminal applications); *id.* at 519 (Scalia, J., concurring in the judgment).
62. See, e.g., Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the historical development of the Void-for-Vagueness doctrine); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 307-08 (2016) (hereafter Larkin, *Lost Due Process Doctrines*).
63. The Supreme Court first held a law unconstitutional under the Void-for-Vagueness doctrine in *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914). The state antitrust law rendered unlawful “any combination [made]...for the purpose or with the effect of fixing a price that was greater or less than the real value of the article.” *Id.* at 221 (alteration in original); Larkin, *supra* note 62, at 362.
64. See, e.g., *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (“Is it sufficient that use of a drug made the victim’s death 50 percent more likely? Fifteen percent? Five? Who knows. Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend.”); Larkin, *Lost Due Process Doctrines*, *supra* note 62, at 362.
65. “Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute ‘abut(s) upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of (those) freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’...than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (parentheses in original).
66. See 1 BLACKSTONE, *COMMENTARIES* \*46 (“[Caligula] wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people”); see also *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion) (“To enforce such a [vague] statute would be like sanctioning the practice of Caligula, who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’” (alteration in original)); 5 JEREMY BENTHAM, *WORKS* 547 (1843) (“We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he kept them from the knowledge of.”); *Livingston Hall & Selig J. Seligman, Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 650 n.39 (1940) (“[W]here the law is not available to the community, the principle of ‘nulla poena sine lege’ comes into play.”).
67. 306 U.S. 451, 453 (1939).
68. 283 U.S. 25 (1931).
69. *Id.* at 27.
70. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (emphasis added).
71. *United States v. Harris*, 347 U.S. 612, 617 (1954) (emphasis added; footnote omitted).
72. Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 761 (2012).
73. See CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, *EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015*, at 1, 2 Tbl. 1 (Mar. 2016).
74. *Id.* at 2 Tbl. 1.
75. See *United States v. Grimaud*, 220 U.S. 506 (1911).
76. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

77. See, e.g., Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204 (1934) (“[W]hat do we find as to the form of that most important group of legislative pronouncements, the administrative rules and regulations? It seems scarcely adequate to say that what we find is chaos. If a pamphlet is discovered which purports to contain the rules and regulations in question, there is no practicable means of telling whether the entire regulation or the article in question is still in force, or, as is so often the case, has been modified, amended, superseded, or withdrawn. There is no feasible way of determining whether or not there has been any subsequent rule or order which might affect the problem. The rules and regulations are most often published in separate paper pamphlets. Many of them, including most of the Executive Orders of the President, are printed on a single sheet of paper, fragile and easily lost. An attempt to compile a complete collection of these administrative rules would be an almost insuperable task for the private lawyer. It seems likely that there is no law library in this country, public or private, which has them all. Even if a complete collection were once achieved, there would be no practicable way of keeping it up to date, and the task of finding with requisite accuracy the applicable material on a question in hand would still often be a virtual impossibility. The officers of the government itself frequently do not know the applicable regulations. We have recently seen the spectacle of an indictment being brought and an appeal taken by the government to the Supreme Court before it was found that the regulation on which the proceeding was based did not exist.”) (footnotes omitted).
78. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring).
79. See Larkin, *Lost Due Process Doctrines*, *supra* note 62, at 327–29.
80. See Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J. L. & PUB. POL’Y 1065, 1074 (2014) (hereafter Larkin, *Strict Liability*).
81. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931).
82. See *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment) (“It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, see *McBoyle*, *supra*, 283 U.S., at 27, albeit one required in any system of law”).
83. See *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment) (“necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports”).
84. *Rapanos*, 547 U.S. at 779–80 (Kennedy, J., concurring in the judgment) (“[J]urisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense...[which] must be assessed in terms of the statute’s goals and purposes.... [W]etlands possess the requisite nexus, and...come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”) (citations omitted; emphasis added).
85. *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring), *aff’d*, 136 S. Ct. 1807 (2016); see Larkin, *Strict Liability*, *supra* note 80, at 1089–90 (“To some extent, the notice-and-comment requirements of the Administrative Procedure Act have the potential to reduce this risk [of inadequate notice], because an agency must afford the public notice of a proposed rule before promulgating any new regulation. But that requirement likely will not benefit every private party equally. The average person reads the local newspaper, not the Federal Register. Of course, large corporations have in-house staff or lawyers on retainer devoted to the task of staying on top of agency developments. Personnel at small companies, however, cannot specialize in regulatory programs because they must play multiple roles. And most individuals lack even the remote familiarity with the law that someone can pick up just by working daily in a particular field. The average person does not have those opportunities. He or she learns what the law forbids from family members, church, school, and (albeit often mistakenly) popular culture. Said differently, the average person learns the law from other average persons, not from individuals educated, trained, and experienced in what a technical regulatory scheme forbids.”) (footnote omitted).
86. “Whatever” because understanding the functional definition of a wetland is quite a chore, given that “Indicator[s]” include “[p]resence of hydrophytes,” “[n]utrient outflow lower than inflow,” “[i]ncrease in depth of sediment,” and “[h]igh diversity of vertebrates.” NAT’L RESEARCH COUNCIL, NAT’L ACADEMY OF SCI., *WETLANDS: CHARACTERISTICS AND BOUNDARIES* 35 Tbl. 2.2 (1995) (hereafter *WETLANDS: CHARACTERISTICS AND BOUNDARIES*). Given the knowledge that a functional analysis of a wetland would require, we should be thankful that “functional analysis is not necessary for the delineation of wetlands[.]” *Id.* at 34.
87. The numbers in the text are rounded off.
88. See *The Ox-Bow Incident* (20th Century Fox 1943).
89. Perhaps, but the “I know it when I see it” standard is hardly an ideal way to define a term enforced via the criminal law. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (coining the oft-derided statement that as far as “obscenity” goes, “I know it when I see it”).
90. See *supra* note 55.
91. See, e.g., RALPH W. TINER, *WETLAND INDICATORS* 1 (1999).
92. See WILLIAM L. LEWIS, JR., *WETLANDS EXPLAINED: WETLANDS, SCIENCE, POLICY, AND POLITICS IN AMERICA* 3 (2001) (“[T]hose portions of a landscape that are not permanently inundated under deep water, but are still too wet most years to be used for the cultivation of upland crops such as corn or soybeans. Wetlands, in other words, coincide pretty well with the common conception of swamps, marshes, and bogs.”).
93. ROYAL C. GARDNER, *LAWYERS, SWAMPS, AND MONEY: U.S. WETLAND LAW, POLICY, AND POLITICS* 36–37 (2011) (“While this definition suggests that a wetland has water, plants that are adapted to water, and soil that has been exposed to water, it does not necessary tell an individual property owner whether (or to what extent) his or her site is a wetland and thus subject to the requirements of the Clean Water Act. You could not take this definition out to the field and use it with any confidence to identify the dividing line between a wetland and an adjacent upland.”).

94. WILLIAM J. MITSCH & JAMES G. GOSSELINK, *WETLANDS* 31-32 (5th ed. 2015).
95. GARDNER, *supra* note 93, at 37. Professor Gardner made that remark in 2011, before the WOTUS Rule was adopted, but the definition he used was not materially different from the one found in the WOTUS Rule.
96. *Id.* at 36-37.
97. MITSCH & GOSSELINK, *supra* note 94, at 42.
98. 80 Fed. Reg. at 37,060; *see id.* at 37,062 (“The final Science Report states that connectivity is a foundational concept in hydrology and freshwater ecology. Connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. Connectivity for purposes of interpreting the scope of ‘waters of the United States’ under the CWA serves to demonstrate the ‘nexus’ between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea. The scientific literature does not use the term ‘significant’ as it is defined in a legal context, but it does provide information on the strength of the effects on the chemical, physical, and biological functioning of the downstream water bodies from the connections among covered tributaries, covered adjacent waters, and case-specific waters and those downstream waters. The scientific literature also does not use the terms traditional navigable waters, interstate waters, or the territorial seas. However, evidence of strong chemical, physical, and biological connections to larger rivers, estuaries, and lakes applies to that subset of rivers, estuaries, and lakes that are traditional navigable waters, interstate waters, or the territorial seas.”).
99. *See* *Bush v. Gore*, 531 U.S. 98, 103-11 (2000) (finding an equal protection violation when the state method for counting punch-card ballots led to widely erratic outcomes).
100. *United States v. Williams*, 553 U.S. 285, 306 (2008); *id.* (“Thus, we have struck down statutes that tied criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”).
101. *See* *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).
102. *See, e.g.,* *Fowler v. United States*, 131 S. Ct. 2045, 2055 (2011); *Clark v. Martinez*, 543 U.S. 371, 378-83 (2005); *United States v. Bass*, 404 U.S. 336, 347-49 (1971) (collecting cases); Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 769-70 (2013). The common-law courts originally created the rule to save defendants from a bloodthirsty Parliament by narrowly construing the vast number of capital crimes then on the books. Today, the rule serves much the same purpose as the aphorism that it is better for 10 guilty persons to go free than for one innocent party be convicted.
103. The rule serves three related purposes. It bars the Executive Branch from holding someone criminally accountable for acts not clearly outlawed in advance; it forces Congress to define the criminal law with precision; and it places “the weight of inertia” on the political branches, which are best positioned to draft criminal statutes clearly. *Santos*, 553 U.S. at 514 (plurality opinion). The rule does not rest on the fiction that people will read the penal code before acting. Instead, the rule of lenity requires that if someone were to make that effort, the criminal statutes must be written with sufficient clarity that a reader could understand them. *See McBoyle*, 283 U.S. at 27 (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”). The rule has been described as a “junior version” of the Void-for-Vagueness doctrine. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 95 (1968). That doctrine is discussed in the text following this footnote.
104. In 1902, German mathematician George Hilbert identified 23 problems that were then unsolved and believed to be unsolvable. Most have since been resolved, but some remain.
105. *WETLANDS: CHARACTERISTICS AND BOUNDARIES*, *supra* note 86, at 291-95.
106. Larkin, *Strict Liability*, *supra* note 80, at 1092-93 (footnote omitted).
107. 561 U.S. 358 (2010).
108. 18 U.S.C. § 1341 (2012).
109. 487 U.S. 350 (1987).
110. 18 U.S.C. § 1346 (2012).
111. 561 U.S. 358 (2010).
112. *Id.* at 415-24 (Scalia, J., concurring in part and concurring in the judgment).
113. *Id.* at 407.
114. *Id.* at 408.
115. *Id.* at 409.
116. The Commerce Clause states that “Congress shall have the Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.
117. Some scholars have criticized the Court’s expansive interpretation, believing that the clause empowers Congress to regulate only truly interstate trade or business. *See, e.g.,* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 703 (1996); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). Other scholars have concluded that the Supreme Court was correct to read the Commerce Clause broadly

- to encompass any gainful activity. See, e.g., Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 Nw. U. L. Rev. 695 (2002).
118. Three developments have combined to reignite that debate. First, at the end of the 20th century, the Supreme Court twice struck down federal statutes on the ground that they could not be justified as a valid exercise of the Commerce Clause. See *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress cannot make it a federal offense simply to possess a firearm in the vicinity of a school); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress cannot make rape occurring off federal property or to a non-federal official a federal offense); see also *NFIB v. Sebelius*, 567 U.S. 519 (2012) (five justices concluded that the Affordable Care Act exceeded Congress's Commerce Clause authority, but the five justices did not join in one majority opinion). Second, there has been a resurgent interest in the legal profession, the academy, and the federal courts in reexamining the legitimacy of the administrative state. For arguments on both sides of that debate, see, for example, *THE IMPERIAL PRESIDENCY AND THE CONSTITUTION* (Gary Schmitt *et al.* eds., 2017); ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016). Third, the WOTUS Rule has made this matter a pressing issue due to the breadth of the authority that the EPA and USACE have given themselves.
119. See, e.g., BERNARD BAILYN, *THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY* (1955); T. H. BREEN, *THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE* (2004); JOHN J. McCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607-1789* (1985); GARY B. NASH, *THE URBAN CRUCIBLE: THE NORTHERN SEAPORTS AND THE ORIGINS OF THE AMERICAN REVOLUTION* (1986); Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 5-6 (2016) (hereafter Larkin, *Original Understanding*).
120. See DOUGLAS C. NORTH, *THE ECONOMIC GROWTH OF THE UNITED STATES, 1790-1860*, at 22 (1966). The English used their mercantile system to govern all trade among the American colonies, the British possessions in the Caribbean, and England itself. See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*108, 154-59; FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 14 & n.8, 18 (1985). Even after winning their liberty, every colony adopted some form of mercantilism. See, e.g., J. R. POLE, *PATHS TO THE AMERICAN PAST* 77 (Oxford Univ. Press 1979) ("[T]he early American state governments were as mercantilist and as interventionist—in intention if not always in power—as the royal government they had overthrown."); Larkin, *Original Understanding*, *supra* note 119, at 64-65, 80.
121. See EARL E. BROWN, *COMMERCE ON EARLY AMERICAN WATERWAYS* 1 (2010) ("Soon after the pioneers moved into the frontier, they began to produce more than they could consume, while at the same time the coastal communities outgrew their food and wood supply. How the early settlers manufactured spars, square timbers and boards from the abundant trees, and then transported them and their excess farm products to the coastal markets is the subject of this book.").
122. See *id.* at 11-13; NORTH, *supra* note 120, at 32 ("The internal trade of the [colonial and early United States] period was preponderantly local, connecting the major seaports with the hinterland."). Philadelphia was the collecting point for the Delaware River and Bay, New York City for the Hudson River, Baltimore for the Chesapeake River and Bay, and New Orleans for the western river trade, with foodstuffs shipped down the Mississippi River. *Id.* at 34-35, 52-53.
123. BROWN, *supra* note 121, at 17; *id.* at 18 (noting that by 1791, "Baltimore was fast becoming the flour exporting capital of the colonies").
124. See *id.* at 3-4; ROBERT HEILBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA, 1600 TO THE PRESENT* 44 (4th ed. 1999).
125. See *id.*; NORTH, *supra* note 120, at 22, 51.
126. See BROWN, *supra* note 121, at 7 ("Early colonists moving inland in the early 1700s had no highways, railroads or other means of conveyance to move their household goods and tools. The only mode of transportation to and from the frontier was by pack animals, or by using canoes on the rivers and creeks like we use highways today."); NORTH, *supra* note 120, at 18.
127. BROWN, *supra* note 121, at 33.
128. *Id.* at 3.
129. *Id.* at 4, 7-9, App. 193-217 (explaining ark and raft construction).
130. See HEILBRONER & SINGER, *supra* note 124, at 36, 38, 44, 46, and 48.
131. See *id.* at 36, 38, 44-46.
132. Barnett, *supra* note 117, at 114-25. That is not to say that the only reading of their remarks is that "commerce" referred to trade rather than agriculture or manufacturing. The point is not that commerce was limited to waterborne trade; it is that waterborne trade is an essential part of the late 18th century understanding of commerce.
133. *Id.* at 125; see also *id.* at 125-26 ("While the sources I have examined do not provide indisputable answers to these questions, on balance, I think navigation appears to be included within the meaning of the term 'commerce' because of its intimate connection to the activity of trading. Indeed, as was noted earlier, the etymology of the term 'commerce' is 'with' (com) 'merchandise' (merci), a phrase that could accurately be applied to the 'carrying trade,' which is how the object of navigation laws was frequently described. Perhaps the strongest evidence that 'commerce' included navigation is in Article I, Section 9, where Congress is forbidden from enacting any 'Regulation of Commerce' that gives preference 'to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.' Though regulations concerning imports that might favor one port over another could be considered simply rules governing trade or exchange, laws governing the movement of vessels, the enactment of which are partially restricted by this clause, would appear to be rules concerning navigation or the transportation of articles of commerce.") (footnotes omitted). The Supreme Court's first interpretation of the Commerce Clause also came in a case, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), that involved interstate water transport.