Definition Delirium: Redefining and Litigating Waters of the United States

Christopher Welch

I. Introduction and Background

The federal government has regulated water pollution since 1948, when Congress passed the Federal Water Pollution Control Act, now known as the Clean Water Act (CWA).[1] The scope of the CWA hinges on the bodies of water that the legislation governs, broadly defined as "Waters of the United States" (WOTUS).[2] On June 29, 2015, the Environmental Protection Agency (EPA) finalized a ruling to change this contentious definition in an effort to "clarif[y] the scope of 'waters of the United States' consistent with the CWA, Supreme Court precedent, and science."[3] The revised definition took effect two months later on August 28, 2015.[4] However, as of January 5, 2016, two courts have placed a nationwide stay upon the ruling. The U.S. District Court for the District of North Dakota granted a preliminary injunction of the rule on the grounds that the twelve states that joined the case would likely succeed on the merits of their claim (the New Mexico Environment Department and State Engineer also joined).[5] Petitioner states argued that the EPA has overreached its authority and that the states would face irreparable harm without a preliminary injunction.[6] The North Dakota federal district court held that the district courts have jurisdiction over the issue.[7] Meanwhile, the Judicial Panel on Multi-District Litigation consolidated four claims by eighteen states in the Sixth Circuit Court of Appeals.[8] The

[1] Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C. (2014)).
[2] 40 C.F.R. § 122.2 (2015).
[3] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,054 (Aug. 28, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).
[4] *Id*. at 37,054.
[5] North Dakota v. U.S. E.P.A., 2015 WL 5060744, at *1 (D.N.D. 2015)
[6] *Id*. (arguing that the Final Rule violated the Administrative Procedures Act because it was not a logical outgrowth of the proposed rule).
[7] *Id*. at *2.
[8] In re E.P.A., 803 F.3d 804, 805 (6th Cir. 2015).

Sixth Circuit imposed a stay on the ruling, for similar reasons as the North Dakota district court, while they take time to thoroughly assess which court or courts have jurisdiction over the matter (however, one dissenting judge disagreed that the Sixth Circuit could grant a stay without first determining jurisdiction).[9] This article briefly explains the original WOTUS definition, explores the reasons for the revised WOTUS definition, and analyzes arguments for and against it.

II. The Original WOTUS Definition and Subsequent Issues

The main objective of the CWA is straightforward: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] The CWA achieves this primarily through permit programs that limit the amount of effluents that persons or entities can release into bodies of water.[11] The Section 402 National Pollutant Discharge Elimination System (NPDES) permit program limits the discharge of pollutants to WOTUS from "point sources."[12] The second major program, under Section 404, issues permits for dredging and filling material in relation to WOTUS.[13] The third major provision, Section 311, is the oil spill prevention and response program.[14] These programs, along with a number of other provisions of the CWA, contribute to a healthier environment. However, one of the toughest parts of executing such sweeping legislation is identifying exactly what constitutes "the Nation's waters."[15]

As part of the 1972 amendments to the Federal Water Pollution Control Act, Congress specified that the scope of these programs extended to "navigable waters," which it defined as

[9] *Id*. at 808-09.
[10] 33 U.S.C. § 1251(a) (2014).
[11] *Id.* § 1311(a).
[12] *Id.* § 1342; *see also* § 1362(14) (defining point source).
[13] *Id.* § 1344.
[14] *Id*. § 1321.
[15] *Id.* § 1251(a).

"waters of the United States."[16] The actual definition of WOTUS was left to the federal agencies. The phrase was subsequently defined to include all waters used for, or that could affect, interstate or foreign commerce (better known as "traditional navigable waters"), tributaries of such waters, territorial seas, and "wetlands" adjacent to any waters otherwise classified under the WOTUS definition.[17] The obscurity of such a powerful definition has induced a significant amount of litigation between citizens, corporations, organizations, and the two agencies that administer the CWA: the EPA and the U.S. Army Corps of Engineers (Corps). The best way to understand the contentious nature of the definition is to explore the cases that have lead to the new WOTUS rule.

a. *United States v. Riverside Bayview Homes, Inc.*

In 1985, the United States Supreme Court unanimously held that a permit was required to dredge and fill wetlands that were adjacent to navigable waters, even though the wetlands in question were not frequently "inundated or saturated" by water from the adjacent body of water.[18] The case turned on the interpretation of the definition of "wetlands" as follows: "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."[19] The Court held that the property in question was a "wetland" and therefore subject to the CWA because the property had "vegetation that requires saturated soil conditions for growth and reproduction," and that the property was adjacent to a navigable waterway

[16] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 886 (1972) (codified at 33 U.S.C. § 1362(7) (2014)) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.")
[17] 40 C.F.R. § 122.2 (2014).
[18] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129–131 (1985).
[19] *Id*. at 124 (quoting 33 C.F.R. § 323.2(c) (1978)).

covered under the WOTUS definition.[20] Justice White's opinion explicitly suggests that the Corps used reasonable discretion when interpreting the CWA.[21] *Riverside Bayview* is just one instance in which the interpretation of the WOTUS definition was litigious.

b. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*

Sixteen years later, the United States Supreme Court ruled against the discretion of the Corps, holding that the WOTUS definition does not include waters that are the habitat of birds that migrate across state lines.[22] In 1986, the Corps issued the "Migratory Bird Rule," protecting such waters under the CWA.[23] A majority of the Court held that the Corps exceeded their authority granted by § 404(a) of the CWA.[24] The Court found that "navigable waters" could not be extended to cover the sand and gravel pit in contention, and thus, a permit was not required to dispose of dredged or fill material there.[25] More importantly, Justice Rehnquist's opinion "introduced the concept that it was a 'significant nexus' that informed the Court's reading of CWA jurisdiction over waters that are not navigable in fact."[26] "Significant nexus" is a term the EPA has now formally defined within the new WOTUS definition.[27]

c. *Rapanos v. United States*

The third and final Supreme Court case to shape the new WOTUS rule was decided in 2006 without a majority. In his concurring opinion, Justice Kennedy stated, "that a water or wetland constitutes 'navigable waters' under the Act if it possesses a 'significant nexus' to

[20] *Id*. at 130–31.
[21] *Id*. at 139 ("We are thus persuaded . . . that the Corps has acted reasonably in interpreting the [Clean Water] Act . . . .").
[22] Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs (SWANCC), 531 U.S. 159, 174 (2001).
[23] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206-01 (Nov. 13, 1986).
[24] *SWANCC*, 531 U.S. at 174.
[25] *Id*. at 162.
[26] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (Aug. 28, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401); *see Id*. at 167.
[27] 40 C.F.R. § 122.2 (2015).

waters that are navigable in fact or that could reasonably be so made."[28] Kennedy added that the "significant nexus" determination must be made in regards to the overall goal of the CWA, specifically, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[29] Justice Scalia, writing the plurality opinion for the Court, went further by saying that "*only* those wetlands with a continuous surface connection" to bodies of water covered by the WOTUS definition could be considered "adjacent" to such, and thus subject to the authority of the CWA.[30] Ultimately, the *Rapanos* plurality attempted to clarify the scope of the CWA by shaping the WOTUS definition to apply the intentions of the legislators who wrote the CWA to fit real-world cases.[31]

Justice Stevens' dissent, joined by Justices Souter, Ginsburg, and Breyer, suggested that the Court infringed upon the discretion of the Corps that it supported in the *Riverside Bayview* decision twenty-one years prior.[32] Justice Stevens concluded that the Court should not "replace regulatory standards with a judicially crafted rule distilled from the term 'significant nexus.'"[33] By defining "significant nexus" (discussed in detail below), the EPA could be attempting to mediate between the plurality, dissenting, and concurring opinions of *Rapanos*. Moreover, Justice Stevens specifically noted the testimony of a wetlands expert who shed light upon a number of "ecological functions" that wetlands provide, including: "habitat, sediment trapping, nutrient recycling, and flood peak diminution."[34] The EPA echoed this analysis within the

[28] Rapanos v. United States, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring) (quoting *Solid Waste Agency*, 531 U.S. at 167, 172).
[29] *Id*. at 759-60 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a) (1987)).
[30] *Id*. at 742 (plurality opinion).
[31] *Id*. at 749-50.
[32] *Id*. at 787–88 (Stevens, J., dissenting).
[33] *Id*. at 807 (Stevens, J., dissenting).
[34] *Id*. at 790 (Stevens, J., dissenting).

definition of significant nexus by suggesting nine functions that should be considered when making a significant nexus determination.[35]

III. Redefining WOTUS

In light of *Riverside Bayview*, *Solid Waste Agency*, and *Rapanos*, as well as a significant amount of scientific research, the EPA issued the new WOTUS ruling to clarify the definition. This article does not analyze the scientific report upon which the EPA relies, but it is important to note that such a report was created by the EPA and reviewed by the agency's Science Advisory Board.[36] The scientific report was specifically used to determine how the WOTUS rule would handle "significant nexus" determinations.[37]

Before delving into the "significant nexus" determination, it is important to understand the categorization of waters made by the new definition. The first three categories are not new, but reorganized in the following order: (1) traditional navigable waters; (2) interstate waters, including interstate wetlands; and (3) the territorial seas.[38] Regarding these first three categorizations, the new WOTUS definition adds all tributaries of such ("covered tributaries"), and all bodies of water adjacent to such ("covered adjacent waters"), as the fifth and sixth categories.[39] The fourth category under the rule is "impoundments of waters otherwise identified as [WOTUS] . . . ."[40] The seventh category contains five waters that would require a case-by-case determination to identify whether or not they have a significant nexus to the first three categories: (1) traditional navigable waters; (2) interstate waters; or (3) territorial seas.[41] The five waters requiring a case-by-case significant nexus determination are: (1) prairie potholes; (2)

[35] *See* 40 C.F.R. § 122.2 (2015) (subsection (3)(v)(A)–(I) of Waters of the United States definition).
[36] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (Aug. 28, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).
[37] *Id.*
[38] 40 C.F.R. § 122.2 (2015) (subsection (1) of the Waters of the United States definition).
[39] *Id.; see* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,060.
[40] 40 C.F.R. § 122.2 (2015) (subsection (1) of the Waters of the United States definition).
[41] *Id.*

Carolina bays and Delmarva bays; (3) Pocosins; (4) Western vernal pools; and (5) Texas coastal prairie wetlands.[42] The eighth and final category of waters that fall under the new WOTUS definition are waters within the 100-year floodplain of the first three categories, and waters within 4,000 feet of the high tide line or ordinary high water mark of the first five categories.[43] Like the seventh category, these waters also require a case-by-case significant nexus determination.[44]

The EPA has taken heed to Justice Kennedy's opinion in *Rapanos*.[45] Not only does the new rule use the significant nexus measure, but it also instructs parties to apply the measure in regards to the ultimate goal of the CWA, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[46] The WOTUS rule makes clear, "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 (1)(i) through (iii) of this definition."[47] Future cases will inevitably have to consider the integrity of the water bodies nearby. In the Final Rule, the EPA stated that the experience and technical expertise of the Agency and the Corps will allow the agencies to make consistent significant nexus determinations.[48] The Agency points to more than 400,000 CWA jurisdiction determinations, and more specifically, 120,000 significant nexus determinations, since the *Rapanos* decision.[49]

---

[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,061 (Aug. 28, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).
[46] 33 U.S.C. § 1251(a) (2014); *see* 40 C.F.R. § 122.2 (2015).
[47] 40 C.F.R. § 122.2 (2015) (subsection (3)(v) of the Waters of the United States definition).
[48] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,065.
[49] *Id*.

Furthermore, the significant nexus definition clarifies three phrases: (1) "similarly situated waters;" (2) "region;" and (3) "significantly affects."[50] "Similarly situated waters . . . function alike and are sufficiently close to function together in affecting downstream waters."[51] The term "region" refers to "the watershed that drains to the nearest [traditional navigable waters, interstate waters, or territorial sea]."[52] Essentially, when the agencies make a significant nexus determination, they will consider nearby bodies of water within the same watershed, with the understanding that "the chemical, physical, and biological integrity of downstream waters is directly related to the aggregate contribution of upstream waters that flow into them, including any tributaries and connected wetlands."[53] Finally, the significant nexus definition echoes Justice Kennedy by defining significant effects as those that are more than "speculative or insubstantial."[54] Furthermore, the rule identifies relevant functions to the significant nexus analysis to determine whether the water body will surpass the "speculative or insubstantial" threshold.[55] These functions include sediment and pollutant trapping, nutrient recycling, retention and attenuation of flood waters, runoff storage, contribution of flow, export of organic matter and food resources, and the provision of life cycle dependent aquatic habitat for species located in WOTUS.[56] In sum, the revised WOTUS rule clarifies the ways in which the agencies apply the scope of the WOTUS definition and specifies how the agencies will ultimately determine whether the water body at issue will be subject to the CWA.

[50] 40 C.F.R. § 122.2 (2015) (subsection (3)(v) of Waters of the United States definition).
[51] *Id.*
[52] *Id.*
[53] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,066.
[54] § 122.2 (2015) (subsection (3)(v) of Waters of the United States definition); *see also* Rapanos v. United States, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring).
[55] *Id.*
[56] § 122.2 (2015) (subsection (3)(v)(A)-(I) of Waters of the United States definition).

IV. The Arguments

As of October 9, 2015, thirty states have filed or joined a complaint against the new WOTUS ruling. Twelve of those states had their claim heard by the U.S. District Court of North Dakota,[57] while the other eighteen states had their claims combined by the Judicial Panel on Multi-District Litigation, and heard by the Sixth Circuit Court of Appeals.[58] Both federal courts granted a stay on the ruling for similar reasons. The courts considered four factors to decide whether granting a stay was prudent:

> 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[59]

First, the Sixth Circuit concluded that the petitioner states would likely prevail on their claim.[60] The court reasoned that it is unclear whether the new rule is "harmonious" with Justice Kennedy's concurring opinion in *Rapanos*.[61] The North Dakota federal district court made a similar finding regarding *Rapanos* and the new rule.[62] Additionally, the district court found that the rule was likely "arbitrary and capricious" because they could not identify a factual basis for the 4,000 foot limit from the high tide line or ordinary high water mark of covered waters for assessing whether waters in question were within the scope of the WOTUS rule.[63]

Next, the courts determined that there would be "irreparable harm" to the states if a stay were not granted. The North Dakota district court made this conclusion for the reason that new jurisdictional assessments of waters would be expenditures that, if the rule were ultimately

---

[57] North Dakota v. U.S. E.P.A., No. 3:15-CV-59, 2015 WL 5060744 at *1 (D.N.D. 2015).
[58] In re E.P.A., 803 F.3d 804, 805 (6th Cir. 2015).
[59] *Id*. at 806 (citing *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d. 150, 153 (6th Cir. 1991)).
[60] *Id*. at 807.
[61] *Id*. at 807.
[62] *North Dakota v. U.S. E.P.A*., 2015 WL 5060744 at *4.
[63] *Id*. at *5–6.

voided, would not be recoverable.[64] The district court added that a preliminary injunction would not harm the agencies and therefore the balance of harms was against the public interest of the states.[65] The Sixth Circuit disagreed that the states would incur "unrecoverable expenditure[s]" or "immediate irreparable harm."[66] The Sixth Circuit instead focused on the balance of harms between the states and the agencies in the absence of a preliminary injunction.[67] The court recognized the technical expertise of the agencies, as well as the need for a clarification of the WOTUS definition in light of its original ambiguities.[68] However, the Sixth Circuit held that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being."[69]

a. Jurisdiction

The dissenting Sixth Circuit Judge suggested that the court does not have the authority to implement a preliminary injunction while they determine whether they have subject-matter jurisdiction over the case.[70] Noting the dissent, the majority points to a statute that grants the Circuit Court of Appeals jurisdiction for reviewing actions of the agency.[71] Nevertheless, the majority admitted that they must conduct a review before granting or denying jurisdiction to hear the case provided to them by the Judicial Panel on Multi-District Litigation.[72] Meanwhile, the North Dakota federal district court concluded that the statute granting authority to the circuit courts did not apply to the WOTUS ruling because the statute referred to rulings of "effluent

[64] *Id*. at *7.
[65] *Id*. at *8.
[66] *In re E.P.A.*,803 F.3d 804, 808 (6th Cir. 2015).
[67] *Id*. at 808.
[68] *Id*. at 808.
[69] *Id*. at 808.
[70] *Id*. at 809 (Keith, J., dissenting).
[71] *Id*. at 807 (citing 33 U.S.C. § 1369(b)(1) (2014)).
[72] *Id*. at 807.

limitations" as opposed to rulings regarding the scope of the CWA.[73] The district court analogized to *Friends of the Everglades v. U.S. E.P.A.* where the Eleventh Circuit denied jurisdiction on the grounds that the rulemaking did not govern effluents, nor the issuance or denial of a permit.[74]

The Supreme Court certainly has an interest in backing up the authority of the EPA if it has not overstepped its authority. Moreover, the Court is often much more likely to take action when multiple circuits reasonably disagree.[75] While both the North Dakota federal district court and the Sixth Circuit granted preliminary injunctions to the rule, the underlying jurisdictional question remains unclear. If the Sixth Circuit finds that the circuit courts have the original jurisdiction regarding the validity of the WOTUS rule, there would be disagreement among courts as to the jurisdictional question. The jurisdictional question is one that must eventually be decided, though it remains to be seen whether the Supreme Court will use its discretion to clarify the jurisdictional issues at stake. Such a ruling by the Court would shape future challenges to rulings made by the EPA and other federal agencies.

b. Administrative Authority

The North Dakota district court held that the EPA failed to comply with Section 553 of the Administrative Procedure Act that requires agencies to publish the proposed rule and accept comments and review from interested parties before issuing a final rule.[76] Specifically, the district court found that the proposed rule contained "ecological and hydrological concepts" that were replaced by arbitrary "geographical distances" in the final rule, and therefore the states

[73] North Dakota v. U.S. E.P.A., No. 3:15-CV-59, 2015 WL 5060744 at *1–2 (D.N.D. 2015) (citing 33 U.S.C. § 1369(b)(1) (1988)).
[74] *Id.* at *2 (citing Friends of the Everglades v. U.S. EPA, 699 F.3d. 1280, 1287 (11th Cir. 2012)).
[75] *See* Wright v. North Carolina, 415 U.S. 936, 936–38 (1974) (Douglas, J., dissenting) (arguing for a writ of certiorari).
[76] North Dakota v. U.S. E.P.A., No. 3:15-CV-59, 2015 WL 5060744 at *6 (citing 5 U.S.C. § 553(b)–(c)).

lacked adequate notice of this type of definitional change.[77] Because the final rule is not a "logical outgrowth" of the proposed rule, the district court held that it does not comply with the administrative procedure guidelines for issuing final rules.[78]

Meanwhile, the Sixth Circuit echoed the district court in its own finding that the question of authority by petitioner states has merit.[79] The distance limitations, the majority wrote, are "facially suspect" and not a "logical outgrowth."[80] They concluded that the respondent agencies failed to provide persuasive rebuttals and therefore, the arguments by petitioner states would likely succeed on their merits.[81] This ultimately contributed to the finding by the Sixth Circuit that a preliminary injunction is prudent.

Meanwhile, Dave Owen, professor at the University of California, Hastings College of Law suggests that considering the distance limitations unlawful is a bit ironic.[82] He points out that the distance limitations are a bright line rule that actually limit the jurisdiction of the agencies, rather than expand it, as the petitioner states argue the WOTUS rule ultimately does.[83] Applying "ecological and hydrological concepts" to determine jurisdiction would not only allow for some waters beyond the distance limitation to be subject to the CWA, but it is also vague and less predictable.[84] In fact, Professor Owen noted that some environmental groups want the geographical limitations excised because they limit the protection of waters that are not categorically included and are outside the geographical limitations, but may nevertheless have a

[77] *Id.* at *6.
[78] *Id*. at *6 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007)).
[79] In re E.P.A., 803 F.3d 804, 807 (6th Cir. 2015).
[80] *Id*. at 807.
[81] *Id*. at 807-08.
[82] Dave Owen, *The Irony of the Sixth Circuit's Clean Water Rule Stay*, L. PROFESSORS BLOG NETWORK: ENVTL. L. PROF BLOG (October 9, 2015), http://lawprofessors.typepad.com/environmental_law/2015/10/the-irony-of-the-sixth-circuits-clean-water-rule-stay.html.
[83] *Id*.
[84] *Id*.

significant nexus to a covered body of water.[85] In the end, the petitioner states could end up striking part of the rule that does not necessarily reduce government regulation, all the while increasing confusion that would be, at least slightly, mitigated by the bright line geographical limitation clause.

On the other hand, the American Farm Bureau Federation (AFBF) is calling for Congress to take action and "Ditch the Rule."[86] The AFBF claims that farm production will be stifled because the EPA may regulate every puddle, pond, and ditch as a WOTUS.[87] They fear that "building a fence across a ditch, applying fertilizer or pesticides, or pulling weeds could require a federal permit.[88] However, the final rule does not seem to support this claim, nor does it purport to regulate these types of waters if they lack a significant nexus.[89]

Ultimately there is some irony at play in the arguments, which may allude to just how technical and confusing a jurisdictional determination under the old WOTUS definition really was.[90] If this is the case, it could be argued that the litigation of the WOTUS rule may be, at least in part, political. It is possible that a majority of states have joined the fight against the WOTUS rule, not because it is an overreach of authority, but because of political tensions between the states and government regulation. Of the thirty states involved in the litigation, only five (Alaska, Colorado, Missouri, Montana, and West Virginia) have Governors who are Democrats, and of those five, only Colorado has a majority (51%) of Democrats in its legislature.[91] The Republican Party is not ashamed to say that they dislike the EPA and environmental regulation; in fact, the

---

[85] *Id.*
[86] *It's Time to Ditch the Rule*, AMERICAN FARM BUREAU FED'N, http://ditchtherule.fb.org/custom_page/its-time-to-ditch-the-rule/#more-26 (last visited Jan. 6, 2016).
[87] *Id.*
[88] *Id.*
[89] 40 C.F.R. § 122.2 (2015) (subsection (1) of the Waters of the United States definition).
[90] *Id.*
[91] *2016 Governors and Legislatures*, MULTISTATE.COM, https://www.multistate.com/state-resources/governors-legislatures (last visited Jan. 5, 2016).

Republican platform includes a sub-heading titled "Reining in the EPA," under which the party claims that environmental regulation discourages new investment and stifles job creation.[92] Understanding these conservative values puts the WOTUS rule litigation into political perspective.

V. Conclusion

The WOTUS rule is an attempt by the EPA to clarify the scope of the CWA and provide some much-needed predictability to jurisdictional determinations under the CWA.[93] The EPA has added a number of new categories and specifications to the definition in light of three Supreme Court cases and a scientific report.[94] Since the rule was finalized, two courts have issued injunctions to stay the rule, as least until jurisdictional issues are solved. The courts agree that a preliminary injunction is applicable for a number of reasons, including that the states would likely win on the merits.[95] However, the courts have yet to decide which court has jurisdiction and, even then, the WOTUS rule may yet reach the Supreme Court on appeal.[96] It remains to be seen whether the arguments made by petitioner states will hold water under stricter scrutiny once the jurisdictional issue is settled.

---

[92] *Republican Platform: America's Natural Resources*, GOP.COM, https://www.gop.com/platform/americas-natural-resources/ (last visited Jan. 6, 2016).
[93] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,054-57 (Aug. 28, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).
[94] *Id*.
[95] North Dakota v. U.S. E.P.A., No. 3:15-CV-59, 2015 WL 5060744 at *3 (D.N.D. 2015); In re E.P.A., 803 F.3d 804, 807 (6th Cir. 2015).
[96] Owen, *supra* note 79.