

## NOTE

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# DEFINING FAIR NOTICE: LOGICAL OUTGROWTH DOCTRINE APPLIED TO THE WATERS OF THE UNITED STATES

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### INTRODUCTION

American navigable waters are an important and strategic natural resource. Exploration, commerce, and navigation marked the early water history of the United States.<sup>1</sup> In the nineteenth century, Congress passed statutes supporting the public right to exploration, commerce, and navigation.<sup>2</sup> By the twentieth century, the focus of navigable water regulation shifted to pollution control. Congress passed a series of water pollution acts culminating in the Federal Water Pollution Control Act Amendments of 1972, which included the Clean Water Act (CWA).<sup>3</sup> In order to support a pollution control policy, the CWA prohibits, *inter alia*, discharge of any dredge or fill material into navigable waters,<sup>4</sup> which is further defined as “waters of the United States.”<sup>5</sup>

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1 The Supreme Court acknowledged the need for a broad definition of “navigable waters,” and in 1851 it expanded federal jurisdiction beyond the traditional, limited English definition of “navigable waters.” See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 464 (1851).

2 See, e.g., Rivers and Harbors Act, ch. 425, §§ 9–20, 30 Stat. 1121, 1151–55 (1899) (version codified as amended at 33 U.S.C. §§ 401, 403–04, 406–09, 411–16, 418, 502, 549(a), 686–87 (2012)).

3 See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1376); see also *Rapanos v. United States*, 547 U.S. 715, 787 (2006) (Stevens, J., dissenting) (describing the history of the Clean Water Act).

4 See 33 U.S.C. § 1311.

5 *Id.* § 1362(7).

In the years following the passage of the CWA, the U.S. Army Corps of Engineers, historically the lead federal government proponent for navigation, defined the phrase “waters of the United States” broadly.<sup>6</sup> By 2000, the Corps’ definition was so broad that the Supreme Court issued two decisions sharply curtailing the definition of waters of the United States.<sup>7</sup> In 2014, the Corps of Engineers and Environmental Protection Agency (EPA) sought to bring clarity to the scope of “waters of the United States” through notice-and-comment rulemaking (“Proposed Rule”).<sup>8</sup> On June 29, 2015, the agencies published a joint final rule (“Final Rule”)<sup>9</sup> that immediately prompted lawsuits across the entire country.<sup>10</sup>

The legal challenges to the Final Rule seek to invalidate the regulation on both procedural and substantive grounds.<sup>11</sup> Procedurally, the petitioners will likely challenge whether the final rule is a logical outgrowth of the proposed rule. This current legal controversy provides a convenient backdrop to propose a new method to analyze logical outgrowth. This Note will use the Proposed and Final Rule as an administrative law case study. Part I will review the historical development of logical outgrowth doctrine. Logical outgrowth is a fact-specific inquiry. There does not exist, however, a categorical framework to help courts and agencies with evaluating agency actions. Part II proposes a new categorical framework to evaluate logical outgrowth. This Note argues that it is beneficial to group similar agency procedural cases in order to analyze agency actions and avoid defects in the procedural process. The goal, simply, is to solve problems. Part III returns to our case study and applies the newly developed framework to the waters of the United States Final Rule and argues that the Final Rule fails by applying the procedural framework established in Part II. Finally, Part IV reviews the substantive law that courts will eventually confront and argues that the Final Rule is substantively within the authority Congress delegated to the Corps of Engineers and the EPA.

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6 See *Rapanos*, 547 U.S. at 724 (plurality opinion) (first citing Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324–25 (July 25, 1975) (to be codified at 33 C.F.R. pt. 209); then citing Permits for Discharges of Dredged or Fill Material into Waters of the United States, 42 Fed. Reg. 37,144, 37,144 (July 19, 1977) (to be codified at 33 C.F.R. pt. 323)).

7 See *id.* at 724–26 (first citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); then citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001)).

8 See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 400).

9 See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,073–101 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 400).

10 See, e.g., *In re EPA*, 803 F.3d 804, 805–06 (6th Cir. 2015).

11 See *id.* at 807 (concluding that petitioners “demonstrated a substantial possibility of success on the merits” and “the rulemaking process . . . is facially suspect”).

## I. LOGICAL OUTGROWTH DOCTRINE

The Administrative Procedure Act (APA), passed in 1946, is the default statute for federal agencies promulgating regulations.<sup>12</sup> As originally conceived, the APA provided for either formal or informal rulemaking.<sup>13</sup> Yet, the Supreme Court, in *United States v. Florida East Coast Railway Co.*, read the formal rulemaking provision very narrowly and since that case, virtually all federal rulemaking, and attendant judicial review, operates in the informal rulemaking channel.<sup>14</sup>

Section 553(b), the section governing APA informal rulemaking, requires federal agencies contemplating rulemaking to publish a “[g]eneral notice” in the *Federal Register*.<sup>15</sup> Furthermore, the section requires that the agency publish the “terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>16</sup> Next, the agency receives comments from the public on the substance of the proposed rule (hence the common title: notice-and-comment rulemaking).<sup>17</sup> Finally, the agency publishes a final rule incorporating the technical expertise and wisdom of both the agency itself and the public comment.<sup>18</sup> Logical outgrowth doctrine is a judicial interpretation of the proper fit between the proposed and final rules.

The doctrine states that an agency’s final rule should be a logical outgrowth of the proposed rule.<sup>19</sup> This requirement prohibits agencies from using the comment period as a “carte blanche to establish a rule contrary to its original proposal.”<sup>20</sup> But logical outgrowth is not a straightjacket on the

12 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59, 701–06 (2012)).

13 Informal rulemaking is governed by 5 U.S.C. § 553(b). Formal rulemaking is triggered by language in 5 U.S.C. § 553(c), stating that when “rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.” *Id.*

14 See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 237–38 (1973) (holding that because Congress specifically chose the language “on the record after opportunity for an agency hearing” in the APA, other statutory language that was similar, for example, “after hearing,” but not the same would not trigger sections 556 and 557 of the APA (quoting 5 U.S.C. § 553(c)); see also *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–57 (1972) (noting that sections 556 and 557 of the APA are only triggered by specific language of 553(c)). Even in the years immediately following *Florida East Coast Railway* and *Allegheny-Ludlum Steel Corp.*, scholars recognized the decreased viability of formal rulemaking. See, e.g., Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 791–92 (1974).

15 5 U.S.C. § 553(b).

16 *Id.* § 553(b)(3).

17 *Id.* § 553(c).

18 *Id.*

19 The first case using the logical outgrowth language was *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974). Cases prior to *South Terminal Corp.* understood that agencies could not act arbitrarily, but acknowledged there must be some termination point in the proceedings. See, e.g., *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 27–28 (D.C. Cir. 1954).

20 *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985).

agency—it is a balancing of an agency’s need for flexibility and the public’s need for fair notice.<sup>21</sup> It would be rather absurd to require agencies to initiate a new round of notice-and-comment rulemaking whenever a minor change occurs between the proposed rule and the final rule.<sup>22</sup> Otherwise an agency would not be able to learn from public comments. Ultimately, the objective of logical outgrowth is fair notice without imposing an unreasonable burden on the agency.<sup>23</sup>

If an agency fails to follow proper procedure, the judicial remedy could be a complete remand of the rule, a partial remand of the rule, or a remand without vacating the rule.<sup>24</sup> The default remedy for procedural errors is to remand the rule to the agency for compliance with the APA’s procedural requirements.<sup>25</sup> A procedural defect is a separate inquiry from the agency’s substantive interpretation of the authorizing statute or the constitutionality of the statute itself.<sup>26</sup> In some logical outgrowth cases, a court will only remand the elements of the rule that did not follow proper process.<sup>27</sup> In some instances, a court will remand the rule for an agency to follow proper procedure, but leave the rule in place.<sup>28</sup> Courts understand that in some instances a complete remand would inflict large social costs, or private parties have a reliance interest in what they thought the proposed rule would be.<sup>29</sup> The upshot here is that courts have some flexibility in crafting a remedy, but generally a defect in the process will only delay, not stop, a regulation.

The term logical outgrowth represents a relatively uncontroversial proposition—a final rule should be logically connected to its predecessor—but without additional explanation the phrase serves little analytical purpose. Courts of appeals have attempted to flesh out the doctrine by adding explanatory language to the amorphous concept of logical outgrowth. Thus, courts will routinely state that a final rule will be valid if interested parties “should have anticipated” that a change from the proposed to final rule was possi-

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21 See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (“The object, in short, is one of fair notice.”).

22 See *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

23 See *Long Island Care at Home, Ltd.*, 551 U.S. at 174.

24 See Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 637–40 (1994) (describing a mini-survey of various procedural reversal outcomes in a D.C. Circuit calendar year).

25 See Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 294 (2003).

26 *Id.* at 293–94 (arguing that there is a distinction between an agency failing to substantively administer the law and a procedural defect).

27 See *infra* subsection II.B.2.

28 See Levin, *supra* note 25, at 294–95 (citing *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995)); see also Wald, *supra* note 24, at 638 n.72 (discussing cases where rule remained in place).

29 See Levin, *supra* note 25, at 298–303.

ble.<sup>30</sup> Another common formulation is that the interested public does not have to “divine . . . the unspoken thoughts” of the agency.<sup>31</sup> Of course, it is one thing to repeat these phrases and entirely another to discern any applicable guidance for future courts and agencies searching for useful guidance.<sup>32</sup> This Note argues that there are workable categories in which to segregate different types of logical outgrowth cases. Part II is descriptive and seeks to distill workable categories of logical outgrowth by analyzing historical logical outgrowth cases.

## II. LOGICAL OUTGROWTH CATEGORIES

Defining the contours of logical outgrowth doctrine is difficult, despite more than four decades of cases affirming and reversing agency rules. Before attempting to outline workable categories, it is necessary to acknowledge the limitations of such an exercise. Logical outgrowth is inherently a fact-based, case-by-case analysis; a proposed rule is either procedurally valid or not and each iteration of logical outgrowth thereafter presents a new rule and a new notice-and-comment rulemaking process. This makes logical outgrowth susceptible to a lack of clarity from case to case, and a doctrine about which it is difficult to draw any generalities.<sup>33</sup>

The value of this inquiry is not found in generalizations about particular rules. Instead, the successes and failures of agency rulemaking processes are sufficiently similar across time to allow for categorical grouping and thus assist agencies, the public, and courts in avoiding the pitfalls of logical outgrowth. Part II’s methodology is to identify and analyze cases, often but not exclusively, from the Court of Appeals for the D.C. Circuit, in order to group the success or failure of logical outgrowth arguments by type.<sup>34</sup> Section II.A defines categories where an agency is able to demonstrate that its final rule was a logical outgrowth of the proposed rule. Section II.B defines categories where the agency fails to demonstrate that it gave fair notice and the court determined there was no logical outgrowth.

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30 *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

31 *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1260 (D.C. Cir. 2005) (first quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991); then quoting *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000)).

32 For example, some scholars suggest agencies only need to follow the four corners of the APA without providing additional, descriptive guidance. See Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 223–24 (1996).

33 Creating tests or standards that are based on concepts like totality of the circumstances or the reasonable person, an appellate judge may just be engaging in glorified fact-finding. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180–81 (1989). Obviously, logical outgrowth is not described in totality of the circumstances language, but the fact-specific, case-by-case assessments to determine logical outgrowth are, perhaps, not far off.

34 See generally Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131 (2013) (describing why and how the D.C. Circuit’s caseload is disproportionately administrative law).

### A. *Categories Where Courts Affirm Logical Outgrowth*

#### 1. Agency Contemplating Specific Change

Courts will uphold a final rule if the notice of proposed rulemaking (NPRM) expressly asks for comment on a particular issue or otherwise makes it clear that an agency was contemplating a specific change.<sup>35</sup> This category of logical outgrowth is the simplest expression of the doctrine. If an agency asks for public comment on an issue and then modifies its final rule based on the comments, then logical outgrowth applies. In *Owner-Operator Drivers Association v. Federal Motor Carrier Safety Administration*, the agency proposed a rule for long-haul truckers that would allow them to split their ten-hour rest period into two segments, including one of at least eight hours.<sup>36</sup> The petitioners protested that the notice was too broad and unspecific to allow them to comment effectively. However, the notice said that the agency “*will consider a variety of possible changes . . . including but not limited to: . . . establishing a minimum time for one of the two ‘splits,’ such as 5 hours, 8 hours, or some other appropriate level.*”<sup>37</sup> The final rule adopted the eight-hour requirement.<sup>38</sup> This represents the plainest logical outgrowth category: the agency offers options, the public provides feedback, and the agency selects one of the options. As the court in *Owner-Operator Drivers Association* stated, the final rule was “reasonably foreseeable.”<sup>39</sup>

#### 2. Partial Abandonment of Proposed Rule

Courts will affirm a partial abandonment of a proposed rule if the agency provides some notice that it could be persuaded that various provisions are unnecessary.<sup>40</sup> Stated another way, the public has fair notice when the agency proposes a broad rule at the outset, announces it is open to a smaller scope, and ultimately chooses a smaller scope than the proposed rule. A case illustrative of this proposition is *Association of American Railroads*

35 See *Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 210 (D.C. Cir. 2007); see also *Agape Church, Inc. v. FCC*, 738 F.3d 397, 412 (2013) (holding that FCC “sunset” rule was a logical outgrowth when proposed rule gave public notice that a viewability rule was in danger of being phased out, i.e., a sunset provision).

36 *Owner-Operator Indep. Drivers Ass’n*, 494 F.3d at 209.

37 *Id.* at 209–10 (emphasis in original) (quoting Hours of Service of Drivers, 70 Fed. Reg. 3339, 3349–50 (Jan. 24, 2005) (to be codified at 49 C.F.R. pts. 385, 390, 395)). The petitioners also challenged that the second rest period requirement was not indicated, but again the notice clearly covered this possibility as well. See *id.*

38 *Id.* at 209.

39 *Id.* at 210 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)); see also *City of Portland v. EPA*, 507 F.3d 706, 715 (2007) (stating that the EPA asked specific questions in its notice that would have led cities to believe that the final rule would implement the substance of the specific questions).

40 See *Ass’n of Am. R.R.s. v. Dep’t of Transp.*, 38 F.3d 582, 589 (D.C. Cir. 1994) (per curiam).

*v. Department of Transportation*.<sup>41</sup> There, the Federal Railroad Administration (FRA) issued a final rule covering a limited number of railroad safety provisions and stated that a more general Occupational Safety and Health Administration (OSHA) regulation would cover any and all other bridge safety matters.<sup>42</sup> The petitioners alleged that the FRA did not give sufficient notice that it was considering using OSHA safety regulations.<sup>43</sup> The court reasoned that the FRA chose to promulgate a narrower scope of regulation than it originally proposed, the FRA gave notice it might use the OSHA rule, and, therefore, the court determined the rule was a logical outgrowth.<sup>44</sup> Thus, the court affirmed a final rule that included a smaller scope than what was originally proposed.<sup>45</sup> Importantly, the agency gave warning that it was open to reducing its scope.<sup>46</sup>

Courts will also uphold an agency's final rule that elects not to adopt aspects of the proposed rule and the agency's requested comment on feasibility or discarding an element, as was the case in *Miami-Dade County v. U.S. EPA*.<sup>47</sup> Pursuant to the Safe Drinking Water Act, the EPA regulated parameters for state underground injection control sites (essentially where pollutants can enter the drinking water supply).<sup>48</sup> The proposed rule offered two different options for regulating municipal disposal wells and proposed a "non-endangerment demonstration," which would have required the regulated entity to show that the well did not exceed drinking water standards.<sup>49</sup> In its final rule, the EPA abandoned the non-endangerment requirement because the other elements of the final rule would obviate the concern the non-endangerment requirement sought to address.<sup>50</sup> While the proposed rule did not give specific notice that the EPA was considering abandoning the non-endangerment requirement, the court recognized that comments on a different (but similar) element of the proposed rule demonstrated the irrelevance of the non-endangerment rule.<sup>51</sup> The petitioners demonstrated, through their comments, that non-endangerment was not effective and thus

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41 *See id.*

42 *See id.* at 584–85.

43 *See id.* at 588.

44 *See id.* at 589.

45 The court's conclusion was not without controversy. Judge Henderson claimed that the FRA's original notice of proposed rulemaking did not contemplate enforcement of OSHA standards by OSHA and that such a formulation "stretched [logical outgrowth] almost to its breaking point." *Id.* (Henderson, J., concurring).

46 *Id.* (majority opinion).

47 529 F.3d 1049, 1059–62.

48 *See id.* at 1052.

49 *See id.* at 1054 (citing Revision to Federal Underground Injection Control (UIC) Requirements for Class I—Municipal Wells in Florida, 65 Fed. Reg. 42,234, 42,244 (July 7, 2000) (to be codified at 40 C.F.R. pt. 146)).

50 *See id.* at 1057.

51 *See id.* at 1060–62.

they should have had notice that an element of the rule would be abandoned.<sup>52</sup>

Clearly, an agency cannot abandon a proposed rule in favor of an altogether new approach during the comment period without some sort of notice. The court in *Miami-Dade County* determined that the administrative record demonstrated that the parties had notice through their comments on a similar element of the proposed rule.<sup>53</sup> The agency in *Association of American Railroads* gave notice it was considering a partial abandonment of its rule.<sup>54</sup> Thus, it is not enough that an agency might refrain from taking a specific step, but there must also be fair notice that partial abandonment was on the table.<sup>55</sup>

### 3. Final Rule Within Proposed Range of Alternatives

Courts will find that a final rule was a logical outgrowth where the final rule was within a range of foreseeable alternatives, as demonstrated in *City of Waukesha v. EPA*.<sup>56</sup> There, the EPA, pursuant to the Safe Drinking Water Act, issued a Notice of Data Availability (NODA) to update its drinking water rules for the appropriate maximum contaminant level (MCL) for four pollutants: two radium isotopes, a naturally occurring uranium, and beta/photon emitters.<sup>57</sup> In 1976, the EPA had established MCLs for the radium isotopes and beta/photon emitters, but not for uranium.<sup>58</sup> The NODA proposed to maintain the 1976 levels for radium and beta/photon emitters and proposed to set the MCL for the naturally occurring uranium at 20, 40, or 80 micrograms per liter (“mg/L”).<sup>59</sup> The final rule set the MCL at 30 mg/L.<sup>60</sup> At oral argument the petitioners conceded that they could not show any substantial difference between the final rule of 30 mg/L and the proposed rule’s 20 or 40 mg/L level.<sup>61</sup> This intuitively makes sense because when the EPA proposed 20, 40, or 80 mg/L it essentially gave notice that it could reasonably choose any number in the 20 to 80 mg/L ranges. Thus, the agency met the logical

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52 *See id.* at 1060.

53 *Id.* at 1060–62.

54 *Ass’n of Am. R.Rs. v. Dep’t of Transp.*, 38 F.3d 582, 589 (D.C. Cir. 1994) (per curiam).

55 *See also Am. Iron & Steel Inst. v. U.S. EPA*, 886 F.2d 390, 400 (D.C. Cir. 1989) (holding that “a simple retreat to the status quo ante can properly be viewed as a ‘logical outgrowth’” (citing *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1242–43 (D.C. Cir. 1988))).

56 320 F.3d 228 (D.C. Cir. 2003).

57 *See id.* at 231. The Safe Drinking Water Act establishes a slightly different notice-and-comment regime from the default Notice of Proposed Rulemaking, but the court noted that other cases held logical outgrowth to be applicable and adopted this reading of logical outgrowth. *See id.* at 245.

58 *Id.* at 231–32. The 1976 levels were: 5 picocuries/Liter for the radium isotopes and 4 millirems for the beta/photon emitters. *Id.*

59 *Id.* at 232.

60 *Id.*

61 *See id.* at 246.



outgrowth burden when it selected one option within a range of options it originally published for public comment.

A second example comes from *Northeast Maryland Waste Disposal Authority v. EPA*.<sup>62</sup> There, the EPA proposed, under its Clean Air Act authority, to regulate three distinct categories of small municipal waste combustion (MWC) units: Class A, for nonrefractory units with capacity greater than 250 tons per day; Class B, for refractory units in plants of the same capacity; and Class C, for all plants at or under the 250 tons-per-day threshold.<sup>63</sup> The final rule collapsed three categories into two: Class I, for MWC units in large capacity plants; and Class II, for MWC units in small capacity plants.<sup>64</sup> After publishing the proposed rule with three categories, the EPA received negative comments opposing different categories, reevaluated the categorization scheme, and ultimately consolidated its categories.<sup>65</sup> Condensing three categories into two was within the foreseeable range of alternatives. The court concluded that the EPA specifically invited comment on the different categories and numerous parties commented on the possible range of alternatives.<sup>66</sup>

This category should not be conflated with our first category (agency contemplating specific change) because the agency did not specifically identify which alternative it would select; only that a selection from within the range was possible. This category is also distinguished from the second category (partial abandonment) because no substance is actually abandoned; the agency only selects a course of action (or inaction).

#### 4. Harmless Error

In some instances, a court will affirm an agency final rule, even when the final rule is not a logical outgrowth, if the result of the final rule is a harmless error.<sup>67</sup> This category stems not from section 553 of the APA, but from the judicial review provision in section 706.<sup>68</sup> The underpinning of harmless error is that the plaintiff must state that prejudice flowed from the agency's error.<sup>69</sup> There are two categories of procedural harmless error. The first category is when the receipt of comments would not have changed the

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62 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam). *But cf.* *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("Agency notice must describe the range of alternatives being considered with reasonable specificity.").

63 *See* *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d at 941.

64 *See id.* at 951. Large capacity were all plants exceeding an aggregate of 250 tons per day and small capacity plants were all those 250 tons per day and below. Classes A and B were condensed into Class I. *Id.*

65 *Id.*

66 *See id.* at 952.

67 *See* *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

68 *See* 5 U.S.C. § 706 (2012) ("[D]ue account shall be taken of the rule of prejudicial error.").

69 *See id.*

agency's final outcome, and the second occurs when the invalid portion of the final rule's impact was so minor that a second round of comment would not accomplish anything.<sup>70</sup> In *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, OSHA proposed engineering controls for the lead industry.<sup>71</sup> In the final rule, it changed its position and allowed the industry some flexibility in implementing the engineering controls.<sup>72</sup> The court applied a harmless error rule, albeit without much explanation, to say that OSHA would have taken the same action regardless of the petitioner's comments.<sup>73</sup>

*First American Discount Corp. v. Commodity Futures Trading Commission* illustrates the second category.<sup>74</sup> The court stated that the portion of the final rule to which the petitioner objected was merely an alternative to a primary requirement.<sup>75</sup> The primary requirement was lawful and the petitioner had opportunity to comment on the primary requirement.<sup>76</sup> Critically, the petitioner was free not to use the alternative requirement of the regulation.<sup>77</sup> A party claiming error on the part of an agency must state a prejudicial harm. Both cases demonstrate that courts will use their reasoned judgment to determine whether the error was harmless.

## 5. Actual Notice Cures Defect

Finally, when a party has actual notice of an agency's change between proposed and final rules, then actual notice will cure the defect in the notice-and-comment rulemaking.<sup>78</sup> This category derives, in part, from section 552 of the APA, which states that "[e]xcept to the extent that a person has *actual and timely* notice . . . thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."<sup>79</sup> Courts distinguish actual notice received from an agency from notice received by participation in the comment process.<sup>80</sup> Thus, the actual notice must come from the agency—for example by participation in meetings with an agency—and not from monitoring other comments in the public record.<sup>81</sup> There is no requirement to

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70 See Arnold Rochvarg, *Adequacy of Notice of Rulemaking Under the Federal Administrative Procedure Act—When Should a Second Round of Notice and Comment Be Provided?*, 31 AM. U. L. REV. 1, 18–20 (1981).

71 647 F.2d 1189, 1223–24 (D.C. Cir. 1980).

72 See *id.* at 1225.

73 See *id.*

74 222 F.3d 1008 (D.C. Cir. 2000).

75 *Id.* at 1015–16.

76 *Id.* at 1016.

77 See *id.*

78 See *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

79 5 U.S.C. § 552(a) (2012) (emphasis added).

80 See *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

81 See *Small Refiner*, 705 F.2d at 549 (“As a general rule, EPA must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.”).

monitor comments from other members of the public. In sum, the first three categories demonstrate proper procedures by agencies resulting in favorable outcomes. The last two categories demonstrate instances where there is a defect in the procedural process, but the defect is not fatal to the agency. Section II.B covers the different categories where an agency action fails logical outgrowth doctrine.

### B. Categories Where Agency Action Reversed

#### 1. Final Rule Presents “First Opportunity” for Comment

The starkest example of a logical outgrowth failure is when an agency’s final rule is entirely disconnected from any notice in the proposed rule and thus a new round of notice-and-comment would provide the first opportunity or occasion for the public to comment on the rule.<sup>82</sup> In *Daimler Trucks North America LLC v. EPA*, the EPA sought to promulgate regulations governing non-conformance penalties, which allowed heavy-duty motor vehicle manufacturers to pay a penalty if their technology lagged behind the EPA’s standards.<sup>83</sup> One component of the proposed rule was whether “substantial work” was required to meet the penalty emission standard.<sup>84</sup> The final rule redefined the substantial work requirement in three ways and both parties agreed that the EPA changed the substantial work criterion.<sup>85</sup> The court conclusively stated that the EPA “*did not propose, and offered no indication that it was contemplating, amendments to the ‘substantial work’ criterion.*”<sup>86</sup> From this conclusion it was not difficult to find there was no logical outgrowth. When the agency added entirely new definitions to its final rule, it no longer provided fair notice to the public and a new notice-and-comment round would have been a first opportunity for comment.

A second example comes from *Kooritzky v. Reich*.<sup>87</sup> The Department of Labor issued immigrant visas for aliens who had a labor certification from an employer, a process that took substantial time to complete and therefore employers were allowed to substitute workers before the Department issued a visa.<sup>88</sup> The Department proposed a rule that would have modified the priority date determining where the employer stood in the queue.<sup>89</sup> The NPRM stated a relatively narrow scope: it claimed to only be implementing technical changes, but it would not substantively alter its existing rule.<sup>90</sup> Instead, the final rule ended the ability of the employer to substitute alien workers, a

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82 See *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013).

83 See *id.* at 96.

84 *Id.* at 98.

85 See *id.* at 99.

86 *Id.* at 100 (emphasis added).

87 17 F.3d 1509 (D.C. Cir. 1994).

88 See *id.* at 1510–11.

89 See *id.* at 1512.

90 See *id.*

change nowhere previewed in the proposed rule.<sup>91</sup> The proposed rule did not include the language of the final rule, did not propose abolishing the employer substitution, and did not mention any explanations for doing the proceeding actions.<sup>92</sup> In sum, the “Department’s interim final rule [did] not even come close to complying with the notice requirement of [the APA].”<sup>93</sup>

The first opportunity category represents the quintessential failure by the agency to offer the public an opportunity to comment on a regulation. The *Kooritzky* court deemed such an action insufficient because “[s]omething is not a logical outgrowth of nothing.”<sup>94</sup> Or, colorfully put by a different court, “[W]e have refused to allow agencies to use the rulemaking process to pull a *surprise switcheroo* on regulated entities.”<sup>95</sup> This category is the clearest example of logical outgrowth failure.

## 2. Final Rule Is Overinclusive

Courts will find a logical outgrowth failure when the final rule covers a broader scope than originally proposed; essentially the final rule is overinclusive compared to the proposed rule. *American Iron and Steel Institute v. EPA* is instructive.<sup>96</sup> In that case, the EPA proposed to regulate certain manufacturing processes in the steel industry.<sup>97</sup> The EPA was under court order to promulgate regulations for various categories and, as relevant here, one was “category 19 . . . ‘Iron and Steel Manufacturing’” and the other was “category 23 . . . ‘Ferroalloy Manufacturing,’” which the court termed “specialty steel.”<sup>98</sup> The proposed rule put forward guidelines for Iron and Steel Manufacturing (Category 19), but did not mention specialty steel, giving the false impression it would not be covered by this regulation.<sup>99</sup> The interim final rule covered *three* specialty steel processes.<sup>100</sup> Essentially, the EPA attempted to extend comments it received for one category to two categories. The court concluded that by creating an overinclusive rule, the EPA did not provide the public an opportunity to comment on specialty steel.

A second example comes from *American Frozen Food Institute v. Train*.<sup>101</sup> Pursuant to its authority under the Federal Water Pollution Control Act Amendments, the EPA published a preliminary document listing only three pollutants that it would regulate for the potato industry.<sup>102</sup> The final rule

91 *See id.*

92 *See id.* at 1513.

93 *Id.*

94 *Id.*

95 *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (emphasis added); *see also infra* note 126 (discussing *id.*).

96 568 F.2d 284 (3d Cir. 1977).

97 *See id.* at 290.

98 *Id.* at 291.

99 *See id.*

100 *Id.*

101 539 F.2d 107 (D.C. Cir. 1976).

102 *Id.* at 135.

included a fourth pollutant, fecal coli, that was not included on the original list.<sup>103</sup> The fourth pollutant did not receive public comment and the EPA attempted to extend its regulation to cover the fourth pollutant.<sup>104</sup> The court held there was no logical outgrowth, but only as to the fourth pollutant.<sup>105</sup> Thus, a final rule will fail when it includes a broader set than what was originally proposed.

This category, however, usually has a different remedy. In both cases, the remedy was limited to the element in the rule that was improperly promulgated. In *American Frozen Food*, only the fecal coli pollutant was remanded to the agency for proper notice-and-comment procedures.<sup>106</sup> In *American Iron and Steel*, the court remanded only the portion of the rule pertaining to the special steel category.<sup>107</sup> Thus, if an agency follows proper procedure for part of the rule, but expands the regulated set, then a court will only remand the portion of the rule with the procedural defect.

### 3. Unexpressed Intention of the Agency

A final rule is not a logical outgrowth of the proposed rule when the final rule places a special emphasis, more detail, or a different emphasis, on an element of the proposed rule; an agency cannot have an unexpressed intention. In *Shell Oil Co. v. EPA*, the EPA proposed a rule for the criteria to list a solid waste as a hazardous waste (a listing requirement).<sup>108</sup> In its notice, the EPA described the listing requirement as playing a “largely supplementary function.”<sup>109</sup> Instead, the final rule placed heightened emphasis on the hazardous waste listing requirement. The EPA’s final rule explicitly acknowledged this; the court stated “the final criteria for listing are ‘considerably expanded and more specific’ than those proposed.”<sup>110</sup> The court explained that the proposed rule did not emphasize the complex listing system adopted in the final rule, and vacated the rule.<sup>111</sup> Thus, where an element of the proposed rule takes on greatly-expanded and specific emphasis in the final rule, it will not be a logical outgrowth.

In *Horsehead Resource Development Co. v. Browner*, the EPA proposed a rule to regulate wet cement process kilns.<sup>112</sup> The agency chose to regulate kilns based on their combustion efficiency and created three tiers under which to

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103 *Id.*

104 *Id.*

105 *Id.*

106 *See id.*

107 *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977).

108 950 F.2d 741, 748 (D.C. Cir. 1991) (per curiam).

109 *Id.* at 751 (quoting Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33,084, 33,106 (May 19, 1980) (to be codified at 40 C.F.R. pt. 261)).

110 *Id.* at 752 (quoting Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed. Reg. at 33,106).

111 *See id.*

112 16 F.3d 1246, 1266 (D.C. Cir. 1994) (per curiam).

classify the kilns (Tiers I, II, and III).<sup>113</sup> In the proposed rule, the EPA gave notice that Tier III would include an emission standard based on total hydrocarbon emissions.<sup>114</sup> It did not give any forewarning that it would expand Tier III to include not only an emission standard based on total hydrocarbons, but also two additional requirements: to identify principal organic hazardous constituents and conduct an onsite health assessment.<sup>115</sup> The court said that the omission of the dual-baseline requirements for kilns was “critical because notice of individual parts of a proposed rule is not necessarily notice of the whole.”<sup>116</sup> In the proposed rule, Tier III had only one element. The final rule expanded Tier III to include three elements. Thus, the agency improperly added more detail to Tier III and failed logical outgrowth.

Finally, in *CSX Transportation, Inc. v. Surface Transportation Board*, the Surface Transportation Board (STB) proposed to allow the rail industry to suggest comparison groups drawn from the past year of rate data in order to determine benchmark figures for rail rates.<sup>117</sup> The final rule, instead, allowed the industry to draw from the past *four* most recent years of data.<sup>118</sup> Like the previous cases in this category, the petitioners argued that the NPRM invited comment on drawing comparison groups from the most recent year, but gave no notice that a broader data set would be considered.<sup>119</sup> The court acknowledged that the “final rule did not amount to a complete turnaround from the NPRM.”<sup>120</sup> Yet, fair notice was lacking because there was no way for interested parties to anticipate that STB would expand the data set from one year to four years.<sup>121</sup> Thus, an agency cannot publish a proposed rule, modify it substantively, and put a different emphasis on elements within the final rule.

#### 4. Clarifying vs. Altering Language

A rule that proposes only to clarify an existing language, but in fact substantively alters the rule will not be a logical outgrowth. In *Allina Health Services v. Sebelius*, the Department of Health and Human Services (HHS) proposed only to clarify the formula for calculating hospital inpatient reimbursement under Medicare and Medicaid.<sup>122</sup> In the notice for the proposed rule the HHS stated, “[T]here should not be a major impact associated with

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113 *Id.* at 1265.

114 *See id.* at 1267.

115 *See id.* Principal organic hazardous constituents are essentially toxic organic compounds that would only be partially broken down and thus subject to EPA’s regulatory authority. *Id.* at 1265.

116 *Id.* at 1267.

117 584 F.3d 1076, 1078 (D.C. Cir. 2009).

118 *Id.*

119 *See id.* at 1080.

120 *Id.* at 1081–82. This distinguishes *CSX Transportation* from the First Opportunity for Comment category. *See supra* subsection II.B.1.

121 *See CSX Transp.*, 584 F.3d at 1082.

122 746 F.3d 1102, 1106 (D.C. Cir. 2014).

this proposed change.”<sup>123</sup> The “final rule adopt[ed] the exact opposite interpretation of the” formula, which indeed created a major financial impact on the hospital industry.<sup>124</sup> Clearly, the public did not have the opportunity to comment on the final rule and, to that end, only a few hospitals even bothered to submit comments—some number did not even understand the rule.<sup>125</sup> Thus, agencies are not allowed to propose to clarify a rule and use that as a Trojan horse to change a major rule.<sup>126</sup>

The preceding categories are not exclusive and they all rest on the basic principle of fair notice.<sup>127</sup> Part II argues that the agencies succeed and fail in sufficiently distinct ways to allow an aggregation of cases into distinct categories. This Note will test the validity of Part II by applying its framework to the waters of the United States case study in Part III.

### III. LOGICAL OUTGROWTH APPLIED TO WATERS OF THE UNITED STATES

#### A. *Proposed Rule and Final Rule*

Part III proceeds first by outlining the substance of the waters of the United States Proposed Rule. It will then cover the differences between the final rule and proposed rule. Finally, Part III will apply the categories developed in Part II in order to determine whether the waters of the United States rule is a logical outgrowth of the Proposed Rule. The case study methodology provides a ready example; the rule is detailed and complex, which provides ample examples to illustrate the Part II categories.

The proposed rule defined seven categories together constituting the waters of the United States. The first four categories constituted the traditional and longstanding definitions of “waters” and were not subject to any substantive revision. They included: (1) traditional navigable waters; (2) interstate waters; (3) territorial seas; and (4) impoundments of the United States.<sup>128</sup> Tributaries, though previously included in past regulations, would now include only those tributaries that flow into Categories 1 through 3.<sup>129</sup> The sixth category, adjacent waters, proposed a significant change from prior practice. This category previously covered adjacent wetlands, which were at

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123 *Id.* (quoting Medicare Program; Proposed Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2004 Rates, 68 Fed. Reg. 27,154, 27,416 (May 19, 2003) (to be codified at 42 C.F.R. pts. 412, 413)).

124 *Id.* at 1106–07.

125 *See id.* at 1106.

126 *See also* *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (holding no logical outgrowth when the EPA issued notice where it “proposed to codify” an interpretation it had previously used, but adopted an entirely different interpretation in the final rule).

127 *See* *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

128 *See* Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,198 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 401).

129 *See id.* at 22,198–99.

issue in the most recent Supreme Court decision on the subject,<sup>130</sup> but the proposed rule sought to cover all adjacent waters, not merely wetlands.<sup>131</sup> Categories 1 through 6 all shared the commonality that they were per se jurisdictions—the agencies presumed all categories to be waters of the United States. Finally, the proposed rule provided for a seventh, catchall, “other waters” category that included any waters determined, on a case-by-case basis, to have a significant nexus with one of the first three categories of waters.<sup>132</sup> Unlike Categories 1 through 6, Category 7 would not be per se jurisdictional.<sup>133</sup>

Also relevant to the logical outgrowth analysis, the proposed rule included a definitions section. In *Rapanos v. United States*, the most recent Supreme Court case on waters of the United States, the plurality opinion cast doubt on the proper definition of “adjacent waters.”<sup>134</sup> In order to clarify any tension post-*Rapanos*, the Proposed Rule defined “adjacent” as “bordering, contiguous or neighboring.”<sup>135</sup> The rule then further defined “neighboring” as: “waters located within the riparian area or floodplain of a water identified in [one of the first five categories], or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.”<sup>136</sup> Nowhere in the definition section, nor in the “other waters” category, is there any mention of a specific distance from a high-water mark. In fact, there is no mention of any distance from a high-water mark throughout the entire proposed rule.

The EPA and the Corps of Engineers requested specific comments on its seventh, “other waters” category.<sup>137</sup> As discussed previously in this Note, a specific request for comment was critical to surviving judicial review.<sup>138</sup> The agencies acknowledged there were several alternate approaches to the “other waters” category and they requested comment whether they could aggregate “similarly situated” waters, but this topic was the extent to which the agencies requested specific feedback.<sup>139</sup> There were three primary alternatives. First,

130 For a discussion of the characterization of adjacent wetlands and whether they fall under the scope of the Clean Water Act, see *Rapanos v. United States*, 547 U.S. 715, 739–42 (2006) (plurality opinion); see also *infra* Section IV.B.

131 Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,199.

132 *Id.* The term “significant nexus” is a term of art common throughout the three relevant Supreme Court cases on waters of the United States and will be covered in more depth. See *infra* Section IV.B.

133 Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,199.

134 See *Rapanos*, 547 U.S. at 742.

135 Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,263.

136 *Id.*

137 *Id.* at 22,215–17.

138 See, e.g., *supra* subsection II.A.1.

139 See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,214.



the agencies could determine that other waters are similarly situated in specific regions of the country.<sup>140</sup> Next, the agencies could take a mixed approach and add specific water types that would always be jurisdictional waters of the United States, while other subcategories would remain a case-by-case analysis.<sup>141</sup> Finally, the agencies requested comment on an approach not favored by the agencies: no waters would be deemed similarly situated.<sup>142</sup> In sum, the requests for comments focused on the extent to which the agencies could group waters as similarly situated. The closest the proposed rule came to suggesting a bright-line rule for other waters was that “the agencies solicit comment and information . . . to determine if there are opportunities to provide greater clarity, certainty, and predictability for establishing jurisdiction over ‘other waters.’”<sup>143</sup>

The agencies received well over one million comments on their proposed rule.<sup>144</sup> From these comments and based on “the agencies’ technical expertise and experience,”<sup>145</sup> the final rule reflected several significant changes. Categories 1 through 6 remained substantively unchanged from the proposed rule,<sup>146</sup> except to the extent that changes to the definition section, discussed below, affected the sixth category (adjacent waters).<sup>147</sup> The former seventh category (other waters) was split into two categories. The new seventh category specified five types of waters—all deemed to be similarly situated, but which would still be subject to the case-by-case analysis.<sup>148</sup> The new eighth category specified that:

[W]aters located within the *100-year floodplain* of a traditional navigable water, interstate water, or the territorial seas, and waters located within *4,000 feet* from the high tide line or the ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments, or covered tributaries may be found to have a significant nexus on a case-specific basis, but the agencies have not made a determination that the waters are “similarly situated.”<sup>149</sup>

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140 *Id.* at 22,215. For example, waters in the Central California Valley or in the Atlantic Coastal Pine Barrens could be deemed, by rule, to be similarly situated. *See id.*

141 *See id.* at 22,216. For example, prairie potholes, Carolina and Delmarva bays, and others could be added as jurisdictional categories. *Id.*

142 *See id.* at 22,217.

143 *Id.* at 22,214.

144 *See Definitions of “Waters of the United States” Under the Clean Water Act*, REGULATIONS.gov, <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OW-2011-0880> (last visited Oct. 27, 2016).

145 Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 401).

146 *See id.* at 37,073.

147 *See infra* note 150 and accompanying text.

148 *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,073. The five types of waters are: (1) prairie potholes; (2) Delmarva and Carolina bays; (3) pocosins; (4) western vernal pools in California; and (5) Texas coastal prairie wetlands. *Id.*

149 *Id.* (emphasis added).

The final rule makes one additional change of significant import to the logical outgrowth analysis. The definition of the term “neighboring” changed to include “all waters within the *100-year floodplain* of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary that is located in whole or in part within *1,500 feet* of the ordinary high water mark of that jurisdictional water.”<sup>150</sup> Similar to the “other waters” definition, the Proposed Rule did not include any distance from the high-water mark in the definition of “neighboring.”<sup>151</sup> Litigation followed closely on the heels of the final rule. Parties challenging the rule focused on the use of bright-line boundaries in the Final Rule, which did not appear in the Proposed Rule.<sup>152</sup>

### B. *Is the Final Rule a Logical Outgrowth?*

#### 1. Applying Categories Where Court Affirms Agency Action

This Section will compare the changes from the Proposed Rule to the Final Rule using the framework established in Part II. Subsection III.B.1 applies the categories affirming agency action. There are several examples within the rules illustrating the categories affirming agency action. Subsection III.B.2 applies the categories reversing agency action, and concludes that the third reversal category, termed Unexpressed Intention of the Agency, is the best fit for the joint EPA and Corps of Engineers rule.

The first affirmance category occurs when an agency requests comment on a specific change it is contemplating. This was illustrated in the Proposed Rule where the EPA and Corps of Engineers proposed determining that certain categories were per se jurisdictional waters of the United States rather than case-specific.<sup>153</sup> The agencies stated that they would consider including prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, and western vernal pools in the jurisdictional category.<sup>154</sup> They did exactly that in the Final Rule. In the Final Rule, these specific water bodies were separated from case-by-case “other waters” into their own category.<sup>155</sup> This example fits neatly within the Agency Contemplating Specific Change category and a court would likely affirm this element of the Final Rule because the agencies specifically asked for comment on the exact bodies of water they sought to regulate in the Final Rule.

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150 *Id.* at 37,081 (emphasis added).

151 *See* Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,263 (Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 401).

152 *See, e.g.*, State Petitioners’ Motion for Stay Pending Review at 3–4, 7–10, *In re* EPA, 803 F.3d 804 (6th Cir. 2015) (Nos. 15-3799, 15-3822, 15-3853, 15-3887) [hereinafter Motion for Stay Pending Review].

153 *See* Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,216.

154 *Id.*

155 *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,054, 37,086–87; *supra* notes 140–41 and accompanying text.

The second affirmance category occurs when the agency states that certain elements of its proposed rule may be unnecessary and abandons the element in the final rule. Here, the agencies did not abandon any substantial element from the proposed rule to the final rule. They did notify the public that they would consider additional approaches for the “other waters” category. Specifically, the agencies sought comment on proposals to determine that certain other waters were similarly situated, which would reduce the burden of determining each other water on a case-by-case basis.<sup>156</sup> The agencies also acknowledged that they could abandon the similarly situated proposal and conduct all “other water” analyses on a case-by-case basis.<sup>157</sup> Ultimately, the agencies chose to use similarly situated categories.<sup>158</sup> This example represents a close call, but because the agencies did not actually abandon any specific element between the proposed and final rules, this category is not applicable.

The third affirmance category arises where the final rule falls within the proposed range of alternatives. The Proposed Rule does not implicate this category, but it is possible to imagine a hypothetical situation where the agencies could have successfully used this category to defend the Final Rule. For example, if the agencies had proposed to regulate other waters at 3,000, 5,000, or 8,000 feet from the high-water mark then a final rule at 4,000 feet would certainly have been foreseeable by the public.<sup>159</sup>

The fourth and fifth affirmance categories apply when there is a defect in the procedural process, but the defect is cured either due to harmless error or actual notice, respectively. The fourth affirmance category, the harmless error doctrine, is also likely not at issue. The 4,000-foot high-water mark rule likely includes a greater swath of waters than was originally proposed.<sup>160</sup> Furthermore, the cost of a permit, required when a body of water is under federal jurisdiction, is substantial.<sup>161</sup> Thus, the high cost, in both time and money, for a permit will result in a substantial burden for those within the scope of the regulation. The fifth and final category is actual notice, which must come from the agency and not from the public’s attempting to monitor over a million comments. This is not readily discernable from

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156 See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,215–17.

157 *Id.* at 22,217.

158 See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,071.

159 *Cf.* *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003); see also *supra* subsection II.A.3 (discussing *City of Waukesha v. EPA* and the third affirming category).

160 The true extent of the 4,000-foot rule is undeveloped and unclear. The State petitioners in the current litigation against the Rule argue that the lack of notice deprived the states of gathering evidence or presenting evidence about the impact of the 4,000-foot rule. See Motion for Stay Pending Review, *supra* note 152, at 9.

161 In *Rapanos*, Justice Scalia catalogued the potential costs. “[A]n individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.” *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion).

either the Final Rule or the electronic docket. A reasonable inference, however, is that the agencies would likely have difficulty providing actual notice to twenty-nine states, environmental groups, and private industry plaintiffs.<sup>162</sup> At best, actual notice might come out during litigation, but is not within the purview of this Note. In sum, the case study provides examples where some affirming categories do apply and other categories do not apply. But none of the categories fully justifies the bright-line limits found in the Final Rule.

## 2. Applying Reversal Categories

The first reversal category is the first opportunity for comment category. This occurs when an agency proposes to regulate a specific area and instead regulates an entirely different category. Here, this is likely not an accurate description. The Proposed Rule clearly notified the public that the “other waters” category sought to regulate bodies with a significant nexus to the waters of the United States.<sup>163</sup> The Final Rule covers largely the same content. For example, the Proposed Rule sought to regulate all waters with a significant nexus with traditional navigable waters; the Final Rule does generally the same.<sup>164</sup>

The second reversal category is where a final rule is overinclusive compared to the proposed rule. The second category is not an accurate description of the rule. The Final Rule creates eight definitional subsections.<sup>165</sup> While it is true that the Proposed Rule had seven subsections, the new eighth subsection is a bifurcation of part of the Proposed Rule; the substance is the same.<sup>166</sup> Furthermore, the agencies gave notice that they were considering providing greater clarity by creating a new definitional category.<sup>167</sup> Consider a hypothetical example. This category would apply if the agencies kept the original categories and added a new category covering swimming pools; surely that would be outside the set covered by the Proposed Rule. Nothing like that occurred here, and thus the second reversal category does not describe the Final Rule.

The third reversal category is the best fit for the Final Rule. The third category applies when an agency puts special or different emphasis or different detail in a final rule than it did in the proposed rule. Here, the NPRM

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162 These groups are all litigating against the Final Rule and claim a logical outgrowth procedural defect. See Amena H. Saiyid, *Environmental Groups Join Water Rule Challenges*, 46 ENV'T REP. (BNA) 2173, 2203 (2015).

163 See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,211.

164 See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,059.

165 See *id.* at 37,104–05.

166 See *supra* notes 141–42 and accompanying text.

167 See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,071 (noting how “agencies specifically sought comment in the proposal on options to address” the new category).

notified the public that certain bodies would fall in the “other waters” category. The rule proposed to determine “other waters” on a case-by-case basis, either individually or by similarly situated waters.<sup>168</sup> Yet, there was no mention that any distance from a high-water mark was even relevant to, much less determinative of, whether an “other water” body fell under federal jurisdiction.<sup>169</sup> The circumstances here provide even less notice than the representative cases in subsection II.B.3. For example, in *CSX Transportation, Inc. v. Surface Transportation Board*, the court reversed the agency’s attempt to use four years of data in the final rule where it notified the public it would use only one year of data.<sup>170</sup> The agency in *CSX Transportation* gave notice as to *how* it would calculate the data, but failed to notice the proper *range* of data. Here, the EPA and the Corps of Engineers not only failed to give notice regarding how the government would calculate the data (i.e., by using the high-water mark), but also failed to do so as to the range of the data (i.e., 4,000 feet). At bottom, the agencies failed to provide the essence of logical outgrowth—fair notice—(1) that they were planning on using a bright-line rule to calculate their category; and (2) what the bright-line rule would be in order to calculate which waters would fall in the “other waters” category.

The agencies used a similarly flawed methodology in defining “adjacent waters.” Recall that the definition turned on the definition of “neighboring.”<sup>171</sup> The Proposed Rule did not include a hint that any distance from a high-water mark would be used to define the term “neighboring.”<sup>172</sup> The Final Rule defined it as 1,500 feet from the high-water mark.<sup>173</sup> Like the “other waters” subsection, there was no indication that the term “neighboring” would be defined at any distance from a high-water mark and there was no indication that 1,500 feet would govern “neighboring” and, thus, “adjacent waters.” Both bright-line rules—in the “other waters” subsection and the definition of “neighboring”—are not a logical outgrowth of anything in the Proposed Rule.

The fourth reversal category is when an agency proposes merely to clarify an existing rule, but in fact substantively alters the rule. Here in the Final Rule, the agencies stated that they were clarifying the existing definition of “waters of the United States.”<sup>174</sup> This language seems to implicate the fourth reversal category. Yet, an examination of the substance of the Proposed Rule demonstrates sufficient notice that the agencies proposed to alter the previous definition. The executive summary stated that the “proposed rule

168 See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,211.

169 For example, the proposed rule would aggregate similarly situated waters by “the functions they perform and their spatial arrangement within the ‘region’ or watershed.” *Id.*

170 584 F.3d 1076, 1082 (D.C. Cir. 2009).

171 See *supra* notes 130–31, 150 and accompanying text.

172 See *supra* notes 135–36 and accompanying text.

173 See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,105.

174 See *id.* at 37,055.

defin[es] the scope of waters protected under the Clean Water Act.”<sup>175</sup> Furthermore, “The proposed rule would revise the existing definition of ‘waters of the United States’ consistent with the science and [previous] Supreme Court cases.”<sup>176</sup> The previous Supreme Court cases curtailed the previous definitions of “waters of the United States,”<sup>177</sup> essentially invited the agencies to redefine the waters of the United States,<sup>178</sup> and created doubt in the application of the law.<sup>179</sup> Thus, when the agencies proposed to revise the existing definition and attempted to provide clarity, the logical inference for the public was that the rule clarification would in fact be substantive. The agencies signaled that this was an important, substantive undertaking and the volume of public comments received confirmed the public knew the importance of the definition.<sup>180</sup> Therefore, the fourth reversal category is not appropriate for this procedural process.

In sum, the agencies’ process suffered from significant logical outgrowth defects. The Proposed Rule did not give any hint that a bright-line distance from high-water marks would be used to define any category. The Final Rule placed a new emphasis on the linear distance affecting two categories. The public did not have actual notice, nor was this a harmless error; thus, the defect was not cured. Logical outgrowth is not a bright-line rule and it is possible a court could find there was a logical outgrowth, but this Note argues that based on categories derived from past caselaw there was no logical outgrowth. While such a holding would be fatal in the present case, it is not fatal in the overall rulemaking process because the remedy for a procedural defect is remand to the agency so it can get a second bite at the apple.<sup>181</sup> Indeed, a court could remand only the portions of the rule that are defective and maintain all validly promulgated sections of the rule.<sup>182</sup> Thus, this Note will conclude with a brief review of the substantive law that courts will review.

#### IV. WATERS OF THE UNITED STATES RULE IN SUBSTANCE

##### A. *Judicial Review of Agency Action and Chevron Doctrine*

The Administrative Procedure Act provides for judicial review of agency action.<sup>183</sup> Yet, the APA does not instruct courts on what deference, if any,

175 See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. at 22,190.

176 *Id.* at 22,192.

177 See, e.g., *Rapanos v. United States*, 547 U.S. 715, 726–27, 739 (2006) (plurality opinion).

178 See *id.* at 758 (Roberts, C.J., concurring).

179 See *id.* (“It is unfortunate that no opinion commands a majority of the Court . . . . Lower courts and regulated entities will now have to feel their way on a case-by-case basis.”).

180 See *supra* note 144.

181 See *supra* notes 24–25 and accompanying text.

182 See *supra* subsection II.B.2.

183 See 5 U.S.C. § 706 (2012).

judges should give to agency interpretation of statutes passed by Congress.<sup>184</sup> Judicial review is essential because Congress delegates vast powers to agencies, which are then exercised without the benefit of the democratic process—namely, bicameralism and presentment.<sup>185</sup> The Supreme Court took up the question of judicial review in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>186</sup>

In *Chevron*, the EPA sought to promulgate regulations defining “stationary sources” of air pollution under the Clean Air Act.<sup>187</sup> Congress did not define the term “stationary sources” and the Court articulated a two-part test to evaluate whether the agency’s interpretation of the term was permissible. First, a reviewing court asks whether Congress has spoken on the precise question at issue.<sup>188</sup> If Congress’s intent is clear then a reviewing court concludes its inquiry because both the court and the agency must give effect to Congress’s intent.<sup>189</sup> If, however, the court determines that Congress’s intent is not clear on the precise issue, then the second step says that the court defers to the agency as long as the agency’s construction is permissible.<sup>190</sup> Courts seized on this two-part test and applied it to agency statutory interpretation cases.<sup>191</sup>

*EPA v. EME Homer City Generation, L.P.*, represents a prototypical *Chevron* application.<sup>192</sup> Congress amended the Clean Air Act to include a Good Neighbor Provision, which charged states with prohibiting pollution that would contribute to downwind pollution of other states.<sup>193</sup> The EPA promulgated regulations based on the Good Neighbor Provision that, among other factors, considered costs when determining emission reductions of upwind states.<sup>194</sup> The Court applied *Chevron* to determine whether the EPA properly interpreted the Good Neighbor Provision. First, the Court noted that the Good Neighbor Provision requires states to eliminate significant “amounts” of pollution that contribute to downwind pollution, but the statute was not clear on how to divide responsibility or regulate the “amounts” of pollu-

184 See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). *Skidmore* was a pre-APA case, but section 706 of the APA focuses on adequacy of *process*, not substance. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1249 n.79 (2007).

185 See David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010).

186 467 U.S. 837 (1984).

187 *Id.* at 839–40.

188 *Id.* at 842.

189 See *id.* at 842–43.

190 See *id.* at 843.

191 See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001). But see Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 730 (2007) (arguing that *Chevron* “applies less often” and is much less frequently cited by the Supreme Court).

192 134 S. Ct. 1584 (2014).

193 See *id.* at 1593.

194 *Id.*

tion.<sup>195</sup> Once the Court concluded that the statute does not dictate how to regulate downwind emissions, it analyzed whether the EPA's interpretation was permissible under *Chevron's* second step.<sup>196</sup> The Court agreed with the EPA that it should consider both the magnitude of a state's upwind pollution contribution and the cost of eliminating that pollution.<sup>197</sup> This example demonstrates *Chevron's* two-step process.

*Chevron* deference is not a blank check; subsequent Supreme Court cases emphasized that "agencies must operate 'within the bounds of reasonable interpretation.'"<sup>198</sup> Reasonable agency interpretation includes both the specific context of the language at issue and also the overall context of the entire statute.<sup>199</sup> For example, in *Michigan v. EPA*, the Supreme Court held that the EPA did not employ a reasonable interpretation when it declined to consider any costs in regulating power plants.<sup>200</sup> There, Congress authorized the EPA to regulate power plant emissions only if such regulation was "appropriate and necessary."<sup>201</sup> The Court reasoned "appropriate" must include at least some consideration of cost by the agency.<sup>202</sup> It also considered the overall statutory context in arriving at its holding.<sup>203</sup> *Michigan v. EPA* demonstrates that courts will look at both the language at issue and the overall statutory scheme to determine whether an agency's interpretation under *Chevron* was permissible, and will reverse an impermissible construction. With the basic structure of agency statutory interpretation in mind, this Note will review the previous Supreme Court waters of the United States jurisprudence and use *Chevron* to comment on the validity of the current Waters of the United States Final Rule.

### B. Previous Supreme Court Jurisprudence on Waters of the United States

The Supreme Court previously interpreted the definition of "waters of the United States" in a trilogy of cases. First, in *United States v. Riverside Bayview Homes, Inc.*, the Court held that the Corps of Engineers' interpretation of certain nonnavigable waters was permissible.<sup>204</sup> The Corps defined "waters of the United States" to include not only traditional navigable waters, but also nonnavigable waters that could affect interstate commerce and wet-

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195 *Id.* at 1603–04.

196 *Id.* at 1606.

197 *Id.* at 1606–07.

198 *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)).

199 *See id.*

200 135 S. Ct. 2699, 2712 (2015).

201 *See id.* at 2707 (quoting 42 U.S.C. § 7412(n)(1)(A) (2012)).

202 *See id.*

203 *See id.* at 2708.

204 474 U.S. 121, 135 (1985).



lands that were adjacent to traditional navigable waters.<sup>205</sup> The Court applied *Chevron* to determine whether the Corps' interpretation was proper.<sup>206</sup> First, the Court determined that the term "waters" was not susceptible to a clear definition.<sup>207</sup> From a scientific perspective, water and land are not clearly distinct. For that reason, the Court acknowledged that "the Corps must necessarily choose some point at which water ends and land begins."<sup>208</sup> Second, the Court determined the Corps' interpretation of the Clean Water Act was reasonable.<sup>209</sup> Noting the difficulty of defining where navigable waters end and where adjacent waters begin, the Court held that wetlands adjacent to a navigable waterway were within the regulatory scope of the Corps.<sup>210</sup>

Next, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"), the Court held that the Corps' interpretation of "navigable waters" was not a permissible construction of the Clean Water Act.<sup>211</sup> After *Riverside Bayview* and leading up to SWANCC, the Corps of Engineers continued to adopt regulations that broadened the scope of waters that were considered the waters of the United States.<sup>212</sup> At issue here was a rule under which the presence of a migratory bird on an otherwise nonnavigable water made that water subject to regulation as interstate commerce and thus falling under Corps regulation.<sup>213</sup> Practically, the so-called Migratory Bird Rule meant that any water, no matter how remote or disconnected from navigable waters, would be subject to federal regulation as soon as a migratory bird alighted on the water. First, the Court characterized the holding in *Riverside Bayview* to require a "significant nexus between the wetlands and navigable waters."<sup>214</sup> The nexus was present in *Riverside Bayview*, but not in SWANCC. The Court did not apply *Chevron* to the Corps' interpretation because it was operating on the outer limits of Congress's enumerated powers and the Court suggested that even if it were to apply *Chevron*, the Corps' interpretation would still fail under the first step because the statute was clear.<sup>215</sup> Congress did not provide a clear statement that it intended to regulate such remote waters that any migratory bird could reach.<sup>216</sup> The lack of both a clear statement and a significant nexus proved fatal to the Corps; the

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205 See *id.* at 123–24 (first citing Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975); then citing 33 C.F.R. § 209.120(d)(2)(h) (1976); and then citing 33 C.F.R. § 323.2(c) (1978)).

206 *Id.* at 131.

207 See *id.* at 132.

208 *Id.*

209 See *id.* at 134.

210 See *id.* 134–35.

211 531 U.S. 159, 174 (2001).

212 See *Rapanos v. United States*, 547 U.S. 715, 725–26 (2006) (plurality opinion) (discussing history prior to SWANCC).

213 See *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 164.

214 *Id.* at 167 (emphasis added) (internal quotation marks omitted).

215 *Id.* at 172.

216 See *id.* at 172–74.

Court held that the Migratory Bird Rule exceeded the authority under the Clean Water Act.<sup>217</sup>

Finally, in *Rapanos v. United States*, a plurality of the Court held that certain remote wetlands could not fall under navigable waters without meeting specific requirements.<sup>218</sup> *Rapanos* concerned Corps jurisdiction over wetlands, which were near ditches and other man-made drains that eventually emptied into traditional navigable waters.<sup>219</sup> Justice Scalia's plurality opinion declined to give the Corps any *Chevron* deference. First, the language of the Clean Water Act included only continuously present, fixed bodies rather than ordinarily dry channels through which water occasionally flows or other ephemeral water flows.<sup>220</sup> Second, even if the Court found the language to include non-traditional, ephemeral waters, the Corps' interpretation was impermissible under *Chevron*'s second step. The Corps' broad reading of the Clean Water Act was an impermissible infringement on state and local power and, like *SWANCC*, required a clear statement from Congress to authorize such an intrusion on state authority.<sup>221</sup> The plurality read *Riverside Bayview* and *SWANCC* to permit federal jurisdiction in the following situation only: there must be (1) wetlands with a continuous surface connection; and (2) that connection must be to bodies of water that are waters of the United States in their own right.<sup>222</sup>

Justice Kennedy's concurring opinion laid out a more expansive standard by which the Corps could determine whether adjacent wetlands were in fact navigable waters. Justice Kennedy focused on the significant nexus between wetlands and navigable waters.<sup>223</sup> *Riverside Bayview* and *SWANCC* established that the Clean Water Act did not grant jurisdiction to nonnavigable waters without a significant nexus present between the two types of waters.<sup>224</sup> Justice Kennedy focused greatly on the significant nexus concept. In order to exert jurisdiction, the EPA and the Corps must show that the wetlands (or other nonnavigable waters) "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"<sup>225</sup> Furthermore, the Corps must establish the significant nexus on a case-by-case basis for wetlands adjacent to nonnavigable waters.<sup>226</sup> It does not need a case-by-case determination for wetlands adjacent to navigable waters.<sup>227</sup> Justice Kennedy determined that, using his sig-

217 *Id.* at 174.

218 547 U.S. 715, 742 (2006) (plurality opinion).

219 *See id.* at 729.

220 *Id.* at 733.

221 *See id.* at 737-38.

222 *Id.* at 742.

223 *Id.* at 767 (Kennedy, J., concurring in the judgment).

224 *See id.*

225 *Id.* at 780.

226 *Id.* at 782. Justice Kennedy invited more specific regulations to govern the significant nexus jurisdiction in order to ameliorate the need for a case-by-case analysis. *See id.*

227 *Id.* ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction.")

nificant nexus standard, the current regulations were potentially overbroad,<sup>228</sup> but attacked the plurality's standard as lacking in practical sense,<sup>229</sup> and lacking in fidelity to *Riverside Bayview's* holding.<sup>230</sup> Thus, post-*Rapanos*, the agencies had two options to regulate jurisdiction of nonnavigable waters: the plurality's narrow, two-part test or Justice Kennedy's significant nexus analysis.

Before turning to the current rule, it is important to consider one last opinion. Chief Justice Roberts wrote a concurring opinion admonishing the Corps and the EPA for not undertaking the rulemaking process, after *SWANCC*, to settle the question at hand.<sup>231</sup> He noted that agencies generally have broad deference under *Chevron* to interpret a statute, but the agencies failed to complete the rulemaking process after *SWANCC*.<sup>232</sup> Had the agencies implemented regulations with "some notion of an outer bound [on] the reach of their authority," the Court would have extended some measure of deference.<sup>233</sup> Coming out of *Rapanos*, the agencies had an opportunity to clarify the definition of "waters of the United States," albeit with some outer boundaries.<sup>234</sup> Thus, the Note will turn to the joint EPA and Corps of Engineers Final Rule in light of *Chevron* and the waters of the United States trilogy.

### C. Applying Chevron to Final Rule

The Corps of Engineers and EPA sought to remedy the mixed guidance post-*Rapanos* by publishing their final rule defining waters of the United States. First, the agencies asserted that the rulings in *SWANCC* and *Rapanos* did not limit their authority to regulate traditional navigable waters or non-navigable interstate waters.<sup>235</sup> The agencies acknowledged that their intrastate nonnavigable jurisdiction was narrower than previous regulations.<sup>236</sup> The agencies sought to remedy the jurisdictional uncertainty; indeed, one purpose of the rule was to provide clarity and reduce litigation.<sup>237</sup> In the abstract, there were several possible standards to form the basis for jurisdiction of nonnavigable waters: the *Rapanos* plurality opinion, Justice Kennedy's

228 *Id.*

229 *Id.* at 769.

230 *Id.* at 772.

231 *See id.* at 757–58 (Roberts, C.J., concurring).

232 *See id.* at 758.

233 *Id.*

234 In addition to the Chief Justice's opinion, Justice Kennedy's opinion also invited the Corps and the EPA to promulgate regulations to clarify the Clean Water Act. *See id.* at 780–81 (Kennedy, J., concurring in the judgment).

235 *See* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,257 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 401).

236 *Id.* at 22,189.

237 *See id.* at 22,190.

significant nexus standard, or possibly some third, broader option.<sup>238</sup> The agencies chose Justice Kennedy's *Rapanos* standard.<sup>239</sup> In fact, throughout the Legal Analysis appendix to the Proposed Rule, the agencies repeatedly based their legal reasoning and conclusions entirely on Justice Kennedy's framework.<sup>240</sup> In order for the Final Rule to pass judicial review, the agencies would need to convince at least five Justices to sign on to Justice Kennedy's standard.

The statutory language of the Clean Water Act is ambiguous and would likely meet the requirements for *Chevron* step one. The Clean Water Act prohibits the discharge of pollutants into navigable waters.<sup>241</sup> Navigable waters are defined as "waters of the United States."<sup>242</sup> This is the same statutory language at issue in *Riverside Bayview*, *SWANCC*, and *Rapanos*.<sup>243</sup> The agencies claimed, in the proposed rule, that their regulatory interpretation was narrower because of the previous decisions.<sup>244</sup> If this statement is true, then the previous cases suggest the Court would accept a *Chevron* step one interpretation. As Chief Justice Roberts wrote in his concurring opinion, "Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms . . . , the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority."<sup>245</sup> Furthermore, both Justice Kennedy's<sup>246</sup> and Justice Stevens's dissents found ambiguity in the statutory language.<sup>247</sup> Thus, it is likely that a reviewing court would also find a statutory ambiguity on the precise question at issue.

The case would likely turn on whether the new definition was permissible under *Chevron* step two. Under traditional *Chevron* doctrine, once an agency establishes an ambiguity in the first step its interpretation will receive deference from the reviewing court.<sup>248</sup> Yet, the history of *SWANCC* and

238 Though not discussed in this Note, the dissent in *Rapanos* would have permitted the Corps' broad definition and regulatory framework. See *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).

239 See Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22,192 ("[T]he agencies determined that it is reasonable and appropriate to apply the 'significant nexus' standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well . . . to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.").

240 See *id.* at 22,252 (noting a lack of uniformity in federal courts of appeals decisions as to which standard applies); see also Heather Keith, Comment, *United States v. Rapanos: Is "Waters of the United States" Necessary for Clean Water Act Jurisdiction?*, 3 SETON HALL CIR. REV. 565, 600-02 (2007) (same).

241 See 33 U.S.C. §§ 1311(a), 1362(12) (2012); see also *Rapanos*, 547 U.S. at 723.

242 See 33 U.S.C. § 1362(7).

243 See *Rapanos*, 547 U.S. at 723-26 (discussing previous cases).

244 See Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22,189.

245 *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

246 See *id.* at 779 (Kennedy, J., concurring in the judgment) ("Congress' choice of words creates difficulties . . .").

247 See *id.* at 796, 804 (Stevens, J., dissenting).

248 See *supra* Section IV.A.

*Rapanos* demonstrates that the interpretation cannot be unlimited. The prior caselaw shows that the dispositive question will be: Is the EPA and Corps interpretation permissible? An agency's interpretation must be permissible both in the context of the language at issue and the overall context of the statute.<sup>249</sup> Here, the agencies sought to correct the deficiencies that led to previous reversals in *SWANCC* and *Rapanos*. In so doing, they purported to select an interpretation of the Clean Water Act that was narrower than the broad definitions pre-*Rapanos* and focused extensively on Justice Kennedy's significant nexus framework.<sup>250</sup> If true, reviewing courts will likely uphold the rule.

Attorneys for the agencies have argued that the Final Rule is simpler than its predecessors, it provides clarity, and the limitations in the rule should alleviate any concerns on the Court.<sup>251</sup> Yet, opposing attorneys have claimed that the rule will not provide clarity and the use of the ordinary high-water mark bright-line rule is problematic.<sup>252</sup> Unsurprisingly, both sides believe that their interpretation of the rule is correct. Ultimately, two factors weigh in favor of a reviewing court upholding the rule. First, the rule does everything it can to incorporate Justice Kennedy's significant nexus standard.<sup>253</sup> Second, as the Final Rule notes, a majority of circuit courts have applied Justice Kennedy's significant nexus standard, either by itself or with the plurality opinion, in various decisions.<sup>254</sup> On balance, the Final Rule is likely a permissible interpretation of the Clean Water Act.

#### CONCLUSION

This Note seeks to remedy a gap in the logical outgrowth literature. Courts of appeals apply logical outgrowth doctrine by reciting formulaic language from previous cases. Logical outgrowth lacks bright-line rules and it necessarily requires a fact-based inquiry. This could, in theory, allow judges to reach whatever outcome they desire. This Note argues that there is enough similarity between certain logical outgrowth cases to group and organize them by agency win or loss. The categories proposed in this Note represent common, though by no means exclusive, types of logical outgrowth

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249 See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

250 See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053, 37,060–61 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 400).

251 See Scott Schang et al., *EPA's "Waters of the United States" Rule: Substance and Significance*, 45 ENVTL. L. REP. 10,995, 10,966–97 (2015) (statement of Ken Kopocis).

252 See *id.* at 10,999–11,000 (statement of Deidre Duncan).

253 See *supra* notes 239–40 and accompanying text.

254 See Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22,252 (first citing *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); then citing *United States v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); and then citing *United States v. Bailey*, 571 F.3d 791, 798–99 (8th Cir. 2009)).

cases. What is the utility of such an exercise? It is simply this: an agency or court can use the categories annotated in this Note to avoid logical outgrowth deficiencies.

The Note uses the current waters of the United States Final Rule litigation as a backdrop and case study to illustrate the applicability of the proposed logical outgrowth categories. This is proof of concept. The Note argues that at least two elements of the Final Rule fit within the reversal logical outgrowth categories and therefore the rule should be remanded back to the EPA and the Corps of Engineers for the opportunity to provide proper notice-and-comment. Finally, the agencies likely interpreted the substance of the Clean Water Act correctly and, assuming they fix the procedural defect, their interpretation would survive judicial review. This rule has been many years in the making and the procedural defect will only delay effective guidance to the public, industry, and local regulators; however, the Administrative Procedure Act requires government action to follow a lawful process.