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## Enemy of the People: The Need for Congress to Pass the Clean Water Restoration Act

Cathryn Henn

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# ENEMY OF THE PEOPLE: THE NEED FOR CONGRESS TO PASS THE CLEAN WATER RESTORATION ACT

*Cathryn Henn\**

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## INTRODUCTION

*An Enemy of the People*, a play written by Henrik Ibsen in 1882, takes place in a town on the south coast of Norway<sup>1</sup>. This play was written ninety years before the passage of the Federal Water Pollution Control Act of 1972, commonly known as the Clean Water Act;<sup>2</sup> it was written more than 125 years before the draft Senate Bill 787 known as the Clean Water Restoration Act.<sup>3</sup> Unfortunately, if Ibsen was living in the United States today he could have written his play using real life characters taken from the local newspapers and courthouse filings. The more things change over time, the more they remain the same.

Ibsen's play opens to a town whose economy is dependent on a large bath complex. People travel from far away to the small town's baths in order to rejuvenate their health. Dr. Stockman, a popular citizen, reports his discovery that the baths are seriously contaminated and poisonous to his brother the Burgomaster (Mayor) and other prominent community members. Dr. Stockman loves his native town, but he cares about the health of his fellow man more. He feels it is his duty to inform his brother the mayor, the highest authority in the town, of this discovery. Unfortunately as an idealist, Dr. Stockman failed to realize that his brother's monetary investment in the baths and political office as Mayor have corrupted him. When the Mayor realizes that the necessary repairs to the baths will be too expensive, he convinces the local newspaper not to support the doctor. Even when threatened by the political authorities and abandoned by the newspaper, Dr. Stockman is determined to warn his fellow town's people by securing a public hall. Dr. Stockman believes in his right to free speech and his duty to his fellowman, but he is ignorant of the power of political propaganda. Eventually, even the townspeople turn against Dr. Stockman. His fellow citizens are unwilling to face the hard truths about the condition of the baths and the resulting unsteady economic future of the town. They instead choose the easier route of blissful ignorance. As the following excerpts from Ibsen's play reveal, the would-be hero becomes the "*enemy of the people*" once the town's economic interest is jeopardized. Authorities take action to protect their self-interests. The majority follows the lead of these selfish and misguided politicians in

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1. HENRIK IBSEN, *AN ENEMY OF THE PEOPLE* *passim* (Eleanor Marx-Azelns trans.) (1882).

2. 33 U.S.C. § 1251 (2006) et seq. (When it was passed the statute was entitled the Federal Water Pollution Control Act Amendments of 1972 and upon its amendment in 1977, it was renamed the Clean Water Act).

3. Clean Water Restoration Act, § 787, 111th Cong. (2009); *see also* Clean Water Restoration Act, H.R. 2421, 110th Cong. (2007).

ostracizing the one man that is trying to protect them. The same tragedy that adversely affected nineteenth century Norway still affects twenty-first century America.

ACT FIRST:

Dr. Stockmann: Simply a pestiferous hole.

Petra: The Baths, father?

Dr. Stockmann: I tell you the whole place [the Baths] is a poisonous whited-sepulchre; noxious in the highest degree. All that filth up there- the stuff that smells so horribly- taints the water in the feed-pipes; and the same accursed poisonous refuse oozes out by the beach-

Hovstad: But how are you so sure of all this, Doctor?

Dr. Stockmann: I sent samples both of the drinking-water and of our sea-water to the University, for exact analysis by a chemist. . . And it proves beyond dispute the presence of putrefying organic matter in the water- millions of infusoria. It's absolutely pernicious to health whether used internally or externally.

Hovstad: And what do you intend to do now, Doctor?

Dr. Stockmann: Why, to *set things right*, of course.

ACT SECOND:

Hovstad: To you, as a doctor and a man of science, this business of the water-works [the Baths] appears an isolate affair. I daresay it hasn't occurred to you that a good many other things are bound up with it?

Dr. Stockmann: Indeed! In what way?

Hovstad: We are entirely under the thumb of a ring of wealthy men, men of old family and position in town.

Dr. Stockmann: The affair seems to me so simple and self-evident.

Burgomaster: Is it your intention to submit this statement to the Board of Directors [of the Baths], as a sort of official document?

Dr. Stockmann: Of course. Something must be done in this matter, and that promptly.

Burgomaster: Do you think anyone would come here [to the Baths], if it got abroad that the water was pestilential?

Dr. Stockmann: But [Burgomaster], that's precisely what it is.

Burgomaster: The matter in question is not purely a scientific one; it is a complex affair; it has both a technical and an economic side. . . You, who in your blind obstinacy, want to cut off the town's chief source of prosperity!

Dr. Stockmann: That source is poisoned, man! Are you mad! We live by trafficking in filth and corruption! The whole of our flourishing social life is rooted in a lie.

## ACT FOURTH:

Dr. Stockmann: I have said I would speak [to my fellow citizens] of the great discovery I have made within the last few days- the discovery that all our sources of spiritual life are poisoned, and that our whole society rests upon a pestilential basis of falsehood . . . my mind's eyes were opened wide, and the first thing I saw was the colossal stupidity of the authorities. . .

Whole Assembly: [Shouting.] Yes! Yes! Yes! He's an enemy of the people!

Aslaksen: I therefore beg to move, "That this meeting declares the medical officer of the Baths, Dr. Thomas Stockmann, to be *An Enemy of the People.*"

## ACT FIFTH:

Dr. Stockmann: This is what I have discovered, you see: *the strongest man in the world is he who stands alone.* [emphasis mine]

Today, corporate economic interests and their lobbyists – the true *enemy of the people* – continue to win as the “waters” of the United States loses. In the public debate, those willing to take a stand against those who pollute our water often become marginalized as extremists; they get painted as the enemy of the people who desire to take away American jobs and hurt the American economy through their overzealous environmental policies. As those from Wall Street, K-Street, and the well-financed Congress share martinis at The Palm in Georgetown, the discussion likely goes as follows: “*Senator, if you listen to those environmental whackos and support the Clean Water Restoration Act, before you know it the EPA and Corps will claim jurisdiction and you will need to get a permit to drop an olive in your Martini. No need for more legislation, the Supreme Court already fixed the problem.*”

Unless Congress passes the Clean Water Restoration Act in order to “*set things right,*” the waters of the United States will be described in the same colorful terms that Ibsen used in *An Enemy of the People*. Each member of Congress individually needs to discover — like Dr. Stockmann did — that the “*strongest man in the world is he who stands alone*” above pure economic and special interests in order to “*set things right.*” Otherwise the water of the United States will become — in the words of Dr. Stockmann, “*simply a pestiferous hole.*”

Part I of this article lays out a brief history of the Clean Water Act's inception, how it functions, and its success as an environmental law aimed at protecting and cleaning the waters of the United States. Part II reviews *SWANCC* and *Rapanos*, two recent Supreme Court cases that eliminated federal enforcement power. The article will show how an administration, supported by corporate economic interests and political lobbyists, failed to hear the calls to reinstate the enforcement

power behind the Clean Water Act. Instead, the Administration chose a path of further dismantling our nation's greatest environmental law. Part III demonstrates the profound paralyzing effect these judicial and administrative actions have on state and federal enforcement agencies; these will be illustrated through specific examples. Part IV of this article calls for Congress to fix past mistakes, and restore the Clean Water Act to its previously proud and vibrant condition by enacting the Clean Water Restoration Act.

### I. THE FOUNDATIONS OF THE CLEAN WATER ACT ("CWA").

During the years preceding the birth of the Clean Water Act (CWA), the water quality in the United States was in turmoil as a result of many human activities.<sup>4</sup> Until 1972, the Federal Water Pollution Control Act (FWPCA) was the federal law regarding water pollution.<sup>5</sup> FWPCA's regulatory system relied on states to create ambient water quality standards for navigable and interstate waters.<sup>6</sup> The power to enforce these standards only arose to prevent an imminent health hazard or discharges reduced the quality of a water body below its specified ambient level.<sup>7</sup> The FWPCA failed for lack of enforcement because: (1) disastrous problems of proof arose from multiple polluters discharging into the same water body; and (2) states were incapable or unmotivated to take enforcement action.<sup>8</sup> Corruption, dumping, and pollution ran rampant for decades after the industrial revolution, leading to an environmental firestorm with our waters as the victim.<sup>9</sup> In 1969, the Cuyahoga River was so heavily polluted that it caught fire when a lit match was haphazardly thrown into its waters.<sup>10</sup> Around this same time, the Potomac River was unsafe for people to swim in

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4. OLGA L. MOYA & ANDREW L. FONON, FEDERAL ENVIRONMENTAL LAW THE USER'S GUIDE, 295 (West Publishing Co. 2d ed. 2001) [hereinafter MOYA & FONON].

5. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1972) (The Water Quality Act of 1965 was replaced with the Federal Water Pollution Control Act of 1972. Upon its amendment in 1977, it was renamed the Clean Water Act.)

6. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 133 (7th ed. 2008) [hereinafter FINDLEY & FARBER].

7. *Id.* at 133-34.

8. *Id.* at 134.

9. Bill Currie, Casenote, *Opening The Floodgates: The Roberts Court's Decision in Rapanos v. United States Spells Trouble for the Future of the Waters of the United States*, 18 VILL. ENVTL. L. J. 209 (2007) [hereinafter Currie]; see also MOYA & FONON, *supra* note 4, at 295.

10. *E.g.*, Drelich, *infra* note 16, at 268; Currie, *supra* note 9, at 213.

and Lake Erie was declared “dead.”<sup>11</sup> These events stirred the nation to speak up and motivated Congress to enact the Clean Water Act.<sup>12</sup>

It is a simple, yet often forgotten proposition that clean water is essential for both human and economic health. “Without water, life on Earth as we know it could not exist. Water is used for many purposes in today’s world and is considered necessary to most human endeavors.”<sup>13</sup> This paper supports the view that the CWA embodies a national epiphany that our nation’s environment, specifically our waters, river, lakes and streams contain an inherent value that is in need of legal protection.<sup>14</sup> I believe that while the CWA allows pollution to infiltrate our nation’s waters, that pollution is an exception to the general proposition that the inherent value of this part of our Earth should be protected from such destruction. Additionally, while our nation has tried in the past to preserve and protect this inherent value – all the previous laws failed from design or lack of enforcement.<sup>15</sup> The 1972 Congressional enactment of the CWA amendments to the FWPCA was cause for congratulations and celebration.<sup>16</sup> Never before had a law so comprehensively and ambitiously attacked the longstanding problem of water pollution.<sup>17</sup> The statute’s objective, announced in Section 101, is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.<sup>18</sup> Congress further proclaimed several specific goals, including: (1) achieving, by 1983, a level of water quality safe fish, wildlife, drinking and provide for recreation in and on the water (“fishable/swimmable goal”); and (2) eliminating, by 1985, all discharges of pollutants into navigable waters (“no discharge goal”).<sup>19</sup>

The CWA created a system of technology and quality based standards, permits, and enforcement aimed at achieving these goals.<sup>20</sup> Those who discharge pollutants are regulated first on technology based requirements, which ensure aggressive pollution reduction, and sec-

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11. Currie, *supra* note 9, at 209.

12. See, MOYA & FONO, *supra* note 4, at 295.

13. *Id.*

14. Judith E. Koons, *The Moral Value of Nature*, 25 PACE ENVTL L. REV. 263, *passim* (2008) [hereinafter Koons].

15. FINDLEY & FARBER, *supra* note 6, at 134.

16. David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 268 (2009).

17. *Id.*; see generally, Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903 (1972) [hereinafter Drelich].

18. 33 U.S.C. § 1251(a) (2006) (The statute states the objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters); see, e.g., Fish, *infra* note 289, at 561-62; and Currie, *supra* note 9, at 213.

19. 33 U.S.C. § 1251(a)(1) – (2) (2006).

20. FINDLEY & FARBER, *supra* note 6, at 134.

only by ambient water-quality standards, which serves as a safety net for our nation's waters.<sup>21</sup>

The CWA, unlike the pollution control law before it, is based on a "cooperative federalism" model that involves both the federal government and the states.<sup>22</sup> The statute asserts it is the states' primary responsibility to prevent, reduce, and eliminate pollution as well as enforce the CWA permit programs.<sup>23</sup> The states are empowered in two ways. First, states have the ability to assume the day to day implementation of certain permit programs and, second, states have the primary authority to establish water quality standards.<sup>24</sup> However, there are two very important caveats to this scheme. First, if a state chooses to participate in the cooperative federalism, and wants the primary responsibility of administering the permits within its borders, the state must be approved by the Environmental Protection Agency (EPA).<sup>25</sup> Second, if a state opts to establish the water quality standards within its borders, those standards must meet or be more stringent than the national federal-floor standards established by the EPA.<sup>26</sup> This uniform baseline standard of protection is essential to ensure that all states and local communities start with the same minimum level of water quality.<sup>27</sup> It also helps to avoid potential conflicts between up and down stream states that might have differing standards for the same body of water, and provide a starting point for those states that choose to have more protective standards.<sup>28</sup> Even though it empowers the states, the federal government is not prohibited (like it was under the FWPCA) from enforcing state and federal standards.<sup>29</sup> The EPA retains oversight for State implemented programs, is empowered with a veto privilege, retains full investigatory

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21. CRAIG N. JOHNSTON, WILLIAMS F. FUNK, & VICTOR B. FLATT, LEGAL PROTECTION OF THE ENV'T 139 (2d. ed. 2007) [hereinafter JOHNSTON, ET. AL].

22. *Id.* at 159.

23. 33 U.S.C. §1251(b).

24. *See*, 33 U.S.C. § 1342(b) and 33 U.S.C. §1313; *see also* JOHNSTON ET AL., *supra* note 21, at 159; FINDLEY & FARBER, *supra* note 6, at 135.

25. JOHNSTON ET AL., *supra* note 21, at 159.

26. JOHNSTON ET AL., *supra* note 21, at 159; *see also* MOYA & FONO, *supra* note 4, at 312-313, 315.

27. Majority Staff, Committee on Transportation and Infrastructure, U.S. House of Representatives, *Stagnant Waters: The Legacy of the Bush Administration on the Clean Water Act*, at 14 (October 18, 2008), available at [http://transportation.house.gov/Media/File/Full Committee/Stagnant Waters 2008 Clean Water Act Report.pdf](http://transportation.house.gov/Media/File/Full%20Committee/Stagnant%20Waters%202008%20Clean%20Water%20Act%20Report.pdf) [hereinafter Majority Staff].

28. *Id.*

29. FINDLEY & FARBER, *supra* note 6, at 135.



powers, and can step-in to take the enforcement lead.<sup>30</sup> Additionally, the statute provides for EPA enforcement suits, citizen suits, and criminal and civil sanctions.<sup>31</sup>

The two permit programs which will be the focus of this paper (and which are used as the statute's major mechanism for pollution control) are the §402 National Pollution Discharge Elimination System ("NPDES") program and the §404 "Dredge and Fill" or "Wetlands" program. In addition to this, there are other water quality based programs under the CWA: Sections 401 and 303(d) overlap the NPDES program, while Sections 208 and 319 apply to non-point sources.<sup>32</sup> Separate standards and programs exist for different types of polluters and different types of technology.<sup>33</sup>

Section 301(a) of the CWA<sup>34</sup> establishes a multi-part jurisdictional test for both the §402 NPDES and §404 Dredge and Fill programs by prohibiting the "discharge of any pollutant,"<sup>35</sup> except when in compliance with other sections of the statute, such as 402 and 404.<sup>36</sup> This prohibition against discharges basically makes it illegal to pollute. The second half of the sentence following the "except," provides the basis for which permits are given to allow pollution in very strictly defined circumstances. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable water from any point source."<sup>37</sup> Thus, the three prong test for jurisdiction requires: (1) an addition of a pollutant to (2) navigable waters (3) from a point source.<sup>38</sup> All three of the elements must be present or there is not NPDES or Section 404 jurisdiction.<sup>39</sup> However, any discharge by a point source not in compliance with the permit (regardless of how *de minimis*), or any discharge without a permit, is automatically deemed unlawful.<sup>40</sup>

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30. JOHNSTON ET AL., *supra* note 21, at 161; FINDLEY & FARBER, *supra* note 6, at 135-36.

31. *Id.* at 159-60 and at 475-76.

32. *Id.* at 201; *Cf.*, MOYA & FONON, *supra* note 4, at 313 (supporting the proposition that several major CWA programs rely on water quality standards, including NPDES permit program, Wetlands Protection and Dredge and Fill Program, Oil Spill Program, and Nonpoint Source Pollution Program).

33. FINDLEY & FARBER, *supra* note 6, at 134-58.

34. §301(a) (prohibits discharges unless in compliance with several other portions of the Act. It is the jurisdictional trigger for both §402 NPDES permits enforced by the EPA or States, and §404 Dredge and Fill permits enforced by the Army Corps of Engineers).

35. Drelich, *supra* note 16, at 269 and 283.

36. Clean Water Act §§ 301(a), 402, and 404; 22 U.S.C §§1311(a), 1342(a), and 1344 (2006).

37. §502 (12).

38. JOHNSTON ET AL., *supra* note 21, at 139.

39. *Id.*

40. FINDLEY & FARBER, *supra* note 6, at 135; JOHNSTON ET AL., *supra* note 21, at 139.

Section 402 allows the EPA or State to issue NPDES permits, which authorize entities to discharge pollutants by following the substantive requirements provided in the individual permit.<sup>41</sup> Section 404 allows the Corps of Engineers to issue permits, which authorize entities to discharge dredge and fill material by following the specific requirements in those permits.<sup>42</sup>

The CWA has been widely successful.<sup>43</sup> Despite our population explosion and increased development, our nation's waters are significantly cleaner than they were in 1972, thanks to the CWA.<sup>44</sup> Since then, the CWA has been commonly viewed as one of the most successful environmental laws in American history and is the main reason the past three decades have seen dramatic improvements in water quality.<sup>45</sup> This broad and well balanced statute triumphed where previous federal laws failed.<sup>46</sup> This is readily apparent by looking at the measure of our nation's progress in assessed water quality, the treatment of wastewaters, and the condition of our wetlands. While these three examples are only a few of the numerous positive effects of the CWA, they provide a quantitative measure of the consistent progress of the past thirty years.

In 1972 it was estimated that only 30 to 40% of assessed waters met the goals of being safe for swimming, fishing, and drinking.<sup>47</sup> Recently, states report that between 60 and 70% of assessed waters meet state water quality goals.<sup>48</sup> This means that more lakes, rivers, streams, estuaries and wetlands are safe for drinking, swimming and fishing.

Drastic improvements are also seen in the quantity and quality of wastewater treatment, which is a major source of pollution. In 1968, 140 million people were served by only primary sewage treatment facilities, which is a level generally inadequate for wastewater

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41. JOHNSTON ET AL., *supra* note 21, at 139.

42. *Id.*

43. *Id.* at 138.

44. *Id.* at 139.

45. A. Dougherty, *Overview: Clean Water Restoration Act of 2009*, CLEAN WATER ACTION, April 3, 2009, available at <http://www.cleanwateraction.org/mediakit/overview-clean-water-restoration-act-2009>. [hereinafter Dougherty, *Overview: Clean Water Restoration Act*].

46. Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903 (1972) (The Water Quality Act of 1965 was replaced with the Federal Water Pollution Control Act of 1972. Upon its amendment in 1977, it was renamed the Clean Water Act).

47. Majority Staff, *supra* note 27, at 4.

48. *Id.*

disposal.<sup>49</sup> The federal government distributed \$61.1 billion dollars, from 1970 to 1995, in federal grants to fund new or upgrade existing treatment facilities.<sup>50</sup> By 2000, the last year of compiled data, 207.8 million people were served by treatment facilities at secondary and more advanced treatment levels.<sup>51</sup>

Additionally, our nation's wetlands have seen far-reaching progress. In 1972, the United States was losing wetlands at 450,000 acres per year.<sup>52</sup> Improvements were made and it was reported that during the second half of the 1990s, annual wetland losses were calculated to be less than a quarter of the previous rate.<sup>53</sup>

Despite the strong national commitment, the CWA has fallen short of its lofty goals. Regulatory gaps have ensured the failure to meet a "fishable/swimmable goal" for many of our nation's waters.<sup>54</sup> Additionally, the CWA fails to contain any mandates capable of reaching the "no discharges goal."<sup>55</sup> For example, "navigable waters" is defined as "the waters of the United States."<sup>56</sup> In doing this, Congress created a linguistic anomaly in which the phrase "navigable waters" is used in a statute clearly encompassing both non-navigable waters and wetlands.<sup>57</sup> This apparent contradiction creates underlying uncertainty in the scope of the CWA.<sup>58</sup> The courts, which have consistently resolved this ambiguity in favor of broad federal authority, have started within the past decade to narrow systematically CWA's reach.

The late 1990's marked a swift change in the political atmosphere, leading to an abrupt halt of water quality improvements in the

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49. U.S. E.P.A., PROGRESS IN WATER QUALITY: AN EVALUATION OF THE NATIONAL INVESTMENT IN MUNICIPAL WASTEWATER TREATMENT 1-20 (June 2000), available at [http://water.epa.gov/polwaste/wastewater/treatment/upload/2002\\_06\\_28\\_wquality\\_wquality.pdf](http://water.epa.gov/polwaste/wastewater/treatment/upload/2002_06_28_wquality_wquality.pdf).

50. *Id.* at 17.

51. *Id.* at 1-20; see also U.S. E.P.A. CLEAN WATERSHED NEEDS SURVEY 2000: REPORT TO CONGRESS (August 2003), available at [http://water.epa.gov/scitech/datait/databases/cwns/2000rtc\\_toc.cfm](http://water.epa.gov/scitech/datait/databases/cwns/2000rtc_toc.cfm).

52. Majority Staff, *supra* note 27, at 4.

53. See generally U.S. E.P.A. & U.S. DEP'T OF AGRICULTURE, CLEAN WATER ACTION PLAN: RESTORING AND PROTECTING AMERICA'S WATERS (February 1998), available at <http://nepis.epa.gov>; U.S. E.P.A., NATIONAL SERVICE CENTER FOR ENVIRONMENTAL PROTECTIONS, CLEAN WATER ACTION PLAN: THE SECOND YEAR REPORT: PROGRESS THROUGH PARTNERSHIP 6-7 (February 2000), available at <http://nepis.epa.gov>.

54. JOHNSTON ET AL., *supra* note 21, at 139.

55. *Id.* at 139.

56. Clean Water Act § 502; 33 U.S.C. § 1362(7).

57. Matthew A. MacDonald, Comment, *Rapanos v. United States and Carabell v. United States Army Corps of Engineers*, 31 HARV. ENVTL. L. REV. 321 (2007) [hereinafter MacDonald].

58. *Id.*

United States, as efforts to enforce the CWA reached a plateau.<sup>59</sup> The EPA recently expressed confusion about its jurisdictional power over approximately 500 CWA enforcement cases, which is nearly 40% of the agency's annual docket.<sup>60</sup> Basically, EPA has dropped hundreds of cases.<sup>61</sup> Roughly 59% of the nation's streams and twenty million acres of wetlands are threatened with loss of protection.<sup>62</sup> Without protections, individuals and business entities are free to pollute those waters without any legal consequences.

More disturbing is recent trends reversing progress in waters protected under the CWA.<sup>63</sup> A recent National Water Quality Inventory Report to Congress reveals that only 33% of the nation's waters are monitored.<sup>64</sup> Of those waters monitored, roughly 49% of streams, 52% of lakes, and 34% of estuaries are not clean enough to be safe for designated uses (such as fishing and swimming).<sup>65</sup> This EPA report serves as the primary vehicle for informing Congress and the public about general water quality conditions in the United States, and is accepted as the most current and thorough report of its kind.<sup>66</sup> The report characterizes our water quality, identifies widespread water quality problems of national significance, and describes various programs implemented to restore and protect our waters.<sup>67</sup>

After decades of progress by the CWA, the very recent decline in water quality may be observed by evaluating the percentage of assessed waters deemed 'impaired' over the last decade. The EPA views a water body as impaired when it does not meet one or more of its designated uses (i.e., swimming, fishing, support to aquatic life, drinking water, agriculture, fish consumption advisories).<sup>68</sup> The amount of

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59. Majority Staff, *supra* note 27, at 5.

60. Saylor, *infra* note 61, at 1; see also Raviya Ismail, *Committee Discusses Future of Clean Water*, EARTHJUSTICE, Oct. 15, 2009, available at <http://www.earthjustice.org/news/press/2009/committee-discusses-future-of-clean-water.html>.

61. Jared Saylor, *As Congress Scrutinizes Clean Water Enforcement, Ambiguity About the Law Looms*, EARTHJUSTICE, Oct. 15, 2009, available at <http://www.earthjustice.org/news/press/2009/as-congress-scrutinizes-clean-water-enforcement>.

62. *Id.*

63. Majority Staff, *supra* note 27, at 5.

64. U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE, ES-2 (October 2007), available at [http://water.epa.gov/lawsregs/guidance/cwa/305b/2002report\\_index.cfm](http://water.epa.gov/lawsregs/guidance/cwa/305b/2002report_index.cfm).

65. *Id.*

66. U.S. E.P.A., MONITORING AND ASSESSING WATER QUALITY, available at [http://water.epa.gov/type/watersheds/monitoring/monitoring\\_index.cfm](http://water.epa.gov/type/watersheds/monitoring/monitoring_index.cfm) (last visited July 2, 2010).

67. *Id.*

68. U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE, 7-8 (October 2007), available at [http://water.epa.gov/lawsregs/guidance/cwa/305b/2002report\\_index.cfm](http://water.epa.gov/lawsregs/guidance/cwa/305b/2002report_index.cfm) (Waters are rated for overall use support as follows: Good –

rivers and streams deemed impaired has increased from 35% (in the 1998 report)<sup>69</sup> to 39% (in the 2000 report)<sup>70</sup> to 45% (in the 2002 report).<sup>71</sup> Reversals have also been demonstrated in our nation's lakes and ponds, with the percentage of impaired lakes increasing from 45% (in the 2000 report) to 47% (in 2002 report).<sup>72</sup> Additionally, the Great Lakes percentages of impaired shoreline waters have increased from 78% (in the 2000 report) to ninety-one percent (in the 2002 report).<sup>73</sup>

For the past three decades, the CWA presented an ideal environmental law; this ambitious and innovative statute worked smoothly to achieve clean and pristine water while remaining unchallenged by Republican or Democratic party administrations.<sup>74</sup> Now the long-standing efforts over the past decades have halted, and even reversed, as a few U.S. Supreme Court justices and President George W. Bush's administration undermined water quality improvement.

## II. THE SWANCC AND RAPANOS JUDICIAL DECISIONS, AND THE BUSH ADMINISTRATION, MUDDIED THE CLEAN WATER ACT

The CWA's drafters intentionally left the statute broad to allow for the greatest impact on the waters.<sup>75</sup> However, with brevity comes uncertainty. Attack on the CWA centers on the scope of the definition

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if they fully support all their designated uses; Threatened – if they fully support all uses, but exhibit a deteriorating trend; or Impaired – if they are not supporting one or more designated use. The top five designated uses for river and streams are: fish, shellfish, and wildlife protection/propagation; recreation; agriculture; aquatic life harvesting; public water supply. Other uses include aesthetic value, exceptional recreational or ecological significance, and industrial).

69. U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 1998 REPORTING CYCLE, 58 (June 2000), available at [http://water.epa.gov/lawsregs/guidance/cwa/305b/98report\\_index.cfm](http://water.epa.gov/lawsregs/guidance/cwa/305b/98report_index.cfm).

70. U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2000 REPORTING CYCLE, 11 (August 2003), available at [http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2002\\_09\\_10\\_305b\\_2000\\_report\\_chp2.pdf](http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2002_09_10_305b_2000_report_chp2.pdf).

71. U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE, 8 (October 2007), available at [http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2007\\_10\\_15\\_305b\\_2002\\_report\\_report\\_2002pt3.pdf](http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2007_10_15_305b_2002_report_report_2002pt3.pdf).

72. Compare, U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: 2000 REPORT, at 18 (September 2002); and U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE, at 11, (October 2007), available at <http://water.epa.gov/lawsregs/guidance/cwa/305b/index.cfm>.

73. Compare, U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2000 REPORTING CYCLE, at 31 (June 2000); and U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE, at 19, (October 2007), available at <http://water.epa.gov/lawsregs/guidance/cwa/305b/index.cfm>.

74. Majority Staff, *supra* note 27, at 14.

75. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (explaining Congressional intent was broad when defining "waters" in the CWA).

of “navigable waters of the United States” and interpretation of the adjective “navigable.”<sup>76</sup> Thomas L. Sansonetti, former Assistant Attorney General, U.S. Department of Justice, Environmental & Natural Resources Division, during the George W. Bush Administration, eloquently explains:

When you look at the CWA, it says the waters of the U.S. are those that are navigable waters. Navigable[,] taken literally[,] means a ship, boat, canoe, or kayak. But what if the water body is not a tributary? What if it’s a stream? A creek? A rivulet? A trickle? What if it’s the place where two raindrops kiss coming out of the sky landing on the mountain top before going on to the Columbia or Mississippi? No vessel could navigate those waters.

At what point should a line be drawn as to the federal regulatory reach, i.e., how far should the tentacle of the Army Corps of Engineers or EPA be able to reach to regulate the way that an individual uses his or her land? . . . And so the issue is, where do you draw the line through the definition of “navigable waters.” Some say the federal government’s reach should go all the way to the top of the mountain where the two raindrops kiss. For example, if you squeeze a dropper of arsenic into the trickle, and it can be traced all the way down to the Mississippi River and the Gulf of Mexico and so long as it can interfere with navigable water and poison them, then you should be regulated goes the argument.<sup>77</sup>

In 1985, the Supreme Court assessed the CWA’s reach for the first time by addressing in *United States v. Riverside Bayview Homes, Inc.*, the Army Corps of Engineers’ (Corps) regulatory authority to define the “waters of the United States.”<sup>78</sup> Without seeking a CWA permit, the defendants began filling marshlands and wetlands in hopes of constructing a housing development.<sup>79</sup> The Corps, in response, brought an action to enjoin defendants from continuing their activities without a permit, arguing the property was an “adjacent wetland” and thus fell within the definition of “waters of the United States.”<sup>80</sup> The Supreme Court relied heavily on *Chevron U.S.A., Inc. v.*

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76. Thomas L. Sansonetti, Transcript, *Water Issues During the First Term of the Bush-Cheney Administration*, 6 WYO. L. REV. 353, 364 (2006) (discussing the issues surrounding the jurisdictional definition of “navigable waters of the United States” in light of the ongoing litigation in the *Rapanos* case. Mr. Sansonetti served as the Assistant Attorney General for the Environment and Natural Resources Division (ENRD) of the Department of Justice from 2001-April 2005).

77. *Id.* (alteration in original).

78. *Riverside*, 474 U.S. at 123; see also MacDonald, *supra* note 57, at 322 (where author noted the Court’s endorsement of an “expansive view” and that “the Corps could reasonably read ‘navigable waters’ to include non-navigable wetlands adjacent to, and connected with, navigable-in-fact water ways”).

79. *Riverside*, 474 U.S. at 124.

80. *Id.*

*Natural Resources Defense Council, Inc.*<sup>81</sup> The Court found that where an agency such as the EPA or the Corps interprets a statute to have a particular meaning, that interpretation is "entitled deference if it is reasonable and not in conflict with the expressed intent of Congress."<sup>82</sup> The *Riverside* court determined that Congress' intent under the CWA was to create a broad definition of the term "waters."<sup>83</sup> The Corps argued that when looking at the broader hydrological cycles of the given area, adjacent wetlands are an integral and inseparable part of the aquatic system; therefore, pollution to wetlands may have a significant effect on water protected by the CWA.<sup>84</sup> The Supreme Court agreed and required the defendants to seek a permit.<sup>85</sup> It held that the Corps had authority to interpret the statute and reasonably interpreted non-navigable "wetlands" lying adjacent to, and connected with, navigable-in-fact waters as fitting within the statute's definition of "waters of the United States."<sup>86</sup>

*Riverside* and CWA's thirty year history demonstrates that courts consistently interpret federal authority broadly. When evaluating post-*Riverside* CWA jurisprudence, it is helpful to view the following two cases as exceptions to CWA's general rule concerning jurisdiction. These two cases deviated from the jurisdictional norm, and as a result frustrated and complicated our nation's most successful environmental law. Without jurisdictional authority to ensure CWA

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81. See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* explains the degree of deference courts give to an agency decision, called the "Chevron-two-step:"

First, determine "whether the statute is ambiguous or there [exists] a gap which Congress intended the [a]gency to fill" or whether "Congress directly spoken [ ] and is the intent clear." If the answer is yes - then the Court will defer to Congressional intent. If the answer is no, and Congress' intent is not clear, then ask: "is the [a]gency's interpretation of the statute reasonable and permissible?" If an agency's interpretation is *reasonable*, then the Court will defer to the agency's reading of the statute.

82. See *Riverside*, 474 U.S. at 131.

83. *Id.* at 133. The *Riverside* court stated,

In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA §§ 301(a), 404(a), 502(12), 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.

84. *Id.* at 134-36.

85. *Id.* at 139.

86. *Id.*

compliance, the EPA and Corps are powerless to prevent atrocities to our nation's environment.

*a. Solid Waste Agency of Northern Cook County (SWANCC)*

In 2001, the U.S. Supreme Court reined in the Corps' historically expansive jurisdiction. In a 5-4 ruling in *SWANCC*, the Court denied the Corps' section 404(a) authority to regulate, through application of subsection (b) the Migratory Bird Rule,<sup>87</sup> intrastate, isolated waters based solely on the presence of migratory birds.<sup>88</sup> Petitioners selected an old abandoned sand and gravel pit mine as a garbage disposal site.<sup>89</sup> This long-abandoned mining site had changed into a stag forest, with its excavated trenches turned into scattered permanent and seasonal ponds; the area became home to roughly 120 different bird species.<sup>90</sup>

CWA section 404(a) grants the Corps authority to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites."<sup>91</sup> CWA defines "navigable waters" as "the waters of the United States."<sup>92</sup> As the agency charged with implementing the statute, the Corps issued regulations defining the term "waters of the United States" to include "water such as intrastate lakes, rivers, streams, intermittent streams, mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."<sup>93</sup> Later, the Corps amended this definition (based on the Migratory Bird Rule), to clarify that it maintains authority over intrastate waters used: (1) as bird habitats "protected by Migratory Bird Treaties;" (2) "as habitat[s] by other migratory birds crossing

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87. 33 C.F.R. § 328.3(b) (1986); *see also* 51 F.R. 41,206, 41,207 (1986). The Corps attempted to clarify its jurisdiction through the "Migratory Bird Rule." The Rule states that §404(a) extends to intrastate waters which are or would be: (a) used as habitat by birds protected by Migratory Bird Treaties; (b) which are or would be used as habitat by other migratory birds crossing state lines; (c) which are or would be used as habitat for endangered species; or (d) used to irrigate crops sold via interstate commerce.

88. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67 (2001) [hereinafter *SWANCC*]; *see also* MacDonald, *supra* note 57, at 322 (arguing the scope of federal jurisdiction under the CWA was narrowed by the holding in *SWANCC*).

89. *SWANCC*, 531 U.S. at 162-63.

90. *Id.* at 163.

91. Clean Water Act § 404(a).

92. Clean Water Act § 502(7) (defines the term "navigable waters" to mean "waters of the United States, including territorial seas.").

93. 33 C.F.R. § 328.3(a)(3) (1999).



state lines; (3) "as habitat[s] for endangered species; and (4) "used to irrigate crops sold in interstate commerce."<sup>94</sup>

After learning of the presence of several migratory bird species at the site, the Corps determined that birds crossing state lines used the site's seasonal ponds and asserted that section 404 granted the agency the authority to regulate the migratory bird's habitat.<sup>95</sup> The Corps denied a permit, claiming the petitioners failed to establish that the proposal was the least environmentally damaging, and failed to find the most practicable alternative for disposal of waste.<sup>96</sup> Petitioners challenged the permit denial and the Corps' jurisdiction, arguing it exceeded its authority under the CWA by interpreting the Migratory Bird Rule in a manner to include authority over non-navigable, isolated, intrastate waters and land-locked ponds.<sup>97</sup>

The Supreme Court agreed with the petitioners, determining the Corps failed to give enough weight and credence to the term "navigable waters" in CWA section 404(a) governing dredge and fill permits.<sup>98</sup> The court explained that the CWA's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>99</sup> The Court applied *Riverside* and interpreted section 404(a) in the context of the statute's stated purpose: (1) that the Corps maintains section 404(a) jurisdiction over wetlands actually abutting with a navigable waterway; (2) noted the term "navigable" is of "limited import"; and (3) that Congress evidenced its intent to "regulate at

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94. *SWANCC*, 531 U.S. at 162-63 (alteration in original).

95. *Id.* at 164-65.

96. *SWANCC*, 531 U.S. at 165. (quoting U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation & Decision), (Lodging of Petitioner, 87).

[T]he Corps refused to issue a § 404(a) permit. The Corps found that SWANCC had not established that its proposal was the least environmentally damaging, most practicable alternative for disposal of nonhazardous waste; that SWANCC's failure to set aside sufficient funds to remediate leaks posed an 'unacceptable risk to the public's drinking water supply,' and that the impact of the project upon area-sensitive species was 'unmistakable since a landfill surface cannot be redeveloped into a forested habitat.

97. *Id.* at 165-66.

98. *SWANCC*, 531 U.S. at 163.

Section 404(a) grants the Corps authority to issue permits for 'discharge of dredged or fill material into the navigable waters at specified disposal sites.' The term 'navigable waters' is defined under the Act as "the waters of the United States, including territorial seas." § 1362(7). *Id.* at 163;

We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute. We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited import' and went on to hold that § 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another thing to give it no effect whatever.

99. 33 U.S.C. § 1251(a).

least some water that would not be deemed ‘navigable’ under the classic understanding of that term.”<sup>100</sup> However, the Court based its earlier holding on Congress’ “unequivocal acquiesce to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters.”<sup>101</sup> Simply stated, Congress’ concern and intent was to regulate areas “inseparably bound up with the ‘waters’ of the United States.”<sup>102</sup>

Unlike the earlier *Riverside* decision, in order to find for the Corps here, the Court would have to hold the Corps’ jurisdiction extended to ponds not adjacent to open waters.<sup>103</sup> While Congress approved of the Corps’ first interpretation of the “waters of the United States,” in *Riverside* the Court held that the Corps failed to show Congress did not intend the 1986 Migratory Bird Rule amendments extended the Corps’ jurisdiction over intrastate waters.<sup>104</sup> The Court reasoned that if Congress intended such an expansive view, then it would have expressly written so when enacting the CWA or subsequent amendments.<sup>105</sup> Thus, the Court refused to give deference to the Corps’ interpretation of the statute. The Supreme Court ultimately refused to remove the term “navigable” completely out of the CWA’s jurisdictional definition and deemed the statute excluded jurisdiction over non-adjacent waters.<sup>106</sup> The Court’s holding started a chain reaction: first calling into question the foundations of the Migratory Bird Rule, which in turn questioned the Corps’ ability to claim jurisdiction based on the Rule.<sup>107</sup> The Court held that the Corps could not use the presence of migratory birds as the sole basis for protecting a water body under the CWA.<sup>108</sup>

SWANCC affected environmental regulation in several ways. Although both the Court’s majority opinion and dissent limit discussion of the term “navigable waters” to the Corps’ authority under section 404, the term “navigable waters” applies to the CWA in its entirety.<sup>109</sup> The Supreme Court used Section 502’s definition that navigable waters consist of “waters of the United States, including ter-

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

101. *Id.*

102. *Id.*

103. *Id.* at 168.

104. *Id.* at 170.

105. *Id.*

106. *Id.* at 171-74.

107. *Id.* at 174.

108. *Id.*

109. *JOHNSTON ET AL.*, *supra* note 21, at 680.

ritorial seas.”<sup>110</sup> This means that any limitation *SWANCC* placed on the Corps’ jurisdiction, based on the definition of waters, also: (1) restricted the EPA’s jurisdiction under the NPDES program; (2) the State’s jurisdiction under section 401; and (3) the EPA’s and Coast Guard’s authority under the Oil Pollution Act (which has the same jurisdictional powers as CWA).<sup>111</sup>

Prior to *SWANCC*, it was not important for wetlands to be adjacent to water bodies because of the likelihood that wetlands would be habitats for migratory birds.<sup>112</sup> By invalidating the Migratory Bird Rule, *SWANCC* changed the jurisdictional argument to determining whether a wetland was adjacent to a navigable water.<sup>113</sup> The Corps’ regulation interprets “adjacent” as “bordering, contiguous, or neighboring . . . [w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes.”<sup>114</sup> The term “neighboring” is subject to interpretation, such as a broader meaning like “in the neighborhood.”<sup>115</sup> In these types of cases, a premium has now been created for determining whether a wetland fits into this definition of “adjacent.”<sup>116</sup>

While the holding in *SWANCC* was very narrow, it marked the first time in history that the Supreme Court questioned federal authority over U.S. waters under the CWA.<sup>117</sup> The *SWANCC* Court explicitly did not overrule *Riverside*, thus it is clear that navigable-in-fact waters and adjacent wetlands still qualified as “navigable waters.”<sup>118</sup> Beyond that, the *SWANCC* opinion alone offered little-to-no guidance to the Corps or to lower courts.<sup>119</sup> As a result, the Court’s opinion led to confusion in determining the scope of the holding.

It is the view of this article that the proper reading of *SWANCC* is to limit its interpretation of the CWA to the narrow facts presented in the case and to the precise question certified for judicial review.<sup>120</sup>

110. 33 U.S.C. § 1362(7).

111. JOHNSTON ET AL., *supra* note 21, at 680-81.

112. *Id.*

113. *Id.* at 681.

114. 33 CFR § 328.3 (c) (alteration in original).

115. JOHNSTON ET AL., *supra* note 21, at 681.

116. *Id.*

117. MAJORITY STAFF, *supra* note 27, at 15.

118. *Id.* (citing *SWANCC*, 531 U.S. at 166, 171-72; *Rapanos*, 339 F.3d 447, 452-53 (6th Cir. 2003)).

119. MacDonald, *supra* note 57, at 322 (citing *United States v. Rapanos*, 376 F. 3d 629, 635 (6th Cir. 2004) (“Unfortunately, the two leading Supreme Court cases on the reach of the CWA have done little to clear the muddied waters of the CWA jurisdiction.”)).

120. Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL’Y F. 363, 379 (2004) [hereinafter Parenteau].

SWANCC should be interpreted as invalidating only the Migratory Bird Rule, and should not affect jurisdictional provisions under the CWA in any other way. This was the interpretation supported by the Clinton Administration which produced a memorandum, signed by the Army Corps and EPA's general counsel.<sup>121</sup>

However, with the change in administration came a shift in perspective, and the tides began to change as economic interests slowly gained more influence. In January 2003, the Bush administration issued a guidance document memorandum<sup>122</sup> to the field staff of the EPA and Corps.<sup>123</sup> The memorandum prohibited jurisdiction over isolated waters solely on the basis of migratory birds, and suggested field staff 'check with Washington' before asserting jurisdiction thereof for any other basis.<sup>124</sup> Nevertheless, the memorandum failed to offer states and regulators any additional guidance.<sup>125</sup> Veiled as an attempt to clarify regulation, the administration proposed a rule-making strategy that would significantly draw back CWA jurisdiction.<sup>126</sup> Upon seeking public comment, this effort was abandoned by the administration as venomous criticism poured in from environmental organizations, regulators, thirty-nine states, and half of the House of Representatives, including twenty-six Republicans.<sup>127</sup>

Although the administration announced it would abandon the proposed rule-making strategy, the guidance document survived public outcry and created problems for the EPA and Corp field staff.<sup>128</sup> With no clear rule to follow, the SWANCC holding was inconsistently applied among the states.<sup>129</sup> The majority of circuit courts presented with this issue interpreted SWANCC narrowly as invalidating only the

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121. *Id.* (citing Memorandum from GARY S. GUZY, EPA, SUPREME COURT RULING CWA JURISDICTION OVER ISOLATED WATER, available at <http://www.spk.usace.army.mil/pub/outgoing/co/reg/SWANCC.pdf>).

122. Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (proposed Jan. 15, 2003).

123. Parenteau, *supra* note 120, at 379.

124. *Id.*

125. *Id.*

126. Advanced Notice of Proposed Rulemaking the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1995, Appendix A (proposed Jan. 15, 2003).

127. Parenteau, *supra* note 120, at 380.

128. *Id.*

129. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS, COMMITTEE IN GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES; WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, GAO-04-297, Feb. 2004, at 3 available at <http://www.gao.gov/new.items/d04297.pdf>.

Migratory Bird Rule as the sole basis for protecting a water body under the CWA.<sup>130</sup> However other courts, such as the Fifth Circuit, significantly limited regulatory authority by interpreting post-SWANCC jurisdiction under the CWA to apply only to wetlands adjacent to navigable waters.<sup>131</sup>

The courts remained divided on the status of non-navigable tributaries and their adjacent wetlands.<sup>132</sup> The split among the circuit courts led the Supreme Court to once again consider the CWA's jurisdictional scope under the CWA in *Rapanos v. United States*.<sup>133</sup>

### b. *Rapanos*

In 2006, the Supreme Court consolidated two Sixth Circuit cases and once again produced a confusing opinion.<sup>134</sup> The Court's opinion further restricted the historically broad reach of the CWA and confused the status of federal protection of the nation's waters.<sup>135</sup> The facts of the two Sixth Circuit cases involved Petitioners facing charges for filing in wetlands on their properties without first obtaining a section 404 permit under the CWA.<sup>136</sup> The wetland in each case was adjacent to a channel, ditch, drain, or intermittent stream, which eventually emptied into a navigable-in fact waterway.<sup>137</sup> In both cases, the Sixth Circuit narrowly interpreted SWANCC and endorsed a broad understanding of federal authority.<sup>138</sup> In *United States v. Rapanos*, the Sixth Circuit held that jurisdiction was proper because the wetlands were adjacent to navigable-in-fact waters, hydrologically connected to navigable-in-fact waters, and flowed through tributaries to navigable-in-fact waters.<sup>139</sup> This became known as the hydrological connection

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130. See *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (asserting a narrow interpretation of SWANCC); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003) (asserting a narrow interpretation of SWANCC); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003) (asserting a narrow interpretation of SWANCC).

131. See *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *In re Needham*, 354 F.3d 340 (5th Cir. 2003).

132. MacDonald, *supra* note 57, at 323.

133. See generally *Rapanos*, 547 U.S. 715.

134. Jonathan H. Alder, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 113 (2007) [hereinafter Alder, *When is Two a Crowd*].

135. *Id.*

136. Compare *U.S. Army Corps of Eng'ers v. Carabell*, 391 F.3d 704, 707 (6th Cir. 2004); with *Rapanos*, 376 F.3d at 632.

137. See *Carabell*, 391 F.3d at 706; *Rapanos*, 376 F.3d at 633-34.

138. MacDonald, *supra* note 57, at 323.

139. See, *Rapanos*, 376 F.3d at 639, 643; *Rapanos*, 126 S. Ct. at 2219.

test.<sup>140</sup> In *U.S. Army Corps of Engineers v. Carabell*, the Sixth Circuit held jurisdiction was proper when the wetland at issue “is adjacent to neighboring tributaries of navigable waters and has a significant nexus to waters of the United States.”<sup>141</sup> In this more expansive holding, the Sixth Circuit adopted the view that no hydrological connection was necessary. Instead, the Corps could regulate wetlands adjacent to tributaries on the “reasonable conclusion” that geographically adjacent wetlands are “usually” hydrologically connected to navigable-in-fact waters.<sup>142</sup>

The Supreme Court granted certiorari and consolidated the two cases in *Rapanos v. United States*,<sup>143</sup> to determine whether the wetlands at issue constituted “waters of the United States” under the CWA, and if so, whether the CWA was constitutional.<sup>144</sup> The deeply divided *Rapanos* Court failed to produce a majority standard and instead produced three distinct opinions on the proper scope of federal authority under the CWA:<sup>145</sup> (1) Justice Scalia’s “relatively permanent/flowing waters” test was joined by three justices, who voted to vacate and remand the decision of the Sixth Circuit and impose significant limitations on the Corps’ jurisdiction;<sup>146</sup> (2) Justice Kennedy concurred to remand the decision of the Sixth Circuit, but wrote separately endorsing a “significant nexus” test that would impose lesser restrictions on the jurisdiction of the Corps;<sup>147</sup> and (3) Justice Stevens’s dissenting opinion, joined by three justices, would affirm the Sixth Circuit’s decision and maintain the existing EPA and Corp jurisdictional authority fully intact.<sup>148</sup>

### c. *How The Court Got Rapanos Wrong*

In arriving at their conclusions, Justice Scalia and Justice Kennedy failed to adhere to Supreme Court precedent, and failed to give

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140. MacDonald, *supra* note 57, at 323.

141. *Carabell*, 391 F.3d at 708.

142. MacDonald, *supra* note 57, at 323.

143. *Rapanos*, 126 S. Ct. 2208 (The Supreme Court granted certiorari and consolidated for review *Rapanos v. United States*, No. 04-1034 and *Carabell v. Army Corps of Engineers*, No. 04-1384).

144. *Id.* at 2220.

145. *See generally Id.* (explaining case has multiple opinions).

146. *Id.* at 2235 (Scalia, J., plurality) (ordering case vacated and remanded to Sixth Circuit under new relatively permanent/flowing waters test).

147. *Id.* at 2252 (Kennedy, J., concurring) (ordering case vacated and remanded to Sixth Circuit under the significant nexus test).

148. *Id.* at 2265 (Stevens, J., dissenting) (ordering to affirm Sixth Circuit holding).

sufficient deference to policy considerations underlying Congress' passage of the CWA.<sup>149</sup>

The Court's opinion in *Rapanos* misinterprets two precedents. First, neither Justice Scalia nor Justice Kennedy is able to distinguish *Rapanos* from the Court's prior holding in *Riverside*.<sup>150</sup> *Riverside*, a Supreme Court case decided roughly twenty years prior, evaluated the validity of the same regulations at issue in *Rapanos*.<sup>151</sup> The Court in *Riverside* held the Corps had jurisdiction over both tributaries and waters lying adjacent to navigable bodies of water.<sup>152</sup> As Justice Kennedy correctly asserted, *Riverside* is directly controlling precedent.<sup>153</sup> Mindful of prior environmental laws that failed, the CWA drafters intentionally adopted a broad definition of the term "waters" and provided for deference to agency field workers.<sup>154</sup> The Court noted the inherent difficulty, especially in the context of wetlands, in defining where "water ends and land begins."<sup>155</sup> Additionally, the *Riverside* Court explained that this problem is one reason to defer to the Corps' decision to define adjacent wetlands as "waters."<sup>156</sup> The Court held, "The Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."<sup>157</sup> Based on Congress' express intent to restore the integrity of the nation's waters, the *Riverside* Court further concluded that adjacent wetlands fell under the CWA purview when "as a general matter, [such waters] play a key role in protecting and enhancing water quality."<sup>158</sup> As Justice Stevens explained, the Court unequivocally recognized that the Corps' jurisdictional determination in *Riverside* was reasonable even though, "not every adjacent wetland is of great importance to the environment of adjoining bodies of water."<sup>159</sup> The Court's opinion in *Rapanos*, which also dealt with the Corps' interpretation of wetlands, failed to follow this clear precedent.

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149. Currie, *supra* note 9, at 222-23.

150. See *Rapanos*, 126 S. Ct. at 2255 (Stevens, J., dissenting).

151. See *Id.* (Stevens, J., dissenting).

152. See *Id.* (Stevens, J., dissenting).

153. See *Id.* (Stevens, J., dissenting).

154. See *Riverside*, 474 U.S. at 132-33.

155. See *Riverside*, 474 U.S. at 132; 106 S. Ct. 455.

156. *Id.*

157. *Riverside*, 474 U.S. at 134.

158. See *Id.* at 133 (alteration in original).

159. *Rapanos*, 126 S. Ct. at 2256 (Stevens, J., dissenting) (quoting *Riverside Bayview Homes*, 474 U.S. at 135).

Second, Justice Scalia incorrectly interpreted *SWANCC*'s relevance to *Rapanos*.<sup>160</sup> The facts underlying *SWANCC* concerned isolated, non-navigable intrastate waters that were not adjacent to navigable waters.<sup>161</sup> The facts underlying *Rapanos* concerned wetlands.<sup>162</sup> As Justice Stevens correctly asserted, “*SWANCC* had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable waters or their tributaries” and is thus distinct from the matter in *Rapanos*.<sup>163</sup> *SWANCC* dealt with waters that were *not* part of a tributary system to navigable or interstate waters; instead it dealt with abandoned gravel and sand pits that became stagnant ponds.<sup>164</sup> *Rapanos* concerned wetlands that abut tributaries of traditionally navigable waters; this is distinguished from *SWANCC* and similar to *Riverside Bayview*.<sup>165</sup> However, the plurality opinion in *Rapanos* failed to recognize this clear factual distinction.

Additionally, the plurality opinion failed to properly analyze Congress' policy considerations for passing the CWA and, as a result, violates the Court's canons of construction enumerated in *Chevron*.<sup>166</sup> Both the opinions by Justice Scalia and Justice Kennedy start with the correct premise that *Riverside* stands for the proposition that in enacting the CWA, Congress intended to regulate at least some waters that are not 'navigable' in the traditional sense.<sup>167</sup> However, Justice Scalia incorrectly asserted that the Corps' interpretation of the CWA is impermissible, and in doing so, frustrated Congress' intent to grant the Corps deference.<sup>168</sup> This article postulates that the Circuit Court below correctly followed the rules of statutory interpretation and was correct in finding the Corps' interpretation permissible. The CWA was anticipated to be “an all-encompassing program of water pollution control regulation,” and was intended to be flexible.<sup>169</sup> *Chevron* states where “Congress has explicitly left a gap for agency to fill, there is an express delegation of authority to the agency to elucidate a specific pro-

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160. See *Id.* (Stevens, J., dissenting); see also David E. Kunz, *A River Runs Through It: An Analysis of the Implications of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers on the Clean Water Act and Federal Environmental Law*, 9 ENVTL. LAW. 463, 473 (2003).

161. *Rapanos*, 126 S. Ct. at 2256 (Stevens, J., dissenting).

162. Compare *Carabell*, 391 F. 3d at 707; with *Rapanos*, 376 F.3d at 632.

163. *Rapanos*, 126 S. Ct. at 2256 (Stevens, J., dissenting).

164. *SWANCC*, 531 U.S. at 168-169.

165. *Rapanos*, 126 S. Ct. at 2256-57 (Stevens, J., dissenting).

166. Currie, *supra* note 9, at 227.

167. *Rapanos* 126 S. Ct. at 2220; *Rapanos* 126 S. Ct. at 2241 (Kennedy, J., concurring); *Riverside*, 474 U.S. at 133; see also *SWANCC*, 531 U.S. at 167.

168. *Rapanos*, 126 S. Ct. at 2224.

169. See *Rapanos*, 126 S. Ct. at 2241 (citing *Milwaukee v. Illinois*, 451 U.S. 304, 318).



vision of the statute by regulation.”<sup>170</sup> Here, Congress intentionally structured the statute to allow the Corps broad authority to construct its own interpretation of the term “waters,”<sup>171</sup> demonstrated by the Supreme Court’s previous holdings in *Bayview*. In *Bayview*, the Court opined Congress intentionally created a broad definition of “waters,” intentionally left a gap in the legislation for the Corps to fill, and found it permissible to apply such a definition to adjacent wetlands.<sup>172</sup>

The Court has clearly failed to follow its own rules. When asked to comment on the *Rapanos* decision, one district court judge stated, “I will not compare the ‘decision’ to making sausage because it would excessively demean sausage makers.”<sup>173</sup> Without a majority decision and with the resulting multiple convoluted tests, the entirety of the CWA has been thrown into turmoil.<sup>174</sup> There is confusion and delay among the States, government agencies, regulated interests, and the public.<sup>175</sup> By taking away the agency’s jurisdictional basis, the EPA and Corps are now powerless to protect the waters of the United States. Self interested industries take advantage of the chaos by dumping and developing, without permit or regulation, in previously protected areas.<sup>176</sup> As a result, the conditions of our nation’s waters are reversing to its previous toxic and putrid state.

*d. How the Administration’s Guidance Documents Further Confused the Rapanos Decision*

In 2007, revised in 2008, the Bush administration added insult to injury by issuing new agency guidance documents embracing the Supreme Court’s error in *Rapanos*.<sup>177</sup> The confusing and unworkable directives enumerated in the guidance documents are even less protec-

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170. *Chevron*, 467 U.S. at 843-844.

171. Currie, *supra* note 9 at 227.

172. *Id.*

173. Dougherty, *supra* note 45, *passim*.

174. *See generally, Id.*

175. *Id.*

176. *Id.*

177. U.S. ENVIRONMENTAL PROTECTION AGENCY & U.S. ARMY CORPS OF ENGINEERS., *Clean Water Act Jurisdiction: Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, (June 5, 2007), available at [www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf](http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf); and U.S. ENVIRONMENTAL PROTECTION AGENCY & U.S. ARMY CORPS OF ENGINEERS., *Clean Water Act Jurisdiction: Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, (Dec. 2, 2008), available at [www.epa.gov/wetlands/guidance/cwawaters.html](http://www.epa.gov/wetlands/guidance/cwawaters.html).

tive of our nation's waters than the *Rapanos* decision.<sup>178</sup> The guidance purports to find CWA jurisdiction under either the Scalia or Kennedy test, but convolutes those two tests to the point of lunacy. The guidance calls for a resource intensive case-by-case process on classes of water previously found to be categorically within CWA jurisdiction, then further breaks those waters down into three classes each with its own separate level of regulatory scrutiny.<sup>179</sup> This directive goes beyond the requirements of the Court's decision and puts wetlands, intermittent and ephemeral streams, and tributaries in danger of losing protection.<sup>180</sup> The result is a costly, time consuming, case-by-case process that will clog the agencies and slow the entire permitting process.<sup>181</sup>

The devastating effect of SWANCC, *Rapanos*, and the agency guidance documents have had on the nation's waters is shocking. These decisions have misinterpreted the law and placed many important pollution limitations for vital bodies of water in doubt.<sup>182</sup> The Court's rulings have brought waterways entirely within a single state, seasonal streams, creeks that sometimes go dry, and lakes unconnected to flowing waters, all into question because they may not be considered "navigable waters."<sup>183</sup> Now, roughly 117 million Americans get their drinking water from sources fed by waters that are excluded from the CWA.<sup>184</sup> "This is a huge deal," stated New York State's assistant commissioner of water recourses, "there are whole watersheds that feed into New York's drinking water supply that are, as of now, unprotected."<sup>185</sup> Our nation's waters and our nation's public health are unable to withstand the current conditions.<sup>186</sup> The guidance docu-

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178. Earthjustice et al., *Courting Disaster*, *infra* note 180, at 3; and Johnston & Sendek-Smith, *infra* note 179, at 24.

179. Keith A. Johnston & Kristine Sendek-Smith, *Muddy Waters: Recent Developments Under the Clean Water Act*, 24 NAT. RESOURCES & ENV'T 31, 34 (2010) [hereinafter Johnston & Sendek-Smith].

180. Earthjustice et al., *Courting Disaster: How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It*, 3 (April 2009), available at <http://www.sieraclub.org/communities/downloads/2009-04-courting-disaster.pdf>. [hereinafter Earthjustice et al., *Courting Disaster*].

181. *Id.*

182. *Id.* at 1.

183. Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Hampering E.P.A.: Regulatory Gray Area: Quibbles on Jurisdiction Let Polluters Keep Dumping Waste*, N.Y. TIMES, March 1, 2010, at A17 [hereinafter Duhigg & Roberts].

184. *Id.*

185. *Id.* at A1 (quoting James M. Tierney, the New York State assistant commissioner for water resources as he speaks about the new constraints placed on regulators).

186. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 4.

ments can be and should be rescinded by the new administration.<sup>187</sup> Unfortunately, the agencies responsible for administering the CWA, the EPA and Corps, cannot alone fix the problems caused by the Supreme Court.<sup>188</sup> Even with *Chevron* deference, these agencies are trapped inside the labyrinth created by the courts. *SWANCC* and *Rapanos* are judicial interpretations of the CWA, and can only be fixed by Congress.<sup>189</sup> By amending the CWA, Congress clearly states its intent with regards to the statute's jurisdictional reach and prevents the need for judicial interpretation. Congress must unite to rally behind the Clean Water Restoration Act.<sup>190</sup>

### III. CONFUSION AND MAYHEM AMONG THE STATES

This inferno of uncertainty is evident in the current circuit split over which of the competing *Rapanos* tests should be controlling. The First and Eighth Circuits and the federal government hold that the CWA grants jurisdiction if either the plurality or Justice Kennedy's test is satisfied.<sup>191</sup> The Seventh, Ninth, and Eleventh Circuits adopted Justice Kennedy's test.<sup>192</sup> Other circuit courts purposefully ruled to avoid the question. In a case before the Sixth Circuit, the court found CWA jurisdiction to exist under both Justice Kennedy's and the plurality test, but declined to rule on which standard should control.<sup>193</sup> And in a case before the Fifth Circuit, the court found CWA jurisdiction under all three tests asserted in *Rapanos*.<sup>194</sup>

Due to this uncertainty over which test to use and consequently which waterways are protected, thousands of the nation's largest polluters are now claiming to be outside the reach of the CWA.<sup>195</sup> Returning back to the days when it was simply more cost effective to dump carcinogens, chemicals, and dangerous bacteria, businesses are now declaring that the law does not apply to them and pollution rates

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187. *Id.* at 3.

188. *Id.*

189. *Id.*

190. Clean Water Restoration Act, S. 787, 111th Cong. (2009).

191. Johnston & Sendek-Smith, *supra* note 179, at 34 (citing *United States v. Johnson*, 467 F.3d 56, 60-66 (1st Cir. 2006); and *United States v. Bailey*, 571 F.3d 200, 207 (6th Cir. 2009)).

192. *Id.* (citing *United States v. Gerke Excavating, Inc.* 464 F.3d 723, 724-25 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007); and *United States v. Robinson*, 505 F.3d 1208, 1219-22 (11th Cir. 2007)).

193. *Id.* (citing *United States v. Cundiff*, 555 F.3d 200, 207 (6th Cir. 2009)).

194. *Id.* (citing *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008)).

195. Duhigg & Roberts, *supra* note 183, at A1.

are rising.<sup>196</sup> Companies which have carelessly spilled and intentionally dumped these contaminants into rivers, lakes and other waters are not being prosecuted, according to EPA regulators who estimate that more than 1500 major pollution investigations have been shelved or discontinued over the past four years.<sup>197</sup>

The EPA and Army Corps of Engineers have been left to their own devices under an entirely confusing judicial precedent and flawed guidance documents. As a result, these agencies are making inconsistent, questionable, and flat out wrong jurisdictional calls. The following are just a few examples of the atrocities that are occurring in every state throughout the country.

The coastal and riparian wetlands of South Carolina, now known as the “Spectra Wetlands”, are an example of how the *Rapanos* restriction on federal jurisdiction is affecting states.<sup>198</sup> Spectra, L.L.C. owned 32 acres of wetlands, which the company wished to fill and develop into a shopping center.<sup>199</sup> The Corps authorized the company to proceed unchecked, claiming the wetlands unprotected by the CWA as “isolated” waters.<sup>200</sup> This decision was made in spite of the fact that the wetlands at issue were historically and currently hydrologically connected to navigable waters.<sup>201</sup>

Several agencies disagreed with the Corps’ determination; the U.S. Fish and Wildlife Service illustrated a connection between the wetlands and a stream, and recommended the wetlands be treated as jurisdictional because of the importance of such wetlands to the state.<sup>202</sup> Additionally, the South Carolina Department of Health and Environmental Control (DHEC) refused to grant a permit to Spectra, L.L.C., explaining the company’s plans violated the state’s Coastal

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196. *Id.*

197. *Id.*

198. Aileo Weinmann, *Report Highlight Threats to Local Waters and Wetlands: Studies Demonstrate Need to Restore Clean Water Act Protections* (2010), available at [https://www.nwf.org/News-and-Magazines/Media-Center/Reports/Archive/2010/~media/PDFs/Water/2009\\_SouthCarolinaWetlands\\_Report.ashx](https://www.nwf.org/News-and-Magazines/Media-Center/Reports/Archive/2010/~media/PDFs/Water/2009_SouthCarolinaWetlands_Report.ashx) (last visited Sept. 12, 2010).

199. Kim Diana Connelly, *SWANCC and RAPANOS Supreme Court Rulings on South Carolina Waters 4* (NAT’L Wildlife Federation 2009), available at [https://www.nwf.org/News-and-Magazines/Media-Center/Reports/Archive/2010/~media/PDFs/Water/2009\\_SouthCarolinaWetlands\\_Report.ashx](https://www.nwf.org/News-and-Magazines/Media-Center/Reports/Archive/2010/~media/PDFs/Water/2009_SouthCarolinaWetlands_Report.ashx) [hereinafter Connelly].

200. Connelly, *supra* note 199, at 4; Earthjustice et al., *Courting Disaster* *supra* note 180, at 5; and S. ENVT L. Center, *Wetland Protection at Stake In Challenge to U.S. Army Corps of Engineers*, Mar. 24, 2009, available at [http://www.southernenvironment.org/newsroom/press\\_release/spectre\\_filing\\_pr\\_3\\_24\\_09/](http://www.southernenvironment.org/newsroom/press_release/spectre_filing_pr_3_24_09/) (last visited Sept. 12, 2010).

201. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 5; Connelly, *supra* note 199, at 5.

202. Weinmann, *supra* note 198, at 1; and Earthjustice et al., *Courting Disaster*, *supra* note 180, at 5.

Management Program.<sup>203</sup> The courts upheld the issuance of the permit and determined the Corps had no authority under the CWA and thus the State DHEC had no authority because the state law tracks the Corps' CWA authority.<sup>204</sup> Thus, despite these strong objections by multiple agencies against the project's impact on South Carolina's vital wetlands, the loss of federal protection has led to an undercut in state-level safe guards.<sup>205</sup>

The South Carolina Environmental Law Project, representing a number of environmental groups, filed a lawsuit in federal court against the Corps, EPA and others in 2009.<sup>206</sup> Decided in 2010, this case reversed the obviously erroneous decision of the Administrative Law Court to issue the permit.<sup>207</sup> The Supreme Court determined that the wetland permits issued by Army Corps of Engineers did not limit application of Coastal Management Project (CMP); the CMP and Coastal Zone Management act (CZMA) valid and enforceable bodies of legislation; and thus, the wetlands at issue are afforded protection under state law.<sup>208</sup> While in the end, the wetlands were given proper protection, which it was legally entitled to do, this case shows the extreme measures that were necessary to get that protection. It seems now, more often than not, a trip to the Supreme Court is necessary for an agency to determine its job. This current legal environment is not only confusing but extremely costly and wasteful of agency resources.

The Santa Cruz River is a significant natural resource that is culturally and historically important to the State of Arizona.<sup>209</sup> After a well-researched study, including a 70-plus page scientific report, parts of this river were deemed "traditionally navigable waters" (TNW) by the Corps.<sup>210</sup> However, without explanation, this classification was

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203. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 6; Connelly, *supra* note 199, at 5.

204. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 6; Connelly, *supra* note 199, at 5; and S. ENTL. L. Center, *Wetland Protection at Stake In Challenge to U.S. Army Corps of Engineers*, Mar. 24, 2009, available at [http://www.southernenvironment.org/newsroom/press\\_release/spectre\\_filing\\_pr\\_3\\_24\\_09/](http://www.southernenvironment.org/newsroom/press_release/spectre_filing_pr_3_24_09/).

205. Weinmann, *supra* note 198 at 1; Earthjustice et al., *Courting Disaster*, *supra* note 180, at 6.

206. Connelly, *supra* note 199, at 6.

207. *Spetre, L.L.C. v. S. Carolina Dep't of Health and Entl Control*, 386 S.C. 357 (2010).

208. *Id.*

209. SaveOurEnvironment.org, *Arizona and Clear Water, What is at Stake?* 1-2 (2009), available at <http://www.savethecleanwateract.org/map/az-state-specific-what-is-at-stake-fact-sheet-oct-2009.pdf> [hereinafter *Arizona and Clear Water*].

210. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 23; *Arizona and Clear Water*, *supra* note 209, at 1-2.

suddenly withdrawn by the agency.<sup>211</sup> An investigation by the House Committee on Oversight and Government Reform as well as the Committee on Transportation and Infrastructure ensued.<sup>212</sup> This investigation revealed that the Assistant Secretary of the Army for Civil Works, under pressure from special interest and corporate lobbyists, had instructed his staff to change the initial classification to a non-protected status.<sup>213</sup> When his staff would not comply, the Assistant Secretary formally overrode the staff determination.<sup>214</sup> These actions could have put the Santa Cruz River and surrounding natural resources in danger.<sup>215</sup> Thanks to the House Committees investigation, the EPA declared the Santa Cruz a “special case” and took the decision away from the Corps.<sup>216</sup> Now the previously protected sections of the river are again classified as TNWs.<sup>217</sup>

An Alabama case involving midnight dumping presented another example of how regulators and justices alike are confounded by the Supreme Court’s holdings. The Avondale creek was determined to be “navigable water” under the CWA by its connection with the Black Warrior River (a traditionally navigable river).<sup>218</sup> In 2005, the courts found the McWane, Inc. manufacturing company guilty of violating the CWA by knowingly discharging grease, oil, lead and zinc into the Avondale Creek<sup>219</sup> in which the conviction resulted in millions of dollars in fines and put the company on a probationary status.<sup>220</sup> The *Rapanos* decision was handed down after this case was decided, and the McWane manufacturing company appealed claiming that the Avondale Creek was not navigable water and that the district court

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211. Daniel R. Patterson, *EPA Elbows Corps Aside to Protect Western River* (Aug. 2008 The American Eagle), available at, <http://dpatterson.blogspot.com/2008/08/epa-elbows-corps-aside-to-protect.html>; and Earthjustice et al., *Courting Disaster*, supra note 180, at 23; and *Arizona and Clear Water*, supra note 209, at 1-2.

212. Earthjustice et al., *Courting Disaster*, supra note 180, at 23; *Arizona and Clear Water*, supra note 209 at 1-2.

213. *Id.*

214. *Id.*

215. Patterson, supra note 211; Earthjustice et al., *Courting Disaster*, supra note 180, at 23.

216. Patterson, supra note 211.

217. *Id.*; Earthjustice et al., *Courting Disaster*, supra note 180, at 23.

218. *Absence of Evidence of Effect on Water Dooms Criminal Conviction*, REAL ESTATE/ENVTL LIABILITY NEWS LRP PUBLICATIONS, Nov. 16, 2007, Vol. 19 No. 3.

219. *Ala. Company, Employees convicted of illegal discharge*, ENVTL LABORATORY WASHINGTON REPORT, Vol. 16, No. 12 (June 30, 2005); see generally, Dept. of Justice, *infra* note 220; and Earthjustice et al., *Courting Disaster*, supra note 180, at 28.

220. Dept. of Justice, *McWane Inc. and Plant Managers Plead Guilty to Clean Water Act Violations at Birmingham, Ala. Facilities*, N. Dist. of Ala., Dec. 18, 2009, available at <http://www.epa.gov/compliance/resources/cases/criminal/highlights/2010/mcwane-12-18-09.pdf>.

has erroneously instructed the jury on the definition of those key terms.<sup>221</sup> The Court of Appeals reversed, holding that *Rapanos* handed down a new jurisdictional test which required the prosecution to show a significant nexus between a navigable waterway and the given waterway; that the 'hydrological connection test' used by the lower court was insufficient to prove a 'significant nexus'; and, that the government failed to prove this burden despite the fact that the creek flows into a TNR.<sup>222</sup> The presiding trial judge recused himself, going so far as to say, "I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again."<sup>223</sup>

A continued failure to remedy the errors of the *SWANCC* and *Rapanos* court opinions will continue to cause an increased quantity and frequency of unregulated pollution being discharged into our nation's rivers, streams, lakes, and wetlands, and consequently a reversal of the past 36 years of water quality improvements. "We are, in essence, shutting down our Clean Water programs in some states," said one EPA attorney.<sup>224</sup> "This is a huge step backwards. When companies figure out that cops can't operate, they will start remembering how much cheaper it is just to dump the stuff in a nearby creek."<sup>225</sup>

#### IV. CLEANING UP THE CWA – A CALL FOR THE CLEAN WATER RESTORATION ACT ("CWRA")

The current unsustainable legal environment facing the waters of the United States simply cannot be mended by the Judicial or the Executive branches. The lower courts have repeatedly failed for eight years to make sense of the jurisdictional labyrinth created by the Supreme Court. As Patrick Parenteau, Clinic Director and Professor of Environmental Law at Vermont Law School stated,

[I]t is time to call a halt to the fruitless search for some divine meaning in the opaque language of the [Supreme Court] decision, and its tortured, inconsistent logic. While the debate over the implications of the holding still rages in the pages of academic and professional journals, the rest of the world is moving on. It is time

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221. *Absence of Evidence of Effect on Water Dooms Criminal Conviction*, *supra* note 218, *passim*.

222. *Id.*; Dept. of Justice, *supra* note 220, at 1; Earthjustice et al., *Courting Disaster*, *supra* note 180, at 28.

223. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 28.

224. Duhigg & Roberts, *supra* note 183, at A1 (quoting Dougals F. Mundrick, E.P.A. lawyer in Atlanta).

225. *Id.*

for new . . . direction on how jurisdictional determinations should be made.<sup>226</sup>

It is time for Congress to step up and fix the broken CWA and reaffirm our commitment to restoring and protecting our most precious natural resources – our rivers, lakes, streams and wetland. Environmental groups are not alone in the call for congressional action. Support to overturn the Bush guidance documents and the Supreme Court decisions is flooding in from multiple individual states, state regulatory agencies, politicians on both sides of the aisle, respected scientists, conservation, hunting and fishing groups and members of the public.<sup>227</sup>

In April 2009 EPA Administrator Lisa Jackson wrote to Congress, imploring legislators to create a more comprehensible definition of wetlands subject to CWA permitting jurisdiction.<sup>228</sup> In May of 2009 the agencies took action; both the EPA and the Army Corps of Engineers wrote to Congress with suggestions for legislation clarifying the phrase “waters of the United States.”<sup>229</sup> Along these lines, aimed at an effort to restore the CWA to its previously healthy state, Senator Feingold introduced the Clean Water Restoration Act (CWRA) in the 111th Congress.<sup>230</sup>

The CWRA has three stated purposes: (1) to reaffirm the original intent of Congress with regard to federal regulatory jurisdiction, the FWPCA, and CWA amendments, (2) to clarify the scope of federal regulatory jurisdiction by clearly defining the “waters of the United States” that are subject to the FWPCA, and (3) to enhance environmental protection by providing protection to the “waters of the United States” to the maximum extent permissible under the Constitution.<sup>231</sup> The CWRA is aimed at restoring federal protection to the level which existed prior to *SWANCC*, *Rapanos*, and the Bush guidance documents.<sup>232</sup> It solves current jurisdictional problems by removing the

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226. Patrick Parenteau, Featured Article, *Bad Calls: How Corps' Districts Are Making Up Their Own Rules of Jurisdiction Under the Clean Water Act*, 6 VT. J. ENVTL L. 3 (2005) (alternation in original).

227. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 3.

228. Johnston & Sendek-Smith, *supra* note 179, at 35.

229. *Id.*

230. Clean Water Restoration Act S. 787, 111th Cong. (2009); *see also*, Kathleen Sutcliffe, *Senate: Clean Water Protection Needed for All Waters*, EARTHJUSTICE, April 2, 2009, at 1, available at <http://www.earthjustice.org/news/press/2009/senate-clean-water-protection-needed-for-all-waters>.

231. Clean Water Restoration Act S. 787, 111th Cong. §2 (2009).

232. S. 787, §3 (10); *see also* Majority Staff, *supra* note 27, at 17.



word “navigable” from the law.<sup>233</sup> Specifically, it will “replace the term ‘navigable waters’ with the term ‘waters of the United States,’ defined to mean all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intra-state waters and their tributaries, including lakes, rivers, streams, playa lakes, and natural ponds.”<sup>234</sup> This is the jurisdiction definition adopted by the EPA and Corps in their agencies regulations, and has been the working definition implemented by those agencies for decades.<sup>235</sup> Deleting the word “navigable” reverts the jurisdictional test to that which existed in the pre-SWANCC and *Rapanos* era, and does so without expanding the government’s power any further.<sup>236</sup> Nothing else under the CWA, nor the powers of the States, nor the powers of the EPA or Corps will be affected or abrogated by this amendment.<sup>237</sup> This simplifies and clarifies the law, ensures its application is based on Congress’ stated intent to restore the nation’s waters, and prevents the application of the CWA from being erroneously based on navigability.<sup>238</sup>

The CWRA is not without its critics. The three main criticisms attack each one of the stated purposes: (1) the legislation will exceed the original intent of the FWPCA by dramatically expanding the federal government’s regulatory reach over waters, puddles, and anything wet; (2) the legislation will fail to clarify the definition of waters subject to federal jurisdiction and instead exacerbate existing regulatory uncertainty; and (3) the legislation will not provide enhanced environmental protection and will lead to worsening conditions.<sup>239</sup>

*a. The CWRA Restores the Original Intent of Congress*

The first major criticism is that the CWRA is cloaked as a modest measure to “restore” jurisdictional authority, while actually providing for regulatory authority that is significantly more expansive

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233. Duhigg & Roberts, *supra* note 183, at A17.

234. Clean Water Restoration Act S. 787, 111th Cong. (2009) (quoting summary of amendment).

235. S. 787, §3(8); *see also* Dougherty, *Overview: Clean Water Restoration Act*, *supra* note 45.

236. S. 787, §§3(7)-(8).

237. *See* S. 787§§3(6), 3(13), 3(15), and §6.

238. Dougherty, *Overview: Clean Water Restoration Act*, *supra* note 45.

239. Adler, *The Clean Water Land Grab*, *infra* note 240, at 29; *see generally*, *Not So Private Property*, *infra* note 243, *passim*; *see also* Dougherty, *Myths and Fact*, *infra* note 248, *passim*.

than that adopted by Congress in 1972.<sup>240</sup> It has been argued that the original intent of the CWA was to solely protect “navigable waters”, and that the CWRA will go beyond this intent by dramatically expanding federal jurisdiction. Looking at the term “navigable,” it is defined in the CWA as “waters of the United States.”<sup>241</sup> The CWA is intended to provide broad protection, even to some non-navigable waters.<sup>242</sup> The United States has had a long history of protection to streams and waters that are not “navigable” by a boat, when such smaller sources lead into larger waters used for our drinking water and other important purposes.<sup>243</sup> The CWRA specifically states the purpose of this amendment is to restore the geographic jurisdiction of the CWA, not expand upon it.<sup>244</sup>

Critics claim the CWRA would assert federal regulatory jurisdiction over “all” interstate waters and activities affecting these waters, extending regulation to cover mud puddles, bird baths, man-made waters and ditches, groundwater and even snow melting.<sup>245</sup> However, in reality the CWRA does not provide any new protection to wetlands and waters that did not exist under the CWA prior to 2001.<sup>246</sup> For example, ground water is specifically excluded from the definition of “waters of the United States” under the amendment, and thus is specifically barred from the scope of federal regulation.<sup>247</sup> The CWA was never meant to give the federal government control over mud puddles, birdbaths, melting snow, or man-made waters created from uplands.<sup>248</sup> CWRA will not and cannot extend that far; it simply re-

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240. Jonathan H. Adler, *The Clean Water Land Grab, Congress Should Not Expand Federal Regulation Under the Guise of “Restoring” Environmental Protections*, 32 CASE W. RES. L. REV. 28, 29 (Winter 2009-2010) [hereinafter Adler, *The Clean Water Grab*].

241. Clean Water Act §502; 33 U.S.C. § 1362(7).

242. MacDonald, *supra* note 57, at 31; *see also Riverside Bayview Homes*, 474 U.S. at 133 (explaining Congressional intent was to broadly define the waters a covered by the act); *see also Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring).

243. *Not So Private Property? Clean Water Restoration Act Raises Fears of Land Grab*, FOX NEWS, Dec. 14, 2009, ¶ 10, available at <http://www.foxnews.com/politics/2009/12/14/private-property-clean-water-restoration-act/> [hereinafter *Not So Private Property*] (quoting Goldmand-Carter).

244. Clean Water Restoration Act S. 787, 111th Cong. §3 (12) (2009).

245. *Not So Private Property*, *supra* note 243 at ¶ 5, (quoting Sen. John Barrasso, R-Wyo.).

246. *See* Clean Water Restoration Act S. 787, 111th Cong. §3(10), (12) (2009) (the act’s intent is to return to the geographic jurisdiction prior to SWANCC in 2001 and *Rapanos* in 2006).

247. S. 787, §3(9).

248. A. Dougherty, *Clean Water Restoration Act 2009: Myths and Fact*, CLEAN WATER ACTION, ¶1-5 (Sept. 24, 2009) available at <http://www.cleanwateraction.org/print/1023> [hereinafter Dougherty, *Myths and Fact*].

turns the federal protection to the level understood by the public, the courts, and Congress since the CWA was passed in 1972.<sup>249</sup>

Those against the CWRA also claim the new law will extend federal regulatory jurisdiction to private lands and interfere with existing agricultural activities, croplands, and require new permits for farm drainage.<sup>250</sup> A coalition of industry lobbyists are attempting to protect their economic self interest by instilling fears in farmers and small businesses that the removal of the word “navigable” will erase all limitations of the government’s reach and permit the agencies to regulate rain puddles.<sup>251</sup> The coalition is taking advantage of the American people through the use of fear tactics, “the game plan is to emphasize the scary possibilities.”<sup>252</sup> One coalition member said, “[i]f you get Glenn Beck to say that government storm troopers are going to invade your property, farmers in the Midwest will light up their congressmen’s switchboards.”<sup>253</sup> Those misplaced fears are unfounded. By restoring federal regulatory jurisdiction to its historical scope under the CWA, the CWRA does nothing to modify any of the permitting exemptions that existed for farming, silviculture, ranching, mining, irrigated agriculture or agricultural storm water.<sup>254</sup> Agricultural activities that were not regulated in 2001, will not be regulated as a result of the CWRA.<sup>255</sup> The CWRA specifically enumerates many existing agriculture exemptions: established, normal farming activities, agriculture return flows, agriculture storm water discharges, drainage ditches, irrigation ditches, and farm or stock ponds.<sup>256</sup> Additionally, the CWRA keeps the exemption for prior converted cropland that currently exists in the U.S. Army Corps and EPA rules and regulations.<sup>257</sup> These prior converted croplands will continue to remain exempt under the CWRA to the extent such lands were exempt under the CWA.<sup>258</sup>

The first purpose of the CWRA is very clear: to reaffirm Congress’ original intent and the historic scope of the CWA as it has been understood since it was passed in 1972.<sup>259</sup> When Congress passed our

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249. *Id.*

250. *Not So Private Property*, *supra* note 243, at ¶ 3-5.

251. Duhigg & Roberts, *supra* note 183, at A17.

252. *Id.*

253. *Id.* (alteration in original).

254. Clean Water Restoration Act S. 787, 111th Cong. §3(13), (2009).

255. Dougherty, *Myths and Fact*, *supra* note 248 at ¶7.

256. Clean Water Restoration Act S. 787, 111th Cong. §3(13)-(14) (2009); *see also* Dougherty, *Myths and Fact*, *supra* note 248 at ¶8.

257. Clean Water Restoration Act S. 787, 111th Cong. §3(14)(A)(i) (2009).

258. Dougherty, *Myths and Fact*, *supra* note 248 at ¶11.

259. Clean Water Restoration Act S. 787, 111th Cong. §2(1) (2009).

water protection laws in 1972, its intent was to restore and maintain the chemical, physical, and biological integrity of such waters.<sup>260</sup> The proposed amendment stays true to Congress' intent by removing the word "navigable" from the definition of "the waters of the United States." Only then can the level of environmental protection offered to our nation's waters return to the extent that which existed prior to the erroneous and convoluted court decisions in *SWANCC* and *Rapanos*.

*b. The CWRA Clearly Defines the Waters of the United States*

The second major criticism is that the CWRA will not clearly define the waters of the United States that are within the scope of federal regulatory jurisdiction, but instead will bring about costly and disruptive litigation, while foregoing the more efficient solution of agency rule making.<sup>261</sup>

Critics claim that the new definition within the CWRA will not remedy the current ongoing regulatory uncertainty. It is argued that the new definition of "waters of the United States" will extend the government's power to "all 'waters' and 'activities affecting' such waters that are 'subject to the legislative power of the Congress under the Constitution", while failing to define what such waters are, thus punting the issue for the courts to decide.<sup>262</sup>

This interpretation of the CWRA is incorrect. In removing the term "navigability" from the definition of "waters of the United States" the proposed legislation does two important things: (1) it declares the proper scope of the protected waters is that which existed in 2001 (prior to *Rapanos* and *SWANCC*), and (2) it further declares the definition of "waters of the United States" is that which already exists in EPA and Corps regulations.<sup>263</sup> Congress intentionally structured the CWA to permit the agencies to construct their own working definition of the term "waters."<sup>264</sup> With both the EPA and the Army Corp of Engineers having consistently applied a broad understanding of federal authority in their agency rule making capacity, these jurisdictional determinations have been subject to court challenges because of the perceived ambiguity in the statute.<sup>265</sup> *SWANCC* and *Rapanos* have led to confusion, inconsistency in application of federal jurisdiction, and

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260. 33 U.S.C. § 1251(a).

261. Adler, *The Clean Water Land Grab*, *supra* note 240, at 31-32.

262. *Id.* at 32.

263. Clean Water Restoration Act S. 787, 111th Cong. §3(7)-(8) (2009).

264. Currie, *supra* note 9, at 227.

265. Adler, *The Clean Water Land Grab*, *supra* note 240, at 32.

varying interpretations adopted by lower courts.<sup>266</sup> The CWRA adopts and provides the agencies' definition right within the language of the act which says the waters of the United States shall include "all waters which are subject to the ebb and flow of the tide; all interstate waters, including interstate wetlands; all other waters, such as intrastate lakes, rivers, streams, . . . wetlands, sloughs, playa lakes, or natural ponds; all impoundments of waters; tributaries; territorial sears, and; wetlands adjacent to waters."<sup>267</sup> The CWRA further limits the scope of the definition by specifically including all previous exemptions.<sup>268</sup> This enumerated definition, and exemptions provided within the language of the CWRA are further evidenced and put into context by the health history of agency determinations prior to 2001.<sup>269</sup> Looking at all this, there is simply no argument that regulators and the regulated will be unable to determine what the term "waters" is within the scope of the CWRA. By restoring the legal understanding of the term "waters," the CWRA clarifies exactly what waters are subject to the CWA. With this proper definition, the question of federal regulatory scope will not be passed onto the judiciary to determine. The Court failures in *SWANCC* and *Rapanos* should not be repeated. By following the intent and heart of this amendment, the courts should properly adhere to the doctrines in *Chevron* and defer to agency interpretation.

Critics also argue that because new legislation is undesirable, as it would prolong confusion and litigation, that it would be more efficient for the agencies to step in and take action.<sup>270</sup> It is argued that agencies have retained ample authority under *SWANCC* and *Rapanos* to determine the ecological factors that establish a "significant nexus" to navigable waters, and thus the better way, to determine the scope of federal regulatory authority under the CWA is for the EPA and Corps to "undertake a notice-and-comment rule making to more clearly define when, and under what conditions, waters and wetlands constitute a part of the waters of the United States."<sup>271</sup>

Those that support this critique of the CWRA do so by supporting the validity of the Court decisions in *SWANCC* and *Rapanos*. As this article has already demonstrated, those Court decisions have not left an atmosphere that allows for sufficient environmental protection. The guidance documents, and proposed agency rulemakings that fol-

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266. Johnston & Sendek-Smith, *supra* note 179, at 34.

267. Clean Water Restoration Act S. 787, 111th Cong. §3(8) (2009).

268. S. 787, §3(13)-(14).

269. Currie, *supra* note 9, at 227.

270. Adler, *The Clean Water Land Grab*, *supra* note 240, at 32.

271. *Id.*

lowed in the wake of those decisions, further failed to remedy the massive legal confusion. The test proposed in *Rapanos* writes a “nexus” requirement into the statute.<sup>272</sup> CWRA critics argue agencies should promulgate regulations to further clarify the scope of jurisdiction by identifying the characteristics and ecological factors that determine such a “significant nexus.” It follows, however, that the same critics would argue that the Corps would lack jurisdiction to adopt these contrary regulations. This argument is not only backwards, but it violates the principal against courts legislating from the bench.

Instead, the CWRA follows the correct procedure in which the legislature is working towards writing the law, which the judiciary should uphold. The CWRA actually writes into law the agency’s definition of “water of the United States.”<sup>273</sup> *SWANCC* and *Rapanos* have caused havoc and confusion in regards to the scope of regulatory jurisdiction under the CWA.<sup>274</sup> No additional note-and-comment period is needed, the proper definition has already been provided, all that needs to be done is to return to the understanding of the law, as it was, prior to *SWANCC* and *Rapanos*. The CWRA provides just this solution. Because the confusion regarding the scope of federal regulatory power was exacerbated by judicial decision, agency rules that try to make sense of the Court’s decisions are impotent to fix the problem.<sup>275</sup> As Congress declared in the CWRA, “to restore original protections, Congress is the only entity that can reaffirm the geographic scope of the waters that are protected under the Federal Water Pollution Control Act.”<sup>276</sup>

*c. The CWRA Protects the Waters of the United States*

The third main criticism of the CWRA is that it will not provide enhanced environmental protection, but will likely impede federal and state agencies from reaching those goals. Critics claim that the CWRA creates excessively broad federal regulatory jurisdiction that excludes, dissuades, and inhibits state and local governments from creating worthwhile state level environmental protection.<sup>277</sup> It is argued that room should be created for the growth of state and local regulatory ef-

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272. *Rapanos* 126 S. Ct. at 2266 (Bryer, J., dissenting); see also *SWANCC* 531 U.S. 159.

273. Clean Water Restoration Act S. 787, 111th Cong. §3(8) (2009).

274. Adler, *When is Two a Crowd*, *supra* note 134, at 113.

275. JOHNSTON ET AL., *supra* note 21, at 698.

276. Clean Water Restoration Act S. 787, 111th Cong. §3(11) (2009).

277. Adler, *The Clean Water Land Grab*, *supra* note 240, at 33.

forts by limiting federal regulatory jurisdiction.<sup>278</sup> Contrary to this criticism, the CWRA maintains the balance between state and federal government, and ensures that agencies have the power to enforce the protective duties that have been bestowed upon them.

When the CWA was enacted in 1972, it created a system of “co-operative federalism,” which balanced the power between the federal and state government.<sup>279</sup> The federal government was empowered with the ability to set a “floor” level of water quality and given vigorous enforcement oversight.<sup>280</sup> This uniform baseline standard of protection is essential to ensure that all states and local communities start with the same minimum level of water quality, and to avoid potential conflicts between up and down stream states, which might have differing standards for the same body of water.<sup>281</sup> The states reserved the right to maintain existing regulatory programs and the primary authority to implement federal regulations.<sup>282</sup> This strong federal-state partnership has been vital to the CWA’s past success.<sup>283</sup>

The CWRA is not an expansion, but rather a restoration of Congress’ original intent with regard to federal regulatory jurisdiction. The CWRA does not exclude states from creating their own programs, or holding the CWA to higher standards than required by federal law. Instead, the CWRA specifically maintains this principal of state empowerment by declaring:

Congress finds that . . . [i]n establishing broad, uniform, and minimum federal standards and programs under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) in 1972, Congress recognized, preserved, and protected the responsibility and right of the State and Indian tribes to prevent, reduce, and eliminate pollution of waters by preserving for States and Indian tribes the ability to manage grant, research, and permitting programs by assuming implementation of portions of the Act to prevent, reduce, and eliminate pollution, and to establish standards and programs that

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278. *Id.*

279. JOHNSTON ET AL., *supra* note 21, at 159.

280. *Id.*

281. Majority Staff, *supra* note 27, at 14.

282. JOHNSTON ET AL., *supra* note 21, at 159; *see also* 33 U.S.C. § 1251(b). Specifically, the CWA declared:

Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.

33 U.S.C. § 1251(b).

283. Majority Staff, *supra* note 27, at 14.

are more protective than the Federal standards and programs, for waters of the United States within borders of each State or on land under the jurisdiction of the Indian tribe.<sup>284</sup>

The CWRA does not preclude or discourage states from adopting their own programs. Since the CWRA is simply a restoration of the federal regulatory authority, which existed in 2001, no state or local community will be prohibited from adopting improved environmental protections that would have been permissible in 2001. It is true that federal regulation is not the only means of improving environmental protection of our nation's waters; however, it is a vital component for the safety of our future generations.<sup>285</sup> Without an enforceable, federal level baseline for protection, we are bound to return to the days when the Cuyahoga River was so heavily polluted it caught fire, the Potomac River was unsafe to swim in, and Lake Erie was declared dead.<sup>286</sup>

Critics of the CWRA have venomously blasted the amendment as one of the boldest property grabs of all time.<sup>287</sup> However, these ludicrous and outlandish claims are without merit. It is easy to recognize the importance of our nation's waters, and recognize the need for enhanced environmental protection. The best way, perhaps the only way, to satisfy these calls for a restoration of the old protections afforded by the Clean Water Act is for Congress to enact the Clean Water Restoration Act.<sup>288</sup> Presented in multiple previous Congressional sessions, the Clean Water Restoration Act has its best chance of saving the nation's waters in the democratically controlled 111th Congress.<sup>289</sup> While it is not a total and all encompassing solution to our current conundrum, it is an important first step on the road to permanently fixing the Clean Water Act.<sup>290</sup>

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284. Clean Water Restoration Act S. 787, 111th Cong. §3(6) (2009) (alteration in original).

285. Koons, *supra* note 14, *passim*.

286. Drelich, *supra* note 16, at 209; Currie, *supra* note 9, at 209, 213; and MOYA & FONO, *supra* note 4, at 295.

287. *Not So Private Property*, *supra* note 243, at ¶ 2 (quoting Nancy Pelosi).

288. Clean Water Restoration Act S. 787, 111th Cong. (2009).

289. Jared Fish, *United States v. Robinson: The Case for Restoring Broad Jurisdictional Authority Under the Federal Clean Water Act In The Wake of Rapanos' Muddied Waters*, 36 *ECOLOGY L. Q.* 561, 566 (2009) [hereinafter Fish].

290. Joan Mulhern, *Senate Committee Approves Urgently Needed Clean Water Legislation*, *EARTHJUSTICE*, June 18, 2009, at 1.



*d. CWRA Flaws and Future Steps*

The CWRA, like any law, has its flaws. While the CWRA would provide a wealth of protection for the environment of the United States and start the journey back to earlier levels of water quality, the proposed CWRA will not reach the goals set out by the original drafters of the CWA back in 1972. The CWRA will fail, just as the CWA has failed, to achieve: 1) a level of water quality that is safe for fish, wildlife, drinking, and recreation in/on the water, and 2) elimination of all discharges of pollutants.<sup>291</sup>

The regulatory gaps that exist in the original CWA ensure that fishable/swimmable water quality standards have not been met for many of our nation's waters.<sup>292</sup> Additionally, the CWA has never reached its no-discharge goal because there is no mandate in the law that has the force to achieve that objective.<sup>293</sup> The CWRA will contain these same flaws of the CWA because the amendments simply restore federal regulatory authority to that which existed in 2001. The protection of our waters can only be as great as it was pre-SWANCC, but not any better. These amendments are a compromise towards the greater goal of sufficient environmental protection, and they are an important step in the process. It will take many years for our nation to return to the pristine levels of water quality that existed prior to this past decade. Hopefully, with the true intent of Congress restored to our nation's most important environmental law, we will once again be able to move forward and advance toward the lofty goals set out in 1972.

The stage is set for the vastly important debate on the jurisdictional bounds of the CWA, all Congress has to do is *act* and *act now*. With the health of our nation's waters in a fever pitch, and a more favorable administration, it is Congress' duty to secure the passage of this legislation and enact the Clean Water Restoration Act.<sup>294</sup>

## V. CONCLUSION

*"You shall not pollute the land in which you live;  
You shall not defile the land in which you live,  
in which I also dwell."*<sup>295</sup>

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291. See 33 U.S.C. § 1251(a)(1)-(2) (2006).

292. JOHNSTON, ET AL., *supra* note 21, at 138.

293. *Id.*

294. Dougherty, *Overview: Clean Water Restoration Act*, *supra* note 45.

295. Numbers 35:33-34.

We cannot survive without clean water: we need it to drink, to grow our crops, and supply our food.<sup>296</sup> The CWA was enacted with the commitment to restore our nation's waters from peril and led us through decades of progress, making improvements and achieving success unseen before. However, there is still much work to be done. The CWA has not yet reached its goal to make all the waters of the United States safe for swimming, drinking, and fishing. Due to a decade of bad law and lobbying from economic self-interests, the conditions of our nation's waters have all but reverted, back almost to square one. In order to save so many years of dedication and save our most valuable resource before it reaches the point of disrepair – action must be taken now. Court decisions in the judicial branch, and guidance from the executive branch, have both failed to fix past mistakes. We must face the harsh truths about the deteriorating condition of our nation's waters and the laws which are meant to protect them. Dr. Stockman stood up in proud defiance for what he believed in and refused to compromise. He was perceived as an enemy of the people by those who were unwilling to accept the uncomfortable truth that the town's praised baths were poisoning people instead of making them healthy. Like Dr. Stockman, who refused to stand by while the corrupt authorities allowed his town's people to be poisoned by the baths, Congress must stand tall, without fear of being perceived as the "enemy of the people" in order to perform their duty of restoring the CWA through the CWRA. Only then, with an eye towards our nation's future, will Congress be able to do what Dr. Stockman couldn't, and save us all.

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296. Earthjustice et al., *Courting Disaster*, *supra* note 180, at 2.

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