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## There Is More to the Clean Water Act than Waters of the United States: A Holistic Jurisdictional Approach to the Section 402 and Section 404 Permit Programs

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THERE IS MORE TO THE  
CLEAN WATER ACT THAN  
WATERS OF THE UNITED STATES:  
A HOLISTIC JURISDICTIONAL  
APPROACH TO THE SECTION 402 AND  
SECTION 404 PERMIT PROGRAMS

*Robin Kundis Craig*<sup>†</sup>

ABSTRACT

When Congress enacted the contemporary form of the Federal Water Pollution Control Act in 1972, it used the same statutory formula to trigger both of the act's two permit programs. That decision was never completely comfortable, and over time it has become clear that, although the two permit programs serve the same regulatory goal of improving water quality, they otherwise resonate in two very different complexes of legal values. The U.S. Supreme Court repeatedly has found the section 404 complex particularly troublesome, holding that a broad definition of "waters of the United States" in this program threatens to infringe both states' Tenth Amendment prerogatives and landowners' private property rights. Moreover, this narrowing of jurisdictional "waters of the United States" is likely to continue into the 2022–2023 Supreme Court term through the case of *Sackett v. EPA*.

The intense legal and political focus on "waters of the United States" since at least the Court's 2006 decision in *Rapanos v. United States* has obscured the fact that Clean Water Act jurisdiction depends on five elements, not just that one, that must be evaluated together. Moreover, the Supreme Court's approach to section 402 jurisdiction in its 2020 decision in *County of Maui v. Hawaii Wildlife Fund* counsels the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Army Corps or Corps) to take a more holistic approach to their next round of Clean Water Act jurisdictional regulations. This more holistic approach offers two immediate benefits: a highlighting of the many existing exemptions from section 404 and a

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simplification of jurisdictional analyses. However, in the wake of the anticipated outcome of *Sackett v. EPA*, the holistic approach can also keep section 402 jurisdiction relatively broad.

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## INTRODUCTION

There is a myth growing in the increasingly politicized world of Clean Water Act (CWA or the Act)<sup>1</sup> jurisdiction: getting the definition of “waters of the United States” “right” will solve all the problems regarding the Act’s jurisdictional scope. What you perceive those problems to be, in turn, likely depends on whether you are focusing on hydrological interconnectivity and ecosystem function, on the one hand, or on what you can do with your private property, on the other.

No small share of the responsibility for this increasingly entrenched myth belongs to the American Farm Bureau Federation, which since at least the 2015 Obama Administration rulemaking<sup>2</sup> on “waters of the United States” has portrayed that regulatory definition as determinative of whether an activity involving water is subject to the Act.<sup>3</sup> It has been no less reductionist with respect to the Biden Administration’s December 2021 proposed definition,<sup>4</sup> which it claims “greatly expands

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- 33 U.S.C. §§ 1251–1389 (formerly amended by Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92–240, 86 Stat. 47, then amended by Clean Water Act of 1977, Pub. L. 95–217, 91 Stat. 1566).
  - Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,053, 37,053 (June 29, 2015) (codified at 33 C.F.R. pt. 328).
  - For example, according to the Federation:  

The 2015 rule . . . creates confusion and risk by giving the agencies almost unlimited authority to regulate, at their discretion, any low spot where rainwater collects, including common farm ditches, ephemeral drainages, agricultural ponds and isolated wetlands found in and near farms and ranches across the nation, no matter how small or seemingly unconnected they may be to true “navigable waters.”

*Clean Water Act, WOTUS*, AM. FARM BUREAU FED’N, <https://www.fb.org/issues/regulatory-reform/clean-water-act/> [<https://perma.cc/F42H-EPTU>] (last visited Feb. 5, 2023).
  - Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372 (Dec. 7, 2021) (codified at 33 C.F.R. pt. 328). For a complete review of the complex history of the “waters of the United States” regulations, see

the federal government's regulatory reach over private land use because it allows it to regulate ditches, ephemeral drainages and low spots on farmlands and pastures" and "could impact everyday activities such as plowing, planting and fence-building in or near these areas."<sup>5</sup>

Such statements blatantly ignore the fact that the Act provides fairly blanket exemptions for "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices," for "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches," and for the "construction or maintenance of farm roads."<sup>6</sup> More generally, they ignore the fact that Clean Water Act jurisdiction is a *multi*-element test, of which "waters of the United States" is just one sub-element.<sup>7</sup>

This Article seeks to break the Clean Water Act free of the agencies' and courts' two-decades-and-counting myopic focus on "waters of the United States" by arguing that the EPA and the Army Corps should accept the fact that the Act's two permit programs—the section 402 National Pollutant Discharge Elimination System (NPDES) program<sup>8</sup> and the section 404 "dredge and fill" program<sup>9</sup>—resonate in different legal webs. Specifically, regardless of where a discharge occurs, the NPDES permit program resonates with public nuisance by protecting human health and the public welfare from water pollution, including toxic pollution. In contrast, as the section 404 permit requirement moves away from the larger navigable-in-fact waters to higher ground, it increasingly interferes with private property use, development, and landowner profit, resonating with land use planning limitations and constitutional takings concerns. While the environmental impacts of development in and near smaller waters and wetlands are both real and substantial,<sup>10</sup> the U.S. Supreme Court has made clear that it views

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ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT: CASES AND MATERIALS 1083–89 (5th ed. 2021).

5. *Waters of the United States*, AM. FARM BUREAU FED'N, <https://www.fb.org/issues/regulatory-reform/waters-of-the-us/> [<https://perma.cc/HUT2-7NQL>] (last visited Feb. 5, 2023).
6. 33 U.S.C. § 1344(f)(1).
7. See discussion *infra* Part I.C.
8. 33 U.S.C. § 1342.
9. *Id.* § 1344.
10. *E.g.*, Susan A. R. Colvin, S. Mažeika P. Sullivan, Patrick D. Shirey, Randall W. Colvin, Kirk O. Winemiller, Robert M. Hughes, Kurt D. Fausch, Dana M. Infante, Julian D. Olden, Kevin R. Bestgen, Robert J. Danehy & Lisa Eby, *Headwater Streams and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, 44 FISHERIES 73, 73–80 (2019), <https://doi.org/10.1002/fsh.10229> [<https://perma.cc/Q3JM>]

section 404 permitting less as preventing nuisance and far more as meddling in the affairs of states, municipalities, and private landowners.<sup>11</sup> As a result, no single geography of “waters of the United States” can possibly accomplish the nuisance-preventing functions of section 402 while simultaneously avoiding the interference with land development that the Court has found suspect since 2001.<sup>12</sup>

The Supreme Court’s two most recent Clean Water Act cases both underscore the need for a way to escape this dilemma and offer the escape route. In *Sackett v. EPA* (*Sackett II*),<sup>13</sup> which the Court is currently deciding, the Court will likely limit the scope of “waters of the United States” yet again in the context of a section 404 permit and problematic analysis from the U.S. Court of Appeals for the Ninth Circuit.<sup>14</sup> However, in its 2020 section 402 decision, *County of Maui v. Hawaii Wildlife Fund*,<sup>15</sup> the Supreme Court created a “functional equivalence” test specifically to keep section 402 jurisdiction broad enough to accomplish Congress’s public purposes for water pollution control.<sup>16</sup> This Article argues that the agencies can use functional equivalence to create a more holistic approach to Clean Water Act jurisdiction to keep section 402 as broad as the *County of Maui* Court wanted while simultaneously emphasizing to regulated entities, their representatives (like the American Farm Bureau Federation), and the courts the multiple limitations on section 404 jurisdiction that already exist, making clear that “waters of the United States” is *not* the whole jurisdictional ballgame.

This Article proceeds in four parts. Part I provides a brief history of how Congress fused the Clean Water Act’s two permit programs under one statutory trigger, ending with an explication of the Act’s five-element jurisdictional test. Part II then recounts the early history of the interagency disagreements between the EPA and the Army Corps regarding the Clean Water Act’s scope, culminating in the joint regulatory definition of “waters of the United States” in the 1980s. In Part III, the focus shifts to the U.S. Supreme Court and its progressive interpretations of the Act, specifically comparing the Court’s initial focus on section 402 to its more recent focus on section 404. Part IV concludes by suggesting a more holistic approach to new regulations

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-NBKU] (summarizing the potential impact of the Trump Administration’s “waters of the United States” rule).

11. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172–74 (2001).

12. See discussion *infra* Part III.

13. 142 S. Ct. 896 (2022) (argued Oct. 3, 2022).

14. See discussion *infra* Part IV.

15. 140 S. Ct. 1462 (2020).

16. *Id.* at 1476–77.

that makes more obvious the many existing limitations on Clean Water Act jurisdiction, undermining the need to so intensely scrutinize and politicize any new definition of “waters of the United States.”

### I. BACKGROUND: FUSING DIFFERENT KINDS OF PERMITS UNDER ONE STATUTORY TRIGGER

Congress had been addressing water quality since 1948 through the Federal Water Pollution Control Act (FWPCA),<sup>17</sup> but until 1972 those efforts focused on encouraging states to address water quality, eventually through setting water quality standards, providing federal money for sewage treatment works, and providing federal research, limiting the federal regulatory role to interstate waters and, in 1970, oil spills.<sup>18</sup> In 1969, however, two water pollution disasters spurred Congress to increase the federal government’s involvement in water quality regulation: the latest in a century-long series of Cuyahoga River fires,<sup>19</sup> and the Santa Barbara oil spill from an oil drilling platform.<sup>20</sup>

The first federal intervention came in 1970, when President Richard M. Nixon ordered the brand new EPA and the Army Corps to establish a permit program under the Refuse Act<sup>21</sup> (section 13 of the Rivers and Harbors Act of 1899 (RHA)) to punish people who polluted the navigable waters (although the statute was an imprecise fit given its larger focus on preserving navigation).<sup>22</sup> The two agencies did so within the year.<sup>23</sup>

More comprehensively, in 1972, Congress substantially amended the FWPCA, creating the contemporary regulatory regime better

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17. Federal Water Pollution Control Act, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. § 1252).
  18. ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION* 12–13, 17, 20 (2d ed., ELI Press 2009).
  19. Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/> [https://perma.cc/FJJ8-DP2L].
  20. Christine Mai-Duc, *The 1969 Santa Barbara Oil Spill Changed Oil and Gas Exploration Forever*, L.A. TIMES (May 20, 2015, 6:38 PM), <https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmlstory.html> [https://perma.cc/99HL-HTRQ].
  21. 33 U.S.C. § 407. For a complete history of the 1972 amendments to the Federal Water Pollution Control Act, see CRAIG, *supra* note 18, at 10–27; see also Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands*, 69 N.D. L. REV. 873, 877–79, 885 (1993).
  22. CRAIG, *supra* note 18, at 10–11 (citations omitted).
  23. *Id.* at 21 (citations omitted).

known as the Clean Water Act, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>24</sup> One of the core regulatory innovations of the 1972 amendments was to tie previously existing state water quality standards to federal water quality permitting requirements, in part because of growing congressional concerns about the impact of water pollution on public health.<sup>25</sup> In knitting preexisting programs together, however, Congress fused two very different regulatory contexts, and that tension still lies at the core of the current “waters of the United States” debate.

*A. U.S. Waterways: From Open Access Resource to Regulated Commons*

Throughout the first two-thirds of the twentieth century, rivers in the United States were sources of problems as often as they were amenities. These classic commons resources were widely viewed as free waste-disposal facilities, and Hardin’s tragedy<sup>26</sup> was often not long in manifesting itself as riverfront cities industrialized. Damage to the larger public good was perhaps most obvious when rivers flowing through and around these cities repeatedly caught fire. Most famously, the Cuyahoga River, which flows through Cleveland, Ohio, caught fire in 1868, 1883, 1887, 1912, 1922, 1936, 1941, 1948, 1952, and 1969; the last fire, although not the worst of the series, provided a direct impetus to Congress to intervene in water pollution regulation.<sup>27</sup>

Until the late 1950s, however, residents often viewed the Cuyahoga’s and other rivers’ pollution as a sign of progress, even though the growing water pollution problem could also affect their drinking water:

The water was nearly always covered in oil slicks, and it bubbled like a deadly stew. Sometimes rats floated by, their corpses so bloated they were practically the size of dogs. It was disturbing, but it was also just one of the realities of the city. For more than a century, the Cuyahoga River had been prime real estate for various manufacturing companies. Everyone knew it was polluted, but pollution meant industry was thriving, the economy was booming, and everyone had jobs.<sup>28</sup>

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24. Clean Water Act of 1972, Pub. L. No. 92-500, § 101(a), 86 Stat. 816, 816 (codified as amended at 33 U.S.C. § 1251(a)).

25. *E.g.*, S. REP. NO. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3670–72.

26. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

27. Boissoneault, *supra* note 19.

28. *Id.* The Clean Water Act does not directly protect drinking water in municipal systems; instead, the Safe Drinking Water Act performs that function. The attribution of almost all drinking water improvements, and



Nor was Cleveland alone in dealing with flammable rivers; “Baltimore, Philadelphia, San Francisco, Buffalo and Galveston all used different methods to disperse oil on their waters in order to prevent fires.”<sup>29</sup>

Slightly less visibly, rivers also functioned as the United States’ primary sewer system. This issue reached the U.S. Supreme Court several times in the first half of the twentieth century, particularly when the City of Chicago decided to redirect its raw sewage away from Lake Michigan (the source of its drinking water) through an artificial canal system and into the Mississippi River. Downstream Missouri sued Illinois over the change, first establishing that the Supreme Court had original jurisdiction over interstate pollution cases<sup>30</sup> and then seeking to shut down the diversion as an interstate nuisance.<sup>31</sup> Missouri alleged that

the result of the threatened discharge would be to send fifteen hundred tons of poisonous filth daily into the Mississippi, to deposit great quantities of the same upon the part of the bed of the last-named river belonging to the plaintiff, and so to poison the water of that river, upon which various of the plaintiff’s cities, towns and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing purposes,<sup>32</sup>

particularly because of an increased risk for typhoid fever.<sup>33</sup> While there are many notable facets of the Supreme Court’s decision that Missouri could not meet its burden of proof for nuisance, most important for this discussion was the fact that essentially *every* city upstream of St. Louis—not to mention St. Louis itself—was discharging its raw sewage into the Mississippi River, making it next to impossible to hold Chicago

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hence associated public health benefits, to this later act has generally skewed cost-benefit analyses of the Clean Water Act. David A. Keiser, Catherine L. King & Joseph S. Shapiro, *The Low but Uncertain Measured Benefits of US Water Quality Policy*, 116 PROC. NAT’L ACAD. SCIS. 5262, 5267 (2019). However, more recent and comprehensive studies better account for the pervasive benefits of sewage treatment, which was, at least at the federal level, the sole domain of the Clean Water Act. *See generally* David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, 134 Q.J. ECON. 349, 356–57 (2019) [hereinafter Keiser & Shapiro, *Consequences*] (focusing specifically on the impacts of the Act’s sewage treatment grants).

29. Boissoneault, *supra* note 19.

30. *Missouri v. Illinois*, 180 U.S. 208, 240–41, 248–49 (1901).

31. *Missouri v. Illinois*, 200 U.S. 496, 517–18 (1906).

32. *Id.*

33. *Id.* at 522–23.

and Illinois responsible for any health impacts (which were themselves difficult to discern).<sup>34</sup>

In response to a growing environmental consciousness generally, the Cuyahoga River fire of 1969, the Santa Barbara oil spill of 1969, and other impetuses, Congress overhauled the FWPCA in 1972 to create the fundamental structure of what is now known as the Clean Water Act.<sup>35</sup> One of the important but less celebrated features of the statute was its grant program to promote the building and upgrading of sewage treatment plants across the country.<sup>36</sup> More directly relevant to this Article, the Act also limited industrial discharges of pollutants into the nation's waterways through the two permit programs, section 402 and section 404.<sup>37</sup>

The Clean Water Act has worked, particularly in terms of addressing the commons water pollution problems that induced its drafting. In 2019, David Keiser and Joseph Shapiro published two of the most comprehensive analyses of the Clean Water Act ever done. Noting that, since 1970, the federal government has spent over \$400 per year for every American “to clean up surface water pollution and provide clean drinking water,”<sup>38</sup> they concluded that “many measures of drinking and surface water pollution have fallen since the founding of the Environmental Protection Agency, due at least in part to the Clean Water Act and the Safe Drinking Water Act,” although progress remains incomplete.<sup>39</sup> Specifically, after analyzing 14.6 million pollution measurements taken at 265,000 monitoring sites between 1972 and 2014, Keiser and Shapiro concluded that “[w]hen the Clean Water Act passed in 1972, nearly 30 percent of water quality readings were unsafe

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34. *Id.* at 525–26; *see also* *New Jersey v. New York*, 256 U.S. 296, 313–14 (1921) (holding that New Jersey had not (yet) proven that New York's discharges of raw sewage into the Passaic River were a nuisance). Importantly, however, the Court did protect the first municipal sewage treatment plants from being enjoined as nuisances themselves, even though their treatment of the raw sewage was substantially incomplete in many cases. *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–40 (1933).

35. 33 U.S.C. §§ 1251–1388. The name “Clean Water Act” comes from the 1977 amendments. Clean Water Act of 1977, Pub. L. No. 95-217, § 1, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

36. Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1388).

37. 33 U.S.C. §§ 1342, 1344; *see* discussion *infra* Part IV.B.

38. David A. Keiser & Joseph S. Shapiro, *US Water Pollution Regulation over the Past Half Century: Burning Waters to Crystal Springs?*, 33 J. ECON. PERSPS. 51, 52 (2019) [hereinafter Keiser & Shapiro, *Pollution Regulation*]. The Clean Water Act accounts for about \$100 per year of that total. Keiser & Shapiro, *Consequences*, *supra* note 28, at 349.

39. Keiser & Shapiro, *Pollution Regulation*, *supra* note 38, at 53.

for fishing,” while “by 2014, only about 15 percent were unsafe.”<sup>40</sup> Grants to upgrade sewage treatment plants and enforcement of the Act’s NPDES permit requirements were particularly important in reducing water pollution.<sup>41</sup> More anecdotal evidence also indicates that the Clean Water Act still operates to achieve this main mission: in March 2019, Cuyahoga River fish were deemed safe to eat, and the river hasn’t caught fire since 1972—although a fuel spill did burn there in August 2020.<sup>42</sup>

*B. Structuring the Clean Water Act’s Permit Programs*

Water quality regulation in the United States has always been complicated by the fact that certain water polluting activities, traditionally the states’ prerogative, can also interfere with navigation, most emphatically the federal government’s domain. Thus, by the time Congress overhauled the FWPCA in 1972, the Army Corps for decades had been regulating dredging and filling of the navigable waters pursuant to RHA section 10<sup>43</sup> as a navigation issue. Rivers that can catch on fire are also navigation problems, and, as discussed, by 1972, the EPA and Army Corps had been operating a Refuse Act permit program for pollution for almost two years.<sup>44</sup>

Already, however, Congress was unimpressed. Senate Bill 2770 provided the initial text of the 1972 amendments. As the Senate Committee on Public Works noted in October 1971 in its initial report on that bill,

While the permit program created in late 1970 under the Refuse Act by the Administrator seeks to establish this direct approach, it is weak in two important respects: It is being applied

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40. *Id.* at 60.

41. *Id.*; see also Keiser & Shapiro, *Consequences*, *supra* note 28, at 352 (“We find that each grant decreases the probability that downriver areas violate standards for being fishable by half a percentage point. These changes are concentrated within 25 miles downstream of the treatment plant and they persist for 30 years.”); *id.* at 373 (“We find large declines in most pollutants that the Clean Water Act targeted. Dissolved oxygen deficits and the share of waters that are not fishable both decreased almost every year between 1962 and 1990.”); *id.* at 374 (“The share of waters that are not fishable fell on average by about half a percentage point per year, and the share that are not swimmable fell at a similar rate.”). Notably, because federal sewage treatment grants began before the 1972 amendments, there were often more declines in sewage pollution before 1972 than after it. *Id.* at 374.

42. West Siler, *51 Years Later, the Cuyahoga River Burns Again*, OUTSIDE (Aug. 28, 2020), <https://www.outsideonline.com/outdoor-adventure/environment/cuyahoga-river-fire-2020-1969/> [https://perma.cc/T6LK-H8X7].

43. 33 U.S.C. § 403.

44. CRAIG, *supra* note 18, at 21–22.

only to industrial polluters, and authority is divided between two Federal agencies.

Experience with the permit system during the past 10 months suggests that the machinery used to date may be as cumbersome as the 1948 abatement procedure. Estimates of the number of permit applications to be received run as high as 300,000; estimates of the time required to process the applications run as long as four years.<sup>45</sup>

The Senate committee proposed a single permit program, run by the EPA until each state could take it over, with permits containing enforceable effluent limitations.<sup>46</sup> State water quality standards would serve as the metrics of progress toward achieving water quality goals.<sup>47</sup> The Senate bill would have converted Refuse Act permits into NPDES permits,<sup>48</sup> and the new NPDES permit requirement would also apply to the “at least 40,000” industrial dischargers that the EPA had identified.<sup>49</sup> However, unlike under the Refuse Act, states would take over the NPDES permit program as they developed the capacity to do so, with federal oversight of state implementation.<sup>50</sup> Most important, under the Senate’s original vision, the NPDES permit program would also largely displace Army Corps “dredge and fill” permits under RHA section 10.<sup>51</sup>

Wrangling over drafting with the House of Representatives, however, led to a different final compromise. Under section 402 of the new Act, Refuse Act permits would still become NPDES permits, and the EPA could eventually delegate NPDES permitting authority to the states—albeit with several new state requirements and expanded EPA oversight, including an expansion of its veto authority.<sup>52</sup> The House, however, had inserted a new section 404 permit program, “for the discharge of dredged or fill material into the navigable waters.”<sup>53</sup> The conference amendment added new roles for the EPA in this permit program, including giving the EPA Administrator “authority to prohibit specification of a site and use of any site for the disposal of any dredge or fill material which he determines will adversely affect

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45. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672.

46. *Id.* at 3675-76.

47. *Id.*

48. *Id.* at 3735.

49. *Id.* at 3736.

50. *Id.* at 3737-38.

51. *Id.* at 3751-52.

52. S. Conf. Rep. No. 92-1236, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3816-18.

53. *Id.* at 3818-19.

municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas”<sup>54</sup>—what has since become known as the EPA’s section 404(c) “veto” authority.<sup>55</sup> As under the RHA, however, the focus of the section 404 permit program remained (at least in Congress’s view) preserving navigation, and the Senate conference committee “expected that . . . unreasonable restrictions shall not be imposed on dredging activities essential to the maintenance of interstate and foreign commerce.”<sup>56</sup>

As a result, the Clean Water Act emerged from Congress with two permit programs, which have remained in force for almost fifty years. However, as the legislative history reveals, Congress’s visions for the two programs were distinctly different: Congress expected section 404 permits to be granted liberally to protect navigation, while NPDES permits were to be subject to more stringent limitations and double regulatory oversight to ensure that the nation’s waters were cleaned up.

### *C. Triggering Clean Water Act Jurisdiction*

Despite its different visions of and expectations for the section 402 and section 404 permit programs, Congress used the same regulatory prohibition to trigger both permit requirements. This decision thus embedded an internal conflict within the statute itself regarding the scope of the Act’s jurisdiction that has persisted into the legal wrangling over “waters of the United States.”

Under the Clean Water Act’s common prohibition, “the discharge of any pollutant by any person shall be unlawful” except as in compliance with the Act,<sup>57</sup> which generally means that the discharger must get and comply with a permit. The Act defines “the discharge of a pollutant” to be “any addition of any pollutant to navigable waters from any point source” and “any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”<sup>58</sup> Thus, the five elements of Clean Water Act jurisdiction are that (1) a person (2) adds (3) any pollutant (4) to jurisdictional waters (5) from an applicable point source.

The Act goes on to define most of these terms in more detail, generally providing for broad jurisdiction. A “person,” for example, is “an individual, corporation, partnership, association, State,

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54. *Id.* at 3820.

55. United States Environmental Protection Agency, *Clean Water Action Section 404(c) Factsheet*, ENV’T PROT. AGENCY (Jan. 25, 2022), <https://www.epa.gov/sites/default/files/2016-03/documents/404c.pdf> [<https://perma.cc/3RZ7-HSFJ>].

56. S. Conf. Rep. No. 92–1236, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3819.

57. 33 U.S.C. § 1311(a).

58. *Id.* § 1362(12). Discharges from vessels into the contiguous zone and ocean are regulated through a different provision of the Act. *Id.* § 1322.

municipality, commission, or political subdivision of a State, or any interstate body.”<sup>59</sup> A “pollutant” is “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”<sup>60</sup> However, this definition explicitly exempts discharges of sewage and discharges incidental to normal operations from vessels, as well as state-regulated injections into oil and gas wells.<sup>61</sup> A “point source,” in turn, is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”<sup>62</sup> However, this definition exempts “agricultural stormwater discharges and return flows from irrigated agriculture.”<sup>63</sup>

The Act also provides several definitions for jurisdictional waters. Probably least familiar is the “contiguous zone,” which the Act defines by reference to the United Nations Convention of the Territorial Sea and the Contiguous Zone,<sup>64</sup> which created a band from three to twelve nautical miles out to sea for enforcement purposes.<sup>65</sup> More important is the “ocean,” which is the portion of the ocean beyond the contiguous zone under U.S. control;<sup>66</sup> the United States relies on customary international law to claim jurisdiction 200 nautical miles out from its shores.<sup>67</sup> The current jurisdictional problem, however, derives from “navigable waters,” which the Act defines as “waters of the United States, including the territorial seas.”<sup>68</sup> The Act defines “territorial

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59. *Id.* § 1362(5). Notably absent from this list is any part of the federal government. However, the Act independently addresses federal facilities, *id.* § 1323, and discharges from U.S. Navy and other federal vessels. *Id.* § 1322(d).

60. *Id.* § 1362(6).

61. *Id.*

62. *Id.* § 1362(14).

63. *Id.*

64. *Id.* § 1362(9).

65. United Nations Convention on the Law of the Territorial Sea and the Contiguous Zone art. 24(2), Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force Nov. 22, 1964).

66. 33 U.S.C. § 1362(10).

67. Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983).

68. 33 U.S.C. § 1362(7).

seas” to be the first three miles of ocean,<sup>69</sup> but it leaves “the waters of the United States” undefined.

The distinction between the two permit programs lies in exactly what pollutant the polluter is discharging. If it is dredged or fill material, the polluter is subject to the section 404 permit program, which the Army Corps takes the lead in implementing.<sup>70</sup> All other dischargers subject to the Clean Water Act must get section 402 NPDES permits.<sup>71</sup>

Even this brief definitional overview reveals that the applicability of section 402 and section 404 can only be assessed by considering all five Clean Water Act jurisdictional elements at once. Consider a vessel at sea. If it discharges *anything* into the territorial sea, it needs a permit, but once it sails past the three-mile mark, section 312<sup>72</sup> applies instead. Discharges of manure from a concentrated animal feeding operation, or CAFO, into a jurisdictional water are subject to the Act (section 402), but discharges of manure into the same waterbody through farm ditches after a storm are not.

As such, a myopic focus on “waters of the United States,” as has been the case for much of the last two decades, distorts the overall picture of Clean Water Act jurisdiction. Before turning to the U.S. Supreme Court’s decisions, however, one additional bit of history is necessary: the development of the consensus on “waters of the United States” regulations in the 1980s, to which this Article now turns.

## II. THE EARLY CONFLICT OVER THE CLEAN WATER ACT’S SCOPE: THE EPA VERSUS THE ARMY CORPS OF ENGINEERS

All five elements of Clean Water Act jurisdiction have been subject to litigation and at least some complexity over how to define them.<sup>73</sup> In the U.S. Supreme Court, however, “waters of the United States” has become the key jurisdictional element, as Part III will discuss in more detail. The Supreme Court’s analysis of “waters of the United States” has always begun with the EPA’s and Army Corps’ regulatory definitions, and so it is important to first understand the evolution of those regulations.

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69. *Id.* § 1362(8).

70. *Id.* § 1344(a).

71. *Id.* § 1342(a).

72. *Id.* § 1322. The Act’s definition of “discharge of a pollutant” exempts vessels discharging into the contiguous zone or the ocean—i.e., more than three miles out to sea—from normal regulation under the Act. *Id.* § 1362(12)(B). As a result, only the marine sanitation device requirements in section 312 are relevant.

73. *See* CRAIG, *supra* note 4, at 1001–129 (illuminating these complexities).

Given that in 1972 Congress yoked together two permit programs that until then had been serving different purposes, it is perhaps unsurprising that the EPA and the Army Corps did not originally see eye to eye regarding either the scope of Clean Water Act jurisdiction or their roles as regulators. The Army Corps arrived at the contemporary Clean Water Act from a tradition of protecting actual navigation from interference (say, from structures in shipping lanes) but otherwise encouraging development in aid of navigation and commerce. In contrast, the EPA came to the Clean Water Act with an intention to prevent pollution. These differences are evident in the two agencies' earliest regulations defining "navigable waters" and "waters of the United States."

*A. The Army Corps' Initial Reluctance to Move Beyond  
Traditionally Navigable Waters*

In its 1974 regulations to implement section 404, the Army Corps was acutely aware of the RHA's key term "navigable waters of the United States," which "has received the benefit of over 100 years of judicial definition and interpretation which has largely been based on the constitutional extent to which the authority of the United States can extend over the nation's waterways."<sup>74</sup> Recognizing both that the 1972 amendments defined "navigable waters" as "the waters of the United States" and that the conference report "advises that this term is to be given the 'broadest possible Constitutional interpretation,'" the Corps nevertheless concluded that the Clean Water Act's relevant constitutional limits were the same as those for the RHA.<sup>75</sup> As such, its initial regulations covered both statutes and defined "navigable waters" to be "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."<sup>76</sup> The Army Corps thus initially limited its section 404 permitting authority to the traditional navigable waters.

The Natural Resources Defense Council and National Wildlife Federation challenged this definition in court and prevailed, inducing the U.S. District Court for the District of Columbia to revoke that part of the Army Corps' regulations and to order the Army Corps to try

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74. Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12115, 12115 (Apr. 3, 1974).

75. *Id.*

76. *Id.* at 12119 (to be codified at 33 C.F.R. § 209.120(d)(1) (1974)); *see also* 33 C.F.R. § 209.260(b) (1974) (laying out the conditions for navigability); *United States v. RGM Corp.*, 222 F. Supp. 2d 780, 783 (E.D. Va. 2002) (emphasizing that there was "no . . . distinction" in the 1974 regulations between "navigable waters" and "waters of the United States").



again.<sup>77</sup> The Corps published an interim final regulation in July 1975 that defined “navigable waters” to mean:

- (1) Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark (mean higher high water mark on the Pacific coast);
- (2) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. “Coastal wetlands” includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction;
- (3) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;
- (4) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark;
- (5) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;
- (6) Interstate waters landward to their ordinary high water mark and up to their headwaters;
- (7) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:
  - (a) By interstate travelers for water-related recreational purposes;
  - (b) For the removal of fish that are sold in interstate commerce;
  - (c) For industrial purposes by industries in interstate commerce; or

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77. Nat. Res. Def. Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (concluding that Congress “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution” and therefore that the Army Corps’ 1974 definition improperly changed the Act’s definition of “navigable waters”).

- (d) In the production of agricultural commodities sold or transported in interstate commerce;
- (8) Freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. “Freshwater wetlands” means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction; and
- (9) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (a)–(h), a decision on jurisdiction shall be made by the District Engineer.<sup>78</sup>

The Corps implemented these interim final rules in phases, starting with discharges of dredged or fill material into the traditional navigable waters and their adjacent wetlands; then progressing to discharges into primary tributaries and lakes greater than five acres, plus their adjacent wetlands; then to discharges into all waters of the United States starting on July 1, 1977.<sup>79</sup>

Also in 1977, the Army Corps adopted its next set of regulations, using the term “waters of the United States” for the first time.<sup>80</sup> The Corps’ decision to focus on “waters of the United States” for its Clean Water Act regulations suggests that the numerous lawsuits regarding its limited view of Clean Water Act jurisdiction<sup>81</sup> were shifting it away from its traditional strong focus on navigation and navigability. Indeed, the Army Corps noted that focusing on “waters of the United States” for section 404 “will assist in distinguishing between the Section 404 program and the types of waters that are subject to the permit programs administered under Sections 9 and 10 of the 1899 [Rivers and Harbors] Act.”<sup>82</sup> Under the 1977 regulations,

[t]he term “waters of the United States” means:

- (1) The territorial seas with respect to the discharge of fill material. (The transportation of dredged material by vessel

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78. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37127 (July 19, 1977).

79. *Id.* at 37124.

80. *Id.* at 37127.

81. *See id.* at 37124 (listing the cases).

82. *Id.* at 37127.

for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 USC 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.);

- (2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;
- (3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).
- (4) Interstate waters and their tributaries, including adjacent wetlands; and
- (5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction and all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.<sup>83</sup>

Thus, the Army Corps went a long way in three years in moving away from a navigation-centric view of section 404 to one focused on the limits of the Commerce Clause.

*B. The EPA's Expansion of "Waters of the United States"*

In contrast to the Army Corps, the EPA began broadening CWA "navigable waters" almost immediately to what it perceived as the outer limits of the Commerce Clause. In its 1973 regulations for the Act's oil spill provisions, for example, the EPA defined "navigable waters" to "include":

- (1) all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments

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83. *Id.* at 37144 (codified at 33 C.F.R. § 323.2(a) (1977)).

to the FWPCA (Pub. L. 92-599), and tributaries of such waters;

- (2) interstate waters;
- (3) intrastate lakes, rivers and streams which are utilized by interstate travelers for recreational or other purposes; and
- (4) intrastate lakes, rivers, and streams from which fish and shellfish are taken and sold in interstate commerce.<sup>84</sup>

By 1980, its view of “waters of the United States” had expanded further, to mean

- (1) [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under this definition.
- (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- (6) The territorial sea;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1)

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84. Non-transportation Related Onshore and Offshore Facilities, 38 Fed. Reg. 34164, 34165 (Dec. 11, 1973) (codified at 40 C.F.R. § 112.2(k) (1973)).

through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA . . . are not waters of the United States.<sup>85</sup>

As the EPA explicitly noted, moreover, this definition of “waters of the United States” for its section 404(b)(1) guidelines did not match the Army Corps’ definition, which to some commentators meant that the EPA’s definition was unconstitutional or too broad.<sup>86</sup> As the EPA emphasized, however, courts had upheld this definition as consistent with the Clean Water Act, and “it is preferable to have a uniform definition for waters of the United States, and for all regulations and programs under the CWA.”<sup>87</sup>

### *C. Litigation and Reconciliation*

Because early litigation over Clean Water Act jurisdiction tended to favor the EPA’s view of “waters of the United States,”<sup>88</sup> the Army Corps’ regulatory definition moved progressively closer to the EPA’s throughout the early 1980s.<sup>89</sup> The Army Corps’ rulemaking on “waters of the United States” culminated in 1986, when it moved the definition to section 328 so that all of the section 404 definitions would be together, finally separating the Clean Water Act from the RHA.<sup>90</sup> Most importantly, the Corps’ 1986 definition of “waters of the United States”

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85. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85336, 85346 (Dec. 24, 1980) (codified at 40 C.F.R. § 230.3(s)). This definition is the same as the one that the EPA promulgated earlier in 1980 for the NPDES permit program as part of its massive consolidated permitting regulations. 45 Fed. Reg. 33290, 33424 (May 19, 1980) (codified at 40 C.F.R. § 122.3 (1980)).

86. 45 Fed. Reg. at 85340.

87. *Id.*

88. *E.g.*, *United States v. Holland*, 373 F. Supp. 665, 671–72 (M.D. Fla. 1974) (concluding that Congress “defined away” the former test of navigability in the FWPCA, allowing jurisdiction over man-made mosquito canals); *P.F.Z. Props., Inc. v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975) (upholding jurisdiction over mangrove wetlands); *North Carolina v. Costanzo*, 398 F. Supp. 653, 673–74 (E.D.N.C. 1975) (holding that jurisdiction extends well beyond the mean high water mark to include coastal salt meadows and noting the Corps’ invalidated 1974 regulations).

89. *See, e.g.*, Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31794, 31795, 31810–11 (July 22, 1982) (amending 33 C.F.R. § 323.2(a) “to be consistent with EPA’s definition found in 40 CFR Part 126” and nearly matching the EPA’s 1980 definition of “waters of the United States”).

90. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

matched the definition that the EPA had been using since 1980.<sup>91</sup> The Corps also added, at the EPA's prodding, a gloss that later became known as the Migratory Bird Rule:

EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.<sup>92</sup>

Like the EPA's 1973 definition, the Army Corps' gloss on the definition of "waters of the United States" makes clear that the two agencies viewed the Act as extending to the limits of the Commerce Clause.

At this point in the history of the Clean Water Act, further shaping of its jurisdictional scope—particularly with regard to "waters of the United States"—shifted to the U.S. Supreme Court. As the next Part details, the Court's attention to the two permit programs has changed over time, first focusing almost exclusively on the section 402 program before shifting to the section 404 program and the effect of dredge-and-fill permits on private property owners.

### III. FROM NPDES TO SECTION 404: THE CONSEQUENCES OF THE SUPREME COURT'S SHIFTED FOCUS

Congress's decision to use the same legal test to trigger both permit programs has become, perhaps, the Clean Water Act's weakest structural feature, because the two regulatory regimes otherwise resonate in very different webs of rights and values. These resonances have meant that how the Supreme Court evaluates the scope of Clean Water Act jurisdiction often depends on which permit program is before it.

This Part provides an overview of the U.S. Supreme Court's twenty-five decisions (out of forty FWPCA decisions total since the 1972 amendments) that focus on implementation of the section 402 and section 404 permit programs, summarized in Table 1 in the Appendix to this Article. In categorizing the Supreme Court's Clean Water Act decisions, I have viewed "implementation" of the two permit programs

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91. 33 C.F.R. § 328.3(a) (1986). The EPA's parallel definitions were at 40 C.F.R. §§ 117.1, 122.2, 230.3(s) (1986).

92. 51 Fed. Reg. at 41217.

broadly. Thus, included in the section 402 decisions are the Supreme Court's decisions in citizen suits against dischargers who have violated their permits,<sup>93</sup> about states' claims that federal facilities<sup>94</sup> are subject to delegated NPDES permit programs<sup>95</sup> and state-imposed civil penalties, and about how the EPA sets effluent limitations.<sup>96</sup> While none of these decisions focuses on Clean Water Act jurisdiction per se, they are critical to how the multiple actors involved in the section 402 permit program—the EPA, the delegated states, and citizen plaintiffs—implement and enforce that permit requirement. Using broad classification categories also helps to make clear that the Supreme Court's Clean Water Act decision-making focus vis-à-vis the two permit programs has shifted over time by not eliminating later decisions from the section 402 category.

*A. An Overview of the U.S. Supreme Court's Clean Water Act Decisions*

As the Senate committee originally noted, the primary focus of the 1972 amendments was effectively regulating the 40,000 (at least)

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93. See 33 U.S.C. § 1365(a) (allowing “any citizen [to] commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation” or against the EPA for failure to perform mandatory duties under the Act). For a more extensive discussion of Clean Water Act citizen suits, see CRAIG, *supra* note 18, at 169–279.
94. See 33 U.S.C. § 1323(a) (“Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity.”). For a more extensive discussion of the federal facilities provision's history and the sovereign immunity problems it caused, see CRAIG, *supra* note 18, at 77–100.
95. See 33 U.S.C. § 1342(b) (requiring the EPA to delegate authority to issue NPDES permit programs to states that apply and meet the statutory criteria).
96. See *id.* § 1311(b)–(p) (setting out the EPA's duty to set effluent limitations for conventional and nonconventional pollutants and its authorities to modify and grant variances), *id.* § 1317 (setting out the EPA's authority with respect to toxic pollutants). An “effluent limitation” under the Act is “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” *Id.* § 1362(11). In general, as these provisions indicate when combined, effluent limitations are usually technology-based, end-of-the-pipe discharge limitations included in NPDES permits.

industrial dischargers that the EPA had discovered<sup>97</sup>—that is, the NPDES permit program—rather than on the Army Corps’ continued oversight of the dredging and filling necessary to preserve navigation. As Table 1 confirms, this prioritization of section 402 carried over to the Supreme Court, reflecting the considerable amount of energy that the EPA and the lower courts were spending getting the NPDES permit program up and running. Ten of the Court’s seventeen decisions that focused on the NPDES permit program (almost 60 percent) occurred in the first half of the Act’s existence, between 1972 and 1996. In contrast, of the Court’s eight decisions focused on section 404, seven (more than 87 percent) have occurred *since* 1997. To cast this information slightly differently, the Court moved from an overwhelming focus on section 402 between 1972 and 1996 (ten NPDES decisions versus one section 404 decision) to giving roughly equal attention to the two permit programs between 1997 and 2022 (seven decisions focused on each permit program).

In addition to shifting focus to the section 404 context, the Court’s decisions regarding the two permit programs are often qualitatively different in how they approach the Clean Water Act. Some of these differences are evident in the permit programs themselves. For example, in its 2009 decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,<sup>98</sup> the Court had to decide whether the EPA and the Army Corps were correct in concluding that the section 404 permit program applied to Coeur Alaska’s discharge of a mine-tailings slurry from its Kensington Gold Mine into Lower Slate Lake.<sup>99</sup> “Over the life of the mine, Coeur Alaska intend[ed] to put 4.5 million tons of tailings in the lake”<sup>100</sup> at a rate of 210,000 gallons per day, effectively destroying the lake for the duration of the mine and “kill[ing] all of the lake’s fish and nearly all of its other aquatic life.”<sup>101</sup> This result was perfectly legal under the section 404 permit program, so long as Coeur Alaska restored the lake at the end of the process and kept it isolated from other waters in the interim—and, the Army Corps concluded, using Lower Slate Lake this way was better for the environment than disposing of the tailings in nearby wetlands.<sup>102</sup> Under the NPDES program, in contrast, the discharge was completely illegal pursuant to the EPA’s effluent

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97. S. Rep. No.92-214 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3736.

98. 557 U.S. 261 (2009).

99. *Id.* at 265–67.

100. *Id.* at 268.

101. *Id.* at 297 (Ginsburg, J., dissenting).

102. *Id.* at 269–70. Forbidding the mine from damaging *either* water of the United States apparently never occurred to the Army Corps.



limitations for the froth-floatation gold mining industry.<sup>103</sup> The Supreme Court's six-Justice majority accorded *Chevron* deference to the Army Corps' and EPA's decisions that the section 404 program applied because Coeur Alaska was "filling" Lower Slate Lake.<sup>104</sup> Among other things, this case made clear that the two permit programs can result in very different environmental outcomes depending on how a discharge is characterized.

*B. The Supreme Court's View of the NPDES Permit Program:  
Protect the Public Commons*

1. Early NPDES Decisions Generally Expedite  
Implementation of Section 402

NPDES permits address classic industrial water pollution by imposing "end of the pipe" limitations (the effluent limitations) on how much or what concentration of pollutants the polluter can discharge into the waterway,<sup>105</sup> generally based on the control technologies available to the polluter's industrial category. As such, NPDES permits condition *how* businesses can operate but, usually, not *whether* they can exist. Moreover, the public benefits of the program are almost always easy to explain. Navigable waterbodies have long been deemed a public resource that should support navigation and fishing, and even privately owned smaller streams flow into larger waters, making the externalities and public harms of traditional water pollution fairly obvious even for these smaller waters. NPDES regulation thus resonates strongly with common law nuisance constraints on private action, allowing that permit program to operate, fundamentally, as a more detailed extension of prohibitions long recognized in the common law.<sup>106</sup>

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103. *Id.* at 278–79 (first citing 33 U.S.C. § 1316(b); and then citing 40 C.F.R. § 440.104(b)(1)).

104. *Id.* at 275, 277, 290–91. Along the way, the Court also deferred to the agencies' conclusion that the permit programs are mutually exclusive: any specific discharge is subject to one or the other, but not both. *Id.* at 274–75.

105. 33 U.S.C. § 1362(11).

106. Indeed,

[i]n 1998, a Washington State court found that even lawful operation of a business—a pulp mill operating with a Federal Water Pollution Control Act national pollution discharge elimination system (NPDES) permit allowing it to discharge treated process wastewater into the Columbia River—could support an award of \$2.5 million in damages for nuisance to potato farmers drawing irrigation water from the aquifer contaminated by the defendant's operation.

Denise Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENV'T. L. REP. NEWS & ANALYSIS 10114, 10119 (2008) (citing *Tiegs v. Watts*, 954 P.2d 877, 884 (Wash. 1998)).

In *this* regulatory context, the Supreme Court has long read the Act broadly to effectuate Congress's goal of reducing water pollution and to strengthen the EPA's authority to make progress toward that goal. For example, one of the Court's earliest NPDES decisions, *E.I. du Pont de Nemours & Co. v. Train* (1977),<sup>107</sup> emphasized that "[t]he statute, enacted on October 18, 1972, authorized a series of steps to be taken to achieve the goal of eliminating all discharges of pollutants into the Nation's waters by 1985 . . . ."<sup>108</sup> The issue was whether the EPA had authority under the Act to issue industry-wide effluent limitations by regulation, as opposed to having to set facility-specific effluent limitations in the process of writing each discharger's permit (the approach that du Pont preferred).<sup>109</sup> In upholding the EPA's authority based on both the statutory language and the legislative history,<sup>110</sup> the Court also elaborated upon the "impossible burden" that du Pont's approach created, since it would require the EPA

to give individual consideration to the circumstances of each of the more than 42,000 dischargers who have applied for permits, . . . and to issue or approve all these permits well in advance of the 1977 deadline in order to give industry time to install the necessary pollution-control equipment. We do not believe that Congress would have failed so conspicuously to provide EPA with the authority needed to achieve the statutory goals.<sup>111</sup>

The Court evidenced this same concern for achieving Congress's goals expeditiously in other early cases. For example, in *Costle v. Pacific Legal Foundation* (1980),<sup>112</sup> the Court upheld the EPA's decision not to hold a public hearing for *every* permit extension or modification decision it makes; instead, the EPA could properly condition the availability of an adjudicatory hearing on both the filing of a proper request and "on the identification of a disputed issue of material fact by an interested party."<sup>113</sup> Similarly, in *EPA v. National Crushed Stone Ass'n* (1980),<sup>114</sup> the Court upheld the EPA's decision not to allow variances from the first phase of effluent limitations just

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107. 430 U.S. 112 (1977).

108. *Id.* at 116.

109. *Id.* at 125–26.

110. *Id.* at 129–32.

111. *Id.* at 132–33.

112. 445 U.S. 198 (1980).

113. *Id.* at 213. In the same vein, in the same year the Supreme Court confirmed that imposition of civil penalties under the Act's oil spill provisions does not trigger the Constitution's many procedural protections for criminal defendants. *United States v. Ward*, 448 U.S. 242, 251–55 (1980).

114. 449 U.S. 64 (1980).

because the discharger could not afford the “best practicable technology”(BPT):<sup>115</sup>

Necessarily, if pollution is to be diminished, limitations based on BPT must forbid the level of effluent produced by the most pollution-prone segment of the industry, that segment not measuring up to ‘the average of the best existing performance.’ So understood, the statute contemplated regulations that would require a substantial number of point sources with the poorest performances either to conform to BPT standards or to cease production.<sup>116</sup>

The only real exception to this early trend came when the Court decided that lower courts retained their traditional equitable discretion to decide whether to enjoin the U.S. Navy when it discharged pollutants without an NPDES permit,<sup>117</sup> a decision entirely consistent with the Court’s ongoing deference to military preparedness in environmental cases.<sup>118</sup>

## 2. Jurisdictional Limitations Imposed in the Context of Section 402 Arise Only in the Second Half of the Clean Water Act’s Existence

In the first half of section 402’s fifty-year history, the only jurisdictional limitation that the Supreme Court imposed was that NPDES permits are not required for discharges of the source, byproduct, and special nuclear materials that the Atomic Energy Act regulates.<sup>119</sup> In the more recent twenty-five years, however, the Supreme

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115. *Id.* at 83–84. In apparent contrast, the Court later upheld the EPA in allowing variances from the toxic effluent limitations based on fundamentally different factors (FDFs). *Chem. Mfrs. Ass’n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125–26 (1985). As the Court explained, however, the FDF variance operates essentially to identify different categories of sources warranting different effluent limitations, rather than to modify toxic effluent standards. *Id.* at 129–31.

116. *Nat’l Crushed Stone Ass’n*, 449 U.S. at 76.

117. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314–15 (1982).

118. *E.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 557 U.S. 7, 24–25 (2008) (holding that the alleged injury to marine mammals from the Navy’s high-powered sonar was outweighed by national defense concerns); *Weinberger v. Cath. Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143–44 (1981) (holding that the Navy did not have to prepare an Environmental Impact Statement under the National Environmental Policy Act prior to storing nuclear weapons in Hawaii).

119. *Train v. Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1, 11, 13–14 (1976). The Court also imposed limitations on citizen suits, but those limitations are not relevant to the scope of the permit program itself. *E.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 58–61 (1987) (holding that citizens cannot sue dischargers for wholly past violations of their NPDES permits).

Court has devoted four decisions to the proper scope of the NPDES permit program. None examined whether the waters involved qualified as “waters of the United States.”

Transfers of pollutants between waterbodies has long been a contentious issue under the Clean Water Act,<sup>120</sup> and this issue underlies two of the Supreme Court’s section 402 jurisdictional decisions. In *South Florida Water Management District v. Miccosukee Tribe of Indians* (2004),<sup>121</sup> the Court addressed the issue of whether a pumping station that transferred polluted water from a canal to remnant wetlands in the Everglades required an NPDES permit.<sup>122</sup> Concluding first that point sources like the pumping station do not themselves need to add pollutants to waters for the permit requirement to attach,<sup>123</sup> it nevertheless remanded the case for a factual resolution of whether the canal and the wetlands were meaningfully distinct waterbodies or whether, instead, the pumping station was merely shifting water within the same waterbody.<sup>124</sup> Similarly, in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* (2013),<sup>125</sup> the issue as it reached the Supreme Court was whether the flood of pollutants out of a concrete channel portion of the Los Angeles River into a more natural portion of the same river qualified as a “discharge of pollutants,” requiring an NPDES permit.<sup>126</sup> Relying on *Miccosukee*, the Court answered “no,” because “the transfer of polluted water between ‘two parts of the same water body’ does not constitute a discharge of pollutants under the CWA.”<sup>127</sup>

The Supreme Court’s last NPDES decision before *County of Maui* was *Decker v. Northwest Environmental Defense Center* (2013),<sup>128</sup> which involved the application of the EPA’s stormwater permit rules to channelized runoff from logging roads.<sup>129</sup> The Court’s decision focused not on the statutory jurisdictional definitions but rather on the EPA’s view of its own regulation, and it accorded considerable deference to that interpretation.<sup>130</sup> As a result, the Court upheld the EPA’s

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120. CRAIG, *supra* note 4, at 1003–21.

121. 541 U.S. 95 (2004).

122. *Id.* at 99–101.

123. *Id.* at 105.

124. *Id.* at 109–12.

125. 568 U.S. 78 (2013).

126. *Id.* at 81–82.

127. *Id.* at 82.

128. 568 U.S. 597 (2013).

129. *Id.* at 601.

130. *Id.* at 613–14.

conclusion that the regulation exempted the pollution at issue from the NPDES permit requirement.<sup>131</sup>

### 3. A Recent Return to Purpose-Based Broadening of Section 402 Jurisdiction

The Supreme Court emphatically returned to a purposivist approach to interpreting the section 402 permit program's scope in its most recent NPDES decision, *County of Maui* (2020).<sup>132</sup> At issue was a sewage treatment plant located north of Lahaina on the island of Maui, Hawai'i, and the Court's majority stressed the water quality problem that it was causing: "The facility collects sewage from the surrounding area, partially treats it, and pumps the treated water through four wells hundreds of feet underground. This effluent, amounting to about 4 million gallons each day, then travels a further half mile or so, through groundwater, to the ocean."<sup>133</sup> The issue was whether this conveyance through groundwater constituted a discharge "from a point source" into the Pacific Ocean that triggered section 402's permit requirement.<sup>134</sup>

The Court sought to find a middle ground between a broad reading that would require a permit for any pollution that reached a jurisdictional water, regardless of how convoluted the links between the discharger and the receiving water actually were,<sup>135</sup> and a narrow reading that would create a "large and obvious loophole" in the NPDES program any time pollutants passed through groundwater on their way to a surface waterbody.<sup>136</sup> As it emphasized, the broad "fairly traceable" standard that the U.S. Court of Appeals for the Ninth Circuit had used "would require a permit in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river."<sup>137</sup> At the same time, eliminating all discharges that traveled through any amount of groundwater or other intervening conveyance would make unnecessarily fine distinctions between polluting activities and create perverse incentives for polluters.<sup>138</sup>

The Court's majority found its middle path by concluding that the sewage treatment plant could be subject to the NPDES permit program

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131. *Id.* at 615.

132. 140 S. Ct. 1462 (2020).

133. *Id.* at 1469.

134. *Id.* at 1470.

135. *Id.* at 1470–73.

136. *Id.* at 1473 (citations omitted).

137. *Id.* at 1471.

138. *Id.* at 1473.

if the injection was the “functional equivalent of a direct discharge.”<sup>139</sup> To reach this result, the Court began with the Clean Water Act’s purpose:

Congress’ purpose as reflected in the language of the Clean Water Act is to “restore and maintain the . . . integrity of the Nation’s waters,” § 101(a), 86 Stat. 816. Prior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards. . . . The Act restructures federal regulation by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA’s permission to do so.<sup>140</sup>

Moreover,

[t]he statute’s words reflect Congress’ basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States’ longstanding regulatory authority over land and groundwater. We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be “from any point source” when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.<sup>141</sup>

Finally, “functional equivalence,” like Clean Water Act jurisdiction itself, is a multifactor analysis. The Court identified

some of the factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.<sup>142</sup>

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139. *Id.* at 1476.

140. *Id.* at 1468 (citations omitted).

141. *Id.* at 1476 (emphasis omitted).

142. *Id.* at 1476–77.

Although the *County of Maui* Court most directly interpreted “from” in the jurisdictional phrase “from a point source,”<sup>143</sup> the case sounds an unavoidable death knell for “waters of the United States” myopia. As the Court emphasized, it does not matter for section 402 jurisdiction whether groundwater is itself a water of the United States; if it helps to convey pollutants to a jurisdictional water from a point source, the groundwater is part of a “discharge of a pollutant.”<sup>144</sup> Among other points, therefore, the *County of Maui* decision underscored a fact about Clean Water Act jurisdiction that the “waters of the United States” debate, discussed in Part IV.B, has obscured: assessing whether Clean Water Act jurisdiction exists is a holistic endeavor.

*C. The Supreme Court’s View of “Waters of the United States”  
Through the Section 404 Permit Program:  
Protect State Prerogatives and Private Property Rights*

As suggested by the Army Corps’ progressive broadening of its “navigable waters”/“waters of the United States” regulations, discussed in Part II, the section 404 permit program has moved far beyond Congress’s 1972 vision of regulating dredging and filling to maintain navigation. Consistent with Congress’s view that section 404 permits were mostly about navigation, the Army Corps’ regulations originally restricted “waters of the United States” to traditionally navigable waters.<sup>145</sup> In the 1980s, when the Army Corps joined the EPA in defining “waters of the United States” to the limits of the Commerce Clause,<sup>146</sup> the two agencies required section 404 permits for the dredging and filling of smaller waters, including wetlands, headwaters, and intermittent streams. People and entities who trigger the section 404 permit requirement are often ditching or filling the soggy parts of their property before building something. Unlike NPDES permits, therefore, section 404 permits can and often do directly interfere with the development of private property, particularly larger development projects.<sup>147</sup>

In other words, it is no accident that almost all constitutional takings litigation that the Clean Water Act has generated comes out of

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143. *Id.* at 1470.

144. *Id.* at 1468.

145. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

146. *See id.* at 123–24 (recounting this history and citing 40 Fed. Reg. 31,320 (1975)).

147. *E.g.*, *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1363–64 (Fed. Cir. 1999) (noting that the denial of the section 404 permit ended development of lots on a lakebed); *Fla. Rock Indus. v. United States*, 21 Cl. Ct. 161, 164 (1990) (noting that a denial of a section 404 permit prevented a limestone mine from operating).

the section 404 permit program.<sup>148</sup> Moreover, determining what uses can and cannot occur on private property means that the Army Corps makes section 404 permit decisions that can look a lot like land use planning, a traditional area of state authority.<sup>149</sup>

Given this very different web of legal resonances from section 402, litigation over the scope of the section 404 permit program shifted the Court's attention away from safeguarding the EPA's authority and improving water quality to protecting private property rights and states' traditional authority. This litigation has focused on the scope of "waters of the United States"; indeed, in the Supreme Court, the controversy over the proper definition of "waters of the United States" has played out entirely in the section 404 context, through four cases.

1. *United States v. Riverside Bayview Homes*

The first decision, *United States v. Riverside Bayview Homes, Inc.*,<sup>150</sup> felt much like the NPDES decisions: the Court unanimously held that, to fulfill the Act's water quality goals, the Army Corps can regulate the dredging and filling of wetlands adjacent to traditionally navigable bodies of water.<sup>151</sup> The defendant, Riverside Bayview Homes, "own[ed] 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan."<sup>152</sup> In 1976, it began to fill these wetlands to build a housing development.<sup>153</sup> Giving *Chevron* deference to the Army Corps' regulations defining "waters of the United States," the *Riverside Bayview* Court concluded that applying the Clean Water Act to "adjacent wetlands" made sense, because "the evident breadth of congressional concern for protection of water quality and aquatic

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148. *E.g., Riverside Bayview Homes*, 474 U.S. at 126–29 (discounting the seriousness of the takings issue as "spurious constitutional overtones"); *Cooley v. United States*, 324 F.3d 1297, 1300 (Fed. Cir. 2002) (asserting a takings claim based on the Army Corps' denial of a section 404 permit); *Forest Props., Inc.*, 177 F.3d at 1364 (asserting a regulatory takings claim on the basis of a section 404 permit denial); *City Nat'l Bank of Mia. v. United States*, 33 Fed. Cl. 759, 760, 761 (1995) (takings claim occasioned by denial of section 404 permit). A corresponding Westlaw search for takings claims in connection with the NPDES program revealed no reported decisions.

149. *E.g., Riverside Bayview Homes*, 474 U.S. at 126 (virtually equating section 404 permits with land use planning); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (first citing *FERC v. Mississippi*, 456 U.S. 742, 767–68 n.30 (1982); and then citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)) ("Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power.").

150. 474 U.S. 121 (1985).

151. *Id.* at 132–33.

152. *Id.* at 124.

153. *Id.*



ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”<sup>154</sup> Moreover, the Court conceived of “waters of the United States” as significantly broader than the traditional navigable waters:

Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into “navigable waters,” . . . 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.<sup>155</sup>

Nevertheless, in a footnote, the *Riverside Bayview* Court also specified that “[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question.”<sup>156</sup>

2. *Solid Waste Agency of Northern Cook County v.*  
*U.S. Army Corps of Engineers (SWANCC)*

As discussed in Part II, in 1986, the Army Corps revised its regulations and included the Migratory Bird Rule gloss on its definition of “waters of the United States.”<sup>157</sup> The Migratory Bird Rule led directly to the Supreme Court’s 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,<sup>158</sup> better known as *SWANCC*. *SWANCC* involved an abandoned sand and gravel mining site that twenty-three cities and villages in suburban Chicago

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154. *Id.* at 131, 133.

155. *Id.* at 133 (citations to statute omitted).

156. *Id.* at 131–32 n.8 (citations to statute omitted). The Court’s 2002 decision in *Borden Ranch Partnership v. U.S. Army Corps of Engineers* also technically upheld section 404 jurisdiction over “deep ripping” of wetlands at a vineyard, but the 4–4 split among the Justices merely affirmed the U.S. Court of Appeals for the Ninth Circuit as a default, and the entire opinion consists of two sentences: “The judgment is affirmed by an equally divided Court. Justice KENNEDY took no part in the consideration or decision of this case.” 537 U.S. 99, 100 (2002), *aff’g*, 261 F.3d 810 (9th Cir. 2001).

157. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

158. 531 U.S. 159 (2001).

wanted to convert to a sanitary landfill.<sup>159</sup> Several of the abandoned gravel pits had filled with water, and, while the Army Corps did not consider them wetlands, over 121 species of birds used the ponds, including migratory birds.<sup>160</sup> The Army Corps asserted jurisdiction over the site on the basis of the Migratory Bird Rule and denied SWANCC a section 404 permit to fill the ponds.<sup>161</sup> When SWANCC appealed, the Supreme Court held, 5–4, that the Army Corps and EPA could not use the Migratory Bird Rule to regulate intrastate, isolated waters.<sup>162</sup> Along the way, the majority emphasized that

[w]e 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. . . . The term “navigable” has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.<sup>163</sup>

The *SWANCC* majority also refused to defer to the Army Corps’ regulatory definition of “waters of the United States.”<sup>164</sup> It emphasized, for example, that “Congress chose 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 . . . .’”<sup>165</sup> The Army Corps’ regulations raised “significant constitutional questions” of federalism, and allowing the agency “to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.”<sup>166</sup>

Notably, Chief Justice Rehnquist’s opinion for the five-Justice majority did not even acknowledge the NPDES program or the effect that the *SWANCC* decision might have on that other permitting scheme. Perhaps more surprisingly, Justice Stevens’s opinion for the

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159. *Id.* at 162–63.

160. *Id.* at 162–64.

161. *Id.* at 165.

162. *Id.* at 174.

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

164. *Id.* at 168 (noting that “the Corps’ original interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here”); *id.* at 172 (explicitly refusing to extend *Chevron* deference).

165. *Id.* at 166–67 (citing 33 U.S.C. § 1251(b)).

166. *Id.* at 174.

dissenters was similarly myopic. It did start with a broad vision of the Act, noting that “[a]lthough Congress’ vision of zero pollution remains unfulfilled, its pursuit has unquestionably retarded the destruction of the aquatic environment. Our Nation’s waters no longer burn. Today, however, the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water.”<sup>167</sup> From there, however, the dissenters focused exclusively on section 404, including its differences from the RHA,<sup>168</sup> why the Army Corps changed its mind about the scope of “waters of the United States,”<sup>169</sup> and how section 404 does indeed respect state authority<sup>170</sup> and does not infringe upon the Commerce Clause’s scope.<sup>171</sup> Caught up in the property and federalism drama of section 404, the Court apparently simply forgot about the implications of its decision for the NPDES program.

### *3. Rapanos v. United States*

In 2006, *Rapanos v. United States*<sup>172</sup> fractured the Supreme Court, and there has been no national unity regarding “waters of the United States” ever since.

#### *a. Justice Scalia’s Plurality Opinion*

As the plurality of four Justices, in an opinion by Justice Scalia, described the facts, John Rapanos backfilled wetlands to develop a parcel of private property in Michigan that “included 54 acres of land with sometimes-saturated soil conditions,” although “[t]he nearest navigable water was 11 to 20 miles away.”<sup>173</sup> From there, the plurality opinion ranted against the Army Corps’ intrusion into private property rights and state land use planning, a passage worth reproducing in full given its potential implications for the Court’s upcoming *Sackett II* decision:

The burden of federal regulation on those who would deposit fill material in locations denominated “waters of the United States” is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as “economics,” “aesthetics,” “recreation,” and “in general, the needs and welfare of the people,” 33 CFR § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and

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167. *Id.* at 175 (Stevens, J., dissenting).

168. *Id.* at 179 (Stevens, J., dissenting).

169. *Id.* at 185 (Stevens, J., dissenting).

170. *Id.* at 191 (Stevens, J., dissenting).

171. *Id.* at 192 (Stevens, J., dissenting).

172. 547 U.S. 715 (2006).

173. *Id.* at 719–21.

\$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. “[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.” These costs cannot be avoided, because the Clean Water Act “impose[s] criminal liability,” as well as steep civil fines, “on a broad range of ordinary industrial and commercial activities.” In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines.

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over “the waters of the United States” to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated “waters of the United States” include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory “waters of the United States” engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”<sup>174</sup>

Moreover, “[t]he extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would benefit a local zoning board.”<sup>175</sup>

To correct this unwarranted and possibly unconstitutional expansion of federal power, the plurality focused on the meaning of “waters,” concluding that

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174. *Id.* at 721–22 (citations omitted).

175. *Id.* at 738.

“the waters of the United States” include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely, “streams,” connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as “rivers,” “lakes,” and “oceans.” None of these terms encompasses transitory puddles or ephemeral flows of water.<sup>176</sup>

Unlike in *SWANCC*, however, the federal government and various amici put the NPDES problem squarely in front of the Court, arguing that the plurality’s interpretation would allow polluters to evade the NPDES permit requirement.<sup>177</sup> The plurality disagreed, arguing that NPDES discharges do not have to reach “waters of the United States directly,” “that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between,” and that the intermittent conveyances might themselves qualify as point sources.<sup>178</sup> In this respect, the plurality concluded, there were important differences between discharges of dredged and fill material and discharges of other pollutants:

In contrast to the pollutants normally covered by the [NPDES] permitting requirement of § 1342(a), “dredged or fill material,” which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an “addition . . . to navigable waters” when deposited in upstream isolated wetlands. . . . It does not appear, therefore, that the interpretation we adopt today significantly reduces the scope of § 1342.<sup>179</sup>

One can speculate whether the plurality Justices had ever actually observed dredging and filling operations.<sup>180</sup> Nevertheless, regardless of how one judges the sincerity of their attempt to distinguish the NPDES

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176. *Id.* at 731–33.

177. *Id.* at 742–43.

178. *Id.* at 743–44.

179. *Id.* at 744–45.

180. Notably, both Justice Kennedy and the dissenters questioned the factual accuracy of the plurality’s assertion that dredged and fill material stays in place. *Id.* at 774–75 (Kennedy, J., concurring), 806–07 (Stevens, J., dissenting).

program, it is clear that concerns about the NPDES program were not going to alter their decision to constrain section 404. These Justices' regulatory focus had thus shifted decisively from promoting continued progress in reducing water pollution to reining in section 404's alleged overreaching.

*b. Justice Kennedy's Concurrence and Justice Stevens's Dissent*

Neither Justice Kennedy in concurrence nor the dissenters agreed that the plurality had arrived at the correct test for "waters of the United States." Justice Kennedy harkened back to *Riverside Bayview* to emphasize hydrological connectivity. Under his test, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."<sup>181</sup> Moreover, "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"<sup>182</sup>

The four dissenting Justices, in an opinion by Justice Stevens, would have maintained broad jurisdiction over wetlands and other waters. However, recognizing that lower courts now had two other tests to decide between, the dissenters concluded that a "water of the United States" existed if *either* the plurality's *or* Justice Kennedy's test was met.<sup>183</sup>

#### 4. The *Rapanos* Aftermath

Since *Rapanos*, there has been no agreement regarding what to do about the definition of "waters of the United States." Proposed amendments in Congress failed,<sup>184</sup> and the U.S. courts of appeals maintain a circuit split over whether to use the dissenters' "either/or" approach or whether Justice Kennedy's test controls; none uses only the plurality test.<sup>185</sup> Both the Obama and Trump Administrations promulgated "waters of the United States" regulations that were

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181. *Id.* at 779–80 (Kennedy, J., concurring).

182. *Id.* at 780 (Kennedy, J., concurring).

183. *Id.* at 810 (Stevens, J., dissenting).

184. *E.g.*, Thomas P. Redick & Christopher Brooks, *WOTUS Wars and Endangered Species: Where Will Farmers Find Their Legal High Ground?*, 31 NAT. RESOURCES & ENVT. 20, 21 (2016) ("A number of proposed amendments aimed at clarifying jurisdiction have never made it to a floor vote . . ."); Cory Ruth Brader, Comment, *Toward a Constitutional Chevron: Lessons from Rapanos*, 160 U. PENN. L. REV. 1479, 1493–95 (2012) (discussing the failed Clean Water Restoration Act).

185. CRAIG, *supra* note 4, at 1081–83.

promptly challenged in multiple courts,<sup>186</sup> and at one point in 2020, both sets of regulations, as well as the EPA's and Army Corps' pre-*Rapanos* regulations, were being challenged in litigation, with confusion and cross-injunctions escalating to the point where not even the EPA was always sure which regulations applied.<sup>187</sup>

In December 2021, the Biden Administration proposed its own "waters of the United States" regulations.<sup>188</sup> As proposed, the new regulations would return to the agencies' 1986 regulations, "with amendments to certain parts of those rules to reflect the agencies' interpretation of the statutory limits on the scope of 'the waters of the United States' and informed by Supreme Court case law."<sup>189</sup> The proposed definition characterizes the traditionally navigable waters, interstate waters, and the territorial seas as "foundational waters" and adopts both Justice Scalia's "relatively permanent" test and Justice Kennedy's "significant nexus" test.<sup>190</sup> Six weeks after the agencies proposed this new definition, however, the Supreme Court announced that would again revisit the scope of "waters of the United States."<sup>191</sup>

### 5. *Sackett I* and *Hawkes*

As agencies and lower courts continue to struggle with *Rapanos*, the Supreme Court has continued to pursue a pro-property owner agenda in cases involving section 404. Both *Sackett v. Environmental Protection Agency* (*Sackett I*, 2012)<sup>192</sup> and *U.S. Army Corps of Engineers v. Hawkes Co.* (2016)<sup>193</sup> involved the right of property owners to immediately challenge the Army Corps' and EPA's determinations that the Clean Water Act applies to wetlands and other waters on their properties. In *Sackett I*, the Sacketts filled in part of their Idaho lot in

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186. *Id.* at 1083. For a summary of the reactions to the 2015 Obama Administration Clean Water Rule, see Dave Owens, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1, 2.

187. CRAIG, *supra* note 4 at 1083–85 & fig.5–7; *see also* CONG. RSCH. SERV., R44585, EVOLUTION OF THE MEANING OF "WATERS OF THE UNITED STATES" IN THE CLEAN WATER ACT 23–32, 33 fig.2 (2019), <https://crsreports.congress.gov/product/pdf/R/R44585> [<https://perma.cc/SP5H-EFED>] (summarizing the litigation and providing a map of which rules applied where as of 2019, noting confusion over which rules applied in New Mexico).

188. Revised Definition of "Waters of the United States," 86 Fed. Reg. 69372 (proposed Dec. 7, 2021) (in final rule stage).

189. *Id.* at 69373.

190. *Id.*

191. *Sackett v. EPA* (*Sackett II*), 142 S. Ct. 896 (argued Oct. 3, 2022) (currently evaluating case to determine whether the Ninth Circuit used the correct *Rapanos* test).

192. 566 U.S. 120 (2012).

193. 578 U.S. 590 (2016).

order to build a house, only to receive an EPA compliance order concluding that they filled jurisdictional wetlands and requiring them to restore the property.<sup>194</sup> The Sacketts claimed that they should be able to contest the compliance order before having to choose between complying with it or becoming subject to penalties, while the government claimed that the compliance order was just an initial step in enforcement, not subject to judicial review. The Court unanimously agreed with the Sacketts, concluding that the order was “final agency action” subject to immediate judicial review.<sup>195</sup> Justice Alito concurred to emphasize that “[t]he position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.”<sup>196</sup>

In *Hawkes*, three companies that co-owned land were engaged in mining peat from bogs that the Army Corps concluded were subject to the Clean Water Act. The companies wanted to challenge that jurisdictional determination before actually going through the section 404 permitting process. All nine Justices again concurred that an Army Corps jurisdictional determination is “final agency action” subject to judicial review.<sup>197</sup>

Notably, however, for Chief Justice Roberts—whose majority opinion seven Justices joined in full (all but Justice Ginsburg, who concurred in the judgment; Justice Scalia died three months before the decision)—the stakes in the section 404 context were particularly high and worth laying out in detail. From the beginning of the *Hawkes* opinion, Justice Roberts relied heavily on Justice Scalia’s plurality opinion in *Rapanos* regarding the costs and extensive jurisdiction of section 404 permits.<sup>198</sup> For example, after laying out the relevant Army Corps “waters of the United States” definition, the opinion announces that “[t]he Corps has applied that definition to assert jurisdiction over ‘270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States.’”<sup>199</sup> Moreover, he wrote:

The costs of obtaining such a permit are significant. For a specialized “individual” permit of the sort at issue in this case, for example, one study found that the average applicant “spends 788 days and \$271,596 in completing the process,” without

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194. *Sackett I*, 566 U.S. at 124–25.

195. *Id.* at 125–26, 131.

196. *Id.* at 132 (Alito, J., concurring).

197. *Hawkes Co.*, 578 U.S. at 597–602 (majority), 604 (Ginsburg, J., concurring).

198. *Id.* at 594–95.

199. *Id.* at 594 (quoting *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion)).



“counting costs of mitigation or design changes.” Even more readily available “general” permits took applicants, on average, 313 days and \$28,915 to complete.<sup>200</sup>

Indeed, in the companies’ case itself,

Corps officials signaled that the permitting process would be very expensive and take years to complete. The Corps also advised respondents that, if they wished to pursue their application, they would have to submit numerous assessments of various features of the property, which respondents estimate would cost more than \$100,000.<sup>201</sup>

Finally, the Court seemed suspicious of the jurisdictional determination’s merits, which rested on the Army Corps’ conclusion that the companies’ “wetlands had a ‘significant nexus’ to the Red River of the North, located some 120 miles away.”<sup>202</sup>

*Sackett I* and *Hawkes* are procedural decisions about Clean Water Act jurisdiction—that is, decisions outlining *when* landowners can challenge the Army Corps’ and EPA’s assertions of section 404 jurisdiction rather than assessing the substantive validity of those assertions. Nevertheless, together, these two cases evidence the Supreme Court’s clear determination to ensure that private property owners can have their day in court *early* to determine whether the Clean Water Act can limit how they develop their land. Notably, Justice Kennedy’s concurrence in *Hawkes*, joined by Justices Thomas and Alito, directly tied the procedural decision to substantive concerns about the scope of section 404 jurisdiction. Justice Kennedy “point[ed] out that, based on the Government’s representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern.” He agreed with Justice Alito’s concurrence in *Sackett I*, stating that “the Act’s reach is ‘notoriously unclear’ and the consequences to landowners even for inadvertent violations can be crushing.”<sup>203</sup> He concluded that “[t]he Act . . . continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”<sup>204</sup>

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200. *Id.* at 594–95 (citations omitted) (first quoting *Rapanos*, 547 U.S. at 721; and then citing 33 CFR § 323.2(h)).

201. *Id.* at 596.

202. *Id.*

203. *Id.* at 602 (Kennedy, J., concurring) (quoting *Sackett I*, 566 U.S. at 132 (Alito, J., concurring)).

204. *Id.* (Kennedy, J., concurring).

6. *Sackett II*

The Justices' continuing suspicions of section 404 jurisdiction are worth emphasizing, because the Sacketts are now back in front of the Supreme Court on the merits of their jurisdictional determination. On January 24, 2022, the Court granted certiorari to review the Ninth Circuit's decision upholding Clean Water Act jurisdiction, "limited to the following question: Whether the Ninth Circuit set forth the proper test for determining whether wetlands is [sic] 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)."<sup>205</sup> Moreover, the facts of the case and the two lower court decisions upholding jurisdiction offer the Supreme Court numerous options to further limit the scope of "waters of the United States" in the section 404 context.

After remand in *Sackett I*, the parties requested a stay in the litigation to pursue settlement negotiations, which ultimately failed.<sup>206</sup> Eventually, both parties filed cross-motions for summary judgment in the U.S. District Court for the District of Idaho on the issue of whether section 404 jurisdiction existed; specifically, "the parties dispute[d] whether the EPA correctly concluded that the Plaintiffs' property contains wetlands that are 'waters of the United States' subject to CWA jurisdiction."<sup>207</sup> Because the 2015 Obama regulation had been invalidated in Idaho (and the 2020 Trump regulation did not yet exist), the district court applied the 1986 regulations as interpreted by *SWANCC* and *Rapanos*.<sup>208</sup> It first concluded that, although the Sacketts had filled and largely destroyed the wetlands on their property, the EPA properly determined that jurisdiction over the wetlands existed because "Plaintiffs' property was originally part of a large wetland complex called the Kalispell Bay Fen" and because, during a site visit, "the EPA personnel were still able to observe the presence of the three wetlands indicators"—that is, "hydrophytic vegetation, hydric soils, and wetland hydrology."<sup>209</sup> Second, the district court upheld the EPA's conclusion that the wetlands were adjacent to Priest Lake, a traditionally navigable waterway, because "there is a shallow subsurface connection between Plaintiffs' wetlands and Priest Lake," the wetlands were separated from the lake only by man-made barriers, and the wetlands are "reasonably close" to Priest Lake.<sup>210</sup> Under this

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205. *Sackett v. EPA (Sackett II)*, 142 S. Ct. 896, 896 (argued Oct. 3, 2022).

206. *Sackett v. EPA*, 2:08-cv-00185-EJL, 2019 WL 13026870, at \*2 (D. Idaho Mar. 31, 2019).

207. *Id.* at \*6.

208. *Id.* at \*6, \*7 n.3, \*9 (citing U.S. ENV. PROT. AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* (2008)).

209. *Id.* at \*8.

210. *Id.* at \*9–10.

conclusion, the Sacketts' wetlands fall within the ambit of *Riverside Bayview*.

However, the district court also concluded that, pursuant to Justice Kennedy's *Rapanos* concurrence, the Sacketts' wetlands are subject to Clean Water Act jurisdiction because they are "adjacent to a jurisdictional tributary and similarly situated with other wetlands that, together, have a significant nexus to Priest Lake."<sup>211</sup> The district court decided that "[t]he record establishes the existence of a hydrologic connection in the form of a substantial shallow subsurface flow between the wetlands, Plaintiffs' property, the adjacent tributary and the lake which significantly improves the physical, biological, and ecological integrity of Priest Lake."<sup>212</sup> More specifically, the wetlands contributed baseflow to Priest Lake, improved Priest Lake's water quality by retaining sediment and uptaking nutrient pollution, helped to prevent flooding from runoff and maintain lake levels in dry periods, and contributed to the lake's biodiversity by supporting species such as beaver and trout.<sup>213</sup>

On appeal, the Ninth Circuit affirmed.<sup>214</sup> It first dealt with an intervening mootness issue that the Trump Administration created. The EPA "sent the Sacketts a two-paragraph letter in March 2020, withdrawing the amended compliance order issued twelve years prior."<sup>215</sup> The Ninth Circuit concluded that this voluntary withdrawal did not moot the case.<sup>216</sup>

Turning to the merits, the Ninth Circuit did not address the district court's *Riverside Bayview* holding that the Sacketts' wetlands were adjacent to Priest Lake.<sup>217</sup> Instead, it turned directly to *Rapanos*, addressing the Sacketts' contention that the Scalia plurality provides the controlling test.<sup>218</sup> Clarifying its own precedent, however, the Ninth Circuit concluded that Justice Kennedy's "significant nexus" test controlled.<sup>219</sup>

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211. *Id.* at \*10–12.

212. *Id.* at \*11.

213. *Id.* at \*12.

214. *Sackett v. EPA*, 8 F.4th 1075, 1079 (9th Cir. 2021).

215. *Id.* at 1082.

216. *Id.* at 1083.

217. *See generally id.*

218. *Id.* at 1088.

219. *Id.* at 1088–91 (relying on *Marks v. United States*, 430 U.S. 188, 193 (1977), "under which the controlling holding of a fractured decision is the 'narrowest ground'" that supports the Court's decision (quoting *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007))).

Agreeing with the district court that the 1986 regulations controlled,<sup>220</sup> the Ninth Circuit readily concluded that “[t]he record plainly supports EPA’s conclusion that the wetlands on the Sacketts’ property are adjacent to a jurisdictional tributary and that, together with the similarly situated Kalispell Bay Fen, they have a significant nexus to Priest Lake, a traditional navigable water.”<sup>221</sup> According to the court, “Water from these wetlands makes its way into Priest Lake via the unnamed tributary and Kalispell Creek.”<sup>222</sup> Moreover, “these wetlands provide important ecological and water quality benefits; indeed, . . . this wetlands complex, which is one of the five largest along the 62-mile Priest Lake shoreline, [is] ‘especially important in maintaining the high quality of Priest Lake’s water, fish, and wildlife.’”<sup>223</sup>

Given these two lower court opinions, the Supreme Court’s decision in *Sackett II* could address several or relatively few issues in answering its own certiorari question. It might, for example, simply decide as a legal matter which test from *Rapanos* controls—the plurality’s “direct hydrological connection” test, Justice Kennedy’s “significant nexus” test, or the dissent’s “either/or” approach. It could also decide whether the Sacketts’ wetlands are still wetlands, whether wetlands not directly adjacent to traditionally navigable waters can be “waters of the United States” (the issue *Riverside Bayview* explicitly did not address), what it means for wetlands to be “adjacent” to anything, what the role of “similarly situated” wetlands can be, or whether Justice Kennedy’s focus on the physical, chemical, and biological integrity of the hydrologically connected, traditionally navigable water is appropriate given the Clean Water Act’s insistence that there be an addition of a pollutant from a point source.

One thing *is* clear, however: whatever the Supreme Court says about the scope of section 404 in *Sackett II*, its decision will also affect the scope of section 402. To keep section 402 as broad as possible, a new conception of Clean Water Act jurisdiction is necessary.

#### IV. DISTINGUISHING SECTION 402 AND SECTION 404 THROUGH FUNCTIONAL EQUIVALENCE

##### *A. The Need for a New Regulatory Approach*

As the Congressional Research Service recognized in 2019, “During the first two decades after the passage of the Clean Water Act, courts

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220. See *id.* at 1079, 1091 (using “the regulations that were in effect when EPA issued the amended compliance order”).

221. *Id.* at 1092.

222. *Id.* at 1093 (quoting Memorandum from John M. Olson, Wetland Ecologist, Env’t Prot. Agency (July 1, 2008)).

223. *Id.*

generally interpreted the act as having a wide jurisdictional reach.”<sup>224</sup> During the Act’s initial twenty years of existence, the Supreme Court focused exclusively on the NPDES program, generally upholding the EPA’s authority “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>225</sup> The EPA and the courts got the NPDES program up and running, states began assuming authority for it, and Congress has not changed that program significantly since the 1987 amendments<sup>226</sup> that required permits for municipal and industrial stormwater discharges and added Tribes as potential permitting authorities.

Section 402 works. Rivers no longer burn and, for the most part, cities no longer discharge raw sewage into the nation’s waterways.<sup>227</sup> Water quality nationwide has gotten better.<sup>228</sup> As the Supreme Court itself recognized in *County of Maui*, broader jurisdiction allows section 402 to continue to perform its public-minded, nuisance-preventing functions.<sup>229</sup>

In contrast, when Supreme Court attention shifted to section 404, especially since the beginning of the twenty-first century, new legal valences came to the forefront. Federalism, for example, is much more important, and the Court “has emphasized that ‘the grant of authority to Congress under the Commerce Clause, though broad, is not

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224. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44585, EVOLUTION OF THE MEANING OF “WATERS OF THE UNITED STATES” IN THE CLEAN WATER ACT, at i (2019).

225. 33 U.S.C. § 1251(a); see Mulligan, *supra* note 224, at 4, 13–14, 16, 18–19 (discussing the Court’s deference to the EPA and Corps’ broad interpretation of jurisdiction under the CWA until the early 2000s).

226. Water Quality Act of 1987, Pub. L. No. 100-4, §§ 401, 403, 405, 518, 101 Stat. 7, 65–70, 77–78.

227. Instead, cities process sewage at publicly owned treatment works (POTWs). It is estimated that 14,748 POTWs serve approximately 84 percent of U.S. households; most of the rest rely on septic tanks. CTR. FOR SUSTAINABLE SYS., UNIV. OF MICH., U.S. WASTEWATER TREATMENT FACT SHEET (2022), [https://css.umich.edu/sites/default/files/2022-09/Wastewater%20Treatment\\_CSS04-14.pdf](https://css.umich.edu/sites/default/files/2022-09/Wastewater%20Treatment_CSS04-14.pdf) [<https://perma.cc/Y6YV-68KB>]. However, wet weather events can still cause problems for sewage systems. NAT’L DISCHARGE ELIMINATION SYS. (NPDES), ENV’T. PROT. AGENCY, REPORT TO CONGRESS ON IMPACTS AND CONTROL OF COMBINED SEWER OVERFLOWS AND SANITARY SEWER OVERFLOWS, FACT SHEET (2004), [https://www.epa.gov/sites/default/files/2015-10/documents/csosso\\_rtc\\_factsheet.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/csosso_rtc_factsheet.pdf) [<https://perma.cc/8LST-7PD6>].

228. Keiser & Shapiro, *Consequences*, *supra* note 28, at 374, 376 (finding that the share of waters that are not fishable or swimmable fell by “11 to 12 percentage points” from 1972 to 2001 and industrial pollutants have “declined rapidly”).

229. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

unlimited.”<sup>230</sup> Similarly, as various Justices’ opinions in cases from *Rapanos* through *Hawkes* have emphasized and detailed, section 404 interferes with private property rights in ways the Justices often perceive as uncertain, costly, and overbearing.<sup>231</sup>

Regardless of what Justice Scalia’s *Rapanos* plurality may have intended, the *Rapanos* problematization of “waters of the United States” spilled into the NPDES context, absolving multiple polluters of the obligation to get a section 402 permit.<sup>232</sup> Thus, in shifting focus from the NPDES program’s control over paradigmatic municipal and industrial dischargers to section 404’s impact on private landowners and federalism, a majority of Justices have effectively discounted the danger of progressively improving the nation’s water quality through section 402 in their collective and ongoing desire to rein in section 404. The dramatic differences in Supreme Court views of the Clean Water Act’s breadth depending on permit context illuminate the Act’s fundamental structural flaw: despite the fact that Congress initially conceived the two permit programs as performing very different functions, it yoked them together interpretively through a single statutory trigger and set of definitions.

One possible (albeit currently improbable) solution is for Congress to amend the Clean Water Act’s jurisdictional provisions. However, the most obvious amendments are unlikely to permanently assuage the Supreme Court’s discomfort with section 404 having a broad scope. Legislatively extending the Act’s jurisdiction to the limits of the Commerce Clause would simply require the Court to address the constitutional issue it avoided in *SWANCC*, with a significant risk—especially if the issue arose in the section 404 context, as it inevitably would—that the Court would find that Congress had impermissibly intruded into states’ reserved Tenth Amendment authority to regulate land use.<sup>233</sup> Statutorily defining “waters of the United States” to encompass the categories identified in the 1986 regulations would similarly render the more expansive categories vulnerable to Commerce Clause challenges. Instead, a more radical approach is needed to insulate section 402 from the Supreme Court’s distaste for section 404.

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230. MULLIGAN, *supra* note 224, at i. (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs.*, 531 U.S. 159, 173 (2001)).

231. *See supra* Parts III.C.3–5.

232. *See, e.g.*, *Black Warrior River-Keeper, Inc. v. Drummond Co., Inc.*, 387 F. Supp. 3d 1271, 1289–90, 1293 (N.D. Ala. 2019); *Env’t Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 822–24 (N.D. Cal. 2007); *Ariz. Pub. Serv. Co.*, 18 E.A.D. 245, 267–69 (Env’t Prot. Agency EAB 2020).

233. For a more extensive discussion of these Commerce Clause arguments, see CRAIG, *supra* note 18, at 109–48.

*B. A New Approach to Clean Water Act Jurisdictional Regulations*

Given that congressional action is unlikely in the near term, the EPA and the Army Corps need to fully embrace the fact that the scope of “waters of the United States” now largely depends on how the Justices view section 404. At least part of the Justices’ distaste for section 404 could be assuaged through a more holistic approach to the agencies’ jurisdictional regulations. Specifically, in addition to being more faithful to the Act’s jurisdictional complexities, a holistic approach would have two primary benefits: foregrounding the many limitations on section 404 jurisdiction that already exist; and, using *County of Maui’s* functional equivalence approach, simplifying the overall approach to Clean Water Act jurisdiction.

1. A Holistic Approach Would Emphasize the Many Existing  
Jurisdictional Limitations to Section 404

As this Article noted in its Introduction, the increasingly myopic focus on “waters of the United States” in the section 404 context encourages both courts and regulated entities to treat that element of Clean Water Act jurisdiction as determinative. Indeed, the entire focus of *Sackett II*, as well as *SWANCC* and *Rapanos*, is whether the waters being filled or dredged are “waters of the United States.” Although pollutants—dredged or fill material—have inferentially been added to those waters from point sources, the point source element in particular is only nebulously identified in all three cases. While “waters of the United States” might indeed be the problematic jurisdictional element, the failure of the Court to methodically work through the entire jurisdictional test serves only to raise the stakes in defining “waters of the United States,” particularly for section 404.

In contrast, a more holistic approach to jurisdictional regulations could start with a list of all the activities that do *not* trigger either the Clean Water Act generally or the section 404 permit requirement. That list, compiled from both the statute and the agencies’ regulations, is extensive. For example, neither a section 402 nor a section 404 permit is required for any of the following activities:

- Additions of any pollutant to “the contiguous zone or the ocean” from a “vessel or other floating craft.”<sup>234</sup>
- Injection of “water, gas, or other material . . . into a well to facilitate production of oil or gas” if the injection is appropriately approved by the relevant state authority.<sup>235</sup>
- Agricultural stormwater discharges.<sup>236</sup>

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234. 33 U.S.C. § 1362(12) (excluding pollutants discharged from “a vessel or other floating craft” from the definition of “discharge of pollutants”).

235. *Id.* § 1362(6).

236. *Id.* § 1362(14).

- Return flows from irrigated agriculture.<sup>237</sup>
- “[D]ischarges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities,” so long as the stormwater is neither contaminated by nor comes into contact with “any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.”<sup>238</sup>
- Discharges of runoff from the following silvicultural activities: “nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.”<sup>239</sup>
- Discharges from recreational vessels of “any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation” of the recreational vessel.<sup>240</sup>

In addition, unless one of the following includes toxic pollutants<sup>241</sup> or constitutes a new activity where the discharge of dredged or fill material may impair the flow or circulation of navigable waters or reduce their reach,<sup>242</sup> the following activities do not require a section 404 permit:

- Discharges of dredged or fill material “from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices”<sup>243</sup> at established and ongoing farming, ranching, or silvicultural facilities.<sup>244</sup>
- Discharges of dredged or fill material “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways,

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237. *Id.*; *id.* § 1342(l)(1).

238. *Id.* § 1342(l)(2).

239. *Id.* § 1342(l)(3)(A).

240. *Id.* § 1342(r).

241. *Id.* § 1342(k) (excluding from the definition of compliance those standards imposed for “a toxic pollutant injurious to human health”); 33 C.F.R. § 323.4(b) (2021) (requiring a section 404 permit for discharges containing enumerated toxic pollutants).

242. 33 U.S.C. § 1344(f)(2).

243. *Id.* § 1344(f)(1)(A).

244. 33 C.F.R. § 323.4(a)(1)(ii) (2021).



and bridge abutments or approaches, and transportation structures.”<sup>245</sup> According to the regulations, “Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.”<sup>246</sup>

- Discharges of dredged or fill material “for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.”<sup>247</sup> According to the regulations, “Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.”<sup>248</sup>
- Discharges of dredged or fill material “for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters.”<sup>249</sup>
- Discharges of dredged or fill material “for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.”<sup>250</sup>
- Discharges of dredged or fill material pursuant to an approved State areawide waste treatment plan.<sup>251</sup>
- Discharges of dredged or fill material occurring “as part of the construction of a Federal project specifically authorized by Congress.”<sup>252</sup>

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245. 33 U.S.C. § 1344(f)(1)(B).

246. 33 C.F.R. § 323.4(a)(2) (2021).

247. 33 U.S.C. § 1344(f)(1)(C).

248. 33 C.F.R. § 323.4(a)(1)(iii)(E)(3) (2021).

249. 33 U.S.C. § 1344(f)(1)(D).

250. *Id.* § 1344(f)(1)(E).

251. *Id.* § 1344(f)(1)(F) (cross-referencing *id.* § 1288(b)(4)(B)–(C) for the requirements for a state plan to be approved).

252. *Id.* § 1344(r); 33 C.F.R. § 323.4(d) (2021).

- Discharges of dredged material consisting entirely of incidental fallback.<sup>253</sup>
- “Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill).”<sup>254</sup>
- “Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.”<sup>255</sup>
- “Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States.”<sup>256</sup>
- Incidental movement of dredged material occurring during normal dredging operations authorized under the RHA.<sup>257</sup>
- Discharges of trash or garbage.<sup>258</sup>

Finally, holistic regulations could also emphasize the number of nationwide and regional general permits available for smaller discharges of dredged or fill material,<sup>259</sup> which save property owners considerable time and expense.

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253. 33 C.F.R. § 323.2(d)(1), (d)(2)(iii) (2021) (including runoff in the definition of “discharge of dredged material” but excluding “[i]ncidental fallback”); 40 C.F.R. § 232.2 (2021) (including “redeposit other than incidental fallback . . . of dredged material” in the definition of “discharge of dredged material” but excluding “[i]ncidental fallback”).

254. 33 C.F.R. § 323.2(d)(2)(i) (2021); 40 C.F.R. § 232.2 (2021).

255. 33 C.F.R. § 323.2(d)(2)(ii) (2021); 40 C.F.R. § 232.2 (2021).

256. 33 C.F.R. § 323.2(d)(3)(i) (2021); 40 C.F.R. § 232.2 (2021).

257. 33 C.F.R. § 323.2(d)(3)(ii) (2021) (citing to authorization under 33 C.F.R. § 322 (2021), which was promulgated under the authority of 33 U.S.C. § 403, popularly known as the “Rivers and Harbors Appropriation Act of 1899”); 40 C.F.R. § 232.2 (2021).

258. 33 C.F.R. §§ 323.1, 323.2(e)(3) (2021); 40 C.F.R. §§ 232.1, 232.2 (2021) (excluding trash and garbage from the definition of “fill material”).

259. *E.g.*, U.S. ARMY CORPS OF ENG’RS, 2021 NATIONWIDE PERMITS 1, 6–8, 12–13 (2021) <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/20099> [<https://perma.cc/MH7L-CFUB>]; *Regional General Permits*, U.S. ARMY CORPS OF ENG’RS, L.A. DIST., <https://www.spl.usace.army.mil/Missions/Regulatory/Regional-General-Permits/> [<https://perma.cc/53RH-D7NF>] (last visited Dec. 29, 2022); *San Francisco District Regional General Permits*, U.S. ARMY CORPS OF ENG’RS, S.F. DIST., <https://www.spn.usace.army.mil/Missions/Regulatory/Permitting/Regional/> [<https://perma.cc/G7FU-JF3R>] (last visited Dec. 29, 2022).

## 2. Holistic Regulations Can Be Simpler

Regardless of whether the *Sackett II* Court decides that Justice Scalia's test or Justice Kennedy's test from *Rapanos* controls, both tests require the EPA, the Army Corps, and implementing states to look at the effect of a particular addition of pollutants on a larger—perhaps distantly located—waterbody. Under the *Rapanos* plurality's approach, jurisdictional waters must be relatively large and permanent.<sup>260</sup> Similarly, Justice Kennedy's "significant nexus" test requires that smaller waters be able to influence the more traditionally navigable waters.<sup>261</sup> Read in the context of *County of Maui*, these *Rapanos* requirements that discharges reach, or at least influence, larger waters make an extensive regulatory definition of "waters of the United States" unnecessary. Instead, holistically, *Clean Water Act jurisdiction exists when a point source discharges a pollutant that reaches the territorial sea, a traditionally navigable water, an interstate water, or any other relatively permanent waterway either directly or through the functional equivalent of a direct discharge.*

For section 402, this approach would likely usually function much the same way as the "significant nexus" test, but with the expansion that the initial "something" to which a point source adds the pollutant need not be a surface water, or even an extant waterway, at all. *County of Maui* thus potentially eliminates the angst regarding ditches, dry arroyos, and intermittent waterways, which no longer need to be "waters of the United States"; instead, they can simply be part of the conveyance "from a point source."<sup>262</sup>

Indeed, lower courts appear to be applying *County of Maui* in exactly this way. For example, in January 2022, the U.S. District Court for the Northern District of Alabama granted summary judgment to a Clean Water Act, citizen-suit plaintiff, concluding that, on the basis of *County of Maui*, acid mine drainage that flowed from a waste pile at an abandoned underground mine across land and through groundwater into a tributary of the Locust Fork of the Black Warrior River and Locust Fork itself required an NPDES permit.<sup>263</sup> The defendant did not contest that the Locust Fork was a water of the United States,<sup>264</sup> the

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260. *Rapanos v. United States*, 547 U.S. 715, 732–34 (2006).

261. *Id.* at 779–80 (Kennedy, J., concurring)("[W]etlands possess the requisite nexus . . . [if they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'").

262. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476–77 (2020).

263. *Black Warrior River-Keeper, Inc. v. Drummond Co.*, 579 F. Supp. 3d 1310, 1311–12, 1323–24 (N.D. Ala. 2022) (citing to Clean Water Act of 1977, § 505 (codified at 33 U.S.C. § 1365(a)), which authorizes citizen suits).

264. *Id.* at 1315.

distance involved was approximately ten feet,<sup>265</sup> and the contaminated groundwater reached the Locust Fork in 4.4 to 14.6 days.<sup>266</sup> The fact that the contaminated water initially flowed over land as surface runoff before entering groundwater did not eliminate functional equivalence.

*County of Maui* is, admittedly, less helpful in the section 404 context, because section 404 cases since *Rapanos* generally do not focus on whether the dredged or fill material discharged into a wetland or other smaller water *reaches* the navigable water with which the wetland has a significant nexus. Instead, as in *Sackett II*, and following Justice Kennedy's lead from *Rapanos*, the focus is on whether the dredging, filling, or destruction of a smaller waterbody—especially wetlands, which provide many water quality-related ecosystem services, can *affect* the navigable waterbody's water quality. This is a subtle but potentially important difference. *County of Maui's* functional equivalence analysis requires the pollutant to actually reach the larger waterbody because the discharge must be the functional equivalent of a discharge directly into that larger waterbody.<sup>267</sup> The significant nexus test does not; instead, it requires only that the discharge into the smaller waterbody “significantly affect the chemical, physical, and biological integrity of other waters covered by the CWA more readily understood as ‘navigable.’”<sup>268</sup> In *Sackett II* itself, remember, the Ninth Circuit held that the required nexus existed because the wetlands sequestered sediment and nutrient pollution, regulated water levels, and supported biodiversity—not because the fill material actually reached Priest Lake.

Applying *County of Maui* thus illuminates an implementation distinction that has developed between the section 402 and section 404 permit programs pursuant to the significant nexus test: section 402 discharges actually pollute larger waterbodies, whereas section 404 dredging and filling often interferes with their ecological functions instead. Perversely, the use of the significant nexus test has brought into existence the distinction that Justice Scalia perceived between the two permit programs in *Rapanos*. As a result, the future scope of the section 404 program far more intimately depends on what the *Sackett II* Court does with *Rapanos* and wetlands than the future scope of section 402 does.

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265. *Id.* at 1316 (acknowledging that the distance may range from “10 to 30 feet” and involve bed seepage of “30 to 100 feet”).

266. *Id.*

267. *County of Maui*, 140 S. Ct. at 1476–77.

268. *Rapanos v. United States*, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring).

## CONCLUSION

For better or for worse, the U.S. Supreme Court, by focusing on the jurisdictional term “waters of the United States,” has used its concerns about the scope of the section 404 program to reduce the reach of *both* Clean Water Act permit programs. As the *SWANCC* majority and the *Rapanos* plurality made clear, Justices perceive section 404 to threaten both the jurisdictional prerogatives of states and private property rights. Moreover, *Sackett I* and *Hawkes* give every evidence that several Justices still harbor considerable skepticism about—if not outright animosity towards—the Army Corps’ and EPA’s assertions of broad jurisdiction over discharges of dredged and fill material.

Of course, the makeup of the U.S. Supreme Court has changed dramatically since even the *Hawkes* decision. Justices Gorsuch, Kavanaugh, and Barrett have replaced Justices Scalia, Kennedy, and Ginsburg, and new Justice Ketanji Brown Jackson was on the bench instead of Justice Breyer for the oral argument and will participate in deciding *Sackett II*.

Nevertheless, the replacement of five Justices does not create grounds for optimism regarding the outcome of *Sackett II*. Justice Gorsuch joined Justice Thomas in dissenting from *County of Maui* (Justice Alito wrote a separate dissent), concluding that the Clean Water Act’s text “excludes anything other than a direct discharge,”<sup>269</sup> which does not augur well for his vote in *Sackett II*. Justice Kavanaugh concurred in *County of Maui* to emphasize that he believed that the Court’s “functional equivalence” test is consistent with Justice Scalia’s *Rapanos* plurality opinion, which recognized additions of pollutants through “indirect route[s]” in the section 402 context.<sup>270</sup> As such, Justice Kavanaugh is likely to adhere to the *Rapanos* plurality’s view of “waters of the United States” in *Sackett II*. Justice Barrett remains a bit of a cipher with regard to environmental cases but is likely to vote in favor of private property rights. Chief Justice Roberts and Justices Thomas and Alito were all members of the *Rapanos* plurality. Thus, in *Sackett II*, the Court likely will once again narrow the categories of waters that can qualify as “waters of the United States.”

This time, however, the Court has also gifted the EPA and states with *County of Maui*. *County of Maui*’s “functional equivalence” test offers a more holistic view of Clean Water Act jurisdiction that can circumvent not only the Court’s narrowing of what falls under “waters of the United States,” but also the politics surrounding the definition—but only if the EPA and Army Corps are willing to accept that the two permit programs can have different jurisdictional scopes.

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269. *County of Maui*, 140 S. Ct. at 1479 (Thomas, J., dissenting); *see also id.* at 1482–92 (Alito, J., dissenting).

270. *Id.* at 1478 (Kavanaugh, J., concurring).

As such, if the Court again limits the scope of “waters of the United States” in *Sackett II*, the agencies’ regulatory reaction will be critical. Specifically, the EPA and Army Corps should not make a bad *Sackett II* outcome worse by reducing section 402 to the limits of section 404 through definitions of “waters of the United States” that apply to both permit programs, as their December 2021 proposed regulation would do. Instead, the agencies should limit that bad litigation outcome as much as possible by making full use of *County of Maui* to keep section 402 jurisdiction, at least, as broad as possible.

APPENDIX

**Table 1: The Forty U.S. Supreme Court Decisions  
About the Clean Water Act**

NPDES Decisions	Section 404 Decisions	Decisions Involving Both Permit Programs	Decisions Not Involving Permit Programs
1972–1976			
<p><b>2:</b></p> <p><i>Train v. Colorado Public Interest Research Group</i>, 426 U.S. 1 (1976): The EPA cannot regulate source, byproduct, and special nuclear materials covered by the Atomic Energy Act under the FWPCA.</p> <p><i>EPA v. California ex rel. State Water Resources Control</i>, 426 U.S. 200 (1976): Federal facilities do <i>not</i> have to get state-issued NPDES permits in delegated states.</p>	NONE	NONE	<p><b>4:</b></p> <p><i>Illinois v. City of Milwaukee</i>, 406 U.S. 91 (1972): A lawsuit asserting federal interstate nuisance is not inconsistent with the FWPCA; later abrogated.</p> <p><i>Lake Carriers' Ass'n v. MacMullan</i>, 406 U.S. 498 (1972): The FWPCA will preempt state requirements for the discharge of sewage.</p> <p><i>Train v. Campaign Clean Water, Inc.</i>, 420 U.S. 136 (1975): The EPA does not have the discretion to allot states less money from the FWPCA's funds than Congress specifies.</p>

			<i>Train v. City of New York</i> , 420 U.S. 35 (1975): The EPA does not have authority to allot to the states less than the full appropriation for sewage treatment grants.
1977–1981			
<p><b>4:</b></p> <p><i>E.I. du Pont de Nemours &amp; Co. v. Train</i>, 430 U.S. 112 (1977): The EPA should set effluent limitations by regulation, not in individual permits.</p> <p><i>Crown Simpson Pulp Co. v. Costle</i>, 445 U.S. 193 (1980): Courts of appeals have jurisdiction to review challenges to EPA variance decisions for permit effluent limitations.</p> <p><i>Costle v. Pacific Legal Foundation</i>, 445 U.S. 198 (1980): The EPA does not have to hold a public hearing every time it</p>	NONE	NONE	<p><b>3:</b></p> <p><i>United States v. Ward</i>, 448 U.S. 242 (1980): Civil penalties imposed under the FWPCA's oil spill provisions are civil and therefore do not trigger the Constitution's protections for criminal defendants.</p> <p><i>City of Milwaukee v. Illinois</i>, 451 U.S. 304 (1981): The FWPCA displaced the federal common law of nuisance.</p> <p><i>Middlesex County Sewerage Authority v. National Sea Clammers Ass'n</i>, 453 U.S. 1 (1981): The FWPCA does</p>



<p>extends an NPDES permit's expiration date.</p> <p><i>EPA v. National Crushed Stone Ass'n</i>, 449 U.S. 64 (1980): The EPA was not required to include economic ability as a factor for granting variances from the 1977 BPT effluent limitations.</p>			<p>not create an implied right of action but does displace the federal common law of nuisance.</p>
<b>1982–1986</b>			
<p><b>2:</b></p> <p><i>Weinberger v. Romero-Barcelo</i>, 456 U.S. 305 (1982): The FWPCA did not require the courts to issue an injunction when the U.S. Navy was discharging pollutants without a permit.</p> <p><i>Chemical Manufacturers Ass'n v. Natural Resources Defense Council</i>, 470 U.S. 116 (1985): The EPA could issue variances from the toxic effluent limitations based on fundamentally different factors.</p>	<p><b>1:</b></p> <p><i>United States v. Riverside Bayview Homes</i>, 474 U.S. 121 (1985): The Army Corps' jurisdiction could reasonably extend to wetlands adjacent to traditionally navigable waters.</p>	NONE	NONE

1987–1991			
1:  <i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.</i> , 484 U.S. 49 (1987): Citizens cannot sue dischargers over wholly past violations of an NPDES permit but can sue on good faith allegations of continuous or intermittent violations.	NONE	NONE	2:  <i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987): The FWPCA preempted the nuisance law of the receiving state but not of the source state.  <i>Tull v. United States</i> , 481 U.S. 412 (1987): The Seventh Amendment guarantees the right to a jury trial for issues of FWPCA liability, but not regarding the amount of the civil penalty.
1992–1996			
1:  <i>Arkansas v. Oklahoma</i> , 503 U.S. 91 (1992): The EPA could issue an NPDES permit to an Arkansas facility based on its interpretation of Oklahoma water quality standards.	NONE	NONE	3:  <i>U.S. Department of Energy v. Ohio</i> , 503 U.S. 607 (1992): Congress had not waived federal facilities' sovereign immunity from civil penalties in the FWPCA.

			<p><i>City of Burlington v. Dague</i>, 505 U.S. 557 (1992): The FWPCA does not allow enhancement of the prevailing party's attorney fees award on the basis of a contingent fee.</p> <p><i>PUD No. 1 of Jefferson County v. Washington Department of Ecology</i>, 511 U.S. 700 (1994): States can condition their section 401 certifications on compliance with state water quality standards and minimum flow requirements.</p>
<b>1997–2001</b>			
<p><b>1:</b></p> <p><i>Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.</i>, 528 U.S. 167 (2000): Group had standing to bring its citizen suit against a discharger who was violating its NPDES permit</p>	<p><b>1:</b></p> <p><i>Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers</i>, 531 U.S. 159 (2001): The Army Corps could not exercise jurisdiction over an abandoned sand and gravel pit that occasionally</p>	NONE	NONE

absent a showing that violations could not be reasonably expected to reoccur.	filled with water under section 404 on the basis that migratory birds used the waters.		
<b>2002–2006</b>			
<b>1:</b>  <i>South Florida Water Management District v. Miccosukee Tribe of Indians</i> , 541 U.S. 95 (2004): An NPDES permit could be required for a point source that did not itself generate pollutants, and be remanded on whether the waters involved were meaningfully distinct.	<b>2:</b>  <i>Borden Ranch Partnership v. U.S. Army Corps of Engineers</i> , 537 U.S. 99 (2002): An equally divided Court affirmed with no opinion the U.S. Court of Appeals for the Ninth Circuit’s conclusion that section 404 applies to “deep ripping” of wetlands.  <i>Rapanos v. United States</i> , 547 U.S. 715 (2006): 4-1-4 split decision on the proper test for assessing “waters of the United States” under section 404.	NONE	<b>1:</b>  <i>S.D. Warren Co. v. Maine Board of Environmental Protection</i> , 547 U.S. 370 (2006): Section 401 certification requirement applies broadly to discharges from dams.
<b>2007–2011</b>			
<b>2:</b>  <i>National Ass’n of Home Builders v. Defenders of Wildlife</i> , 551 U.S.	<b>1:</b>  <i>Coeur Alaska, Inc. v. Southeast Alaska Conservation</i>	NONE	<b>1:</b>  <i>Exxon Shipping Co. v. Baker</i> , 554 U.S. 471 (2008): The FWPCA’s

644 (2007): Delegation of NPDES permitting authority to a state that meets the statutory criteria is a nondiscretionary decision that does not trigger Endangered Species Act consultation.  <i>Entergy Corp. v. Riverkeeper, Inc.</i> , 556 U.S. 208 (2009): The EPA permissibly relied on a cost- benefit analysis when regulating cooling water intake at power plants.	<i>Council</i> , 557 U.S. 261 (2009): The section 404 permit program properly applied to a discharge of mining waste that would fill Lower Slate Lake.		penalties for water pollution did not preempt maritime common law on punitive damages.
<b>2012–2016</b>			
<b>2:</b>  <i>Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.</i> , 568 U.S. 78 (2013): The flow of water out of a concrete channel within a river was not a “discharge of a pollutant” subject to the NPDES permit requirement.	<b>2:</b>  <i>Sackett v. EPA (Sackett I)</i> , 566 U.S. 120 (2012): Landowners could immediately challenge an EPA compliance order charging that they had illegally filled wetlands without a section 404 permit.	<b>NONE</b>	<b>NONE</b>

<i>Decker v. Northwest Environmental Defense Center</i> , 568 U.S. 597 (2013): The FWPCA does not require NPDES permits before channeled stormwater runoff from logging roads can be discharged into the waters of the United States.	<i>U.S. Army Corps of Engineers v. Hawkes Co.</i> , 578 U.S. 590 (2016): A landowner can immediately challenge the U.S. Army Corps of Engineers' determination that a project will affect jurisdictional wetlands subject to section 404.		
<b>2017–2022</b>			
<b>1:</b>  <i>County of Maui v. Hawaii Wildlife Fund</i> , 140 S. Ct. 1462 (2020): Discharges of treated sewage reaching the ocean through groundwater can be the functional equivalent of a direct discharge, requiring an NPDES permit.	<b>1:</b>  <i>Sackett v. EPA</i> ( <i>Sackett II</i> ), 142 S. Ct. 896 (argued Oct. 3, 2022): Deciding the issue of “[w]hether the Ninth Circuit set forth the proper test for determining whether wetlands is [sic] ‘waters of the United States’ under the Clean Water Act, 33 U.S.C. § 1362(7).”	<b>1:</b>  <i>National Ass’n of Manufacturers v. Department of Defense</i> , 138 S. Ct. 617 (2018): Challenges to the EPA’s and Army Corps’ regulations defining “waters of the United States” must be brought in the federal district courts.	<b>NONE</b>
<b>TOTALS</b>			
<b>17</b>	<b>8</b>	<b>1</b>	<b>14</b>