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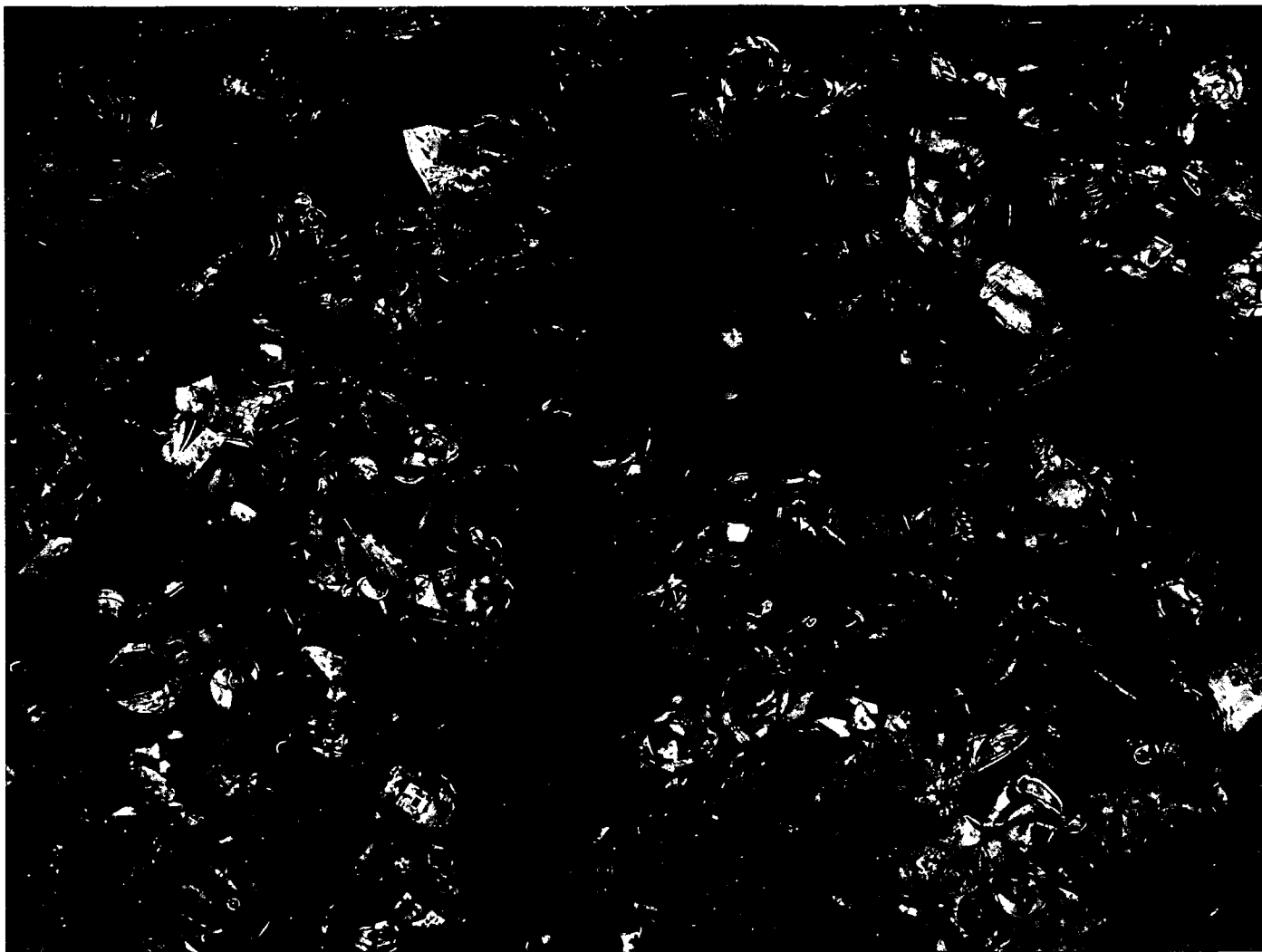


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The Judicial Assault on the Clean Water Act

By Mark Squillace

From at least the time of the U.S. Supreme Court's decision in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*,¹ the federal courts have led an assault on the Clean Water Act (CWA). The primary target of their attack has been on the scope of "waters" encompassed by the law. But recent decisions by the Supreme Court and the U.S. District Court for the District of Columbia suggest that the courts may be prepared to move beyond this jurisdictional question. These judicial efforts to scale back regulations pertaining to water pollution are utterly at odds with Congress' plain intent when it adopted the basic scheme of the CWA in 1972.² Moreover, the courts' decisions undercut the federal government's ability to manage one of our most precious natural resources effectively and efficiently.

This article seeks to identify how and why the courts fell off the rails and offers a prescription for getting the CWA and the courts back on track. The discussion begins with an examination of the key statutory language and congressional purposes in adopting the law and is followed by a brief review of the hydrologic cycle and its relevance to the scope of the law. The article then shifts to a discussion of some major CWA decisions with a particular focus on recent cases. The article is not intended as a comprehensive review of either the CWA or litigation under that law. Rather, it chronicles a pattern of treatment by the courts that has seriously undermined the clear intent of Congress in adopting the law. The article concludes with suggestions for restoring the Clean Water Act to its original purposes.

Background and History of the Clean Water Act

To understand the courts' current treatment of the CWA, it is necessary to review the background and history behind the act. The initial federal foray into the regulation of water pollution came from the 1899 Rivers and Harbors Appropriation Act. Section 13 of this act prohibited, among other things, the discharge of refuse into navigable waters *or their tributaries* without first obtaining a permit from the U.S. Army Corps of Engineers.³ This act was followed in 1948 by the Federal Water Pollution Control Act, which authorized the surgeon general of the Public Health Service to work with state, federal, and local agencies to reduce or eliminate pollution from "interstate waters and their tributaries."⁴

The 1972 amendments to the Federal Water Pollution Control Act form the core of what is now called the Clean Water Act. The very first sentence of this legislation describes the essential purpose of the act as follows: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵ Even though the statute does not define the phrase "the Nation's waters," there seems little doubt that Congress hoped to protect *all* of the nation's waters without regard to questions about federal jurisdiction. The key permitting sections of the CWA, however, specifically regulate discharges into "navigable waters,"⁶ a phrase that Congress unhelpfully defined as "waters of the United States."⁷ Despite Congress' failure to articulate its intentions more clearly in the statute itself, the legislative history leaves little doubt that Congress intended that this language be construed broadly. The conference report on the bill that became the law expresses the conferees' intention "that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."⁸ Rep. John Dingell (D-Mich.) explained the conferees' intent as follows:

The conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographic sense. It does not mean "navigable waters" in the technical sense as we sometimes see in some laws ... [T]his new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.⁹

Plainly, Congress did not intend that the phrase "navigable waters" be given its traditional meaning as articulated by the U.S. Supreme Court in its 1870 decision in *The Daniel Ball*,¹⁰ but rather that the phrase should be read expansively.

This broad construction of the Clean Water Act is also consistent with common sense and basic scientific principles relating to the country's water resources. We all know that water exists in a hydrologic cycle.¹¹ As such, all of our water resources are, at some level, interrelated. Mismanaging some of our water has an impact on the availability

and use of other water. Mismanagement can, for example, increase the scarcity of potable water supplies, thus driving up the cost and availability of water, and can cause environmental problems, killing fish and other biotic resources. Given the instrumental role the nation's water resources play in the public's health and welfare and in the economic well-being of our society, the U.S. Supreme Court's 1982 decision in *Sporbass v. Nebraska*,¹² declaring water an article of commerce, seems unsurprising. But that decision does reinforce the interrelated nature of our water resources and the importance of a national and holistic management program.

The Key Regulatory Requirements of Sections 402 and 404

Two key provisions of the CWA—§ 402 and § 404—are critical to achieving Congress' goal of restoring and maintaining the integrity of our nation's waters.¹³ The U.S. Environmental Protection Agency (EPA) administers this program, although the EPA may approve programs that allow states to issue § 402 permits;¹⁴ indeed, most states have received approval to operate their own programs under § 402.¹⁵ Section 404 of the CWA authorizes permits for "the discharge of dredged or fill materials into the navigable waters at specified disposal sites" and is administered by the U.S. Army Corps of Engineers.¹⁶ Like the § 402 program, states may seek the authority to administer the § 404 program in their states,¹⁷ but unlike the case with the § 402 program, only two states—Michigan and New Jersey—currently have such authority.¹⁸

Shortly after the amendments to the Federal Water Pollution Control Act were enacted in 1972, the Army Corps of Engineers promulgated rules defining the phrase "navigable waters of the United States" as "those waters which are presently or have been in the past, or may be in the future susceptible for us for purposes of interstate or foreign commerce."¹⁹ Two years later, when the Corps adopted rules to address the § 404 permitting program, the Corps described its jurisdiction over "waters of the United States" as encompassing the full scope of traditional navigable waters.²⁰ In *Natural Resources Defense Council v. Callaway*,²¹ the U.S. District Court for the District of Columbia rejected the Corps' definition, holding that Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."²² More specifically, the court found that the term "navigable waters" as used in the CWA "is not limited to the traditional test of navigability."²³

In response to the court's decision, in 1975, the Corps promulgated interim final rules that largely tracked final rules that were eventually promulgated in 1977. These rules made clear that "waters of the United States" included "isolated wetlands and lakes, intermittent stream, prairie pot-holes, and other waters that are not part of tributary system to interstates waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."²⁴ These rules were further "clarified" in 1986 to explain that the phrase "waters of the United States" includes intrastate waters that are (1) used by migratory birds that cross state lines or are protected by migratory

bird treaties, (2) used as habitat for endangered species, or (3) used by crops sold in interstate commerce.²⁵ This clarification of the rules followed, in part, from the Supreme Court's full-throated support of the Corps' broad interpretation of jurisdiction under the CWA in the 1985 decision, *United States v. Riverside Bayview Homes Inc.*²⁶

Riverside involved a proposal to build a housing project in southeastern Michigan, about one mile from Lake St. Clair. The development would have required the filling of wetlands adjacent to a navigable stream that emptied into Lake St. Clair. Accordingly, the Army Corps of Engineers insisted that Riverside first obtain a § 404 permit. Although *Riverside* was arguably an easy case, the Court spoke in broad language, using the test used in deciding *Chevron U.S.A. Inc. v. Natural Resources Defense Council*²⁷ to uphold the Corps' conclusion that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."²⁸ Pointing to the expertise of the EPA and the Corps, a unanimous Supreme Court held the following: "In view of the breadth of the federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."²⁹

At this point, judicial attitudes toward the CWA seemed to have evolved largely as Congress intended, with the courts recognizing broad federal authority over water pollution. Judicial opinions on the CWA track closely with Congress' stated intentions, and the courts' rulings fit well within our basic scientific understanding of water resource management. In 1998, however, a federal circuit court signaled an abrupt turn in the judiciary's treatment of the CWA. Three years later, the Supreme Court dealt its own devastating blow, and the Clean Water Act has yet to recover.

The Undoing of the Clean Water Act in the Courts

A good starting point for understanding the role of the courts in undermining the CWA is the decision of the Court of Appeals for the District of Columbia Circuit in *National Mining Association v. U.S. Army Corps of Engineers*.³⁰ That case involved a challenge to regulations promulgated jointly by the EPA and the Army Corps of Engineers in response to an earlier lawsuit filed by the National Wildlife Federation, which charged the Corps with failing to regulate the draining and clearing of about 700 acres of wetlands in North Carolina.³¹ The case was settled when the EPA and the Corps agreed to propose new rules to address permitting requirements for land clearing and excavation activities. The key issue in *National Mining Association* involved an interpretation of the term "discharge" as used in § 404 of the CWA, which is defined as "an addition of any pollutant to any navigable waters from any point source."³² The new rules defined the "discharge of dredged or fill material" to include "any redeposit of dredged material."³³

From an environmental perspective, the definition made

perfect sense. Dredging activities done for the purpose of draining and channeling water into ditches and canals have wreaked havoc on our nation's waters throughout its history. (For a further description of these adverse impacts see Mark Squillace, From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation, 40 Mich. J.L. Reform 799, 809-810 (2007).) But the National Mining Association claimed that any "incidental fallback" that might result from dredging activities did not amount to the "addition of a pollutant," and therefore could not be regulated under § 404. Although the agencies were careful to limit the rule to redeposits that destroy or degrade the waters of the United States,³⁴ the court ruled that "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters ... and a small portion of it happens to fall back."³⁵ A fair response is: Why not?—especially when an agency rule construing ambiguous language is entitled to considerable deference?³⁶ Indeed, when Congress adopted the Clean Water Act in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," it surely did not intend that integrity to be destroyed by unregulated dredging activities just because the addition involved redepositing materials that had been dredged. Even the court seemed to acknowledge the extreme nature of its holding by conceding that "we do not hold that the Corps may not legally regulate some forms of redeposit under ... § 404" ³⁷ But if an "addition" cannot include incidental fallback, then it is unclear how the Corps can ever regulate a redeposit. Most incredibly, the court suggested that, if the agencies made a "reasonable attempt" to draw a line between activities that could and could not be regulated, "such a line would merit considerable deference."³⁸ But the agencies had done that very thing in their rule and were accorded no deference whatsoever. Despite repeated efforts, the agencies have had little success fixing the problems created by the decision in *National Mining Association v. U.S. Army Corps of Engineers*.³⁹

Even more fundamental to the government's CWA authority is the scope of the phrase "waters of the United States." As previously noted, the Court appeared to accept a broad construction for that phrase in its decision in *United States v. Riverside Bayview Homes Inc.* But in 2001, in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*, the Supreme Court signaled a sharp retreat from its holding in *Riverside*.⁴⁰ The case of *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* involved the county's proposal to construct a landfill that would have resulted in filling some isolated ponds, which were being used by migratory birds and even supported the second largest breeding colony of great blue herons in northeastern Illinois.⁴¹ In a 5-4 decision, however, the Court rejected the Corps' assertion of jurisdiction over these ponds. According to Chief Justice William Rehnquist, the author of the majority opinion, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside*."

But this was not the basis for the Court's holding in *Riverside*. On the contrary, the *Riverside* Court focused on the

“breadth of the federal regulatory authority contemplated by the Act, ... the inherent difficulties of defining precise bounds to regulable waters,” and the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands.”⁴² Indeed, the Court went so far in *Riverside* as to suggest that it was perfectly appropriate for the agencies to decide that the law should encompass “some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways.”⁴³ Nonetheless, despite acknowledging that the legislative history of the statute supported the “broadest possible constitutional interpretation,”⁴⁴ in its ruling in *Solid Waste Authority*, the Court suggested that Congress did not intend to exert anything more than “its traditional jurisdiction over waters that were or had been navigable ... or could be reasonably made so.”⁴⁵

Perhaps the most devastating part of the Court’s opinion was its conclusion that the Clean Water Act should be construed narrowly in order to avoid raising a possible constitutional issue.⁴⁶ But a broad interpretation of the phrase “waters of the United States” does not implicate constitutional concerns. The fact that water resources support any number of commercial activities—from hunting to bird watching to farming—does not seem in doubt, and the regulation of these activities is well within Congress’ commerce authority as construed by the Supreme Court.⁴⁷ If there was any doubt about the constitutional power to regulate water resources under the commerce clause, the government’s authority to manage waters used by migratory birds and endangered species falls well within the government’s power under the treaty.⁴⁸ By erroneously suggesting that a narrow reading of the law was compelled by the Constitution, the Court effectively reinterpreted the law in a way that Congress never intended. The Court’s ruling also set the stage for a series of other decisions that have built on this unfortunate trend.

Another distressing thing about the decision in *Solid Waste Authority* was its application of the *Chevron* doctrine in construing the definition of “navigable waters.” As a result of the *Chevron* decision courts are required to ask first whether the statute is clear. If so, the courts must faithfully apply the statute. But if the law is ambiguous, then the court must ask whether the agency’s interpretation of the statute was reasonable. Incredibly, the Court found that the definition of “navigable waters” as “waters of the United States” was clear. Hedging its bets, however, the Court held that *Chevron* did not apply anyway, because the statute sought to invoke the “outer limits of Congress’ power.” As already noted, the regulation of water resources does not come even close to the limits of congressional power. Thus, *Chevron* most certainly should have applied to the *Solid Waste Authority* case, as the dissent eloquently argued.⁴⁹

Solid Waste Authority set the stage for the Court’s subsequent decisions in *Rapanos v. United States*⁵⁰ and a companion case, *Carabell v. United States*.⁵¹ Both cases involved wetlands adjacent to water bodies that the government claimed required a permit under § 404 of the Clean Water Act. An interesting aspect of the *Rapanos* and *Carabell* cases is that they both involved lands in Michigan, one of two states with § 404 permitting authority. *Rapanos* involved three sites that contained wetlands that were adjacent to

non-navigable tributaries of navigable streams. The facts in *Carabell* were interesting, because the site at issue was within a few miles of the site involved in *Riverside* and, like that site only, were about a mile from Lake St. Clair. *Carabell* involved a 20-acre site—16 acres of which were wetlands—that was adjacent to a man-made ditch that flowed into Lake St. Clair.

Freed from having to consider the limits of constitutional power by the decision in *Solid Waste Authority*, the Court relied on the faulty interpretation of the CWA that it had adopted in that earlier decision. But a plurality of the Court, led by Justice Scalia, went even further, announcing that the word “waters” in the phrase “waters of the United States” should be given its common dictionary meaning, which he claimed was “relatively permanent, standing, continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams ... oceans, rivers [and] lakes.”⁵² Note how far the Court has strayed from its holding in *Riverside* and the intent of Congress.

Not only are the *Solid Waste Authority* and *Rapanos* decisions unconvincing as a matter of law, they have foisted upon the government an expensive and entirely unnecessary obligation to determine the government’s jurisdiction whenever it attempts to apply the provisions of the Clean Water Act. In particular, since at least the time of the decision in *Solid Waste Authority*, the Army Corps of Engineers has expended considerable resources employing a formal “jurisdictional determination” to decide whether the significant nexus required by the Supreme Court exists in a particular case.⁵³ If the Court had accepted the simple argument that Congress had intended to regulate discharges into all of our nation’s waters, this considerable expenditure of time and money would become pointless.⁵⁴

What makes this claim all the more compelling is the apparent fact that the federal government enjoys overwhelming support for its position that the CWA should be read broadly. In *Rapanos*, 33 states and the District of Columbia joined an amicus brief supporting the broad construction of the CWA claimed by the United States.⁵⁵ On its face, such broad state support for comprehensive federal control seems somewhat startling. The visceral position of states is to scrupulously guard their regulatory prerogatives. In this case, however, the states understood the need to regulate discharges into all the nation’s waters as well as the impracticality of requiring states to develop separate state programs to manage those waters that might not be encompassed by a narrow reading of the law.⁵⁶

The reaction of the lower courts to *Rapanos* has not been terribly surprising even if it has been more troubling. *United States v. Chevron Pipe Line Co.*⁵⁷ involved a spill of 3,000 barrels of oil from a leaky pipeline into an unnamed ephemeral creek that discharged into Ennis Creek, which flowed into Rough Creek, before discharging into the Double Mountain Fork of the Brazos River. Only Double Mountain Fork flowed continuously. The federal government brought an action against Chevron under the Oil Pollution Act, which defines “navigable waters” as “waters of the United States” just like the CWA does. The evidence suggested that there was no water flowing in the creek when the spill occurred

in August 2000 until October 12, 2000, when a rainfall event occurred. The government produced evidence of extensive contamination of the soils in the creek after Oct. 12, 2000, suggesting that some of these contaminated soils would be washed downstream to navigable waters. Nonetheless, the federal district court granted Chevron's motion for summary judgment on the grounds that the evidence that the oil would reach jurisdictional waters was speculative.⁵⁸

Even assuming that Justice Scalia's opinion in *Rapanos* reflects current law, the district court probably got it wrong in *United States v. Chevron Pipe Line Co.* In his plurality opinion in *Rapanos*, Scalia noted that, "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the CWA] ..." ⁵⁹ as long as the pollutant ultimately flows into jurisdictional waters. But skepticism about the scope of the CWA as set forth in *Solid Waste Authority* and *Rapanos* surely provided cover for the court; and indeed, the government chose not to appeal the district court's decision.

Even more egregious than *Chevron Pipe Line* is the decision handed down by the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Robison*.⁶⁰ This case involved a pipe manufacturer named McWane that had discharged pollutants into Avondale Creek, which flows into Village Creek, then Locust Fork, then Bayview Lake, and finally into the Black Warrior River, which is indisputably a navigable river in Alabama. McWane held a National Pollutant Discharge Elimination System (NPDES) for this discharge for many years, suggesting that McWane believed it was required to have a permit for its discharges. The government presented uncontested evidence that McWane had ordered its employees to discharge pollutants in violation of the permit, and the resulting violations were repeated and intentional. The government filed criminal charges against several parties, and a jury convicted three employees on 22 of 25 counts for knowingly violating the Clean Water Act.

All the alleged violations occurred before either the *Solid Waste Authority* case or the *Rapanos* case was decided, and the indictment and convictions were handed down well before the *Rapanos* decision.⁶¹ Nonetheless, on appeal, the defendants argued that *Rapanos* precluded application of the CWA to Avondale Creek, and—to the surprise of many—the court agreed. What makes this decision so unexpected is that the court acknowledged that jurisdiction appeared to have been satisfied under either the Scalia plurality opinion in *Rapanos*, which recognized that pollution discharges that ultimately flow into navigable waters are covered by the law, or by the dissenters, who read the CWA to afford broad jurisdiction. The court nonetheless held that the controlling opinion in the case was that of Justice Kennedy, and that the government had failed to establish a "significant nexus" between Avondale Creek and the Black Warrior River as Justice Kennedy would apparently have required. The court reached this conclusion even in the face of testimony by an EPA expert that there was a continuous uninterrupted flow between Avondale Creek and the Black Warrior River. Because the expert failed to opine on the "significant nexus" between the two bodies of water, the

court found the evidence insufficient to sustain a conviction.⁶² The Supreme Court denied a petition for a writ of certiorari in the case.

Perhaps both *Chevron Pipe Line* and *Robison* were wrongly decided, but the Supreme Court's narrow view of the Clean Water Act clearly invited these results. What is perhaps most distressing is the fact that few people really believe that the federal government lacks the power to regulate the dumping of oil into an ephemeral creek or the discharge of pollutants into flowing waters that ultimately discharge into much larger water bodies. But that now appears to be the world in which we live.

Although different in kind from these decisions, two other decisions—one by the Supreme Court and the other by the U.S. District Court for the District of Columbia—rankle as much as these other decisions. In *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*,⁶³ the Court addressed the interplay between § 402 and § 404 of the Clean Water Act. *Coeur Alaska* involved a mining company that proposed to discharge mine tailings and other waste into the Lower Slate Lake—a 23-acre lake in the Tongass National Forest of Alaska. The discharges would kill all the fish and most of its aquatic life in the lake and would raise the elevation of the lake bed by 50 feet, causing the lake area to expand from 23 acres to 60 acres. The mining company obtained a § 404 permit from the Army Corps of Engineers, but the plaintiff alleged that the company was required to obtain a § 402 permit, because the Clean Water Act classifies the discharged material as a pollutant.⁶⁴

In denying the plaintiff's request for relief, the Court noted that, under § 402, the Environmental Protection Agency may issue permits "[e]xcept as provided in ... [§ 404]." Thus, if the mining company were eligible for a § 404 permit, it could arguably avoid the need for a § 402 permit. According to the Court, the company's eligibility for a permit depended on whether the mine tailings could be classified as "fill materials" within the meaning of § 404. Here the Court relied on the EPA rules that define "fill material" as any "material ... [that] has the effect of ... [c]hanging the bottom elevation of any portion of a water of the United States."⁶⁵ It should be noted that these rules excluded trash or garbage, and one could easily argue that using a natural lake to dispose of mine tailings was essentially using it for garbage. But the more important point, which Justice Ginsburg made so eloquently in her dissent, is that § 306(e) of the Clean Water Act states unequivocally that "it shall be unlawful for any owner or operator of any new source to operate such a source in any standard of performance applicable to such source."⁶⁶ And the EPA had adopted specific new source performance standards for the froth flotation process that was proposed for use by Coeur Alaska in this case.⁶⁷ As the dissent noted, the act could easily be read to support both the § 404 permit and EPA's standards of performance in a manner that would undermine the essence of the CWA. Moreover, the majority effectively exalted the EPA's regulation that defined fill material over the standard of performance requirement contained in the statute.

Any doubt about the proper resolution of the *Coeur*

Alaska case should surely have been resolved in a manner consistent with the basic purposes of the statute. But here the Court adopted a construction that intentionally authorized the biological destruction of a freshwater lake. How this result can possibly be understood as one that would “restore and maintain the chemical, physical, and biological integrity of the waters of the United States” is not clear.

One final case is *Mingo Logan Coal Company Inc. v. U.S. Environmental Protection Agency*,⁶⁸ which involved a § 404 permit that was issued by the Army Corps of Engineers for the Spruce No.1 coal mine in West Virginia but was subsequently “vetoed” by the EPA. The Mingo Logan Coal Company, a subsidiary of Arch Coal Company, challenged the EPA’s authority to overturn the permit. A careful reading of § 404 of the statute is necessary to understand the issue before the court in this case. First, § 404(a) authorizes the secretary of the army to “issue permits ... for the discharge of dredged or fill material into the navigable waters at *specified* disposal sites”; § 404(b) then provides that “*such disposal site shall be specified for each such permit* by the Secretary”; finally, § 404(c) authorizes the administrator of the “to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and ... to deny or restrict the use of any defined area for specification ... whenever he determines ... that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” Thus, the essence of a § 404 permit is the specification of a disposal site, and if the EPA prohibits the specification of a particular disposal site, any permit issued for that disposal site would appear to be invalid. Therefore, even though § 404(c) of the CWA does not actually use the term “veto,” the effect of an EPA decision to prohibit or withdraw a specification of a disposal site is to veto the permit.

The Spruce No. 1 coal mine in West Virginia, which was the subject of the § 404 permit in the *Mingo Logan* case, is one of the largest mountain removal mines ever proposed for Appalachia. The mine is designed in a way that would disturb approximately 3.5 square miles of land and bury approximately 7.48 miles of mountain streams.⁶⁹ The Corps issued a § 404 permit to Mingo Logan in 2007, but when the EPA identified “significant new scientific information confirming and strengthening EPA’s concerns regarding the environmental effects of mountaintop mining operations, and in particular those operations on the scope and scale of the Spruce No. 1 Mine,” the EPA initiated a proceeding to consider withdrawing the specification set out in the permit. The EPA received more than 50,000 comments and made detailed findings about the specific adverse impacts on fish and wildlife resources that would result from the operation of the mine.⁷⁰ Even though the EPA’s conclusion was fully supported by the U.S. Fish and Wildlife Service, in a decision that shocked many familiar with the basic structure and history of the CWA, the court held that the EPA did not have the authority to overturn the decision made by the Army Corps of Engineers.

The decision handed down by Judge Amy Berman Jack-

son, a recent Obama appointee to the district court, found that “whatever section 404(c) means, it only talks about prohibiting, restricting, or withdrawing a specification, and it does not give EPA any role in connection with permits.”⁷¹ It is entirely unclear how the court reached this conclusion. If the EPA prohibits or withdraws the specification of a disposal site, then a permit that specifies that site is rendered meaningless. Thus, it is not surprising that courts and commentators have routinely described § 404(c) as giving the EPA veto power over dredge and fill permits.⁷² Indeed, despite the court’s suggestion that the EPA plays no role in the § 404 permitting process, the court concedes that the EPA can “veto the use of certain disposal sites at the start, thereby blocking the issuance of permits for those sites.”⁷³

What appeared to trouble the court, however, was the fact that the Environmental Protection Agency vetoed the permit nearly two years after it had been approved. As the court recognized, two words in § 404 of the CWA—“withdrawal” and “whenever”—are critical to construing the scope of the EPA’s power under § 404(c). One would have to concede that the use of the parenthetical phrase in the phrase “prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site ...” is awkward at best. But the only logical reading of this phrase is that Congress intended to allow the EPA to withdraw a specification after it was approved by the Corps. But the court somehow concluded that, no matter what authority the EPA may have to withdraw a specification, that does not necessarily mean that the agency had the authority to withdraw the specification “after a permit has already been issued.”⁷⁴ But what else could it mean? There could be no need to withdraw a specification if that specification were not already made in a permit decision. The court found that the question ultimately turned on the meaning of the word “whenever” in the phrase “whenever he determines ... that the discharge of such materials ... will have an unacceptable adverse effect.” Even though the word “whenever” appears to suggest that the EPA can make this finding “at any time,” the court determined that the word merely signaled a predicate to the finding of adverse environmental effects. The court attempted to reinforce this conclusion by pointing to what it described as the “exclusive permitting authority accorded the Corps in section 404(a).”⁷⁵

What is perhaps most troubling about this decision is the dismissive way that the judge treated the Environmental Protection Agency and its role under the Clean Water Act. Although the court suggested that the *Chevron* doctrine applied to the case and that the language of the statute was unclear, there is no deference to the EPA or even respect for its role in the process.⁷⁶

For those who have been dealing with the environmental consequences of mountaintop removal mining, and the long-standing failure of the federal government to enforce the requirements of the CWA in approving permits for mountaintop mines, the EPA’s decision on the Spruce No. 1 coal mine to at long last tackle this problem undoubtedly came as a welcome surprise. The court’s subsequent use of an entirely unconvincing reading of the statute to declare that the EPA lacks the power to protect the ecological integ-

city of the nation's water resources represents yet another example of the recent pattern of judicial hostility toward the Clean Water Act.⁷⁷

Solving the Problem

What is perhaps most troubling about this story is how removed the courts have allowed themselves to become from the overarching purposes of the law. When Congress declared that it was enacting the Clean Water Act in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"⁷⁸ it surely had little expectation that the courts would ignore these purposes and use ambiguous language to indirectly advance activities that have exactly the opposite effect. Something needs to change if we expect to recapture the original mission of the CWA.

The best and most practical solution is through legislation. Until the 2010 election made CWA reform legislation unlikely, Congress had considered various versions of the Clean Water Restoration Act⁷⁹ over several years that would, in essence, redefine "waters of the United States" to mean "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." Few doubt that such legislation would pass constitutional muster, thus giving the lie to the majority's finding in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* that the Clean Water Act had to be read narrowly in order "to avoid the significant constitutional ... questions" raised in that case.⁸⁰ Even accepting the Supreme Court's recent decisions that limit the government's power under the Commerce Clause to activities that have a significant economic impact on the public,⁸¹ the proposed language seems likely to satisfy that test quite easily. Moreover, by not limiting itself to the Commerce Clause, the proposed legislation would allow the government to use its treaty power⁸² and perhaps other authorities delineated in the Constitution.

But a simpler solution could result with a one-vote shift on the Supreme Court. Predicting vacancies, ideological preferences, and voting on the Supreme Court may be a risky business, but it seems fairly safe to assume that replacing one of the conservative judges on the Court with a liberal appointee could very well lead the Court to revive its broad reading of the Clean Water Act, as it did in *Riverside*. This development might require the Court to overturn its decision in *Solid Waste Authority* or *Rapanos*, or both. Given that both these cases were decided on the slimmest of margins, such a change is not inconceivable.

Conclusion

For reasons that are somewhat hard to understand, the federal courts have shown a surprising hostility to the Clean Water Act.⁸³ Beyond simply tying the hands of the federal

government in its effort to implement key aspects of this law, the courts' recent rulings have created an inefficient and far less effective program for protecting and preserving our water resources for present and future generations. This does not seem like an outcome that anyone really wants, but it is an outcome that seems all too inevitable under current law. **TFL**

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Endnotes

¹31 U.S. 159 (2001). SWANCC involved an application by the county for a § 404 permit to allow the county to fill several small ponds in conjunction with the construction of a solid waste disposal site. The U.S. Army Corps of Engineers denied the application, but the Supreme Court held that the wetlands in question were outside the jurisdiction of the Clean Water Act. A 5-4 majority of the Court refused to give deference to the Corps' definition of 'navigable waters' 'to avoid the significant constitutional and federalism questions raised by the [Corps'] interpretation ...'. *Id.* at 174. The Court also specifically rejected the 'Migratory Bird Rule,' which supported a range of commercial and interstate activities, including waters used as habitat by birds protected by Migratory Bird Treaties. *Id.*

²See 33 U.S.C. § 1251(a), §101(a), which sets out the CWA's objective as the following: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

³33 U.S.C. § 407.

⁴Federal Water Pollution Control Act, ch. 758, Pub. L. No. 845, 62 Stat. 1155 (1948).

⁵33 U.S.C. § 1251(a).

⁶*Id.* at §§ 1342, 1344.

⁷*Id.* at § 1362(7).

⁸S. Rep. No. 92-1236, at 144 (1972).

⁹118 CONG. REC. 33,756-33,757 (Oct. 4, 1972)

¹⁰77 U.S. 557, 563 (1870). The oft-cited test from *The Daniel Ball* provides the following: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

¹¹See *Summary of the Water Cycle*, available at www.gsa.water.usgs.gov/edu/watercyclesummary.html, last updated Jan. 2, 2012.

¹²458 U.S. 941 (1982). *Sporbese v. Nebraska* involved a decision by the State of Nebraska to deny a groundwater permit to a Colorado farmer who proposed to take water from a well in Nebraska for use on his Colorado farm. The Supreme Court held that water is an article of commerce, and a Nebraska state law prohibiting the out of state use of Nebraska's water posed an undue burden on interstate commerce and thus violated the commerce clause of the U.S. Constitution.

¹³33 U.S.C. § 1342(a). Section 402 of the Clean Water Act created the National Pollutant Discharge Elimination System (NPDES), which requires that parties who discharge pollutants from point sources into waters of the United States to obtain a permit and comply with certain restrictions on those discharges. See National Pollutant Discharge Elimination System, available at www.fpub.epa.gov/npdes (last updated Mar. 12, 2009).

¹⁴*Id.* at § 1342(b).

¹⁵See *State Program Status, NPDES System*, available at www.cfpub.epa.gov/npdes/statestats.cfm, last updated Apr. 14, 2003.

¹⁶33 U.S.C. § 1344(a).

¹⁷*Id.* at § 1344(g).

¹⁸See *Overview of EPA Authorities for Natural Resource Managers Developing Aquatic Invasive Species Rapid Response and Management Plans: CWA Section 404—Permits to Discharge Dredged or Fill Material*, available at www.water.epa.gov/type/oceb/habitat/cwa404.cfm, last accessed May 22, 2012.

¹⁹33 C.F.R. § 209.260(c)(1973).

²⁰*Permits for Activities in Navigable Waters or Ocean Waters*, 39 FED. REG. 12,115 (April 3, 1974).

²¹392 F. Supp. 685 (D.D.C. 1975).

²²*Id.* at 686.

²³*Id.*

²⁴42 FED. REG. 37,122, 37,144 (July 19, 1977).

²⁵51 FED. REG. 41,206, 41,217 (Nov. 13, 1986). These rules also made clear that certain types of waters were not generally covered, including (1) nontidal drainage and irrigation ditches excavated on dry land; (2) certain artificially irrigated lands and artificial lakes and ponds used for stock-watering or certain other agricultural purposes, or for ornamental or aesthetic purposes; and (3) water-filled depression created on dry lands and incidental to certain types of construction. *Id.* See 33 C.F.R. § 328.3 (2011).

²⁶474 U.S. 121 (1985).

²⁷*Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–845 (1984). The Chevron doctrine generally applies to an agency's interpretation of a statute, particularly when it follows a public process for developing that interpretation, such as notice and comment rulemaking. When Chevron applies, a court first asks whether a statute is clear. If so, the Court follows the clear language of the statute. If however, the statute is ambiguous, the court must then generally defer to any permissible or reasonable interpretation arrived at by the agency through an appropriate

public process.

²⁸474 U.S. at 135.

²⁹*Id.* at 134.

³⁰145 F.3d 1399 (D.C. Cir. 1998).

³¹*National Wildlife Federation v. Tulloch*, Civ. No. C90-713-CIV-5-BO (E.D. N.C. 1992)

³²33 U.S.C. § 1362(12).

³³33 CFR § 323.2(d)(1)(iii) (1998).

³⁴58 FED. REG. at 45,023.

³⁵145 F.3d. at 1404.

³⁶See *Chevron*, 467 U.S. 837 (1984). It bears noting that in *S.D. Warren v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), the Supreme Court appeared to take a more holistic view of what constitutes a “discharge” subject to regulatory control. That case involved an interpretation of § 401 of the CWA, which establishes a process for state certification of discharges into navigable waters. See 33 U.S.C. § 1341. S.D. Warren claimed that in order to fall under § 401 the discharge had to add something foreign to the water. The Court disagreed, noting that “the Act does not stop at controlling the ‘addition of pollutants,’ but deals with ‘pollution’ generally, which Congress defined to mean ‘the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water....’” 547 U.S. at 385.

³⁷145 F.3d. at 1405.

³⁸*Id.*

³⁹After losing another battle over revised rules in 2007, *National Ass'n of Homebuilders v. U.S. Army Corps of Engineers*, 2007 WL 259944 (2007), *appeal dismissed*, 2007 WL 1549109 (2007), the agencies appear to have largely waved their white flag. See 73 FED. REG. 79641 (Dec. 30, 2008); 60 FED. REG. 25120 (May 10, 1999) (to be codified at 33 C.F.R. pt. 323). The Fourth and Ninth Circuit Courts have issued opinions in cases involving “deep ripping” and “sidecasting” that suggest a somewhat friendly view of agency authority over dredging activities. But the Supreme Court's affirmance of the Ninth Circuit decision by an equally divided Court casts doubt on the longevity of these decisions. See *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000).

⁴⁰531 U.S. 159 (2001).

⁴¹Brief of Federal Government in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* at 6–7.

⁴²474 U.S. at 134.

⁴³Specifically, the Court held that “the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.” *Id.* at n.9.

⁴⁴*Id.* at 168.

⁴⁵*Id.*

⁴⁶*Id.* at 126.

⁴⁷See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (“The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”) (citing *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942), recognizing congressional authority under the Commerce Clause to regulate economic activity that has any incident affect on interstate commerce).

⁴⁸*United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996).

⁴⁹531 U.S. at 174. The Court also rejected the government’s claim that Congress had acquiesced in the Corps’ 1977 regulations by considering and failing to enact legislation that would have overturned those rules. *Id.* at 169–170. As the dissent pointed out, however, the Court had already held that Congress had acquiesced in the very regulations at issue in *Solid Waste Authority* in its *Riverside* decision. *Id.* at 186–187.

⁵⁰547 U.S. 715 (2006).

⁵¹*Id.*

⁵²*Id.* at 732–733.

⁵³See, e.g., *The Wetland Jurisdictional Determination and Permit Process*, available at www.sac.usace.army.mil/?action=jurisdictional_determination.process_overview, last updated May 8, 2012.

⁵⁴To the claim that minor discharges into minor water sources should not be regulated it is simply worth noting that the government has developed general permits, which allow such discharges to effectively avoid burdensome requirements. See *Background Information on EPA’s Pesticide General Permit*, available at www.cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm, last updated May 8, 2012.

⁵⁵Two states—Alaska and Utah—filed a brief supporting John Rapanos.

⁵⁶Indeed, given the uncertainty surrounding federal jurisdiction and the elaborate process for making that determination, the states cannot even know in advance what waters they would be required to regulate.

⁵⁷437 F. Supp. 2d 605 (N.D. Texas 2006). But see *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

⁵⁸437 F. Supp. 2d at 615.

⁵⁹547 U.S. at 743.

⁶⁰505 F.3d 1208 (11th Cir. 2007), *cert. denied*, 129 S. Ct. 630 (2008).

⁶¹*Id.* at 1213–1214.

⁶²*Id.* at 1223.

⁶³129 S. Ct. 2458 (2009).

⁶⁴33 U.S.C. § 1362(6).

⁶⁵40 C.F.R. § 232.2 (2011).

⁶⁶33 U.S.C. § 1316(e).

⁶⁷40 C.F.R. § 440.104 (2011).

⁶⁸Civil Action No. 10-0541 (ABJ) (D.D.C. March 23, 2012), available at www.ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv0541-87.

⁶⁹76 FED. REG. 3127 (Jan. 19, 2011).

⁷⁰*Id.* at 3127–3128.

⁷¹Slip op. at 14.

⁷²See *Board of Miss. Levee Comm’rs v. U.S. E.P.A.*, 785 F. Supp. 2d 592 (2011); *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425 (2003); 3 PUB. NAT. RES. L. § 27:2 ((2nd ed. 2012).

⁷³Slip op. at 12.

⁷⁴*Id.* at 13.

⁷⁵*Id.* at 18.

⁷⁶*Id.* at 9–12.

⁷⁷Some might add the Supreme Court’s recent decisions in *Sackett v. United States*, 2012 WL 932018 (2012) and *Entergy Corp. v. Riverkeeper Inc.*, 129 S. Ct. 1498 (2009), to the list of cases hostile toward the CWA. In the *Sackett* case, the Court ruled unanimously against the government’s claim that the EPA’s decision to issue an administrative compliance order under § 309(a)(1) was not subject to judicial review. The Court noted the administrative order was a final EPA decision and that, as such, it was subject to review under the Administrative Procedure Act provision authorizing review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. In the view of the author, the unanimous decision in *Sackett* was unremarkable, because it flowed directly from the language of the Administrative Procedure Act.

The *Entergy* decision addressed a somewhat obscure provision of the CWA that concerns thermal discharges from utility plants. Section 316(b) of the CWA requires that point source standards for cooling intake structures reflect the “best technology available [BTA] for minimizing adverse environmental impacts.” 33 U.S.C. § 1326(b). The EPA had employed a cost-benefit analysis in establishing standards, and the issue before the Court was whether such balancing was allowed under the BTA standard of § 316(b). Five members of the Court deferred to the EPA’s decision to allow existing facilities to avoid using a closed-cycle system based on the high costs relative to the benefits. The four remaining justices looked to the legislative history that quite clearly suggested congressional intent that would have allowed costs to be considered in deciding what technologies were available, but not relative to the benefits achieved.

⁷⁸33 U.S.C. § 1251(a).

⁷⁹See S. 787, 111th Cong. § 4(3) (2009); H.R. 2421, 110th Cong. § 4(3) (2007) (amending the CWA’s definition of “waters of the United States”).

⁸⁰531 U.S. 174 (2001).

⁸¹See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995).

⁸²In *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court made it clear that Congress has the power to adopt any legislation necessary to execute its authority under a valid treaty.

⁸³Indeed, the Court has shown far less antipathy to other key environmental laws like the Clean Air Act. See, for example, *Whitman v. American Trucking*, 531 U.S. 457 (2001).