

The Importance of the Clean Water Act and Current Attacks on its Layers of Oversight and Effectiveness Under Sections 401 and 404

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INTRODUCTION

Water is the most important resource on the planet for mankind.¹ It is essential in almost every aspect of our lives, ranging from agriculture and production to our daily household activities like cooking and bathing.² While all water is important, fresh water is specifically imperative for human survival.³ However, of the total amount of water on our planet, only 3 percent of it is fresh water.⁴ Of that 3 percent of fresh water, 83 percent is trapped in ice caps and glaciers (a total of roughly 2.5 percent of water on earth).⁵ That leaves the human race with roughly 0.5 percent of the Earth's total water supply in a form that is fresh and readily accessible, such as freshwater lakes, rivers, and groundwater.⁶ There are more than 7.8 billion people on this planet, and that number is steadily rising.⁷ With each person needing around three liters of water per day, twenty-three billion liters of drinking water are needed *every day* to sustain our population.⁸ Protecting our water's integrity is a crucial environmental goal.⁹

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¹ *Water Resources*, SCIENCE DAILY, https://www.sciencedaily.com/terms/water_resources.htm (last viewed Oct. 16, 2020) [<https://perma.cc/UTW9-6FND>].

² *Id.*

³ *Id.*

⁴ *Water Facts – Worldwide Water Supply*, BUREAU OF RECLAMATION, <https://www.usbr.gov/mp/arwec/water-facts-ww-water-sup.html> (last updated Nov. 4, 2020) [<https://perma.cc/F2DV-XESZ>].

⁵ *Id.*

⁶ *Id.*

⁷ *Current World Population*, <https://www.worldometers.info/world-population/> (last viewed Oct. 28, 2021) [<https://perma.cc/QH7A-VMKX>].

⁸ *Water: How much should you drink every day?*, MAYO CLINIC, (Oct. 14, 2020), <https://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/in-depth/water/art-20044256> [<https://perma.cc/X2RN-QY9R>].

⁹ SCIENCE DAILY, *supra* note 1.

Understanding that fresh water is both essential and relatively scarce, Congress has taken steps to protect the United States' fresh water supply.¹⁰ Congress's first attempt at protecting fresh water sources was the Rivers and Harbors Appropriation Act of 1899.¹¹ The protective mechanism of the 1899 Act required a permit before any alteration or building could happen upon "navigable water[s]."¹² The term 'navigable waters' includes "small streams along which only the smallest of boats can travel as well as rivers with stretches of unnavigable hazards such as rapids."¹³ Only Section 13 of the Act addressed matters of pollution and simply forbade the discharge of all waste other than sewage into navigable waters.¹⁴ Although Section 13 was a good start to addressing water pollution problems, it was not broad enough to adequately protect the purity of the Nation's waterways, specifically because this Section allowed for the dumping of sewage into U.S. waterways.¹⁵ This policy created problems that persisted for more than a century.¹⁶ Congress saw that the Rivers and Harbors Act was in desperate need of reform, which was partially achieved with the Federal Water Pollution Act of 1948.¹⁷ Real progress was not achieved, however, until the Federal Water Pollution Act was overhauled by Congress in 1972 when it implemented the Clean Water Act ("CWA").¹⁸ Congress achieved a massive overhaul of the guidelines for protecting surface waters with the passage of the CWA by including quality criteria for pollutants in surface waters and the requiring permits to discharge pollutants into navigable waters.¹⁹ The stated goals of the CWA are many; they include eliminating the discharge of pollutants into U.S. waterways, improving the water quality standard to protect fish and wildlife, and promoting further scientific research and

¹⁰ ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT 20 YEARS LATER* 1 (1993).

¹¹ *Id.*

¹² Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, <https://www.encyclopedia.com/environment/energy-government-and-defense-magazines/rivers-and-harbors-appropriation-act-1899> (last viewed Oct. 28, 2021) [<https://perma.cc/DN8D-THSF>].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Summary of the Clean Water Act*, EPA, <https://www.epa.gov/laws-regulations/summary-clean-water-act> [<https://perma.cc/5GMP-JFQ3>].

¹⁸ *Id.*; *See also* Clean Water Act (CWA), 33 U.S.C. §§1251—1388 (encompassing the statutory range of the Clean Water Act).

¹⁹ EPA, *supra* note 17.

development to assist in these goals.²⁰ However, recent changes made by the Trump administration are jeopardizing the attainability of these goals by changing the balance of powers within the permit system of the CWA.²¹ Unless the Biden administration quickly and affirmatively reverses the changes made by the Trump administration, this balance shift could lead to lasting negative effects for years to come.

Part I of this Note will provide an overview of Sections 401 and 404 of the Clean Water Act, each of which provide vital protections and a balance of powers within the permit system. Part II will then highlight the recent changes to the CWA made by the Trump administration and how those changes impact the balance of powers within the permit system. Part II will also briefly discuss the inefficiencies that arise as a result of the exchange of power between political parties following elections. Part III will discuss prior controversies surrounding Sections 401 and 404 and will introduce a current lawsuit brought by the Suquamish and Pyramid Lake Paiute Tribes that aims to combat the Section 401 rollbacks made by the Trump administration. Part IV will provide an overview of the judicial history of the CWA by highlighting several key Supreme Court decisions. Part V will then return to the Suquamish and Pyramid Lake Paiute Tribes, and will discuss possible outcomes of the case, given the Supreme Court's historical treatment for the CWA. It will also discuss the possibility of the Biden administration reversing the changes made by the Trump administration. Finally, Part VI will discuss what is at stake and how these regulations can affect not only the United States, but the entire planet in the long term.

I. IMPORTANT CLEAN WATER ACT PROVISIONS

To protect and further the stated goals of the CWA, Congress included two sections that provide important additional layers of authority in the permit approval process.²² These are Sections 401 and 404.²³ Both sections provide vital limitations on the federal government's ability to decide who can and cannot

²⁰ 33 U.S.C. § 1251.

²¹ Rebecca Bowe, *What the Trump Administration is Doing to Your Water*, EARTH JUSTICE (Apr. 21, 2020), <https://earthjustice.org/blog/2019-october/what-the-trump-administration-is-doing-to-your-water> [<https://perma.cc/V8G4-HEYG>].

²² See generally 33 U.S.C. § § 1341, 1344.

²³ *Id.*

dump pollutants into the United States's waters.²⁴ Although the federal government has the ultimate authority to approve the permits, Sections 401 and 404 give the federal government, state governments, and indigenous tribes the authority to deny or restrict the granting of a permit.²⁵ These sections provide critical protections for the United States's water sources, helping to ensure that only compliant applicants receive permits.

First, Section 404 creates the basic permit program which requires the Secretary of the Army, through the Corps of Engineers, to grant permits to applicants before any "discharge of dredged or fill material" can be dumped "into the navigable waters."²⁶ To add a level of oversight to the permit process, section 404(c) gives the Administrator of the Environmental Protection Agency ("EPA") power to restrict or deny permits as well.²⁷ Specifically, the Administrator can deny a permit if it is determined that the applicant plans to discharge pollutants that will have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."²⁸ The Administrator of the EPA acts as an initial gatekeeper in the permit approval process and adds a layer of federal oversight to the work of the Corps of Engineers.²⁹

As a second layer of protection, Section 401 gives states and indigenous tribes an indirect method of vetoing Section 404 permits.³⁰ The states and tribes achieve this through the Section 401 certification process.³¹ A 401 water quality certificate must be issued or waived by the state or tribe before any permit can be granted.³² The state or tribe waives the 401 certification by declining to complete the water quality compliance review, or by failing to complete the 401 certification "within a reasonable period

²⁴ *Id.*

²⁵ *Id.*

²⁶ Clean Water Act (CWA), 33 U.S.C. § 1344.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Bowe, supra* note 21.

³⁰ *Basic Information on CWA Section 401 Certification*, EPA, <https://www.epa.gov/cwa-401/overview-cwa-section-401-certification> (last viewed Nov. 13, 2021) [<https://perma.cc/6Y5D-YNFX>]; *See also* 33 U.S.C. § 1341 (indicating that no permit shall be granted if certification has been denied by the State).

³¹ EPA, *supra* note 30.

³² *Id.*

of time.”³³ States and tribes issue certification by verifying that the applicant’s proposed project will comply with all applicable state and federal water quality standards.³⁴ If the applicant fails to meet the current water quality standards, the state or tribe can deny certification and thereby effectively deny the permit to the applicant.³⁵

II. CHANGES TO THE CLEAN WATER ACT, ITS LEGISLATIVE VOLATILITY, AND THE FUTILITY OF JUDICIAL INTERVENTION

Much of the legislation passed by Congress contains ambiguities, either intentional or unintentional, that fall to the court system to resolve. The Clean Water Act is no exception.³⁶ Consequently, the two major areas of oversight in the CWA, Sections 401 and 404, have seen significant judicial intervention.³⁷ The U.S. Supreme Court has heard cases involving the interpretation of Section 404 more than a dozen times.³⁸ Now, with recent changes, Section 401 is becoming a larger point of controversy.³⁹

The need for judicial intervention primarily comes down to Congress’s overly vague definition for which navigable waters are protected under the CWA.⁴⁰ Originally, the definition of navigable waters used by the Act was simply “water of the United States, including the territorial seas,” now colloquially referred to as “WOTUS.”⁴¹ However, several Supreme Court decisions, as well as additional rules and regulations from executive agencies, have

³³ 33 U.S.C. § 1341.

³⁴ EPA, *supra* note 30; *See also* 33 U.S.C. § 1341 (indicating that no permit shall be granted if certification has been denied by the State).

³⁵ EPA, *supra* note 30.

³⁶ *See* Mark Latham, *Rapanos v. United States: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction*, in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 5, 13–16 (L. Kinvin Wroth ed., 2007).

³⁷ *See generally* County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

³⁸ *See generally* County of Maui, 140 S. Ct. at 1462; *Rapanos*, 547 U.S. at 715; *Solid Waste Agency*, 531 U.S. at 159; *Riverside Bayview*, 474 U.S. at 121.

³⁹ *Bowe*, *supra* note 21.

⁴⁰ Adam S. Ward & Riley Walsh, *New Clean Water Rule Leaves U.S. Waters Vulnerable*, EOS (Feb. 11, 2020), <https://eos.org/opinions/new-clean-water-act-rule-leaves-u-s-waters-vulnerable> [https://perma.cc/U8ZZ-LVEU].

⁴¹ *Id.*

helped define the limits of WOTUS more narrowly.⁴² Despite the Supreme Court’s efforts, the steps taken by the judicial system to further narrow and fully define WOTUS can be easily modified as political parties are able to enact new, or amend prior, legislation. For example, in 2015, the Obama administration released the “Clean Water Rule” which took a science-based approach to determining what qualified as “waters of the United States” and effectively added protections for wetlands and other smaller waterways.⁴³ But, following the Obama administration, the Trump administration redefined WOTUS, overriding many parts of the Clean Water Rule.⁴⁴ This new definition greatly restricts the scope of water sources protected under the CWA, including a specific exclusion of previously protected wetlands.⁴⁵ By the EPA and Corps of Engineers’s own estimates, the Trump administration’s definition of WOTUS removes the federal protection of roughly 18 percent of streams and 51 percent of wetlands that were previously protected under the Clean Water Rule.⁴⁶ However, with the Biden administration and the Democratic Party now in control of the executive and legislative branches of the U.S. government, it is possible that the Biden administration will simply reverse all of the changes made by the Trump administration.

Although reversing the changes made may have a positive impact on the environment, the constant back-and-forth of policies and regulations can be a costly burden on the efficiency of the United States’s economy and program administration.⁴⁷ For example, with every new policy comes re-training of agency employees, creations of new forms, and the fine-tuning of new systems and processes, all of which result in higher costs and

⁴² See 33 C.F.R. § 328 (2017); See generally *County of Maui*, 140 S. Ct. at 1462; *Rapanos*, 547 U.S. at 715; *Solid Waste Agency*, 531 U.S. at 159; *Riverside Bayview*, 474 U.S. at 121.

⁴³ *Bowe*, *supra* note 21.

⁴⁴ *Id.*

⁴⁵ Ryan Richards, *Debunking the Trump Administration’s New Water Rule*, *CTR. OF AM. PROGRESS* (Mar. 27, 2019, 9:01 AM), <https://www.americanprogress.org/issues/green/news/2019/03/27/467697/debunking-trump-administrations-new-water-rule/> [https://perma.cc/7NFJ-7C5M].

⁴⁶ Ariel Wittenburg, *EPA Claims ‘No Data’ on Impact of Weakening Water Rule. But the Numbers Exist*, *SCIENCE.ORG* (Dec. 11, 2018), <https://www.sciencemag.org/news/2018/12/epa-claims-no-data-impact-weakening-water-rule-numbers-exist> [https://perma.cc/7VTQ-72EQ].

⁴⁷ Alberto Alesino, *Macroeconomic Policy in a Two-party System as a Repeated Game*, 102 Q. J. ECON. 651, 651–78 (1987) [https://perma.cc/34VZ-69BT].

increased inefficiency.⁴⁸ In fact, the political representatives in charge of making these decisions are incentivized to ignore the negative side effects and instead focus on the short-term outcomes, choosing policies that will help them be re-elected rather than policies that can help alleviate the potential costs and inefficiencies that occur from the “pendulum effect” of a two-party system.⁴⁹ John Adams, one of the United States’ Founding Fathers, predicted this war of competing policies when he said “[t]here is nothing which I dread so much as a division of the republic into two great parties, each arranged under its leader, and concerting measures in opposition to each other.”⁵⁰ Ironically, if the two major U.S. political parties could simply cooperate to enact more bipartisan policies and regulations, then the Nation could avoid these costly inefficiencies.⁵¹

Political issues like environmental regulations invariably have strong supporters and detractors. Environmentalists argue that the definition of WOTUS should be expanded, while others believe it should be restricted. Environmentalists and other supporters believe that an expansive definition of WOTUS is preferable because it gives the CWA broader jurisdiction over a greater amount of waters, thereby allowing the federal government to more directly oversee their protection.⁵² Opponents to the expanded definition, including States’ rights activists, believe that the definition of WOTUS should be narrower, thereby limiting the reach of the CWA and giving more power to the states to regulate the waters within their borders.⁵³ The main argument for a narrower interpretation of WOTUS, and thereby allowing more deference to the states, is that the states have better knowledge on how to manage their water resources.⁵⁴ Ultimately, the dividing factor between these competing factions is who they believe is better able to protect our Nation’s waters: the federal government or the states.

The question of who is more equipped to protect the waters of the United States is quickly becoming moot, as the federal

⁴⁸ *Id.*

⁴⁹ *Id.* at 653.

⁵⁰ 9 JOHN ADAMS, THE WORKS OF JOHN ADAMS 511 (1780) [<https://perma.cc/A7GZ-USRE>].

⁵¹ Alesino, *supra* note 47.

⁵² Ward & Walsh, *supra* note 40.

⁵³ *Id.*

⁵⁴ *Id.*

government has shown its ability to unilaterally change the traditional protections built into the CWA. In April 2019, President Trump, through Executive Order 13,868, called upon the EPA to revisit Section 401 of the CWA.⁵⁵ Section 401 had not received any interpretation or guidance from the EPA in over fifty years.⁵⁶ The Executive Order stated that “federal guidance and regulations regarding section 401” were “outdated” and in need of revision because they were “causing confusion and uncertainty and [were] hindering the development of energy infrastructure.”⁵⁷ This call for review by President Trump led to the EPA amending Section 401 in June 2020.⁵⁸

One highly controversial amendment is the EPA’s newly defined scope of what states and tribes can review. The new section narrowly defines the scope of the 401 certification process as a review to ensure that the “discharge . . . will comply with water quality requirements.”⁵⁹ The Final Rule states that “[t]here is nothing in the text of the statute or its legislative history that signals that Congress intended to impose, using section 401, federal requirements on licensed or permitted activities beyond those addressing water quality-related impacts.”⁶⁰ This narrow interpretation drastically limits the review power of the states and tribes. Prior to the amendment, states and tribes would review the project’s environmental impact as a whole, which required them to consider a variety of issues such as: transportation concerns, public access to waters, energy policy, building and maintaining fish passages, protection of sensitive species, habitat restoration, tree-planting along waterways, spill management plans, and stormwater management plans.⁶¹ Now, states and tribes are only allowed to consider whether the discharge meets the water quality

⁵⁵ Exec. Order No. 13,868, 84 Fed. Reg. 15,495 (Apr. 15, 2019) [hereinafter Executive].

⁵⁶ Chuck Sensiba et al., *Long-Awaited EPA Rule Overhauls Section 401 of Clean Water Act*, ENV’T. L. & POL’Y MONITOR (June 30, 2020), <https://www.environmentallawandpolicy.com/2020/06/long-awaited-epa-rule-overhauls-section-401-of-clean-water-act/> [<https://perma.cc/BY7N-H6LA>].

⁵⁷ Executive, *supra* note 55.

⁵⁸ *Clean Water Act Section 401 Certification Final Rule*, EPA, <https://www.epa.gov/cwa-401/fact-sheet-final-clean-water-act-section-401-certification-rule> (last viewed Nov. 13, 2021) [<https://perma.cc/6FY7-CFDB>].

⁵⁹ 40 C.F.R. § 121.3 (2020).

⁶⁰ Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,230 (July 13, 2020) (to be codified at 40 C.F.R. pt. 121).

⁶¹ Sensiba, *supra* note 56.

standards.⁶² They can no longer consider how the discharge, and the project as a whole, will affect any of these other concerns.⁶³

Another controversial change was the enforcement of a strict one-year time limit for states and tribes to complete the 401 certification process.⁶⁴ If the certifying authority needs more information from the applicant, there is no provision to toll or extend the time limit.⁶⁵ The strict time limit effectively prevents the certifying authority from requesting any information that would take more than a year to collect, such as such as multi-year studies or National Environmental Policy Act documents.⁶⁶ Many environmentalist groups fear that this time limit is too short for states and tribes to properly conduct the environmental impact reports necessary for 401 certification.⁶⁷ If states and tribes are unable to complete the certification within the one-year time limit, then they have effectively waived certification and the permit is granted without meeting the state water quality standards.⁶⁸ This strict one-year time limit has also been applied to the EPA, limiting its power under §404(c) to review applications before the Corps of Engineers issues its permits.⁶⁹

III. CONTROVERSY OVER SECTION 401

Section 401 is no stranger to controversy and has been in the national spotlight on several occasions. One well-known instance is the 2017 battle over the Alaska Pebble Creek Mine.⁷⁰ The Alaska Pebble Creek Mine (“Pebble Mine”) is in the Bristol Bay region, which is home to copper and gold depositories and the world’s largest sockeye salmon run.⁷¹ The salmon run generates over \$1.5 billion in tourist revenue annually and the depositories

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Clean Water Act*, *supra* note 58.

⁶⁵ Michael A. Swiger & Sharon White, *EPA Issues New Final Rule to Streamline CWA Section 401 Review*, THE NAT’L L. REV. (June 2, 2020), <https://www.natlawreview.com/article/epa-issues-final-rule-to-streamline-cwa-section-401-review> [<https://perma.cc/DJ9R-QXAM>].

⁶⁶ Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. at 42,246.

⁶⁷ *Bowe*, *supra* note 21.

⁶⁸ 40 C.F.R. § 121.9 (2020).

⁶⁹ *Bowe*, *supra* note 21.

⁷⁰ Aaron Ernst, *Alaska’s Controversial Pebble Mine Was Dead. Not Anymore.*, PBS (May 27, 2020), <https://www.pbs.org/wgbh/frontline/article/alaska-pebble-mine-bristol-bay/> [<https://perma.cc/YE57-SQZQ>].

⁷¹ *Id.*

are estimated to be worth nearly \$500 billion.⁷² With so much potential profit on the line, investors were eager to begin mining, but in 2012 their permits were denied under the Obama administration due to environmental impact concerns.⁷³ Then, in 2017, with a new administration in power, Pebble Mine filed for a new permit.⁷⁴ The permit application received substantial backlash from native tribes, fishermen, and environmentalists.⁷⁵ Pebble Mine responded by paying a reputable D.C. lobbyist millions of dollars to head its cause.⁷⁶ Ultimately, the lobbyist succeeded, and the federal government released a report stating that Pebble Mine would not be a serious environmental risk and approved the plans for the mine.⁷⁷ Overcoming the federal environmental impact study is a significant hurdle, but the mining operation will still have to receive state approval under Section 401.⁷⁸ Although receiving state approval is no easy task, the fact that the federal government has already approved the plan indicates that state approval is likely.⁷⁹ States have legitimate power under 401 to enforce their water quality standards, but those powers cannot be used arbitrarily or unilaterally against a single applicant.⁸⁰ The mining operation only has to meet the state's water quality standards, and if they do, the state will have no valid reason to deny them approval.⁸¹ To deny an applicant that would normally be compliant would mean that the state would have to make changes to its water quality standards, which in turn would affect every permit that has already been issued.⁸²

Alaska, and other states, are unlikely to go to such lengths just to stop one proposal from moving forward. In addition to the political inertia, with a narrower scope of power and a strict one-

⁷² *Id.*

⁷³ Juliet Eilperin & Brady Dennis, *Trump administration says massive Alaska gold mine won't cause major environmental harm, reversing Obama*, WASH. POST (July 24, 2020, 3:55 PM), <https://www.washingtonpost.com/climate-environment/2020/07/24/pebble-mine-alaska-trump/> [<https://perma.cc/3J2S-8MME>].

⁷⁴ Ernst, *supra* note 70.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Eilperin & Dennis, *supra* note 73.

⁷⁸ Tim Bradner, *Alaska may be able to veto Pebble mine project*, ANCHORAGE PRESS (July 12, 2018), https://www.anchoragepress.com/news/alaska-may-be-able-to-veto-pebble-mine-project/article_e3e0ec88-8614-11e8-a6e8-83eaefd4d4cc1.html [<https://perma.cc/ZA7K-ZRLU>].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

year time limit in place for states and tribes to conduct their environmental impact study, the opportunity for a state or tribe to effectively block a permit from being issued is even more slim.

Despite the apparent loss for the environmentalists in the Alaska Pebble Creek matter, new amendments provide new opportunities for relief. In response to the 2020 rollbacks on the protections provided to states and tribes in Section 401, on August 31, 2020, the Suquamish and Pyramid Lake Paiute Tribes, along with the Orutsararmut Native Council and two environmentalist groups, filed suit against the EPA seeking injunctive relief.⁸³ The tribes and environmentalist groups brought suit alleging that the new Section 401 rule was an overreach of the EPA's authority and that it was enacted without following the required tribal consultations.⁸⁴ The complaint noted that Section 401 had worked "well for decades" and reached a good balance of "cooperative federalism."⁸⁵ In support of its claim for injunctive relief, the plaintiffs pointed to the public outcry against the proposed amendments to Section 401, noting that the proposal received over 125,000 comments in two months.⁸⁶ Despite the significant opposition to the changes, the EPA promulgated the new rule.⁸⁷ The plaintiffs now seek an injunction in federal court enjoining the EPA from enforcing section 401 with its new changes.⁸⁸ It is unlikely that this complaint will achieve any lasting results. With a more environmentally progressive administration in place, much of the complaint may become moot. However, an analysis of how the Supreme Court has historically treated cases concerning the Clean Water Act is insightful.

⁸³ Complaint at 2, *Suquamish Tribe v. Wheeler*, No. 3:20-cv-06137-WHA (N.D. Cal. filed Aug. 31, 2020).

⁸⁴ *Id.* at 4.

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 16.

⁸⁷ *Id.*

⁸⁸ *Id.* at 26.

IV. HISTORICAL TREATMENT OF THE CLEAN WATER ACT BY THE SUPREME COURT

Four landmark cases are useful in understanding the Supreme Court's history of interpreting the Clean Water Act. From *United States v. Riverside Bayview Homes, Inc.* in 1985 to the recent decision of *County of Maui v. Hawaii Wildlife Fund* in 2020, the Supreme Court has consistently followed a pattern of narrowing and limiting the power of the CWA.

A. United States v. Riverside Bayview Homes, Inc. (1985)

In 1976, Riverside Bayview Homes owned roughly eighty acres of marshy wetland near the shores of Lake St. Clair in Michigan.⁸⁹ Riverside decided to begin filling the wetlands in preparation for the construction of new homes when the Corps of Engineers sought an injunction claiming that the wetland being developed fell under the jurisdiction of the CWA and therefore required a permit before development could begin.⁹⁰ Although the initial interpretation of the CWA only included "waters navigable in fact," subsequent regulations issued by the Corps of Engineers itself broadened this definition to include other waters such as "freshwater wetlands' that [are] adjacent to other covered waters."⁹¹ On appeal, the Sixth Circuit discussed the broader interpretation promulgated by the Corps' regulations, stating that it constituted an unlawful "taking" under the Fifth Amendment.⁹² Riverside argued that the permit requirement, along with the expanded jurisdictional reach of the CWA, constituted a taking because it restricted Riverside's ability to freely develop the land.⁹³ This lawsuit went through the appeals process and ultimately made its way to the Supreme Court.⁹⁴

On review, the Supreme Court first determined that no unlawful "taking" could occur by the "mere assertion of regulatory jurisdiction."⁹⁵ The Court first noted that logically, no "taking"

⁸⁹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 (1985).

⁹⁰ *Id.*

⁹¹ *Id.* at 123–24.

⁹² *Id.* at 125–26.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Riverside Bayview*, 474 U.S. at 126.

could occur until after a permit had been applied for and denied.⁹⁶ In fact, even when a permit is denied, a “taking” of the land occurs only when the “effect of the denial” prevents the “‘economically viable’ use of the land.”⁹⁷ The Court reasoned that because Riverside had not applied for a permit, their “taking” argument failed.⁹⁸ Secondly, the Supreme Court upheld the broadening of relevant regulations, but did so primarily due to reliance on legislative history.⁹⁹ The Court noted that Congress had considered broadening the definition, but Congress’ subsequent acquiescence of the regulations provided the basis for upholding the regulations implemented by the Corps of Engineers.¹⁰⁰ Therefore, the Court determined that the regulations were rightly put forth under the Corps of Engineers’ §404 authority because the regulations helped further the primary purpose of the CWA—to maintain the water quality of waters of the United States.¹⁰¹

B. Solid Waste Agency v. United States Army Corps of Engineers (2001)

The Solid Waste Agency (“SWA”) represented the interests of multiple suburban Chicago cities in their effort to develop a new waste disposal site.¹⁰² The local area needed a new wasteyard and the SWA decided to purchase a long-abandoned mining site which was previously owned and worked on by the Chicago Gravel Company.¹⁰³ The old mine site had been abandoned for more than thirty years, and had become overrun with plant and animal life.¹⁰⁴ In their effort to be thorough, in addition to applying for all the required local permits, the SWA contacted the Corps of Engineers to determine if they would need a §404(a) permit.¹⁰⁵ In 1986, the Corps of Engineers passed a regulation known as the “Migratory Bird Rule” that extended the jurisdiction of the CWA to intrastate

⁹⁶ *Id.* at 127.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.* at 133.

¹⁰⁰ *Id.* at 137.

¹⁰¹ *Riverside Bayview*, 474 U.S. at 138.

¹⁰² *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 162–63 (2001).

¹⁰³ *Id.* at 163.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

waters that were inhabited by protected migratory birds.¹⁰⁶ The Corps of Engineers determined that since the abandoned mine site was now home to several species of protected migratory birds, the mine site was under the jurisdiction of the CWA.¹⁰⁷ When the Corps of Engineers subsequently denied the SWA's permit application, the SWA brought suit, arguing that the "Migratory Bird Rule" exceeded the statutory authority granted to the Corps of Engineers.¹⁰⁸

The Supreme Court agreed with the SWA's argument and held that the "Migratory Bird Rule" was beyond the authority of the CWA.¹⁰⁹ The Court noted that in previous cases, such as *Riverside*, the definition of WOTUS had been interpreted broadly in order to further the CWA's stated purpose of "restoring and maintaining the . . . integrity of the Nation's waters."¹¹⁰ Here, the regulation put forth by the Corps of Engineers no longer focused on the *waters* of the United States but instead focused on the protection of migratory birds which was clearly outside the stated purpose of the CWA.¹¹¹

C. Rapanos v. United States (2006)

In 1989, Mr. Rapanos backfilled several areas of wetlands within his property that he owned in an effort to begin development of the area.¹¹² The area was roughly fifty-four acres of land containing "somewhat-saturated soil conditions."¹¹³ Although "the nearest body of navigable water was eleven to twenty miles away," regulators stepped in to stop the development, saying that Mr. Rapanos's fields were under the jurisdiction of the CWA.¹¹⁴ Mr. Rapanos had filled the areas of land before properly obtaining a Section 404 permit and subsequently faced over five years in prison, as well as "hundreds of thousands of dollars in criminal and civil fines."¹¹⁵ Mr. Rapanos contested these violations and argued that his land was outside the jurisdiction of the CWA

¹⁰⁶ *Id.* at 164.

¹⁰⁷ *Id.* at 164–65.

¹⁰⁸ *Solid Waste Agency*, 531 U.S. at 165–66.

¹⁰⁹ *Id.* at 167.

¹¹⁰ *Id.* at 166.

¹¹¹ *Id.* at 173–74.

¹¹² *Rapanos v. United States*, 547 U.S. 715, 720 (2006).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 719–21, 729.

because it was not a permanent wetland, but was only “sometimes saturated.”¹¹⁶

The Supreme Court agreed and spoke to the gross over-expansion of the CWA.¹¹⁷ In its opinion, the Court stated:

“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.”¹¹⁸

The Court stated that the waters of the United States “include only relatively permanent, standing or flowing bodies of water” and that other waters need a “significant nexus” to those covered

¹¹⁶ *Id.* at 720, 729–30.

¹¹⁷ *Id.* at 722.

¹¹⁸ *Rapanos*, 547 U.S. at 722.

waters to be included under the Clean Water Act.¹¹⁹ Therefore, land held by Mr. Rapanos that was only occasionally saturated and could only reach “navigable waters” by virtue of man-made drains was determined to be outside the scope of the CWA’s jurisdiction.¹²⁰ The Court also held that the Corps of Engineers’ expansive interpretation was not “based on a permissible construction of the statute.”¹²¹

D. County of Maui v. Hawaii Wildlife Fund (2020)

The County of Maui operated a treatment facility on the island of Maui for processing and managing wastewater from the island’s residents.¹²² The County of Maui’s wastewater treatment procedure was to collect sewage, partially treat it, and then dump the sewage into four different underground wells.¹²³ The issue, however, was that the sewage would travel about half a mile through the groundwater and empty into the Pacific ocean.¹²⁴ Because these pollutants were reaching the ocean and having a negative ecological impact, several environmental groups brought suit to enjoin the County of Maui from continuing to use this management process.¹²⁵ The plaintiffs’ argument was that the County of Maui was effectively dumping pollutants directly into navigable waters because “the path to the ocean [was] clearly ascertainable,” meaning a Section 401 permit should have been required.¹²⁶ The CWA requires a permit for “any addition of any pollutant to any navigable waters from any point source.”¹²⁷ Here, the issue concerned the interpretation of the word “from.”¹²⁸ The County of Maui argued that “from” refers to the “last ‘conveyance’ that conducted the pollutant to navigable waters.”¹²⁹ Because the County of Maui only dumped pollutants into the groundwater, which was not considered a “point source,” it was therefore not a

¹¹⁹ *Id.* at 733, 741–42.

¹²⁰ *Id.* at 739.

¹²¹ *Id.*

¹²² *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1469 (2020).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *County of Maui*, 140 S. Ct. at 1470.

¹²⁹ *Id.*

violation of the CWA.¹³⁰ The environmental groups argued for a broader interpretation which would include discharges of pollutants from point sources that were “functionally [discharges] into navigable water.”¹³¹

The Supreme Court began the analysis by reciting the purpose of the CWA, using that as the background of their reasoning and decision.¹³² The Ninth Circuit Court of Appeals had applied a “fairly traceable” test to determine when discharge from a point source required a Section 401 permit.¹³³ The “fairly traceable” test considers the functional effect of the discharge over its literal form.¹³⁴ If the path from the point source where the pollutants are initially dumped is “fairly traceable” to where the pollutants ultimately end up, then under the “fairly traceable” test, the court would deem the discharge equivalent to dumping the pollutants directly into the navigable water.¹³⁵ The Supreme Court, however, was wary of accepting a “fairly traceable” test because, as the Court noted, “[v]irtually all water, polluted or not, eventually makes its way to navigable water.”¹³⁶ However, if the Court allowed pollutants that travelled through any distance of groundwater to be discharged without a permit, it would create a “large and obvious loophole.”¹³⁷ To reconcile the competing views, the Court created a test which required a permit for discharges from point sources that are the “functional equivalent of a direct discharge” and included several factors to consider.¹³⁸ The Court also noted that the legislative history and statutory structure of the Act implied that for issues of groundwater and nonpoint pollution, “Congress intended to leave substantial responsibility and autonomy to the States,” meaning the states and their interests should be considered when applying the new test.¹³⁹ Here, as in the Supreme Court’s previous CWA cases, the Court followed a trend of a narrowly interpreting the Act, favoring a reduction of federal power.

¹³⁰ *Id.*

¹³¹ *Id.* at 1469–70.

¹³² *Id.* at 1468–69.

¹³³ *Id.* at 1469.

¹³⁴ *County of Maui*, 140 S. Ct. at 1469.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1470.

¹³⁷ *Id.* at 1473–74.

¹³⁸ *Id.* at 1476–77.

¹³⁹ *Id.* at 1471, 1477.

Since the Clean Water Act's adoption in 1972, the Supreme Court has heard several cases concerning the CWA. For the last fifty years, the Supreme Court has shown a tendency to narrowly interpret the CWA to avoid expansion of federal power under the Act.¹⁴⁰ This pattern is not guided by a mere distrust of federal power, but by a strict adherence to the purpose of the CWA, as has been re-stated by the Court in each of the four examined cases.¹⁴¹ Congress created the CWA to "restor[e] and maintai[n] the chemical, physical, and biological integrity of the Nation's waters," and that is what the Supreme Court is committed to upholding.¹⁴² The Supreme Court's dedication to narrowly interpreting statutes explains the trend seen in recent CWA decisions. In *Riverside*, the Court upheld the expansive definition put in place by the Corps of Engineers because it was "not in conflict with the expressed intent of Congress."¹⁴³ It is this focus on Congress's "purpose" which led the Court to strike down the Corps of Engineers' attempted expansion of the CWA to protect migratory birds.¹⁴⁴

Although the courts will look to the Supreme Court's long line of precedent on the CWA, the outcome of the Suquamish and Pyramid Lake Paiute Tribes' recent lawsuit cannot be easily predicted. Given the Supreme Court's history of narrowly interpreting the CWA, one is inclined to think the Court will uphold these new regulations as they are restrictions on the power and scope of the Act.¹⁴⁵ However, the case, if ultimately resolved by the Supreme Court, has one key fact that distinguishes it from the Court's prior CWA cases. Historically, the Court has tackled issues concerning the expansion of federal power under the Act.¹⁴⁶ Here, however, the new regulations restrict the federal government's power under the Act, which the Court would presumably approve of, following its historical trend of restriction.¹⁴⁷ Another twist in this case is that the new regulations have not only limited federal power, but also limit the power of

¹⁴⁰ See generally *County of Maui*, 140 S. Ct. 1462; *Rapanos*, 547 U.S. 715; *Solid Waste Agency*, 531 U.S. 159; *Riverside Bayview*, 474 U.S. 121.

¹⁴¹ See generally *County of Maui*, 140 S. Ct. 1462; *Rapanos*, 547 U.S. 715; *Solid Waste Agency*, 531 U.S. 159; *Riverside Bayview*, 474 U.S. 121.

¹⁴² *Solid Waste Agency*, 531 U.S. at 166-67.

¹⁴³ *Riverside Bayview*, 474 U.S. at 131-32.

¹⁴⁴ *Solid Waste Agency*, 531 U.S. at 166-67.

¹⁴⁵ See *County of Maui*, 140 S. Ct. at 1467.

¹⁴⁶ *Id.* at 1490.

¹⁴⁷ *Id.* at 1491.

states and tribes.¹⁴⁸ Although the Court has readily restricted federal power, whether or not it would uphold the restriction on the states and tribes is a different question. It seems plausible that the courts will favor the plaintiffs' efforts to protect the rights of the states and native tribes, as this goal seems comport with the stated purpose of the CWA.

Despite the potential issues that this and other cases may present to the judicial system, these claims may become moot due to the recent change in presidential administration. The Biden administration is expected to overturn several of the changes made by the Trump administration.¹⁴⁹ One major goal of the administration is to return the previously revoked protections for the Nation's wetlands.¹⁵⁰ However, these changes will take time and effort by the Biden administration to put into place.¹⁵¹ The reversion of policy changes will be beneficial for the environment and waterways for the next four years, but if another change in presidency occurs after this term, what will be the lasting effects? Both sides of the political aisle need to focus on issues of the United States' environmental health, one of which is the protection of U.S. waterways.

VI. WHAT ARE THE STAKES?

The importance of keeping the waterways of the United States clean cannot be understated. The condition of these waterways have direct impacts on our Nation in three major areas: environment, health, and economy. These areas overlap in many ways and poor water quality can lead to negative effects in each of them. Additionally, with the interconnectedness of today's global economy, the poor management and care of the United States waterways will not only directly impact the United States, but it may also lead to negative impacts worldwide.

¹⁴⁸ *Bowe*, *supra* note 21.

¹⁴⁹ Hannah Northey, *How Biden could undo Trump's water regulations*, E&E NEWS (Nov. 17, 2020), <https://www.eenews.net/stories/1063718667> [<https://perma.cc/K3JF-6P5K>].

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

The United States' waterways are home to over 100,000 species of wildlife¹⁵², and nearly half of those species are at risk of population decline or even extinction due to diminishing water quality.¹⁵³ Additionally, climate change is threatening the amount of water found in the waterways of the United States.¹⁵⁴ There is concern that climate change could create a “chain effect” of less precipitation each year, coupled with warmer temperatures, which would lead to a significantly reduced water supply.¹⁵⁵ If the available water supply were to decrease, preserving and protecting the quality of what water remains available would be essential.

Beyond just the impacts our waterways have on wildlife, the integrity of the waterways affects the human population of the United States directly. The country's waterways are the primary source of drinking water for the 330 million people that live in the United States.¹⁵⁶ Rivers and streams supply roughly sixty-five percent of drinking water in the United States.¹⁵⁷ History has shown the consequences of consuming polluted drinking water—Flint, Michigan is a prime, and recent, example of these consequences. The Flint River flowed through the center of town and was the primary waste dumping site of dozens of industrial companies.¹⁵⁸ Not only was the water full of industrial waste, but it was also filled with sewage runoff from the city.¹⁵⁹ As the city of Flint suffered from economic downturns, city managers looked for ways to cut costs.¹⁶⁰ While the city waited for a new pipe from Lake Huron to be constructed, city officials decided to temporarily pump drinking water from the Flint River rather than pumping treated

¹⁵² *Freshwater habitat*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/habitats/freshwater-habitat> (last viewed Nov. 4, 2021) [<https://perma.cc/MU7L-3WGT>].

¹⁵³ *Aquatic Species*, USGS, <https://www.usgs.gov/ecosystems/fisheries-program/science/aquatic-species> (last viewed Feb. 4, 2021) [<https://perma.cc/K6TB-S2PS>].

¹⁵⁴ *Climate Change Impacts to Rivers*, CAL. COASTKEEPER ALL., <https://cacoastkeeper.org/what-we-do/climate-change-impacts-to-rivers/> (last viewed Feb. 18, 2021) [<https://perma.cc/WA73-GL2M>].

¹⁵⁵ *Id.*

¹⁵⁶ *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last viewed Feb. 8, 2021) [<https://perma.cc/TZ8Y-LLCD>].

¹⁵⁷ *Conserving Clean Water*, AM. RIVERS, <https://www.americanrivers.org/threats-solutions/clean-water/> (last viewed Feb. 18, 2021) [<https://perma.cc/SJH3-RKGS>].

¹⁵⁸ Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NRDC (Nov. 18, 2018), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> [<https://perma.cc/C36W-3APN>].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

water from Detroit.¹⁶¹ As a result of drinking the contaminated water, citizens of Flint suffered from skin rashes, hair loss, itchy skin, elevated blood pressure, and elevated levels of total trihalomethanes—cancer-causing chemicals.¹⁶² The results of using the Flint River’s water, despite having been corrected, still detrimentally affect the citizens of Flint today.¹⁶³ Although Flint may be an extreme example of the effects of polluted water on humans, it highlights the importance of protecting our Nation’s drinking water. If drinking water quality is not safeguarded, incidents like the Flint, Michigan water crisis may become more common.

In addition to the environmental and health concerns connected to the waters of the United States, the integrity of our waterways is also an important part of our Nation’s economy and affects millions, if not billions, of people.¹⁶⁴ A relatively clear link between the U.S. economy and its waterways is the fishing industry, which employs more than 800,000 people each year.¹⁶⁵ In 2020, more than 38 million people purchased recreational fishing licenses in the United States.¹⁶⁶ Recreational fishing alone contributes more than \$115 billion to the United States’ economy.¹⁶⁷ The United States’ water supply, food production, and energy production rely heavily on the waterways, accounting for roughly 94% of the total use of U.S. waterways.¹⁶⁸ Hydroelectric energy production, which relies directly on U.S. waterways, employs over 65,000 people each year¹⁶⁹ and accounts for roughly

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Denchak, *supra* note 158.

¹⁶⁴ See *The Importance of Water to the U.S. Economy*, EPA (Nov. 2013), <https://archive.epa.gov/partners/web/pdf/importance-of-water-synthesis-report.pdf> [<https://perma.cc/7UJ5-UDQA>].

¹⁶⁵ USGS, *supra* note 153.

¹⁶⁶ *Number of fishing licenses in the United States from 2000 to 2020 (in millions)*, STATISTA (Apr. 3, 2020), <https://www.statista.com/statistics/247674/fishing-licenses-in-the-us/> [<https://perma.cc/QT9Z-BNN2>].

¹⁶⁷ USGS, *supra* note 153.

¹⁶⁸ *Water is Critical to Our Economy*, EPA (Nov. 5, 2013), <https://blog.epa.gov/2013/11/05/importance-of-water/> [<https://perma.cc/4RLA-UKSD>].

¹⁶⁹ Anna McGinn & Katie Schneer, *Fact Sheet - Jobs in Renewable Energy Efficiency, and Resilience*, ENV’T & ENERGY STUDY INST. (July 23, 2019), <https://www.eesi.org/papers/view/fact-sheet-jobs-in-renewable-energy-energy-efficiency-and-resilience-2019> [<https://perma.cc/3HJT-53TY>].

7.3% of the Nation's energy production.¹⁷⁰ The fishing and energy industries are just two examples of the countless industries that these waterways affect.

The United States' waterways are directly and indirectly related to nearly every aspect of the nation's economy.¹⁷¹ Thus, any decline in the waterways, whether that be in quality or in volume, could have significant impacts on the economy. Globalization has made the U.S. economy the largest in the world and an integral part of the global economy.¹⁷² Because it plays such a key role, if the U.S. economy were to suffer due to detrimental effects of its waterways, it is likely that the world economy would indirectly suffer as well.

CONCLUSION

Under the Trump administration, several key parts of the Clean Water Act were revised.¹⁷³ The revisions redefined the waters of the United States and ultimately excluded many previously protected waterways.¹⁷⁴ The revisions also limited the available safeguards for reviewing potentially harmful projects before approval.¹⁷⁵ Despite the Biden administration now being in power, no new legislation has been proposed to overturn the Trump administration's revisions.¹⁷⁶

The Clean Water Act is a vital piece of legislation that protects not only the waters of the United States, but the Nation's citizens, environment, and economy. The United States government, either through executive action by the Biden administration or through Congress, must act quickly to address the dangerous rollbacks made by the Trump administration. Any delay in correcting the course of the waterways' integrity could result in lasting negative effects on nearly every aspect of American life.

¹⁷⁰ *Hydropower Explained*, U.S. ENERGY INFO. ADMIN. (last updated Mar. 30, 2020), <https://www.eia.gov/energyexplained/hydropower/where-hydropower-is-generated.php> [<https://perma.cc/WA8C-CFMN>].

¹⁷¹ EPA, *supra* note 168.

¹⁷² *Economy & Trade*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/economy-trade> (last viewed Feb. 8, 2021) [<https://perma.cc/2WRK-8B4D>].

¹⁷³ Jeffrey R. Porter, *The More Things Change... The Most Recent Clean Water Act Confusion*, 11 NAT'L L. REV. 290 (2021).

¹⁷⁴ Wittenburg, *supra* note 46.

¹⁷⁵ EPA, *supra* note 58.

¹⁷⁶ Porter, *supra* note 173.