SYMPOSIUM

THE CLEAN WATER ACT AT 50: REQUIEM OR RESURRECTION?

Fifty years ago, Congress passed the Federal Water Pollution Control Act of 1948 (later known as the Clean Water Act) in response to a disturbing public health issue: egregious pollution of U.S. waterbodies. The Cuyahoga River fire of 1969, among other events, generated national concern over water quality and set in motion a new regulatory era. Indeed, the Clean Water Act (CWA) has been a powerful driver of point source pollution reduction; many waterways once ridden with oil-soaked debris, fecal coliform, and waterborne contaminants—such as the Cuyahoga—are now fishable and swimmable by CWA standards.

Yet, at its fiftieth anniversary, the landmark law has fallen short. Until recently, the Environmental Protection Agency (EPA) has failed to meaningfully consider environmental justice in CWA administration, and the CWA has been relatively ineffective at addressing non-point source pollution. Likewise, EPA has done little to regulate modern threats to water quality like "contaminants of emerging concern" and plastics. Scholars grappled with these successes and failures at *Environmental Law's* Spring 2022 Symposium—*The Clean Water Act at 50: Requiem or Resurrection?*

In one Article, Mr. Cassidy and Professor Johnston deconstruct the "small handles" problem and its implications for public interest review under CWA § 404. They argue that by artificially segregating NEPA review and § 404 public interest review, the Army Corps of Engineers circumvent preparation of an Environmental Impact Statement and foreclose public participation. This approach, the Authors claim, is based off an erroneous interpretation of the CWA, NEPA, and the Corps' own NEPA regulations. The Authors suggest that a broader, more harmonious scope of review would better fulfill the statutes' goals.

Professor Flatt discusses the ecological value of wetlands—and their eventual disappearance—assuming efforts to limit federal CWA

jurisdiction succeed. In the hot debate over "Waters of the United States" (WOTUS), proponents of a narrow definition suggest that states will step up, assuming regulatory control over wetlands. Professor Flatt rebuts this argument, pointing to federalism theory, empirical evidence, and state practice—whereby states lack the willingness or capacity to regulate wetlands, or are legally prohibited from doing so.

Similarly, Professor Parenteau analyzes the Supreme Court's recent grant of certiorari to consider the Ninth Circuit's decision in *Sackett v. EPA*—which concerned the proper test for determining CWA jurisdiction over wetlands. Professor Parenteau predicts the Court will overturn *Sackett*, resulting in one of three outcomes: a narrow decision based on *Sackett's* unique facts, an application of the test in *County of Maui v. Hawai'i Wildlife Fund*, or the worst-case scenario—a wholesale adoption of former-Justice Scalia's rigid test in *Rapanos v. United States*. Finally, he discusses the disastrous implications of narrowing CWA jurisdiction over wetlands and headwater streams.

In her Article, Professor Salcido examines how plastic degrades environmental health, and notes that production is set to increase in areas already overburdened with air and water pollution. She discusses activists' efforts to use CWA as a tool for regulating plastic and its toxic footprint, and barriers that activists have encountered along the way. Professor Salcido concludes by urging both EPA and Congress to combat the plastic crisis by assuming greater regulatory responsibility.

Professor Villa explores why Indigenous peoples, racial minorities, and low-income communities have borne the brunt of impacts from water pollution, with a special focus on Washington D.C.'s Anacostia River, Seattle's Duwamish River, and Michigan's Flint River. In each case, the CWA played a central role in achieving environmental justice goals. However, Villa contends that reliance on the CWA is not enough to fully restore urban watersheds and communities—EPA must utilize other law, such as the Safe Drinking Water Act, and must confront the legacy of environmental racism, moral cowardice, and timidity that enabled the Flint Water Crisis.

This issue also features a student Comment by Benjamin Criswell, which is not tied to the Symposium. Mr. Criswell explores the history and nature of electricity regulation in the U.S. and the divergent electricity markets of Oregon and California. Based on those states' energy storage policies, Mr. Criswell suggests measures to improve access to and utilization of energy storage resources. Doing so, in his view, will help effectuate deep decarbonization goals.

Environmental Law thanks all who contributed to this year's symposium, including authors, speakers, moderators, volunteers, and attendees. We hope this contemporary analysis of a decades-old law is both informative and thought-provoking.

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