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The Clean Water Act and Evolving Due Process: The Emergence of Contemporary Enforcement Procedures

Alexandria A. Polk

The Clean Water Act and Evolving Due Process: The Emergence of Contemporary Enforcement Procedures

I. Introduction

Environmental laws did not concern early American lawmakers. Congress gave attention to other matters as it worked to provide governing principles on which to build a nation. As the twentieth century approached, however, the growing population of America began to wear on the environment. By 1900, nearly 40% of Americans lived in urban areas.[1] Denser populations created new problems, resulting in heavily polluted streams and rivers.[2]

Early in the twentieth century, the primary concern respecting water quality derived from fear about disease transmittance.[3] People regarded rivers as a dumping ground for sewage, leading to ideal conditions for certain contagious waterborne diseases.[4] Despite health concerns, pollution in waterways continued to increase as industry grew.[5] Treatment for waste was expensive, and the social attitude embraced water pollution merely as "an inevitable penalty of progress."[6] At one point, a sanitary engineering report observed "that a waterway passing through [Chicago] was so fetid from waste discharges that small animals had no difficulty in running back and forth across its scum-crusted surface."[7] Such reports were not uncommon, as similar conditions existed throughout waterways in America. In Cleveland

1. UNITED STATES CENSUS, STATISTICS OF POPULATION, at lxxxiv (1900) (defining an urban area as a town or city with 4000 or more people).

2. *See* Jouni Paavola, *Water Quality as Property: Industrial Water Pollution and Common Law in the Nineteenth Century United States*, 8 ENV'T & HIST. 295, 301 (2002). Urbanization created issues with sewage disposal and increased industrialization. *Id.* Although by 1911 the most heavily populated cities had put sewer systems in place, these systems did not necessarily treat the water. William L. Andreen, *The Evolution of Water Pollution Control in the Unites States–State, Local, and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENVTL. L.J. 145, 166 (2003). Rather than prevent the further spread of pollution, these systems often added to the problem by discharging large amounts of untreated sewage and wastewater into nearby waters. *Id.*

3. Edward J. Cleary, *Evolution of Social Attitudes and Action on Water Pollution Control*, 44 J. WATER POLLUTION CONTROL FED'N 1301, 1301 (1972).

4. *Id.* at 1301-02.

5. *Id.* at 1302 ("Entire waterways were being rendered unfit for any use except as sewers.").

6. *Id.*

7. *Id.* at 1301.

during 1936, a large river known as the Cuyahoga caught fire and burned for five days, feeding off the oil, sewage, and other debris infiltrating the water.[8]

Fortunately, social attitudes have changed. A waterway so polluted that its status as a waterway becomes debatable is no longer considered acceptable. By the 1940s, people began to take notice of the deterioration of American waters,[9] and, in 1948, the first Clean Water Act (CWA) emerged under the name of the Water Pollution Control Act.[10] The 1948 Act lent focus to the idea of clean water, but conceded little power to the federal government.[11] Congress did not become serious about the state of the nation's waters until 1972.[12] The congressional goal of the 1972 amendments was to provide waters to the public that were both "fishable and swimmable."[13] Despite this goal, a 2004 report to Congress found that 44% of assessed river and stream miles and 64% of assessed lakes contained waters unfit for either fishing or swimming.[14]

The modern version of the CWA gives the Environmental Protection Agency (EPA) much more power than was included in the original 1948 Act. Many people do not like that the EPA has this power, and there still exists a social attitude that "progress" and industry cannot coexist with a clean environment—that these environmental goals impede industry "progress."[15]

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8. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 99-101 (2002). Additionally, a river in Baltimore, the Buffalo River in New York, and the Rouge River in Michigan all caught fire. *Id.* at 105. The Cuyahoga River caught fire repeatedly, with reports of fires in 1868, 1883, 1887, 1912, 1922, 1930, 1936, 1941, 1948, 1952, and 1969. *Id.* at 101-04.

9. Cleary, *supra* note 3, at 1302-03.

10. *See* Water Pollution Control Act, ch. 758, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified at 33 U.S.C. §§ 1251-1387 (2012)).

11. *See id.*

12. *See* 133 CONG. REC. S1691-01 (daily ed. Feb. 4, 1987) (statement of Sen. Stafford).

13. *Id.* ("[T]he fundamental goal of the Clean Water Act [was] that the Nation's waters be 'fishable and swimmable.'").

14. EPA, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS 13, 16 (Jan. 2009), *available at* http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009_01_22_305b_2004report_2004_305Breport.pdf. Additionally, the report found that 30% of the tested estuaries were impaired. *Id.* at 20. Although less than half of the nation's waters were tested, they provide a fairly reliable test group. *Id.* at 1-2.

15. *See, e.g.*, Oliver A. Houck, *Of Bats, Birds and B-A-T: The Convergent Evolution of Environmental Law*, 63 MISS. L.J. 403, 462 (1994) ("Industry has challenged virtually every regulation the EPA has issued under the [Clean Air Act, Clean Water Act, and Resource and Conservation Recovery Act]."); Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 IOWA L. REV. 1, 29 n.117 (1988) ("In many industries, environmental controls are a net cost item—that is why environmental laws must exist."); Heidi Przybyla, *EPA Tops List of Business Complaints to Congress*, BLOOMBERG

It is necessary, however, that the federal government step in to control the water pollution problem. Early versions of the CWA did not give the federal government enough enforcement power; the government faced too many procedural difficulties, and the statute provided polluters with no real consequences for their actions.

Current enforcement procedures entrust power to both the EPA and individuals to impose the CWA. The EPA can enforce the act by: (1) issuing an administrative compliance order; (2) initiating a civil judicial enforcement action; or (3) assessing an administrative penalty.[16] Of the available enforcement tools, the EPA most frequently uses administrative orders.[17] Individuals may also seek to enforce the Act by initiating a citizen suit.[18]

(Feb. 7, 2011, 6:59 AM), http://www.bloomberg.com/news/2011-02-07/epa-rules-top-list-of-business-complaints-to-issa-committee.html ("American businesses have a common enemy: the U.S. Environmental Protection Agency."). Many of these people come from industries that do not want to worry about complying with regulations or incurring the high fines that accompany large violations. *See* Houck, *supra*, at 462. Still others believe federal funds should be spent on other regulations or do not believe in much federal regulation at all. *See* JUDITH A. LAYZER, OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION 2-3 (2012).

16. *See* 33 U.S.C. § 1319(a), (b), (g) (2012).

17. Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement*, 29 HARV. ENVTL. L. REV. 1, 12 (2005). Administrative orders comprise approximately 90% of all enforcement actions taken by the EPA. *See id.*; *see also* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. Rev. 401, 415 n.68 (2004) [hereinafter Miller, *Part One*].

18. 33 U.S.C. § 1319(b). Citizen suits can be brought by anyone against a discharger for a failure to comply with the CWA. *Id.* § 1365(a). This includes an action "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)," or against the Administrator for failure to act. *Id.* § 1365(a)(1)-(2). The statute defines a "citizen" as "a person or persons having an interest which is or may be adversely affected." *Id.* § 1365(g). To have an interest that is adversely affected, the plaintiff will generally have to show (1) that there is an injury in fact which is "concrete and particularized" and "not 'conjectural' or 'hypothetical,'" (2) that the defendant caused the injury, and (3) that a favorable decision will redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). If the plaintiff is a group, at least one member of the group bringing suit must suffer the injury in fact. Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 181 (2000). Plaintiffs allege a proper injury when "they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). When a citizen sues, the purpose is to gain an

Citizen suits are intended as a back-up plan in the event that the EPA does not enforce or take action against a violator.[19]

A primary concern of the CWA arises from the power it confers to federal agencies, especially the EPA. The Supreme Court partially addressed the due process implications of administrative compliance orders under the CWA in the recent case of *Sackett v. EPA*.[20] *Sackett* involved landowners seeking to build a house on their property.[21] In anticipation, the Sacketts deposited "fill material" onto their land.[22] Unfortunately for the Sacketts, however, the land was considered a wetland by the EPA.[23] After discovering the Sacketts filled

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injunction to prevent further pollution and impose any other consequences to the polluter required under the CWA. The citizen suit provision does not create monetary incentives for citizens to bring action. *See* 33 U.S.C. § 1365. Its purpose "is to allow citizens to act as private attorneys general and enforce the CWA's provisions where government officials have [not]." 36 AM. JUR. PROOF OF FACTS 3D *Proof of Wrongful Discharge of Pollutant Into Waterway under Federal Clean Water Act* § 27 (1996). However, citizens may be able to recover litigation costs. *Id.* § 34. Such a determination is made by the court in which the action is brought. *Id.* For more information on citizen suits generally, see Miller, *Part One*, *supra* note 17.

19. *See* 33 U.S.C. § 1365(b)(1)(B) (providing that if the EPA or a State is already pursuing a civil or criminal action against the violator, then an individual cannot bring a citizen suit, although the individual may be able to intervene); *see also id.* § 1365(b)(1)(A) (providing that after a citizen gives notice of the alleged violation, he must wait sixty days before actually commencing suit in order to allow either the Administrator or the State an opportunity to take action, and also to see if the alleged violator takes action on his own).

20. *See* 132 S. Ct. 1367, 1371-74 (2012). The case has caused controversy over the extent of the EPA's regulatory power. As a result, many organizations filed amicus briefs on behalf of petitioners. *See* Brief of Amici Curiae Nat'l Ass'n of Home Builders et al. in Support of the Petitioners, Sackett v. EPA, 132 S. Ct. 1367 (2011) (No. 10-1062), 2011 WL 4542131; Brief of the Am. Farm Bureau Fed'n et al. as Amici Curiae Supporting Petitioners, Sackett v. EPA, 132 S. Ct. 1367 (2011) (No. 10-1062), 2011 WL 4564006; Amicus Curiae Brief of the Am. Civil Rights Union in Support of Petitioners, Sackett v. EPA, 132 S. Ct. 1367 (2011) (No. 10-1062), 2011 WL 4590836; Brief of Amici Curiae Wet Weather P'ship et al. in Support of Petitioners, Sackett v. EPA, 132 S. Ct 1367 (2011) (No. 10-1062), 2011 WL 4642656.

21. Sackett v. U.S. EPA, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

22. *Id.* "Fill Material" is any "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 40 C.F.R § 232.2 (2012). In *Sackett*, the fill material consisted of dirt and rocks. *Sackett*, 622 F.3d at 1141.

23. *Sackett*, 622 F.3d at 1141.

the wetland without first obtaining a permit,[24] the EPA issued a "compliance order requir[ing] the Sacketts to remove the fill material and restore the [land] to its original condition."[25] The Sacketts responded to the order by contending that the land was not a wetland subject to EPA jurisdiction.[26] The Ninth Circuit held: (1) the compliance order was not subject to judicial review prior to the agency bringing action and (2) such preclusion was not violative of due process.[27] The Supreme Court then granted certiorari on two issues: (1) whether the Administrative Procedures Act (APA)[28] provides petitioners the right to seek judicial review of an administrative compliance order prior to the agency bringing an enforcement action and (2) if the APA does not provide this right, whether preclusion of pre-enforcement judicial review violates due process.[29] Although the Sacketts originally brought a claim disputing the status of their lands as wetlands subject to CWA jurisdiction, this paper does not consider the issue of whether the property in fact contained wetlands[30] or whether the APA provides petitioners as a matter

24. Permits for filling in wetlands, including any type of discharge into a wetland, are to be obtained from the U.S. Army Corps of Engineers. *See infra* note 30 and accompanying text.

25. *Sackett*, 622 F.3d at 1141. The compliance order stated that if the Sacketts did not remove the fill material, then they would be subject to fines. *Id.* "'[F]ailure to comply [could result in either] (1) civil penalties of up to $32,500 per day of violation . . . [or] (2) administrative penalties of up to $11,000 per day for each violation.'" *Id.* (third and fourth alterations in original).

26. *See id.*

27. *Id.* at 1147.

28. 5 U.S.C. § 704 (2012).

29. Sackett v. EPA, 131 S. Ct. 3092, 3092 (2011).

30. Although wetlands regulation is governed by both the U.S. Army Corps of Engineers (the Corps) and the EPA, it is the Corps who are responsible for issuing permits to those wishing to discharge dredged or fill material into an area where wetlands are present. *See* 33 U.S.C. § 1344; 33 C.F.R § 320.4 (2012). Debate among the Corps and the courts often involves discussion over what can reasonably be interpreted to constitute a "wetland." The Supreme Court is currently unsettled as to a definitive "wetlands" definition. In 1985, the Court upheld an action by the Corps seeking to enjoin the owner of Riverside Bayview Homes from filling wetlands in preparation for construction of a housing development. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985). At that time, the Corps defined wetlands as lands "'inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.'" *Id.* (quoting 33 C.F.R. § 323.2(c) (1985)). The Court found the Corps' interpretation of the statute reasonable, taking into account the Corps' explanation that wetlands may play a vital role in the water quality of rivers, streams, lakes, and other traditionally "navigable" waterways. *Id.* at 135. The Court upheld the Corps' assertion that permits were required not

of right the ability to sue under § 704. This comment focuses on the extent of the EPA's power with regard to issuing penalties and the effects such penalties have on an individual's due process rights.

To study the extent of the EPA's enforcement power under the CWA and the implications of this power, it is important to understand the Act's history. This paper explores the evolutionary processes of the CWA's enforcement procedures by examining the growth of the Act since its inception and the effects of such growth. Part II gives a brief overview of the development of administrative procedural due process to provide a constitutional background against which the evolution of the CWA has taken place. Part III studies the history of CWA enforcement procedures by analyzing the transformation of the statute over time. Finally, Part IV discusses how the increase in available enforcement procedures have been affected by changes in the ways the Supreme Court and the American public view the requirements of due process of law. The increase in available enforcement procedures, in part,

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only prior to filling traditionally navigable waters, but also when filling wetlands adjacent to navigable waters. *Id.* at 129. Although in 1985 the Court held that the Corps acted reasonably in interpreting its jurisdiction to extend to wetlands adjacent to "waters of the United States," *id.* at 139 (internal quotation marks omitted), the Court later deviated. In 2001 the Court decided the wetland must be adjacent to an open body of water, not simply *any* body of water. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167-68 (2001) [hereinafter *SWANCC*]. The dissent in *SWANCC* pointed out that "once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream." *Id.* at 176 (Stevens, J., dissenting). In *Rapanos v. United States*, decided only a few years later, the Court again upheld the narrowed interpretation of the Corps' jurisdiction from *SWANCC*. Rapanos v. United States, 547 U.S. 715, 739 (2012). Justice Scalia, writing for a plurality of the Court, found that the phrase "waters of the United States" meant waters which were relatively permanent. *Id.* at 729 (internal quotation marks omitted). Additionally, the Court held that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States'" are wetlands within the Corps' jurisdiction. *Id.* at 742 (emphasis omitted). The *Rapanos* decision, however, was not decided by a majority of the Justices, making it difficult to determine how the Court will rule in the future. *See id.* at 718. As it currently stands, there is assurance that wetlands adjacent to navigable bodies of water are likely subject to regulation, but less assurance exists for those residing near a body of water deemed non-navigable. For further discussion of what constitutes a wetland, see Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473 (2005); James Murphy, *Muddying the Waters of the Clean Water Act:* Rapanos v. United States *and the Future of America's Water Resources*, 31 VT. L. REV. 355 (2007); Taylor Romigh, Comment, *The Bright Line of* Rapanos*: Analyzing the Plurality's Two-Part Test*, 75 FORDHAM L. REV. 3295 (2007).

correlates to changing attitudes toward due process requirements and the importance of clean water. Understanding the development of the CWA and the history of accompanying social attitudes provides insight into the statute's current authority and how it may evolve in the future.

II. Summary of Administrative Procedural Due Process History

As Americans, the right to due process is fundamental to our way of thinking. The Fifth Amendment to the United States Constitution declares that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[31] While the Constitution dates back approximately two hundred years, the idea of due process can be traced as far back as the fourteenth century.[32] The 1354 version of the Magna Carta provided that "'[n]o free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.'"[33] This declaration was intended to protect the innocent by providing procedural safeguards to ensure that laws were not improvised to try particular cases.[34] From these origins, the American courts developed their own views on required procedures and the meaning of due process.

In the administrative law context, due process procedures are required before depriving an individual of liberty or property.[35] Rapid regulatory expansion occurred after the Great Depression, an event that increased concern about individual due process rights.[36] The continued increase in the regulatory powers of governmental agencies signals the importance of

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31. U.S. CONST. amend. V.

32. *See* Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring).

33. *Id.* (emphasis omitted) (quoting Magna Carta ch. 39).

34. *Id.*

35. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 192 (West Publ'g Co., 4th ed. 1997) (1972). Pursuant to the Constitution, due process is required any time a person is deprived of life, liberty, or property. U.S. CONST. amend V. In administrative decisions, however, deprivation of life is rarely an issue. Therefore, most administrative due process issues deal with the procedures required for deprivation of liberty or property.

36. Jill Nylander, *The Administrative Procedure Act: A Public Policy Perspective*, MICH. B.J., Nov. 2006, at 38, 40. Due to the rapid expansion of regulatory agencies, many people voiced concern that the expanding federal government would intrude upon their rights. *See id.* In response, Congress enacted the Administrative Procedure Act in 1946 "as an oversight tool designed to help increase accountability [of agencies] and to bring order to a rapidly expanding government" by standardizing procedures, such as agency adjudication. *Id.*

understanding the procedures required prior to deprivation.[37] Traditionally, the benefits provided by agencies (such as welfare and occupational licenses) were considered "privileges," as opposed to rights, and thus were not subject to a due process claim prior to deprivation.[38] Eventually this distinction between government privileges and fundamental rights disappeared.[39]

The Supreme Court decided a case in 1970 that appeared to radically change the development of administrative law.[40] In *Goldberg v. Kelly*, the Court found that procedural due process required a hearing prior to the termination of welfare benefits.[41] The Court noted that a fundamental aspect of due process is the opportunity to be heard, which must take place "at a meaningful time and in a meaningful manner."[42] The Court noted that welfare recipients depend on welfare checks for their very subsistence and thus should not be deprived of their checks prior to a hearing.[43] Such hearings should consist of a "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting . . . arguments and evidence orally."[44] This determination was problematic because, from its holding, it

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37. *See* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 240-41 (Thomson Reuters, 4th ed. 2010).

38. *See* GELLHORN & LEVIN, *supra* note 35, at 192-93 ("Traditionally . . . . [m]any government benefits and grants were considered mere gratuities or 'privileges' rather than rights; like a private donor, the government could impose whatever conditions it wished on its gift, or even remove the benefit at will."). The courts applied this view to benefits such as employment or allowance of a license. *Id.* This rights-privileges distinction may have grown out of the fact that early administrative due process issues were considered in light of substantive due process claims, rather than as an independent issue. Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 281 (1978).

39. GELLHORN & LEVIN, *supra* note 35, at 194. In place of the rights-privileges distinction, the Supreme Court created a new test for when procedural due process was implicated. *Id.* at 195. It held "that the requirements of procedural due process extend only to those who have been deprived of 'liberty' or 'property.'" *Id.* To have a property interest, there must exist "a 'legitimate claim of entitlement' . . . rather than merely a 'unilateral expectation.'" *Id.*

40. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

41. *Id.* at 270-71.

42. *Id.* at 267 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted).

43. *Id.* at 264-65.

44. *Id.* at 267-68. *Goldberg* might be seen "as a reaction against the inferior treatment non-regulatory decisions had long received." Verkuil, *supra* note 38, at 285. Because the case dealt with welfare benefits, the Court traditionally saw this as part of the rights-privileges distinction, placing it outside the concern of due process issues because it was a benefit (a privilege) and not a right. GELLHORN & LEVIN, *supra* note 35, at 193. The lack of

appeared that *Goldberg* required a hearing prior to terminating any rights whatsoever.[45] Full trial-type hearings are expensive and time-consuming. As a result of the significantly increased administrative process requirements implicated by the *Goldberg* decision, the Court in 1976 reinterpreted how courts and agencies determine the procedural processes required when depriving an individual of liberty or property.[46]

In *Mathews v. Eldridge*, the Court held that *Goldberg* should be limited only to its facts, as welfare recipients are different in kind from others receiving government benefits.[47] The Court created a three-part balancing standard to determine the appropriate procedure for depriving a person of liberty or property.[48] First, the agency must determine the interest of the individual and how that interest will be affected by the agency action (if the individual's interest is greatly at stake, then an agency's procedural requirements will likely be greater).[49] Second, the agency must consider the risk of unnecessary deprivation and whether additional procedural safeguards would be effective in alleviating that risk.[50] Third, the agency should consider the government interest in using certain procedures.[51] Government interests include economic efficiency and resulting administrative burdens imposed by additional procedural requirements.[52] The government interest of using particular procedures should be balanced against individual interests.[53] The Court held that a balancing test was necessary because due process should be flexible, thus recognizing that different situations call for different procedural protections, depending on the circumstances.[54] "The essence of due process is . . . that 'a person in jeopardy of serious loss [be given] notice of the case

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procedural requirements and general ease of agencies to retract privileges, "created the environment for a strong procedural due process reaction in *Goldberg*." *Id.*

45. *See Goldberg*, 397 U.S. at 267-70.

46. *See* Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976).

47. *Id.*

48. *See id.* at 335.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 334.

54. *Id.* ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (alteration in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

against him and the opportunity to meet it.'"[55] As long as these conditions are met, the requirements of due process are satisfied.

The *Mathews* test is still the standard used in determining the correct administrative due process procedures. Its flexible balancing approach is adaptive, making it an appropriate test to keep up with our changing world. A concern associated with this balancing, however, is that it tends to tip the scales in favor of the government more often than not.[56] Although disconcerting, no approach is perfect, and a balancing test is the most practical way of weighing options to tailor procedures to the specific circumstances at hand.

In the context of the CWA, the courts must find a balance between ensuring protection for individual procedural due process rights and the government interest of ensuring clean water for its people. Although "the right to clean water" is not a phrase found in the United States Constitution, it is a resource to which Congress has provided protection. This idea of water protection has grown in response to the Court's evolving interpretation of due process requirements and in response to support from the American people.[57] When an individual's interest in building on a piece of property is assessed against the availability of clean water for the nation, careful weighing of values must be considered.

III. History of CWA Enforcement Procedures

A. CWA Beginnings

Congress first introduced the CWA in 1948 as the Water Pollution Control Act (1948 WPCA).[58] Originally, it had very little muscle. Similar to the Articles of Confederation,[59] the 1948 WPCA gave little power to the

55. *Id.* at 348-49 (second alteration in original) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

56. The flexibility of the *Mathews* test often allows agencies significant amounts of deference, raising the possibility that government efficiency claims may lead to harassment of particular groups. *See* GELLHORN & LEVIN, *supra* note 35, at 234 ("Unless the utilitarian calculus is applied with appropriate sensitivity to the worth and dignity of the individual, government's efficiency claims can become a cloak for petty oppression and harassment."). This result, however, is a possibility with many of the Court's decisions.

57. *See* 118 CONG. REC. 37,452 (1972) (statement of Rep. John A. Blatnik).

58. *See* Water Pollution Control Act, ch. 758, Pub. L. No. 80-845, 62 Stat. 1155, 1155 (1948) (codified at 33 U.S.C. §§ 1251-1387 (2012)).

59. The Articles of Confederation was the first constitution of the United States. Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 20 PUBLIUS 55, 55 (1990). Too much power in a centralized government concerned the early

federal government[60] and too much to the states. Also, much like the Articles of Confederation, this off-balance arrangement led to serious problems with an inability of the federal government to enforce the 1948 WPCA.

Congress enacted the 1948 WPCA in large part to combat the increasing problem of sewage build-up in waterways.[61] Although previous laws had been enacted to confront water pollution problems, these previous statutes focused specifically on pollution that impeded navigation and not necessarily human health.[62] Under the 1948 WPCA, the Surgeon General acted as sole enforcer of its provisions.[63] Because the 1948 statute had the main purpose of determining whether a waterway was so badly polluted as to become a nuisance, the Surgeon General could only bring suit if the pollution affected interstate waters to the point it endangered the health or welfare of people in another state.[64] If a river was badly polluted but did not carry the pollution into another state in such a concentration as to endanger the health or welfare of people there, the statute provided no remedy.[65] Additionally, the 1948 WPCA did not provide a remedy for people within the state where the discharge originated.[66] It reserved the decision of how to

framers. Lisa A. Ennis, *Articles of Confederation*, *in* 1 ENCYCLOPEDIA OF TARIFFS AND TRADE IN U.S. HISTORY 26 (Cynthia Clark Northrup & Elaine C. Prange Turney eds., 2003). As a result, the Articles of Confederation allotted much power to the states and hardly any to a central government. *Id.* Without a centralized leader and continued bickering between the states, the Articles quickly fell into dissolution, and the drafting of a new constitution began in 1787. *Id.*

60. *See* Water Pollution Control Act § 2, 62 Stat. at 1155.

61. *See id.* § 2(a), 62 Stat. at 1155-56 ("[T]he Surgeon General is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may deleteriously affect such waters.").

62. *See, e.g.*, Oil Pollution Act of 1924, ch. 316, § 3, 43 Stat. 604 (amended by Act of Apr. 3, 1970, Pub. L. No. 91-224, § 108, 84 Stat. 91); River and Harbor Appropriations Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152.

63. Water Pollution Control Act § 1, 62 Stat. at 1155.

64. *Id.* § 2(d)(1), 62 Stat. at 1156. The text of the statute provides:

> The pollution of interstate waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is hereby declared to be a public nuisance and subject to abatement as herein provided.

Id.

65. *See* Water Pollution Control Act, 62 Stat. 1155

66. *See id.*

handle intrastate pollution problems to the state.[67] By giving the states discretion, the 1948 WPCA did not require the states to provide safe water to their peoples.[68]

Even if the Surgeon General found an actionable violation, a series of obstacles needed to be overcome before anything could be done. Upon learning of a possible violation, the Surgeon General had to first provide "formal notification to the alleged polluters, recommend measures for abatement and set a reasonable time for the polluter to comply."[69] Then, the Surgeon General was to send notice to the state in which the discharge occurred.[70] If the polluter refused to cease polluting, the Surgeon General could send a reminder, once again notifying the state and the polluter of the continued discharge.[71] Only after this second notification could the Surgeon General recommend to the state that a suit be initiated to secure abatement of the pollution.[72] However, a mere recommendation did not satisfy the process required to bring legal action. Initiation of a suit required several additional steps.

If after the second notice no action occurred, the Federal Security Administrator[73] could assemble a committee to find a reasonable solution.[74]

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67. *See id.*

68. This is evidenced by the fact that several river fires occurred even after enactment of the 1948 WPCA. For example, Cleveland, Ohio, chose to do little to protect its own citizens, illustrated by the Cuyahoga River fires of 1952 and 1969. Adler, *supra* note 8, at 103-04. The 1952 fire resulted from unregulated oil discharges. *Id.* at 103. A lack of enforcement against polluters allowed the oil to accumulate so that it formed a two-inch blanket across the river's surface. *Id.* In some places it provided a cover from bank to bank. *Id.*

69. Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1105 (1970).

70. *Id.*

71. *Id.*

72. *Id.* (citing Water Pollution Control Act § 2(d)(2)).

73. The Federal Security Administrator headed the Federal Security Agency (FSA). Reorganization Plan No. 1 of 1939 § 201(a), 53 Stat. 1423, 1424. The FSA was a consolidation of the United States Employment Service Department from the Department of Labor, the Office of Education (previously part of the Department of the Interior), the Public Health Service (including the Surgeon General), and the National Youth Administration into one department. *Id.* ("[T]hese agencies and their functions, together with the Social Security Board and its functions, and the Civilian Conservation Corps and its functions, are hereby consolidated under one agency to be known as the Federal Security Agency, with a Federal Security Administrator at the head thereof.").

74. Water Pollution Control Act § 2(d)(3), 62 Stat. at 1156-57 (allowing the Administrator "to call a public hearing . . . before a board of five or more persons appointed by the Administrator").

This reasonable solution was to be based on evidence presented at a hearing.[75] If the polluter did not comply with the solution created by the board, then the Administrator might be able to take action.[76] The ability to take action depended on whether the Administrator could obtain consent from the appropriate state agency or official.[77] Once the Administrator obtained consent, he could make an official request for the United States Attorney General to bring suit against the polluter.[78] Even then, this was only a suggestion. The statute provided no requirement that action be brought.[79]

If the Attorney General chose to bring suit, the statute mandated that the court give "due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved."[80] This meant that regardless of the danger to human health posed by the pollution, if the court found abatement to create a hardship to the polluter, abatement would not be required.[81] Such a standard made it highly unlikely the government would prevail in court; yet it remained the judicial standard until 1972.[82] The cumbersome procedure made the 1948 WPCA highly ineffective for controlling water pollution.[83] The combination of the required procedures and the judicial standard eviscerated any power the statute might have had. As might have been expected, the 1948 Act inspired not one lawsuit under its authority.[84]

B. Amendments to the Original WPCA (1956-1966)

The lack of progress resulting from the 1948 WPCA did not go unnoticed. In 1955 the Secretary of Health, Education, and Welfare

75. *Id.* § 2(d)(3), 62 Stat. at 1157.
76. *Id.* § 2(d)(4), 62 Stat. at 1157.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* § 2(d)(7), 62 Stat. at 1157.
81. Barry, *supra* note 69, at 1107.
82. *See id.* at 1120 (noting the standard had not changed with the latest amendment in 1970). The 1972 amendments to the 1948 WPCA introduced a permitting system as a means of ensuring compliance with water quality standards. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 402, 86 Stat. 816, 880-83 (codified at 33 U.S.C. § 1342 (2012)). To hold a polluter responsible after the 1972 amendments, the only standard that need be shown is that a violation of the permit conditions occurred. *Id.* § 309, 86 Stat. at 859.
83. Barry, *supra* note 69, at 1107.
84. *Id.* (citing *Hearings on S. 4 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 89th Cong. 29-32 (1965)).

pressured Congress to take action.[85] Congress acquiesced the following year by delivering the Water Pollution Control Act Amendments of 1956.[86] In doing so, Congress overrode the President's veto, disagreeing with his belief that water pollution was only a local problem.[87] The 1956 amendments eliminated the second notice requirement and the requirement of gaining the state's consent prior to giving notice to a polluter.[88] In place of the deleted procedures, however, a new procedure was added.[89] Following formal notification to the state warning of a dangerous discharge of pollutants, the Surgeon General had to organize a conference among "all [affected] state and interstate water pollution control agencies."[90] After the conference, the Surgeon General summarized the discussion in writing, analyzing whether the pollution was actionable and listing factors that could cause abatement to be delayed.[91] State agencies had six months after the conference's conclusion to take action regarding the pollution.[92] If the agencies continued to take no action, the Secretary was to call a public hearing before an appointed board, a process substantially similar to that of the 1948 WPCA's public hearing requirement.[93] The main difference was "that the board was now required to make findings respecting pollution and any abatement action being taken."[94] The board then compiled its findings and recommendations, allowing the alleged polluters a second six-month period to comply.[95] If the pollution still had not subsided by the end of the second six-month period, the Secretary could petition the state attorney

85. *Id.* Reorganization Plan No. 1 of 1953 shifted the directive responsibility previously executed by the Federal Security Administrator to the Secretary of Health, Education, and Welfare. *See* Reorganization Plan No. 1 of 1953, § 5, 67 Stat. 632.

86. Barry, *supra* note 69, at 1107. The 1956 amendments affirmed the Secretary of Health, Education, and Welfare as the supervisor and director. *Id.* However, the Surgeon General of the Public Health Service continued to administer and enforce the Act. *Id.* at 1108; *see also* Federal Water Pollution Control Act Amendments of 1956, ch. 518, Pub. L. No. 84-660, § 1(a), 70 Stat. 498, 498.

87. 118 CONG. REC. 37,452 (1972) (statement of Rep. John A. Blatnik).

88. Barry, *supra* note 69, at 1107.

89. *See id.* at 1107-08.

90. *Id.* at 1108. Interestingly, the time it took to organize the conference counteracted any benefit derived from deleting the second notice requirement. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

general to file an abatement action.[96] The Secretary, however, could only make the request if asked to do so by one of the states affected by the pollution (a state where the health and welfare of its people were in danger) or the state where the pollution originated.[97] Basically, the Secretary could not bring suit on behalf of the federal government unless someone was complaining. Although changes were made from the 1948 WPCA, the 1956 amendments did little to make the statute more operational.

After 1956, pollution control amendments increased in their frequency. Congress amended the scheme again in 1961 and renamed it the Federal Water Pollution Control Act (FWPCA).[98] Although not much changed in the way of procedure, the 1961 amendments reinterpreted the meaning of interstate waters to include lakes and other bodies of water, such as coastlines.[99] This change was important because the 1956 statute had eliminated isolated intrastate waters (such as lakes) and coastal waters (oceans) from its control as had been allowed under the 1948 WPCA.[100] By reopening federal control over these bodies of water, Congress provided more water protection coverage. Additionally, the 1961 amendments consolidated the previously shared responsibility of enforcing the FWPCA.[101] The 1956 amendments allotted various enforcement powers between the Surgeon General and the Secretary of Health, Education, and Welfare.[102] Under the 1961 amendments, the power of enforcement became the sole responsibility of the Secretary of Health, Education, and Welfare.[103]

Amendments in 1965, known as the Water Quality Act of 1965, incentivized states to engage directly in water regulation.[104] The 1965

96. *Id.* at 1109; *see also* Federal Water Pollution Control Act Amendments of 1956, ch. 518, Pub. L. No. 84-660, § 8(f), 70 Stat. 498, 505 (1956).

97. Barry, *supra* note 69, at 1109.

98. Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, § 11, 75 Stat. 204, 210.

99. *Id.* § 8(d), 75 Stat. at 208 (eliminating "interstate" and instead inserting "interstate or navigable").

100. Federal Water Pollution Control Act Amendments of 1956 § 11(e), 70 Stat. at 506.

101. Federal Water Pollution Control Act Amendments of 1961 § 1(b), 75 Stat. at 204.

102. Federal Water Pollution Control Act Amendments of 1956 § 1(a), 70 Stat. at 498.

103. Federal Water Pollution Control Act Amendments of 1961 § 1(b), 75 Stat. at 204 (relieving the Surgeon General of any responsibility in enforcing the FWPCA and instead allocating all enforcement and administrative power to the Secretary of Health, Education, and Welfare).

104. *See* Water Quality Act of 1965, Pub. L. No. 89-234, §§ 5(c)(1), 8, 79 Stat. 903, 907-08, 910.

amendments required states to establish their own water quality standards with regard to interstate waters.[105] Congress encouraged states to participate in water quality regulation with the intent that local enforcement would enforce standards set by the states.[106] The likely theory was that if a state established its own standards, then those standards would be ones with which voters (citizens) agreed because the voters were the ones that elected the officials.

If a state failed to create its own water quality standards, then the FWPCA authorized the Secretary to establish standards for it.[107] The language of the FWPCA, however, stated that should a state fail to promulgate its own standards "the Secretary *may*" create standards on behalf of that state, conveying that such standards were not absolutely required.[108] Should the Secretary choose to establish such standards, the FWPCA required that he give reasonable notice and convene with representatives from affected agencies, states, municipalities, and industries.[109] If after six months the state had not adopted the Secretary's standards, the Secretary's standards automatically took effect.[110] The creation of standards for interstate waterways aided regulation because procedures for enforcing interstate water quality standards were not as cumbersome as those required of merely "navigable" waterways (bodies of water within a state that do not travel into another).[111] Procedures used for regulating "navigable" waterways consisted of a time frame considerably longer than the "single six-month notice period" required for enforcement of an interstate water quality standard.[112]

Only a year later, more amendments ensued.[113] This time, Congress turned its focus to foreign policy considerations.[114] The 1966 FWPCA further expanded the scope of protection to waters in foreign countries where "pollution originating in the United States . . . endanger[ed] the

105. *Id.* § 5(c)(1), 79 Stat. at 907-08.

106. *See id.* (encouraging each state to "adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted").

107. *Id.* § 5(c)(2), 79 Stat. at 908.

108. *Id.* (emphasis added).

109. *Id.* The agencies involved included interstate agencies and federal departments and agencies. *Id.*

110. *Id.*

111. Barry, *supra* note 69, at 1116.

112. *Id.*

113. *See id.* at 1117.

114. *See id.*

health or welfare of persons" there.[115] Upon discovering such endangerment, the Secretary of State could request that the Secretary of the Interior[116] call a conference of all responsible agencies and representatives of the affected foreign country.[117] Additionally, the amendments authorized the Secretary of the Interior to require anyone polluting an interstate water to provide a report disclosing the "'character, kind, and quantity'" of the pollutants being discharged.[118] This addition to the FWPCA provided the Secretary of the Interior a better idea of what measures should be taken to reduce the specific pollutant discharged.[119] While this may seem like an obvious step, previous acts focused merely on abatement of the discharge of pollution rather than also providing a mechanism for facilitating cleanup of a pollutant that had already been discharged.[120]

C. Summary of Early Acts Laying the Groundwork for Future Legislation (1948-1966)

Overall, these early amendments relegated little power to the federal government. Congress continued to worry about allowing the federal government too much power, and the anxiety over a supply of clean water had not yet overpowered this concern. "[T]he awkwardly shared federal and state responsibility for promulgating" tolerable standards, combined with burdensome enforcement procedures, made the FWPCA inefficient and ineffective with regard to controlling water pollution.[121] The FWPCA

115. *Id.*

116. Reorganization Plan No. 2 of 1966, Pub. L. No. 90-86, § 1(a), 80 Stat. 1608, 1608. Reorganization Plan No. 2 of 1966 transferred the responsibility of enforcing the FWPCA to the Secretary of the Interior. *Id.*

117. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, § 206, 80 Stat. 1246, 1250 (amending Federal Water Pollution Control Act § 10(d)(2)). However, this applied only to foreign countries granting similar rights to the United States. Barry, *supra* note 69, at 1117 (citing Clean Water Restoration Act of 1966 § 206).

118. Barry, *supra* note 69, at 1117 (quoting Clean Water Restoration Act of 1966 § 208(b)).

119. *Id.* at 1117.

120. *Compare* Clean Water Restoration Act of 1966, 80 Stat. 1246, *with* Water Pollution Control Act, ch. 758, Pub. L. No. 80-845, 62 Stat. 1155 (1948), Federal Water Pollution Control Act Amendments of 1956, ch. 518, Pub. L. No. 84-660, 70 Stat. 498, Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204, *and* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903.

121. EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 202 (1976). For example, the 1952 Cuyahoga fire ignited due to oil that had built up from improper regulation of surrounding facilities. Adler, *supra* note 8, at 102-03. The fire caused damages somewhere between $500,000 and $1.5 million. *Id.*

lacked economic efficiency as well due to its focus solely on the tolerable effects of water pollution.[122] Prevention of pollution often costs less than the attempts to clean it up later.[123] Congress, however, placed little emphasis on prevention;[124] nor did it require a polluter to rectify damage caused by a discharge.[125] Rather, the only penalty for pollution consisted of possible abatement.[126] While abatement might be obnoxious to the polluter, the only real incentive provided by this penalty was not to get caught. The law allowed a person to continue to knowingly pollute until required by the government to stop. This "stop action" command was unlikely to occur considering the number of steps required to enforce any FWPCA provision.[127]

Even if the Secretary chose to bring an enforcement action against a polluter and managed to accomplish each step, there still existed an enormous obstacle to overcome: the lenient judicial standard.[128] One of the biggest problems with the FWPCA and its predecessor was that the judicial standard requiring consideration of economic and physical feasibility allowed "even the most heinous pollution" to continue if the court found the standard not met (that abatement of the pollution was not economically feasible for the polluter).[129]

Although Congress, in 1970, introduced civil and criminal penalties for violation of the FWPCA, these penalties applied only to discharges of oil.[130] While an important step, it was not enough. The FWPCA generally aided the polluters' "catch me if you can" attitudes due to the mild consequences

122. EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. at 202 (noting that the premise of the act rested on tolerable pollution levels).

123. 118 CONG. REC. 37,452 (1972) (statement of Rep. John A. Blatnik) ("[T]his undertaking is going to be costly, but the cost of inaction would be far greater, because ultimately we are going to have to do the job and the longer we delay, the worse the problem will become and the more expensive it will be.").

124. *See* EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. at 202.

125. *See* Barry, *supra* note 69, at 1121.

126. *Id*.

127. *Id.*

128. *Id.* at 1120.

129. *Id.*

130. *Id.* at 1119-21.

of enforcement.[131] The law lacked a true incentive not to pollute and permitted distinct advantages to those who did.[132]

D. 1972: Getting Serious About Clean Water

The FWPCA underwent major reforms in 1972.[133] Despite repeated amendments to the FWPCA in previous years, enforcement procedures remained "too lengthy and proved too vulnerable to political influence and polluter pressure."[134] During the twenty-three year life span of the FWPCA, only fifty-three enforcement actions arose.[135] Of those, only one actually reached a court.[136] Unfortunately, the lack of enforcement actions was not a sign of an increase in cleaner waters. Quite to the contrary, the waters of the United States continued to deteriorate, pushing Congress to take further action.[137] The 1972 amendments significantly increased the enforcement power of the FWPCA and more closely resemble our modern statute.

As water quality worsened, society's attitude toward the availability of clean water turned into one of genuine concern.[138] There was hope that this concern, in combination with new amendments, would generate advances in technology to improve the condition of the water quality.[139] One report to Congress spurred this hope by demonstrating that new sewage treatment technology had developed since the last FWPCA revision.[140] For example, a company known as Biospherics Incorporated developed new methods for successfully reducing phosphorous levels in sewage.[141] The removal of phosphorous from sewage in locations surrounding the bodies of water in the Great Lakes region and the Fox River enabled these waterways to meet

131. *See id.* at 1121. Because polluters knew the only real consequence of polluting was the possibility that they would be forced to stop polluting, there was an incentive to continue polluting until caught by the government. *Id.*

132. *See id.* For a more thorough look at the history of enforcement procedures up through 1970, including history and analysis, see Barry, *supra* note 69.

133. *Compare* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *with* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903.

134. HARVEY LIEBER, FEDERALISM AND CLEAN WATERS 20 (1975).

135. *Id.*

136. *Id.*

137. *Id.* at 15 (citing *Water Pollution Control Legislation—1971: Hearings on H.R. 11,896, H.R. 11,895 Before the Comm. on Pub. Works,* 92d Cong. 417 (1971) (statement of Sam Love)).

138. *See* 118 CONG. REC. 37,451 (1972) (statement of Rep. Gilbert Gude).

139. *See id*.

140. *Id.*

141. *Id.* Biospherics Incorporated reported to Congress that it created a PhoStrip method to reduce phosphorous in wastewater. *Id.*

Illinois's water quality standards.[142] Development of waste removal methods inspired Congress to believe cleaner waters could be a reality.[143] Such innovations are important because they show that, when necessary, people rise to the occasion. Society is more likely to meet demands once the demands are made.[144] With this background in mind, Congress forged ahead on the water quality frontier, fashioning drastic changes.

While Congress recognized the need for major changes, the proposed amendments concerned some (such as the President) that the costs of implementation would be too high.[145] To this, proponents retorted that the cost of inaction would be much greater.[146] Congressman John A. Blatnik observed that "[i]f we who are most responsible for the earth's pollution and best equipped to deal with it cannot afford to save the environment, who on earth can?".[147] Congressman Blatnik's answer came in the form of ambitious goals, demonstrating Congress's commitment to rectifying the

142. *Id.*

143. *Id.*

144. Innovation tends to come in times of need. For example, technological innovation soars during wartime, with examples including the development of nuclear power for commercial use, significant advances in the aircraft industry, and development of the Automatic Sequence Controlled Calculator (an early calculator) and the Selective Sequence Electronic Calculator (the precursor to early computers). *See* VERNON W. RUTTAN, IS WAR NECESSARY FOR ECONOMIC GROWTH?: MILITARY PROCUREMENT AND TECHNOLOGY DEVELOPMENT 13, 35, 92 (2006). "It is difficult to overemphasize the importance of the historical role that military procurement has played in the process of technology development." *Id.* at 3. Similar innovations are likely to occur in the development of controlling water quality once society is motivated to create them. A good example of environmental motivation is found within the field of air regulation. In 1970, Congress greatly modified the Clean Air Act to require a drastic reduction of car emissions by 1975, so that future emissions would "emit one-tenth the level of CO (carbon monoxide) and HC (hydrocarbons) compared to current [vehicle] models." *The 1970 U.S. Clean Air Act*, HONDA, http://world.honda.com/history/challenge/1972introducingthecvcc/text01/index.html (last visited June 30, 2013). In response, automakers vehemently contended that such a high standard would be impossible to meet in such a short period. *Id.* It is true that these ambitious deadlines for compliance were ultimately extended. *See* Arnold W. Reitze, Jr., *Mobile Source Air Pollution Control*, 6 ENVTL. LAW. 309, 331-32 (2000). One car company, however, was up to the challenge. *See The CVCC Engine System: An Immediate Success*, HONDA, http://world.honda.com/history/challenge/1972introducingthecvcc/text06/index.html (last visited June 30, 2013). Honda was the first car company to meet the new Clean Air Act standards. *Id.* Feeling the competition from the industry, Mazda came in second. *See id.*

145. *See* 118 CONG. REC. 37,452 (1972) (statement of Rep. John A. Blatnik).

146. *Id.*

147. *Id.*

degradation of America's waters.[148] The goals of the 1972 FWPCA were more straightforward than those of previous acts: to eliminate the discharge of pollutants into navigable waterways by 1985, and to ensure waters that provide a healthy environment for fish and other wildlife, as well as recreational uses for people, by 1983.[149] These goals could be achieved through policies that (1) prohibited "the discharge of toxic pollutants in toxic amounts," (2) provided federal financial assistance for public treatment works, (3) developed state programs to meet these goals, (4) promoted research of new technological developments for cleaner water, and (5) encouraged efficiency.[150] These goals were much clearer not only in their aim, but also as to how Congress wanted them accomplished.

In order to achieve the goals set out, the 1972 amendments authorized new enforcement procedures. The responsibility of enforcing water quality control standards shifted again with the creation of the Environmental Protection Agency (EPA) in December 1970.[151] The 1972 amendments appointed the Administrator of the EPA (the Administrator) the main

148. *Id.*

149. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 101(a), 86 Stat. 816, 816 (codified as amended at 33 U.S.C. § 1251(a)).

150. 33 U.S.C. § 1251(a), (f) (2012). The statute sets out the purpose:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
>
> (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
>
> (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; [and]
>
> (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans . . . .

Id. § 1251(a).

151. LIEBER, *supra* note 134, at 17-18.

enforcer.[152] Unlike previous versions of the FWPCA which required a hazard to human health in a neighboring state to result prior to bringing any sort of action, the 1972 amendments took a far more proactive approach. Instead, Congress introduced a permitting system known as the National Pollutant Discharge Elimination System (NPDES).[153] This new permitting system was similar to one instituted nearly seventy-three years earlier in the Rivers and Harbors Appropriations Act of 1899.[154] NPDES became the primary enforcement tool for the EPA.[155] In an attempt to avoid preempting states' authority, the amendments allowed states to be in charge of issuing their own permits if they created their own permitting programs.[156] However, the permitting program created by each state was subject to requirements set by the FWPCA and the Administrator.[157]

The concept of state standards created confusion. States were unsure of whether their approved permit programs applied to federal installations located in their respective states.[158] In particular, California and Washington became frustrated that the federal government did not believe it was necessary for federal dischargers to comply with state permit program requirements.[159] The Supreme Court found that the 1972 FWPCA amendments did not clearly state Congress's intent to subject federal

152. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 101(d), 86 Stat. at 816.

153. *Id.* § 402, 86 Stat. at 880-83.

154. *Compare id.*, *with* Rivers and Harbors Appropriation Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152. Section 13 of the Rivers and Harbors Appropriation Act of 1899 (also known as the Refuse Act) required that a permit be obtained prior to discharging or depositing refuse other than liquid street sewage into a navigable waterway. Rivers and Harbors Appropriations Act of 1899, § 13, 30 Stat. at 1152; Diane D. Eames, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 58 CALIF. L. REV. 1444, 1445-46 (1970). Unlike the CWA, the primary purpose of the Refuse Act was not to ensure cleaner waters, but to ensure that navigation was not impeded by buildup of refuse in the rivers and harbors. Rivers and Harbors Appropriations Act of 1899, § 10, 30 Stat. at 1151.

155. *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215, 276 (2003); 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4:26 (2012).

156. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 402(b), 86 Stat. at 880-81.

157. *Id.* § 402(b)-(c), 86 Stat. at 880-82.

158. *See* EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 202 (1976).

159. *Id.* at 213. Both California and Washington had stricter standards than those of the national program under the FWPCA. *See id.* at 218; *see also* Cal. *ex rel.* State Water Res. Control Bd. v. EPA, 511 F.2d 963, 972 (9th Cir. 1975), *rev'd*, 426 U.S. 200 (1976); Brief for the Respondent, State of California at 53-54, EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200 (1975) (No. 74-1435), 1975 WL 173542.

installations to state regulation, so the federal dischargers were not required to obtain state NPDES permits before polluting.[160]

Regardless of whether an entity was subject to federal or state permitting, the 1972 amendments expressly provided that the Administrator was authorized to bring an action when violations of either were discovered.[161] Unlike previous versions, the 1972 amendments introduced monetary penalties for noncompliance with either the NPDES program or a compliance order issued by the Administrator.[162] Establishment of penalties for violators signified an important change in the enforcement procedures of the FWPCA. Although the penalties were significantly less than they are today, they were a vast improvement over previous penalties, which were nonexistent save those for oil discharge.[163] Rather than merely requiring abatement to prevent future pollution, monetary penalties provided punishment for past acts of wrongful conduct[164] and were a more realistic deterrent to discharging pollutants into waterways.

New enforcement procedures authorized the Administrator, upon learning of a violation, to either issue an administrative compliance order[165] or initiate a civil judicial enforcement action (with possible consequences of civil penalties).[166] Administrative compliance orders required either abatement or limitation of the pollution.[167] Accompaniment of monetary penalties was not authorized under a compliance order.[168] Civil and criminal penalties, however, were available in the event that issuance of a compliance order was not enough.[169] Monetary penalties were imposed

160. EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. at 227. This decision was later rectified by Congress. *See infra* text accompanying notes 200-202.

161. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 309(a)(3), 86 Stat. at 859 ("Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, or 308 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.").

162. *Id.* § 309(b)-(d), 86 Stat. at 860.

163. Barry, *supra* note 69, at 1121.

164. *See* Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 309(c)-(d), 86 Stat. at 860 (introducing monetary penalties for violations).

165. *Id*. § 309(a)(2)(A), 86 Stat. at 859.

166. *Id.* § 309(b), 86 Stat. at 860.

167. *Id.* § 309(a)(1), 86 Stat. at 859.

168. *See id.* § 309(a)(1)-(3), 86 Stat. at 859; *see also infra* note 170.

169. *See* Federal Water Pollution Control Act Amendments of 1972, § 309(c)-(d), 86 Stat. at 860.

through enforcement actions.[170] Civil penalties allowed for a maximum fine of $10,000 per day that a violation of the FWPCA continued.[171] If the Administrator found the violation was either willful or negligent, criminal penalties could also be assessed.[172] Under willful or negligent criminal penalties, the perpetrator could be fined anywhere between "$2,500 . . . [and] $25,000 per day of violation, or by imprisonment for not more than one year, or by both."[173] For recurrence of a violation, the potential penalties increased to "$50,000 per day of violation, or by imprisonment for not more than two years, or by both."[174] Criminal penalties might also be assessed for anyone who made false statements on his application for a permit, allowing a fine up to $10,000, imprisonment up to six months, or both.[175] Possible punishments of high fines and prison time significantly increased the Administrator's power to carry out enforcement of the clean water regulations.

In addition to providing incentive for polluters to follow the law, enforcement procedures became easier as well. Upon learning of a water pollution violation, the Administrator was still required to notify the alleged polluter and the state where the pollution originated.[176] However, if the state did not take action within thirty days after receiving notice, the Administrator could immediately issue a compliance order or bring a civil suit.[177] For example, in *United States v. Phelps Dodge Corp.*, the defendant was charged "with polluting navigable waters of the United States."[178] The defendant argued that prior to bringing a criminal enforcement action the Administrator must first issue an abatement order, allowing the defendant time to respond.[179] The court held that while the 1972 FWPCA required the

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170. *Id.*; *see also* LYNN M. GALLAGHER & LEONARD A. MILLER, CLEAN WATER HANDBOOK 182 (2d ed. 1996). This is because the order itself is only a command, not an adjudication. *Id.* To enforce the order (if the violator has not complied), the agency must bring suit in a federal district court. *Id.* However, non-compliance with an order may give rise to a criminal action for "knowingly" violating the order. *Id.*

171. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 309(d), 86 Stat. at 860. The amount of possible civil penalty is now an amount "not to exceed $25,000 per day." 33 U.S.C. § 1319(d).

172. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 309(c)(1), 86 Stat. at 860.

173. *Id.*

174. *Id.*

175. *Id.* § 309(c)(2), 86 Stat. at 860.

176. *Id.* § 309(a)(1), 86 Stat. at 859.

177. *Id.*

178. 391 F. Supp. 1181, 1182 (D. Ariz. 1975).

179. *See id.* at 1183.

Administrator to act upon learning of a violation, he had discretion in his response and he was not required to bring an abatement order prior to bringing a civil or criminal action against a defendant.[180]

Allowing the Administrator to bring suit at this point in the legal procedure significantly shortened the process required to take action. No longer was he required to wait for complaints from states or to go through the process of requesting state attorneys general to bring suit.[181] The Administrator now possessed the authority to bring suit himself.[182] Similarly, if the Administrator found that a state was not implementing its own permit program, evidenced by pervasive statewide pollution, then the Administrator could notify the state that it had thirty days to begin implementation.[183] Failure to do so could result in the issuance of compliance orders or civil actions brought by the Administrator against individuals.[184] This would trigger a "period of 'federally assumed enforcement.'"[185] Once the Administrator issued any order, a copy had to be sent not only to the Administrator of the state where the pollution occurred, but also to any other states potentially affected by the pollution.[186] The orders had to be delivered by personal service, state the nature of the violation, and specify a time for compliance not to exceed thirty days.[187]

In addition to permitting requirements for discharges of pollutants into navigable waterways, the 1972 amendments created a special permitting requirement if the discharge involved dredged or fill material.[188] Unlike the

180. *Id.* at 1184.

181. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 309(a)(1), 86 Stat. at 859.

182. *Id.*

183. *Id.*

184. *See id.*

185. *Id.* § 309(a)(2), 86 Stat. at 859.

186. *Id.* § 309(a)(4), 86 Stat. at 859.

187. *Id.*

188. *Id.* § 404(a), 86 Stat. at 884. "'[D]redged material' and 'fill material' are two separate concepts." Sylvia Quast, *Regulation of Wetlands: Section 404*, *in* THE CLEAN WATER ACT HANDBOOK 113, 114 (Mark A. Ryan ed., 3d ed. 2011). Both are regulated under section 404. *See* Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 404(a), 86 Stat. at 884. "Fill material" is any material originating from outside the body of water in which it is placed, such as rocks or dirt from another location which were not originally present. Quast, *supra*, at 114. "Dredged material" is "'material that is excavated or dredged from waters of the United States.'" *Id.* (citation omitted). It originates in the body of water in question and does not require that any change in the water level take place. *Id.* The difference between dredged and fill material is important because incidental fallback of

NPDES permitting system, section 404 permits for dredged and fill material were administered by the Secretary of the Army.[189] Prior to authorization of a permit for dredged or fill material, the Secretary of the Army was required to issue public notice and provide an opportunity for public hearings.[190] Presumably, this was done to allow people who might be negatively affected to comment on the proposed permit.[191] Part of the permitting condition included specifying a particular disposal site for the discharge of dredged or fill material.[192] Despite the power of the Secretary of the Army to issue these permits, the Administrator had the ability to override the Secretary of the Army's decision if the Administrator found that the adverse impact of discharging in a given location would be too great.[193] The Administrator looked to the overall goals of the 1972 amendments when deciding whether the adverse impact would be too great.[194] The impact on water quality for the purposes of providing drinking water, recreation, and water healthy enough to sustain aquatic life were important factors in his decision-making.[195] This, however, was not a wholly unilateral decision. Prior to overturning the Secretary of the Army's decision, the Administrator consulted with him to discuss why they came to different conclusions.[196]

Out of the 1972 amendments, section 404 probably created the most controversy in later enforcement actions. Initially section 404 was thought to apply only to navigable waterways—"'those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.'"[197] But in 1975 the Army

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dredged material related to an activity is not considered a violation of the 1972 amendments, whereas the addition of minimal fill material can violate section 404. *Id.* at 114-15.

189. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 404(a), 86 Stat. at 884.

190. *Id.*

191. *See* Quast, *supra* note 188, at 121.

192. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 404(b), 86 Stat. at 884.

193. *Id.* § 404(c), 86 Stat. at 884.

194. *See id.* § 101(a)(2), 86 Stat. at 816.

195. *Id.* § 404(c), 86 Stat. at 884. The Administrator could take into consideration such factors as the "adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Id.*

196. *Id.*

197. *SWANCC*, 531 U.S. 159, 168 (2001) (quoting 33 C.F.R. § 209.120(d)(1) (2000)).

Corps of Engineers reinterpreted section 404 to apply to the filling of wetlands, thereby expanding what was subject to regulation.[198]

Overall, the 1972 amendments to the FWPCA represented an important change in social attitudes. The complexity of the amendments showed increasing recognition of the importance of clean water. The permitting systems provided a much more efficient means for achieving clean water goals than did the mere abatement penalty used in previous acts. Permits allowed the EPA to keep track of who made discharges and what they discharged, making it easier to hold polluters liable for harm they caused. Expansive measures allowed by the FWPCA caused a significant increase in cases brought against polluters.[199] The complexity of the FWPCA once the 1972 amendments took effect left significantly less to be improved upon than previous acts, and, as a result, only two large amendments were subsequently made.

E. 1977 Amendments

Upset with the outcome in *EPA v. California ex rel. State Water Resources Control Board*,[200] Congress clarified its intent in 1977 to ensure federal compliance with state standards and pollution control requirements. Congress amended section 313(a) of the FWPCA to clearly express that when the federal government is engaged in an activity resulting in the discharge or runoff of pollutants, the federal government must comply with state requirements "in the same manner, and to the same extent as any

198. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985) ("[I]n 1975 the Corps issued interim final regulations redefining 'the waters of the United States' to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce." (quoting 40 Fed. Reg. 31320 (1975))).

199. For example, a Westlaw search of "Federal Water Pollution Control Act" shows there were over forty cases in federal court in the year following passage of the revamped Federal Water Pollution Control Act. Westlaw Next Search (go to "advanced" search, under "find documents that have . . ." type in and use quotation marks around the phrase "Federal Water Pollution Control Act;" then go to "date," click "date range," and use dates from 1-1-1973 to 1-1-1974; click "search."), https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20%22Federal%20Water%20Pollution%20Control%20Act%22%20%26%20DA(aft%2012-31-1972%20%26%20bef%2001-01-1975)&jurisdiction=ALLFEDS&saveJuris=False&contentType=CASE&querySubmissionGuid=i0ad7051c0000013c9268c904bb50b5a6&startIndex=1&searchId=i0ad7051c0000013c9268c904bb50b5a6&simpleSearch=False&transitionType=Search&contextData=(sc.Search). This is more cases in one year than in the previous two decades combined.

200. 426 U.S. 200 (1976).

nongovernmental entity."[201] This decision by Congress ensured that no state would be penalized for having standards more stringent than those required by the federal government.[202]

Congress entitled the new amendments the "Clean Water Act of 1977," thereby renaming the FWPCA to "The Clean Water Act," as it is now more commonly known.[203] Despite statutory amendments to make federal dischargers comply with the sometimes stricter state standards, the 1977 amendments generally broadened the scope of the CWA's jurisdiction. The CWA aimed to tighten holes remaining from the 1972 FWPCA.[204] Realizing that much work was still needed in the field of compliance, Congress created a compromise.[205] It granted the Administrator the authority, where necessary, to grant an extension to certain violators not in compliance with CWA regulations.[206] This extension ensured polluters would have notice of the new requirements and provided them a reasonable amount of time to comply. People eligible for extensions included those

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201. Clean Water Act of 1977, Pub. L. No. 95-217, § 61(a), 91 Stat. 1566, 1598 (codified at 33 U.S.C. § 1323(a)(1)); *see* United States v. Pa. Envtl. Hearing Bd., 584 F.2d 1273, 1280-81 (3d Cir. 1978) (referencing the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 313, 86 Stat. 816, 875, which provides that "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges").

202. *See* EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. at 209-10. The State of Washington attempted to force federal facilities within the state to comply with state permitting requirements. *Id.* After the federal entities Washington tried to regulate complained, the EPA decided that Washington's permitting program was no longer compliant with the federal NPDES permitting program. *See id.* at 210.

203. Clean Water Act of 1977, § 1, 91 Stat. at 1566. "The Environmental Protection Agency (EPA) still uses both terms. *Compare* 40 C.F.R. §§122.1(a), 122.2 (2003), *with* 40 C.F.R. § 104.2(a) (2003)." Robert E. Beck, *Water and Coal Mining in Appalachia: Applying the Surface Mining Control and Reclamation Act of 1977 and the Clean Water Act*, 106 W. VA. L. REV. 629, 633 n.19 (2004).

204. MALCOLM SIMMONS, CONG. RESEARCH SERV., IB77043, WATER POLLUTION: AMENDING THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972, at 1 (1977).

205. *See id.* at 2. Due to the lack of manpower at both the state and federal levels and the lack of guidance from the EPA, CWA obligations were not carried out at the rate Congress previously expected. *Id.*

206. *Id.* at 3.

who "acted in good faith, and . . . made a commitment (in the form of contracts or other securities)" to be in compliance by 1979.[207] Also, those who applied for permits prior to 1974 and those already constructing facilities to aid in compliance were eligible for extensions.[208] As the polluters worked to comply, the extension authorized the Administrator to allow those in violation of the effluent limitation standards to release pollutants into public treatment works facilities.[209] Permission, however, was only given if it authorized "the most expeditious and appropriate means of compliance."[210]

To further encourage future compliance, Congress added to the list of those who could be held liable under the CWA. Section 54(b) of the 1977 amendments allowed for indirect liability against owners or operators of a treatment works facility.[211] This amendment allowed the Administrator to bring a civil action against not only the person wrongfully discharging pollutants, but also the operator of a treatment works facility.[212] The operator could be held liable if he knew of the violation and failed to discourage the polluter.[213] Holding the operator of a treatment works facility liable for inaction ensured the maintenance of healthier water systems.

The 1977 amendments focused heavily on the section 404 permitting requirements for discharging dredged or fill material.[214] The amendments imposed a five-year limit on the life of a permit beginning from the day it was issued.[215] This helped clarify the length of time a permit holder could

207. Clean Water Act of 1977, sec. 56(c), § 309(a)(5)(B), 91 Stat. at 1593; *see also* SIMMONS, *supra* note 204, at 3 (stating that case-by-case determinations were to be made for all extensions, that municipalities might obtain a five-year extension from the original July 1, 1977, deadline, and that industries had three options). Industries might comply on time, obtain an eighteen-month extension, or, where an industry was working to invent a creative technology, get more than five years before being required to meet compliance standards. *Id.*

208. Clean Water Act of 1977, sec. 56(c), § 309(a)(5)(B), 91 Stat. at 1593.

209. *Id.* § 309(a)(6), 91 Stat. at 1593.

210. *Id.*

211. *Id.* sec. 54(b), § 309(f), 91 Stat. at 1591.

212. *Id.*

213. *Id.* If "an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 307, the Administrator may notify the owner or operator of such treatment works and the State of such violation." *Id.* If, after thirty days, "the owner or operator of the treatment works does not commence appropriate enforcement action . . . the Administrator may commence a civil action . . . against the owner or operator of such treatment works." *Id.*

214. *See id.* sec. 67(b), § 404(e)(2), 91 Stat. at 1600.

215. *Id.*

continue discharging dredged and fill material. By requiring permit holders to reapply every five years, Congress took into consideration that environmental conditions can change.[216] A person once eligible for a permit may not be eligible five years later, particularly if the discharge of pollutants had unexpected consequences.[217]

The amendments also carved out multiple exceptions for various types of polluters.[218] Such exceptions from the permit requirements included "discharge[s] of dredged or fill material" that were (1) a result of normal agricultural activities, (2) necessary to maintaining and "emergency reconstruction of . . . serviceable structures such as dikes, dams, levees, . . . and transportation structures," or (3) for construction purposes, so long as any discharge did not interfere with the health and integrity of navigable waters.[219]

Similar to the NPDES program, the 1977 amendments to section 404 introduced state cooperation plans for dredged and fill material.[220] If a state desired greater autonomy and preferred to implement its own permitting

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216. *See id.*

217. *See id.*

218. *See id.* § 404(f)(1)(A)-(F), 91 Stat. at 1600-01.

219. *Id.* Discharge permits were not required where discharges were:

> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
>
> (D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
>
> (E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
>
> (F) resulting from any activity with respect to which a State has an approved program under section 208(b)(4) . . . .

Id.

220. *See id.* § 404(g)(1), 91 Stat. at 1601.

scheme regarding dredged and fill material, then the state's governor could create a plan to submit to the EPA Administrator.[221] The plan had to detail the proposed program and include guarantees by the state attorney general that the state possessed agencies authorized to carry out the permitting plan.[222] Once approved, the state had control over issuing permits and gained oversight to any permits pending with the Secretary of the Army prior to the granting of the state program.[223] Also similar to the NPDES program, if the Administrator found at any time that the state was not administering the program appropriately, the Administrator notified the state of its noncompliance.[224] If the state failed to take corrective action within ninety days of notification, the state program approval was withdrawn.[225] The Secretary of the Army would then again take over the issuing of permits.[226]

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221. *Id.* The jurisdiction of a state, however, was limited. *See id.* Waters not eligible as part of the state permit program were those:

> [W]hich are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto . . . .

Id.

222. *Id.*

223. *Id.* § 404(h)(4), 91 Stat. at 1603.

224. *Id.* § 404(i), 91 Stat. at 1603.

225. *Id.*

226. *Id.* The amendments authorized the Secretary of the Army to use any of the enforcement procedures under section 56 of the CWA against any section 67 violators. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 309, 86 Stat. 816, 859 (*amended* by Clean Water Act of 1977, sec. 56, § 309, 91 Stat. at 1592). However, if the Secretary wished to use other enforcement tools, he was in luck. Violations of dredged and fill material permits under section 67 had their own additional set of enforcement tools. Section 67 specifically authorized the Secretary to commence a civil action, including seeking an injunction. Clean Water Act of 1977, sec. 67(b), § 404(s)(3), 91 Stat. at 1605. The Secretary could bring this action "[w]henever on the basis of *any* information available to him" he discovered a violation. *Id.* § 404(s)(1), 91 Stat. at 1605 (emphasis added). This comprehensive language appeared to give the Secretary a broad range of tactics for discovering permit violations. After determining that a violation existed, the amendments required that the Secretary give notice to the state if he planned to commence action against the violator. *Id.* § 404(s)(3), 91 Stat. at 1606. Punishment for a violation ranged from $2500 per day up to $25,000 per day for persons found to have committed the violation either willfully or negligently. *Id.* § 404(s)(4)(A), 91 Stat. at 1606. In addition, such person could also be imprisoned for up to a year. *Id.* For a second conviction, the potential maximum fine and possible prison time doubled. *See id.*

Congress did not significantly alter the NPDES permitting requirements through the 1977 amendments. In 1983, however, the EPA promulgated rules to facilitate CWA enforcement. The rule requires those holding NPDES permits to report their compliance to the agency.[227] These reports are known as Discharge Monitoring Reports (DMRs).[228] They inform the agency to what extent the permit holder discharged pollutants in accordance with its permit.[229] Dischargers communicate their DMRs to the EPA at specified intervals noted on individual permits.[230] For states with EPA approved NPDES programs, dischargers may send reports to the appropriate state agency instead.[231] Generally, directions regarding where to send DMRs are located in the letter granting the permit, as well as on the back of the DMR.[232] DMRs are a practical way to aid the EPA in regulation and help permit holders remain aware of their discharges.

By increasing the time allowed for polluters to make good-faith efforts to comply, Congress conveyed its awareness that compliance with heightened standards would not occur overnight. Potential polluters needed additional time to change their practices. In addition, the EPA needed time to adjust allocation of its resources to ensure it had enough manpower to carry out enforcement.[233] This flexibility shows congressional sympathy and is a realistic way to reach the goals established in 1972.

F. 1987 Amendments

Despite the changes made to the CWA, Congress determined that the EPA Administrator and the Secretary of the Army still lacked enough enforcement power to sufficiently regulate the discharge of pollutants into

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Furthermore, "[a]ny person who violate[d] any condition or limitation in a permit . . . and any person who violate[d] any order issued by the Secretary . . . [was] subject to a civil penalty not to exceed $10,000 per day of such violation." *Id.* § 404(s)(5), 91 Stat. at 1606.

227. 40 C.F.R. § 122.41(*l*)(6) (1983).

228. *Id.* § 122.41(*l*)(4)(i).

229. *See id.* § 122.41(*l*)(4), (7).

230. *Id.* § 122.41 (*l*)(5).

231. *See* U.S. EPA, NPDES REPORTING REQUIREMENTS HANDBOOK 27 (2004), *available at* http://www.deq.state.ok.us/wqdnew/forms/DMR-Manual.pdf.

232. *See, e.g.*, Letter from Bruce Fielding, Envtl. Scientist Manager, La. Dep't of Envtl. Quality, to Charles Kendrick, Halliburton Energy Servs., Inc. (July 13, 2012), *available at* http://edms.deq.louisiana.gov/app/doc/view.aspx?doc=8456198&ob=yes&child=yes (providing the specific location and agency where DMRs for the permitted facility should be sent).

233. SIMMONS, *supra* note 204, at 2.

the waters of the United States.[234] As a result, in 1987, important amendments were proposed that significantly increased maximum penalties and introduced administrative penalties as a new mechanism for enforcing CWA violations. In addition to changing how violations could be enforced, Congress also added nonpoint pollution to the list of pollutants the EPA can regulate.[235] While these amendments promised to play an important role in regulating our nation's waters, President Reagan vetoed the 1987 Water Quality Act, citing overspending as his main concern.[236] Yet, the members of Congress found that "Americans want[ed] clean water."[237] They saw spending as an investment in the future of America.[238] Despite the presidential veto, the bill enjoyed tremendous endorsement from both Houses of Congress.[239]

Although the President was concerned that the regulating of nonpoint source pollution put too much power in the hands of the federal government,[240] the enforcement procedures allowed for regulation that gave

234. *See* Water Quality Act of 1987, Pub. L. No. 100-4, sec. 312-314, § 309, 101 Stat. 7, 42, 45, 46 (codified at 33 U.S.C. § 1319) (adding more aggressive enforcement mechanisms).

235. *Id.* sec. 316, § 319, 101 Stat. at 52 (codified at 33 U.S.C. § 1329); *see also* 133 CONG. REC. 2799 (1987) (statement of Sen. Baucus) (citing EPA reports that identified nonpoint source pollution as the cause of over half the remaining problems with water quality).

236. 133 CONG. REC. at 2795-96 (President Reagan's veto message dated Jan. 30, 1987).

237. *See id.* at 2799 (statement of Sen. Burdick).

238. *Id.*

239. *Id.* at 2798 (statement of Sen. Chafee). The House of Representatives overrode the veto with a 401 to 26 vote. *Id.* at 2799. The Senate overrode the veto by a vote of 86 to 14. Bernard Weinraub, *Senate Overrides Water Bill Veto by 86-to-14 Vote*, N.Y. TIMES, (Feb. 5, 1987), http://www.nytimes.com/1987/02/05/us/senate-overrides-water-bill-veto-by-86-to-14-vote.html.

240. 133 CONG. REC. at 2796 (President Reagan's veto message dated Jan. 30, 1987). The example used by President Reagan was that of farming. *See id.* He felt that by "controlling non-point source pollution," the effects would allow the EPA too much control:

> [I]f farmers have more run-off from their land than the Environmental Protection Agency decides is right, that Agency will be able to intrude into decisions such as how and where the farmers must plow their fields, what fertilizers they must use, and what kind of cover crops they must plant. To take another example, the Agency will be able to become a major force in local zoning decisions that will determine whether families can do such basic things as build a new home. That is too much power for anyone to have, least of all the Federal Government.

Id.

power back to the states.[241] Control of nonpoint source pollution actually limited federal government interference.[242] While the amendments provided the states authority to manage nonpoint source pollution, they also permitted each individual state to decide whether to implement such a program.[243] If a state chose not to create a control program concerning nonpoint source pollution, then no program existed in that state and thus there was no possibility of incurring consequences by the federal government.[244]

For all other discharges of pollution, namely those previously subject to EPA regulation, it appeared there were no arguments about expanding the available enforcement procedures. It was noted that, in modern times, "administrative penalties [were] commonplace."[245] Administrative penalties provided much more enforcement power. Following the 1987 amendments, the EPA could assess an administrative penalty for any matter on which a civil action could be brought, including violations of section 404 dredge and fill permits issued by a State.[246] The Secretary of the Army, however, retained enforcement power over violations of section 404 permits that were issued by him.[247]

The 1987 amendments directed that "the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs" issue administrative penalties in the form of either a class I or class II civil penalty.[248] Class I penalties provide a civil penalty up to $10,000 per violation; however, the total amount of penalties to be issued cannot exceed $25,000.[249] After assessing a fine, the Administrator (or the Secretary) must alert the polluter, in writing, of the prospective penalty.[250] The polluter then, upon receipt of the notice, has thirty days to request a

241. *Id.* at 2799 (statement of Sen. Chafee).

242. *See id.*

243. *Id.* at 2802 (statement of Sen. Mitchell).

244. *Id.*

245. *Id.* at 2800 (statement of Leon G. Billings). Congress found the statement by Mr. Billings (a former congressional aide) representative of its feelings regarding the veto override such that it included his remarks in the *Congressional Record*. *See id.* at 2799 (statement of Sen. Baucus).

246. Water Quality Act of 1987, Pub. L. No. 100-4, sec. 314(a), § 309(g)(1)(A), 101 Stat. 7, 46 (codified at 33 U.S.C. § 1319 (2012)).

247. *Id.* § 309(g)(1)(B), 101 Stat. at 46.

248. *Id.* § 309(g)(1), 101 Stat. at 46.

249. *Id.* § 309(g)(2)(A), 101 Stat. at 46.

250. *Id.*

hearing.[251] Agency hearings are usually conducted in accordance with guidelines set out in the Administrative Procedure Act (APA).[252] Sections 554 and 556 of the APA, specifically, provide guidelines for formal adjudication by an agency.[253] However, neither section of the APA governs hearings for class I penalties under the CWA.[254] Despite lack of regulation by the APA, the hearing should still provide the defendant with "a reasonable opportunity to be heard and to present evidence."[255] Class II penalties are also capped at $10,000 per day for an ongoing violation; but the penalty may accumulate up to $125,000.[256] Unlike class I penalties, the severity of class II penalties makes them subject to section 554 of the APA, which provides for agency formal adjudication.[257]

The CWA provides a list of factors for the Administrator to consider when assessing an appropriate penalty.[258] Such factors include the nature and circumstances of the violation, the "extent and gravity of the violation," previous history of the polluter regarding similar violations, culpableness, and any "economic benefit . . . resulting from the violation."[259] This list is not exhaustive and other factors may be considered.[260]

Administrative sanctions may be assessed with greater ease than civil actions.[261] However, because they are more efficient and assessed more quickly, additional proceedings follow the issuance of administrative penalties.[262] Once the Administrator or Secretary decides to issue a penalty, he must notify the public and allow the public a reasonable opportunity for comment.[263] Public notice allows interested parties to intervene, either on behalf of or against the violator.[264] Anyone who chooses to comment "shall

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251. *Id.*

252. *See* 5 U.S.C. §§ 554, 556 (2012).

253. *See id.*

254. *See* Water Quality Act of 1987, sec. 314(a), § 309(g)(2)(A), 101 Stat. at 46.

255. *Id.*

256. *Id.* § 309(g)(2)(B), 101 Stat. at 46.

257. *See id.*; 5 U.S.C. § 554.

258. *See* Water Quality Act of 1987, sec. 314(a), § 309(g)(3), 101 Stat. at 47.

259. *Id.*

260. *See id.*

261. William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1, 3 (1993). Administrative penalties can be assessed by the agency without following formal procedures set out in the APA or involving the Department of Justice. *Id.* at 2-3.

262. *See* Water Quality Act of 1987, sec. 314(a), § 309(g)(4), 101 Stat. at 47.

263. *Id.*

264. To determine when intervention is appropriate in civil proceedings, see FED. R. CIV. P. 24.

be given notice of any hearing" and allowed "a reasonable opportunity to be heard and to present evidence."[265] Once such comments have been made or, at least, the opportunity for comments has been provided, the order may be issued.[266] Once the order is sent to the polluter, it becomes final within thirty days unless the polluter applies for a hearing or seeks judicial review.[267] If the Administrator denies the request for a hearing, the order becomes final within thirty days following the denial of the hearing request.[268]

Although administrative penalties quickly became the enforcement tool of choice, the 1987 amendments also increased the price of polluting under the civil and criminal penalties, making them attractive reinforcement tools.[269] Criminal penalties were broken down by type into "negligent violations," "knowing violations," and "knowing endangerment."[270] The original penalty for negligent violations was retained from the earlier 1972 amendments.[271]

For a knowing violation, however, the polluter can be charged from $5000 to $50,000 for each day the violation continued, be imprisoned for up to three years, or both.[272] The potential penalty for a second-time offender increases to "$100,000 per day of violation" and incarceration of up to six years.[273] It is not necessary that the polluter intend or even know he is violating the law, only that he is aware of what he is doing and conscientious of his actions which cause the violation.[274] Because there is

265. Water Quality Act of 1987, sec. 314(a), § 309(g)(4)(B), 101 Stat. at 47.

266. *See id.*

267. *Id.* § 309(g)(5), 101 Stat. at 47 ("An order . . . shall become final 30 days after its issuance unless a petition for judicial review is filed . . . or a hearing is requested . . . .").

268. *Id.*

269. *See id.* sec. 312-313, §§ 309(c)-(d), 404(s), 101 Stat. at 42-46.

270. *See id.* sec. 312, § 309(c), 101 Stat. at 42-44.

271. *Compare id.*, *with* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 309(c)(1), 86 Stat. 816, 860 (codified as amended at 33 U.S.C. § 1319(c)(1) (allowing for punishment "by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both").

272. Water Quality Act of 1987, sec. 312, § 309(c)(2), 101 Stat. at 43 (codified as amended at 33 U.S.C. § 1319(c)(2)).

273. *Id.*

274. *See* United States v. Wilson, 133 F.3d 251, 262 (4th Cir. 1997) (holding that while defendant must have had knowledge of his actions which constituted the offense, it need not be shown that he knew his actions were illegal); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1994) (holding that "knowingly" did not require defendants know their act violated the CWA, but only required that they were aware of their actions), *amending on denial of reh'g and reh'g en banc* 1 F.3d 1523 (9th Cir. 1993).

no limit to how many days' worth of fines one may accumulate, the potential consequences of knowingly polluting make it a highly serious offense.[275]

A new category for knowing endangerment presented the most severe punishment of the criminal penalties.[276] Knowing endangerment refers to a polluter who knowingly violates the CWA and "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury" through his violation.[277] For such knowledge to be imputed to the polluter, the polluter himself needs an "actual belief or awareness" that the injury will result.[278] Anyone who knowingly endangers faces a potential fine of up to $250,000, up to fifteen years imprisonment, or both.[279] Similar to penalties for knowing violations, the penalty for a second knowing endangerment offense doubles.[280] While these fines may seem steep, hefty fines are necessary to ensure that large polluters who have the potential to harm many lives feel pressure to comply with the law. In particular, older statutes provided greater incentive for a large polluter to weigh the economic benefits of polluting and determine that the financial pros outweighed the environmental and legal cons.[281] Large penalties for polluting are a deterrent to those attempting to measure the worth of a human life against any economic benefit that might be gained from polluting.

Criminal penalties should be used only where a violation is sufficiently serious.[282] Criminal sanctions are the most difficult to bring because they

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275. *See* Water Quality Act of 1987, sec. 312, § 309(c), 101 Stat. at 42-45.

276. *See id.* § 309(c)(3)(A), 101 Stat. at 43 (codified as amended at 33 U.S.C. § 1319(c)(3)).

277. *Id.*

278. Andrew Oliveira et al., *Environmental Crimes*, 42 AM. CRIM. L. REV. 347, 386 (2005).

279. Water Quality Act of 1987, sec. 312, § 309(c)(3)(A), 101 Stat. at 43. If the "person" convicted is in fact an organization, the potential penalty increases to one million dollars. *Id.*

280. *Id.*

281. *See supra* text accompanying note 129.

282. *See* U.S. EPA, *Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies*, 4-5 (Aug. 28, 1987), *available at* http://www.epa.gov/compliance/resources/policies/civil/cwa/cwacivcriminenfremed-mem.pdf. The determination as to whether criminal penalties should be imposed ought to take into consideration the following factors: (1) whether the conduct was knowing or negligent, (2) whether the conduct was egregious in nature, (3) whether resulting environmental harm was a foreseeable consequence of the conduct, (4) whether the conduct was of a type that society has a particular interest in deterring, (5) whether the violator (polluter) was in a category that should be specially deterred from such conduct, (6) whether the pollutant

cannot be brought solely through EPA officers.[283] To bring a criminal action under the CWA, the EPA must work with the Environmental Crimes Section at the Department of Justice (DOJ).[284] Upon referring the criminal violation to DOJ, the matter comes under DOJ discretion.[285] It is then up to the DOJ to determine whether to file criminal charges in federal court.[286] Because of this referral process, many of the recommended cases are not prosecuted.[287] Differing priorities, resources, and expertise contribute to DOJ decisions not to prosecute alleged environmental crimes.[288]

In addition to criminal monetary penalty increases, civil monetary penalties also increased. Although civil penalties were originally capped at $10,000 per day of violation, the 1987 amendments increased this figure to a possible $25,000 per day of violation.[289] The pre-1972 standard required a court to determine the feasibility of abatement and the economic hardship it would cause.[290] The current standard instead requires a court to consider the economic benefit gained from polluting and to hold such benefit against the polluter when determining an appropriate fine.[291]

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was a particularly dangerous material, and (7) who was responsible for the conduct. *Id.* These factors are only considerations, they are neither wholly determinative nor exclusive; other factors may also be considered. *Id.* at 5.

283. David A. Barker, Note, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1404 (2002).

284. *Id.* at 1404-05. There are a significantly disproportionate number of environmental criminal investigators at the EPA versus the number available at DOJ. *See id.* at 1404. There are nearly two hundred criminal investigators at the EPA, whereas the DOJ has only about thirty. *See id.*

285. *Id.* at 1405.

286. *Id.*

287. *Id.*

288. *Id.*

289. *See* Water Quality Act of 1987, Pub. L. No. 100-4, sec. 313(b)(1), § 309(d), 101 Stat. 7, 45.

290. *See supra* text accompanying note 129.

291. Water Quality Act of 1987, sec. 313(c), § 309(d), 101 Stat. at 45 ("In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." (internal quotation marks omitted)). This standard was added as part of the 1987 amendments. *See id*. The 1972 FWPCA, although having excluded the pre-1972 standard from its language, did not appear to replace the language with a new standard. *See* Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 309(b), 86 Stat. 816, 860. Thus, it seems that the 1972 act was enacted without providing a specific judicial standard to guide the courts, a deficiency which lasted until the 1987 amendments.

G. Clean Water Forecast: Future Implications of Past Legislation

Current enforcement against civil violations makes the CWA viewable as a strict liability statute.[292] Regardless of the intent of the violator or his reasons for polluting, "once the violation [of the CWA] is established, liability attaches."[293] Unlike earlier versions of the Act, which took into account the economic feasibility and practicality of the polluter's ability to abate,[294] the modern standard does not consider these factors for civil enforcement purposes.[295] This standard facilitates regulatory enforcement because the only burden the EPA needs to prove is that the violation occurred.

Criminal enforcement, however, has different standards. The state of mind of the polluter is taken into account for criminal penalties, which vary depending on whether the violation was done negligently or knowingly and whether there was actual harm caused by the violation.[296] Although a polluter's state of mind is more difficult to prove, when the penalty involves criminal punishment, there is more at stake and the added burden preserves the integrity of the enforcement system.

Congress has made very few modifications to the CWA since the 1987 amendments. It is difficult to determine the overall effectiveness of these changes because the world has changed in the two decades since Congress last amended the CWA. As a result of scientific discoveries and the problems arising from nonpoint source pollution, there are some who consider it time for new statutory revisions to address more recent environmental pollutants.[297] The conditions that the CWA aimed to combat

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292. GALLAGHER & MILLER, *supra* note 170, at 173.

293. *Id.*

294. *See* Water Quality Act of 1987, sec. 313(d)(3)(B), § 404(s), 101 Stat. at 45-46.

295. *See, e.g.*, Kelly v. U.S. EPA., 203 F.3d 519, 522 (7th Cir. 2000) ("[N]othing in the statute makes good faith or a lack of knowledge a defense. . . . [N]o such requirement exists for civil or administrative penalties, [under] 33 U.S.C. § 1319(d) and (g). Civil liability under the Clean Water Act, therefore, is strict."); United States v. Winchester Mun. Utils., 944 F.2d 301, 304 n.1 (6th Cir. 1991); United States v. Tex. Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979).

296. *See* Water Quality Act of 1987, sec. 312, § 309(c), 101 Stat. at 42-45.

297. *See, e.g.*, DEMOCRATIC STAFF OF THE COMM. ON TRANSP. & INFRASTRUCTURE, THE CLEAN WATER ACT: 30 YEARS OF SUCCESS IN PERIL 9 (Oct. 18, 2002), *available at* http://lobby.la.psu.edu/_107th/117_Effluent_Limitation/Congressional_Statements/House/Success_In_Peril.pdf; Patrick L. Brezonik & William Cooper, *Reauthorization of the Clean Water Act: Important Issues for Water Quality Scientists*, 94 J. CONTEMP. WATER RES. & EDUC. 47, 47-48 (1994) (explaining that because of newer research, some toxins which are listed in

in the 1970s and 1980s are not necessarily the same as those that exist today.[298] Congress first introduced the WPCA to help combat visible pollution such as raw sewage and other debris, much of which came from identifiable sources.[299] The CWA has been very successful in limiting polluted waters caused by this type of point source pollution.[300]

Currently, however, the largest cause of water pollution and degradation in the United States is caused by nonpoint source pollution.[301] Much of nonpoint source pollution is invisible to the naked eye, such as chemicals and other toxins running off into the water (although not all of these chemicals and toxins are from nonpoint sources).[302] These invisible pollutants are dangerous because oftentimes people are unable to taste these chemicals, and the negative impacts on health may not be realized until too late.[303] That chemicals cannot be seen does not equate to safe water. Although Congress addressed nonpoint source pollution in later amendments to the CWA (the 1987 amendments in particular), nonpoint

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sections 307 and 311 of the CWA need not be regulated any longer, but some pollutants which are not included in the scope of the CWA should now be regulated).

298. Brezonik & Cooper, *supra* note 297, at 47-48.

299. *Id.*

300. *Id.* Point source pollution is that which comes from a readily identifiable source. 33 U.S.C. § 1362(14) (2012) ("The term 'point source' means any discernible, confined and discrete conveyance . . . . This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."). Nonpoint source pollution is more difficult to control because it generally includes runoff into streams, rivers, and lakes from unidentified sources. *What Is Nonpoint Source Pollution?*, EPA, http://water.epa.gov/polwaste/nps/whatis.cfm (last updated Aug. 27, 2012). Usually, nonpoint source pollution comes from many different sources and is not directly dumped into a body of water. *Id.* An example is agricultural runoff of pesticides or nutrients from fertilizers. *Id. See generally* Arun S. Malik et al., *Point/Nonpoint Source Trading of Pollution Abatement: Choosing the Right Trading Ratio*, 75 AM. J. AGRIC. ECON. 959 (1993).

301. Brezonik & Cooper, *supra* note 297, at 47; *see also What Is Nonpoint Source Pollution?*, *supra* note 300 ("States report that nonpoint source pollution is the leading remaining cause of water quality problems.").

302. Brezonik & Cooper, *supra* note 297, at 48. Provisions exist to allow the EPA Administrator to alter the list of water toxins that can be regulated under the CWA. *Id.* Revisions, however, are infrequent. *Id.* As a result, there are toxins listed which are not as dangerous as previously thought and do not require heavy regulation. *Id.* Other chemicals though, which should be on the list, have not yet been added. *Id.* This misallocation causes inefficient monitoring with too much focus on less worrisome toxins and not enough regulation of those posing more substantial risks. *Id.*

303. *See* David Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 520 (1996).

source pollution is not as heavily regulated as point source pollution due to concerns of politicians at the time point source regulations were strengthened.[304]

Enforcement of the CWA post-1972 led to significant improvements in water quality.[305] In the last decade, however, progress has slowed and the rate of improvement has even declined.[306] In 2009, the *New York Times* published a series of articles reporting on the recent progress of the CWA, observing that it has been significantly under-enforced in many areas of the country.[307] It has been suggested that this is in part because much of the regulation under the NPDES program has devolved to the states.[308] In 2005, at least forty-five states were approved to conduct their own NPDES programs.[309] The problem now is that because so many states are responsible for implementing the program themselves, the EPA does not focus as much on the information those states provide.[310] The solution

304. *Id.* at 515.

305. Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES (Sept. 12, 2009), http://www.nytimes.com/2009/09/13/us/13water.html?adxnnl=1&pagewanted=all&adxnnlx=1353531636-OL0IkAdyWwIEGirPGEKRiQ&_r=0.

306. *Id.*

307. *Id.* In West Virginia, coal companies "injected more than 1.9 billion gallons of [toxic waste]" from coal mining operations into United States waters from 2004 to 2009. *Id.* Three of the largest West Virginian companies reported "that 93 percent of the waste they injected . . . had illegal concentrations of chemicals including arsenic, lead, . . . or chromium." *Id.* Despite reports sent to state officials, no fines were ever imposed for the violations; nor were any injunctions filed. *Id.* Residents, however, suffered health problems such as painful rashes covering their bodies after bathing, fertility problems, gall bladder diseases, and corrosion of tooth enamel. *Id.* Research by the *New York Times* indicates "that fewer than 3 percent of Clean Water Act violations [throughout the country] resulted in fines or other significant punishments by state officials" during the research period. *Id.* Although the *Times* included small as well as large violations in its compilation, such a low rate of reprimand is discouraging and evidences heavy under-enforcement of the CWA. *Id.*

308. David Markell, *"Slack" in the Administrative State and Its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1, 25-27 (2005) ("Intuitively, at least at first glance, there may be reason to think that it should make little difference whether the states or the EPA has the lead in implementing our environmental laws. . . . But the reality appears to be far different. The state-federal relationship has not been particularly smooth.").

309. *Id.* at 20.

310. *Id.* at 29 ("'With little data coming back to states from EPA, many states built their own information systems over the years so they could more easily retrieve information they needed to manage their programs. As states built their own systems, system incompatibilities arose, requiring many states to enter data separately into both EPA's systems and their own. Not surprisingly, since states primarily relied upon their own systems, they spent little time worrying about the quality of the information in EPA's systems.'" (quoting SHELLEY H.

would seem simple—require the EPA to focus on the information provided by the states. However, part of the reason for this decline in focus is also due to environmental protection agencies being understaffed at both the federal and the state levels.[311] A possible solution lies in the hands of citizens. Citizens can provide enforcement assistance by acting as monitors.[312] Monitoring takes place when either individuals or groups generate "independently-compiled emissions data or compliance reports" such as Discharge Monitoring Reports.[313] These citizen groups are an asset to thorough enforcement of the CWA and provide much needed aid. Revisions to the CWA to better fund both regional EPA offices and state programs, as well as revisions specifying enforcement priorities for efficiency purposes, would help combat current reduced resource and enforcement problems.

IV. How Due Process Changes Affected CWA Enforcement Procedures

As the CWA grew, power shifted from the states to the federal government. Early versions of the CWA gave the states a large amount of power as well as significant deference to individuals. This was exemplified by forcing the federal government to maneuver a series of obstacles before actual enforcement could occur and by placing heavy consideration on the feasibility of individuals to comply. In its first twenty-three years of life, the WPCA did little to create change. In 1972, Congress dramatically increased the amount of control the federal government had in enforcing the Act. Expansion was accomplished through the introduction of the NPDES permitting system and creation of monetary penalties. Later amendments further added to the enforcement arsenal, allowing agencies to have a greater impact while using fewer procedures. Changes in the available enforcement procedures correlate to evolving views of what means are necessary to meet the requirements of due process.

METZENBAUM, STRATEGIES FOR USING STATE INFORMATION: MEASURING AND IMPROVING STATE PERFORMANCE 17 (IBM Center for the Business of Government 2003))).

311. *Id.* at 17.

312. *Id.*

313. *Id.* at 18 (quoting U.S. EPA, CITIZEN ENFORCEMENT: TOOLS FOR EFFECTIVE PARTICIPATION 7 (1998), *available at* http://inece.org/CBldg%20Docs/citenf.pdf); *see also id.* at 17-18 ("As two commentators put it: '[t]he sheer size of the citizenry . . . enables individual citizens to monitor compliance throughout the nation and identify violations an understaffed investigative agency might miss.'" (alterations in original) (quoting E. Roberts & J. Dobbins, *The Role of the Citizen in Environmental Enforcement*, 1 INT'L CONF. ON ENVTL. ENFORCEMENT PROC. 531, 532 (1992))).

A. Early Due Process and Control

During the early twentieth century and up until 1970, there were no monetary penalties for violations of the WPCA/FWPCA.[314] The dearth of monetary penalties, however, may be attributed more to public constructions of due process than those of the Supreme Court. For over a century, the Supreme Court has consistently upheld the use of civil monetary penalties by an agency where such use is clearly intended by Congress.[315] It was the public that remained dubious of administratively imposed monetary sanctions; many people believed that such fines should be imposed by a court, not by an agency.[316] Congressional delay in allowing agencies to impose monetary penalties for violations of the CWA may have been heavily influenced by the public's opposition. While the Supreme Court did not necessarily view administrative penalties as violative of due process rights, Congress likely played to public views that monetary penalties were a judicial, not an administrative, function.[317] Particularly during a time when environmental laws were sparse, Congress may not have felt this was a battle in which to introduce a controversial measure such as administrative penalties.

B. Paradigm Changes in 1970s

Environmental legislation hit an all-time high in the 1970s. At this time, the American people's distress regarding environmental affairs culminated in an "environmental movement," providing an ideal atmosphere for

314. In 1970 the first monetary penalty was introduced for a violation of the CWA. *See* Barry, *supra* note 69, at 1121. The penalty, however, only applied to oil discharges. *Id.*

315. Funk, *supra* note 261, at 5. In 1853 the Supreme Court upheld a monetary sanction imposed by a United States customs agent against an undervaluation of imported goods, imposing a 20% penalty for the crime. *Id.* Nearly a century later, in *Helvering v. Mitchell*, the Supreme Court determined that a 50% penalty for fraudulent withholding of taxes was acceptable and that the IRS had the power to assess such a sanction where Congress had specifically denominated the sanction to be a civil penalty. *Id.* at 6 (citing Helvering v. Mitchell, 303 U.S. 391 (1938)). There is a long tradition by the Supreme Court of upholding the use of agency monetary penalties, at least in certain situations, where such use has been expressly allowed by Congress. *Id.*

316. *Id.* at 8.

317. *See id.* ("[Administratively imposed penalties are] 'repugnant to the basic principles upon which our administrative law is grounded. [They] violate[] the fundamental rule that the imposition of a money penalty is, with us, a judicial, not an administrative function.'" (quoting Bernard Schwartz, *1952 Survey of New York Law—Administrative Law*, 27 N.Y.U. L. REV. 928 (1952))).

Congress to act.[318] As a result, Congress churned out environmental legislation at a rapid rate.[319] A 1972 report to the Administrative Conference of the United States (ACUS) recommended that, for efficiency purposes, judicial proceedings should not be required prior to the imposition of an administrative penalty.[320] Rather, one fined by an agency who wished to contest the matter could request a hearing by the agency.[321] The recommendation suggested that an agency decision be "final unless appealed within a limited period to a federal court."[322] A recommendation to increase use of civil penalties was adopted by ACUS,[323] but Congress apparently did not believe that the CWA's enforcement procedures were yet ready to incorporate such a new and provocative rule. Congress did, however, decide the public was ready to face judicially-imposed monetary penalties. The imposition of monetary penalties appeared in the 1972 amendments.[324] During this time period, the Supreme Court's decision in *Goldberg v. Kelly*[325] was still controlling and may have influenced the requirement that monetary sanctions for violations of the CWA only be imposed after a judicial hearing for a civil enforcement action. The addition of these penalties in the 1972 amendments reflected the changing views

318. *See* Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 88 (2001).

319. *Id.* Congress enacted many environmental statutes in the 1970s, such as the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1466 (1972); the Endangered Species Act, 16 U.S.C. §§ 1531-1599 (1973); the Solid Waste Disposal Act, 42 U.S.C. §§ 6091-6992k (1978); and the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1970). Additionally, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (1969), became effective January 1, 1970. Kenneth A. Manastar, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation,* 74 FORDHAM L. REV. 1963, 1963 n.1 (2006).

320. Funk, *supra* note 261, at 9. ACUS is an independent federal agency. 2 AM. JUR. 2D *Administrative Law* § 11 (2004). It functions as a resource for development of new laws by conducting census-type research and giving expert advice and policy recommendations. *Id.* Membership is made up of appointed private individuals, as well as appointed public officials. *Id.* § 12. For an in-depth look at the development and importance of ACUS, see Thomas O. Sargentich, *The Case for the Reauthorization of the Administrative Conference of the United States*, 8 ADMIN. L.J. AM. U. 687 (1994).

321. Funk, *supra* note 261, at 9.

322. *Id.*

323. *Id.*

324. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec 2, § 309(c)-(d), 86 Stat. 816, 860.

325. 397 U.S. 254 (1970).

about due process requirements and the power of the federal government during this time.[326]

ACUS's recommendation gained steam with Congress a little over a decade later. The next major change to the available enforcement procedures for the CWA occurred in 1987 with the addition of administrative penalties.[327] This newest tool allowed the EPA to assess penalties and to enforce such penalties without ever having to enter a courthouse. Instead, the agency itself could hold a hearing to be presided over by an administrative law judge.[328] Although the idea was not new to administrative law, the changes in public views of due process since 1972 made the addition less controversial.[329] In 1976, when *Mathews v. Eldridge* was decided, the Court worked to narrow its previous interpretation of due process requirements that were so broadly expanded in *Goldberg*.[330] The *Mathews* test involves balancing governmental and individual interests to determine appropriate procedures.[331] Application of the *Mathews* balancing test to administrative penalties generally weighs in favor of the use of such penalties.[332] While individuals have an interest in a judicial hearing prior to imposition of a monetary penalty, Congress balanced this by allowing for judicial review of a monetary sanction when a review request is filed within thirty days of sanction issuance.[333] Congress found the governmental interest in efficiency outweighed both the individual interest and any benefit that earlier judicial review might provide. Because the 1987 amendments still allowed for judicial review of administrative penalties when demanded, the added benefit of requiring a judicial hearing for each one was found to be less than the governmental interest in assessing an administrative fine.

Also prior to the 1987 amendments, the Supreme Court considered the due process issue of the right to a jury trial, an issue which arose in the

326. *Compare* Water Pollution Control Act, ch. 758, Pub. L. No. 80-845, 62 Stat. 1155 (1948), *and* Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (amending FWPCA), *with* Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 309, 86 Stat. at 859.

327. *See* Water Quality Act of 1987, Pub. L. No. 100-4, sec. 314(a), § 309(g), 101 Stat. 7, 46-49 (codified at 33 U.S.C. § 1319).

328. GELLHORN & LEVIN, *supra* note 35, at 261. When agencies hold formal hearings internally, an administrative law judge usually presides over the hearings. *See id.* at 263.

329. *See infra* note 339.

330. *See* Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976).

331. *Id.* at 334-35.

332. *See* Funk, *supra* note 261, at 13-14.

333. Water Quality Act of 1987, Pub. L. No. 100-4, sec. 314(a), § 309(g), 101 Stat. 7, 48.

context of agency-administered monetary sanctions.[334] Administrative penalties are imposed before an opportunity for judicial review and are based solely on the opinion of the agency.[335] The Seventh Amendment, however, requires that "[i]n [s]uits at common law, . . . the right of trial by jury shall be preserved."[336] The Court, in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, found "that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[]."[337] Assignment of adjudicating public rights included determination of monetary sanctions.[338]

With the combination of both *Mathews* balancing and the Supreme Court's decision in *Atlas Roofing*, it makes sense that by 1987 Congress felt the time was right for authorizing the use of administrative penalties to enforce the CWA. Administrative penalties are a faster, more efficient way of carrying out enforcement. Additionally, the use of administrative penalties for enforcement purposes had expanded to several other agencies,[339] making the use of administrative penalties less publicly controversial than they might have been if introduced at an earlier time.

C. Current Due Process Issues with the CWA

Although no recent amendments have been made, recent controversy has arisen relating to wetlands regulation under section 404 of the CWA. Wetlands regulation is unique in that it often involves control over a person's private property.[340] While the CWA as a whole tends to regulate waters to which no individual can reasonably lay claim (navigable

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334. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977).

335. Water Quality Act of 1987, § 309(g), 101 Stat. at 48.

336. U.S. CONST. amend. VII.

337. 430 U.S. at 455. The Court further stated that "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field." *Id.* The Court reiterated that this was not a new concept. *See id.* It had for over a century upheld the use of such delegation of powers. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46-47 (1937); Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U.S. 329, 334 (1932); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

338. Funk, *supra* note 261, at 7.

339. 133 CONG. REC. 2800 (1987) (statement of Leon G. Billings) ("Today, administrative penalties have become commonplace.").

340. *See* Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 312 (1991).

waterways such as rivers and lakes), the section 404 permitting requirements can regulate land a person might reasonably believe he controls. For example, if a landowner owns fifty acres of land, and on that land exists a Corps-defined wetland, controversy may erupt over who should legitimately be able to control the wetland portion of the property. Because of this problem, there are claims that wetlands regulation encroaches upon an individual's Fifth Amendment rights under the Takings Clause.[341] The Takings Clause states that private property shall not "be taken for public use, without just compensation."[342] Although regulation of property is not the same as a physical taking, the Supreme Court has ruled that the Fifth Amendment may be implicated where government regulation limits an individual's use of private property.[343] This type of taking, known as a "regulatory taking,"[344] is a major issue within the wetlands regulation context because due process issues are implicated by the way such regulation is enforced.

Most notably, recent due process issues emerged in *Sackett v. EPA*.[345] Under the CWA, the EPA may issue an administrative compliance order for an injunction to prevent further degradation of an affected water or wetland.[346] If an individual does not comply with the compliance order, the EPA may also bring an enforcement action in court.[347] While the law does not expressly prohibit judicial review of compliance orders prior to the EPA bringing an enforcement action, all federal appellate circuits that have considered the issue have held that pre-enforcement judicial review of a compliance order is not allowed.[348] While compliance orders alone do not

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341. Quast, *supra* note 188, at 129-30.

342. U.S. CONST. amend. V.

343. Quast, *supra* note 188, at 130 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

344. *Id.*

345. 132 S. Ct. 1367 (2012); *see supra* Part I.

346. 33 U.S.C. § 1319(a) (2012). Compliance orders are essentially injunctive orders issued by the Administrator. *Id.* An injunction is "[a] court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted." *Injunction*, BLACK'S LAW DICTIONARY 855 (9th ed. 2009). With the issuance of a compliance order requiring injunctive relief regarding the filling of a wetland, it is inferable that the irreparable injury comes from the possible permanent loss of the wetland unless fill material is removed.

347. 33 U.S.C. § 1319(b).

348. *See* Sackett v. U.S. EPA, 622 F.3d 1139, 1144 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012); Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1427 (6th

have authority to impose fines, the EPA can threaten future administrative or civil penalties through an enforcement action as occurred in *Sackett*.[349] Although Congress has not authorized compliance orders to carry an immediate fine, the EPA generally attaches the threat of a future fine for noncompliance. This means that the party must either comply or wait for the agency to bring an action in court while potential penalties accumulate. Waiting for the commencement of an enforcement action while penalties accrue can be intimidating to the parties against whom the order is issued. The drawback of allowing parties to bring an action in court before the EPA exercises enforcement, however, is that all parties could take all compliance orders to court, causing a drastic increase in litigation costs and a significant decrease in efficiency. While some disputes may be legitimate, the cost of litigating each compliance order in court should be measured not only in monetary terms, but also by the prolonging of noncompliance. The longer one takes to comply with the order, the more likely it is that the affected water will suffer irreparable harm. Dispute over the implications of prohibited pre-enforcement judicial review is of major concern in *Sackett*.[350]

The issue addressed by the Court, of whether the Sacketts ought to have been able to bring suit prior to an enforcement action, is important in determining the expanse of the EPA's enforcement power.[351] Throughout the last century, there appears to be a general trend of increasing federal power; but the issue in *Sackett* is unique. In this case, the petitioners were afforded no opportunity for a hearing regarding the compliance order until an enforcement action was brought against them.[352] Yet, if they did not comply with the EPA order, the potential fine for noncompliance would continue to accrue for each day they remained in violation of the CWA.[353]

While the public has grown increasingly comfortable with administrative penalties and compliance orders, the Supreme Court, in *Sackett*, expressed its uneasiness with the idea of potential fines that cannot be disputed prior

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Cir. 1994); S. Pines Assocs. *ex rel.* Goldmeier v. United States, 912 F.2d 713, 716 (4th Cir. 1990); Hoffman Grp., Inc. v. EPA, 902 F.2d 567, 569 (7th Cir. 1990). Note that these cases all occurred prior to the Supreme Court decision in *Sackett*. 132 S. Ct. at 1367.

349. *See Sackett*, 622 F.3d at 1141 ("The compliance order states that '[v]iolation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation . . . [or] (2) administrative penalties of up to $11,000 per day for each violation.'" (alterations in original)).

350. *See Sackett*, 132 S. Ct. at 1372-73.

351. *See id.* at 1372.

352. *Sackett*, 622 F.3d at 1141.

353. *See id.*

to enforcement.[354] The Court reversed the Ninth Circuit, holding that the EPA must make the opportunity for a hearing available prior to bringing an enforcement action so as not to violate an individual's due process rights.[355]

Due process is highly regarded in American society and is a fundamental right that must be protected. Part of the discomfort with section 404 of the CWA is that it impedes the potential for certain individuals to earn money or to have the freedom to build on their land as they choose. But after examining the history of CWA enforcement procedures, it is evident there is also a grave concern regarding the state of American waters both now and in the future. There are many who believe it is best to utilize all the resources at hand in order to reap the benefits now, particularly in a society that has become so accustomed to the idea of instant gratification. On the other hand, there are also many who assume the earth will take care of itself, replenish itself, and somehow manage to provide for the next generation. Water, especially, is thought of as the ultimate resource in its astonishing ability to cleanse itself of pollutants disposed of in its body. Used for washing, building, cleaning, and more, it suffers from overuse in many of these daily activities. There is an old West African proverb warning that "[f]ilthy water cannot be washed."[356] Although running waters such as oceans and rivers are more adept at ridding themselves of wastes than are many other ecosystems on the planet, they can only do so much.[357] Water does not have an endless capacity to renew itself, as exemplified by the large number of American waters that are not fit for swimming, fishing, or other recreational activities.[358] As evidenced by the history of the CWA and the history of the nation's waters, it is apparent that government

354. *See Sackett*, 132 S. Ct. at 1372.

355. *Id.* at 1374.

356. FRANK R. SPELLMAN & JOANNE E. DRINAN, THE DRINKING WATER HANDBOOK 35 (2d ed. 2012).

357. For example, the April 2010 BP Oil Spill "released an estimated 185 to 205 million gallons of crude oil" into the Gulf of Mexico. Duane A. Gill et al., *The* Exxon Valdez *and BP Oil Spills: A Comparison of Initial Social and Psychological Impacts*, 56 AM. BEHAV. SCIENTIST 3, 3-4 (2012). People helping the clean-up effort were astonished at how quickly the oil seemingly disappeared. Jeffrey Kofman, *BP Oil Spill: Clean-Up Crews Can't Find Crude in the Gulf* (July 26, 2010), http://abcnews.go.com/WN/bp-oil-spill-crude-mother-nature-breaks-slick/story?id=11254252#. Within a period of two weeks, skimmers discovered that the collection of oily water in barrels was down from 25,000 barrels per day to 200 barrels per day. *Id.* Despite the apparent disbanding of the oil, the National Oceanic and Atmospheric Administration still banned shrimping seven months after the explosion. Gill et al., *supra*, at 4. Such a ban suggests concerns that the surrounding seafood was still unsafe for human consumption. *Id.*

358. *See* EPA, *supra* note 14, at 1-2.

regulation is necessary. While the Supreme Court has not declared it to be a fundamental right, it does not get much more fundamental than the availability of safe water, either for drinking, for recreation, or from which to obtain food. In the spirit of *Mathews*, it is important to balance the necessity of water quality regulation with the due process rights of individuals.[359]

There is no dispute that the Sacketts had an interest in using their land as they chose. However, considering that wetlands have been protected since the 1970s, it was curious for them to claim they were not on notice of the permitting program.[360] Application for a section 404 permit is significantly cheaper than payment of the fines they accrued.[361] Additionally, the CWA expressly provides for an immediate appeal following the denial of a permit.[362] The government (through the EPA) has an interest in enforcing the CWA and in continuing to work towards providing safe, clean water for the American people, as well as sustaining fragile ecological systems. Forcing the agency to provide judicial review each time an injunctive order is issued will result in placing a higher burden on an already overburdened and under-enforced government program. While this might be a positive step for individual due process rights, it increases the risk of hindering

359. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

360. The Sacketts' land was located near Priest Lake. *Sackett*, 132 S. Ct. at 1371. Interestingly, the local golf course's website boasts that, upon visiting, tourists can golf on a course "[s]et amidst the splendor of natural ponds, wetlands and lush forest." *Priest Lake Golf Course*, PRIEST LAKE, http://www.priestlake.org/index.php/activities/things-to-and-do/11-attractions/47 (last visited June 30, 2013). Of course, this does not necessarily translate to the presence of wetlands a few miles away; but the presence of abundant wetlands and forests in the Priest Lake area does make the occurrence more likely.

361. For example, in Idaho, where the Sacketts sought to build, the Army Corps of Engineers has a permit application fee of $10 for non-commercial activities and $100 for commercial activities. U.S. Army Corps of Eng'rs et al., Instructions for Completing Joint Application for Permit 1 (USACE NWW Form 1145-1, IDWR Form 3804-B, n.d.), *available at* http://www.idwr.idaho.gov/RulesStatutesForms/StreamChannel/PDF/JointAppInstructionGuide2010.pdf. Even accounting for the contractors that might need to be hired in order to complete the permit application, one might imagine that the total cost would still be less than penalties accumulating at either $11,000 or $32,500 per day of violation, as proposed in the EPA administrative order to the Sacketts. Sackett v. U.S. EPA, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012). Additionally, "the Corps receives about 80,000 dredge and fill permit applications each year and approves at least 90 percent of them." 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 27:2 (2d ed. 2012).

362. *Sackett*, 622 F.3d at 1146 ("The [applicants] could seek a permit to fill their property . . ., the denial of which would be immediately appealable to a district court under the APA.").

success in the clean water fight, which recent statistics indicate is already an uphill battle.[363]

D. Due Process Conclusion

While the WPCA/CWA's initial purpose was to address concerns of the decreasing availability of clean water, the evolution of due process views appears to have advanced around the time the legislation became necessary. Such advancement is fortunate because later enforcement procedures such as monetary sanctions and administrative penalties have been instrumental in implementation of the CWA by providing realistic consequences to polluters. Despite any public concerns that arise from the shift of so much power to the federal government, we must balance the benefits of efficient regulation with the potential harmful effects on individual due process. Although it would be ideal if our nation could obtain cleaner waters without regulation, such a notion is pure fantasy, as evidenced by early CWA predecessors that allocated significant power to the states and individuals, and the heavily polluted condition of our nation's waters during that time.

V. Conclusion

The CWA is an important tool in regulating water pollution. Prior to its passage, the only recovery for those affected by water pollution was to bring an individual action under tort law. The evolution of congressional focus to a paradigm of public protection by providing a comprehensive federal statute is significant in ensuring protection of American waters. Although the statute began with a weak foundation, Congress slowly modified it into a much stronger social policy as the public's knowledge and interest in protection of water as a natural resource matured and progressed. Looking at the change in titles of water protection laws, it is evident that Congress changed its goal from that of merely controlling water pollution by keeping it at a tolerable level to one of actually maintaining water that is clean. Part of the success resulting from the CWA arises from the evolution of due process procedures. It is unlikely that the CWA would be nearly as successful without the monetary penalties that eventually developed and the ability of the EPA to impose them.

Although there are still challenges with implementation, the improvements in water quality since the CWA's inception are inspiring. Water in rivers, streams, and lakes is significantly cleaner now than prior to the passage of the 1972 CWA. This progress, however, should not prevent

363. *See* EPA, *supra* note 14, at 13, 15.

the CWA from developing further and evolving with the needs of the public. Both the states and the federal government must maintain vigilant enforcement of the CWA to ensure the program continues working in the way Congress intended. Such enforcement is essential to providing clean water for a healthy environment and for the enjoyment and wellbeing of the American people, both now and for future generations.

Alexandria A. Polk