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Congress Must Protect Innocent Property Owners from Section 404 Civil and Criminal Penalties

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KEY TAKEAWAYS

Property owners have long struggled to comply with the Clean Water Act, in large part because they do not know which "waters" are regulated.

The federal government continues to impose civil and criminal penalties on property owners—even when they cannot know that they are violating the law.

Congress should protect innocent property owners while giving the EPA and the Army Corps of Engineers the flexibility to enforce the law—properly and reasonably.

For decades, property owners across the United States have struggled to comply with the Clean Water Act (CWA),[1] in large part because they are unclear which "waters" are regulated.[2] The agencies that implement the CWA—the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps)—have offered vague[3] and overly broad definitions in their implementation of the CWA and have enforced the law inconsistently.

In recent years, there have been numerous regulatory definitions of "waters of the United States" (WOTUS), which are waters regulated by the CWA. Currently, the Biden Administration is proposing a new WOTUS definition even as the U.S. Supreme Court considers a case that could clarify which waters are covered under the CWA.[4]

Despite the confusion, the federal government continues to impose civil and criminal penalties on property owners—even when they do not, and, arguably, cannot know that they are violating the law. Congress should limit civil and criminal enforcement related to CWA Section 404 dredge-and-fill permits[5] to those situations when property owners have actual knowledge that a water is a "waters of the United States," and that their activity requires a permit. Further, the EPA and the Corps should adjust their enforcement policies consistent with this approach regardless of congressional action.

Regulatory Confusion

The CWA prohibits discharge of pollutants into "navigable waters" without a federal permit and states that "navigable waters" mean "the waters of the United States, including the territorial seas."[6] The agencies have interpreted the discharge of pollutants to include even normal activities, such as farming[7] or building a home, that most people do not consider to be polluting. Such activities often require Section 404 dredge-and-fill permits if they would affect "waters of the United States."

Vagueness and General Lack of Clarity. Knowing when a water is regulated is no easy task, and innocent property owners bear the brunt of this problem. For example, in the case currently being considered by the Supreme Court, *Sackett v. EPA*,[8] the property owners are a couple whom the EPA threatened with $75,000-per-day fines simply for placing gravel on virtually dry land, with no inkling that the government would one day decide that their land was a water subject to the CWA.[9]

Some other examples include the United States government's civil enforcement suits against California farmers John Duarte and Jack LaPant who were each accused of farming their own land without a Section 404 dredge-and-fill permit. The only thing either had done was to run a plow through their soil in preparation for planting wheat crops, but the Corps argued that property owners need federal permission to plow in damp spots if they have not plowed there recently. Both farmers eventually had to pay millions of dollars to resolve these cases.[10]

Courts have made strong statements regarding the CWA's vagueness and the difficulty in complying with the law. In her concurrence in the Eighth Circuit Court of Appeals case *Hawkes v. Corps* (a case that was eventually decided by the Supreme Court), Judge Jane Kelly explained, "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."[11]

During oral argument in the Supreme Court case *U.S. Army Corps of Engineers v. Hawkes*, Justice Anthony Kennedy explained, "The Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice."[12] In his concurrence in the case, he wrote: "As Justice Alito has noted in an earlier case, the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing."[13]

Inconsistent Enforcement. Vague definitions make it easier for agencies to apply the law in a subjective manner that best suits their needs at the time they seek to enforce the law. Citing a Government Accountability Office[14] report in his plurality opinion in *Rapanos v. United States*,[15] Justice Antonin Scalia wrote: "The Corps' enforcement practices vary somewhat from district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'"[16] Further, even experts can have genuine disagreements about whether specific waters are regulated by the CWA. It therefore makes no sense to expect property owners to have the "right" answer that has alluded the experts.

Ever-Changing Rules. For property owners, the current compliance situation is especially difficult as the regulations defining regulated waters continue to change. In 2015, the Obama Administration finalized its Clean Water Rule.[17] In 2019, the Trump Administration rightfully repealed the Obama rule and temporarily recodified the regulations that existed prior to the rule.[18] In 2020, the Trump Administration finalized the Navigable Waters Protection Rule, which helped to provide some clarity on covered waters.[19] In December 2021, the Biden Administration proposed a new rule to define which waters are covered under the law,[20] a rule that the Administration says will be temporary until it comes out with yet another rule.[21]

As a result, since 2015, there have been numerous sets of regulations (including the Biden Administration's proposed rule). Further, this blitz of rulemaking has led to increasingly confusing litigation involving dozens of lawsuits from all sides of the political spectrum, with each successive rule being invalidated by some courts but not others.[22] The litigation has been further tangled by the EPA's decision to abandon the defense of rules issued under previous Administrations.

At this point, with so many court orders relating to different versions of the regulations issued in so short a time, it is difficult for regulated parties to even know which version of the regulations is in effect. And every time a new version of the regulation is issued, the litigation starts over again, making it unlikely that the questions can even be resolved on appeal before the next change is made.

Recommendations for Policymakers

As a general matter, policymakers should be concerned when civil and criminal penalties are imposed on innocent property owners, regardless of the statute in question or provision of the CWA. The focus of these recommendations, though, is on Section 404 dredge-and-fill permits for various reasons, including that the most problematic CWA enforcement cases have generally concerned innocent property owners who were required to secure Section 404 dredge-and-fill permits.[23] Further, these cases are especially egregious because they often cover dirt-moving activities that ordinary people would not consider to be water pollution. In other words, this is not something akin to the dumping of toxic waste or other obvious polluting activities. Congress should, at a minimum:

Prohibit Certain Civil and Criminal Enforcement Under Section 404. The EPA and the Corps should not be able to impose civil and criminal penalties under Section 404[24] for discharges to waters (other than "traditional navigable waters")[25] unless the property owner had actual knowledge that there was a final agency determination that a water is regulated[26] and the government can prove that the property owner acted willfully (that is, intentionally violated a known legal duty).[27]

This prohibition would not cover waters that are uncontestedly "traditional navigable waters" (major water bodies like the Mississippi River), which are the types of waters that clearly should raise some red flags for property owners. The prohibition would also require that an agency make a final determination on the status of a water. The purpose of this requirement is to ensure that property owners are able to know of a genuine and informed decision made by the agencies. A mere non-binding preliminary determination that could easily change will not suffice; a decision should be binding and judicially reviewable. Finally, the prohibition would require willful action, because even if a property owner knows that a water is regulated, this still does not necessarily mean that all activities, like certain farming activities, are prohibited.

Clarify that the Agencies Still Have Strong Recourse to Enforce the Law. This enforcement prohibition is in no way intended to prevent the government from properly enforcing Section 404 dredge-and-fill permit requirements. Even when the prohibition on civil and criminal enforcement applies, the agencies should still have recourse to enforce Section 404 through cease-and-desist orders and injunctive relief to enforce such orders for the purpose of preventing pollution in federally regulated waters. In essence, these recommendations ensure due process by giving property owners notice, while still giving the agencies the flexibility to properly enforce the law.

While these recommendations focus on what Congress should do, the EPA and the Corps should adopt enforcement policies consistent with these recommendations regardless of congressional action. It is, however, critical that Congress act so these protections are codified into statute.

Conclusion

The CWA can address water pollution without imposing unreasonable civil and criminal penalties on Americans. Yet, unreasonable enforcement of the statute is all too common. This has had devastating effects on innocent Americans, from farmers who produce the nation's food to families who want to build a home. Congress should rectify this situation by protecting innocent property owners while giving the EPA and the Corps the necessary flexibility to properly and reasonably enforce the law.

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Endnotes

1. Federal Water Pollution Control Act, as Amended Through Public Law No. 107–303, 107th Cong., November 27, 2002, https://www.epa.gov/sites/production/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf (accessed June 6, 2022), and 33 U.S. Code, § 1251 et seq., https://www.law.cornell.edu/uscode/text/33/chapter-26 (accessed June 6, 2022).
2. In *Sackett v. EPA*, Justice Alito wrote in his concurrence: "The reach of the Clean Water Act is notoriously unclear." *Sackett v. EPA*, 566 U.S. 120, 132 (2012), https://www.law.cornell.edu/supremecourt/text/10-1062 (accessed June 6, 2022).
3. The definitions may even be unconstitutionally vague. See, for example, Paul Larkin, "The 'Waters of the United States' Rule and the Void-for-Vagueness Doctrine," Heritage Foundation *Legal Memorandum* No. 207, June 22, 2017, https://www.heritage.org/government-regulation/report/the-waters-the-united-states-rule-and-the-void-vagueness-doctrine.
4. *Sackett v. EPA*, Supreme Court Docket No. 21-454, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html (accessed June 6, 2022).
5. U.S. Environmental Protection Agency, "Permit Program Under CWA Section 404," https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 (accessed June 8, 2022).
6. Federal Water Pollution Control Act, as Amended Through Public Law No. 107–303, 107th Cong., November 27, 2002, Sec. 502, https://www.epa.gov/sites/production/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf (accessed June 6, 2022).
7. While the Clean Water Act provides a permitting exemption for "normal farming practices," federal agency interpretations have narrowed the exemption and subjected many farming activities to dredge-and-fill permitting. See, for example, 33 C.F.R. § 323.4(a)(1)(ii) (imposing temporal and operational limits on availability of permitting exception for normal farming practices), https://www.law.cornell.edu/cfr/text/33/323.4 (accessed June 6, 2022).
8. *Sackett v. EPA*, Supreme Court Docket No. 21-454.
9. Daren Bakst, Mark C. Rutzick, and Adam J. White, "Restoring Meaningful Limits to 'Waters of the United States,'" Regulatory Transparency Project: Energy & Environment Working Group, September 26, 2017, https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-WOTUS.pdf (accessed June 6, 2022).
10. "Wheat Farmer vs. the Federal Government: Will the Constitution Prevail?" Pacific Legal Foundation, undated, https://pacificlegal.org/case/duarte-nursery-v-u-s-army-corps-of-engineers/ (accessed June 6, 2022), and "Bureaucrats Can't Rewrite the Law Just Because They Don't Like It," Pacific Legal Foundation, undated, https://pacificlegal.org/case/united-states-v-lapant/ (accessed June 6, 2022).
11. Justia, "Hawkes Co. Inc. v. U.S. Army Corps of Eng'rs, No. 13-3067 (8th Cir. 2015)," https://law.justia.com/cases/federal/appellate-courts/ca8/13-3067/13-3067-2015-04-10.html (accessed June 6, 2022).
12. Oral arguments in *U.S. Army Corps of Engineers v. Hawkes Co., Inc. et al.*, No. 15-290 (March 30, 2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-290_j5fl.pdf (accessed June 6, 2022).
13. Oyez, U.S. Army Corps of Engineers v. Hawkes 136 S. Ct. 1807 (2016), https://www.oyez.org/cases/2015/15-290 (accessed June 6, 2022).
14. At the time, the Government Accountability Office was named the General Accounting Office.
15. *Rapanos v. U.S.*, 547 U.S. 715 (2006), https://www.law.cornell.edu/supct/html/04-1034.ZS.html (accessed June 6, 2022).
16. U.S. General Accounting Office, "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO-04-297, February 2004, pp. 20–22, http://www.gao.gov/new.items/d04297.pdf (accessed June 6, 2022).
17. U.S. Army Corps of Engineers, Department of the Army, Department of Defense, and U.S. Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,'" Final Rule, *Federal Register*, Vol. 80, No. 124 (June 29, 2015), p. 37053, https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-unitedstates (accessed June 6, 2022).
18. Department of Defense, Department of the Army, U.S. Army Corps of Engineers, and U.S. Environmental Protection Agency, "Definition of 'Waters of the United States'–Recodification of Pre-Existing Rules," Final Rule, *Federal Register*, Vol. 80, No. 204 (October 22, 2019), p. 56626, https://www.federalregister.gov/documents/2019/10/22/2019-20550/definition-of-waters-of-the-united-states-recodification-of-pre-existing-rules (accessed June 6, 2022).
19. Department of the Army, U.S. Army Corps of Engineers, Department of Defense, and U.S. Environmental Protection Agency (EPA), "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" Final Rule, *Federal Register*, Vol. 85, No. 77 (April 21, 2020), p. 22250, https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states (accessed June 6, 2022).
20. Department of the Army, U.S. Army Corps of Engineers, Department of Defense, and U.S. Environmental Protection Agency, "Revised Definition of 'Waters of the United States,'" Proposed Rule, *Federal Register*, Vol. 86, No. 232 (December 7, 2021), p. 69372, https://www.federalregister.gov/documents/2021/12/07/2021-25601/revised-definition-of-waters-of-the-united-states (accessed June 6, 2022).

21. U.S. Environmental Protection Agency, "Notice of Public Meetings Regarding 'Waters of the United States,'" https://www.epa.gov/wotus/notice-public-meetings-regarding-waters-united-states (accessed June 6, 2022). Complicating the situation further, the Biden Administration decided not to appeal when two trial courts invalidated the Trump rule, and federal appellate courts have not allowed other parties to challenge the invalidation. U.S. Environmental Protection Agency, "Current Implementation of Waters of the United States," https://www.epa.gov/wotus/current-implementation-waters-united-states (accessed June 6, 2022). See also *Pasqua Yaqui Tribe v. EPA*, 557 F.Supp.3d 949 (D. Az. 2021) (vacating 2020 Rule), and *Pasqua Yaqui Tribe v. EPA*, 2022 WL 1259088 (9th Cir. Feb. 3, 2022) (dismissing intervenor's appeal).
22. See, for example, *Rapanos v. U.S.*, 547 U.S. 715 (2006) (pre-2015 regulations defining WOTUS exceed scope of CWA); *Georgia v. Wheeler*, 418 F.Supp.3d 1336 (S.D. Ga. 2019) (permanently enjoining 2015 Clean Water Rule); and *Pasqua Yaqui Tribe v. EPA*, 557 F.Supp.3d 949 (D. Ariz. 2021) (vacating 2020 Navigable Waters Protection Rule).
23. See, for example, Bakst, Rutzick, and White, "Restoring Meaningful Limits to 'Waters of the United States,'" and U.S. Senate Committee on Environment and Public Works, Majority Staff, "From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act," September 20, 2016, https://www.epw.senate.gov/public/_cache/files/9/9/99dc0f4b-50a8-4b9e-a604-cb720e7f19bc/1C09C14A8FD18AB786684EB1E6538262.wotus-committee-report-final1.pdf (accessed June 6, 2022).
24. In addition to civil and criminal penalties, this recommendation would also cover administrative penalties and mitigation payments.
25. "Traditional navigable waters" generally refer to waters as described in the 1870 case *Daniel Ball* and its progeny. The Daniel Ball, 77 U.S. 557 (1870), https://caselaw.findlaw.com/us-supreme-court/77/557.html (accessed June 16, 2022). These waters have been too broadly defined by agencies and the courts, and this paper refers to traditional navigable waters in a narrow sense, that is, those waters that are uncontestedly traditional navigable waters. See, for example, Daren Bakst, "Two Critical Improvements for the New Proposed 'Waters of the United States' Rule," Heritage Foundation *Issue Brief* No. 5000, September 19, 2019, https://www.heritage.org/environment/report/two-critical-improvements-the-new-proposed-waters-the-united-states-rule
26. See, for example, U.S. Army Corps of Engineers, Philadelphia District, "Jurisdictional Determinations Overview," https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/ (accessed June 6, 2022).
27. See, for example, *United States v. Bishop*, 412 U.S. 346 (1973); *United States v. Pomponio*, 429 U.S. 10 (1976); and later cases. The existing "knowing" standard under Section 309 of the CWA has proven inadequate to ensure that enforcement targets actually know that their activities would affect federally regulated waters, because courts have interpreted the term to only require knowledge of facts about the aquatic nature of a site, not that under the agencies' complex rules those facts add up to federal regulation. See, for example, *United States v. Lucero*, 989 F.3d 1088 (9th Cir. 2021). U.S. Environmental Protection Agency, "Clean Water Act Section 309: Federal Enforcement Authority," https://www.epa.gov/cwa-404/clean-water-act-section-309-federal-enforcement-authority (accessed June 6, 2022).