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MISSING THE POINT WITH POINT-SOURCE "ADDITION" SEMANTICS: SECTION 511 OF THE CLEAN WATER ACT EXEMPTS INTERCONNECTED WATERWAYS FROM SECTION 402 JURISDICTION, PERIOD?

Paul F. Foley*

I. INTRODUCTION

A. Environmental Law in its Second-Generation

As environmental law continues to mature in the second-generation since the enactment of several major federal environmental statutes in the 1970s,¹ two important implications from its current stage of development must be derived. First, second-generation judicial interpretation of these statutes no longer occurs in a vacuum: the applicability of the statute’s internal provisions to a particular subset of factual circumstances has, in all likelihood, already been litigated. Second, and corollary to the first implication, the first-generation’s establishment of precedent for interpreting each of a respective statute’s provisions was a necessary prerequisite for what should now be the overriding purpose of the statute’s second-

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generation maturation: the articulation of jurisdictional relationships amongst federal environmental statutes. Unless this second-generation maturation occurs, environmental law will not evolve into a comprehensive legal regime but will remain the same confusing morass of isolated and contradictory statutes that the first-generation of statutory interpretation necessarily laid the foundation to overcome.

Recent judicial interpretation of the Clean Water Act\(^2\) (CWA) threatens to revert environmental law to its first-generation of development. This interpretation completely fails to address the CWA's jurisdictional relationship with other federal environmental statutes; it correspondingly also fails to address whether almost identical factual circumstances have already been fully litigated under federal environmental law. Regrettably, this recent litigation has granted legitimacy to a completely novel interpretation of the CWA. Thus, an area of environmental law that has been well settled for decades has been shattered: the first-generation of environmental law has begun again, threatening to stunt the development of the field in an endless feedback loop involving the interpretation of fragmented provisions of discrete environmental statutes as if each occupied completely independent fiefdoms. To understand how the CWA has recently been distorted, and to map the proper road for the second-generation of environmental law's development, it is first necessary to look through the near-distant mirror of the statute's infancy period.

**B. Water Diversion Structures as Near-Distant Mirror**

During the early 1970s, the California Water Project (CWP) was "designed primarily to transport water from the relatively moist climate of northern California to the more arid central and southern portions of the State."\(^3\) Under the CWP, water stored behind Sacramento River dams would periodically be released into the Sacramento-San Joaquin Delta and then be diverted into newly constructed and existing canals and aqueducts.\(^4\) In *California v. Sierra Club*, a citizen group and two individual plaintiffs sought to enjoin the construction and operation of these CWP water diversion structures. Before the U.S. Supreme Court in 1981, plaintiffs argued that "present and proposed diversions of water from the Delta degraded the quality of Delta water, and that such diversion violated Section 10 of the Rivers and Harbors Appropriation Act of 1899."\(^5\)

\(^4\) Id.
\(^5\) Id. at 291-92 (citing Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403).
At the time *Sierra Club* was argued, it was axiomatic that diversions of water by means of canals and other structures connecting navigable waterways were subject to Section 10 jurisdiction, as had been the case for many decades. The plaintiffs in *Sierra Club* knew that structures connecting navigable waterways required a Section 10 permit issued by the United States Army Corps of Engineers (Army Corps); it would not have even occurred to them that Section 402 of the CWA (Section 402) could trump the Army Corps long established authority over these structures. Indeed, the idea that the CWA actually transferred permitting authority over these structures from the Army Corps to the United States Environmental Protection Agency (EPA), which issues permits for pollutant discharge under Section 402, would have seemed absurd. Not surprisingly, then, the plaintiffs in *Sierra Club* argued that the CWP required permits under Section 10 of the Rivers and Harbors Act. No mention was made of Section 402 of the CWA.

The Supreme Court in *Sierra Club* did not reach the merits of the plaintiffs' assertion that the Army Corps was required to issue a Section 10 permit for the CWP. Instead, it reversed the Ninth Circuit's holding that a private right of action exists to enforce Section 10. Accordingly, the Court placed all environmental citizen groups and potential plaintiffs on notice that the Army Corps permitting decisions pursuant to its authority under the Rivers and Harbors Act could not be challenged by means of citizen suits.

While the Supreme Court's declension to substantively decide the merits of a claim for which no cause of action existed was, of course, appropriate, an unfortunate byproduct has now ensued. Citizen suit plaintiffs have predictably attempted to bypass the Rivers and Harbors Act completely by asserting that Section 402 of the CWA regulates water diversion structures as the "addition" of "pollutants" between interconnected waterways. The reason for this plaintiff tactic is quite simple: the CWA has an explicit citizen suit provision. More surprisingly, however,

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8. Id.
9. Id.
10. "Petitioner the State of California urges that we reach the merits of these cases . . . . This we decline to do. Our ruling that there is no private cause of action permitting respondents to commence this action disposes of the cases . . . ." Id.
11. 33 U.S.C. § 1311 (2000); see also 33 U.S.C. §§ 1342, 1362(12) (defining the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").
12. 33 U.S.C. § 1365 (2000). The CWA's citizen suit provision applies only to effluent limitations regulated by EPA under Section 402; it does not grant citizen standing to challenge the Army Corps exercise of authority regulating activity involving the discharge
is that this opportunistic environmental lawyering has been greeted by courts with a collective legal amnesia. As a result, over two decades since the *Sierra Club* decision, the law concerning water diversion structures is in complete disarray. Meanwhile, the fact that interbasin water transfer has been regulated by the Rivers and Harbors Act since its inception in 1899 has been completely and, rather inexplicably, overlooked.\(^3\)

Two recent federal appellate decisions\(^4\) have held that interbasin water transfer requires a National Pollutant Discharge Elimination System (NPDES) permit issued by EPA pursuant to its authority under Section 402 of the CWA.\(^5\) Neither of these decisions address Section 10 of the Rivers and Harbors Act; interested defendant parties have apparently completely neglected Section 10 in their respective pleadings, nor has it occurred to courts to address this threshold jurisdictional issue. However, plaintiffs in *Sierra Club* pursued a Section 10 cause of action—and not a Section 402 CWA claim—before the Supreme Court in 1981 for a clearly definable reason: The CWA, by its express terms in Section 511, does not apply to the Secretary of the Army’s authority under Section 10 of the Rivers and Harbors Act.\(^6\)

Despite this Supreme Court precedent, plaintiffs in recent litigation have successfully argued that Section 402 of the CWA requires an NPDES permit for all artificial connections between formerly discrete waterways.\(^7\) Each dam, canal, aqueduct, channel, or pipeline connecting waterways may now require a NPDES permit where each causes water from one waterbody to be diverted into a more pristine waterbody. Thus, literally thousands of these structures, which are already permitted by the Army Corps under the Rivers and Harbors Act, may now require Section 402 permits—even though Section 402 has no applicability to these Army Corps structures. Without exaggeration, this recent litigation is the most significant interpretation of the CWA in the last decade.\(^8\) Most disturbing, however,

\(^14\) See *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).
\(^16\) See id. § 1371(a).
\(^17\) See *Miccosukee Tribe*, 280 F.3d at 1364; *Catskill Mountains*, 273 F.3d at 481.
is that a provision of the CWA that facially contradicts this interpretation is nowhere mentioned in this litigation; it has, indeed, been completely overlooked.

The first of these two recent cases, *Miccosukee Tribe of Indians v. South Florida Water Management District*, has been granted certiorari by the U.S. Supreme Court. It is therefore imperative that the relationship between Section 402 and Section 10 of the Rivers and Harbors Act be immediately addressed. If it is not, the Supreme Court may only address the limited issue *Miccosukee Tribe* or a similar case ultimately presents before it: whether the elements requiring a Section 402 permit, in the form of an “addition” of a “pollutant,” have been met. The fundamental issue, however, is whether Section 402 of the CWA can even apply to Section 10 permits. As this article demonstrates, Section 10 permits are not subject to Section 402 of the CWA.

This article maps the road necessary to overcome the recent quagmire of CWA interpretation now threatening to stagnate environmental law in its first-generation of development. Following this Introduction, Section II of this article analyzes the development of water diversion litigation from the time of the CWA’s enactment to its recent judicial interpretation as requiring Section 402 permits for water diversion structures connecting previously discrete waterways. Section III of this article discusses the CWA’s Section 511 prohibition against interference with the Secretary of the Army’s authority under the Rivers and Harbors Act and situates Section 511 within the CWA’s legislative history. Section IV of this article demonstrates that the scope of the Army Corps Section 10 authority under the Rivers and Harbors Act includes all water diversion structures and activities affecting the “footprint” of navigable waters; it then examines Section 401 of the CWA as the necessary jurisdictional link between the CWA and the Rivers and Harbors Act.

The conclusion of this article outlines the procedure wherein potential defendants can demonstrate that Section 511 of the CWA exempts structures operating under existing Section 10 permits from Section 402 permit requirements. Establishing this precedent at the earliest opportunity will thereby prevent this issue from causing a further regression in environmental law during what should be its second-generation of development.

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21. 33 U.S.C. § 1341 (2000). Section 401 requires any applicant for a federal license or permit to obtain state certification that the proposed activity complies with applicable effluent limitations under the CWA. *Id.*
development. Finally, because only a complete absence of jurisdictional thinking can explain otherwise capable courts and attorneys’ recent failure to address the Section 10 issue, an alternative methodology is proposed wherein jurisdictional issues will be brought to the forefront of environmental legal analysis. Unless this methodology is adopted, environmental law will continue to be plagued by seemingly novel interpretations of isolated environmental statutes—mere clever disguises for tattered, old clothes and recycled arguments.

II. INTERCONNECTED WATERWAY LITIGATION AS MANUFACTURED CRISIS

A. Crisis Created: the Miccosukee Tribe and Catskill Mountains Cases

Early in the 20th Century, the Army Corps of Engineers dug a canal through the Everglades in Broward County, Florida to facilitate flood control in the region. During the 1950s, the Army Corps expanded the project by constructing levees and a pump station, resulting in the conveyance of water from the canal to its surrounding basin area within the Everglades. In absence of the pump station and interconnected levees, “the populated western portion of Broward County would flood within days.” Half a century later, plaintiffs in Miccosukee Tribe have successfully argued before the Eleventh Circuit that this Army Corps project is subject to EPA permitting authority under Section 402 of the CWA. The Army Corps permitting authority under Section 10 of the Rivers and Harbors Act is nowhere mentioned.

From 1917 to 1924, the world’s then largest tunnel was constructed in the Catskills of New York State by a workforce averaging over one thousand people. The eighteen-mile Shandaken Tunnel diverts water from the contemporaneously built Schoharie Reservoir to the Esopus Creek, where it runs into the Ashokan Reservoir before entering New York City’s water supply system via the Catskill Aqueduct. In Catskill Mountains Chapter of Trout Unlimited v. City of New York, an alliance of citizen groups convinced the Second Circuit that the eighty-year-old

22. See Miccosukee Tribe, 280 F.3d at 1366.
23. Id.
24. Id.
25. Id. at 1371.
Shandaken Tunnel requires a Section 402 permit under the CWA for the "discharge" of water pollutants into Esopus Creek.²⁸ Committing the same fundamental error as the Ninth Circuit in Miccosukee Tribe, the Second Circuit in Catskill Mountains failed to consider that the Shandaken Tunnel and its accompanying water diversion structures are already permitted by the Army Corps pursuant to its Section 10 authority.²⁹

Having overlooked the fundamental legal issue as to whether EPA under Section 402 retains the jurisdiction under the CWA to impede the Army Corps Section 10 permitting authority, both the Ninth and Second Circuits perform semantic gyrations in interpreting whether the elements requiring a Section 402 permit—the "addition" of a "pollutant" from a "point-source"—are met.³⁰ Assuming, arguendo, that Section 402 of the CWA can have jurisdiction over Section 10 structures, which it cannot, the respective courts' ultimate conclusion that the three elements requiring a Section 402 permit were, in fact, present, was not devoid of logic. Nonetheless, the agonizing process by which this conclusion was derived should have made apparent that a jurisdictional issue was present—a complex question of the relations amongst federal environmental statutes now appropriate and necessary for judicial engagement during the second-generation of environmental law's development. Unfortunately, such a recognition did not manifest.

The Second Circuit's decision in Catskill Mountains turned on the meaning of "addition," given that water with suspended solids was considered to be a "pollutant" that was discharged from the Shandaken Tunnel as the "point-source."³¹ For there to be an "addition," the court reasoned, a pollutant must be introduced into a navigable water from the "outside world."³² Relying entirely on intuition, rather than exploring the statutory definition of a navigable water as extending over the entire surface of a waterbody,³³ the Second Circuit posited a distinction between a natural watercourse and one created through artificial means. According

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²⁸. Catskill Mountains, 273 F.3d at 493–94.
²⁹. See id.
³². Id. at 491 (quoting National Wildlife Federation v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982)).
³³. See 33 C.F.R. 329.4 (2003). Under the Rivers and Harbors Act, "a determination of navigability, once made, applies laterally over the entire surface of the waterbody." Id. Meanwhile, for purposes of CWA jurisdiction, waters of the United States are defined as including "impoundments of waters otherwise defined as waters of the United States" and their "tributaries." 33 C.F.R. § 328.3(a)(4–5) (2003). In either case, no distinction is made between waters that are artificially and naturally connected. Imputing such a distinction, while ignoring agency regulations defining the scope of navigable waters, is not within the proper realm of the court's prudent exercise of judicial authority.
to the Second Circuit, where water is merely recirculated or diverted from one part of a natural watercourse to another, nothing is "added" to the navigable water because the water had already been present within the waterway. In contrast, the court stated that where "water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water unrelated in any relevant sense to the Schorarie Reservoir and its watershed," an addition of pollutants occurs requiring a Section 402 permit.

Apparently, the Second Circuit in Catskill Mountains did not find it "relevant" that these waterways had already been connected eighty years previously. Had the court conducted a relevant inquiry, it would have determined that these water diversion structures operate under a current Section 10 permit. Thus, the particular portions of the presently interconnected watercourse that were created artificially is irrelevant: the entire watercourse became subject to Army Corps jurisdiction, as one navigable water, once the Army Corps authorized this interconnection pursuant to the Rivers and Harbors Act. Moreover, irrespective of the semantic distinction between artificial and natural watercourses as constituting multiple or uniform waterbodies, no Section 402 jurisdiction exists over either naturally or artificially connected water diversion structures under the CWA.

Four months after the Second Circuit decided Catskill Mountains, the Ninth Circuit issued its Miccosukee Tribe decision in 2002. As in Catskill Mountains, the Miccosukee Tribe court wrestled with the meaning of the word "addition" as the "one legal issue." Again relying entirely upon intuition, rather than the statutory and regulatory guidance provided by the Army Corps for determining the extent of navigable waters, the Ninth Circuit posited that the "receiving body of water" is relevant for analyzing

34. Catskill Mountains, 273 F.3d at 492. With mind-numbing profundity, the Second Circuit explained that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot (beyond, perhaps, a de minimis quantity of airborne dust that fell into the ladle)." Id. Soup analogies need not, however, be resorted to during environmental law's second-generation of development. When the temptation arises, courts should instead raise the jurisdictional questions appropriate for the development of a second-generation environmental legal regime. Once these jurisdictional issues are addressed, the letters within the soup bowl will, thankfully, read quite differently.

35. Id. (emphasis added).

36. See 33 C.F.R. § 329.8(a) (2003). "Determinations [of navigability] are not limited to the natural or original condition of the waterbody . . . [a]n artificial channel may often constitute a navigable water of the United States . . ." Id.

37. Miccosukee Tribe, 280 F.3d at 1366.

38. Id. at 1367.
whether an addition of a pollutant has occurred.\textsuperscript{39} Thus, if the point-source is the cause-in-fact of the addition of pollutants into the receiving water, a Section 402 permit is required.\textsuperscript{40} Following this tautology to its inexorable conclusion, the Ninth Circuit decided that "but for" the pumping station, the natural flow of water would not have entered the receiving basin area within the Everglades.\textsuperscript{41}

Stated differently, the import of the Ninth Circuit's decision is that any artificial water connection is, by definition, the cause-in-fact of a pollutant addition into any natural waterbody.\textsuperscript{42} In contrast, the addition of water pollutants from a natural hydrological connection is not really an addition—simply because it is "natural."\textsuperscript{43} Once the philosophic essentialism behind this nature fetishization is accepted, however, nothing natural can be the but-for cause of anything: nature is, was, and ever shall be. To be sure, this philosophy may have some spiritual appeal, but it has nothing to do with statutory interpretation of the CWA. More strikingly, this philosophy would nullify the entire Rivers and Harbors Act,\textsuperscript{44} the purpose of which is precisely to determine which artificial structures become integrated into the navigable waters of the United States. Indeed, "[d]eterminations [of navigability] are not limited to the natural or original condition of the waterbody."\textsuperscript{45} Nature aside, a canal can unquestionably be a navigable water.\textsuperscript{46}

The Ninth Circuit in \textit{Miccosukee Tribe} characterized the CWA as prohibiting the "discharge of pollutants from a point source into navigable waters without an NPDES (Section 402) permit."\textsuperscript{47} This is simply a misstatement of the CWA. Activities regulated under the Army Corps Section 404 CWA jurisdiction involve the discharge of pollutants from a point-source and do not require Section 402 permits.\textsuperscript{48} Additionally, as this article discusses below in more detail, Section 511 of the CWA excludes Section 402's application to water diversion structures regulated by the

\begin{itemize}
  \item \textsuperscript{39} \textit{Id.} at 1368.
  \item \textsuperscript{40} \textit{Id.}
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{42} \textit{See Miccosukee Tribe,} 280 F.3d at 1368.
  \item \textsuperscript{43} \textit{See id.}
  \item \textsuperscript{44} 33 U.S.C. §§ 401–467 (2000).
  \item \textsuperscript{45} 33 C.F.R. § 329.8(a) (2003).
  \item \textsuperscript{46} \textit{See id.} "Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable." \textit{Id.}
  \item \textsuperscript{47} \textit{Miccosukee Tribe,} 280 F.3d at 1367.
  \item \textsuperscript{48} \textit{See 33 U.S.C. § 1344 (2000) (permits for dredge and fill material). Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA." 40 C.F.R. § 122.3(b) (2003) (delineating discharges excluded from NPDES permit requirements).
Army Corps pursuant to the Rivers and Harbors Act, regardless of whether the discharge of a pollutant is involved. Had the Miccosukee Tribe court instead been more sufficiently oriented towards jurisdictional questions, it would have become aware of both the distinction between Section 402 and Section 404 CWA jurisdiction, and the need for exploring the jurisdictional relationship between the CWA and other federal environmental statutes.

B. Water Diversion Litigation: How Interpretation of a Non-Issue Became the Legal Issue

The seemingly novel issue of CWA interpretation by which the Catskill Mountains and Miccosukee Tribe courts were confronted had been framed by two decades of previous litigation. This litigation had patently rejected all claims that water diversion structures could be subject to Section 402 of the CWA. Nonetheless, the reasons courts gave for summarily rejecting Section 402’s applicability concerned the statutory construction of its provisions; the jurisdictional applicability of Section 402 to water diversion structures was not questioned. Having neglected the jurisdictional question, courts left the door open for the water diversion issue to again rear its ugly head two decades later.

When the U.S. Supreme Court held in California v. Sierra Club that no private right of action existed to enforce Section 10 permit requirements for water diversion structures, plaintiffs immediately sought to sidestep the Rivers and Harbors Act by claiming that certain water diversion structures violated other environmental statutes. Asserting that an Environmental Impact Statement was required for proposed water diversion structures pursuant to the National Environmental Policy Act, plaintiff Oklahoma Wildlife Federation unsuccessfully brought suit against the Army Corps in 1988. The court held that no Environmental Impact Statement was required because “[t]here is an established history of interbasin transfers of water,” including the “transfer of water with rather high total dissolved solids levels for mixing with higher quality water . . . .” Thereafter, plaintiffs exclusively focused their litigation efforts on Section 402 of the CWA, avoiding any mention of the Army Corps long-established authority over water diversion structures altogether.

53. Id.
Within a year of the *Sierra Club* decision, environmental plaintiffs had successfully recast the framework of the debate concerning permit requirements for interconnected water structures by singularly focusing upon Section 402 of the CWA. In *National Wildlife Federation v. Gorsuch*, a citizen group asserted that a dam’s discharge of water with low levels of dissolved oxygen from a reservoir to another waterbody violated the CWA.\(^{54}\) While the D.C. Circuit rejected plaintiff’s claim, the court’s analysis involved an exhaustive interpretation of Section 402’s provisions to inform its holding that EPA’s interpretation of the terms “addition” and “pollutant” was reasonable and therefore entitled to deference.\(^ {55}\) Despite the D.C. Circuit’s attempted thoroughness in deconstructing Section 402’s terms, the lack of breadth by which the court treated the larger environmental issue of pollution from dams—structures that had exclusively been under the Army Corps Rivers and Harbors Act jurisdiction for several generations—was remarkable, particularly in the wake of the *Sierra Club* decision. The *Gorsuch* court’s establishment of this limited mode of analysis as methodological precedent allowed subsequent plaintiffs to ignore the Rivers and Harbors Act with impunity.

The Sixth Circuit held, in *National Wildlife Federation v. Consumers Power Company*, that water containing entrained fish, discharged from the Ludington hydro-electric facility into Lake Michigan did not constitute a pollutant discharge subject to Section 402.\(^ {56}\) Once again focusing upon the meaning of the term “addition,” the court reasoned that because the Ludington facility initially obtains water containing fish from Lake Michigan, the redeposit of both live and dead fish into that same waterbody after power has been generated “adds” no pollutants from the outside world.\(^ {57}\)

The Sixth Circuit’s interpretation that nothing “new” is added to a waterbody when live fish are removed and their entrails subsequently redeposited was, of course, debatable. The court in *Consumers Power*, however, deferred to EPA’s construction of the CWA as not requiring Section 402 permits for these redeposits.\(^ {58}\) In absence of that agency

\(^{54}\) *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 161 (D.C. Cir. 1982). Anne Gorsuch was sued in her official capacity as Administrator of EPA. *Id.*

\(^{55}\) *Id.* at 177. The court here deferred to an agency’s reasonable interpretation of its statutory mandate (citing EPA v. National Crushed Stone Association, 449 U.S. 64, 83 (1980)). *Id.*


\(^{58}\) *Id.* As the court stated, “[t]here can be no doubt that the Ludington facility does not create the fish which become entrained in the process of generating electricity.” *Id.*

\(^{59}\) *Id.* at 584.
deference, it was in hindsight inevitable for some courts to instead conclude that an addition of a pollutant requiring a Section 402 permit does, in fact, occur under these or similar circumstances. Nearly fifteen years later, this is precisely what the Catskill Mountains and Miccosukee Tribe courts decided.60

To its credit, the Consumers Power court at least attempted to bypass intuition by addressing the issue before it in terms of the constitution of navigable waters—not merely by intuiting non-natural waterflows as necessarily constituting pollutant additions. The Sixth Circuit’s statement that the “water which passes through the Ludington facility never loses its status as water of the United States,”61 was a tacit admission that Section 402 jurisdiction cannot exist, nor can a discharge of pollutants occur, entirely within the boundaries of navigable waters. Unfortunately, the Consumers Power court did not feel it necessary to follow through with the implications of its analysis: lack of Section 402 jurisdiction over pollutants already flowing within interconnected navigable waters implies either that no such jurisdiction exists under federal environmental law or that this jurisdiction has been vested in another statute. Upon examination, the Sixth Circuit would have determined that this jurisdiction over navigable waters is indeed vested in another federal environmental statute: the Army Corps retains exclusive jurisdiction over waterflow between artificially or naturally interconnected waterbodies pursuant to Section 10 of the Rivers and Harbors Act.62

The Consumers Power court’s failure to address the scope of Section 402 jurisdiction, despite its seeming recognition that no addition can occur within water that “never loses its status as water of the United States,” narrowed the issue to one of mere statutory interpretation of Section 402’s provisions.63 Accordingly, the larger question of Section 402’s scope has, predictably, not been raised since Consumers Power. Most importantly, Consumers Power had completely set the stage for another court to subsequently determine that the existing pattern of flow between already interconnected water structures violates Section 402. This is precisely what the Ninth Circuit decided when it heard the issue in 1993.64

In Mokelumne River v. East Bay, a municipal utility district constructed a dam and other impoundments in 1978 to minimize the amount of acid mine drainage that had previously been flowing into the Mokelumne River

60. See Catskill Mountains, 273 F.3d at 481; Miccosukee Tribe, 280 F.3d at 1364.
61. Consumers Power Co., 862 F.2d at 589.
63. Consumers Power Co., 862 F.2d at 589.
64. See Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305, 310 (9th Cir. 1993).
as surface runoff. The reservoir and dam succeeded in containing almost all of the acid mine runoff and dramatically reduced the amount of pollutants entering the river. Nonetheless, because a small fraction of this water and drainage occasionally passed "over the spillway or through the dam's discharge valve into the Mokelumne River," the Ninth Circuit concluded that this spillage constituted a point-source addition of pollutants in violation of Section 402. The court readily admitted that finding the utility district liable, fifteen years after the project's completion, for nearly eradicating the amount of pollutants entering the river—when the district would have suffered no liability whatsoever had it done nothing—was a perverse outcome. But the Ninth Circuit stated that "[w]e are not policymakers. We must simply apply the law." To the Ninth Circuit, the elements requiring a Section 402 permit were clearly met; it did not even occur to the court, or to defendant's attorneys, to first explore Section 402's jurisdictional relationship with other federal environmental statutes. Thus, while the Ninth Circuit may accurately have been described as "applying" a law—the Clean Water Act—it made no effort to determine what the law, in terms of a greater environmental regulatory regime, actually was.

The collective legal amnesia the Mokelumne River decision represented had become fully petrified by the time the Second Circuit heard Catskill Mountains in 2001 and the Eleventh Circuit decided Miccosukee Tribe the following year. Despite the Sierra Club plaintiffs' argument before the U.S. Supreme Court in 1981 that water diversion structures violated Section 10 of the Rivers and Harbors Act, courts and respective attorneys alike came to blindly accept the premise that only Section 402 of the CWA applied to water diversion structures. Stated differently, the implications of these structures' operation under existing Army Corps permits were not drawn because neither courts nor respective attorneys seemed to recognize

65. Id. at 307.
66. Id.
67. Id.
68. Id. at 310. As Justice Fernandez, in a concurring opinion, stated:
Appellants earnestly argue that the EPA's approach, and that of the appellee's, will not serve the long-term purpose of bettering the aquatic environment. They indicate that it takes no genius or epopt to see what the message will be. Do nothing! Let someone else take on the responsibility. Let the water degrade, let your fish die, but protect your pocketbook from vast and unnecessary expenditures. Do not try to bring some order out of environmental chaos. In short, appellants suggest that no Odysseus or Daedalus crafted the policy which we are now asked to follow. Perhaps they are correct; I suspect they are.

69. Committee to Save Mokelumne River, 13 F.3d at 310.
70. See Catskill Mountains, 273 F.3d at 481; Miccosukee Tribe, 280 F.3d at 1364.
that an environmental statute does not exist as an independent fiefdom; its scope of jurisdiction is, rather, defined by the other environmental statutes that may retain jurisdiction over the same type of activity.

The amnesia caused by the first-generation emphasis on statutory provisions, at the expense of a second-generation emphasis on jurisdictional relations among environmental statutes, has been historically traced in this section. This article now recreates the memories that this amnesia has dissipated through an articulation of the law that does actually exist, despite first-generation environmental practitioners and courts' demonstrated ignorance of this persistent reality.

III. SECTION 511 OF THE CWA AND THE SECRETARY OF THE ARMY'S AUTHORITY

A. The Section 511 Prohibition

Section 511(a)(2) of the CWA states that the CWA "shall not be construed" as "affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899. . . ."72 The "Act of March 3, 1899," to which Section 511 refers, is the Rivers and Harbors Act of 1899.73 Thus, by the CWA's explicit terms, the CWA cannot "affect or impair" the Secretary of the Army's navigation authority or "affect or impair" the Secretary's authority under the Rivers and Harbors Act.74 Pursuant to the Secretary of the Army's authority, the Army Corps issues permits for activities affecting navigable waters.75

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72. 33 U.S.C. § 1371(a) (2000) (emphasis added). Section 511(a) of the CWA reads, in its entirety, as follows:
(a) Impairment of authority or functions of officials and agencies; treaty provisions
This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899; except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

Id.


74. 33 U.S.C. § 1371(a).

75. See 33 U.S.C. §§ 401, 403. "The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition,
Section 10 of the Rivers and Harbors Act prohibits altering or modifying, "in any manner," the "course, location, condition, or capacity of" any navigable water, including canals or "the channel of any navigable water," without the Secretary of the Army’s authorization. 76 This language is extremely broad: requiring a Section 402 permit for a canal pump station, as in Miccosukee Tribe 77—and the prospect of the canal’s continued operation being cast in doubt—is, on its face, a change in the "condition, or capacity of" that canal in some "manner."78 Any such change in the condition or capacity of a waterbody must be approved by the Army Corps under Section 10—not by EPA under Section 402 of the CWA. In contrast, vesting EPA with this authority under the CWA, and thereby negating the Army Corps permitting authority, by definition "affect or impairs" the authority of the Secretary of the Army under the Rivers and Harbors Act. Section 511 of the CWA explicitly prohibits this. Accordingly, despite the Miccosukee Tribe and Catskill Mountains courts’ apparent ignorance of Section 511, their respective holdings that EPA has final permitting authority over these structures nonetheless constitutes a facial violation of the CWA.79

Section 511 of the CWA, however, does not preclude the CWA’s applicability to any structure or activity previously regulated by the Secretary of the Army.80 The CWA does, in fact, apply to many of these activities and Section 511 makes clear to which of these activities the CWA specifically applies. Although Section 511 generally prohibits any impairment whatsoever of the Army Corps authority under the Rivers and Harbors Act, one exception to this is itemized: "except that any permit issued under section [404] shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section [10 of the Act of March 3, 1899]."81 The word "except" here is important; it or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit.” 33 C.F.R. § 320.2 (b).

77. Miccosukee Tribe, 280 F.3d at 1367.
79. See Miccosukee Tribe, 280 F.3d at 1364; Catskill Mountains, 273 F.3d at 481.
81. Id. § 1371(a)(2)(emphasis added). The exception is delineated in section (a)(2), immediately following Section 511’s prohibition against “affecting or impairing” the
Acknowledges that a water quality requirement is, in fact, an impairment to
the Secretary of the Army's authority—an impairment that is permissible
under the CWA only because it is specifically enumerated as an
exception.\textsuperscript{82} Were Section 402 also considered to be an exception to
the general prohibition against impairment of the Secretary of the Army's
authority "in any manner,"\textsuperscript{83} it would have been delineated in Section 511
along with the Section 404 exception.\textsuperscript{84} No such enumeration exists in
Section 511, however, precisely because Section 402 of the CWA does not
apply to structures and activities under the Army Corps jurisdiction.\textsuperscript{85}

The Army Corps regulations implementing Section 10 also underscore
EPA's lack of authority under Section 402 to grant permits for activities or
structures affecting or impairing navigable waters.\textsuperscript{86} As the implementing
regulations explain, "[t]he general legislation by which Federal agencies
are empowered to act generally is not considered to be sufficient authoriza-
tion by Congress to satisfy the purposes of Section 10."	extsuperscript{87} Therefore, "[i]f
an agency asserts that it has Congressional authorization meeting the test
of Section 10 . . . , the legislative history and/or provisions of the Act
should clearly demonstrate" that Congress intended that outcome.\textsuperscript{88}

Requiring a Section 402 permit for a tunnel functioning as a water channel,
as in \textit{Catskill Mountains},\textsuperscript{89} or for a canal, as in \textit{Miccosukee Tribe},\textsuperscript{90} affects
or impairs the condition or capacity of these navigable waters.\textsuperscript{91}
Accordingly, a Section 402 permit for this effect or impairment could only be
authorized by Congress's explicit vesting of this Section 10 authority to

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Secretary of the Army’s authority. \textit{Id.}
82. \textit{Id.}
85. \textit{See id.}
86. \textit{See 33 C.F.R. § 322.3(c)(2) (2003).}
87. \textit{Id.}
88. \textit{Id.}
89. \textit{See Catskill Mountains}, 273 F.3d at 492. "For purposes of a section 10 permit, a
tunnel or other structure or work under or over a navigable water of the United States is
considered to have an impact on the navigable capacity of the waterbody." 33 C.F.R. §
322.3(a) (2003). \textit{Id.}
90. \textit{See Miccosukee Tribe}, 280 F.3d at 1364. Section 10 retains jurisdiction over any
canal or artificial waterway "if at some point in its construction or operation it results in an
effect on the course, location, condition, or capacity of navigable waters." 33 C.F.R. §
322.5(g) (2003). The plaintiffs in \textit{Miccosukee Tribe} sought to require a Section 402 permit
for the "operation" of a canal pump station which, they alleged, alters the "condition" of
navigable waters. \textit{Miccosukee Tribe}, 280 F.3d at 1367. The harms the plaintiffs alleged are
therefore clearly under Section 10 Army Corps jurisdiction; these grounds alone warranted
dismissal of plaintiff's Section 402 claim in \textit{Miccosukee Tribe}.
EPA.\textsuperscript{92} Congress, however, not only failed to affirmatively grant EPA this authority but, in the plain language of Section 511,\textsuperscript{93} explicitly prohibited EPA from its exercise. Under the CWA, the Secretary of the Army retains full Section 10 authority.\textsuperscript{94}

The Army Corps has jurisdiction over both Section 404 of the CWA, which regulates discharges of dredged and fill material into navigable waters, including wetlands,\textsuperscript{95} and the Rivers and Harbors Act.\textsuperscript{96} Section 404 of the CWA cannot, therefore, be said to "impair" or "affect" the Army Corps authority over structures or activities within navigable waters.\textsuperscript{97} Indeed, the only federal court that has analyzed the scope of Section 511 has held that Section 511 does not exempt the Army Corps from complying with Section 404 permitting requirements.\textsuperscript{98} Moreover, the Section 404

\textsuperscript{92} It should be noted that this does not mean that EPA’s Section 402 authority and the Army Corps Section 10 authority are mutually exclusive. More accurately, the two can co-exist but, when this does occur, EPA’s Section 402 authority is subordinate to Section 10. Thus, an outfall pipe permitted under EPA’s NPDES program, like any structure within navigable waters, requires a Section 10 permit. A Section 10 structure, however, such as an artificial waterway, does not require a Section 402 permit to authorize its functioning and operation as a waterway; that authority is exclusively vested by Section 511 of the CWA to the Secretary of the Army. The CWA, by its explicit terms, does not impair the Army Corps Section 10 authority through the superimposition of another agency’s permitting requirements. In contrast, the Secretary of the Army’s authority is hardly impaired when a Section 402 permit requires Army Corps approval under Section 10.

\textsuperscript{93} 33 U.S.C. § 1371(a) (2000).

\textsuperscript{94} Id. As a condition of EPA’s delegation of its NPDES authority to the states, Section 402 requires assurance that “no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers . . . anchorage and navigation of any of the navigable waters would be substantially impaired thereby.” 33 U.S.C. § 1342(b)(6) (2000). This explicit provision further demonstrates that Section 402 does not apply to activities and structures under the Army Corps Section 10 jurisdiction.

\textsuperscript{95} 33 U.S.C. § 1344 (2000).

\textsuperscript{96} 33 U.S.C. §§ 401-467 (2000).


\textsuperscript{98} Save Our Sound Fisheries Ass’n v Callaway, 387 F. Supp. 292, 4 ELR 20437 (R.I. 1974). Here, the Army Corps, as defendant, claimed that its actions were not subject to Section 404 because this would “impair” or “affect” the Secretary of the Army’s authority in violation of CWA Section 511(a). Id. at 300–01. The court, correctly, refused to read Section 511(a) this broadly because the Army Corps was itself charged with implementing Section 404 of the CWA. Id. The court refused to exempt the Army Corps, in other words, from complying with its own permit requirements. Section 402 of the CWA, however, was not addressed; the Army Corps, as a federal agency, unquestionably must follow its own Section 10 and Section 404 permit requirements. Section 511 does state, however, that the Army Corps permit requirements cannot themselves be rendered invalid through subordination to EPA’s Section 402 permitting regime. See 33 U.S.C. § 1371(a) (2000). Thus, even under the most narrow construction of Section 511, conditioning Army Corps permits upon receipt of an additional Section 402 permit “impairs” or “affects” the Secretary
exception\textsuperscript{99} makes evident that water quality determinations for activities under the Army Corps jurisdiction are not subject to Section 402. Under the CWA, Section 402 jurisdiction and Section 404 jurisdiction are mutually exclusive, because no activity can be subject to both EPA and the Army Corps CWA jurisdiction. Either a Section 402 or a Section 404 permit may be required for an activity regulated under the CWA, but never both.\textsuperscript{100}

Except for the Rivers and Harbors Act of 1899, Section 511 explicitly supplanted the Secretary of the Army of the authority vested by previous statutes.\textsuperscript{101} The CWA overrides the Rivers and Harbors Act of 1910 and the Supervisory Harbors Act of 1888 "except as to effect on navigation and anchorage."\textsuperscript{102} This exception is again meaningful because it underscores Congress's intent to preserve the Secretary of the Army's authority, without "affect" or "impairment,"\textsuperscript{103} over activities subject to Section 10 while the Army Corps authority over other activities was removed by the new legislation. These activities were instead delegated to EPA under the CWA. While the plain language of Section 511 makes the intent of Congress sufficiently unambiguous for an analysis of legislative history to be conducted of necessity, an analysis of Section 511 in the context of the CWA's legislative history is nonetheless warranted. Having completely overlooked the Section 511 argument in recent litigation, courts and practitioners alike might otherwise be loathe to admit that the explanation for Section 402's inapplicability to activities and structures permitted under Section 10 is, indeed, as simple as it will appear.

\textsuperscript{100} 40 C.F.R. § 122.3 (2003). "Exclusions. The following discharges do not require NPDES permits: (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA." Id. Additionally, Section 402 requires a permit \textit{except} as provided in Section 404. 33 U.S.C. § 1342(a)(1) (2003).
\textsuperscript{102} 33 U.S.C. § 1371(b). Section 511(b) of the CWA appears, in its entirety, as follows:

\textit{(b) Discharges of pollutants into navigable waters}
Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 and the Supervisory Harbors Act of 1888 shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

\textit{Id.}
B. Section 511 and the CWA's Legislative History

Four years before the CWA was enacted in 1972, the Army Corps revised its regulations governing permit applications to assess the "effect of the proposed work on navigation, fish and wildlife, conservation, pollution, esthetics, ecology, and the general public interest." General Groves, as the Chief of the Army Corps, stated in a 1971 hearing before the Subcommittee on Air and Water Pollution that "we have required detailed information on effluents passing through a section 10 structure, [since] May of 1970." In response to Senator Edward Muskie's queries, General Groves further elaborated that "as the water quality standards emerged and became apparent to us that Section 10 and Section 13 were related, which they very definitely are, we felt compelled to require this additional information on effluents."

The "section 13" to which General Groves referred is Section 13 of the Rivers and Harbors Act of 1899 (Section 13), a section which "is popularly known as the 'Refuse Act'..." Section 13 was replaced by Section 402 of the CWA; in accordance with Section 402's explicit terms, no further Section 13 permits were issued after 1972. Thus, just prior to the CWA's enactment in 1972, the Army Corps had already incorporated environmental considerations into the permit application process for Section 10 permits; applications for Section 10 permits required information on effluents passing through Section 10 structures; and the Section 10 and Section 13 programs administered by the Army Corps were acknowledged to be "very definitely" related.

The federal courts have recently explored, in some depth, the historical relationship between Section 10 and Section 13 of the Rivers and Harbors Act and Section 402 and Section 404 of the CWA. In Kentuckians v. Rivenburgh, the federal district court in West Virginia attempted to delineate the boundary between Section 402 and Section 404 jurisdiction. According to the court, "Section 10 does not [nor did it ever] control waste or refuse disposal," and Section 404, as a decedent to Section 10, likewise

104. Zabel v. Tabb, 430 F.2d 199, 214 n.27 (5th Cir. 1970) (citing former 33 C.F.R. § 209.120(d)(1)).
106. Id. (emphasis added).
108. See id. § 1342(a).
111. See id at 935.
cannot regulate these discharges. The Fourth Circuit promptly over-
turned this decision, finding that the lower court "erred in concluding that [Section] 10 regulated only beneficial fills, not waste." The Fourth Circuit explained that Section 10 "is sufficiently broad to prohibit the discharge of any fill material, including waste ..." Indeed, prior to the CWA's adoption, Section 10 and Section 13 of the Rivers and Harbors Act were, quite simply, "very definitely" related; both permit applications required information on effluent discharges, and the Army Corps often issued a dual permit covering both Section 10 and Section 13.

The CWA was adopted in October 1972 when Congress passed the Senate bill after conference with the House of Representatives. The Senate Conference Report ("the Conference Report") states that "Section 511 preserves the authority of other Federal laws which are consistent with this Act, specifically the Secretary of the Army to maintain navigation and his authority under the Rivers and Harbors Act of 1899." Further elaboration in delineating the scope of Section 511(a) is not provided. The commentary on Section 511(c), moreover, merely summarizes the following text of 33 U.S.C. § 1371(h): "Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 ... and the Supervisory Harbors Act of 1888 ... shall be regulated pursuant to this chapter [the CWA], and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage." The statutory text of Section 511(b) is important, however, because it explicitly states that some "discharges of pollutants" are not subject to the CWA. While pollutant discharges are generally subject to the CWA, Section 511(b) explicitly excepts pollutant discharges concerning "navigation and anchorage." Taken together, then, Section 511(a) and Section 511(b) make clear that pollutant discharges concerning navigation remain under the exclusive purview of the Secretary of the Army and cannot be regulated

112. Id at 935–36.
114. Id.
118. See id. Most Congressional debate concerning Section 511 of the CWA instead addressed the applicability of the National Environmental Policy Act. Id.; see also 42 U.S.C. §§ 4321–4370 (the National Environmental Policy Act).
120. Id.
121. Id.
by Section 402 of the CWA. Unfortunately, despite this plain statutory language, neither *Miccosukee Tribe* nor *Catskill Mountains* even contemplate that the CWA, by its explicit terms in Section 511, has no applicability to this—or any—subset of pollutant discharges. This is a grave oversight.

Congressperson Dingell, in urging the House’s approval of the Conference Report, stated, “[t]he bill does not repeal the Refuse Act of 1899. It still remains available to prevent the discharge of polluting wastes. In addition, section 511(a) of the bill specifically preserves the authority of the Secretary of the Army under the Refuse Act.” In this statement, Congressperson Dingell was evidently referring to the entire Rivers and Harbors Act of 1899 as the Refuse Act—not merely to Section 13. Nonetheless, his statement clearly evinces Congress’ understanding that some pollutant discharges would remain under the exclusive jurisdiction of the Secretary of the Army, namely, pollutant discharges affecting navigation under Section 10.

The plain language of Section 511 makes clear that the Secretary of the Army’s authority under Section 10 could not be impaired by the CWA. Analysis of the legislative history and the text of Section 511(b), however, further underscores Congress’s intent for those discharges of pollutants affecting navigation to remain under the Secretary’s jurisdiction. This jurisdiction over pollutant discharges includes the Army Corps Section 404 jurisdiction and its Section 10 authority. The Fourth Circuit, moreover, has affirmed that the Army Corps Section 10 authority includes pollutant discharges. Accordingly, a water diversion structure may require either or both a Section 10 and a Section 404 permit from the

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122. *See Miccosukee Tribe*, 280 F.3d at 1364; *Catskill Mountains*, 273 F.3d at 481.
127. *See id.*. § 1371(b). “Discharges of pollutants into the navigable waters . . . shall be regulated pursuant to this chapter . . . except as to effect on navigation and anchorage.” *Id.* (emphasis added).
130. *See Kentuckians for the Commonwealth*, 317 F.3d at 439.
Army Corps; but by Section 511's explicit terms\textsuperscript{131} it does not require a Section 402 permit under the CWA.\textsuperscript{132}

IV. THE CORPS' AUTHORITY AND SECTION 10 OF THE RIVERS AND HARBORS ACT

A. The Army Corps Section 10 Authority

Navigation and the protection of navigation is "a primary concern of the federal government" and not the states.\textsuperscript{133} Without the Army Corps permit approval, any activity, including "the construction of any structure in or over any navigable water," or "any other work affecting the course, location, condition, or capacity of such waters is unlawful."\textsuperscript{134} The Army Corps permitting decisions are based on an assessment of cumulative environmental impacts; these include wetlands, water supply, floodplain values and "general environmental concerns."\textsuperscript{135} Pursuant to its nationwide permit program, the Army Corps issues permits (NWPs) for activities not requiring an individual permit application.\textsuperscript{136} NWPs "can be issued to satisfy the permit requirements of section 10 of the Rivers and Harbors Act of 1899."\textsuperscript{137} An NWP was issued in July of 1977 for "structures or work completed before December 18, 1968, or in waterbodies over which the DE [the Army Corps] had not asserted jurisdiction at the time the activity occurred."\textsuperscript{138} Thus, pursuant to its authority under Section 10, the Army Corps has permitted all structures, within its jurisdiction, completed prior to December 1968.\textsuperscript{139} Unless these permitted activities are modified, "they do not require further permitting."\textsuperscript{140}

The structures in both \textit{Miccosukee Tribe} and \textit{Catskill Mountains} are within the navigable waters of the United States and are under the Army Corps Section 10 jurisdiction.\textsuperscript{141} In \textit{Miccosukee Tribe}, the Army Corps

\begin{thebibliography}{99}
\bibitem{131} 33 U.S.C. § 1371(a).
\bibitem{132} See id. § 1342.
\bibitem{133} 33 C.F.R. § 320.4(o)(3) (2003).
\bibitem{135} 33 C.F.R. § 320.4(a) (2003).
\bibitem{136} See id. § 330.1.
\bibitem{137} See id. § 330.1(g).
\bibitem{138} See id. § 330.3.
\bibitem{139} Id.
\bibitem{140} 3 C.F.R. § 330.3 (2003) "Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP." See id. § 330.6(b).
\bibitem{141} See \textit{Miccosukee Tribe}, 280 F.3d at 1364; \textit{Catskill Mountains}, 273 F.3d at 481.
\end{thebibliography}
itself built the canals through the Everglades wetlands in the early 1900s;\textsuperscript{142} these canals are navigable waters of the United States under Section 10 jurisdiction,\textsuperscript{143} while the larger wetlands system is subject to the Army Corps Section 404 authority.\textsuperscript{144} In \textit{Catskill Mountains}, meanwhile, the Shandaken Tunnel connects two reservoirs to a creek.\textsuperscript{145} "For purposes of a Section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody"\textsuperscript{146} and is therefore subject to the Army Corps jurisdiction. The Shandaken Tunnel is also a power transmission line that required a Section 10 permit because it is not subject to the Federal Power Act.\textsuperscript{147} Moreover, the reservoirs and creeks are themselves navigable waters,\textsuperscript{148} and a determination of navigability ... applies laterally over the entire surface of the waterbody."\textsuperscript{149} The Army Corps therefore retains jurisdiction over all of the water diversion structures in \textit{Miccosukee Tribe}\textit{ and} \textit{Catskill Mountains}.

The structures in \textit{Miccosukee Tribe} and \textit{Catskill Mountains} operate under existing NWPs promulgated by the Army Corps in 1977.\textsuperscript{150} The Army Corps regulations implementing the NWP program explicitly state that these NWPs remain effective unless the activities are modified.\textsuperscript{151} The pump station and accompanying levees in \textit{Miccosukee Tribe} were completed in the 1950s,\textsuperscript{152} and the Shandaken Tunnel was completed in 1924.\textsuperscript{153} Accordingly, these structures were completed well before December 1968 and continue to operate under this Army Corps NWP.\textsuperscript{154}

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\item \textsuperscript{142} See \textit{Miccosukee Tribe}, 280 F.3d at 1366.
\item \textsuperscript{143} 33 U.S.C. § 403 (2000).
\item \textsuperscript{144} See id. § 1344.
\item \textsuperscript{145} See \textit{Catskill Mountains}, 273 F.3d at 492.
\item \textsuperscript{146} 33 C.F.R. § 322.3(a) (2003).
\item \textsuperscript{147} See id. § 322.5(i).
\item \textsuperscript{148} See id. § 328.3(a). The Army Corps issued regulations applicable to reservoirs at the headwaters of the Mississippi River; these regulations, issued pursuant to Section 10 jurisdiction, address water diversions from reservoirs: "The accumulation of water in, and discharge of water from the reservoirs, including that from one reservoir to another, shall be under the direction of the U.S. District Engineer." See id. § 207.340(d). Although these regulations have not been made explicit for all reservoir discharges, it nonetheless makes clear that reservoir discharges are under Section 10 jurisdiction. See id. § 329.4.
\item \textsuperscript{149} See id. § 329.4.
\item \textsuperscript{150} See id. § 330.3.
\item \textsuperscript{151} 33 C.F.R. § 330.3 (2003).
\item \textsuperscript{152} \textit{Miccosukee Tribe}, 280 F.3d at 1366.
\item \textsuperscript{154} 33 U.S.C. § 330.3 (2000).
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Existing Army Corps Section 10 permits cannot be modified by Section 402 permits. Instead, an established mechanism for modifying existing Section 10 permits is clearly delineated in the Army Corps regulations; this mechanism has no relation whatsoever to Section 402 permits. Courts’ imposition of a Section 402 permitting requirement on existing Section 10 permits directly contradicts these regulations and these decisions are, accordingly, facially invalid. The Army Corps retains discretionary authority to “modify, suspend, or revoke NWP authorizations.” Should the Army Corps determine that an existing NWP “would result in more than minimal . . . adverse effects on the environment,” it must “modify the NWP authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee” that the NWP is no longer authorized. The Army Corps encourages public input: “Anyone may, at any time, suggest to the Chief of Engineers . . . changes to existing NWPs.” In deciding whether to exercise its discretion to modify, revoke or suspend an NWP, the Army Corps considers, among other things, “changes in circumstances” since the NWP was issued and “cumulative adverse environmental effects resulting from activities occurring under the NWP.” The specificity of these procedures only makes apparent that Section 402 provides no jurisdiction for EPA to modify the Army Corps existing NWPs. Nonetheless, plaintiffs in Miccosukee Tribe and Catskill Mountains succeeded in bypassing these procedures completely.

Although courts have recently failed to address the applicability of Section 10 to water diversion structures, whenever courts have, in fact, analyzed Section 10 it has been interpreted broadly. In United States v. Republic Steel Corp., the United States Supreme Court reviewed Section

155. See id. § 330.4(e). “The Corps reserves the right (i.e., discretion) to modify, suspend, or revoke NWP authorizations.” Id.

156. See Miccosukee Tribe, 280 F.3d at 1364; Catskill Mountains, 273 F.3d at 481. Courts have no authority to overrule an agency’s rulemaking without following the standards and procedures of the Administrative Procedure Act. See Administrative Procedure Act, 5 U.S.C. §§ 500-596 (1994).

157. 33 C.F.R. § 330.4(e) (2003). In United Texas Transmission Co. v. U.S. Army Corps, 7 F.3d 436, 441 (5th Cir. 1993), the Fifth Circuit held that the Army Corps had the authority to require a valid permit holder to pay for the relocation of pipes to accommodate a flood control project. Id.; see also United States v. Alameda Gateway, 213 F.3d 1161, 1167 (9th Cir. 2000) (holding that the Rivers and Harbors Act “allows the United States to remove structures that were once erected lawfully but subsequently found to be obstructions”).


159. See id. § 330.5(b). This section provides, in detail, the procedures that must be followed “for modifying, suspending, or revoking NWPs and authorizations under NWPs.” Id. § 330.5(a).

160. See id. § 330.5(d).

161. See id. § 330.5.
10 precedent through 1960 and affirmed that Section 10 had always been interpreted to have a "broad sweep."\textsuperscript{162} Quoting an earlier opinion by Justice Holmes, the Court in \textit{Republic Steel} stated that anything "which affects the water level may... amount to an 'obstruction' within the meaning of [Section] 10."\textsuperscript{163} In \textit{United States v. Alaska}, the Supreme Court again confirmed that the language of Section 10 is "quite broad," holding that the Army Corps "authority is not confined solely to considerations of navigation [but may incorporate a whole range of environmental concerns] in deciding whether to issue a permit under [Section] 10."\textsuperscript{164} Summarizing this Section 10 precedent in 1994, the First Circuit stated in \textit{United States v. Estate of Boothby} that the "Rivers and Harbors Act has been transformed into an instrument of environmental policy. This transformation occurred long ago."\textsuperscript{165}

The water diversion structures in \textit{Miccosukee Tribe} and \textit{Catskill Mountains} operate under existing Section 10 permits.\textsuperscript{166} The procedure for modifying these permits is clearly delineated in the Army Corps regulations; they cannot be modified by Section 402.\textsuperscript{167} Moreover, Section 1371 of the Rivers and Harbors Act explicitly prohibits the CWA from impairing the Army Corps Section 10 authority—authority that the Supreme Court has always broadly construed.\textsuperscript{168} Were Section 402 applicable to existing Army Corps permits, the EPA—and not the Secretary of the Army—would retain final authority to revoke, suspend, or modify Section 10 permits. However, this would flatly contradict the Army Corps implementing regulations.\textsuperscript{169} Most importantly, according to \textit{Miccosukee Tribe} and \textit{Catskill Mountains}, the EPA could completely suspend existing Section 10 permits for failure to comply with Section 402.\textsuperscript{170} Given the history and broad statutory mandate of Section 10 and Section 511’s explicit terms, it is, in short, inconceivable that Section 402 of the CWA empowered EPA to invalidate existing Section 10 permits involving inter-basin water

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\item \textsuperscript{162} United States v. Republic Steel Corp., 362 U.S. 482, 487 (1960).
\item \textsuperscript{163} \textit{Id.} at 488.
\item \textsuperscript{164} United States v. Alaska, 503 U.S. 569, 579–80 (1992). The Court pointed to a long line of precedent establishing a “broad interpretation of agency power under [Section] 10 that was consistent with the language used by Congress and was well settled by this Court and the Army Corps of Engineers.” \textit{Id.} at 582.
\item \textsuperscript{165} United States v. Estate of Boothby, 16 F.3d 19, 23 (1st Cir. 1994).
\item \textsuperscript{166} \textit{See} 33 C.F.R. § 330.3(6) (2003) (issuing NWPs for “[s]tructures or work completed before December 18, 1968” which, unless modified, “do not require further permitting”). \textit{Id.}
\item \textsuperscript{167} \textit{See id.} § 330.5(b).
\item \textsuperscript{168} 33 U.S.C. § 1371(a) (2000).
\item \textsuperscript{169} \textit{See}, e.g., United States v. Alaska, 503 U.S. at 580.
\item \textsuperscript{170} \textit{See} 33 C.F.R. § 330.5(b).
\item \textsuperscript{171} \textit{See Miccosukee Tribe}, 280 F.3d at 1364; \textit{Catskill Mountains}, 273 F.3d at 481.
\end{itemize}
transfer. At the very least, the CWA would have made such a broad encroachment upon the Secretary of the Army's authority explicit. To the contrary, Section 511 makes explicit that the Secretary of the Army's authority cannot be impaired or affected.\footnote{172}

**B. The Army Corps Retains Sole Jurisdiction to Determine the "Footprint" of Navigable Waters**

The Army Corps jurisdiction under the Rivers and Harbors Act extends "laterally to the entire water surface and bed of a navigable waterbody."\footnote{173} This surface area "is not extinguished by later actions or events,"\footnote{174} nor are the boundaries "limited to the "natural or original condition of the waterbody."\footnote{175} "However, a waterway in its original condition might have had substantial obstructions" but may now constitute a navigable water.\footnote{176} Similarly, artificial channels, including canals, expand the boundaries of navigable waters.\footnote{177} The boundaries of a navigable water are therefore considered partially as the "defined geographical limits of the waterbody,"\footnote{178} that is, its entire surface area. Stated differently, the Army Corps has jurisdiction over the "footprint" of navigable waters.\footnote{179} Whenever the outer boundary of that footprint is "impaired" or "affected," the activity is under the exclusive jurisdiction of the Army Corps.\footnote{180} The Army Corps alone determines the outer boundaries of navigable waters. Whenever the boundaries of navigable waters are changed, whether through the creation of artificial connections such as canals\footnote{181} or the filling of wetlands pursuant to Section 404,\footnote{182} the Army Corps retains jurisdiction over that footprint boundary. Thus, expansion or declension of that footprint requires the Army Corps permitting approval; it is not subject to EPA jurisdiction. Accordingly, if a canal is built linking a navigable stream and a lake, a new footprint—an expanded navigable water boundary—is created. In contrast, the NPDES permitting scheme bears no relationship to the navigable water boundary: the outer footprint of navigable waters is

\footnote{172}{33 U.S.C. § 1371(a) (2000).}  
\footnote{173}{33 C.F.R. § 329.11(a) (2003).}  
\footnote{174}{See id. § 329.4.}  
\footnote{175}{See id. § 329.8.}  
\footnote{176}{See id. § 329.10.}  
\footnote{177}{See id. § 329.8(a).}  
\footnote{178}{33 C.F.R. § 329.5(c).}  
\footnote{179}{See id.}  
\footnote{180}{33 U.S.C. § 1371(a) (2000); see also 33 U.S.C. § 403 (2000); 33 C.F.R. § 322.3(a) (2003).}  
\footnote{181}{33 U.S.C. § 403 (2000).}  
\footnote{182}{See id. § 1344.}
not changed by the discharge of a pollutant from a point source regulated by Section 402.\textsuperscript{183} A Section 404 permit for wetlands, however, by definition always changes that boundary,\textsuperscript{184} as does a Section 10 permit for a water diversion structure between two navigable waters.\textsuperscript{185} Thus, no circumstance exists wherein a Section 402 permit can be required for changing the footprint boundary of a navigable water in lieu of a permit administered by the Army Corps.

Although any modification of a navigable water, including the modification of its course or footprint, requires a permit, the Army Corps exempts certain activities resulting in discharges of dredge or fill from Section 404 permit requirements.\textsuperscript{186} Any activity, however, involving "alterations to flow or circulation" cannot be exempt from Section 404.\textsuperscript{187} The Army Corps also requires a Section 9 permit under the Rivers and Harbors Act for the construction of a dam or dike;\textsuperscript{188} these structures likely change the pre-existing navigable water footprint through their impact upon tributaries. Moreover, the Army Corps requires a Section 10 permit for any obstruction or any other activity affecting the "course, location, or condition of a waterbody in such a manner as to impact on its navigable capacity."\textsuperscript{189} Thus, while the Army Corps jurisdiction cannot be said to exclusively concern the outer footprint of a navigable water, it nonetheless has a definitive jurisdictional orientation: the expansion and declension of navigable water boundaries and the removal of obstructions to circulation within those delineated boundaries all require Army Corps permits. Accordingly, whenever a water diversion structure implicates these footprint boundaries, the Army Corps clearly has jurisdiction over that structure—and its continued operation. Understanding the Army Corps jurisdictional primacy within this analytical framework will, it is hoped, prevent courts and environmental practitioners alike from continuing to overlook the relevance of Section 10 to water diversion structures in future litigation.

\textit{C. Section 401 of the CWA as the Jurisdictional Link}

Although Section 402 of the CWA has no applicability to water diversion structures regulated by the Army Corps under Section 10, a

\begin{flushleft}
\textsuperscript{183} See \textit{id}. § 1342.
\textsuperscript{184} See \textit{id}. § 1344.
\textsuperscript{185} See \textit{id}. § 403.
\textsuperscript{187} 33 C.F.R. § 323.4(c) (2003).
\textsuperscript{188} 33 U.S.C. § 401 (2000).
\textsuperscript{189} 33 C.F.R. § 322.3(a) (2003).
\end{flushleft}
jurisdictional link nonetheless exists between these permitted structures and water quality requirements. Section 401 of the CWA requires all applicants for a federal license or permit to obtain certification from the state that the activity meets applicable effluent limitations. This certification applies to both the construction and subsequent operation of the facility. If the state attempts to withdraw a water quality certification that has previously been granted for an NWP, the Army Corps must consider whether a suspension, modification, or revocation of the NWP is warranted—and its discretion is exercised accordingly.

To further concretize the jurisdictional relationship between Section 401 water quality certification and Army Corps jurisdiction, suppose, for example, that a proposed activity involves the construction of a canal. In that instance, a newly constructed canal would require a Section 10 permit under the Rivers and Harbors Act, a Section 404 permit under the CWA—because the canal itself is considered fill material—and a Section 401 water quality certification, also under the CWA. The Section 401 certification would help to ensure that the construction and subsequent operation of the canal complies with effluent standards; this water quality certification would therefore protect the same environmental interests that the plaintiffs in *Miccosukee Tribe* and *Catskill Mountains* claim are violated unless Section 402 of the CWA applies to these structures. Thus, a Section 402 permit is not issued for activities under the Army Corps jurisdiction because compliance with emissions standards is already regulated through Section 401 of the CWA. Indeed, as Section 511 explicitly states, a Section 404 permit will be conclusive as to water quality.

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191. *See id. § 1341(a)(1) (2000).*
192. *Id. § 1341(a)(3).* Permit applications will be "evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity." *33 C.F.R. § 320.4(d) (2003).*
193. *33 C.F.R. § 330.4(c)(7) (2003).*
195. *See 33 C.F.R. § 323.2(e)(1) (2003).*
197. *See 33 C.F.R. § 320.4(d) (2003).*
198. *See Miccosukee Tribe, 280 F.3d at 1364; Catskill Mountains, 273 F.3d at 481.*
for any discharge resulting from a Section 10 permit. To be sure, environmental plaintiffs may prefer to apply Section 402 permit requirements to structures under Army Corps jurisdiction in anticipation that more stringent environmental regulation will be imposed under Section 402 than would be required under Section 401. Nonetheless, their claim that the CWA has no applicability to water diversion structures, absent the imposition of Section 402 permitting requirements, is simply untrue: Section 401 of the CWA applies to water diversion structures and all other "facilities" permitted by the Army Corps under Section 10.

The Section 401 water quality certification also requires an analysis of "both point and non-point sources of pollution." This has caused Miccosukee Tribe petitioner South Florida Water Management District and at least one amicus to argue before the Supreme Court that water diversion structures are non-point sources of pollutants and are therefore not subject to Section 402. The plain language of Section 401, however, contradicts this assertion: "facilities" that "may result in any discharge" must obtain a certification of compliance with six provisions of the CWA enumerated in Section 401. Although Section 401 does not explicitly use the term "point-source," each of these six enumerated provisions concerns point-sources. Moreover, by Section 401's explicit terms, a water diversion structure is a "facility" requiring certification of compliance with effluent limitations; were these facilities not point-sources, the imposition of effluent limitations would not be possible.

Missing the point completely, petitioner in Miccosukee Tribe also argues that Section 304 of the CWA explicitly defines "flow diversion

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200. See id. § 1371(a).
201. See id. § 1341 (2000) (requiring water quality certifications for any activity including "the construction or operation of facilities").
206. id. Section 401 requires compliance with "the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." id. Each of these provisions requires a permit for a discharge only from a point-source.
208. id. Permit applicants for the construction and operation of facilities will be "evaluated for compliance with applicable effluent limitations." 33 C.F.R. § 320.4(d). By definition, effluent limitations require a point-source. 33 U.S.C. § 1311.
facilities” as non-point sources. However, Section 304 does nothing of the sort: Section 304 merely itemizes guidelines for non-point pollution sources and methods for controlling pollution resulting from certain enumerated activities, “including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.” Section 304 is not, on its face, an enumeration of non-point sources, as the CWA’s legislative history further underscores. The Senate Report discusses “diversion of freshwater flows in the construction of a dam or other facility” in an entirely different section from its itemization of non-point sources, which appears ten paragraphs earlier. The House Report, meanwhile, has no discussion of these water flows whatsoever, excepting “surface and ground waters,” which are clearly non-point sources. Most disturbingly, however, is that this argument was made despite the fact that these structures are “fill material” and are therefore subject to Section 404 jurisdiction as point sources. In short, the argument that a water diversion structure is not a point-source quickly collapses once the CWA is more appropriately viewed as consisting of both Sections 402 and Sections 404—each of which regulate point sources as the sole basis for jurisdiction pursuant to Section 301 of the CWA.


210. 33 U.S.C. §1314(f) (2000). Section 304 is a “guidelines” section of the CWA, not a definitional or regulatory section; it requires the EPA administrator to issue “information including (1) guidelines for identifying and evaluating the nature and extent of non-point sources of pollutants, and (2) processes, procedures and methods to control pollution.” Id. (emphasis added). The listing of six types of activities follow both (1) and (2)—not as a simple enumeration of non-point sources mentioned in (1), but including the broader rubric of activities mentioned in (2) for which information would also be useful. Id.


212. Id. at 796–98.

213. 33 C.F.R. § 323.2(e) (2003). In addition, the term “discharge of fill material” explicitly includes “dams and dikes.” Id. § 323.2(f) (2003).

214. 33 U.S.C. § 1311(a) (2000). Reliance on the weak statutory underpinnings of Section 304 as a supposed definition of water diversion structures as non-point sources, given the CWA’s actual definition of point-sources as “any discernible, confined and discrete conveyance,” is a rather desperate grappling at straws. 33 U.S.C. § 1362(14). This begs the question: why did defendants attempt to rely on Section 304 while ignoring Section 511? The only plausible explanation is that the respective courts and attorneys involved lacked a basic jurisdictional knowledge of both Section 402 and the Rivers and Harbors Act; ignorance of Section 10 thereby encouraged numerous eyes to simply gloss over Section 511—without grasping its significance.
V. CONCLUSION: THE NEED FOR JURISDICTONAL THINKING

This article has demonstrated that water diversion structures are not subject to Section 402 of the CWA and are instead under the jurisdiction of the Army Corps according to the explicit terms of Section 511. The water diversion structures at issue in both *Miccosukee Tribe* and *Catskill Mountains* operate under an existing Section 10 NWP which EPA has no authority to modify. The Army Corps retains exclusive discretionary authority to revoke, modify, or suspend NWPs. Thus, Section 402 is clearly inapplicable to structures operating under existing Section 10 permits. Despite this, two circuit courts, over a dozen amici before the Supreme Court, and, presumably, several additional score of attorneys have failed to look beyond Section 402 of the CWA to address Section 10 of the Rivers and Harbors Act. The fact that this has occurred, even in the context of established Section 10 precedent concerning water diversion structures, points to a systemic problem in the ongoing development of environmental law.

Environmental law in its second-generation will unfortunately remain a confusing array of isolated statutes unless courts and practitioners alike begin to ask the jurisdictional questions necessary for environmental law to mature into a comprehensive legal regime. The validity of a claim under a particular statute cannot simply be assessed through an examination of that statute’s provisions; the first questions asked must instead be jurisdictional in nature. With respect to any CWA claim, the first question to ask is, always, whether the activity can conceivably be under *either* Army Corps or EPA jurisdiction. This can only rarely be assumed; it must

216. *See id.* § 1371(a).
217. *See Miccosukee Tribe*, 280 F.3d at 1364; *Catskill Mountains*, 273 F.3d at 481.
219. *See id.* § 330.5(b).
220. *See id.*
221. *See 33 C.F.R.* § 330.6(b). “Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.” *Id.*
222. *See Miccosukee Tribe*, 280 F.3d at 1364; *Catskill Mountains*, 273 F.3d at 481.
226. *See 33 U.S.C.* §§ 1342, 1344 (2000). This does not imply that an activity can be simultaneously subject to Section 402 and Section 404 jurisdiction; the two are mutually exclusive. 40 C.F.R. § 122.3. It does mean, however, that considerable controversy exists.
typically be researched. Indeed, the line between Section 404 and Section 402 jurisdiction is often unclear.\textsuperscript{227} If the activity implicates the Army Corps Section 404 jurisdiction\textsuperscript{228} or involves a structure bearing any relation whatsoever to waterways, the potential applicability of Section 10\textsuperscript{229} must be addressed. Rather than continuing to delimit legal analysis to the particular claim that is pled, environmental lawyers will accomplish this greater jurisdictional savvy only by acquiring foundational knowledge of the jurisdictional overlap amongst all major environmental statutes. This knowledge will, in turn, only be obtained by systematically researching the environmental fact pattern at issue before the actual claims of a statutorily-based pleading are assessed in depth. While this may not be the appropriate manner for commencing research in other legal sub-fields, the indeterminacy of environmental law presently requires new methods for developing a more evolved, second-generation environmental jurisprudence. Unfortunately, the competing jurisdictional spheres of federal environmental statutes have heretofore not been properly analyzed. The conflict pre-emption and related environmental federalism issues inherent in overlapping federal and state environmental jurisdictions have, similarly, too often been overlooked. It is time, however, for environmental law to enter into its second-generation of development—in a more substantive manner than that of mere temporality.

Finally, while citizen group advocacy for novel interpretations of environmental statutes is certainly understandable, the question nonetheless needs to be asked whether the \textit{Miccosukee Tribe} and \textit{Catskill Mountains} cases\textsuperscript{230} have indeed been "good" for the future development of a more comprehensive and stringent environmental legal regime. Assuming that citizen groups desire—as do most environmental attorneys, present author included—a more effective and complete form of environmental regulation, how does establishing defendants' liability under a novel theory, thirty years after the CWA's enactment, facilitate that future desired outcome? I submit that it may not. The ultimate question for environmental law is not whether plaintiffs succeed with novel theories in particular environmental claims, but whether the legal-administrative state possesses the institutional capacity for more pervasive environmental regulation to be implemented in the future. The \textit{Miccosukee Tribe} and \textit{Catskill Mountains} cases underscore the conclusion that the federal government's capacity to

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\item \textsuperscript{227} See, e.g., \textit{Kentuckians for the Commonwealth}, 317 F.3d at 442.
\item \textsuperscript{228} See id. § 403 (2000).
\item \textsuperscript{229} See id. § 403 (2000).
\item \textsuperscript{230} See \textit{Miccosukee Tribe}, 280 F.3d at 1364; \textit{Catskill Mountains}, 273 F.3d at 481.
\end{itemize}
regulate the environment, during environmental law’s second-generation, remains disturbingly weak. Environmental citizen groups must therefore begin to contemplate how potentially undermining the integrity of a core environmental statute, such as the CWA, can possibly further the future adoption and successful implementation of more stringent environmental regulation—the achievement of which remains, at least rhetorically, these citizen groups’ ultimate goal.

231. See id.