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CLEAN WATER RULE: CAN BUSINESS AFFORD OTHERWISE?

The current administration has been consistent in its message to reduce regulation. By engaging in “bold anti-regulatory rhetoric,” President Trump is reinforcing the idea that all regulation is inherently bad for Americans and American business.1 The Trump administration has cut regulation across the board but particularly in the policy area of immigration, banking, healthcare and the environment.2 This paper will focus on environmental regulation, specifically the Clean Water Rule (CWR) and how this regulation is not only appropriately stringent, but essential for keeping businesses alive.

The Clean Water Rule, given authority under the Clean Water Act (CWA), has a tumultuous history with interested individuals, non-profits, and businesses staking out staunchly opposing positions. This legal issue draws fervent support and opposition by business interests because many businesses require clean water to operate, while others must obtain permits issued under the CWA to operate.3 This paper will first discuss the evolution of the CWR and where it stands today. Next, the paper will focus on a sample of amicus briefs filed by business groups to illustrate the competing business ideologies surrounding the CWR. From these briefs, this paper will demonstrate the extent to which clean water regulation is essential for business interests and recommend an approach to regulating waterways that is both protective not only the water, but also business interests.

President Trump’s anti-regulatory agenda became a reality in an executive order signed January 30, 2017, requiring that for each proposed or promulgated regulation, the agency “shall identify at least two existing regulations to be repealed.”4 Before he signed the executive order, President Trump stated the Federal government will be “reducing [regulations] big league and their damaging effects on our small businesses, our economy, our entrepreneurial

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2 Id.
spirit.” What President Trump fails to recognize is that regulation is essential to keep some sectors of business in operation.

I. THE CLEAN WATER RULE’S ORIGIN AND WHERE IT STANDS TODAY

The country is at a pivotal moment, as the Clean Water Rule is under fire by the current administration and at risk of being rendered ineffective by the EPA’s issuance of a rule suspending the CWR. Under the authority of the Clean Water Act, a business/operation requires a permit if there is a discharge of a pollutant into navigable waters of the United States (WOTUS), a phrase which did not have a precise definition until the Clean Water Rule was written.

The history of the CWA shows how contentious the process has been to achieve the CWR that was eventually established in 2015. In 1972, the CWA established federal regulation of discharges of pollutants into “waters of the United States.” The broad term “waters of the United States” led to debate as to whether ephemeral streams and wetlands were included in the definition. The debate continued through litigation and changes to the rule in the 1980’s, and finally reached the Supreme Court in *Rapanos v. United States* in 2006, resulting in a 4-1-4 split. Justice Scalia authored the plurality opinion which created a new definition for WOTUS, Justice Kennedy concurred in the judgment but wrote a separate opinion defining WOTUS differently, and four Justices dissented. After this split plurality decision lead to further confusion, the Clean Water Rule was established in 2015 which defined WOTUS.

The Rule, based on Kennedy’s definition, defines waters of the United States under the significant nexus test: A navigable water or a non-navigable waterway or wetland having a significant nexus to navigable waters, impacting the chemical, physical, or the biological integrity of a navigable water. This rule caused intense reactions with some groups hailing it as rightfully protective of waterways. However President Trump is a vocal critic of the rule, describing it

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10 See *Id.* at 756.

11 *Definition of Waters of the United States, 33 C.F.R. § 328 (2018).*

12 *Id.*
as “one of the worst examples of federal regulation,” and directing the EPA to suspend its implementation.\(^\text{13}\)

In 2018, the EPA issued the Suspension Rule, which halts implementing the 2015 Clean Water Rule definition of “waters of the United States” until 2020.\(^\text{14}\) The Suspension Rule was challenged in district courts across the nation. The first court to come to a decision was the U.S. District Court for the District of South Carolina in *South Carolina Coastal Conservation v. Pruitt*.\(^\text{15}\) On August 16, Judge David Norton held the Suspension Rule violated Administrative Procedure Act (APA) notice and comment rulemaking.\(^\text{16}\) To provide “complete relief,” Judge Norton issued a nationwide injunction of the Suspension Rule, but did not rule on the merits of the CWR.\(^\text{17}\) This injunction means the 2015 CWR’s definition of WOTUS is the law of the land in states without ongoing litigation on the matter, which is twenty two states (including South Carolina) and the District of Columbia.\(^\text{18}\) The remaining twenty-eight states are following the WOTUS definition promulgated in 1980’s.\(^\text{19}\) Since the decision did not rule on the merits of CWR and as more interest groups and businesses join the debate over what water to regulate, it is time to understand the importance of the Clean Water Rule to business.

II. AMICUS BRIEFS OUTLINING VARYING BUSINESS INTERESTS IN THE CLEAN WATER RULE

Whether a business supports or opposes the Clean Water Rule has little to do with business size and everything to do with the industry of the business. Since many businesses can join together to file an amicus brief, a brief can provide information on dozens of businesses at once. Through an evaluation of four amicus briefs, arguments from diverse business groups and companies of varying sizes will be summarized, followed by an analysis of the arguments.

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\(^\text{16}\) *Id.* at 967.

\(^\text{17}\) *Id.* at 968.


The first amicus curiae brief is from clean water dependent small businesses in an ongoing case in the District Court for the District of North Dakota. The owners and operators that filed the brief represent 157 small businesses which include “organic farmers and ranchers, outdoor and recreation outfitters, guides, and retailers, craft brewers, coffee shop owners, herbalists, and operators of camping resorts.” The farmers and ranchers support the Rule because it protects the quality of the water which is vital for livestock and maintaining crops. One farm located in New York, which serves as an example for the other amici farmers, is in close proximity to oil and gas operations. These operations cause discharge of dangerous chemicals into waterways and lead directly to reduced quality and quantity of supplies for the farm. Sports and recreation businesses describe their need for clean water as essential to their fishing charters on the rivers because without protection of the wetlands that remain, the fish population will be depleted and therefore end any fishing charters that operated in those waterways. The U.S. has 6,372 breweries, 99% of which are small independent breweries, as of 2017 and that number is growing. As summarized by a marketing manager at One World Brewing in Asheville, North Carolina, “We can’t make good beer without clean water.”

The second brief comes from non-clean-water-dependent small businesses in the 2016 case United States Army Corps of Engr’s v. Hawkes Co. The brief was filed in support of decreasing regulations of the Clean Water Rule by the National Federation of Independent Business Small Business Legal Center (NFIB). NFIB has a membership of 325,000 business owners, ranging from sole proprietorships to firms with hundreds of employees. The complaint of the NFIB focuses on the idea that the Clean Water Rule restricts property rights by making it prohibitively expensive to obtain a necessary permit if there is a “water of the United States” located on the property. The NFIB is concerned that there are too many waters included in the definition of “waters of the U.S.”

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21 Id. at 2.
22 Id.
23 Id.
24 Id. at 5.
25 Id.
26 Id. at 8.
28 Id.
29 Id. at 5.
30 Id. at 4-5.
but the majority of their argument is not about the substance of the Clean Water Rule but rather the costs that the permits impose on businesses with limited resources. They believe permit costs could be avoided if fewer waters require permits. The NFIB does not specify exactly how many businesses would be impacted by this issue.

Third, large and small businesses that are clean water dependent filed an amicus brief in the case of *Rapanos v. United States.* The brief filed on behalf of Bass Pro Shops, The Orvis Company, Inc., American Fisheries Society, Trout Unlimited and more: businesses and organizations which rely on hunters and anglers as customers, and organizations which represent professionals who manage fishers and wildlife. Amici argue that headwaters, tributaries and adjacent wetlands are “inseparably bound to navigable-in-fact waters like trees to their roots” and therefore must be protected to ensure larger water bodies do not become “lifeless and polluted.” They assert hunting, fishing, and wildlife-related activities maintain a multi-billion dollar a year industry which would be substantially affected by the degradation and destruction of water resources.

The final amicus briefs under review are also from the *Rapanos* case and represent large businesses that are non-clean-water-dependent. These include trade associations representing corn growers, pork producers, dairy producers, livestock and cattle feeders, as well as general contractors, industrial and office properties, real estate investment trusts, and shopping centers. The real estate groups argue there is no basis in science or law for regulating wetlands and ephemeral streams and by forcing land owners to obtain expensive CWA permits, the rule slows development inequitably. The agricultural groups echo the same concerns, focused on the “substantial and inappropriate permitting obligations” that are imposed by allowing regulation of wetlands and other

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31 Id.
32 Id.
34 Id. at 9.
35 Id.
36 Id. at 10.
39 Id.
seemingly stand-alone bodies of water with no impact on other bodies of water.40

III. THE CLEAN WATER RULE IS A PRO-BUSINESS RULE

Instead of attempts to lessen regulations over the water body types or quality of clean water under the WOTUS definition, focus should be on finding ways to keep stringent protections while expediting the permitting process. No group or business amicus brief opposes having clean water. The opposition is heavily concerned with the slow, time-consuming, expensive permitting process.

The business benefits of stringent clean water regulation far outweigh the disadvantages. When it comes to weighing economic and business arguments, the factor that should be given the most weight in regulating WOTUS is the lack of alternatives a group of businesses will face if stringent regulation is repealed. A large real estate company may have to pay more for compliance, however stricter water rules will be unlikely to crush the foundation needed for their business to exist. On the other hand, the businesses which rely on clean waterways have no way to continue their work once the water is polluted with chemicals, heavy metals, disease causing bacteria, fertilizers, or even heat, as these pollutants are not readily removed from water.41 For example, Not a Clue Adventures leads camping, kayaking, and fishing expeditions in Tampa, Florida but some trips have been marred by algae blooms caused by upstream polluting.42 The streams and wetlands flowing into the Suwanee River affect its biological integrity which in this case, results in dissatisfied customers for Not a Clue Adventures.43 The destruction of industries ranging from craft breweries to organic farms to outdoor recreation charter companies is more damaging than stalled business development due to permit requirements. Without a stringent

40 Id.
43 Id.
WOTUS definition, the small businesses this administration vows to protect may be the ones going out of business.

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