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Muddy Waters: Deconstructing the Clean Water Act in Arizona

By Benjamin Barr, former Constitutional Policy Analyst, Goldwater Institute

EXECUTIVE SUMMARY

Arizona faces an environmental challenge: take responsibility for its own environmental management or cede authority to the federal government. For some time, there has been a decided preference for the latter. With that acquiescence come substantial problems for the state. This study examines one such problem: the heavy-handed regulation of water in one of the nation's driest states.

The impulse to legislate tougher federal environmental laws reigns eternal in the halls of Congress. As that impulse grows, so too do the negative consequences for states that must operate under these ambitious programs. Well-intentioned laws, such as the Clean Water Act (CWA), operate in a one-size-fits-all manner, ignorant of the vast environmental differences between Fargo, North Dakota, and Tucson, Arizona. As a result, Arizonans pay the price with less innovative and appropriate local environmental regulation and increased burdens due to unnecessary federal oversight.

This paper proposes a variety of reforms to the CWA. Its chief recommendation is that Arizona pressure Congress to permit it to fully opt out of the law, leaving it free to manage and develop its own water program. In that manner, the promise of federalism is achieved, property rights are respected, and environmental management will match the needs of the Grand Canyon State.

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Introduction

CAPTAIN RENAULT: What in heaven's name brought you to Casablanca?

RICK: My health. I came to Casablanca for the waters.

CAPTAIN RENAULT: The waters? What waters? We're in the desert.

RICK: I was misinformed.

– *Casablanca*, Warner Brothers Pictures, 1942

Like Rick in *Casablanca*, federal water regulation seems to have been misinformed about the presence of water in the desert. In Arizona—one of the driest states in the Union—the Clean Water Act (CWA) covers dry washes and desert sand as if they were “navigable waters of the United States.” Clearly, something has gone amiss when it comes to regulating the nation's water.

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Today, it is generally accepted that our nation's most pressing environmental problems are best solved by adopting no-nonsense federal measures. In the 1960s, the federal government steadily began churning out more environmental laws, including the Clean Air Act, the Oil Pollution Act, the Shoreline Erosion Act, the Endangered Species Act, and the National Environmental Policy Act, to name a few. Federal control over the environment now seems to be the norm. And while these laws promote laudable goals, they come with overlooked implications worthy of serious consideration.

The pursuit of clean water is an understandably important goal for any state. That is especially true in Arizona, where residents have faced drought conditions for more than 11 years.¹ Riparian habitats and limited waterways provide obvious and important services for humans. They are also important for a variety of animals, such as great-horned owls, tree lizards, and western diamondback rattlers. The ecosystems found in Arizona are one of a kind, possessing “unique biogeography and biological diversity” as described by the Office of Arid Lands Studies at the University of Arizona.²

Federal environmental policy and law do not reflect the unique needs of Arizona's environment. The state's distinctive riparian systems and unique ecosystems should dictate an exceptional approach to environmental management—for both water and land preservation. But federal one-size-fits-all regulation requires Arizona to be regulated much in the same manner as New York, Louisiana, and Alaska, with obvious inattention to the vast differences between the states. That effort produces uniform environmental regulation but ignores the special needs of the state. This dynamic proves especially true when it comes to clean water.

As is so often the case, theory and real-world application seem to be distant cousins. The CWA—a law that applies to “navigable waters,” which are defined as waters of the United States—reaches deep into the Grand Canyon State, regulating all sorts of dry, dusty land should water drip out of it, however sparsely or infrequently. Attempting to make beneficial use of land becomes wrought with delay and financial burden. This study addresses the permitting process under Section 404 of the CWA—a process its supporters deem a “wetlands” program.

Federal clean water mandates, however noble in intent, carry significant costs for the citizens of Arizona. This study examines the history and growth of the CWA and its particular application to the state. It next looks at the constitutional principles behind water regulation. The study then examines some of the practical problems encountered with the CWA in Arizona, concerns over state sovereignty, policy problems related to centralization, and how private property rights are affected. Lastly, it considers several reforms, favoring decentralization as a norm of environmental regulation.

Understanding Arizona

Arizona is largely composed of desert areas that receive minimal rainfall. Wetlands are rare, making the application of Section 404—a wetlands program—rather peculiar. In 1991, a U.S. Fish and Wildlife Service study determined that there were 600,000 acres of wetlands in Arizona.³ That amounts to less than 1 percent of the land surface in Arizona.⁴ Regardless, the Section 404 program still thrives in the state because it reaches “other waters.” Ephemeral washes are abundant and are frequently encountered in development. They are deemed “other waters” subject to the reach of the Clean Water Act. According to state law, an “ephemeral water” is defined as “a surface water that has a channel that is at all times above the water table, that flows only in direct response to precipitation and that does not support a self-sustaining fish population.”⁵

As noted by Robert D. Anderson, a practicing land-use attorney,

The linear nature of these [ephemeral] drainage areas makes them difficult to avoid, particularly the smaller washes that are ten feet wide or narrower. While difficult to avoid, the washes do not appear to be a significant percentage of the overall land surface area. Estimates I compiled from my own permitting experience indicate that ephemeral washes are typically around 2% to 5% of the total land area of a project, although I have projects with ephemeral

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wash acreage as high as 10% of the project area. Further, it is my impression from viewing numerous jurisdictional delineations over the years that it is difficult to develop anything larger than a 40 acre parcel of raw land *without* affecting an ephemeral wash that the Corps would consider jurisdictional. Again, it is the linear nature of the drainage areas, not their size, which makes them difficult to avoid. It is the smaller washes, those less than ten feet, that present the greatest challenge to the program.⁶

Thus, federal authority extends jurisdiction for a wetlands program to the desert. Of course, prior to development of the CWA, Arizona law had already defined the contours of its own water law and regulation. Specifically, it had taken the account of washes into effect as well, explaining that regulable water “must be running water, though it need not run continuously. It is not sufficient to constitute a watercourse that there is a mere surface drainage over the face of a tract of land occasioned by unusual freshets or other extraordinary causes.”⁷ Federal law is not so flexible to take specific, regional differences into account in tailoring appropriate regulations.

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The History of Clean Water Legislation

Today’s Clean Water Act is a result of 1972 amendments to the existing Federal Water Pollution Control Act of 1948 (FWPCA). The aim of the law is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁸ It included ambitious goals—swimmable and fishable waters by 1983 and the elimination of polluting discharges by 1985.⁹ Those dates have long passed, but, undeterred by failure, the federal government marches forward with continued regulation.

While the goals of the CWA may be laudable, many who have had to work with the law firsthand experience the negative, secondary effects of a federal bureaucracy. In fact, the average applicant hoping to develop his or her own wetlands will spend 788 days and \$271,596 working with federal authorities to do so.¹⁰ In pursuing environmental purity, the principle that one may use his property as he best sees fit has vanished.

This dynamic began with Congress’ first meaningful regulation of water, the Rivers and Harbors Appropriation Act of 1889.¹¹ This modest law prohibited, among other things, discharging refuse into navigable waters or their tributaries.¹²

The FWPCA marks the birth of federal water legislation.¹³ Congress implemented the FWPCA as a supplementary action to support states' water programs. It provided loans for states to develop water treatment facilities, as well as grants for state water pollution programs.¹⁴ This placed the federal government in the role of a helpful big brother – it was there if a state needed assistance.

The FWCPA proved largely respectful of states' rights, since it left them with the primary responsibility to prevent, reduce, and eliminate pollution.¹⁵ Telling was its deference to state administration and enforcement of such laws. In short, the law provided that the federal government could move forward in investigation and enforcement only after obtaining approval from state officials and fulfilling other procedural requirements.¹⁶ Since 1948, the FWPCA has steadily evolved from a modest federal program into a far-reaching bureaucracy.

In 1956 and 1961, Congress enacted incremental but significant amendments to the FWCPA.¹⁷ Taken in their entirety, the changes signaled a dramatic shift in enforcement policy. No longer would state approval and a lengthy procedural process be required for investigation and enforcement. The 1961 amendments increased funding for grant programs, expanded regulated navigable waters, and further increased the federal government's investigative authority.¹⁸

Congress further increased its regulatory authority through the Water Quality Act of 1965.¹⁹ The new law pushed states to create water quality standards and make pollution control plans that would meet those standards. These requirements, however, lacked enforceability.

In 1969, oil resting on the top of the Cuyahoga River in Ohio caught fire from the spark of a passing train, igniting the modern environmental movement. By 1972, environmental groups pushed several amendments that would have given the federal government greater jurisdiction over environmental regulation and enforcement.²⁰ Local governments supported the enhanced regulation because of promises of new federal grants. And farming interests did not resist the move toward more stringent regulation because the laws would not apply to them.²¹ President Nixon vetoed the 1972 amendments; however, those amendments set the stage for the 1977 CWA.

From 1977 to 1987, rule-making by the federal agencies charged with implementing the Act would expand the jurisdiction of the CWA to cover nearly all "waters" of the United States, whether navigable or not, and no matter how wet or dry. Just how "navigable" water was would later become the subject of heated litigation.

Table 1: Federal Clean Water Legislation

Year	Act	Public Law	Summary
1948	Federal Water Pollution Control Act	P.L. 80-845	Aided states' water programs with assistance and money.
1956	Water Pollution Control Act of 1956	P.L. 84-660	State approval for enforcement removed. Direct funding of municipal sewer programs added.
1961	Federal Water Pollution Control Act	P.L. 87-88	Coastal waters added to jurisdiction. Gave municipalities enhanced authority to initiate relief under the Act.
1965	Water Quality Act of 1965	P.L. 89-234	Required state water quality standard programs.
1966	Clean Water Restoration Act	P.L. 89-753	Increased funding for public waste treatment.
1970	Water Quality Improvement Act of 1970	P.L. 91-224, Part I	Established strict liability for oil spills.
1972	Federal Water Pollution Control Act, Amendments	P.L. 92-217	Established modern federal water statutes. Expanded jurisdiction to all "navigable waters."
1977	Clean Water Act of 1977	P.L. 95-217	Section 404 permitting process expanded to wetlands.
1981	Municipal Wastewater treatment Construction Grants Amendments	P.L. 97-117	Reauthorized federal grant program for public waste treatment. Reduced federal share of cost in construction projects.
1987	Water Quality Act of 1987	P.L. 100-4	Expanded enforcement options. Enhanced regulation of non-point source pollution, toxins, and storm water discharge.

Source: Bureau of Land Management

Understanding the Clean Water Act

Section 404 of the Clean Water Act prohibits the discharge of pollutants into navigable waters without a permit from the U.S. Army Corps of Engineers.²² Under this section, pollutants include natural materials such as rock, sand, and dirt.²³ “Navigable waters” have been broadly defined to include dry washes and remote wetlands.²⁴

Enforcement options under the CWA are vast. The U.S. Environmental Protection Agency (EPA) is empowered to issue criminal and civil sanctions, as well as administrative penalties and compliance orders.²⁵ Applicable fines are steep: up to \$1 million in one-time fees and \$50,000 daily noncompliance penalties.²⁶ States enjoy nearly equal authority to pursue violations of the Act.²⁷ Lastly, citizens and environmental organizations can bring suit under some provisions of the law.²⁸

The definition of what constitutes regulated waters is complex. The CWA defines regulated waters as “navigable waters of the United States, including the territorial seas.” Traditionally, courts have interpreted that to mean waters involved in transporting interstate or foreign commerce. In fact, in 1870, the U.S. Supreme Court defined “navigable waters” as those waters that are “navigable in fact. And [waters] are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted.”²⁹

Later, the U.S. Supreme Court would expand its view of what constitutes navigable waters. In 1940, the Court reasoned that federal jurisdiction also extended to waters that may be made navigable waters. In 1940, the Court reasoned that federal jurisdiction also extended to waters that may be navigable through “reasonable improvements.”³⁰ But traditionally, for Congress to regulate waters, those waters have had to retain some significant connection to interstate commerce.

In 1975, the U.S. District Court for the District of Columbia directed the Army Corps of Engineers to adopt a more expansive interpretation of “navigable waters.”³¹ Expand it did, as the Corps extended its regulations to cover not only navigable waters but areas near navigable waters that “are periodically inundated and that are characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.”³²

Affected citizens soon challenged the Corps’ growing jurisdiction over property near navigable waters through a challenge before the U.S. Supreme Court.³³ Unanimously, the Court held that the Corps had not violated its authority by

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regulating wetlands and lands adjacent to navigable waters.³⁴ In short, the Court found nothing amiss with the Corps' assertion of regulatory authority over wetlands adjacent to navigable waters so long as there was a hydrological or ecological connection between them.³⁵ This was because the wetlands in question were "inseparably bound up" with navigable waters.³⁶ This set the stage for yet further expansion of the Corps' regulatory power.³⁷

In 1986, the Corps and the EPA enlarged their authority over wetlands to include areas that were or would be used as

- a habitat by birds protected by migratory bird treaties
- a habitat by other migratory birds that cross state lines
- a habitat for endangered species
- an area to irrigate crops sold in interstate commerce.

This became known as the infamous "migratory bird rule."³⁸

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In *Solid Waste Agency v. United States Army Corps of Engineers*, the Supreme Court held that the CWA could not be applied to an abandoned sand and gravel pit, even if it had a connection with migratory birds.³⁹ In *United States v. Riverside Bayview Homes*, the Court decided that the phrase navigable waters included "at least some waters that would not be deemed 'navigable' under the classical understanding of that term."⁴⁰ Unfortunately, the text of the Act does not describe what those waters might be. It just called them "other ... waters." The Court found it plausible that Congress opted to include all waters adjacent to "navigable waters," including non-navigable tributaries.⁴¹ But ultimately the Supreme Court limited federal jurisdiction over navigable water to a showing of a "significant nexus" between property and traditional navigable waters.

The Court also upheld an important lynchpin of federalism in *Solid Waste Agency*. "Permitting [the federal government] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."⁴² Traditionally, as the Court has recognized, states have had the role of first responder when it comes to their environmental problems. When the federal government stepped in, the CWA still recognized that there were limits to federal power, particularly in the area of land and water use. Sadly, that limitation, clearly stated in the Act, is being ignored, and this first commitment to states' rights is not being held.

The "significant nexus" test adopted by the *Solid Waste Agency* Court proved too lenient a standard. With the exception of the Fifth Circuit, the federal government

convinced courts nationwide that even the most questionable connection between a wetland and traditional navigable water was “substantial.”⁴³ In short, under this test it seemed plausible that the escape of but one drop of water from an isolated source to navigable waters might be sufficient for the Army Corps of Engineers to regulate a landowner’s property. In Arizona, that meant dry desert washes were now considered regulated sources of water.

Of course, Arizona had already defined the areas of water over which the state, not the federal government, had authority. In *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton*, the state supreme court held that the “essential characteristics of a watercourse are a channel, consisting of a well-defined bed and banks, and a current of water. And the best reasoned cases go to the extent that without all these characteristics there can be no watercourses.”⁴⁴ Arizona law had taken the account of washes into effect as well, explaining that regulable water “must be running water, although it need not run continuously. It is not sufficient to constitute a watercourse that there is a mere surface drainage over the face of a tract of land occasioned by unusual freshets or other extraordinary causes.”⁴⁵

The culmination of steadily growing federal regulatory power coupled with dissatisfied landowners came to a head in *Rapanos v. United States*.⁴⁶ *Rapanos* and a second case, *Carabell v. U.S. Army Corps of Engineers*, concerned themselves with regulated wetlands that were far removed from any navigable waters. In the case of *Rapanos*, the nearest navigable water was 11 to 20 miles away.⁴⁷ No single opinion commanded a majority of the Court. Four justices ruled that separated wetlands were not covered under the CWA; four justices called for high deference to the Corps’ own interpretation of the law; and one justice adhered to the Court’s earlier “significant nexus” test. This left “significant nexus” as the primary legal test.

Had the Corps had its way, the bare showing of a mere “hydrological connection” between a wetland and navigable waters would have established jurisdiction. Thus, the adopted “significant nexus” test is more restrictive than the Corps’ view of its authority. As Justice Anthony Kennedy noted,

Wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, *significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term “navigable waters.”⁴⁸

The “significant nexus” test adopted by the Solid Waste Agency Court proved too lenient a standard. The federal government convinced courts nationwide that even the most questionable connection between a wetland and traditional navigable water was “substantial.” In Arizona, that meant dry desert washes were now considered regulated sources of water.

Before *Rapanos*, federal courts regularly rubberstamped the Corps' jurisdiction, even when it was most implausible. For example, the Fourth Circuit upheld the Corps' jurisdiction over 2.5 miles of streams and man-made ditches flowing under an interstate highway in Virginia.⁴⁹ The Ninth Circuit sustained jurisdiction over irrigation ditches and drains that intermittently connected to protected water.⁵⁰ Even Justice Antonin Scalia noted the absurdity of the Court's modern CWA jurisprudence in a case originating in Arizona, *Save Our Sonoran, Inc. v. Flowers*.⁵¹ *Save Our Sonoran* involved application of the CWA to dry "washes and arroyos" in a proposed development site located in the desert where water coursed "during heavy periods of rain."⁵² Even though flowing water was a rare exception in the dry washes, the Ninth Circuit believed that regulation under the CWA was still permissible.

As the Corps steadily expanded its jurisdictional reach, the corresponding process of obtaining permits to work with wetlands became increasingly difficult. Section 404 of the CWA requires citizens to obtain permits from the Corps before dredging or filling their own wetlands.⁵³ Successfully obtaining a "404 permit" is often an arduous, unpredictable process. In deciding whether to issue a permit, the Corps applies a cornucopia of indefinite factors, such as

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.⁵⁴

These open-ended standards help permit governmental jurisdiction to reach such natural features as mudflats, prairie potholes, sandflats, and wetlands.⁵⁵ With such a laundry list of subjective considerations, as Justice Scalia noted, the Corps "exercises the discretion of an enlightened despot" when deciding whether or not to grant a 404 permit.

The consequences of vesting a federal agency with ever-expanding, vague regulatory standards are predictable. Without clear standards, federal jurisdiction is exercised in a lopsided and arbitrary manner. The Corps' rulings against property owners who fail to meet nebulous environmental standards cost Americans some \$45 billion in 1990 alone.⁵⁶

Efforts to limit the Corps' extensive jurisdiction have been met with resistance. In 2003, the Bush administration prepared a draft EPA rule that would have prohibited the Corps from exercising jurisdiction over waterways without annual

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flow—that is, dry washes without regular water flow.⁵⁷ The EPA dropped the proposed exemption without public explanation. New guidance post-*Rapanos* from the EPA and the Army Corps proves largely unhelpful—adopting a case-by-case, fact-intensive test for deciding jurisdiction over many cases.

While some may trumpet the evolving power of the Army Corps as beneficial for environmental progress, a brief review of the constitutional principles at stake illustrates the dangers inherent in a government agency with unchecked command.

The Constitutional Principles at Stake

We return to the first principles of the Constitution, noting that states have historically been responsible for exercising jurisdiction over water and land use matters.⁵⁸ In fact, the federal government possesses little authority over environmental issues. What power it has is rooted in the Commerce Clause of the U.S. Constitution.

The standard of providing state governments with authority over water management dates back to the reign of English kings, who enjoyed sovereign authority over all navigable waters.⁵⁹ In the United States, as new states were admitted, each possessed the same sovereign authority as other existing states—including jurisdictional authority over navigable waters. Most courts have recognized that states administer a public trust of sorts to protect the navigability of their waters.⁶⁰

Until the 1960s, courts drew a distinction between interstate and intrastate waters. The federal government could properly exert its authority over navigable waters that operate as channels of interstate or foreign commerce. But purely internal, intrastate waters were subject to the sovereign authority of the state, not the federal government.⁶¹

In the past, citizens relied on the common law as a means of dispute resolution over land and water conflicts. Most frequently, the doctrines of nuisance and trespass served as tools to remedy any injury caused by one party to another's property.⁶² Even federal law respects this principle, noting that it is the “policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”⁶³

The federal government possesses rather limited authority to create

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environmental laws under the Commerce Clause. The Commerce Clause provides that Congress shall have the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁶⁴ A return to first principles illustrates that the federal government is one of limited and enumerated powers.⁶⁵ The federal government’s first noted use of commerce power arrived in 1787 when Congress passed the Interstate Commerce Act.⁶⁶ Later, in *Gibbons v. Ogden*, the Court would construe the limited power of the Commerce Clause.⁶⁷ Chief Justice John Marshall explained that the power granted under the Commerce Clause “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.”⁶⁸ Chief Justice Marshall also noted that the Commerce Clause “may very properly be restricted to that commerce which concerns more States than one.”⁶⁹

Over the past 70 years, the Supreme Court has interpreted this power broadly—allowing Congress to regulate activity if the activity shares some “close and substantial” relationship to interstate commerce.⁷⁰ In practice, such laws as the Civil Rights Act have been upheld even though they bore little connection to interstate commerce.⁷¹

In 1937, the Supreme Court reached a turning point in its Commerce Clause jurisprudence when it decided *NLRB v. Jones & Laughlin Steel Co.*⁷² At issue in *NLRB* was the National Labor Relations Act, a federal law designed to stop Jones & Laughlin Steel from firing employees based on their union activity. Prior to *NLRB*, any attempt to regulate intrastate activity required a “direct and logical” relationship between the activity and interstate commerce.⁷³ But the *NLRB* court decided that “direct and logical” relationships were not required. Instead, so long as a federal law regulated conduct that had a “substantial effect” on commerce, it would be upheld.

In 1942, the Supreme Court went much further and expanded its Commerce Clause jurisprudence in *Wickard v. Filburn*.⁷⁴ *Filburn* concerned a law that prohibited anyone from growing more wheat than the federal government allowed.⁷⁵ Farmer *Filburn* decided to “overproduce” wheat to eat it himself, rather than buy it on the market.⁷⁶ The Supreme Court upheld the federal prohibition, reasoning that the farmer’s consumption of wheat, *when aggregated with that of other farmers*, could substantially affect the national wheat market.⁷⁷ Under this aggregation principle, it is difficult to imagine any type of activity, when aggregated, that would not substantially affect commerce.

With the advent of *NLRB* and *Filburn*, the Commerce Clause power of the federal government seemed unlimited. Nearly any conduct, including boycotts, protests, or just growing one’s own wheat, could be controlled by the federal

government. Of course, such an expansive reading of the Commerce Clause renders it meaningless. Taken to its logical conclusion, every action, when considered in aggregate, will substantially affect commerce.⁷⁸ That interpretation of the Commerce Clause turns federalism on its head and transforms the federal government from one of limited, enumerated powers, to one enjoying unbounded authority.

In 1995, the Supreme Court set marginal limits on Commerce Clause authority in *United States v. Lopez*, which involved a challenge to the Gun-Free School Zones Act of 1990.⁷⁹ The *Lopez* Court decided that Congress may regulate three sorts of activity under its Commerce Clause power. First, it could regulate the “channels of interstate commerce.”⁸⁰ Second, it could control the “instrumentalities of interstate commerce, or persons or things in interstate commerce.”⁸¹ Third, Congress could regulate “activities having a substantial effect on interstate commerce.”⁸²

Lopez’s “substantial effect” provided the first meaningful reduction of congressional Commerce Clause authority since the New Deal era. The Supreme Court expressly required some connection to economic activity for regulation under the Commerce Clause to be valid. In a second Commerce Clause challenge, the Court overturned the Violence Against Women Act of 1994 because gender crimes were not deemed a regulable economic activity.⁸³

Exactly how Congress may legitimately assert its jurisdiction through the Commerce Clause over environmental issues remains open to speculation. For the federal courts, it has been a decidedly less difficult question. In *Leslie Salt Co. v. United States*, the U.S. Court of Appeals for the Ninth Circuit decided that “the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps’ jurisdiction to local waters which may provide habitat to migratory birds and endangered species.”⁸⁴ At about the same time, the Seventh Circuit in *Hoffman Homes, Inc. v. EPA*, held that a minimal connection to interstate commerce, as through migratory birds, is enough to invoke the Corps’ jurisdiction over land.⁸⁵ Neither of these rulings could be said to anchor the reach of the CWA into one of the Commerce Clause’s traditional areas of regulation—activities that substantially affect commerce, channels of commerce, or instrumentalities of commerce.

In applying the core principles of the Commerce Clause to the CWA, questions arise as to how Congress may sustain its regulatory jurisdiction under the *Lopez* rationale. In *Lopez*, the Court held that when Congress attempts to regulate behavior, it must be connected to or result from commercial activity. And the Gun-Free School Zones Act was largely invalidated because it was not related to any type of commercial activity.⁸⁶ The *Lopez* decision held that the Gun-Free Act “by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise”; therefore, possessing a gun in a school zone was not considered economic activity that “substantially affect[ed]” interstate commerce.⁸⁷

Certainly there is a case to be made that truly navigable waters used for commerce are properly subject to regulation under the Commerce Clause. But regulating wetlands and desert washes far removed from navigable waters in furtherance of that goal is abstruse.

This reasoning provides little justification for expansive CWA powers under the Commerce Clause. Congress designed the CWA with environmental, not economic, goals in mind. The very aim of the law is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁸⁸ Certainly there is a case to be made that truly navigable waters used for commerce are properly subject to regulation under the Commerce Clause. But regulating wetlands and desert washes far removed from navigable waters in furtherance of that goal is abstruse.

Some argue that Congress enjoys plenary jurisdiction over wetlands and isolated waters through the CWA because developers use these properties for commercial activity, including the development of shopping malls or residences. The CWA’s stated regulatory objective is environmental, however, not economic in nature (“restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”). No doubt, developers have a commercial interest in developing wetlands. But to argue that Congress enjoys authority under the Commerce Clause to regulate *any conduct* that remotely affects some commercial interest is to eliminate the meaning of the Commerce Clause.⁸⁹

The federal government may not properly regulate waters, or dry stream beds, that are far removed from navigable waters. Ignoring this rule destroys the careful balancing of federalist ideals established in the Constitution and eliminates incentives for states, and private citizens, to be wise stewards of their own natural resources.

Undoubtedly, some waters are subject to regulation under Congress’s Commerce Clause authority. But that power is limited in scope. Interstate waters that are polluted and clogged likely impair national commerce and are subject to environmental regulation under the Commerce Clause. But the federal government may not properly regulate waters, or dry stream beds, that are far removed from navigable waters. Ignoring this rule destroys the careful balancing of federalist ideals established in the Constitution and eliminates incentives for states, and private citizens, to be wise stewards of their own natural resources.

Setting the constitutional issues aside, some proponents of the CWA rationalize that the law is of vital importance, whatever the constitutional consequences. Several unexamined claims surrounding such allegations are worthy of analysis.

Clean Water Truths

Jonathan Adler, professor at Case Western Reserve School of Law, and Richard Revesz, professor at New York University School of Law, both have tackled many of the myths supporting the Clean Water Act. Behind the CWA stands an implicit commitment to centralization as a norm of environmental policy. Proponents of the CWA assume that centralized, federal control over water resources is more effective at promoting sound environmental policy than a decentralized, state-based system. This section addresses how states played the role of first responders in

addressing environmental problems and how decentralized, state-based solutions may be superior alternatives to the current system.

States Addressed Clean Water Standards before the Federal Government Did

One common myth about water regulation is that federal intervention became necessary because states failed to act. However, before the creation of federal environmental laws, states were innovators and led the charge to solve environmental problems, ordinarily through state health agencies. In fact, as early as 1921, one state enacted laws to limit the pollution of potable water supplies.⁹⁰ Three states later enacted stream pollution protection programs.

Before 1966, enforcement efforts at the state level involved discussions with suspected polluters and resolution efforts were obtained through voluntary negotiations.⁹¹ Since 1966, states have enhanced their enforcement programs in a variety of ways, including passing stronger enforcement legislation, increasing coordination between state water pollution control agencies and state attorneys general, and relying on the courts to enforce their laws.⁹²

In 1972, the General Accounting Office (GAO) issued a report to Congress concerning the water pollution abatement program.⁹³ The report noted that the “Federal role under the act is essentially to back up the States, that is, to initiate enforcement action when a State fails to act or when a State requests such action.”⁹⁴ The Federal Water Pollution Control Act reflected that respect to states’ sovereignty. Under the FWPCA, the EPA could take action against polluters only when “pollutants cross a state boundary, when the Governor consents, in writing, in cases of intrastate pollution, or when substantial economic injury results from inability to market shellfish.” By and large, the federal government required state consent to initiate enforcement actions.

The GAO also noted that states began to confront water pollution problems and address them through administrative orders. Typically, state water pollution control agencies issued these orders, which specified the “type and place of the violation and either a date by which corrective action must be taken or a date by which the polluter must meet with State officials to discuss the violation and the corrective action needed.”⁹⁵ When polluters failed to comply with administrative orders, states referred the cases to the state attorneys general. Between 1968 and 1970, more than 90 cases were referred to the attorneys general in six states. Notably, in the first eight months of 1971, more than 60 cases were referred.⁹⁶ Before federal intervention, states, citizens, and private organizations started taking environmental protection seriously.

Since 1966, states have enhanced their enforcement programs in a variety of ways, including passing stronger enforcement legislation, increasing coordination between state water pollution control agencies and state attorneys general, and relying on the courts to enforce their laws.

While centralized, command-and-control-type efforts to preserve the environment seem popular, decentralized approaches offer comparable, if not better, protection while preserving liberty and upholding the norms of federalism. At both the individual and state level, legal tools exist to preserve environmental assets.

States Protected Wetlands before the Clean Water Act

Just as many states addressed water quality protection before federal intervention, the same trend holds true in preserving wetlands. In 1963, Massachusetts was the first innovator and regulated wetland development.⁹⁷ As Professor Adler of Case Western noted,

By 1975, all fourteen states in the continental U.S. with more than ten percent of their land area in wetlands according to the National Wetland Inventory had embraced wetland protection measures. The fact that those states with the most wetland acreage regulated first is important to note. Imposition of wetland regulations in a state in which there is a greater proportion of wetlands as a percentage of the state's total land area will impose higher costs than the imposition of similar regulations in a state in which wetlands represent a smaller proportion of its land area. As a result, one would expect such states with more wetlands to begin regulating after those states with fewer wetlands, if they were to ever regulate at all.⁹⁸

A conservation restriction binds the owners of the land not to develop it or use it in specified ways. This provides for flexibility: landowners can decide whether to bar all future development, or to permit limited use of the land, such as forestry.

Before the 1970s, states and private parties protected local wetlands. Two leading organizations central to wetland protection were the National Audubon Society and Ducks Unlimited. Both have led the historical fight to protect wetland habitat for waterfowl. As it stands today, 16 states have wetland regulatory programs in place.⁹⁹

Arizona's Private Conservation Efforts

Straightforward examples of how Arizona's natural resources are protected through existing, private legal options abound. Through well-established real property law, citizens can, and do, take conservation into their own hands, protecting the environment while promoting freedom. One prominent national example is the Nature Conservancy, whose efforts have protected more than 1 million acres of land in the United States.¹⁰⁰ The Conservancy has accomplished this by acquiring fee simple title to privately held land.¹⁰¹

Trends in private land conservation are also instructive about how Arizona might handle its clean water management. One trend in Arizona is for citizens to partner with land conservation trusts to protect natural resources. Land trusts act as trustees over acquired land – managing the property for the benefit of the beneficiary – the former landowner. In land conservation trusts, the land trust holds legal title to the land and is responsible to manage the land according to an underlying trust agreement.¹⁰²

Under existing law, citizens can use real estate tools to preserve their land, or open spaces, for perpetuity. The first way citizens can preserve their land is through a fee simple transfer, which transfers the owner's entire interest in the land to a conservancy or land trust. The managing trustee then agrees to uphold a legal duty to see that the property in question is preserved according to the terms of the transfer. After title transfers to the land trust, the land is permanently maintained as open space.

When an interest in land is transferred fee simple, both parties benefit. The buyer, interested in conservation, provides for the perpetual preservation of the property. The seller is assured of the protection and is remunerated for the land. For example, the Canoa Ranch in the Santa Cruz River Valley of Arizona operated as working ranch from 1820 to the 1970s. In 2001, a conservation buyer bought more than 4,000 acres through a fee simple acquisition and paid fair market value.¹⁰³ Those 4,000 plus acres will be perpetually preserved as open space.

The Trust for Public Land (TPL) helped establish the first local land trust in northern Arizona to save the “Thumb Butte” near Prescott. TPL now partners with the City of Prescott and holds conservation easements in perpetuity over five lots near Thumb Butte.¹⁰⁴

The Desert Foothills Landtrust (DFLT) efforts have also proven successful. The organization has raised more than \$3.8 million, permitting it to purchase more than 290 acres of desert land.¹⁰⁵ DFLT has recently focused its efforts on developing conservation partnerships with private landowners.

In 2006, the Rincon Institute entered into a conservation easement with the Wendt family and Pima County.¹⁰⁶ It protects some 160 acres of the Wendt property in the Rincon Mountains. This is an example of private-public partnership in conservation efforts, since both parties are responsible for protecting the land.

The Rincon Institute operates as a land trust, providing it a legal method to hold conservation easements over land for landowners who want to protect their land from development in perpetuity. “The Rincon Institute’s private land protection efforts as a land trust help protect the natural resources within and

In Arizona, private landowners make use of these options with great frequency. The Arizona Open Land Trust has protected more than 14,000 acres of southern Arizona’s parklands, streams, and ranches.

around Saguaro National Park by promoting voluntary conservation of open space on private lands near the Park and along important riparian areas and wildlife corridors.”¹⁰⁷ The Rincon Institute actively reaches out to landowners to encourage preservation.

Existing legal options to preserve land are both flexible and advantageous. Some or all of a land parcel may be donated to a land trust for preservation, with or without strings attached. Property owners could elect to live on the land until their death and then provide a land trust with full title to the property—a reserved life estate with a remainder interest in the land trust. Landowners could also retain certain rights, or easements, over the land, for themselves and their heirs. Donating land to land trusts can provide fortuitous tax advantages as well.¹⁰⁸ Giving undivided interests in the property—for example, 20 percent a year—provides a long stream of tax benefits while similarly protecting the environment. Both the landowner and the environment stand to benefit.

Of course, some people prefer to retain ownership over their land while providing for conservation. Donating a conservation restriction to a land trust affords this class of landowners a means to protect their property for perpetuity while retaining ownership. In short, a conservation restriction binds the owners of the land not to develop it or use it in specified ways. This provides for flexibility: landowners can decide whether to bar all future development, or to permit limited use of the land, such as forestry. Conservation easements prove popular. The national Land Trust Alliance reveals that state and local land trusts throughout the United States hold more than 17,000 conservation easements.¹⁰⁹

Likewise, mutual covenants between neighbors help protect shared natural resources, such as lakefronts. Mutual covenants act as deed restrictions on each participating landowner’s property and can be enforced by other participating landowners.¹¹⁰ In contrast to conservation easements, covenants do not provide permanent land protection because they can be terminated through subsequent agreements of the participating landowners or through a failure to enforce.

Land trusts have another effective arsenal available to preserve land: purchasing development rights. Through fundraising, a land trust can acquire funds to purchase development rights from landowners who might otherwise not be interested in protecting a property. Selling development rights can provide much-needed income to allow, for example, a farmer to keep the farm in the family. After selling development rights, the property owner retains ownership of the land, may use it for limited agricultural purposes, or may sell it in the future, but he or she may not use or sell the property for different uses.

In Arizona, private landowners make use of these options with great

frequency. The Arizona Open Land Trust has protected more than 14,000 acres of southern Arizona's parklands, streams, and ranches.¹¹¹ Likewise, the Superstition Area Land Trust helps preserve open spaces near the Superstition Mountains in Arizona.¹¹² Moreover, the Desert Foothills Land Trust preserves a wide variety of land parcels, including the Carefree Galloway Wash Preserve and the Ocotillo Ridge, which protects a portion of the Grapevine Wash.¹¹³ Certainly, citizens can and do bind together to protect natural resources, including washes, when given the opportunity. None of these options requires taxes or heavy-handed government regulations, just a commitment to preserving nature through voluntary selection.

Some environmental proponents argue that while private conservation efforts are welcome, they are too meager to address serious environmental problems. But such a view ignores the legal responsibility that attaches to land trusts. Generally, trustees must exercise reasonable care and judgment in administering a preserved trust land.¹¹⁴ Beneficiaries of the trust, normally the heirs of the owner of the land in question, may enforce the terms of trust against its trustee.¹¹⁵ This legal landscape affords those citizens most connected with the land the earliest opportunity to ensure competent management of environmental resources. All this remedy requires is freedom and an active interest in being a wise steward of one's land.

Arizona's Public Legal Conservation Efforts

Arizona law has responded to the state's unique environmental dynamics. In fact, the state decided that while eastern states followed the legal doctrine of "riparian rights" with respect to water law, that same dynamic would not work in Arizona. The state constitution provides that the "common law doctrine of riparian rights shall not obtain or be of any force or effect in the state."¹¹⁶ The "riparian rights doctrine" refers to the legal rule that landowners who have a waterway running through their property have the legal right to the benefits of the water for all useful purposes to which it may be applied.¹¹⁷

Arizona largely adopted the "doctrine of prior appropriation"—that is, one who diverted water and put it to a beneficial use acquired a usage right.¹¹⁸ That usage right represents a property right in the water acquired. The basic aim of the doctrine of prior appropriation was to protect the property rights acquired in appropriations once achieved.¹¹⁹

As early as 1888, the Supreme Court of Arizona committed to the doctrine of prior appropriation when it comes to water:

Here, the defendants, six or seven years subsequent to the appropriation of plaintiffs, bought the lands about two miles above plaintiffs, on both sides of the San Pedro river, and sought the usufruct of the waters thereof; diverting the same by means of a dam, ditch, etc., thereby interfering with the vested rights of plaintiffs as prior appropriators. Plaintiffs, as *prior appropriators*, had acquired *vested rights* in these waters, and the purchase and ownership of the lands on both sides of San Pedro river above plaintiffs did not divest these rights.¹²⁰

Another example is found in the 1957 Supreme Court of Arizona case that concerned the use and impact of the Sonoqui Wash, which crossed over several parcels of property.¹²¹ At issue were the rights of respective landowners to use and divert waters from the wash.

In 1957, Arizona law reflected the common law commitment to the establishment of servitudes between neighboring real estate parcels.¹²² A servitude is the creation of a burden on one property for the benefit of another. Property owners freely enter into the creation of servitudes to arrange for the most beneficial use of common land features, such as washes in Arizona. Further, Arizona law reflected the sentiment that where a servitude existed between two properties, the burdened property owner enjoyed rights to the water that naturally flows through a connecting wash, and the owner of the other property had no right to artificially burden that right.¹²³

At the same time, Arizona statutory law developed to tackle the unique features of water management in the state. In 1945, Arizona enacted the Ground Water Act, which included registration requirements for drilling wells.¹²⁴ Three years later, the Critical Groundwater Code of 1948 was established, which acknowledged that certain areas of the state required special regulation of water supplies.¹²⁵ By 1977, pressure arose to develop an extensive groundwater management code for Arizona, which came into effect in 1980. That Code still acts as the basis for groundwater management in Arizona today.

Title 45 of the Arizona Revised Statutes is devoted entirely to defining water law in the state. In painstaking detail, it defines such laws as vested water rights, establishes a water rights claim registry, and provides for a manner in which to adjudicate water rights claims.¹²⁶ In short, the Arizona Legislature seems perfectly competent in handling the state's unique water law requirements. Unfortunately, the imposition of uniform requirements under the Clean Water Act diminishes the state's future interest in establishing its own laws for managing clean water.

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There Was No “Race to the Bottom”

In 1992, Professor Revesz challenged federal environmental advocates to address why the federal government should be responsible for environmental regulation.¹²⁷ A common refrain issued from supporters of federal intervention is that decentralization produces a “race to the bottom” for environmental policy. That is, states will compete for business interests by lessening environmental protections. To guard against this effect, some suggest that only federal intervention will provide meaningful environmental protection. Yet, federal intervention fails to address the unique environmental needs of differing states, leading to homogeneous, oversimplified regulation.

Three principles support de-centralization as a norm in environmental policy.¹²⁸ First, the United States covers more than 3.5 million square miles, and each state, county, and municipality has unique preferences for environmental policies. Arizona is largely a desert; Minnesota is the “land of 10,000 lakes.” One size truly does not fit all. Permitting for diverse environmental policies allows citizens to decide their environmental and economic preferences and to make trade-offs accordingly. Uniform national regulations do not.

Second, not all environmental laws are created equally. While stringent antismog laws may be well suited for Los Angeles, their applicability to Cheyenne, Wyoming, may be less than ideal. Indeed, they may actually prove harmful. Different communities have dissimilar environmental needs. Federal laws tend to apply one solution homogeneously while ignoring the heterogeneous composition of the United States. That hinders environmental progress.

Third, attendant costs vary. A 1995 analysis of the CWA in the *Water Resources Research Journal* explained that some 35 states will have compliance costs higher than net benefits under the CWA.¹²⁹ The study highlighted the important cost problem connected with the CWA: “Some rural states already have generally good water quality, according to data supplied to EPA under Section 305(b) of the Clean Water Act.”¹³⁰ Notably, this led the researchers to the conclusion that state-level management plans may be superior to uniform federal regulations.¹³¹ States with existing supplies of good water need not be told how to manage their water supplies.

Professor Revesz explained that

when states compete for industry through environmental standards, they are competing for the sale of a good: the right to locate within their jurisdictions. If competition for the sale of most goods is

A 1995 analysis of the CWA in the Water Resources Research Journal explained that some 35 states will have compliance costs higher than net benefits under the CWA.

generally good, why should competition for the sale of this good be clearly bad?¹³²

This type of interjurisdictional competition promotes the “maximization of social welfare, rather than a race to the bottom.”¹³³ That is, each state internally decides on two policy preferences: tax rates on capital with corresponding environmental standards. Each state can best decide which is more important.

Even left-of-center theorists have acknowledged that interstate competition for environmental policy does not necessarily promote a race to the bottom. Just the opposite may be true.

The distinction between states following each other in setting more stringent or less stringent standards (or both) is not important as it might seem ... Because the race-to-the-bottom is simply a race to inefficiency, the race can occur both when states adopt standards that are too stringent as well as when states adopt standards that are too lax.¹³⁴

Even within a given state, “water quality problems can be quite localized.” Uniform federal standards for water regulation ignore local costs and policy preferences, leading to inefficient and unnecessary one-size-fits-all regulation.

Uniform federal regulation ignores this dynamic while imposing significant attendant costs. Thus, interstate competition allows for the best environmental regulation—that which fits the particular needs of local communities. Even within a given state, “water quality problems can be quite localized.”¹³⁵ Uniform federal standards for water regulation ignore local costs and policy preferences, leading to inefficient and unnecessary one-size-fits-all regulation.

What the Clean Water Act Costs Arizona

The federal one-size-fits-all Clean Water Act imposes heavy costs on Arizona businesses and citizens. For example, 56th & Lone Mountain, LLC (“Lone Mountain”) purchased more than 600 acres of desert land in northeast Phoenix for residential development.¹³⁶ Some 5 percent of those 600 acres included dry desert washes.¹³⁷ In those areas, Lone Mountain hoped to design road and utility crossings over the washes—a bad idea under the CWA.¹³⁸

Save Our Sonoran, Inc., a local environmental organization, rushed in to stop the development. Specifically, the group challenged the permit issued to discharge fill into, or to disturb, “navigable waters of the United States.” Notably missing were “waters” in the desert washes. The Sonoran Desert typically receives between three and fifteen inches of rain per year—rain that falls in uneven patterns.¹³⁹

Extending jurisdiction under the CWA to hundreds of acres of desert land, with some 5 percent constituting washes, illustrates the absurdity of the law. If desert land is considered “navigable waters,” then little property remains outside the Army Corps of Engineers’ jurisdiction.

Consider the case of the Douglas Ranch development in Buckeye, Arizona. The Douglas Ranch is the largest master-planned community in Arizona, with more than 33,000 acres planned for development over 40 years. Projections for the development include 135,000 jobs, 275,000 residents, and an economic output of more than \$2 billion per year.

Within the proposed Douglas Ranch phase one development, the project will affect nine acres out of more than 230 acres of jurisdictional washes. On average, the washes flow 1.5 times per year. The remaining 221 acres will be preserved in wide natural corridors. Moreover, the development will protect habitat and migration through open space corridors. The noted ephemeral washes on site are 192 miles away from the nearest navigable river, the Colorado River, and the project is 21 miles away from the nearest perennial stream, the Gila River. Because of evaporation, evapotranspiration, and recharge, it is very unlikely that much runoff from the site ever gets to the Colorado River.

Still, the Douglas Ranch developers must forge through significant federal regulations under the CWA—costly ones at that. Money spent on federal regulations will be passed on to homebuyers. The problem with deep-seated regulatory programs like the CWA is that costs related to scientific investigations, negotiations with regulatory agencies, and redesign are hidden and imbedded.

Complying with the CWA is not easy. The regulatory program is administered through more than 30 district offices. Districts, in turn, have more than 10 division offices. Division offices are responsible to the Army Corps headquarters. Further, the Corps does not act alone; it “consults with the Fish and Wildlife Service, the EPA, the National Marine Fisheries Service (NMFS), state fish and game agencies, state water quality agencies, and state and federal cultural resource offices.”¹⁴⁰

That size of bureaucracy is expensive. In a 2002 assessment of the CWA, David Sunding and David Zilberman noted in the *Journal of Natural Resources* that the mean individual permit application cost over \$270,000 to prepare—and that ignores costs of mitigation, design changes, costs of carrying capital, and other costs.¹⁴¹ On average, landowners who wished to fill their own wetlands required more than 750 days—two years and two months—from the start of CWA application preparation to the time they received their permit.

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The attendant costs and burdens of the CWA reach more than just private landowners. State and local governments must also apply for wetland permits to construct roads and schools. Compliance costs increase as state and local governments must rely more on outside consultants, engineers, and lawyers to navigate the CWA maze. Sunding and Zilberman explained how small increases to the complexity of the CWA result in exponential price increases,

Suppose that a local agency cannot use the most direct route for a road and instead builds a longer road to skirt a wetland. This response imposes potentially large private costs. Suppose that the more circuitous route raises average commute time by just six minutes per day and 100,000 people use the affected road. This single change implies that the environmental regulation increases travel time by 10,000 hours per day. At an average opportunity cost of \$10/hour, which is quite conservative, changing road placement costs commuters \$100,000 per day.¹⁴²

At the same time, the resulting costs affect developers and homebuyers. As the permitting process under the CWA becomes more complicated, it takes longer to comply with federal edicts. Extending the Army Corps' relevant period of review will make development efforts take longer, increasing the "cost of capital to developers and, by extension, the price of housing." So increases in the complexities of obtaining CWA permits translate to increases in the cost of private development, resulting in higher housing prices while simultaneously decreasing the amount of available housing.¹⁴⁴

Arizona's Unique Environment

Among the problems inherent in regulating water in Arizona is the fact that there is very little of it. When there is regulable water, it tends to flow intermittently, making uniform regulation difficult.

Applying the Clean Water Act to dry washes, arroyos, and sand in Arizona makes little practical sense. These "waters" become classified under water quality standards for swimming, fishing, and drinking water. Private actors are then prohibited from discharging substances into the dry washes that could interfere with fishing or swimming, which of course do not occur in dry washes.

Legally, the problem is that the courts have not required a permanent hydrological connection between a potentially regulable water source and navigable waters. Should an area of land be subject to water flowing intermittently, seasonally, or only during significant rainfall, a hydrological connection is created, allowing for regulation to

proceed under existing precedent.¹⁴⁵ Pushing the limit of absurdity, the U.S. Court of Appeals for the Tenth Circuit has provided that a hydrological connection can be underground and travel so slowly that it may take “centuries” for the water to reach “waters of the United States.”¹⁴⁶ Common sense illustrates that dry land just cannot be “waters of the United States.” Under current U.S. Supreme Court precedent, a “significant nexus” between one source of water and actual navigable waters of the United States is all that is required to invoke jurisdiction. Deciding what exactly constitutes a “significant nexus” will take case-by-case determinations.

Moving beyond the senselessness of federal regulation, Arizona law already provides for regulation of its water sources, alleviating the necessity of far-reaching federal intervention. Arizona Revised Statutes 45-141, for example, provides that all water flowing, even intermittently, belongs to the “public and are subject to appropriation and beneficial use.”¹⁴⁷ Arizona has taken steps to tailor its water regulations to reflect the unique status of dry washes and arroyos. But Arizona’s incentive to innovate and customize its water law is lost as the CWA increasingly occupies similar regulatory space

Save Our Sonoran

Save Our Sonoran, Inc., an environmental organization, challenged a Section 404 permit used by a developer to infill some 5 percent of a proposed 600-acre development. Specifically, the permit in question allowed Lone Mountain to fill 7.5 acres of waterways through development. The district court issued a preliminary injunction ordering an end to all development on the site. The Ninth Circuit affirmed.

The district court issued findings of fact that desert washes ran through the development “the way capillaries run through tissue.” The Army Corps of Engineers had decided to extend its jurisdiction to the affected 7.5 acres of potential waterways that the developer planned to infill. At the end of the day, the court held that the Corps had authority not just over the affected 7.5 acres of waterways, but over the entire development – some 600 acres. Since desert washes were considered “navigable waters,” any and all development affecting them – even 600 acres of it – would be subject to the jurisdiction of the Corps.

The impact of Save Our Sonoran for Arizona is immense. Instead of applying the Clean Water Act in a limited fashion – for example, over potential waterways where jurisdiction exists – entire development projects come under the jurisdictional umbrella of the Army Corps. The obvious implication from this practice is that as relevant land parcels grow in size for Corps jurisdiction, so too will attendant time delays, regulatory burdens, and costs. Reviewing 600 acres

Save Our Sonoran, Inc., an environmental organization, challenged a Section 404 permit used by a developer to infill some 5 percent of a proposed 600-acre development. The court held that the Corps had authority not just over the affected 7.5 acres of waterways, but over the entire development.

takes much more time than reviewing seven acres.

So, applying the Save Our Sonoran rationale continues to expand the jurisdiction of the Army Corps one step further. Entire developments and land parcels will be examined for compliance with federal water standards – a slow task, to be sure.

Negative Consequences

As the Army Corps of Engineers and the EPA steadily increase their jurisdiction over seemingly every drop of water throughout the United States, several consequences occur.

First, the state of Arizona becomes less interested in developing its own innovative reform methods to provide clean water. This gradual expansion of federal sovereignty comes with an attendant cost: the reduction of state sovereignty over what is traditionally thought of as a state concern – water resources. “Passing the buck” to federal authorities means less accountability at the state level and less sensitivity to the particular needs of communities.

It is now a common assumption that the federal government should take care of the nation’s diverse environmental tragedies through uniform regulation. Yet, centralization as a norm of environmental policy remains untested.

Second, unrestrained federal authority over clean water provisions enhances the possibility that land takings will occur. When the federal government commands individual property owners not to use their land in a particular manner, it may result in a taking subject to the “just compensation” requirement of the Fifth Amendment to the U.S. Constitution. While pressing, and valid, environmental concerns may be regulated by the government without such redress, laws that turn sand into “water” and prohibit their use are questionable uses of constitutional authority.

The third dynamic is that any reduction in state sovereignty will provide fewer incentives for individuals to voluntarily preserve the environment. As demonstrated earlier, private citizens can and do band together in land trusts to preserve land, water, washes, and the like if they are committed to do so. Federal intervention in this area promotes a cultural understanding that the federal government, not local neighbors, should protect every environmental asset.

State Sovereignty and Federalism Concerns

The Move Toward Centralization

It is now a common assumption that the federal government should take care of the nation’s diverse environmental tragedies through uniform regulation. This list continues to mushroom, as demonstrated in Table 2:

Table 2: The Growth of Major Federal Environmental Laws

1938 Federal Food, Drug, and Cosmetic Act
1947 Federal Insecticide, Fungicide, and Rodenticide Act
1948 Federal Water Pollution Control Act (also known as the Clean Water Act)
1955 Clean Air Act
1965 Shoreline Erosion Protection Act
1965 Solid Waste Disposal Act
1970 National Environmental Policy Act
1970 Pollution Prevention Packaging Act
1970 Resource Recovery Act
1971 Lead-Based Paint Poisoning Prevention Act
1972 Coastal Zone Management Act
1972 Marine Protection, Research, and Sanctuaries Act
1972 Ocean Dumping Act
1973 Endangered Species Act
1974 Safe Drinking Water Act
1974 Shoreline Erosion Control Demonstration Act
1975 Hazardous Materials Transportation Act
1976 Resource Conservation and Recovery Act
1976 Toxic Substances Control Act
1977 Surface Mining Control and Reclamation Act
1978 Uranium Mill-Tailings Radiation Control Act
1980 Asbestos School Hazard Detection and Control Act
1980 Comprehensive Environmental Response, Compensation, and Liability Act
1982 Nuclear Waste Policy Act
1984 Asbestos School Hazard Abatement Act
1986 Asbestos Hazard Emergency Response Act
1986 Emergency Planning and Community Right to Know Act
1988 Indoor Radon Abatement Act
1988 Lead Contamination Control Act
1988 Medical Waste Tracking Act
1988 Ocean Dumping Ban Act
1988 Shore Protection Act
1990 National Environmental Education Act

Yet, centralization as a norm of environmental policy remains untested. Richard Stewart noted in the *Columbia Journal of Environmental Law*:

Our current environmental regulatory system was an understandable response to a perceived need for immediate controls to prevent a pollution crisis. But the system has grown to the point where it amounts to nothing less than a massive

effort at Soviet-style central planning of the economy to achieve environmental goals. It strangles investment and innovation. It encourages costly and divisive litigation and delay. It unduly limits private initiative and choice. The centralized command system is simply unacceptable as a long-term environmental protection strategy for a large and diverse nation committed to the market and decentralized ordering.

Decentralization of environmental regulation leaves decision-making to political institutions better fit to determine applicable trade-offs between the environment and industry. Professor Henry Butler of the University of Kansas Schools of Law and Business and Professor Jonathan Macey of Cornell University School of Law constructed the “environmental matching principle” to describe best practices of environmental regulation. Generically, the size of geography affected by pollution should determine the appropriate governmental level for the response. The “matching principle” is rather common to questions of constitutional governance and consistent with federalist ideals – purely local pollution is best dealt with by local communities. Federal responses to purely local problems provide suboptimal remedies.

Under a centralized approach, as embodied in the Clean Water Act, elimination of all water pollution is the stated goal. That goal is unattainable. Decentralized approaches permit the attainment of superior environmental policy in a manner that respects liberty, operates most efficiently, and adheres to the varied policy preferences of different communities.

Many still support centralization as the leading norm of environmental policy. The most compelling of these reasons relates to negative interstate externalities – the imposition of spillover costs across state lines. But even negative interstate externalities do not create a presumption in favor of stringent federal regulation. Localized regulations can force private actors to bear the full costs of their decisions regarding pollution – creating a market solution for environmental problems. That is, the appropriate role of government in such an instance relates to the clear definition and enforcement of property rights.

Another favored response, as detailed earlier, is the “race to the bottom” rationale – that decentralized environmental policies will force states to severely weaken their environmental standards. But that assumes each state has the same policy preference toward industry and the environment. This “race to the bottom” presumption ignores the diverse policy preferences of states: each does not face the same environmental and economic concerns. States should be free to balance environmental and economic needs according to the preferences of their residents.

Toward Decentralization

The principles of limited government require that decentralization be favored as an underlying norm of environmental policy. Under a centralized approach, as embodied in the Clean Water Act, elimination of all water pollution is the

stated goal. That goal is unattainable – except through imaginary government fiat. Decentralized approaches permit the attainment of superior environmental policy in a manner that respects liberty, operates most efficiently, and adheres to the varied policy preferences of different communities.

Diverse Pollution Problems Require Diverse Solutions

Phoenix, Arizona, is a very different place than Billings, Montana; New York City; or Chicago. The preferences of each locale for environmental regulation vary according to their unique geographic settings, specialized pollution problems, contamination sources, and local preferences. As Professor Adler of Case Western Reserve University School of Law has noted, the “most cost-effective pollution control measures in a city with a centralized downtown and a large, aging industrial base will be different than those in a city that is more spread out, has little industry, and where automobiles are newer and better maintained than in other cities.”

In the context of clean water, the Clean Water Act treats most water alike – whether dirty or clean. Good-quality waters are regulated largely in the same manner as highly polluted sources. That approach wastes the limited resources available to local government and private citizens to address seriously polluted waters. Uniform one-size-fits-all federal regulation cannot adequately take these differences into account.

The Knowledge Problem

From a knowledge perspective, local governments and private citizens are better suited to gauge local environmental problems than are distant federal authorities. F.A. Hayek put it best when he noted that the

knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate “given” resources—if “given” is taken to mean given to a single mind which deliberately solves the problem set by these “data.” It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge not given to anyone in its totality.

Under this reasoning, a “single mind” cannot possess all the necessary information to solve numerous and dissimilar environmental problems. Individual citizens and local governments provide for optimal environmental regulation.

States as Innovators in Environmental Policy

Supreme Court Justice Louis Brandeis explained in 1932 that “it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Environmental policy should embrace, not repudiate, this principle. As federal command-and-control-type environmental regulation reaches its natural limits, it will no longer provide beneficial environmental regulation at an acceptable price.

Alternatives to the current one-size-fits-all approach may prove useful for Arizona. In Europe, the development of contractual agreements between governing environmental agencies and affected industry has proven an effective tool in creating sensible environmental policy. Referred to as “macrocontracts,” they permit businesses, which must comply with the rules, to voluntarily negotiate sensible regulations. This provides industry with the time and flexibility necessary to reach environmental goals, rather than have them dictated from a singular government agency. That ensures that the goals are in fact attainable and practical.

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Another alternative to command-and-control models of environmental regulation is found in economic incentive systems (EIS). The fundamental difference between our current federal system and EIS is that “command systems limit, directly or indirectly, the quantity of residuals that each actor may generate. EIS establish, directly or indirectly, a price that must be paid for each unit of residuals generated but leave each actor free to decide on the level that it generates.” In short, EIS impose a pricing mechanism for pollution, providing flexibility for private actors to decide what limitation is appropriate for them.

Pure free-market environmentalism is yet another viable option for environmental stewardship. This reform rests on the theory that assigning stringent private property rights to environmental resources would give property right holders an incentive to protect the resources with limited government intervention. That produces the greatest amount of flexibility in such a system, allowing those who value the environmental property rights the most to purchase them.

Further, creating a free market in water resources can be similar to the existing free market established for real estate transactions. However, established prices in a water market should reflect the “social value of water, and therefore, state policies ought to facilitate incorporating external costs and benefits into the price of water resources.”

As described earlier, Arizona's adoption of prior appropriation helps move the state in a direction favoring a market approach to water management. But the doctrine of prior appropriation is not entirely favorable for the creation of such a market because of underlying legal uncertainties. For example, the doctrine of prior appropriation requires that owners of water resources not waste the water and that they put it to a beneficial use. The terms "waste" and "beneficial use" are subjective, incapable of exact definition. Because of this, market participants cannot form reasonable expectations of future transactions and the status of their rights. This uncertainty creates a disincentive to purchase water rights when it remains unclear what legal ramifications accompany a purchase.

In short, water market participants will be less apt to robustly use a free market in water supplies if their property rights in the water wax and wane according to non-static criteria like "waste" and "beneficial use." There is no shortage of academic and legal commentary surrounding helpful reform to the prior appropriation doctrine. Reforms such as water auctions, objectively defining vested water rights, and otherwise removing government from the water business are leading examples.

At the end of the day, any reform that introduces some level of decentralization is favored over the current top-down regime of environmental regulation. Local communities and private citizens know best when it comes to protecting their environmental resources. Environmental law should reflect that sentiment. At the same time, constitutional principles compel adherence to this approach.

Assigning stringent private property rights to environmental resources would give property right holders an incentive to protect the resources with limited government intervention.

Cleaning Up the Clean Water Act

There are many ways out of the Clean Water Act, or at least many ways to make it more sensible. First, existing law permits states to partially opt out of the Section 404 permitting process under the Act. This is dependent upon a state agency taking responsibility where the federal government previously exercised authority. Second, revised federal rulemaking could substantially narrow the jurisdictional power of the Army Corps of Engineers and the EPA. Third, reform could provide for complete devolution, allowing the states and private citizens to take responsibility for clean water.

Opting Out of the Clean Water Act

Section 404 of the Clean Water Act permits states to take control of the 404 permitting program and administer it on behalf of the federal government. While

more than a dozen states administer aquatic resources and wetland protection programs similar to the federal 404 program, only two states – Michigan and New Jersey – have formally adopted the 404 program in place of the federal government.

The EPA publicly supports state control over the 404 process because state regulators are normally closer to the water in question and more familiar with pressing local issues and resources than are their federal counterparts. By formally assuming control of the 404 regulatory program, a state can eliminate redundancy in regulatory programs. Under the streamlined program, Section 404 permit applicants would need only a state permit for dredged or fill material discharges in waters regulated under the state 404 program (including, under current law, dry desert washes).

For a state to assume control of the 404 process, it must demonstrate to the EPA that the state program

Section 404 of the Clean Water Act permits states to take control of the 404 permitting program and administer it on behalf of the federal government. The EPA, however, reviews the sufficiency of state regulation annually to guarantee compliance with the requirements of federal law.

- shares an equivalent scope of jurisdiction comparable to the EPA
- regulates the same type of activities as the EPA did
- provides for public participation and input
- follows Section 404(b)(1) guidelines
- provides for sufficient enforcement authority.

After a state assumes control of the 404 permitting process, the Army Corps of Engineers no longer processes permit applications for areas under state control. The EPA, however, reviews the sufficiency of state regulation annually to guarantee compliance with the requirements of federal law. Further, when there are “serious impacts,” the EPA will review the applicable permits and provide the state agency with input. The state agency is not permitted to overrule the EPA’s determination.

To take control of the 404 permitting process, the governor of a state must submit a complete description of the state’s proposed regulatory program. The state’s attorney general must also certify that state laws provide adequate authority to do so. The EPA will then review and approve or deny the request within 120 days. During that time, a public comment and hearing process will occur.

Even after a state assumes control of the 404 permitting process, there remains significant involvement with the EPA. The Act requires the state agencies to transmit to the EPA a copy of each permit application received by the state and provide notice to the EPA “of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.”

The EPA then submits the application to the Corps and to the Fish and Wildlife Service of the U.S. Department of the Interior. If the EPA submits an objection to a proposed permit, a state shall not issue the proposed permit unless it “modifies such proposed permit in accordance with [the EPA’s] comments.” The state may still issue the permit so long as it modifies it to meet the EPA’s requirements.

While states may elect to administer their own Section 404 permit process, they cannot fully divest themselves of federal regulatory oversight. For the promise of federalism to have meaning, states must be given the opportunity to truly opt out of the CWA. Only this step permits states to experiment and innovate, leading to better water policy. Existing opt-out provisions under the CWA are insufficient to spur policy innovation.

One example of the failure inherent in the opt-out mechanism under the CWA can be found in Michigan. Michigan was the first state to assume control of the 404 permit process in 1984. But it was in Michigan that the infamous Rapanos case originated, where Mr. Rapanos was brought to court for filling his own wetlands that were 11 to 20 miles away from navigable waters. Clearly, Michigan’s election to assume control of the 404 process did little to help Mr. Rapanos.

Kentucky has studied the feasibility of assuming control of the 404 permit process. Of prime concern to Kentucky is that the “administration of the 404 program by four districts has created confusion and uncertainty for the regulated public due to historical inconsistencies in implementation and difficulty in determining which district has jurisdiction at a given location.” Kentucky’s Environmental Task Force hopes that state assumption of the 404 process will help jurisdictional problems and streamline the permitting process.

While some level of redundancy may be eliminated if a state assumes the 404 permitting process, it is doubtful that any state-based 404 system would incite innovation in clean water management. Before a state can assume control of the program, it must enter into memoranda of agreement with the EPA and the Army Corps of Engineers. State 404 programs must be as stringent as the federal program. That means that natural features such as mudflats, dry washes, and desert sand must still be counted as “water.”

State assumption of the 404 process may prove minimally helpful in eliminating jurisdictional confusion. But the very text of the CWA does not permit states to opt out and provide more innovative means of clean water regulation. States must largely duplicate federal measures. This ensures that the reach of the CWA will remain the same, but citizens might wait in shorter lines to subject themselves to the law.

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Revised Federal Rulemaking

Another small, but welcome, pathway to reform is to reaffirm the limited jurisdictional authority federal authorities enjoy under the Clean Water Act. As this study has demonstrated, courts and federal bureaucracies have extended the term “navigable waters of the United States” to include all sorts of implausible applications. To understand why reform is necessary, it is helpful to re-examine the current status of federal jurisdiction over state waters.

Existing federal regulations that define the scope of the Army Corps of Engineers and the EPA’s jurisdiction prove too expansive. Current regulations permit either body to regulate purely intrastate waters that “could affect interstate commerce or foreign commerce.” Going further, they allow regulation of wetlands near such water. As the U.S. Supreme Court has held, the EPA and Corps may only exercise jurisdiction where the property in question bears some “significant nexus” to waters of the United States. The burden is on the Corps and the EPA to issue regulations that establish objective criteria defining where a “significant nexus” exists between a given parcel of land and actual navigable waters. Current regulations provide the Corps and the EPA with significantly more regulatory power than the U.S. Supreme Court endorsed in *Rapanos*.

Another small, but welcome, pathway to reform is to reaffirm the limited jurisdictional authority federal authorities enjoy under the Clean Water Act.

The effect of narrowly and objectively defining the “significant nexus” test would be to limit the overarching jurisdiction under the CWA. Narrowly defining the areas subject to regulation may establish sensible restriction of the CWA and help to uphold private property rights.

The opportunity to bring sanity to the CWA came and passed. On June 8, 2007, the EPA and the Army Corps issued guidance concerning the scope of the government’s authority in issuing Section 404 permits. This guidance was issued based not on a single, comprehensive standard, but incorporated the three separate opinions issued in *Rapanos* – one plurality and two concurring opinions.

The plurality opinion of four justices in *Rapanos* adopted a restrictive interpretation of “waters of the United States.” Under this interpretation, the Corps would lose its jurisdiction over ditches that are regularly dry and experience only occasional or intermittent flows. The Corps also would lose its jurisdiction over wetlands that are close to navigable waters. Were this the test today, it would spell the end of regulating “dry water” in Arizona.

When the Supreme Court fails to issue a majority opinion, controlling legal precedent may be determined from the legal principles described by five or more justices. Thus, jurisdiction could be affirmed under the CWA if either the plurality’s

or Justice Kennedy's standard were satisfied. The new guidance issued by the EPA and the Army Corps largely relies on Justice Kennedy's concurrence – that is, a variable, shifting, subjective, and factually intensive test.

In issuing its guidance, the joint EPA-Army Corps memorandum affirms regular jurisdiction over such areas as traditional navigable waters and “relatively permanent non-navigable tributaries of traditional navigable waters.” But for land that is an adjacent wetland or a non-navigable tributary, the EPA and the Army Corps will rely on Justice Kennedy's “significant nexus” test to determine jurisdiction. That amounts to no easy task.

As the EPA itself notes, a “significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.” This includes fact-intensive, case-by-case determinations, looking to factors such as watershed size, aquatic habitat characteristics, and the ability of wetlands to trap pollutants. Detailed research concerning the history of water flow volume, gauge data, site observations, and statistical analysis will also be relied upon in making these determinations. Missing, however, is the promise of a bright-line test.

While the EPA notes that even though it may relinquish jurisdiction over traditional ditches, gullies, and small washes in most of the United States, it is hesitant to do so in the arid west. Because washes might send sediment downstream, provide animals with habitat, offer pollutant trapping, and support nutrient cycling, they are likely to have a “significant nexus” with traditional water, making them wholly regulated under this approach.

Truly, any modest reduction in the EPA and Corps' jurisdiction is welcome, but that means little for landowners in Arizona. The unfortunate result of structuring reform guidance on a splintered Supreme Court opinion is that the resulting changes do not offer clear, objective guidelines. Citizens are left with the knowledge that land sharing a “significant nexus” with traditional water will be subject to costly regulation, but that the EPA and the Corps will determine what constitutes a significant nexus.

There is a ray of hope, though: the EPA and the Army Corps will use the new guidance temporarily and afford the public an opportunity to comment on it. Toward the end of 2008, the agencies will revise, maintain, or suspend the guidance based on the public comments received and the agencies' own experience with its interpretation.

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Devolution as an Environmental Norm: Truly Opting Out of the Clean Water Act

While the Clean Water Act, on its face, permits states to assume control of the 404 permitting process, more robust opt-out and waiver provisions should be built into the law. That is, where states opt for local regulation of water resources, the CWA, at least in its entirety, should not apply. Under the current CWA, a lengthy process is required just to assume state control of a nearly identical 404 permitting process. The Act should be modified to permit any state to opt out of the regulatory authority of the EPA and Army Corps should the state issue a proclamation of its intent to withdraw from the law.

Opting out of federal programs is an idea with some precedent. For example, in Oregon, the state successfully acquired waivers for its Medicaid plan and welfare program. The Oregon Legislature also issued a resolution calling on Congress to permit the state to opt out of the social security program. In Utah, state lawmakers have flirted with the idea of opting out of the No Child Left Behind Act and spurning some \$116 million in federal funding annually due to onerous federal regulations. Arizona can, and should, move in the direction of these other states to create pressure on Congress to amend the CWA so that states may fully design and control their own clean water acts.

By being permitted to opt out and waive the requirements of the CWA, states can start reassuming heightened responsibility for their own environmental policies. That ensures that innovation will be the leading guide in developing environmental policy, rather than adherence to one-size-fits-all federal regulations.

By being permitted to opt out and waive the requirements of the CWA, states can start reassuming heightened responsibility for their own environmental policies. That ensures that innovation will be the leading guide in developing environmental policy, rather than adherence to one-size-fits-all federal regulations. As more states opt out, competition will increase between the states to create the optimal balance between environmental and industrial needs. Under a system of competitive federalism, our citizens should demand no less.

Conclusion

According to federal law, dry is the new wet. The Clean Water Act broadly reaches out and regulates elements of nature such as dry desert washes and sand as “waters of the United States.”

Common sense dictates that states should recoil from any regulatory program that defies the obvious. That sentiment is particularly strong in the case of the CWA – the prime example of a well-intentioned federal law gone wildly astray. Committing to a norm of decentralization for environmental policy encourages

Arizonans to have a say in environmental management and to determine what constitutes the most effective environmental regulation for the Grand Canyon State.

The CWA adds substantial hidden costs and delays to private developers and local governments attempting to comply with the law. And when Arizonans are forced to treat sand as if it were water, serious attention should be given to reforming or opting out of the Act. Continuing to comply with the law only encourages expansion of the federal government's regulatory reach, while imposing real costs on the citizens of Arizona. In a state that is home to Barry Goldwater and is committed to federalist ideals with a respect for limited government, Arizona should take responsibility for its own clean water.

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181. How states regulate their water resources could take dramatically different shapes—including private management. This proposal still leaves open the possibility of assuring minimal environmental standards are met through the CWA.
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