

# Treading Water While Congress Ignores the Nation's Environment

[Sandra B. Zellmer](#)

University of Nebraska at Lincoln - College of Law

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## **Abstract:**

In the past two decades, Congress has failed to legislate any meaningful reforms related to the environment. This is so despite an array of blockbuster judicial decisions, some of which have effectively amended existing statutes with radical interpretations that undermine legislative purposes and intent. Water-related issues provide a useful lens through which to study congressional apathy toward the nation's environment. Although the Supreme Court has reviewed a surprising number of Clean Water Act (CWA) cases, including cases challenging the fundamental jurisdictional reach of the Act and the enforcement authority of the responsible agencies, Congress has failed to address these crucial legal issues in any substantive way. Congress has also remained silent despite at least two catastrophes that warrant attention from the nation's legislative branch. In 2005, the deadly storm surge of Hurricane Katrina was funneled into the City of New Orleans by the levee and navigation system of the lower Mississippi. Just a few years later, in 2010, BP's Deepwater Horizon platform and Macondo well exploded, killing eleven and spreading billions of gallons of oil throughout the Gulf of Mexico. While Katrina provoked modest insurance reforms by Congress and the Deepwater Horizon resulted in institutional reorganization within the executive branch, there has been no comprehensive, remedial legislative response to either disaster.

This article contrasts the current congressional vacuum on water-related issues with the syncopated yet rhythmic dance that took place between the federal courts, the agencies, and Congress prior to 1990. The bipartisan support for environmental protection that existed from the late 1960s through the 1980s no longer exists, and the bitterly partisan nature of environmental issues in Congress today suggests that comprehensive reforms tailored to the problems faced by modern society are unlikely.

It is not clear, however, that congressional reticence or even gridlock is necessarily a bad thing when it comes to environmental law. Certainly, the physical environment and the tools available for addressing environmental problems have changed since most of our key statutes, including the CWA, were passed, making some existing provisions seem outdated. On the other hand, the objectives of the CWA and other bedrock environmental laws have not changed; if anything, these goals have become all the more compelling in the twenty-first century. As a society, we still expect clean and reliable water resources — an expectation that cannot be met unless we attain the CWA's goals of maintaining and restoring the chemical, physical, and biological integrity of the nation's waterways. Yet if Congress were to take up the call to reform existing statutes, it would be more likely to dismantle discrete provisions disliked by powerful, regulated entities than to pass comprehensive, forward-thinking legislation.

Even if it were feasible, perhaps it is not necessary or wise, then, to push for a more responsive legislature. While Congress has been neglectful, the federal agencies have attempted to take up the slack by crafting more innovative and, in some cases, more comprehensive solutions than might be expected in Congress. Moreover, the agencies have been more willing to consider evolving scientific findings and conclusions and to adapt their strategies to the science, and the courts, for the most part, have deferred to the agencies when their decisions are well founded on science. There are numerous obstacles to progressive regulation, however, that need to be eradicated or reformed, some of which can be addressed by executive order.

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