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Just Add Water: Permitting, State Sovereignty, and the Marble Cake Debacle

Deciding where federal environmental authority should give way to state and local jurisdiction—"baking the marble cake of federalism," as administrative law scholars put it—is admittedly a difficult task. But when it comes to bungling the federalism recipe, the Clean Water Act, well, takes the cake. Congress in 1972 and 1977 largely established the modern Clean Water Act (CWA), grandly announcing an often-quoted but rarely followed policy: "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

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