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From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term "Navigable Waters"

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Editors' Summary: This spring, the U.S. Supreme Court will be deciding two very important wetlands cases. In both, the Court is asked to decide whether the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency exceeded the bounds of the CWA by claiming jurisdiction over certain wetlands or, alternatively, whether such jurisdiction violates the Commerce Clause of the U.S. Constitution. As a preview to what the Court will find in determining the jurisdictional reach of the CWA, this Article examines the legislative history of the CWA and its various precursors, as well as the term "navigable waters." The authors conclude that the CWA, as enacted in 1972 and as amended in 1977, was intended to encompass all the nation's waters, including wetlands, with the exception of truly isolated intrastate waters.

Perhaps of all the myriad terms in the American legal lexicon, the term "navigable waters" has come under as much scrutiny in the last few decades as any other. While the authors of this piece are not so bold as to claim that we know the true meaning of the term as it appears in its many contexts, we are confident that we can at least shed some light on what the term does and does not mean within the confines of the Clean Water Act (CWA).[1]

In the Federal Water Pollution Control Act (FWPCA) of 1972 (which the U.S. Congress renamed the "Clean Water Act" in 1977)[2] Congress defined "navigable waters" as the "waters of the United States, including the territorial seas."[3] Because the geographic jurisdiction[4] of the CWA is tied directly to the definition of "navigable waters,"[5] the central question examined in this Article is whether Congress intended the term "navigable waters" to encompass all of the nation's waters, or only traditional navigable waters and their adjacent wetlands. The answer to this question is of critical importance because an estimated 98% to 99% of the nation's waters are not traditional navigable waters or wetlands adjacent to such waters.[6]

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1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. In 1977, Congress renamed the Federal Water Pollution Control Act of 1972 the "Clean Water Act." Pub. L. No. 95-217, 91 Stat. 1566 (1977). For the sake of clarity, the name "Clean Water Act of 1972" is used in place of the name "Federal Water Pollution Control Act of 1972" throughout this Article.
3. 33 U.S.C. §1442(7).
4. The jurisdiction of the CWA is comprised of two components: geographic jurisdiction and activities jurisdiction. Geographic jurisdiction, the focus of this Article, goes to the types of waters protected by the CWA. Activities jurisdiction goes to the types of actions that cannot be performed in a "water of the United States" without a §404 permit. When the term "jurisdiction" is used in this piece, it refers to geographic jurisdiction.
5. Under the CWA, the federal government has the authority to regulate all discharges of pollutants from "point sources" into the "navigable waters." *See* 33 U.S.C. §§1241 & 1442(12). Thus, whether a discharge of a pollutant into one of the nation's waters is regulated depends on whether the water is, in fact, a "navigable water."
6. 123 CONG. REC. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Philip Hart (D-Mich.)), *reprinted in* 4 CRS, LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 at 939-40 (1978) [hereinafter CWA LEGISLATIVE HISTORY]; 123 CONG. REC. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. William Harsha (D-Ohio)), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra*, at 1280; Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ELR 10187, 10193 (Feb. 2004).

Since 1972, the term "navigable waters" has been, for the most part, interpreted broadly by judges, federal agencies, and commentators. During the last five years, however, some commentators[7] and judges[8] have suggested that the U.S. Supreme Court, in its 2001 decision *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[9] indicated that Congress intended for "navigable waters" to encompass only the traditional navigable waters and any adjacent non-navigable waters. In contrast to this position, the vast majority of district court and court of appeals judges who have decided CWA cases since 2001 disagree with this narrow interpretation of CWA jurisdiction. These courts have held that Congress intended the CWA to cover all the waters in the United States with the exception of isolated intrastate waters that lack a significant Commerce Clause nexus. We will have to wait for the U.S. Supreme Court to resolve this issue.

We may not have to wait long for the U.S. Supreme Court to decide this issue. By July 2006, in all likelihood, the Court will have decided two cases that will either confirm the current reach of CWA geographic jurisdiction or restrict that jurisdiction markedly. The cases are *Rapanos v. United States*[10] and *Carabell v. U.S. Army Corps of Engineers*.[11] When the Court decides these cases, it is likely that the meaning of the term "navigable waters" will be substantially clarified. In the meantime, we offer this Article as a preview to what the Court will find as it examines the history of the CWA, and in particular, the legislative history of the term "navigable waters."

In seeking this elusive key to the CWA—the meaning of "navigable waters"—we traced a course from the Magna Carta, executed in 1215, to the CWA of 1977. From this extensive journey, we found that the bulk of the information contained in the legislative histories, statutes, and case law supports a broad interpretation of the term "navigable waters." These sources show that in drafting the CWA of 1972, Congress intended the term "navigable waters" to encompass all the waters of this nation with the exception of truly isolated intrastate, non-navigable waters.

Our journey begins with the Magna Carta. As William Rodgers explains in his treatise on environmental law, "the [Clean Water] Act still is rooted deeply in the past,"[12] and the term "navigable waters" is rooted, in a certain sense, in the Magna Carta. We then turn to the U.S. Constitution and examine the role that navigation played in its drafting. Next, we examine the leading pre-CWA U.S. Supreme Court decisions that have addressed the issue of federal jurisdiction over the nation's waters. These decisions are discussed repeatedly during the legislative history of the CWA of 1972, which is where the Article focuses next. Then we look at the regulations that the U.S. Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (EPA) promulgated to implement the CWA, and the judicial decisions that reviewed those regulations. Next, we examine the CWA of 1977 and its legislative history to better understand what Congress intended in 1972 about the scope of federal jurisdiction, as well as to determine what Congress hoped to accomplish by amending the Act in 1977. Finally, we conclude our journey by briefly examining what has transpired on this issue since 1977 in an attempt to gain further insight into the appropriate meaning of the term "navigable waters."

Before going further, it is incumbent upon us to explain how we use certain terms in this Article. We do this because some courts and commentators over the years have not always used the terms "navigable waters," "traditional navigable waters," "non-navigable waters," and other related terms in the same way. In this Article, we use the term the *nation's waters* to refer to all waters in the country, including wetlands, with the exception of certain isolated intrastate waters that have no significant Commerce Clause nexus. *Nation's waters* is synonymous with how the term "waters of the United States" has generally been used over the past three decades. Since the terms "navigable waters" and "waters of the United States" are at the center of this debate, we use these terms only when necessary to avoid confusion. The term *nation's waters* will be italicized when *we* use it in the Article. In some of the legislative history entries quoted in the Article, U.S. senators and representatives refer to the "nation's waters." In those instances, we do not put the term in italics. We consider *nation's waters* to be comprised of two distinct groups of waters: traditional navigable waters and non-navigable waters. Since we use these terms consistently with how they are generally used, we do not put them in italics in the Article unless we emphasize them in a quote.

Traditional navigable waters are waters that, either with other waters or with land routes, establish or could establish a "highway" for the movement of commerce. These waters are generally divided into three types of waters, which we refer to in short forms as *present use waters*, *susceptible use waters*, and *historic use waters*. *Present use waters* are those waters commonly referred to as "navigable-in-fact waters." These waters currently are used for commerce. *Susceptible use waters* are those waters that could be used for commerce if reasonable improvements were made to them. And, *historic use waters* are those waters that have been used in the past for commerce but are no longer navigable in fact and are not susceptible for use in commerce. Tidally influenced waters, depending on the type, could fit within any of these three categories, thus, we consider all tidally influenced waters traditional navigable waters.

Non-navigable waters comprise all the *nation's waters* that are not traditional navigable waters or wetlands adjacent to those waters. For the purposes of this Article, if a waterbody, other than a wetland, is jurisdictional, then wetlands adjacent to that waterbody are also jurisdictional. Thus, the *nation's waters* are the traditional navigable waters (including the *present use*, *susceptible use*, and *historic use waters*) and their adjacent wetlands, plus the non-navigable waters. The necessity of this careful explanation of terms will become apparent in the pages to follow.

7. *See, e.g.*, Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (Sept. 2002). *But see* Wood, *supra* note 6, at 10187.

8. Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001); In re Needham, 354 F.3d 340 (5th Cir. 2003).

9. 531 U.S. 159, 31 ELR 20382 (2001).

10. 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1034).

11. 391 F.3d 704, 34 ELR 20147 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1034).

12. William H. Rodgers, Environmental Law §4.1, 354 (1977).

I. Pre-1972

In this section we examine the Magna Carta, the Constitution, and the Rivers and Harbors Act of 1899, as well as leading Supreme Court cases to see how the term "navigable waters" has been used in the past.

A. The Origins of the Commerce Clause

Government control over the waters in this country has its roots in English common law. Originally, the Crown had complete authority over all waters that were tidally influenced, as well as the lands beneath them. It was not until King John was defeated by his rebellious barons in 1215 at the Battle of Runnymede and forced to sign the Magna Carta that the Crown's dominion over these waters was reduced. In the Magna Carta, King John signed over to the people of England many rights, including the rights of navigation and fishery on tidally influenced waters.[13] From that time forward the Crown held title to the land under the tidally influenced waters in trust for the public, who could navigate and fish these waters subject only to restrictions established by Parliament.[14]

George W. Koonce, the first and longest-serving General Counsel of the Corps, described the transition of these English common-law principles to this country in the following:

> Upon the settlement of the American Colonies these [property] rights passed to the grantees in royal charters in trust for the communities established. When, as a result of the Revolution, the original thirteen States established their independence they automatically became vested with all the sovereign rights and powers of the Government of Great Britain and with the title and the dominion of the navigable waterways and the lands under them within their respective borders. This exclusive control over navigable waters, their shores and beds, resided in the several States up to the ratification of the Constitution of the United States. Prior to ratification the States also possessed the power to regulate commerce between themselves and with foreign Nations, but by such ratification they transferred this portion of their sovereign power to the United States.[15]

Actually, one of the primary reasons that the states sought the move from the Articles of Confederation and its loose-knit government to a more centralized union under the Constitution was so that interstate trade and traffic moving on land or by water would be subject to federal, rather than state, regulation.[16]

So was born in 1789 the U. S. Constitution, including Article 1, §8, Clause 3 of that document—the Commerce Clause. Under the Commerce Clause, Congress has the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." As discussed in the two centuries of cases summarized below, the Supreme Court has held repeatedly that the Commerce Clause gives the federal government the authority to regulate the navigable waters and activities taking place on those waters.

Although the federal Constitution did not strip the states of any fee simple property rights in the beds or shores of any waterbody in the new United States, it did give the federal government a dominant "easement [in certain water bodies] for the benefit of commerce and navigation."[17] Any right that a state or individual may have to the land beneath a water subject to this "navigation servitude" was, and continues to this day to be, subordinate to "such use of the lands as may be consistent with or demanded by the public right of navigation."[18] In short, the federal government's control over these submerged lands is "tantamount nearly to absolute Federal ownership."[19] However, it was not until nearly four decades after the Constitution had been ratified that the federal government began to exercise its inherent authority over the waters of this country.

B. U.S. Supreme Court Cases on Navigability

The Supreme Court, as might be expected, played a major role in defining the extent of the federal government's authority over the *nation's waters*. Here we describe how these Court cases progressively ratified the direction the federal government was taking toward exerting more and more influence over the *nation's waters*.

1. Navigation Is Subject to Federal Regulation

In the 1824 watershed Commerce Clause case *Gibbons v. Ogden*,[20] the Court held that navigation, which had been long recognized as an important part of commerce, was within the power of the federal government to regulate. In that case, a steamship owner, Thomas Gibbons, challenged a law that the New York State Legislature had passed giving Robert Fulton and Robert Livingston an exclusive 30-year right to "use steam navigation on all the waters of New York" to reward the two for pioneering steam commerce.[21] The Court, in deciding the case, found the state-granted monopoly repugnant to the Commerce Clause. As a result, Aaron Ogden, the primary benefactor of the monopoly at the time of the case, was not able to reap any more rewards from the monopoly.

As Chief Justice John Marshall explained, it was constitutionally intolerable for New York to prohibit the operation of federally licensed out-of-state steamboats within New York waters. As he stated: "The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it."[22] In other

13. *See* Magna Carta, §§33 and 44 (June 19, 1215).

14. George W. Koonce, Federal Laws Affecting River & Harbor Works (Apr. 23, 1926) (a lecture before the Company of Officers Class, the Engineer School, Fort Humphreys, Virginia) (on file with author).

15. *Id.* at 1.

16. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824).

17. Koonce, *supra* note 14, at 3.

18. *Id.*; *see also* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704 (1899) ("In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any state action.").

19. *Id.*; *see also* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-06 (1940) ("The Federal government's power over improvements for navigation in rivers is 'absolute.'").

20. 22 U.S. (9 Wheat.) 1, 190 (1824).

21. *Id.* at 7.

22. *Id*. at 190.

words, in voting for the Constitution, the states recognized that if they were left to their own parochial self-interests and designs, little trade would flow between them. Thus, as evidenced in the Commerce Clause, when the states adopted the Constitution, they transferred their sovereign powers over interstate commerce to the federal government.

2. Federal Jurisdiction Covers Tidally Influenced Waters, as Well as Non-Tidally Influenced Waters That Form a Highway of Interstate Commerce

Although the Court—in *Gibbons*—had decided that "commerce" included navigation, it still had to decide the geographic jurisdictional bounds of waters subject to federal jurisdiction under the Commerce Clause. The seminal case on this point is *The Daniel Ball v. United States*.[23] In *The Daniel Ball*, in 1871, the Supreme Court expanded the geographic reach of the term "navigable waters" to extend beyond the tide-waters to many non-tidal rivers, streams, and lakes. In England, the topography was such that most waterborne commerce occurred on tidally influenced waters. That was not necessarily the case in the United States.

The owner of *The Daniel Ball*, a steamship operating on the Grand River in Michigan, refused to allow his vessel to be inspected or to apply for a federal license. He claimed that since the Grand River was not tidally influenced, it was not a navigable water of the United States. *The Daniel Ball* Court rejected this argument, holding that "navigable waters" did not necessarily have to be subject to the ebb and flow of the tides as long as the waters could be used for interstate commerce. In other words, the waters first had to be "navigable-in-fact" waters that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[24] Second, the waters had to be "navigable waters of the United States," that is, waters that "form in their ordinary condition by themselves, or by uniting with other waters, a *continued highway* over which commerce is or may be carried on *with other States or foreign countries* in the customary modes in which such commerce is conducted by water."[25] Thus, according to *The Daniel Ball* Court, the federal government has the authority to regulate commerce on navigable-in-fact waters that form an interstate highway of trade or travel. As a result, *The Daniel Ball* needed a federal license and was subject to federal inspection.

3. Smaller Rivers Can Be Subject to Federal Jurisdiction

Three years later, in 1874, the Court expanded this navigability test. In *United States v. Steamer Montello*[26] the Court decided that a water could be found navigable, and thus subject to federal regulation, even if the commerce was hindered by rapids and small waterfalls. In this case the Fox River in Wisconsin had been used to transport people and goods in canoes and other boats from as far back as the 1700s. After a lock system had been established to quiet the river, steamboats such as the *Montello*, using the Fox River, were able to navigate from Lake Michigan to the Mississippi River and beyond. The case arose when the owner of the *Montello* refused to license and equip the steamer in accordance with certain congressional mandates. The jurisdiction of the admiralty laws at issue was tied to the term "navigable waters" and, hence, the issue in the case was whether the Fox River was indeed "navigable."

In deciding the case, the Court held that the Fox River was "navigable" despite the fact that in its natural unimproved state the river had intermittent rapids and other obstructions to navigation.[27] In way of further explanation, the Court stated that

> the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.[28]

Finally, the Court related that the threshold for commerce is low when it stated the following:

> *It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.* The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, *no matter in what mode the commerce may be conducted*, it is navigable in fact, and becomes in law a public river or highway.[29]

4. Artificial Canal Can Be Subject to Federal Jurisdiction

A decade later, in 1884, the Court refined the test for navigability again in *Ex Parte Boyer*[30] when it decided that a "wholly artificial" canal is a navigable water if it is used as "a highway for commerce between ports and places in different States."[31] The case involved a collision between the canal-boat *Brilliant* and the steam canal-boat *B&C*, the former suing the latter for damages in admiralty. The collision occurred on the Illinois-Michigan Canal, which connects the Chicago River to the Illinois River, thus making commerce between Lake Michigan and the Mississippi River possible. In deciding the issue of jurisdiction, the Court pointed out that it did not matter that the *Brilliant* was only engaged in commerce within the state of Illinois; the real issue was whether the 96 mile-long canal could support or was supporting commerce among the various states.[32] Thus, in *Ex Parte Boyer*, it was the nature of the waterbody, not the nature of the specific commerce in that case, that determined whether the canal was navigable.

23. 77 U.S. (10 Wall.) 557 (1871).
24. *Id*. at 563.
25. *Id*. (emphasis added).
26. *Montello*, 87 U.S. (20 Wall.) 430 (1874).
27. *Id.* at 443.
28. *Id.* at 441.
29. *Id.* (emphasis added).
30. 109 U.S. 629 (1884).
31. *Id.* at 632.
32. *Id.*

5. Non-navigable Tributaries Can Be Subject to Federal Jurisdiction

In *United States v. Rio Grande Dam & Irrigation Co.*,[33] decided in 1899, the Court clarified the limits of navigability yet again when it held that a body of water is not a navigable water of the United States when transportation is only possible during exceptional times of temporary high water. The case involved a company that had designs on damming the Rio Grand River in New Mexico to create a large artificial lake.

Two questions arose in the case. The first was whether the proposed dam's location was on a "navigable water of the United States." The Court held that it was not. As the Court stated: "the mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river."[34] The second question was whether the federal government had jurisdiction over an activity located on a non-navigable water. The Court held that federal jurisdiction does reach such activities if the work would "substantially interfere[ ] with the navigable capacity within the limits where navigation is a recognized fact."[35] That is, if an activity on a non-navigable tributary "substantially interferes" with navigation on a *present use water*, then the activity could come under federal regulation. This is an important case because it is the first case in which the Court has held that federal jurisdiction could reach beyond navigable-in-fact waters.

In the 1960 case *United States v. Grand River Dam Authority*,[36] the Court again held that the federal government has jurisdiction over non-navigable tributaries of navigable waters of the United States. At issue in the case was a Corps Civil Works Project that, as a result of its construction, would degrade non-navigable tributaries of a navigable water of the United States. Landowners who would be impacted by the project filed a lawsuit seeking compensation. The Court held that under the navigation servitude,[37] the project could go forward without any compensation to the property owners affected.[38] Here the Court clearly held that under the Commerce Clause, Congress had the authority to control activities on non-navigable tributaries.

6. Federal Jurisdiction Can Extend to *Historic Use Waters*

Twenty-two years after *Rio Grande*, in 1921, the Court addressed the situation where a waterbody historically used for commerce was no longer used for commerce. In *Economy Light & Power Co. v. United States*,[39] the United States was successful in obtaining an injunction against a power company that was seeking to construct a dam on the Desplaines River without a permit from the Corps under the Rivers and Harbors Act of 1899.[40] The power company argued that no such permit was needed because at the location of the proposed dam, the Desplaines River was not navigable in fact.

The Court held: "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."[41] In finding the Desplaines River navigable in fact, the Court took into account the fact that it had been used as a highway for fur trappers up to about 1825, and, thus, was navigable in its natural state.[42] It was only later that the navigable capacity of the waterway was diminished through the construction of two canals and the drainage of a swamp.[43] In deciding the case, the Court explained that

> a river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions.[44]

And thus, the Court adopted the basic rule of "indelible navigability," which means that once a water is navigable in fact, it will always be at least navigable in *law* and within federal Commerce Clause jurisdiction.

7. If a Water Could Be Used in the Future for Commercial Navigation, It Could Be Subject to Federal Regulation

In *United States v. Utah*,[45] in 1931, the Court addressed the reverse situation—a waterway that was not currently supporting commerce, but feasibly could support commerce in the future. Relying on evidence that there had been 17 non-commercial "through trips" down the stretch of the Colorado River at issue over a 60-year period, the Court found the waterway to be a navigable water of the United States.[46] The Court provided its rationale in the following:

> The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.[47]

Following the *Utah* decision, it was not enough for the courts and the Corps to look to the past and present in making navigability determinations, they would have to look to the future as well.

8. A Water That Could Be Made Suitable for Commerce Through Reasonable Improvements Could Fall Under Federal Jurisdiction

Nine years later, in 1940, the Court addressed the desire of a power company to build a hydroelectric power dam. After a

33. 174 U.S. 690 (1899).
34. *Id.* at 698.
35. *Id.* at 709.
36. 363 U.S. 229 (1960).
37. *See* note 17 and accompanying text.
38. *Grand River Dam*, 363 U.S. at 232-33.
39. 256 U.S. 113 (1921).
40. 33 U.S.C. §407.
41. *Economy Light & Power*, 256 U.S. at 122.
42. *Id.* at 117.
43. *Id.* at 118.
44. *Id.* at 123.
45. 283 U.S. 64 (1931).
46. *Id.* at 81.
47. *Id.* at 82.

decade of legal wrangling over whether the New River in Virginia was navigable in fact, the Appalachian Electric Power Company decided to start work on a dam without a federal permit under the Rivers and Harbors Act of 1899 or a license under the Federal Power Act of 1920. In *United States v. Appalachian Electric Power Co.*,[48] after the Court determined that the relevant portion of the New River was subject to federal jurisdiction under both statutes, it remanded the case to the lower courts to enjoin the construction of the dam.

The Court held that it is not enough to consider whether a river was ever navigable in its natural state; rather, the reviewing court must also consider whether the river could have been made navigable, at present or at any time in the past, through reasonable improvements. As the Court stated:

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous . . . . A waterway, otherwise *suitable for navigation*, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.[49]

The improvements do not need to exist, be planned, nor even be authorized.[50] It is sufficient that they could reasonably be made. The Court went on to state:

> Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.[51]

The "reasonability analysis" that is employed in these cases to determine whether a water is susceptible to commercial use is much like the cost/benefit analysis done by the Corps when it conducts a flood control study.[52] That is, would the benefits of the project outweigh the costs of the improvements.

9. Federal Jurisdiction Extends Laterally to the Ordinary High Water Mark or the Mean High Water Mark Depending on the Water

One year later, in 1941, in *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*,[53] the Court was faced with determining the lateral boundaries of federal jurisdiction for non-tidal waters. The Court held as follows:

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below *ordinary high-water mark*. The exercise of the power within these limits is not an invasion of any private property rights in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.[54]

After *Chicago*, the federal government could regulate private activities conducted in waters up to the ordinary high water mark. And, the federal government could construct federal projects in waters all the way up to the ordinary high water mark without getting permission from or paying compensation to riparian landowners. The same is true in tidal waters except that for tidal waters the federal government has jurisdiction up to the "mean high water mark" instead of the "ordinary high water mark."[55]

These U.S. Supreme Court cases demonstrate an evolving federal authority over the *nation's waters*. During the past two centuries, the Court has acknowledged that federal jurisdiction extends from tidal waters up into non-navigable tributaries. This judicial history helped to shape the CWA of 1972. Many of the early cases also helped to shape legislation that preceded the CWA, such as the Rivers and Harbor Act of 1899 and the Water Pollution Control Act (WPCA) of 1948, which are examined in the next two sections.

C. The Rivers and Harbors Act of 1899

The Rivers and Harbors Act of 1899 is just one of a series of appropriations acts in which Congress provided the Corps with the authorizations and funding necessary to continue its mission of improving the navigability of waterways across the country. The Rivers and Harbors Act of 1899, however, included something unusual—comprehensive federal regulatory authorities. For example, §§9 and 10 of the 1899 Act prohibit the unauthorized construction of bridges, dams, and other structures in the "navigable waters of the United States," as this term is defined below. Section 13 prohibits the unauthorized discharge of refuse that could impede waterborne commerce.

These provisions are important in our inquiry as to the meaning of the term "navigable waters" in the context of the CWA because they include terms such as "navigable waters of the United States," "waters of the United States," and "tributary of any navigable water." These are terms that Congress used to define the bounds of Corps jurisdiction for the Rivers and Harbors Act regulatory program. Later, Congress used some of these same terms to define the regulatory boundaries of the CWA. But before we can determine whether Congress used these terms consistently in the two statutes, it is important to determine how Congress used these terms in the Rivers and Harbors Act.

Section 9 of the Act provides as follows:

> It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike in any . . . *navigable water of the United States* [without federal approval]. The approval required by this section . . . does not apply to any bridge or causeway over *waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural con-*

48. 311 U.S. 377 (1940).

49. *Id.* at 408 (emphasis added).

50. *Id.* at 409.

51. *Id.* at 417 (citing United States v. Utah, 283 U.S. 64, 81 (1931)).

52. Department of the Army, Attorney's Supplement: Definition of Navigable Waters of the United States 13 (1972).

53. 312 U.S. 592 (1941).

54. *Id.* at 597-98 (emphasis added). The term "ordinary high water mark" for nontidal rivers, as it is defined today in the Corps regulations is:

> [T]he line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of the soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

51 Fed. Reg. 41206, 41253 (Nov. 13, 1986).

55. Leslie Salt Co. v. Froehlke, 578 F.2d 742, 753 (9th Cir. 1978).

> dition or by reasonable improvement as a means to transport interstate or foreign commerce.[56]

Thus, under §9, federal authorization is required before one can construct any structure that would span a "navigable water of the United States." Because §9 uses some of the same terms, it is reasonable to interpret §9 consistently with the decisions that preceded its enactment. Thus, based on those earlier decisons, §9 jurisdiction encompasses *present use* and *susceptible use waters*.[57] In its 1921 decision in *Economy Light & Power*,[58] the Supreme Court held that §9 jurisdiction extended to *historic use waters* as well.

Section 10 of the Act provides:

> That the creation of any obstruction not affirmatively authorized by Congress, to the *navigable capacity of any of the waters of the United States* is hereby prohibited; and it shall not be lawful to build or commence the building of any . . . structure[ ] in any . . . harbor, canal, navigable river, or other *water of the United States*, . . . except on plans recommended by the Chief of Engineers . . . ; and it shall not be lawful to excavate or fill . . . any . . . harbor, canal, lake, . . . or channel of any *navigable water of the United States*, unless the work has been recommended by the Chief of Engineers . . . prior to the beginning of the same.[59]

Section 10 is interesting because it uses the term "waters of the United States" twice in the first sentence of the provision. This is the same term that Congress chose to define "navigable waters" in the CWA. The question is: Did Congress intend this term to have the same meaning in the two Acts that were enacted almost one century apart?

Another term that is used in §10 that also appears repeatedly in the Supreme Court cases is "navigable waters of the United States."

"Waters of the United States," however, based on how this term is used in §10, appears to include a larger set of waters than "navigable waters of the United States." Section 10 would not make sense were it any other way. For example, it would have been unnecessary and confusing if Congress had inserted the word "navigable" before "waters of the United States" when it used the term the two times in the first sentence of §10. Both times the term "waters of the United States" appears, it is being modified by the term "navigable capacity." In essence, what Congress was saying is that one cannot obstruct, excavate, or fill a "water of the United States" that has navigable capacity. It would have been redundant for Congress to say that one cannot obstruct, excavate, or fill a "navigable water of the United States" that has navigable capacity. Thus, it appears that in 1899 Congress viewed the term "navigable waters of the United States" as a subset of "waters of the United States."

The next question then is: If "waters of the United States" includes more than the *present use* and *susceptible use waters* found in the "navigable waters of the United States," what are these other waters? Section 13 of the Rivers and Harbors Act provides some clues.

Section 13 of the Act, colloquially referred to as the "Refuse Act," provides as follows:

> [t]hat it shall not be lawful to . . . discharge . . . any refuse matter of any kind or description whatsoever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any *navigable water of the United States*, or into *any tributary of any navigable water* from which the same shall be washed into such *navigable water*; and it shall not be lawful to deposit . . . material of any kind in any place on the bank of any such *navigable water*, or on the bank of *any tributary of any navigable water*, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed [without a permit].[60]

Under this authority, the Corps could regulate discharges of refuse matter into the "navigable waters of the United States." In order to accomplish this goal, §13 also gave the Corps the authority to regulate such discharges into "any tributary of any navigable water." By extending the Corps' jurisdiction to the tributaries of the navigable waters, Congress provided the authority for a regulatory program with a jurisdictional reach that far eclipsed that of §§9 and 10. Despite having this very broad regulatory authority, the Corps was not successful in developing a regulatory program under §13 to regulate discharges of refuse until 1970.[61] Later in the Article, we discuss this program and how it helped to shape the CWA.

Even though the Corps took 70 years to exercise its regulatory authority under §13 and, as a result, there are few cases that interpret the Corps' jurisdiction under that provision, the tributary language in §13 alone furthers our inquiry. This language suggests that one set of waters that might be included in "waters of the United States," in addition to the "navigable waters of the United States," is "any tributary of any navigable water." As we discuss below, the tributary waters comprise a significant portion of the *nation's waters* and, not surprisingly, Congress included them when it began building a water pollution control program.

D. WPCA of 1948

In 1948, Congress enacted the WPCA to address the growing water pollution problem in the country.[62] We examine the WPCA and its amendments because they are the precursors to the CWA of 1972. They show that as early as 1948 Congress recognized the value in addressing water pollution at its source. They also show that without a significant federal presence, a water pollution program is in many cases not going to succeed.

The 1948 WPCA was passed to "benefit public health and welfare through the abatement of *stream* pollution."[63] The jurisdictional reach of the WPCA was defined as "the water-

56. 33 U.S.C. §401 (emphasis added).

57. *Id.*

58. 256 U.S. 113, 122 (1921).

59. 33 U.S.C. §403 (emphasis added).

60. *Id.* §407 (emphasis added).

61. The Corps first attempted to use §13 of the Rivers and Harbors Act early in the 20th century to abate water pollution. These attempts, however, were thwarted by restrictive interpretations of Rivers and Harbors Act regulatory provisions by the U.S. Department of Justice and Army Judge Advocate General's Office. Donna M. Downing et al., *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 WETLANDS 477 (2003) (citing A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY, 1912, at 284, 752-53, 773 (Washington, D.C. 1912).

62. Pub. L. No. 80-845, Stat. 1155 (1948).

63. *Id.* (emphasis added).

ways of the Nation."[64] This provision indicates that Congress intended this WPCA to encompass all the *nation's waters*, even "streams." The WPCA did little more than provide technical assistance and financial aid to help the states deal with their growing water pollution problem.

Congress amended the WPCA in 1956, 1961, 1965, 1966, and 1970, making it somewhat more protective of water resources each time.[65] Through all the amendments, the purpose of the WPCA remained essentially the same: to improve water quality so that adequate water was available to drink, to use in industry and agriculture, to recreate on and in, and to support fish and wildlife needs.[66]

In the 1956 Amendments to the WPCA, Congress directed the states and federal government to develop "comprehensive programs for eliminating or reducing the pollution of interstate waters and *tributaries* . . . and improving the sanitary condition of surface and underground waters . . . ."[67] The Surgeon General was tasked with doing joint investigations with willing states to examine the conditions of "any water of any State or States."[68] Again, this language suggests that Congress wanted to address the water pollution problem in this country by looking at all of the *nation's waters*.

In the 1961 Amendments, Congress substituted the term "interstate or navigable waters" for the term "interstate waters" in the provision that established the jurisdictional reach of the WPCA.[69] Congress did not define "navigable waters" or "interstate or navigable waters" in this amendment. Nonetheless, after this amendment the jurisdiction of the WPCA, by its terms, extended to "interstate waters," "navigable waters," and the tributaries of each.[70]

In the 1965 Amendments, Congress adopted a new approach to addressing water pollution; Congress mandated that the states develop water quality standards for their respective interstate waters by 1967.[71] And the 1965 Amendments indicate, in the following provision, that Congress was contemplating the impacts of the pollution of tributaries on the larger "interstate" or "navigable" waters:

> [D]ischarge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or *reaches such waters after discharge into tributaries of such waters*), is subject to abatement . . . .[72]

Thus, a polluter discharging toxic chemicals into a tributary was just as responsible under the WPCA as a polluter discharging the same chemicals into an "interstate water." This provision shows that Congress wanted to control pollution where it started, whether the source was located on a large traditional navigable water or on a non-navigable tributary. Dealing with pollution at its source is a theme that surfaced repeatedly during the debates on the CWA, discussed below.

E. Condition of the Nation's Waters *Leading Up to 1972*

Despite the hard work and consideration that had gone into the WPCA and all its amendments, the *nation's waters* were still suffering from wholesale pollution. It is important that we appreciate how dire the situation was, because Congress' actions were influenced by the water pollution problems across the country. Those pollution problems spurred Congress to act and shaped the action that it took.

There is considerable commentary on how bad the pollution problem was in the 1960s and early 1970s. The following statements are typical. At a Senate hearing in 1992 commemorating the passage of the CWA of 1972, LaJuana Wilcher, then Assistant Administrator for Water at EPA, described the state of the nation's water quality in the years leading up to 1972 as follows:

> Untreated sewage was flowing into our rivers and bays. Industrial wastes poured into the Mississippi and Ohio Rivers, and the Cuyahoga River was so laden with industrial waste that it periodically caught fire. Massive algae blooms choked the Great Lakes, particularly Lakes Erie and Ontario, killing millions of fish and tainting the water supplies of millions. In fact, the 1968 World Book Encyclopedia noted that Lake Erie was testament to mankind's ability to kill a lake and predicted it would soon be an aquatic desert.[73]

Even the Potomac River had not been spared. In the late 1960s, President Lyndon Johnson described the Potomac as a national disgrace because it was clogged with blue-green algae blooms that were killing fish and destroying underwater habitat.[74] Wetlands, those that had not been filled already, were also disappearing at an alarming rate. Of the estimated 221 million acres of wetlands that were present in the coterminous states when the country was first settled, over one-half of them had been lost to dredging, filling, draining, and flooding.[75]

In his comments introducing to the Senate the Conference Report for the CWA of 1977, Sen. Edmund Muskie (D-Me.) painted an equally bleak picture of the pre-CWA state of water affairs:

> Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.
>
> We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and

64. *Id.*

65. WPCA Amendments of 1956, Pub. L. No. 84-660, ch. 518, 70 Stat. 498; FWPCA Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91.

66. *See* RODGERS, *supra* note 12, §4.1, 355-57.

67. Pub. L. No. 84-660, 70 Stat. 498, 498 (1956).

68. *Id.*

69. Pub. L. No. 87-88, 75 Stat. 204, 208 (1961).

70. 33 U.S.C. §§466a, 466g(a) (1964).

71. Pub. L. No. 89-234, 79 Stat. 903, 908 (1965).

72. *Id.* at 909 (emphasis added).

73. 138 CONG. REC. D612 (daily ed. Sept. 22, 1992) (Prepared Statement of LaJuana S. Wilcher, Assistant Administrator for Water, at EPA, Hearing Before the Committee on Environment and Public Works, United States Senate) (copy on file with authors).

74. *Id.*

75. THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. DEP'T OF THE INTERIOR, WETLANDS: STATUS AND TRENDS OF WETLANDS IN THE COTERMINUS UNITED STATES, MID-1970S TO THE MID-1980S (1991).

> bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.[76]

Senator Muskie clearly thought that Congress' actions in the fight against water pollution had been inadequate and ineffective.

The proverbial race to the bottom on environmental standards could not have been better exemplified than in the water quality arena during the time leading up to 1972.[77] Despite alarming water quality studies, mandated state and federal cooperation, and new water quality standards, many of the states that had been entrusted with addressing water pollution had shirked this task so as to avoid burdening local industries and potentially causing those industries to relocate to states with more favorable "regulatory climates." A new approach was desperately needed.

In the decades preceding the passage of the CWA of 1972, Congress had passed legislation that focused on examining water quality and then allowed additional discharges if it appeared that the additional discharges would not negatively impact water quality. Since it is difficult to determine the precise impact on water quality a given discharge will have, more discharges were occurring than should have. In 1970, another approach was implemented—regulation based on effluent limitations.

F. Attempts by the Executive Branch to Address Water Pollution Prior to 1972

In this section of the Article, we discuss steps President Johnson and President Richard M. Nixon took through their administrative agencies to address water pollution using existing legislative authorities. This section helps to set the stage for the CWA of 1972 and helps to explain why Congress chose the approach it did in that Act.

In 1966, President Johnson signed Executive Order No. 11288, which imposed a duty on all federal agencies to "improve water quality through prevention, control and abatement of water pollution."[78] This order applied both to the Corps' federal dredging operations and to private dredging operations that needed §10 permits from the Corps. Section 10 permits are required for any structures built in the "navigable waters of the United States." In either case, the entity performing the dredging had to take water samples to ensure that it was complying with water quality standards.[79] In essence, the president was endorsing the water quality standards approach to controlling water pollution. This would soon change.

In 1967, due to the growing national concern about the state of the *nation's waters* and due to mounting pressure from the U.S. Fish and Wildlife Service (FWS),[80] the Corps entered into a memorandum of understanding (MOU) with the Secretary of the Interior. The MOU set forth the procedure whereby the Corps would notify the U.S. Department of the Interior (DOI) every time a §10 permit application was submitted to the Corps. In any instance in which the DOI determined that the proposed work would violate applicable water quality standards or "unreasonably impair the natural resources or the related environment," the Corps would, "within the limits of [its] responsibility, encourage the applicant to take steps that [would] resolve the [DOI] objections to the work."[81] If this approach proved unsuccessful, the case would be elevated to the headquarters offices of both agencies.[82]

Spurred on by the FWS and the signing of the MOU, in 1968 the Corps made the first of a series of changes to its regulatory program under §10. It introduced a new set of criteria for reviewing permit applications that was dubbed the "public interest review." The Corps included these criteria in §209.120(d)(1) of its 1968 regulations, which provides as follows: "The decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the *general public interest*."[83] Further along in the same section, the Corps explained that its permit function is to ensure "that the structures meet the requirements of navigation and the *public interest*."[84] This public interest included curbing pollution. For instance, companies that sought permits for outfall sewers from their industrial plants where effluent from the plants could have affected the "navigable capacity of a waterway or have a *pollution impact on a waterway*" were required to explain in their applications: (1) how they were going to measure the impact of the effluent; (2) how much the company was going to pay for the dredging of such effluent from the waterway; and (3) how the company was going to upgrade its plant to avoid future discharges of pollutants.[85] Thus, by adopting the public interest review, the Corps was helping to address the water pollution problem.

At the same time, the Corps began to assert the full extent of its Rivers and Harbors Act jurisdiction up to the mean high tide mark for tidal waters, and up to the ordinary high water mark for non-tidal navigable waters.[86] Since many

76. 118 Cong. Rec. 33691-92 (daily ed. Oct. 4, 1972), *reprinted in* 1 CRS, Legislative History of the Water Pollution Control Act Amendments of 1972, at 161 (1973) [hereinafter WPCA Legislative History].

77. This was still the case in 1977. As Sen. Howard Baker (R-Tenn.) explained during the Senate Debate on S. 1952:

> Comprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors. Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain dischargers.

123 Cong. Rec. 26718 (daily ed. Aug. 4, 1977) (statement of Sen. Baker), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 920.

78. Exec. Order No. 11288, 31 Fed. Reg. 9261 (July 2, 1966).

79. *Id.* Each permit had to contain the following condition: "That the permittee shall comply promptly with any regulations, conditions, or instructions affecting the work hereby authorized if and when issued by the Federal Water Pollution Control Administration and/or the State water pollution control agency having jurisdiction to abate or prevent water pollution." *Id.*

80. David Salvesen, Wetlands: Mitigating and Regulating Development Impacts 21 (Urban Land Inst. 1990).

81. 33 Fed. Reg. 18669, 18673 (Dec. 18, 1968).

82. *Id.*

83. *Id.* at 18671 (emphasis added).

84. *Id.* (emphasis added).

85. *Id.* at 18676.

86. Downing et al., *supra* note 61, at 477.

valuable wetlands on the coast and along inland waters lie below these lines, the Corps' regulatory program began to regulate many projects that it had formerly ignored.[87]

By instituting the "public interest review" and by deciding to expand the geographic reach of its regulatory program, the Corps began to regulate more potentially harmful activities. The Corps also began to deny permits when proposed projects would "unnecessarily destroy ecologically valuable aquatic areas, such as wetlands."[88] Previously, the Corps had focused on impacts to navigable capacity alone. When developers challenged the Corps' regulatory initiatives, the federal courts generally upheld them.[89]

Despite these enhancements of the Corps' regulatory program, the water pollution problem was still severe. One year into his presidency, President Nixon became convinced that Congress was going to attempt to pass comprehensive legislation to address the nation's water pollution problem. In February 1970, probably in an attempt to head off what he viewed as an overly expansive approach to dealing with that problem, President Nixon submitted to Congress a legislative proposal that was designed to make the "establishment and enforcement of water quality standards more effective and expeditious."[90] Congress did not act on his proposal, apparently favoring the approach that it was already working on.

In December of 1970, President Nixon changed his approach and directed the Corps to immediately implement the new regulatory program it had been developing under §13 of the Rivers and Harbors Act. Earlier in 1970, the Corps, with prompting from at least one congressional committee,[91] decided to develop a new regulatory program addressing water pollution with the "Refuse Act," or §13 of the Rivers and Harbors Act, as its legislative authority. Since Refuse Act jurisdiction extended to the "navigable waters of the United States" and "any tributary of any navigable water," the Act contained a wide jurisdictional reach. As the Corps geared up for the new program, President Nixon issued an Executive Order that accelerated the rollout still further.[92] President Nixon described his intentions in a statement that accompanied the Executive Order as follows:

> Through a more activist utilization of this act, we will be able to require industries to submit to State authorities and the Federal Government data concerning effluents which they plan to discharge into navigable waters. [The permit system] will assure all parties that water quality standards are being met. To deal with those who are disregarding our pollution control laws, a swift and comprehensive enforcement mechanism is provided by this authority.[93]

The new program got under way on July 1, 1971.[94] Like the Refuse Act itself, the Corps' implementing regulations made it clear that the program applied to the "navigable waters" and their "tributaries." The regulations provided as follows:

> All discharges of deposits to which the Refuse Act is applicable . . . are unlawful unless authorized by an appropriate permit . . . . Any such discharges or deposits not authorized by an appropriate permit may result in . . . legal proceedings . . . . [T]he mere filling of an application requesting permission to discharge or deposit [wastes] into *navigable waters or tributaries thereof* will not preclude legal action . . . .[95]

Here the Corps embraces the concept that its geographic jurisdiction would extend into non-navigable tributaries. Thus, before the CWA was even drafted, the Corps was operating a regulatory program that encompassed non-navigable tributaries.[96] It is logical to conclude that the reach of the Refuse Act regulatory program probably influenced the drafters of the CWA.

The Refuse Act certainly influenced the drafters of the CWA in another way. The regulatory mechanism behind the Refuse Act was much different than the one behind the WPCA and its progeny.[97] Instead of prohibiting only those discharges that contributed to water quality violations, as those statutes had done,[98] the Refuse Act included a blanket prohibition against all unpermitted discharges of refuse into the traditional navigable waters and their tributaries.[99] To obtain a Refuse Act permit, a discharger had to agree to meet

87. *Id.*

88. *Id.* at 478.

89. *See*, *e.g.*, Zabel v. Tabb, 430 F.2d 199, 1 ELR 20023 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Rep. Herbert Roberts (D-Tex.) described the broadening of Corps jurisdiction under the Rivers and Harbors Act of 1899 as follows:

> For many years this authority was exercised only in the interest of protecting navigation and was, therefore, confined to those waters where sufficient navigation was taking place to warrant the exercise of authority. The method employed to limit the authority in this manner was to consider administratively as nonnavigable waters those waters where jurisdiction was not exercised.
>
> As the years passed and attitudes changed, however, the exercise of this authority has broadened considerably. This broadening has come about in two ways. First, the definition of what is a navigable water of the United States has been expanded by the courts. This has had the effect of increasing the number of waters to which the courts have upheld the responsibility—and the duty—of the Corps to decide whether or not to issue a permit. These matters include the environment, fish and wildlife, economics, flood control, navigation, and similar considerations. This meant, of course, that the Corps could no longer confine the exercise of its regulatory authority to those bodies of water on which a substantial amount of navigation takes place. As a result of these two factors, the broader definition of navigable waters of the United States and the broader range of factors considered when evaluating a permit application, the Corps' regulatory activities under the 1899 act have expanded considerably.

123 CONG. REC. 38967 (daily ed. Dec. 15, 1977), *reprinted in* 3 CWA LEGISLATIVE HISTORY, *supra* note 6, at 347.

90. Statement by the President Upon Signing an Executive Order Providing for the Establishment of a Federal Permit Program to Regulate the Discharge of Waste Into the Waters of the United States (Dec. 23, 1970), 6 WEEKLY COMP. PRES. DOC. 1724, 1724 (Dec. 28, 1970).

91. H.R. REP. NO. 91-917 (1970).

92. Statement by the President, *supra* note 90, at 1724.

93. *Id.*

94. H.R. REP. NO. 92-911, at 398 (1972), *reprinted in* 1 WPCA LEGISLATIVE HISTORY, *supra* note 76, at 867.

95. 33 C.F.R. §209.131(d)(4) (1972) (emphasis added).

96. The Corps' Refuse Act permit program suffered a setback in 1971 when the district court for the District of Columbia held in *Kalur v. Resor*, 335 F. Supp. 1, 9, 1 ELR 20637 (D.D.C. 1971), that although §13 prohibited discharges into non-navigable tributaries, it did not authorize the Corps to issue permits for such discharges on any waters other than traditional navigable waters.

97. *See supra* note 65.

98. *See id.*

99. 33 U.S.C. §407; RODGERS, *supra* note 12, §4.1 at 357.

specified effluent limitations. Under this effluent approach, it was much easier for the government to catch violators (sources either had a permit or they did not), than under the ineffective and inefficient water quality approach (which could involve extensive sampling and analysis that could yield inconclusive results).[100]

A little over one month before the CWA of 1972 was enacted, the Corps issued another revision to its Rivers and Harbors Act regulations. The new regulations updated the Corps' administrative definition of the term "navigable waters of the United States" "generally" as follows:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, *or have been used in the past*, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.[101]

The most important change in this definition is that it states that Corps jurisdiction would include *historic use waters*.[102] Although this did not change the jurisdictional reach of §13 (because the Refuse Act already covered all tributaries, including those that were *historic use waters*), it did broaden the jurisdiction of the §9 and §10 regulatory programs.

In discussing the new definition of the term "navigable waters of the United States," the Corps explained that establishing the "extent of Federal authority over the nation's waterways has been an evolutionary one and that recent judicial decisions have provided additional guidance and direction as to the scope and extent of this jurisdiction . . . ."[103] To arrive at the definition, the Corps "undertook an extensive review of all the judicial decisions [concerning navigable waters], and substantially revised and refined its administrative definition of [navigable waters of the United States] to more accurately reflect and incorporate this judicial guidance."[104]

The Corps' updated definition of the term "navigable waters of the United States" in its 1972 Rivers and Harbors Act regulations is important for our inquiry into the meaning of the term "navigable waters" because it shows that as of 1972, the Corps' §§9 and 10 regulatory programs included all of the traditional navigable waters, that is, the *present use waters*, the *susceptible use waters*, and the *historic use waters*. But even more important to our inquiry is the fact that by 1970 the Corps was operating a Refuse Act regulatory program that covered the "navigable waters of the United States," as well as "any tributary of any navigable water." Consistent with Supreme Court decisions such as *Rio Grande Dam & Irrigation Co.*[105] and *Grand River Dam Authority*,[106] discussed above, federal jurisdiction over the *nation's water* extended into non-navigable tributaries.

Despite its broad jurisdictional reach, the Refuse Act program had a major flaw: it did not take advantage of states resources. And, even though the Corps had received about 20,000 permit applications by October of 1972[107] and the Corps had already awarded fines to polluters in amounts up to $200,000,[108] the program was still viewed by many as a "stopgap-measure" until Congress could pass more comprehensive legislation.[109] That legislation came in the form of the CWA of 1972.

II. The "Clean Water Act of 1972"

In this section, we finally reach the statutory provision that is at the heart of our inquiry, the CWA term "navigable waters." As we describe below, not very much was said about this term in 1972. Nonetheless, it is apparent from what was said and written about CWA jurisdiction during the passage of this Act that it was meant to cover the *nation's waters* in a comprehensive manner.[110]

100. H.R. Rep. No. 92-911, at 414 (1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 883.

101. 37 Fed. Reg. 18289, 18291 (Sept. 9, 1972) (emphasis added).

102. *Id.* at 18290. In its 1968 regulations, the Corps was using a definition for navigable waters of the United States based on *The Daniel Ball* test but that also incorporated the "reasonable improvements" allowances of the *Appalachian Electric Power Co.* decision. In short, the water had to be navigable in fact and, with reasonable improvements, capable of forming a highway of interstate commerce. 33 Fed. Reg. at 18692. The test for whether a river was navigable in fact, as set forth by the Corps, was whether the water was "capable in its natural state [with or without reasonable improvements] of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." *Id.*

103. 39 Fed. Reg. 12115, 12115 (Apr. 3, 1974).

104. *Id.*

105. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

106. United States v. Grand River Dam Auth., 363 U.S. 229 (1960).

107. H.R. Rep. No. 92-911, at 398 (1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 867.

108. 118 Cong. Rec. 10779 (daily ed. Mar. 29, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 689. As the CWA provisions were being debated, there were about 170 federal suits pending against such polluters. There had been over 300 criminal convictions under the Refuse Act and 120 civil actions. 118 Cong. Rec. 33705 (daily ed. Oct. 4, 1977) (statement by Sen. Robert Griffin (R-Mich.)), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 191.

109. Downing et al., *supra* note 61, at 478.

110. As is explained below, Congress intended the CWA to have a broad application. Whether it fully comprehended the role wetlands would play in the interpretation of the CWA of 1972 is unclear. What is clear, though, is that by 1972 the scientific community was rapidly increasing its understanding of the vital role that wetlands play in aquatic ecosystems. As early as 1956, the FWS published a report that coined the phrase "wetlands" and articulated a taxonomy of wetland types. It also explained the value of wetlands as habitat for fish and wildlife and called for the setting aside of land to protect these areas. Samuel P. Shaw & C. Gordon Fredine, *Wetlands of the United States: Their Extent and Their Value to Waterfowl and Other Wildlife*, FWS Circular No. 39 (1956). Others sounded the alarm about wetlands too, including authors such as John and Mildred Teal whose book *Life and Death of a Salt Marsh* was published in 1969. By 1970, at least one committee in the U.S. House of Representatives had recognized the importance of wetlands and published a report explaining how the Corps could help protect the important resource. *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H.R. Rep. No. 91-917 (1970). In this report the Committee on Government Operations stated the following:

> The natural environments of our Nation's bays, estuaries, and other water bodies are being destroyed or threatened with destruction by water pollution, alteration of river courses, landfilling of the shallow and marshland areas, sedimentation, dredging, construction of piers and bulkheads, and other man-made changes. Many of these water areas, including some located near densely populated urban areas, serve public needs for recreational opportunities and provide feeding, habitat, and nesting or spawning grounds for migratory waterfowl, fish, shellfish, and other wildlife. Many Federal agencies participate in, or authorize work and activities which contribute to, the destruction of these water areas, and

To characterize the CWA of 1972 as simply another set of amendments to the long series of water pollution control statutes that Congress enacted during the 1940s, 1950s, and 1960s, (which we refer to collectively as the FWPCAs), would be misleading. The FWPCAs had relied on the concept of water quality standards. They had also placed the federal government in a support role to the states. These approaches had not been very successful in reducing water pollution. As a result, Congress revised the structure of the FWPCAs when it passed the CWA of 1972 and crafted a state-federal partnership to improve water quality.

The most important addition that Congress made to the FWPCAs, for the purposes of our present inquiry, is that in the CWA of 1972 it defined the term "navigable waters" as the "waters of the United States, including the territorial seas." As demonstrated in the discussion below, it took some time and some debate for Congress to arrive at that definition. Between the two houses of Congress, the Senate was the first to arrive at a definition for the term "navigable waters."

A. Senate Bill 2770

The Senate Environment and Public Works Committee introduced S. 2770 on October 28, 1971.[111] In S. 2770, the Committee defined "navigable waters" as meaning "the navigable waters of the United States, portions thereof, and *the tributaries thereof*, including the territorial seas and the Great Lakes."[112] From this definition it is clear that the committee was proposing a geographic jurisdiction for the CWA comparable to that of the Refuse Act.

The Committee Report that accompanied the bill offers support for this position. It provided as follows:

> The control strategy of the Act extends to navigable waters. The definition of this term means the *navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes*. . . . Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made the navigable waters, portions thereof, and their tributaries.[113]

Had the committee meant to restrict the jurisdiction of the proposed legislation to the traditional navigable waters, it could have defined "navigable waters" as the "navigable waters of the United States." It did not. Instead, it specifically included tributaries in the definition because of the committee's goal of controlling water pollution at its source.

In the extensive debates over S. 2770 on the Senate floor, the jurisdictional reach of S. 2770 was only commented on once. In summarizing the bill, Sen. John Williams (R-Del.) stated that proposed legislation would lead to an increase in federal jurisdiction by extending the reach of that jurisdiction "to all navigable waters rather than just interstate and boundary waters."[114] With no further discussion about "navigable waters," the Senate passed S. 2770 on November 2, 1971, leaving the definition for "navigable waters" unchanged.

B. House Bill 11896

On November 19, 1971, the U.S. House of Representatives' Public Works Committee introduced H.R. 11896. It defined "navigable waters" as the "navigable waters of the United States, including the territorial seas."[115] The House Report that accompanied H.R. 11896 commented on this definition in the following:

> One term the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes.[116]

This language shows that, like the Senate, the House intended for the CWA to have a broad jurisdictional reach.

Furthermore, S. 2770 had been available to the members and staffers of the House for more than three weeks before the Public Works Committee introduced H.R. 11896. Thus, it is more than likely that the committee was well aware of the definition that the Senate was using for "navigable waters." If the committee had intended for H.R. 11896 to have a significantly smaller jurisdictional reach than S. 2770, it is likely that it would have noted this in its report. Instead, the House Public Works Committee Report indicates that the definition for "navigable waters" in H.R. 11896 was intended to be the same as its counterpart in S. 2770.

The debates on the House floor on H.R. 11896 yield only two comments on its jurisdictional reach. Both provide some support for the position that the House and Senate were substantially aligned on the issue of "navigable waters." First, Rep. William Sikes (D-Fla.), in comparing H.R. 11896 to S. 2770, said: "Both the House and the Senate bill declare their objective is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[117] If the House bill were designed to protect a much smaller subset of the waters intended to be protected by the S. 2770, it would seem that Representative Sikes would have mentioned such a difference between the two bills.

Second, Rep. Ray Madden (D-Ind.), after describing the deplorable condition of the nation's waters,[118] stated that

> some agencies have specific responsibilities for preventing such pollution and destruction.
>
> *Id.* at 1. In the remainder of the report, the committee strongly suggests ways that the Corps can use its existing authorities to protect wetlands and other waters.

111. S. 2770, 92d Cong. (1971), *reprinted in* 2 WPCA Legislative History, *supra* note 76, at 1534.

112. S. 2770, 92d Cong., §502(h) (1971), *reprinted in* 2 WPCA Legislative History, *supra* note 76, at 1698 (emphasis added).

113. S. Rep. No. 92-414, at 77 (1971), *reprinted in* 2 WPCA Legislative History, *supra* note 76, at 1495 (emphasis added).

114. 117 Cong. Rec. 38863 (daily ed. Nov. 2, 1971), *reprinted in* 2 WPCA Legislative History, *supra* note 76, at 1410.

115. H.R. 11896, 92d Cong. §502(8) (1971), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 1069.

116. H.R. Rep. No. 92-911, at 131 (1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 818 (emphasis added).

117. 118 Cong. Rec. 10799 (daily ed. Mar. 29, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 739.

118. Representative Madden described those deplorable conditions in the following statement:

> We admit that one must consider today that almost 75 percent of our population live in urban areas where drinking water

H.R. 11896 "calls for an all-out drive by the Federal Government to eliminate the discharge of pollutants into our *lakes, rivers, and navigable waters* by 1985. In the meantime the legislation strives to purify our *lakes and streams* so that they would all be suitable for swimming by 1981."[119] He then went on to comment that: "We have 225 miles of Lake Michigan shoreline, hundreds of miles of *trout streams* and hundreds of *inland lakes* and exploding recreational facilities demands that stimulate my constituents to want action to provide clean water."[120] Based on these comments, it is likely that Representative Madden believed that the federal government's "all-out" drive was going to extend to the trout streams and inland lakes he referred to, as well as to traditional navigable waters such as Lake Michigan.

With neither House willing to adopt the other's bill, H.R. 11896 and S. 2770 were sent to a joint House and Senate conference committee.

C. Conference

On September 28, 1972, S. 2770 emerged from the Conference Committee with certain modifications. One of these modifications was a new definition for "navigable waters." The Conference Committee decided to define "navigable waters" as the "waters of the United States, including the territorial seas."[121] The committee included the following statement in the Conference Report to provide guidance on how the term should be interpreted: "The conferees fully intend that the term 'navigable waters' be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes."[122] The conferees did not want the jurisdiction of the CWA to be limited by legislative or executive fiat. Instead, it appears that the conferees were leaving that determination up to the U.S. Supreme Court. Since the Court had already held that federal jurisdiction could extend to non-navigable tributaries in cases such as *Rio Grande Dam & Irrigation Co.*[123] and *Grand River Dam Authority*,[124] it is logical to conclude that the conferees intended for "navigable waters" to include traditional navigable waters and non-navigable waters.

During Senate debate on the Conference Report, Senator Muskie asked that the legislative history for the CWA include a written summary of the major points of the Conference Report. In that summary, he began by stating that: "One matter of importance throughout the legislation is the meaning of the term 'navigable waters of the United States.'"[125] He then goes on to include the Conference Report statement quoted above that calls for a broad interpretation of the term "navigable waters."[126] In the next passage he continues this theme by stating:

> Based on the history of consideration of this legislation, it is *obvious that its provisions and the extent of application should be construed broadly.* It is intended that the term "navigable waters" *include* all water bodies, such as lakes, streams and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.[127]

In this passage, Senator Muskie reiterates that the term "navigable waters" should be construed broadly. He then goes on to focus on navigable-in-fact waters (or *present use waters*) in such a way to suggest that only they could be considered "navigable waters." Considering that Senator Muskie was one of the key architects of the CWA and that he had consistently argued for a broad interpretation of the term "navigable waters," this passage should not be taken as evidence that Senator Muskie had in the "eleventh hour" abruptly changed his views on CWA jurisdiction.

After hearing the remarks of Senator Muskie and others, the Senate voted 74 to 0 to approve the Conference Report. Had there been any dispute over an issue as fundamental as the jurisdiction of the CWA, this vote would not have been unanimous.

During the House debate on the Conference Report, Rep. John Dingell (D-Mich.), floor manager for the bill and one of the cosponsors of H.R. 11896, discussed the definition of "navigable waters" as it appeared in §502 of the conference version of S. 2770. Representative Dingell discussed how the concept of "navigable waters" had expanded over time since *The Daniel Ball* case in 1870.[128] Representative Dingell explained that although "navigable waters" may have once had a strict meaning that was tied to whether a ship could navigate a waterbody, that strict meaning had been changed by two centuries of U.S. Supreme Court precedent.[129] As an example, he pointed out that to be consid-

> during the last 12 years has become stagnated and infested with germs and pollutants caused by municipalities, industries, and all segments of our economy dumping refuse, waste, and pollutants into our lakes and streams. Beaches are being closed, rivers, both large and small, are becoming stench-holes, and over 30 percent of the Nation's drinking water contains hazardous amounts of chemicals and pollutants.

118 CONG. REC. 10202 (daily ed. Mar. 27, 1972), *reprinted in* 1 WPCA LEGISLATIVE HISTORY, *supra* note 76, at 346.

119. 118 CONG. REC. 10202-03 (daily ed. Mar. 27, 1972), *reprinted in* 1 WPCA LEGISLATIVE HISTORY, *supra* note 76, at 346-47 (emphasis added).

120. 118 CONG. REC. 10202-03 (daily ed. Mar. 27, 1972), *reprinted in* 1 WPCA LEGISLATIVE HISTORY, *supra* note 76, at 347 (emphasis added).

121. S. CONF. REP. NO. 92-1236, at 144 (1972), *reprinted in* 1 WPCA LEGISLATIVE HISTORY, *supra* note 76, at 327.

122. *Id.* (emphasis added).

123. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

124. United States v. Grand River Dam Auth., 363 U.S. 229 (1960).

125. 118 CONG. REC. 33699 (daily ed. Oct. 4, 1972), *reprinted in* 1 WPCA LEGISLATIVE HISTORY, *supra* note 76, at 178.

126. *Id.*

127. *Id.* (emphasis added).

128. 77 U.S. at 563.

129. As Representative Dingell stated in his remarks on the House floor:

> The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be

ered a "navigable water" in the past, a waterbody had to be a link in an interstate chain of waterborne commerce; by 1972, a waterbody could be a "navigable water" even if the chain of commerce included links that were over land.[130] In short, Representative Dingell did not want any of his colleagues to apply an outmoded definition to the term "navigable waters" as it appeared in §502 of H.R. 11896.

In an attempt to end all possible misunderstanding about the term "navigable waters," Representative Dingell summarized the breadth of the term by making one of the clearest statements on the subject contained in the legislative history of the CWA: "Thus, this new definition clearly encompasses all water bodies, including main streams and their *tributaries*, for water quality purposes."[131] By including the word "tributaries" in this statement, it demonstrates that Representative Dingell intended for the term "navigable waters" to include non-navigable tributaries, as well as traditional navigable waters.

In discussing the Conference Report, several representatives and senators described at great length the differences between H.R. 11896 and S. 2770. What is significant about these discussions is that not one of these individuals mentioned that the definition of "navigable waters" in H.R. 11896 differed from that in S. 2770. Instead, the members pointed out other differences. For example, S. 2770 provided EPA with veto power over state-issued permits, whereas H.R. 11896 did not. S. 2770 included a no-discharge goal by 1985, whereas H.R. 11896 did not. And, S. 2770 provided for national pollution standards, whereas H.R. 11896 did not.[132]

If the H.R. 11896 definition of "navigable waters" genuinely was understood by any Representative to cover only traditional navigable waters, and the S. 2770 definition of "navigable waters" was understood to mean traditional navigable waters and any adjacent wetlands, as well as non-navigable tributaries, then this single difference would have dwarfed all of the other differences between the two bills described above. As Rep. William Harsha (D-Ohio) and Sen. Philip Hart (D-Mich.) estimated in the 1977 debates on the CWA, only about 2% of the *nation's waters* would be covered by the legislation if federal jurisdiction under the CWA were limited to the traditional navigable waters and any adjacent wetlands.[133]

In other words, at least 98% of the *nation's waters* would have been unprotected by the proposed 1972 legislation if it had covered only traditional navigable waters. Although it is not clear whether the 92d Congress had these precise statistics, it is likely that the senators and congressmen who voted on the CWA of 1972 realized that the traditional navigable waters included but a small fraction of the *nation's waters*. If the definitions for "navigable waters" in the two bills were indeed being interpreted differently—with S. 2770 being interpreted to include close to 100% of the *nation's waters* and H.R. 11896 being interpreted to include at most 2% of the *nation's waters*—it would seem that this would have been a difference in the two bills that at least 1 of the 531 elected members of the 92d Congress would have felt worthy of recording in the legislative history of the Act.

Based on the legislative history, there does not appear to have been any disagreement in the House over having a broad interpretation of the term "navigable waters." The Conference Committee's version of S. 2770 passed the House 366 to 11.[134]

D. Presidential Veto

At the close of their respective considerations of the Conference Report, the two houses adopted S. 2770 and sent it on to President Nixon for signature. Instead of signing the bill, he vetoed it. Senator Muskie had anticipated that the president would veto the bill because of the "stringent regulations it would impose on industrial polluters."[135] Instead, President Nixon stated that he vetoed the bill because the country could not afford to build all the municipal sewage treatment plants that the bill required. President Nixon explained that S. 2770 was a "bill whose laudable intent is outweighed by its unconscionable $24 billion price tag."[136] The day after the president concluded the nation could not afford the CWA, Congress debated S. 2770 a final time. Much was

"susceptible of being used . . . with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera. *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Applachian* [sic]*Electric Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA 7, 1945); *cert. den.* 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA 7, 1954) *cert. den.* 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA 7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA 5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F. 2d 594 (CA 2, 1965); [*United States v. Steamer Montello*], 87 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

118 Cong. Rec. 33756-57 (daily ed. Oct. 4, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 250.

130. As Representative Dingell stated in the following, the waterbodies only have to be one link in the chain of interstate commerce:

> Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11, 1 ELR 20250 (1971); [*United States*] *v. Underwood*, 4 ERC 1305, 1309, 2 ELR 20567 (M.D. Fla. June 8, 1972).

118 Cong. Rec. 33756-57 (daily ed. Oct. 4, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 250.

131. *Id.* (emphasis added).

132. *See, e.g.*, H.R. Deb. on H.R. 11896, 92d Cong. (1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 696, 739.

133. 123 Cong. Rec. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Hart), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 939-40; 123 Cong. Rec. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. Harsha), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1280.

134. 118 Cong. Rec. 33767-68 (daily ed. Oct. 4, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 278-79.

135. 118 Cong. Rec. 33694 (daily ed. Oct. 4, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 166.

136. Veto Message for S. 2770, 92d Cong., at 1 (1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 137.

said about the price tag of the bill, but nothing was said about the definition of "navigable waters."[137]

Congress easily overrode President Nixon's veto by votes of 52 to 12 in the Senate and 247 to 23 in the House. The CWA became law on October 18, 1972, and it included the following definition: "'navigable waters' means the 'waters of the United States, including the territorial seas.'"[138] Taking into consideration the history of the term "navigable waters" and all that was said and written on the subject during the debates of the CWA of 1972, as we have done in the above discussion, we conclude that Congress intended CWA jurisdiction to encompass all the *nation's waters*. And, as explained above, this includes the *present use*, *susceptible use*, and *historic use waters*, as well as the non-navigable waters, such as the non-navigable tributaries. This conclusion is reinforced by the remaining sections of this Article.

III. The Response of the Executive and Judicial Branches

Examining how the executive branch and judicial branch interpreted the term "navigable waters" after 1972 helps establish the context for the legislative history of the CWA of 1977. EPA, the Corps, and the courts had a lot to say about the geographic jurisdiction of the CWA of 1972. What these entities said and did during the implementation of the Act helped to shape the discussion in Congress over the term "navigable waters" in 1977.

A. EPA's Response

EPA immediately interpreted the scope of the CWA to cover "all the waters of the United States" and began drafting regulations to implement §402, which provides the authority for EPA's national pollution discharge elimination system (NPDES).[139] The NPDES program regulates all discharges of pollutants into the "navigable waters" except for discharges of "dredged or fill material."[140] These latter pollutants are regulated by the Corps, in conjunction with EPA, under §404 of the CWA.[141]

The regulations that EPA promulgated in 1973 to implement the Act included the following broad definition of the term "navigable waters":

> (1) All navigable waters of the United States;
> (2) Tributaries of the navigable waters of the United States;
> (3) All interstate waters;
> (4) Intrastate lakes, rivers and streams which are utilized by interstate travelers for recreation and other purposes;
> (5) Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce;
> (6) Intrastate lakes, rivers and streams which are utilized for industrial purposes by industries in interstate commerce.[142]

Consistent with congressional direction, EPA developed an administrative definition of "navigable waters" that would allow the new Act to control water pollution "at its source," as the statutory provisions and legislative history of the new law required. Although EPA's original definition quoted above did not specifically list "wetlands" as "navigable waters," EPA contemporaneously issued a policy statement noting that wetlands "represent an ecosystem of unique and major importance to citizens of this Nation" that require "extraordinary protection."[143] Accordingly, EPA announced its policy to "preserve the wetland ecosystems and to protect them from destruction through waste water or nonpoint source discharges regarding protection of wetlands" and to "minimize alterations in the quantity or quality of the natural flow of water that nourishes wetlands and to protect wetlands from adverse dredging or filling practices."[144]

B. The Corps' Response

The Corps' response to the CWA was more complicated. Two months after the passage of the Act, the Acting General Counsel for the Corps, William R. Orlandi, signed a memorandum addressed to the Corps' Director of Civil Works outlining the issues raised by the new legislation. The first issue involved the transfer of the Refuse Act regulatory program from the Corps to EPA. The Refuse Act program was to serve as the foundation of the new EPA NPDES program. This posed a potential problem for the Corps, because under the Refuse Act, the Corps had been able to control any discharges of refuse into non-navigable tributaries. If not properly regulated, these discharges could flow downstream and cause sandbars to develop in navigation channels.

Acting General Counsel Orlandi explained the problem as follows:

> Since [Refuse Act] permits for discharges into *nonnavigable tributaries* have been transferred to EPA, what course of action should the Corps take to control and remedy shoaling conditions in *navigable waters* which may occur as a result of discharges into *nonnavigable tributaries*? This will require coordination with EPA with resultant agreements being reduced to a memorandum of understanding between both agencies.[145]

This passage demonstrates that the head attorney at the Corps at that time had concluded that the jurisdiction of the CWA extended to non-navigable tributaries just like the jurisdiction of the Refuse Act had extended into such waters.

Next, Orlandi raised the question of whether the Corps should consider observing two different jurisdictional reaches for the established §10 regulatory program (which regulated the construction of structure in the "navigable waters of the United States") and the new §404 program.

> Should the Corps continue to use the definition of "navigable waters" as prescribed in [its regulations implementing §10] to define the scope of its regulatory jurisdiction, or expand its jurisdiction to include "*all* waters of the United States" which is the definition of "naviga-

137. 118 Cong. Rec. 36871-79 (daily ed. Oct. 18, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 95-113; S. Deb. on Veto of S. 2770, 92d Cong. (1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 115-36.

138. Pub. L. No. 92-500, §502(7), 86 Stat. 886 (1972).

139. 33 U.S.C. §1342.

140. *Id*.

141. *Id.* §1344.

142. 38 Fed. Reg. 13527, 13529 (May 22, 1973).

143. 38 Fed. Reg. 10834 (May 2, 1973).

144. *Id.*

145. Memorandum from William R. Orlandi, Acting General Counsel, U.S. Army Corps of Engineers, to Director of Civil Works, U.S. Army Corps of Engineers, Problem Areas to Be Resolved in Corps Regulatory Programs Following Passage of Recent Legislation, ¶ 2(a)(2) (Dec. 13, 1972) (on file with author).

> ble waters" used in the [CWA]? It is possible that we would be confined to our current definition of "navigable water" in the administration of our [§]10 permit program, but would have to expand our normal jurisdiction to include additional waters in the administration of the new [§]404 permit program.[146]

Here the Acting General Counsel poses a remarkable question considering the ultimate path that the Corps chose to take in implementing the §404 program; Mr. Orlandi asks whether, considering that CWA jurisdiction extends into non-navigable tributaries, the Corps should extend the jurisdiction of its §10 program into non-navigable tributaries. He concludes that the Corps probably would not be able to expand the jurisdiction of the §10 program, and thus, the §404 program would have to have a broader jurisdictional reach than the §10 program.

In making these observations, the Acting General Counsel acknowledged that implementing a §404 permit program covering discharges of dredged and fill material in all the *nation's waters* would have political repercussions.[147] His concerns are clear in his concluding remarks in the memorandum:

> In view of the fact that many of the problem areas raised by [the CWA of 1972] involve an *intermixture of legal and policy decisions*, it is suggested that representatives from your Directorate meet with members of my staff to resolve these matters.[148]

The Corps decided to interpret the terms "navigable waters" and "waters of the United States" narrowly and apply the §404 program to the same waters as the §10 program, that is, only the traditional navigable waters. In the following passage from his recent article on "navigable waters," long-time Corps Assistant Chief Counsel Lance D. Wood describes why the Corps decided to interpret CWA jurisdiction so narrowly:

> From 1972 through 1974, the Corps' leadership came to realize that the new §404 permit responsibility over "all the waters of the United States" could overwhelm the Corps with regulatory duties that the Corps had neither the staff nor the legal means to perform effectively, but which could get the Corps into serious political, practical, and legal difficulties.[149]

According to Mr. Wood, the Corps did not have the regulatory resources to implement a drastically increased regulatory program, as required by §404. In 1972, the Corps did not have sufficient personnel to administer even its existing regulatory programs under §9 and §10 of the Rivers and Harbors Act.[150] And the Corps did not want to hire and train the large new regulatory staff that would be needed to administer the §404 program. As Mr. Wood provides, "[t]he Corps' senior leadership wanted the Corps to remain to the maximum extent possible an engineering agency, staffed with engineers who solved important U.S. military and civil engineering problems, not a regulatory agency staffed with lawyers and regulators."[151]

Consequently, the Corps chose to view its new §404 jurisdiction as equivalent to its established §10 jurisdiction. Since §404 jurisdiction extends to the "navigable waters," which was defined in the CWA to mean the "waters of the United States, including the territorial seas," and since §10 jurisdiction extends to the "navigable waters of the United States," to make its jurisdictional plan work, the Corps had to conclude that the three terms above are all synonymous. This feat was explained in the Corps' first set of regulations that implemented the CWA of 1972.

The final rule of April 3, 1974, stated:

> Section 404 of the [CWA] uses the term "navigable waters" which is later defined in the Act as "the waters of the United States." The Conference Report, in discussing this term, advises that this term is to be given the "broadest possible Constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." We feel that the guidance in interpreting the meaning of this term which has been offered by this Conference Report—to give it the broadest Constitutional interpretation—is the same as the basic premise from which the aforementioned judicial precedents have evolved. The extent of Federal regulatory jurisdiction must be limited to that which is Constitutionally permissible, and in this regard, we feel that we must adopt an administrative definition of this term which is soundly based on this premise and the judicial precedents which have reinforced it. *Accordingly, we feel that both ["navigable waters of the United States" and "waters of the United States"] should be treated synonymously.*[152]

In order for the Corps to reach the conclusion that "navigable waters of the United States" and "waters of the United States" should be used synonymously, the Corps had to conclude that by 1974 the limits of federal jurisdiction over the *nation's waters* extended only to the traditional navigable waters. If that had been the case, the Corps could not have legally implemented the §404 program in any non-navigable waters. This conclusion, of course, belies the fact the Court had already sanctioned federal regulation of non-navigable tributaries[153] and that the Corps already had jurisdiction over non-navigable tributaries under the Refuse Act.[154]

Not surprisingly, EPA, the U.S. Department of Justice (DOJ), and four federal courts did not approve of the Corps' narrow interpretation of "navigable waters." Near the time the Corps issued its regulations implementing the CWA, the DOJ wrote a letter to the Corps arguing in favor of a broader interpretation of "navigable waters."[155] In *United States v. Holland*[156] and *United States v. Smith*,[157] the courts held that

146. *Id.* ¶ 2(c)(5).

147. Wood, *supra* note 6, at 10206.

148. Orlandi, *supra* note 145, ¶ 4 (emphasis added).

149. Wood, *supra* note 6, at 10208.

150. *Id.* at 10207.

151. *Id.*

152. 39 Fed. Reg. 12115, 12115 (Apr. 3, 1974) (emphasis added).

153. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899); United States v. Grand River Dam Auth., 363 U.S. 229 (1960).

154. 33 U.S.C. §407. Under §13, the Corps had authority to regulate discharges of refuse into the "navigable waters of the United States," as well as "any *tributaries* of any navigable water." *Id.* (emphasis added).

155. William L. Want, Law of Wetlands Regulation §2:9, 2-10, n.3 (2005).

156. 373 F. Supp. 665, 671 (M.D. Fla. 1974):

> Clearly Congress has the power to eliminate the "navigability" limitation from the reach of federal control under the Commerce Clause. The "geographic" and "transportation" conception of the Commerce Clause which may have placed the navigation restriction in the Rivers and Harbors Act of

the phrase "waters of the United States" signaled a broad interpretation of "navigable waters." And, in *United States v. Ashland Oil & Transportation Co.*,[158] the U.S. Court of Appeals for the Sixth Circuit explained that the Corps' narrow interpretation of "navigable waters" to exclude tributaries was nonsensical.

> It would, of course, make a mockery of [Congress' Commerce Clause] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.[159]

As the court explained, unless discharges into tributaries are regulated, it is impossible to address water pollution in any effective way.

It was not until the Natural Resources Defense Council challenged the Corps' regulations in the federal district court for the District of Columbia, however, that the issue was resolved. In an eight-paragraph decision, the district court in *Natural Resource Defense Council, Inc. v. Callaway*,[160] ordered the Corps to "revoke and rescind those portions of the Corps regulations that pertained to the jurisdiction of the Corps under §404 of the [CWA]." The key paragraph in the decision states as follows:

> [The Corps is] without authority to amend or change the statutory definition of navigable waters and [it is] hereby declared to have acted unlawfully and in derogation of [its] responsibilities under Section 404 of the Water Act by the adoption of the definition of navigability described at . . . 39 Federal Register 12119 . . . and it is ordered that the [Corps issue new regulations consistent with the CWA].[161]

When the Corps proposed a new set of regulations with an expanded interpretation of "navigable waters," it also issued a press release that explained that the expanded jurisdiction of the §404 permit program could force farmers, foresters, and ranchers to obtain Corps permits for many of their common activities.[162] The press release was successful in getting the attention of a regulated community that saw an onerous federal permit program on the horizon.[163]

In its post-*Callaway* regulations, the Corps adopted a three-phase approach to implementing the expanded Corps regulatory jurisdiction. Wetland scholar William Want summarized the waters included in each phase in the following:

> [1] [Traditional Navigable Waters and Any Adjacent Wetlands]
>
> Phase I began immediately upon publication of the regulation on July 25, 1975, and included all the waters subject to the ebb and flow of the tide and/or waters that were or are susceptible to use for commercial navigation purposes (waters already being regulated by the Corps), plus all adjacent wetlands to these waters.
>
> [2] [Larger Non-navigable Waters and Any Adjacent Wetlands]
>
> Phase II became effective on September 1, 1976 (originally scheduled for July 1, 1976, but postponed for sixty days by Presidential action), and included primary tributaries to the Phase I waters and lakes greater than five acres in surface area, plus wetlands adjacent to these waters.
>
> [3] [Remainder of Non-navigable Waters and Any Adjacent Wetlands]
>
> Phase [III] became effective on July 1, 1977, and included all waters of the United States.[164]

Thus, within the span of two years, the Corps went from regulating only the traditional navigable waters under its 1974 regulations to regulating all the *nation's waters* under its 1975 regulations.

In its proposed §404(b)(1) Guidelines, which were published three months before the Corps' 1975 regulations, EPA explained that the dredge and fill program would protect "wetlands which are especially valuable for propagation and support of fish and wildlife, as well as other beneficial uses [from] capricious development [that is] having a major impact on the aquatic life and wildlife of the United States, and other water uses."[165] Recognizing the importance of the program and that the Corps' resources were limited, EPA supported the phase-in of the Corps' regulatory program as evidenced by this passage from the preamble to the final §404(b)(1) Guidelines:

> [EPA and the Corps] have worked together in an effort to develop a program that is manageable, responsive to the concerns of protecting vital national water resources from destruction through irresponsible and irreversible decisions, and sensitive to the often conflicting needs and desires of people who utilize these resources. We have attempted to create a program that recognizes the

1899 has long since been abandoned in defining federal power. Now when courts are forced with a challenge to congressional power under the Commerce Clause a statute's validity is upheld by determining first if the general activity sought to be regulated is reasonably related to, or has an effect on, interstate commerce and, second, whether the specific activities in the case before the court are those intended to be reached by Congress through statute. Perez v. United States, 402 U.S. 146, 91 S. Ct 1357, 28 L. Ed. 2d 686 (1970); Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); United States v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

157. 7 Env't Rep. Cas. (BNA) 1937, 1938-39 (E.D. Va. 1975).

158. 504 F.2d 1317, 1325 (6th Cir. 1974):

> [W]e believe that Congress knew exactly what it was doing and that it intended the Federal Water Pollution Control Act to apply, as Congressman Dingell put it, "to all water bodies, including main streams and their tributaries." Certainly the Congressional language must be read to apply to our instant case involving pollution of one of the tributaries of a navigable river. Any other reading would violate the specific language of the [navigable waters definition] and turn a great legislative enactment into a meaningless jumble of words.

159. *Id*. at 1326.

160. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

161. *Id.* at 686.

162. WANT, *supra* note 155, §2:8 (citing Press Release, U.S. Dep't of Army, Office of the Chief of Engineers (May 6, 1975), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 1263).

163. WANT, *supra* note 155, at 2-8.

164. *Id. See also* 40 Fed. Reg. 31319, 31320 (July 25, 1975); 33 C.F.R. §209.120(d)(2) and (e)(2) (1976).

165. 40 Fed. Reg. 19794 (May 6, 1975).

> need to interweave all concerns of the public in the decision making process: *that recognizes that present limitations on manpower preclude its immediate implementation throughout the country*; and that we believe to be responsive to the overall objectives and needs of the [FWPCA].[166]

While EPA and the Corps worked together to implement the phase-in, the regulated community began banding together to oppose it. Many of the groups that formed to oppose the new regulatory program had the political clout to make their voices heard in Washington, D.C.[167] So arose the political storm that would end in the CWA of 1977.

IV. The CWA of 1977

Beginning in about 1975, the regulated community, led by the silviculture, agriculture, and ranching interests,[168] lobbied against the broad scope of §404 of the CWA. Congress, considering the intensity of this lobbying effort, was faced with two options: (1) roll back the jurisdictional reach of the §404 program to the "traditional navigable waters;"[169] or (2) develop some statutory fixes to the program to make the broad reach of the Act workable and palatable. Congress ultimately chose the latter option.[170] It is important to note that had Congress chosen to roll back the jurisdictional reach of the §404 program in 1977, the statutory fixes ultimately embodied in the 1977 Amendments would not have been necessary.

A. H.R. 3199

In the 94th Congress, both chambers passed bills to amend the 1972 legislation, but both bills died in conference. In the 95th Congress, both the Senate Environment and Public Works Committee and the House Public Works and Transportation Committee held hearings on water pollution bills. On February 17, 1977, Rep. Herbert Roberts (D-Tex.) and 21 cosponsors introduced H.R. 3199 to the House with the intention of establishing the bounds of the Corps' §404 regulatory authority once and for all.[171]

Section 16 of H.R. 3199 was intended to overhaul §404 of the CWA by redefining "navigable waters" and "adjacent wetlands" for the purpose of the §404 program only.[172] Thus, under this approach, §402 of the CWA would have continued to have a broad definition for "navigable waters," whereas §404 would have had a more narrow one. Section 16 states that "[t]he term 'navigable waters' as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . ."[173] Thus, under §16 of H.R. 3199, §404 jurisdiction would have covered *present use* and *susceptible use* waters, but not *historic use* waters.

By omitting *historic use waters* from the definition of "navigable waters," the cosponsors of H.R. 3199 were apparently attempting to roll back federal jurisdiction to the pre-1921 era. As explained above, it was in 1921 that the U.S. Supreme Court, in the *Economy Light & Power* case,[174] first decided that *historic use waters* fall under federal jurisdiction. It is also noteworthy that this §16 definition for "navigable waters" is narrower than the definition adopted by the Corps for "navigable waters" in its short-lived 1974 regulations. In these regulations, the Corps, consistent with the holding in *Economy Light & Power*, had included the *historic use waters* in its definition of "navigable waters of the United States."[175]

In addition to defining the term "navigable waters," §16 of H.R. 3199 also defined the term "adjacent wetlands" as any wetlands that are "contiguous or adjacent to navigable waters."[176] Section 16 then stated that those waters that are not "navigable waters" or "adjacent waters" are not subject to direct regulation by the Corps under the CWA, or "section 9, section 10, or section 13" of the Rivers and Harbors Act of

166. 40 Fed. Reg. 41292, 41292 (Sept. 5, 1975) (emphasis added).

167. *Id.*

168. For example, Reps. Robert Edgar (D-Pa.) and Gary Myers (R-Pa.) stated the following in their Additional Views that accompany H.R. REP. NO. 95-139 (1977): "Thousands of farmers, and ranchers have written to their Congressmen calling for a roll back in the corps' jurisdiction with respect to the section 404 program. This grass-roots lobbying effort has been very effective to date." H.R. REP. NO. 95-139 (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 6, at 1248.

169. I.e., *present use*, *susceptible use*, and *historic use waters*, and their adjacent wetlands.

170. Wood, *supra* note 6, at 10208.

171. H.R. 3199, 95th Cong. (1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 1143.

172. H.R. REP. NO. 95-139, at 24 (1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 1215.

173. *Id.*

174. Economy Light & Power Co. v. United States, 256 U.S. 113, 123 (1921).

175. Relevant text from the committee's explanation is as follows:

> The definition of "navigable waters" contained in section 16 is the same as the definition of navigable waters of the United States as it has evolved over the years through court decisions with one exception. The definition in section 16 omits the historical test of navigability. Under the historical test many bodies of water—particularly small lakes—have been classified as navigable by the Corps of Engineers solely on the basis of their use some time in the past as part of a highway of commerce. For example, some have been classified as navigable because they were used in the fur trade in the 1700's where traders would transport their furs by trail to the lake, across the lake by boat, and then again by trail into another State. Others have been classified as navigable because they were used in the same manner for the supply of army bases in the 1700s and 1800s. Likewise, small lakes located entirely within one State, which were part of a highway of commerce in the 1800s by virtue of their proximity to a railway track which led into another State, have been classified as navigable.

H.R. REP. NO. 95-139 (1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 1218.

176. The full text is as follows:

> The term "adjacent wetlands" as used in this section shall mean (A) those wetlands, mudflats, swamps, marshes, shallows, and those areas periodically inundated by saline or brackish waters that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction, which are contiguous or adjacent to navigable waters, and (B) those freshwater wetlands including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to navigable waters, that support freshwater vegetation and that are periodically inundated and are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

H.R. 3199, 95th Cong. §16 (1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, §16.

1899.[177] Under §16 then, the only way that the Corps could regulate discharges of dredged or fill material into waters that were not "navigable waters" or "adjacent waters" would have been by entering into a joint agreement with the governor of the state in which these "other waters" were located.[178] Because the cosponsors of §16 did not attempt to limit the bounds of these "other waters" in any way, §16 provided a form of "conditional federal jurisdiction" that would have extended to all of the *nation's waters* had this provision ever been enacted.

In recommending §16, the House Public Works and Transportation Committee offered three basic reasons for its adoption. First, the committee said that the Corps would not be able to efficiently and effectively process all of the permits that would be required if §404 jurisdiction were maintained for all the *nation's waters* because the committee did not believe that Congress would approve any increases to the Corps' regulatory resources.[179] Second, the committee believed that the federal government could not and should not assume the entire responsibility for cleaning up the *nation's waters*.[180] Third, the committee contended, incorrectly, that historically the federal government had only regulated traditional navigable waters and any adjacent wetlands.[181]

In the debates on the House floor over H.R. 3199, the representatives divided into two groups. Those who supported §16 reiterated the arguments made by the House Public Works and Transportation Committee when its members had reported the bill. Those who opposed §16 pointed out that many states had weak environmental protection programs.[182] In explaining this point, Rep. Stewart B. McKinney (R-Conn.) stated, "delegating the corps' program to State agencies would leave too much of the nation's wetlands subject to uncoordinated, unplanned, and destructive development."[183] He also explained that §16 would leave "98 percent of the Nation's stream miles and 80 percent of its swamps and marshlands" unregulated by the Corps or EPA.[184]

Representative McKinney then argued that the traditional navigable waters-non-navigable tributaries distinction "does not reflect the environmental truism that water is water, wherever it is."[185] Commenting on §404 jurisdiction, Reps. Robert Edgar (D-Pa.) and Gary Myers (R-Pa.) in a written statement on H.R. 3199 stated, "[the framers of the CWA of 1972] knew that a broad interpretation was necessary to provide for restoring and maintaining the quality of our waters."[186] Representatives Edgar and Myers then went on to remind the House Public Works and Transportation Committee of the statement about "navigable waters" the committee included in its Committee Report only five years earlier (and it bears repeating here):

> One term that the committee was reluctant to define was the term "navigable waters." The reluctance was based on the *fear that the interpretation would be read narrowly.* However, this is not the committee's intent. The committee fully intends that the term "navigable waters" be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes.[187]

Edgar and Myers continued by stating that "[i]n defining 'navigable waters' broadly, the committee knew that there was a limit to dumping raw sewage into our streams, to injecting life-destroying toxins into our lakes, or dumping sludge off our coasts without eventually paying the penalty."[188] In short, they argued that the committee, like the rest of Congress, intended the jurisdiction of §404 to reach all of the nation's waters. Finally, they made the point that §16 would not even allow the Corps to assert jurisdiction over *historic use waters*—waters that had been subject to federal jurisdiction, as discussed above, since 1921.[189]

In an attempt to broker a compromise, Representative Edgar and Rep. James Cleveland (R-N.H.) both offered amendments to H.R. 3199 that would have preserved a broad interpretation of "navigable waters," but would have exempted certain agricultural and silvicultural activities such as plowing and ditching.[190] These amendments were rejected and the House passed H.R. 3199 on April 5, 1977, by a large majority. Section 16 survived unchanged.[191] It was, however, not to survive Senate scrutiny.

B. S. 1952

While the House was hammering out H.R. 3199, the Senate was working on its own bill, S. 1952. The Senate Committee for the Environment and Public Works reported the bill to the Senate floor on July 19, 1977. The Senate bill left the 1972 definition of "navigable waters" unchanged.[192] While the committee sought to preserve the broad jurisdiction of

177. Considering that §13 explicitly states that it covers "tributaries" of traditional navigable waters, it is not clear what import the §16 limitation would have had on §13, especially considering that §13 had already been superceded, in large measure, by §402 of the CWA.

178. H.R. 3199, 95th Cong. §16 (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, §16.

179. H.R. Rep. No. 95-139 (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1217.

180. *Id*.

181. *Id*. at 1218.

182. *See* Additional Views of Representatives Harsha and Cleveland, H.R. Rep. No. 95-139 (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1266:

> We are similarly unable to accept at this time the argument that state regulation can be relied upon to protect our most important wetlands in areas beyond Federal authority as curtailed by section 16 of this bill. If the States were doing an adequate job, the version of 404 currently in H.R. 3199 would not have the support it has among those interests not wishing to be regulated at all.

183. 123 Cong. Rec. 10404 (daily ed. Apr. 5, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1288.

184. 123 Cong. Rec. 10401 (daily ed. Apr. 5, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1280.

185. *Id.*

186. Additional Views of Representative Edgar and Representative Myers, H.R. Rep. No. 95-139, at 54 (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1249.

187. *Id.* (quoting H.R. Rep. No. 92-911, at 131 (1972)), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 818 (emphasis added).

188. *See supra* note 186.

189. *Id.* at 1250; *see supra* note 39 and accompanying text.

190. 123 Cong. Rec. 10426-29 (daily ed. Apr. 5, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1342, 1349.

191. H.R. 3199, 95th Cong. §16 (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1182-87.

192. S. 1952, 95th Cong. (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 555.

§404, its members realized that the heady days of 1972, with its unanimous Senate votes to protect the environment, were over. Influential senators, including Sens. Lloyd Bentsen (D-Tex.), Robert Dole (R-Kan.), Pete Domenici (R-N.M.), and John Tower (R-Tex.), had teamed up to restrict the jurisdictional reach of the §404 program.[193]

Despite the new legislative landscape, the committee members were determined to ensure "continued protection of *all the Nation's waters*."[194] The Committee Report argues that without broad jurisdiction, the CWA would fail in its mission of cleaning up the nation's waters:

> The 1972 [CWA] exercised *comprehensive jurisdiction over the Nation's waters* to control pollution to the fullest constitutional extent . . . . The objective of the 1972 act is to protect the physical, chemical, and biological integrity of the Nation's waters. Restriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render this purpose impossible to achieve. Discharges of dredged or fill material into lakes and tributaries of these waters can physically disrupt the chemical and biological integrity of the Nation's waters and adversely affect their quality.[195]

The Committee Report also stresses that pollution must be addressed at its source:

> The presence of toxic pollutants in these materials compounds this pollution problem and further dictates that *the adverse effects of such materials must be addressed where the material is first discharged into the Nation's waters*. To limit the jurisdiction of the [CWA] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives.[196]

Senator Hart made this same point about the need to treat pollution at its source during an exchange with Senator Bentsen on the Senate floor:

> So now what the Senator from Texas is suggesting is that we are only going to treat the cancer if it occurs in the trunk of the body, but not allow any treatments for the arms or the legs, so that if you have cancer in the hand, the arm, the foot, or the knee, we cannot treat that even though it may spread to the rest of the body or cause the loss of that limb.[197]

Just as Senator Hart tried to explain to Senator Bentsen in the above quote, the Committee argued that if the Corps did not have the freedom under the §404 program to regulate discharges of dredged or fill material in all the nation's waters, the traditional navigable waters could be severely impacted by unregulated discharges into the non-navigable waters and their adjacent wetlands. To ensure that the Corps would be able to continue its mission of protecting the nation's waters from unauthorized discharges of dredged and fill material, the committee fought to preserve the current broad definition of "navigable waters."

The committee, however, was mindful of the administrative burden that such a large regulatory program would place on the Corps. Thus, the committee decided to tap the resources of willing states to help run the §404 program. As the Senate Committee Report provides:

> [S. 1952] *does not redefine navigable waters*. Instead the [S. 1952] intends to assure *continued protection of all the Nation's waters*, but allows *States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the Corps program in the so-called Phase 1 waters.* Under [S. 1952], the Corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for Phase 2 and 3 waters.[198]

Thus, the committee determined that states willing to develop §404 programs for non-navigable tributaries and their adjacent wetlands should be encouraged to do so. Under the "state assumption" process in S. 1952, if a state could demonstrate to EPA that its §404 program was as vigorous as the federal program, then it could take over the §404 program from the federal government for non-navigable tributaries and their adjacent wetlands.[199] The Corps would then confine its regulatory program within the state to just the traditional navigable waters (including the *historic use waters*) and their adjacent wetlands.[200]

C. The Bentsen Amendment

During the debates on S. 1952, it became quite apparent that Senator Bentsen was not happy with the bill. S. 1952 left unchanged the definition of "navigable waters" that was in the CWA of 1972—"navigable waters means the waters of the United States, including the territorial seas."[201] Convinced that the §404 program should be confined to a more limited jurisdiction, Senator Bentsen offered §16 from H.R. 3199 as an amendment to S. 1952. The House had approved H.R. 3199 four months earlier.[202] As discussed in the previous section on H.R. 3199, §16 was designed to limit jurisdiction of the §404 program to *present use waters* and *susceptible use waters*. Thus, under §16, §404 jurisdiction would not have extended to any non-navigable waters, any *historic use waters*, or any adjacent wetlands thereof.[203]

Many senators supported the Bentsen Amendment. Like the supporters of §16 in the House, these senators were attempting to turn back the clock on §404 jurisdiction over the *nation's waters*.[204] Non-navigable tributaries have been subject to federal jurisdiction since 1899,[205] and *historic use waters* have been subject to federal jurisdiction since 1921.[206]

193. *See* 123 Cong. Rec. 26711, 26725 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 901-34.

194. S. Rep. No. 95-370, at 75 (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 708 (emphasis added).

195. *Id*. (emphasis added).

196. *Id*. (emphasis added).

197. 123 Cong. Rec. 26713 (daily ed. Aug. 4, 1977); S. Deb. on S. 1952, 95th Cong. (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 907.

198. S. Rep. No. 95-370, at 75 (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 708 (emphasis added).

199. *Id*.

200. S. 1952, 95th Cong. §49(a)(5) (1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 621.

201. Pub. L. No. 92-500, §502(7), 86 Stat. 886 (1972).

202. 123 Cong. Rec. 26711 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 901.

203. *See supra* note 177 and accompanying text.

204. 123 Cong. Rec. 26711 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 901.

205. *See supra* note 33 and accompanying text.

206. *See supra* note 39 and accompanying text.

These senators voiced three basic arguments in support of the Bentsen Amendment. First, Senator Domenici argued that when Congress passed the CWA of 1972, it only intended for the Act to reach *present use* and *susceptible use waters*.[207] He contended that *Callaway* had been wrongly decided and that the Corps, as a result of this decision, was forced to improperly expand its regulatory program. The *Callaway* court, as explained above, held that the Corps acted illegally when, in its 1974 regulations, it limited the §404 program to the traditional navigable waters and their adjacent wetlands.[208] It is not clear from his testimony whether Senator Domenici believed that EPA, in contrast to the Corps, had improperly included non-navigable waters and *historic use waters* when it implemented the §402 NPDES program.[209]

Second, Senator Tower argued that if the federal government maintained control over all the nation's waters until a state assumed the program, the federal government would be usurping the police powers of the states, albeit temporarily.[210] States, he contended, not the federal government, had primary responsibility over their intrastate waters and had the right to preserve and protect the quality of non-navigable tributaries, traditional navigable waters, and their adjacent wetlands as they saw fit.[211] Consequently, in accordance with the Bentsen Amendment, the Corps should regulate non-navigable tributaries and their adjacent wetlands only if asked to do so by a state.[212]

Third, Senators Bentsen, Dole, Domenici, and Tower, among others, argued that citizens wanted and needed less federal government involvement in their lives.[213] As Senator Tower stated:

> If we do not act affirmatively and clean up the language in Public Law 92-500, it will result in unwarranted and despotic intrusion by the Federal Government over every brook, creek, cattle tank, mud puddle, slough, or damp spot in every landowner's backyard across this Nation. It seems unreasonable that we should choose more Federal Government on our citizens in an era when they want less.[214]

Many other senators, however, did not agree with these arguments made in support of the Bentsen Amendment. Sen. John Chafee (R-R.I.) argued that a §404 program that only covered *present use* and *susceptible use waters* would leave too many of the "Nation's ecologically important wetlands with no protection and many with uncertain protection from discharges of dredged or fill material."[215] Sen. Robert Stafford (R-Vt.) argued that this lack of protection "would cripple efforts to achieve the act's objectives."[216] He continued by quoting the Senate Committee Report for S. 1952, which states "waters move[ ] in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source."[217]

Like Senators Chafee and Stafford, other senators who opposed the Bentsen Amendment recognized that unregulated discharges of dredged or fill material into small streams, marshes, lakes, and wetlands would physically disrupt the biological integrity of those waters, as well as downstream waters.[218] For example, Sen. Howard Baker (R-Tenn.), a cosponsor of the 1977 Amendments, pointed out that contaminated sediments could be found in rivers and harbors nationwide, and that the disposal of dredged material, laden with such toxins, in wetlands could destroy those wetlands, as well as the sports fisheries dependent on those wetlands.[219]

Senator Baker went on to remind his colleagues of the importance of a comprehensive §404 program in the following:

> Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.[220]

He also indicated that he thought that EPA and the Corps were heading in the right direction by establishing a "management program that focused the decision-making process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities."[221] And, he pointed out that earlier that year, much like Congress was attempting to do through the 1977 Amendments, the Corps had "revised its [§404] regulations to further streamline the program and correct several misunderstandings."[222]

207. 123 CONG. REC. 26716 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 926.

208. *See supra* note 160 and accompanying text.

209. As is explained further in Section V of this Article, the geographic jurisdiction of §§402 and 404 are the same because they both cover discharges of pollutants into "navigable waters." Therefore, to be consistent, if one were to argue that the jurisdiction of §404 had been interpreted too broadly, one would also have to argue that the jurisdiction of §402 also had been interpreted too broadly.

210. 123 CONG. REC. 26721 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 930-31.

211. *Id.*

212. Senator Bentsen and his colleagues on the Committee on Environment and Public Works differed markedly in how they approached the issue of state assumption. Senator Bentsen, through his proposed amendment to S. 1952 (the product of that committee), would have given all authority to regulate non-traditionally navigable waters (including historically navigable waters) to the states and then allowed the states to request the Corps to regulate certain ecologically and environmentally important "state waters" if the state was so inclined. The committee, in drafting S. 1952, gave the Corps authority to regulate discharges into all waters of the United States, and then allowed the states to assume all but the traditionally navigable waters (minus the historically navigable waters). 123 CONG. REC. 26711 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 901.

213. 123 CONG. REC. 26719 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 924 (Senator Domenici, arguing for the Bentsen Amendment, stated as follows: "[I] think we have an opportunity here in the Senate to undo something that has grown up that we really never intended under section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams. We just did not intend that [in 1972].").

214. 123 CONG. REC. 26721 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 931.

215. 123 CONG. REC. 26716 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 916.

216. *Id.*

217. 123 CONG. REC. 26714 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 911.

218. *Id.*

219. 123 CONG. REC. 26718 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 921.

220. *Id.*

221. *Id.*

222. *Id.*

Senator Hart also argued for protecting the "entire resource"—all of the Nation's waters. He pointed out, as he had done in earlier debates, that the traditional navigable waters comprised no more than 2% of the "entire resource" and that leaving the other 98% unregulated would be manifestly inadequate.[223]

In short, these senators argued that, to protect the *nation's waters*, it is critical to have a comprehensive nationwide regulatory program.

It was not clear how the vote would turn out. The makeup of the Senate had changed in the five years since the CWA of 1972 had been enacted. Twenty-eight of the senators who had voted unanimously to pass the CWA of 1972 had retired or been replaced.[224] Furthermore, the agriculture, silviculture, and ranching lobbies had made their presence known on Capitol Hill during that time. When the votes were counted, however, the Bentsen Amendment to S. 1952 was defeated by a margin of 45 to 51.[225]

By defeating the Bentsen Amendment, the Senate had voted in favor of maintaining a §404 regulatory program that encompasses all of the *nation's waters*. The House, in contrast, as explained in the previous section, had four months earlier approved §16 to H.R. 3199 (the House's "Bentsen Amendment"), which would have limited §404 jurisdiction to present use and susceptible use waters and their adjacent wetlands. Thus, as of August 4, 1977, the two chambers of Congress were very much at odds on the issue of §404 jurisdiction.

D. Amendment of H.R. 3199

In an attempt to move toward a consensus with the House, the Senate adopted those sections of H.R. 3199 that it agreed with and then amended the remainder of the sections. One of the changes that the Senate made to H.R. 3199 was that the Senate excised §16 from H.R. 3199. By doing so, the Senate let the House know that it would not agree to limit the jurisdiction of the §404 program. The Senate's amended version of H.R. 3199 sought to continue §404 jurisdiction on "all waters of the United States."

The Senate version of H.R. 3199 also changed the provision in the House's version of H.R. 3199 that covered state involvement in the §404 program. S. 1952 and H.R. 3199 varied greatly regarding when and how states would regulate waters. As stated above, the House wanted to confine all federal regulation under §404 to *present use* and *susceptible use waters*. States would regulate all other waters, but could ask for federal assistance on certain high value waters. Alternatively, the Senate preferred to allow a state to assume control over non-navigable waters after that state had applied for the responsibility, submitted a comprehensive plan for regulating discharges of dredged or fill material, and had received approval from the EPA Administrator.[226]

These and other differences led the House to reject the Senate's amendments to H.R. 3199 and to request another Senate-House Conference to attempt a compromise.

E. Conference Number Two

The House and Senate conferees made many concessions during the second conference. The major ones involved jurisdiction, state assumption, exemptions, and general permits.

The Senate-House Conference Committee recommended that both legislative branches agree to the broad jurisdictional reach of CWA §404 as adopted by the Senate amendment to H.R. 3199.[227] As Senator Muskie pointed out during the Senate debates on the Conference Report: "The conference bill follows the Senate bill by maintaining the full scope of Federal regulatory authority over all discharges of dredged or fill material into any or [sic] the Nation's waters."[228]

During the conference, the House conferees accepted the Senate's approach to state assumption, namely that the states would have to seek approval from EPA before they could administer a §404 permit program. The Senate conferees accepted that the *historic use waters* could be delegated to the states.[229] Section 404(g)(1), as it appears in the conference bill, outlines the parameters of the state program and the federal program as follows:

> The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are *presently used*, or are *susceptible to use* in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, *including wetlands adjacent thereto*), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.[230]

Under this provision, the states can assume the §404 program for all the "navigable waters" except for those that are

223. *See supra* note 6 and accompanying text.

224. *Compare* 123 Cong. Rec. 26728 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 947, *with* 118 Cong. Rec. 33718 (daily ed. Oct. 4, 1972), *reprinted in* 1 WPCA Legislative History, *supra* note 76, at 222-23.

225. *See* 123 Cong. Rec. 26728 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 947 (yeas 45, nays 51).

226. As passed by the Senate: H.R. 3199, §53(a)(5):

> State programs for discharges of dredged or fill material that are subject to approval under this subsection shall include all navigable waters within the State except any coastal waters of the United States subject to the ebb and flow of the tide, including any adjacent marshes, shallows, swamps, and mudflats, and any inland waters of the United States that are used, have been used or are susceptible to use for transport of interstate or foreign commerce, including any adjacent marshes, shallows, swamps, and mudflats. H.R. 3199, §53(b) Section 404 of the Clean Water Act is amended by adding the following new subsections: Section 404(d) [a]t any time after the enactment of the Clean Water Act of 1977 a State may assume the authority of the Secretary of the Army under this section . . . .

123 Cong. Rec. 26783 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1087.

227. H.R. Conf. Rep. No. 95-830, at 97-99 (1977), *reprinted in* 3 CWA Legislative History, *supra* note 6, at 281-83.

228. 123 Cong. Rec. 39187 (daily ed. Dec. 15, 1977), *reprinted in* 3 CWA Legislative History, *supra* note 6, at 470.

229. 123 Cong. Rec. 26783 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA Legislative History, *supra* note 6, at 1087.

230. 33 U.S.C. §1344(g)(1) (emphasis added).

included in the provision's parenthetical phrase. The parenthetical phrase includes *present use waters*, *susceptible use waters*, and any adjacent wetlands, which are reserved for federal regulation.[231] Thus, a state program can assume §404 regulatory responsibility for non-navigable waters and *historic use waters*.[232] As this provision indicates, the conferees viewed the traditional navigable waters as a subset of the terms "navigable waters" and "waters of the United States" as they appear in the CWA of 1972.[233]

Drawing upon provisions in S. 1952 and H.R. 3199, the conferees included several proposed amendments to the CWA of 1972, in addition to the one on state assumption. These other amendments were designed to reengineer the §404 regulatory scheme in two significant respects. First, the amendments exempted a large number of small-scale activities (most notably routine agricultural, silvicultural, and ranching activities) from §404's permit requirements.[234] Under these amendments, for example, farmers would not have to obtain §404 permits for "normal" farming activities. Second, the amendments authorized the issuance of general permits for any category of similar-in-nature activities that would cause only minimal separate and cumulative adverse environmental effects.[235] Under these amendments, activities such as minor road crossings could receive expedited approval as long as the permittee complied with established general permit conditions.

During the final debates on the conference bill, little was said on the issue of §404 jurisdiction. In the end, the conference bill passed both houses with substantial support, and was enacted as Public Law No. 95-217 on December 27, 1977.[236] The definition for "navigable waters" remained "waters of the United States, including the territorial seas." While incorporating significant changes in the operation of the §404 program, Congress in the 1977 Amendments preserved the broad assertion of CWA jurisdiction it had intended in the 1972 Act and endorsed the jurisdictional reach of the Corps' 1975 regulations.

V. §402 Jurisdiction Versus §404 Jurisdiction

For the sake of completeness and before leaving the 1977 debates entirely, there is one other aspect of those debates that is quite telling. Interestingly enough, this aspect has less to do with what was said in the debates and more to do with what was not said. Considering that the jurisdictional reaches of §§402 and 404 of the CWA of 1972 were the same—that is, they were both tied to the definition of the term "navigable waters"—it would follow that if the jurisdiction of §404 had been inappropriately expanded after 1972 by the courts, EPA, and the Corps, then the jurisdiction of §402 would logically have been inappropriately expanded as well. Yet, while several members of Congress argued in the 1977 debates that §404 jurisdiction needed to be rolled back, no member of Congress even suggested, during those debates, that §402 jurisdiction should be limited, since restricting §402 jurisdiction would have crippled the NPDES program.

This inconsistency is probably best explained as follows: while Congress intended in 1972 for both the §402 program and the §404 program to have a broad jurisdictional reach, many senators and representatives did not fully *comprehend* the far-reaching impacts that the §404 program would have on activities such as agriculture, silviculture, and ranching. This was quite understandable since the §404 program was so new. When the impacts came to light, some members of the 95th Congress quickly responded by saying that the 92d Congress never intended for the jurisdiction of §404 to extend to *historic use* and non-navigable waters. Possibly a more accurate assessment of what was going on was that, although the 92d Congress intended for §402 and §404 jurisdiction to include non-navigable waters, many of the members who voted on the CWA of 1972 did not intend for the impacts of the §404 program to be so widespread.

VI. 1977 to the Present

Although what has happened since 1977 has no bearing on what the 92d and the 95th Congresses thought about CWA jurisdiction, certain post-1977 events do provide some context for the upcoming U.S. Supreme Court decisions in *Carabell* and *Rapanos*. We conclude in this Article that the 92d Congress intended for CWA jurisdiction to encompass all the *nation's waters*, and that the 95th Congress validated that conclusion by instituting certain midcourse corrections to the CWA while maintaining the definition of the term "navigable waters." However, there are some who would disagree with this conclusion. To understand this other perspective better, this section summarizes how this current debate about CWA jurisdiction has taken shape.

Many thought that the expansive view of CWA jurisdiction was cemented in the 1985 Supreme Court decision

231. 123 CONG. REC. 26783 (daily ed. Aug. 4, 1977), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 6, at 1087.

232. Rep. Norman D'Amours (D-N.H.) explained why the states were given authority over the historic only waters in the following:

> The waters in which a State may not regulate the discharge of dredged or fill material under a State program approved under section 404 are those waters defined as the phase I waters in the Corps of Engineers 1975 regulations, with the exception of waters considered navigable solely because of historical use. These latter waters are considered more appropriate for State regulation rather than Federal since they do not support interstate commerce either in their present state or with reasonable improvement. (A State can, however, regulate the discharge of dredge or fill materials into these so-called Phase I waters where it takes over the administration of a general permit issued by the Corps or under an EPA approved section 208 program regulating a class or category of activities).

123 CONG. REC. 38970-72 (daily ed. Dec. 15, 1977), *reprinted in* 3 CWA LEGISLATIVE HISTORY, *supra* note 6, at 358.

233. In theory, one might argue that §404(g)(1) simply allows states to assume the "historic use waters" and no more. This argument is a non-starter considering that one of the primary goals of the CWA of 1977 was to encourage the states to assume a portion of the §404 program and become partners with the federal government in running the program. To this day, there are very few identified *historic use waters*. Therefore, if in fact, Congress had intended for the states to assume authority covering only *historic use waters*, then the states would have undertaken only a token role in administering the §404 program. It is also unlikely that Congress would have included in the amendments the extensive provisions for state assumption that it did, if the waters at issue were so minimal.

234. *See* 33 U.S.C. §1344(f); H.R. CONF. REP. NO. 95-830, at 100-01 (1977), *reprinted in* 3 CWA LEGISLATIVE HISTORY, *supra* note 6, at 284-85.

235. *See* 33 U.S.C. §1344(e).

236. Pub. L. No. 95-217 (1977), *reprinted in* 3 CWA LEGISLATIVE HISTORY, *supra* note 6, at 4.

United States v. Riverside Bayview Homes, Inc.,[237] but that has proved not to be the case. In *Riverside Bayview*, the Court held that the Corps was properly within its administrative discretion when it determined that wetlands adjacent to a "navigable waterway" are jurisdictional even if they are not regularly flooded by overflow from the traditional navigable waters. The Court concluded that "it was a permissible interpretation of the Act" to conclude that the term "waters of the United States" encompasses "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction."[238] In examining the legislative history of the CWA, the Court said the following: "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[239] Finally, the Court found it somewhat instructive that the Bentsen Amendment, which would have narrowed the jurisdiction of §404 markedly, was defeated, thus preserving the broad definition of navigable waters.[240] The Court unanimously concluded its decision by stating that it "was persuaded that the language, policies, and *history* of the CWA compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'"[241]

After *Riverside Bayview*, the primary question was what are the outermost limits of CWA jurisdiction. One year after the Court decided *Riverside Bayview*, the Corps published guidance in the preamble to its 1986 regulations that would ultimately test those outermost limits. The provision stated, in part, that if migratory birds use or would use an intrastate isolated water as habitat, then that waterbody would be considered a jurisdictional "water of the United States."[242]

This so-called migratory bird rule was challenged when the Solid Waste Agency of Northern Cook County (SWANCC) decided that it wanted to construct a solid waste landfill in an abandoned gravel mine outside of Chicago. The Corps initially declined to assert jurisdiction over the SWANCC site, but when the Corps discovered that migratory birds frequented the numerous ponds at the site, the Corps decided to assert jurisdiction, and ultimately denied the permit because it posed a potential threat to drinking water supplies and destroyed unmitigatable habitat for migratory birds.[243] When *SWANCC* reached the Supreme Court, a divided 5-4 Court held that the "migratory bird rule" was not an allowable basis for asserting jurisdiction and that the ponds were "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its term extends."[244] The question after the *SWANCC* decision became: If the "isolated" ponds in that case were beyond the limits of CWA jurisdiction, what other classes of waterbodies might the U.S. Supreme Court hold to be outside CWA jurisdiction?

The federal courts of appeals and district courts have largely construed the *SWANCC* decision narrowly. The U.S. Court of Appeals for the Fourth Circuit, the Sixth Circuit, the U.S. Court of Appeals for the Seventh Circuit, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Court of Appeals for the Eleventh Circuit have held in varying contexts that EPA and the Corps may continue to assert jurisdiction over non-navigable waters even if those waters are quite small and distant from traditional navigable waters.[245] Although no circuit has held that CWA jurisdiction does not encompass non-navigable waters, the U.S. Court of Appeals for the Fifth Circuit has stated in dicta something to the effect that the CWA covers traditional navigable waters and non-navigable waters adjacent to traditional navigable waters.[246]

In granting certiorari in *Rapanos*[247] and *Carabell*,[248] it appears that the Supreme Court is responding to what it considers a split between the Fifth Circuit and the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits. The initial question the petitioners pose in *Rapanos* is whether CWA jurisdiction extends to wetlands that do not abut a navigable-in-fact water. The initial question the petitioners pose in *Carabell* is whether CWA jurisdiction can extend to a wetland that is separated from a tributary stream of navigable-in-fact waters by a man-made berm when there is no proven hydrologic connection between the two waterbodies. In both cases, if the answer is yes, then a second question comes into play, namely: does Congress have the authority under the Commerce Clause of the Constitution to extend federal jurisdiction to such waters?

VII. Conclusion

Once the U.S. Supreme Court decides these cases, we may finally have a clearer answer to the question: What is the jurisdictional reach of the CWA? Then again, a number of times in recent legal history many have thought that we had that answer. Three come to mind: (1) when the CWA of 1972 was enacted; (2) when the CWA of 1977 was enacted; and (3) when the U.S. Supreme Court decided *Riverside Bayview.* The question now is: Will the road from the Fields of Runnymede to the "waters of the United States" end with the decisions in *Rapanos* and *Carabell* or will these upcoming decisions simply become two more milestones along that thoroughfare?

237. 474 U.S. 121, 106 S. Ct. 455 (1985).

238. *Id.* at 135.

239. *Id.* at 132-33 (citing S. REP. NO. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

240. *Id.* at 135.

241. *Id.* at 139 (emphasis added).

242. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

243. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 165, 31 ELR 20382 (2001).

244. *Id.* at 173.

245. *See*, *e.g.*, United States v. Deaton, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); United States v. Rapanos, 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004); United States v. Gerke, 412 F.3d 804, 35 ELR 20128 (7th Cir. 2005); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 34 ELR 20104 (11th Cir. 2004); United States v. Newdunn Assocs., L.L.P., 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

246. Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001); In re Needham, 354 F.3d 340 (5th Cir. 2003).

247. 376 F.3d at 629, *cert. granted*, 74 U.S.L.W. at 3228.

248. 391 F.3d at 704, *cert. granted*, 74 U.S.L.W. at 3228.