

ARTICLES

Plain Meaning, Precedent, and Metaphysics: Interpreting the “Navigable Waters” Element of the Clean Water Act Offense

by Jeffrey G. Miller

Jeffrey G. Miller is Professor of Law
Emeritus at Pace Law School.

Summary

This Article, the third in a series of five, examines the meaning of “navigable waters” under the Clean Water Act. It traces the traditional judicial interpretation of navigable waters and how Congress and EPA attempted to extend its meaning, then examines how the term has been applied in the context of tributaries and wetlands, isolated waters, groundwater, and EPA’s unitary theory of navigable waters. The author then analyzes EPA and the Corps’ 2014 proposed amendments to the definition of “waters of the United States,” and concludes that those amendments may resolve much of the interpretive crisis.

I. Introduction

The Clean Water Act (CWA)¹ in §301(a) prohibits “the discharge of any pollutant by any person,”² unless in compliance with several listed sections authorizing the issuance of two types of permits³ and specifying their substantive requirements. In §502(12), the statute defines “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.”⁴ In sum, the subsection prohibits (1) any addition (2) of any pollutant (3) to navigable waters (4) from any point source (5) by any person, except in compliance with a CWA permit. Justice Ruth Bader Ginsburg has called this the CWA’s “core command.”⁵

This Article reviews the meaning of “navigable waters”—a traditional Commerce Clause jurisdictional phrase denoting waters associated with transportation, but with a short CWA statutory definition having nothing to do with waterborne transportation.⁶ The Article examines the U.S. Environmental Protection Agency’s (EPA’s) 2014 proposed amendments to its definition of “waters of the United States” and concludes that those proposed amendments may resolve much of the interpretive crisis. The Article also examines EPA’s theory that all navigable waters are one (the unitary navigable waters theory), and argues that the theory is inconsistent with the CWA and should be disavowed by EPA and rejected by the courts.

In §502(6), the CWA defines navigable waters to mean “the waters of the United States, including the territorial seas.” Of all the elements in the CWA’s core command, only “navigable waters” had a developed legal meaning before

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1. Clean Water Act (CWA), 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. 33 U.S.C. §1311(a).
3. Permits issued pursuant to CWA §402, 33 U.S.C. §1342, regulate water pollution; permits issued pursuant to CWA §404, 33 U.S.C. §1344, regulate filling streams or wetlands.
4. 33 U.S.C. §1362(12). Because the term defined in CWA §502(12), “discharge of a pollutant,” is not exactly the same as the term used in CWA §301(a), “the discharge of any pollutant,” the definition in §502(12) arguably does not apply to the phrase used in §301(a). However, courts routinely refer to §502(12) as defining discharge of any pollutant in §301(a), without noting the difference. (Emphases added throughout.) See Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the “Addition” Element of the Clean Water Act Offense*, 44 ELR 10770 n.4 (Sept. 2014) [hereinafter Miller, *Addition*]. In any event, discharge itself is defined to include the discharge of a pollutant, §502(16), the term defined in §502(12).
5. *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 298 (2009). The author has called it elsewhere the basic prohibition of the CWA. See JEFFREY G. MILLER ET AL., INTRODUCTION TO ENVIRONMENTAL LAW: CASES AND MATERIALS ON WATER POLLUTION CONTROL 141 (2008).
6. 33 U.S.C. §1362(7). The touchstone of “navigable waters” for Commerce Clause jurisdictional purposes is use in waterborne navigation. See *The Daniel Ball*, 77 U.S. 557 (1870).

enactment of the statute. First, the U.S. Supreme Court developed that legal meaning in one dozen decisions over the preceding century and a half, establishing the extent of the U.S. Congress' constitutional authority to develop and regulate waterways under the Commerce Clause. Second, the statutory definition of navigable waters, "the waters of the United States," attempts to broaden the element's meaning, while the statutory definitions of the other elements narrow their meanings. (For example, the statutory definition of "pollutant" limits it to specifically listed materials and categories of materials.⁷) Third, Congress devoted substantial legislative history to the intended broad reach of navigable waters, while providing far less legislative history to the meanings of the other elements.⁸

The courts' historical familiarity with interpreting navigable waters suggests they should be more comfortable interpreting the term under the CWA than interpreting other elements of the CWA offense. Indeed, this is the case; the Supreme Court and lower courts have interpreted navigable waters far more often than they have interpreted any of the other elements.⁹ The historical role of the courts in shaping the meaning of the term navigable waters also suggests that they should be more willing to disregard or overrule an Agency interpretation of the term than to disregard or overrule Agency interpretations of other elements of the CWA offense. Indeed, this too is the case; the Court has twice overruled EPA and U.S. Army Corps of Engineers (the Corps) interpretations of navigable waters, but has not overruled their interpretations of other elements in the CWA offense.¹⁰ Finally, the availability of one century and a half of judicial decisions interpreting navigable waters prior to the CWA makes it unsurprising that courts

use precedent more often than other interpretive devices such as plain meaning to determine the meaning of the term in the CWA. And indeed they have done so: Precedent is by far the most commonly used device for judicial interpretation of navigable waters,¹¹ while plain meaning is the most commonly used device for judicial interpretation of some of the other elements.

The major tension in interpreting the CWA's navigable waters element is the inherent conflict between judicial interpretation of Congress' authority to develop and regulate navigable waters for promoting interstate and foreign commerce, and Congress' subsequent use of the term to establish expansive EPA authority for improving and maintaining water quality. The importance of a waterway for transportation may have little connection to water quality. Congress appeared to have understood this disconnect and to distance CWA jurisdiction from waterborne commerce by defining navigable waters as "the waters of the United States," a more expansive term having nothing to do with transportation. But because Congress used "navigable waters" as an element of the CWA offense, it invited judicial focus on the term rather than on its definition, because courts were familiar with that term, having interpreted it for over one century and a half. Courts understood the historical meaning of navigable waters far more than they understood the meanings of "waters of the United States" or of the CWA's other elements. And because of the Supreme Court's current fascination with textualism, it has great difficulty divorcing navigable waters entirely from waterborne transportation; "navigable" must mean something.

If the CWA dealt only with pollution control under the §402 permit program,¹² the disconnect between promotion of interstate commerce and protection of water quality might not have ripened into a jurisdictional crisis. The primary issue would have been whether particular tributaries of navigable waters were within the jurisdiction of the CWA, when those tributaries themselves had never and could never support waterborne transportation. Because tributaries, even remote ones,¹³ contribute both water and pollution to the navigable waters into which they flow, they directly affect those navigable waters. The water volumes they contribute increase the navigability of the receiving waters, and the water pollution they contrib-

7. CWA §502(6), 33 U.S.C. §1352(6). The listed categories of materials, however, cover a vast territory. See Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Pollutant" Element of the Federal Water Pollution Offense*, 44 ELR 10960, 10963-64 (Nov. 2014) [hereinafter Miller, *Pollutant*].

8. Compare the discussion of the legislative history of "navigable waters" in this Article with the discussions of legislative history in Miller, *Addition*, *supra* note 4, at 10773; and Miller, *Pollutant*, *supra* note 7, at 10962-63.

9. The Court has interpreted navigable waters in six decisions: *Los Angeles County Flood Control Dist. v. Natural Res. Def. Council*, 133 S. Ct. 710, 43 ELR 20004 (2013); *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006); *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 34 ELR 20021 (2004); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (SWANCC), 531 U.S. 159, 31 ELR 20382 (2001); *International Paper Co. v. Ouellette*, 479 U.S. 481, 17 ELR 20327 (1987); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985). It has interpreted "addition" in two decisions and "pollutant" in three decisions. See Miller, *Addition*, *supra* note 4, at 10804-05; and Miller, *Pollutant*, *supra* note 7, at 10981-83. The author's research (set out in tbl. A to this Article) has found that lower courts interpreted navigable waters in 137 decisions; addition in 63 decisions, see Miller, *Addition*, *supra* note 4, at 10804-05; and pollutant in 68 decisions, see Miller, *Pollutant*, *supra* note 7, at 10981-83. The greater number of navigable waters decisions also results from parties challenging interpretations of that element more than the other elements, but that probably results from the same factors.

10. *Rapanos*, 547 U.S. 715; SWANCC, 531 U.S. 159.

11. In the 137 lower court decisions the author found interpreting navigable waters, precedent was used in 124 decisions. Courts used the second most popular interpretive device, broad interpretation to achieve statutory goals, in only 51 decisions. The statistical analysis is set out in tbl. B to this Article. By contrast, in the 68 decisions interpreting pollutant, courts used plain meaning in 55 decisions, but precedent in only 27 decisions. See Miller, *Pollutant*, *supra* note 7, at 10806-07.

12. 33 U.S.C. §1342.

13. Headwater streams, for instance, contribute 60% of the total flow to north-eastern streams and rivers. See 79 Fed. Reg. 22188, 22224 (proposed Apr. 21, 2014) (scientific support for EPA's proposed amendments).

ute may interfere with the navigability of the receiving waters. The Court had recognized congressional power to develop flood control projects in watersheds of navigable waters to protect against floods on the navigable waters into which the tributaries directly and indirectly flowed.¹⁴ The same rationale applies to controlling discharges of pollutants into tributaries of navigable waters to protect the water quality of the navigable waters into which the tributaries flow.

But the CWA did not deal only with pollution control under the §402 permit program; it also dealt with filling wetlands under the §404 permit program.¹⁵ While wetlands contribute both water and pollutants to the navigable waters into which they flow and protect those navigable waters from flooding and pollution,¹⁶ their contributions to adjacent or downstream navigation and water quality may not be apparent to the uninitiated. Moreover, wetlands may not exhibit surface water for months at a time, when to the untrained eye they may be indistinguishable from the surrounding dry land. Wetlands pose two problems for the Court's historical view or even for the plain meaning of navigable waters: Wetlands do not directly support waterborne navigation and, at least when they are dry, are not waters at all.

Unfortunately, narrowing interpretations of navigable waters to defeat §404 jurisdiction over wetlands may also defeat §402 jurisdiction over tributaries of navigable waters, because terms are to be interpreted in the same manner throughout a statute,¹⁷ unless the statute explicitly indicates otherwise. The CWA reiterates this interpretive canon by beginning its definitional §502 "[e]xcept as otherwise specifically provided, when used in this chapter . . . 'navigable waters' . . . means'" And it does not provide in §402, §404, or elsewhere that the term has different meanings in §§402 and 404.

Aside from the Corps' initial, interim regulatory definition of navigable waters, which merely repeated the Court's traditional interpretation of the term, EPA and the Corps' regulatory definitions have followed legislative history to interpret the term broadly. After recent setbacks from the Supreme Court,¹⁸ however, the two agencies have recently proposed an amended definition of "waters of the United States" that preserves much of their earlier regulations' breadth, but retrenches it where the Court's recent decisions give the agencies no room to do otherwise. The preamble to the proposed rulemaking offers a detailed justification for the controversial portions of the definitions, much of it scientific.¹⁹

These dynamics frame the interpretive battles examined in this Article. We begin by tracing the development of the traditional judicial interpretation of navigable waters and how Congress and EPA attempted to extend its meaning. The Article then examines the primary battlefields for interpreting navigable waters: tributaries and wetlands, isolated waters, groundwater, and EPA's unitary theory of navigable waters.²⁰ Along the way, the Article takes sidelong glances at a wild card in these interpretive battles, the development of the CWA's §404 program regulating the filling of wetlands. The §404 program has provided proponents of narrowly interpreting "navigable waters" with the rhetorical support that EPA and the Corps' broad interpretations of the term metaphorically make water of dry land.

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II. The Traditional Legal Meaning of Navigable Waters

The legal concept of navigable waters originated in medieval England. The Crown owned the land beneath waters used for navigation and the public had a common-law right to use navigable waters for fishing and transport.²¹ We know this public right today as the navigable servitude. Upon independence, the American colonies succeeded to ownership of the beds beneath navigable waters, subject to the common-law navigable servitude. As the United States acquired new territories, it took ownership of the beds beneath their navigable waters, again subject to the common-law navigable servitude. When new states were formed from those territories, ownership of the beds beneath the navigable waters transferred to those states, again subject to the navigable servitude.²²

At the time that the 13 colonies formed the United States, only waters subject to the ebb and flow of the tide were considered navigable waters.²³ This limited concept of navigability expanded to meet a growing and industrializing nation's needs for federal improvement and regulation of waterborne commerce and transportation. In *Propeller Genesee v. Fitzhugh*,²⁴ the Court held that navigable waters included freshwater. Not long after, it held in *Gibbons v. Ogden*²⁵ that

14. See *Oklahoma ex rel. Phillips v. Atkinson*, 313 U.S. 508 (1941).

15. 33 U.S.C. §1344.

16. The Court briefly surveyed the benefits of wetlands in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35, 16 ELR 20086 (1985). For a more extensive treatment of the subject, see WILLIAM L. WANT, LAW OF WETLANDS REGULATION §2.01[1] (1993).

17. WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 324 (1994); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 170-73 (2012).

18. See *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006); *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 31 ELR 20382 (2001).

19. 79 Fed. Reg. 22188 (proposed Apr. 21, 2014). The scientific support is provided at 79 Fed. Reg. 22222-52, but is referenced throughout the preamble.

20. For more information on EPA's unitary theory of navigable waters and its exemption of water transfers and diversions from §402, see Miller, *Addition*, *supra* note 4, at 10781-94.

21. *Martin v. Waddell's Lessee*, 41 U.S. 367, 407-14 (1842), traces this history back to the Magna Carta.

22. *Pollard v. Hagen*, 44 U.S. 212 (1843). The U.S. Constitution did not grant the shores of navigable waters and the soil beneath them to the United States, impliedly reserving them to the states. New states have the same rights, sovereignty, and jurisdiction over navigable waters as the original states. This is known as the "equal footing" doctrine: New states are admitted to the Union on an equal footing with the original states. See also *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), in which the navigable servitude gave rise to the public trust doctrine.

23. *Wilson v. Blackbird Creek Marsh Co.*, 27 U.S. 245 (1845).

24. 53 U.S. 443 (1851).

25. 9 Wheat. 1; 21 U.S. 1 (1866).

the U.S. Constitution's Commerce Clause²⁶ conferred on Congress authority to regulate interstate commerce, including the authority to regulate navigation. Finally, in *The Daniel Ball*,²⁷ it held that waters forming a highway or part of a continuous highway of foreign or interstate commerce were subject to Commerce Clause jurisdiction.

The Court has subsequently broadened Commerce Clause jurisdiction to include waters that were once navigable, *Economy Power & Light Co. v. United States*²⁸; waters that presently are capable of use for navigation, *The Monticello*²⁹; and waters that could be made navigable with reasonable improvements, *United States v. Appalachian Electric Power Co.*³⁰ The Court has also recognized that Commerce Clause jurisdiction extends to tributaries of navigable waters or even to entire watersheds, where necessary to accomplish Commerce Clause-justified purposes; for example, flood control, as in *Oklahoma ex rel. Phillips v. Atkinson*.³¹

Traditional federal navigable water jurisdiction, therefore, extends to waters subject to the ebb and flow of the tide; waters that are navigable in fact, or once were navigable in fact, or could be made navigable in fact with reasonable improvements; and, for some purposes, to their tributaries or watersheds. But this is somewhat simplified, because it reflects an amalgam of decisions interpreting "navigable waters" for different purposes: ownership of land beneath navigable water; public rights to use navigable waters for fishing and transportation; admiralty jurisdiction; and Commerce Clause jurisdiction.³² Of these uses, the definition of navigable waters for the purpose of delineating land ownership is, predictably, the most conservative, while the definition for Commerce Clause jurisdiction is more flexible.³³ Those differences are not significant for interpreting navigable waters in the CWA, however, because, as discussed below, Congress intended that term to include all waters within Congress' constitutional authority.

III. Congressional Action: Statutory Definition and Legislative History of Navigable Waters

A. Statutory Definition

Section 502(6) of the CWA defines navigable waters to mean "the waters of the United States, including the ter-

ritorial seas."³⁴ As discussed above, the term "navigable waters" has a well-established legal meaning. "The waters of the United States," on the other hand, has no well-established meaning. Congress defined the limited "navigable waters" with the expansive "waters of the United States" to extend the CWA's jurisdiction to the constitutional limits of congressional authority for water pollution control.

But wording the underlying element to suggest traditional linkage with waterborne commerce was an odd way to accomplish expansiveness. The navigable waters formulation of the element has caused and continues to cause interpretive conflict. EPA and the Corps have promulgated detailed regulatory definitions of waters of the United States, claiming a broad reach for jurisdiction under the CWA.³⁵ Indeed, EPA ultimately abandoned reference to navigable waters, using waters of the United States throughout its regulations, perhaps hoping that others would forget the origin of the statute's jurisdiction in waterborne transportation. If so, it has not fooled the Supreme Court, which has twice ruled that the government's actions under §404 exceeded its statutory jurisdiction over navigable waters.³⁶

B. Legislative History

1. Section 402

The CWA draws on two distinct statutory lineages, with different pollution control strategies and different jurisdictional bases. These lineages have their origins in the Federal Water Pollution Control Act (FWPCA) and the Refuse Act. Congress enacted the FWPCA in 1948³⁷ and has since amended it repeatedly.³⁸ The FWPCA initially encouraged and provided technical and financial support for state water pollution control programs, as well as partial funding for the construction of municipal sewage treatment facilities. Its goal was to achieve state-established water quality standards.³⁹ It evolved from providing a passive federal role to establishing an active, although secondary, federal role. Its strongest federal role was to abate interstate pollution, assisting states in achieving their water quality standards when they were unable to do so themselves because of pollution originating beyond their jurisdictions in other states.

26. U.S. CONST., art. I, §8, cl. 3.

27. 10 Wall. 557; 77 U.S. 557 (1871).

28. 256 U.S. 113, 123 (1921).

29. 20 Wall. 430, 441-42; 87 U.S. 430, 441-42 (1874).

30. 311 U.S. 377, 406 (1940).

31. 313 U.S. 508 (1941).

32. For more information on these uses of navigable waters, see A. DAN TARLOCK, *THE LAW OF WATER RIGHTS AND RESOURCES* (Clark Boardman 1988).

33. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 10 ELR 20042 (1979), in which a privately owned pond separated from an ocean bay by a barrier beach became navigable water for purposes of Commerce Clause navigational regulation under 33 U.S.C. §403 when the owners constructed a channel between the pond and the bay, but the private property did not become subject to the navigational servitude for public access without just compensation.

34. 33 U.S.C. §1362(6).

35. 40 C.F.R. §122.2 (EPA); 33 C.F.R. §328.3 (Corps).

36. See *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 31 ELR 20382 (2001).

37. Federal Water Pollution Control Act (FWPCA), 62 Stat. 1155 (1948).

38. FWPCA Amendment Acts: 66 Stat. 755 (1952); 70 Stat. 498 (1956); Pub. L. No. 86-90, 73 Stat. 141 (1959); Pub. L. No. 86-624, 74 Stat. 411 (1960); Pub. L. No. 87-88, 75 Stat. 204 (1960); Pub. L. No. 89-234, 79 Stat. 903 (1965); Pub. L. No. 89-753, 80 Stat. 1246 (1966); Pub. L. No. 91-224, 84 Stat. 91 (1970); Pub. L. No. 91-611, 84 Stat. 1818 (1970); Pub. L. No. 92-50, 85 Stat. 124 (1971); Pub. L. No. 92-240, 85 Stat. 47 (1972).

39. For a description of the development of the program, see William L. Andreen, *The Evolution of Water Pollution Control in the United States: State, Local and Federal Efforts, 1789-1972; Part II*, 22 STAN. ENVTL. L.J. 215 (2003); N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 432, 799 (1966/1967).

Not surprisingly, the FWPCA's jurisdictional basis was "interstate waters."⁴⁰

On the other hand, the Refuse Act⁴¹ was enacted as part of a revision of navigation laws in the Rivers and Harbors Act of 1899.⁴² The Refuse Act protected navigation by prohibiting the discharge of refuse into navigable waters or their tributaries, except for flow from streets and sewers (that is, regulating industrial discharges but excluding municipal discharges) without a permit from the Secretary of the Army. Pursuant to a 1970 Executive Order,⁴³ the Corps and EPA adapted this statute for water pollution control. The Corps processed applications for and issued Refuse Act permits to industries discharging wastes to navigable water, conditioned on the industries' treatment of the wastewater to achieve standards established by EPA based on the technological treatment capabilities of different industrial categories. Not surprisingly, the Refuse Act's jurisdictional basis was "navigable waters."

Environmentalists brought the Refuse Act Permit Program to a halt by winning a suit against the Corps to require it to comply with the National Environmental Policy Act (NEPA)⁴⁴ when issuing each of the thousands of anticipated pollution control permits.⁴⁵ In comprehensive amendments to the FWPCA in 1972, Congress adopted the permit program from the Refuse Act for all industrial and municipal point sources of pollution. CWA permits were to be conditioned on the permit holders meeting both state-established water quality standards, originally established under the FWPCA, and EPA-established technology-based standards under the CWA, much like those EPA had established under the Corps/EPA Refuse Act permit program.⁴⁶ The new statute exempted the issuance of CWA §402 permits from compliance with NEPA, except for permits to new sources,⁴⁷ on the theory that for existing sources CWA permits require reduction of existing pollution, to the benefit of the environment, while new sources would add to existing pollution.

The legislative history of the CWA is replete with statements that Congress intended the statute's jurisdiction to be expansive, indeed to reach the outer limits of congressional jurisdiction under the Constitution. Both houses of Congress, however, used "navigable waters" as a jurisdictional element for their respective bills. The U.S. Senate bill defined navigable waters to mean "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."⁴⁸ The U.S. House of Representatives bill defined it to mean "the navigable waters of the United States, including the territorial seas."⁴⁹ Insofar as both bills defined "navigable waters" as "navigable waters," the definitions were circular. The Committee Report accompanying the Senate bill explained the rationale for the shift from the model of the earlier FWPCA to the model of the Refuse Act:

Through a narrow interpretation of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source. Therefore reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.⁵⁰

The Conference Committee changed the circular definitions of navigable waters in both bills to the present "waters of the United States" and explained that "[t]he 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."⁵¹ Sen. Edmund Muskie (D-Me.), widely credited as the author of the legislation, explained the Conference Committee bill to the Senate as containing the "broadest possible constitutional interpretation" of navigable waters.⁵² Rep. John Dingell (D-Mich.), chief sponsor of the legislation in the House, explained that the

conference bill defines the term "navigable waters" broadly for water quality purposes It means "all of the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in a technical sense as we sometimes see it in some laws. This new definition clearly encompasses all water bodies, including

40. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965). Although EPA continues to include interstate waters in its definition of waters of the United States, see 40 C.F.R. §122.1 (2013), and its proposed revision of that definition, see 79 Fed. Reg. 22188, 22267 (proposed Apr. 21, 2014), there is no explicit constitutional authority for Congress to regulate interstate waters unless they are also parts of the highways of interstate commerce. Indeed, EPA identifies no such authority in its discussion of jurisdiction over interstate waters in the preamble to its proposed amended definition of navigable waters. See 79 Fed. Reg. at 22254-55. It has been argued that such jurisdiction does not exist. See WILLIAM FUNK, 1 LAW OF ENVIRONMENTAL PROTECTION §13:117 (2014). EPA, however, argues that the Court inherently recognized Congress' authority to regulate pollution of interstate waters when it held in *Milwaukee v. Illinois*, 451 U.S. 304, 11 ELR 20406 (1981), that the CWA preempted the federal common law of interstate water pollution. See EPA's legal justification for its proposed amendment of its definition of waters of the United States, 79 Fed. Reg. 22188, 22256-57.

41. Refuse Act, 33 U.S.C. §407.

42. Rivers and Harbors Act of 1899, 33 U.S.C. §§401-148.

43. Exec. Order No. 11574, 3 C.F.R. §1966-70, 35 Fed. Reg. 19627 (Dec. 23, 1970). For a description of the program, see 42 Fed. Reg. 37122-23 (July 19, 1977).

44. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

45. See *Kaluz v. Resor*, 335 F. Supp. 1, 1 ELR 20637 (D.D.C. 1971).

46. 33 U.S.C. §§1311, 1342, CWA §§301, 402.

47. CWA §511(c)(1), 33 U.S.C. §1371(c)(1).

48. S. 2770, 92nd Cong. §502(h) (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 [hereinafter LEGIS. HISTORY], at 1534, 1698.

49. H.R. 11896, 92nd Cong. §502(8) (1971), reprinted in 1 LEGIS. HISTORY, *supra* note 48, at 1069.

50. S. REP. NO. 92-414, at 77 (1971), reprinted in 2 LEGIS. HISTORY, *supra* note 48, at 1419, 1495. The explanations that water moves in hydrological cycles and that pollution must be treated at its source are not helpful. The hydrological cycle goes far beyond either navigable or interstate waters, encompassing groundwater beneath and water vapor in the clouds above Kansas. Congress did not intend the CWA to regulate discharges to groundwater and there is no hint in the statute itself or in its legislative history that Congress intended the CWA to reach water vapor in the clouds above Kansas.

51. S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.), reprinted in 1 LEGIS. HISTORY, *supra* note 48, at 327.

52. 118 CONG. REC. S16876 (daily ed. Oct. 4, 1972) (statement of Sen. Muskie), reprinted in 1 LEGIS. HISTORY, *supra* note 48, at 166.

main streams and their tributaries for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.⁵³

The repeated references to old, narrow determinations of navigable waters referred to formal determinations the Corps had made that particular waterways were navigable and therefore eligible for spending federal funds to improve them.

This legislative history suggests that Congress made a deliberate choice to base the CWA's jurisdiction on navigable waters rather than on interstate waters because it believed navigable waters jurisdiction to be broader.⁵⁴ It also indicates that Congress intended the CWA's jurisdiction to be as broad as constitutionally possible, encompassing "all water bodies . . . including their tributaries."⁵⁵ Whether the congressional choice of navigable waters jurisdiction accomplished its expansive goals is questionable. Representative Dingell himself explained the reach of navigable waters jurisdiction by describing judicial interpretation of a term denoting waterborne commerce.⁵⁶ And while the Senate Committee Report urged that the "Committee fully intends that the term 'navigable waters' be given the broadest possible interpretation," it prefaced that statement by confessing that "[o]ne term that 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."⁵⁷ The Committee's observation was not initially justified, but ultimately proved prescient.

Congress' choice of navigable waters jurisdiction for the CWA appears not to extend to the full limits of Commerce Clause jurisdiction, because navigable waters evokes only the first of the three prongs of Commerce Clause jurisdiction the Supreme Court enunciated in *United States v. Lopez*⁵⁸: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities substantially affecting interstate commerce. With regard to the CWA's jurisdiction to regulate water pollution sources under the §402 permit program, many polluting discharges are not

to traditional navigable waters, but instead to waters that are directly or indirectly tributary to traditional navigable waters. An industrial discharge of pollutants, for instance, may be to a ditch flowing into a small stream, which in turn flows into a larger stream that eventually flows into a navigable-in-fact river. An ordinary ditch⁵⁹ is not a channel of interstate commerce in the traditional sense, although a discharge to the ditch might be considered an indirect discharge to navigable waters, because the tributaries to a navigable water in the aggregate contribute most of the flow of that water as well as most of the pollutants discharged to it, invoking either the first or third prong of *Lopez*.⁶⁰

Municipal and industrial pollutants also might be considered instrumentalities of interstate commerce, analogous to liquid and solid wastes that the Court has held are items in interstate commerce when they are transported on interstate roadways, invoking the second prong of *Lopez*.⁶¹ Moreover, the discharge of pollutants to non-navigable water, aggregated with other discharges to the same or similar smaller waterways, can have adverse impact on the navigable waters they eventually flow into, again implicating the *Lopez* third prong of Commerce Clause jurisdiction and the Necessary and Proper Clause.⁶² Those arguments, however, are beyond the scope of this Article, because it interprets navigable waters in the CWA, not as a term of Commerce Clause jurisdiction.⁶³

Congressional choice of navigable waters as the CWA's jurisdictional basis implicitly limits its claim of jurisdiction only to the first of the three *Lopez* prongs of Commerce Clause jurisdiction, and that prong alone does not reach the

53. 118 CONG. REC. H33756-57 (daily ed. Oct. 4, 1972) (statement of Rep. Dingell), reprinted in 1 LEGIS. HISTORY, *supra* note 48, at 250.

54. Congress was correct in this regard. The traditional definition of navigable waters under the Commerce Clause does not distinguish between interstate and intrastate waterways, as long as an intrastate waterway is part of a highway of foreign or interstate commerce. On the other hand, none of the enumerated powers in the Constitution explicitly or inferentially grant Congress the power to regulate interstate waters that are not highways or parts of a highway of interstate or foreign commerce.

55. It could be argued, however, that abandoning "the tributaries" in the Senate bill's definition of navigable waters narrowed the definition to exclude tributaries. The more expansive definition from the Conference Committee, "waters of the United States," coupled with the expansive language of the Conference Committee Report and the expansive meanings attributed to it by the sponsors on the House and Senate floors, however, rebut this negative inference.

56. 118 CONG. REC. H9114-35 (daily ed. Oct. 4, 1972) (House Consideration of the Report of the Conference Committee), reprinted in 1 LEGIS. HISTORY, *supra* note 48, at 250.

57. S. COMM. ON PUB. WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. REP. NO. 92-911 (1972), reprinted in 1 LEGIS. HISTORY, *supra* note 48, at 818.

58. 514 U.S. 549, 558-59 (1995).

59. Writing the plurality opinion in *Rapanos v. United States*, 547 U.S. 715, 735-36, 36 ELR 20116 (2006), Justice Antonin Scalia argues that a ditch cannot be navigable water because a ditch is a "point source." The §502(14) definition of point source is a "discernible, confined and discrete conveyance," and incorporates a list of inclusive examples, including "ditch." He argues that a ditch cannot be "navigable water" because it is already a "point source" and the same thing cannot be two elements. Justice Scalia's argument is a non sequitur, however. True, a ditch is a conveyance; it conveys water, whether or not navigable, but often polluted. A ditch is not water and therefore cannot be navigable water, although it can convey navigable water. Justice Scalia has confused the issue by conflating a ditch with the water it conveys, and conflating "point source" with "navigable waters." Navigable waters are distinct from their beds, a distinction that underlies the doctrine that the public may use navigable water for fishing or transport, regardless of who owns the land beneath the waters.

60. See *Rapanos v. United States*, 547 U.S. 715, 743, 36 ELR 20116 (2006).

61. *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 24 ELR 20815 (1994); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 22 ELR 20909 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 8 ELR 20540 (1978). The analogy is not perfect, because the transportation of municipal garbage to and the disposal of it in landfills are compensable services, and hence traditional interstate commerce, while dumping liquid wastes in navigable waters or their tributaries is a free substitute for otherwise compensable services. That implicates *Wickard v. Filburn*, 317 U.S. 111 (1942), extending Commerce Clause jurisdiction to activities that would in themselves escape Commerce Clause jurisdiction but for their aggregate effect on interstate commerce.

62. U.S. CONST., art I, §8, cl. 18.

63. Justice John Paul Stevens' dissenting opinion in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 192-96, 31 ELR 20382 (2001) (Stevens, J., dissenting), joined by three other Justices, outlined the case for Commerce Clause jurisdiction over isolated ponds as habitat for migratory birds. Circuit courts had earlier reached similar conclusions. See, e.g., *United States v. Byrd*, 609 F.2d 1204, 1209-11, 9 ELR 20757 (7th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-28, 4 ELR 20784 (6th Cir. 1974).

outer limits of Commerce Clause jurisdiction. Congress attempted to reach the outer limits of Commerce Clause jurisdiction by defining “navigable waters” as the expansive “the waters of the United States” in CWA §502(7) and by repeated pronouncements in the legislative history to the effect that it intended to confer jurisdiction as broad as constitutionally possible. Despite the initial willingness of courts to interpret the term expansively, however, the jurisdictional term is still “navigable waters” and textualist jurists insist that “navigable” must have something to do with floating commerce.⁶⁴

The CWA’s definition of navigable waters as the waters of the United States does not solve the problem, because while “navigable waters” has an established meaning, “waters of the United States” has no commonly understood meaning. Representative Dingell’s explanation that waters of the United States is used in a geographical sense is ambiguous. The term could include the water in the glasses on our desks, the water vapor in the clouds above Kansas, water 500 feet below the surface that never flows into surface water, or water on federal lands. “Waters of the United States,” standing alone, might be interpreted to break out of the first prong of the *Lopez* test to incorporate all three prongs. But for textualist jurists, defining navigable waters as waters of the United States does not abandon entirely the concept of waterborne transportation in navigable waters, because it evokes only the first prong of the *Lopez* test.

The issue is exacerbated by §404’s protection of wetlands, which EPA and the Corps interpret to include areas that might be dry land part of the year. Dry land does not appear to most people to be water, let alone navigable water. The Court has fixated on this issue.⁶⁵ Three of the six Supreme Court decisions interpreting navigable water were §404 cases,⁶⁶ and the Court reached narrow interpretations of the term in two of those three decisions. These narrow interpretations affect §402 pollution control cases, where they raise the question of whether §402 governs additions of pollutants to remote or intermittent tributaries of navigable waters, in turn making it difficult to control the pollution of indisputably navigable waters into which these pollutants ultimately flow.⁶⁷ If the CWA does not

provide the agencies with jurisdiction to stop additions of pollutants to remote or intermittent tributaries of navigable waters, it cannot stop those pollutants from flowing into navigable waters, thwarting admitted congressional jurisdiction to control pollution of navigable waters.

2. Section 404

The role of §404 in wetlands protection is obvious today, but it was not obvious when Congress enacted the CWA in 1972. The initial §404 contained only §404(a)-(c), which have scarcely been altered since.⁶⁸ The word “wetland” did not then and does not now appear in §404(a)-(c). Indeed, the word wetland did not appear in the descriptions and explanations of §404 in any of the committee reports accompanying the House, Senate, or Conference Committee bills or in any of the congressional debates over the bills leading to enactment of the 1972 legislation. A close reading of §404(a)-(c) and its legislative history suggests Congress intended to establish a program regulating the disposal in open water of spoil from dredging rivers and harbors for navigation maintenance, rather than a program regulating the filling of wetlands. Indeed, the legislative history demonstrates that is exactly what Congress intended it to be.

Dredging is essential to waterborne commerce. Harbors and navigational channels must be dredged or they will fill with silt and become impassable. Construction in navigable waters also requires dredging bottom sediments to make way for the foundations of bridges, jetties, and other water-related structures. To carry out such activities, vast quantities of bottom sediment, commonly known as dredged spoil, must be removed and disposed. Existing legislation prohibited dredging in navigable waters without a Corps permit.⁶⁹ As part of a permit for a dredging project, the Corps specified where and how the dredged spoil generated by the project would be disposed.

As a result of NEPA⁷⁰ and the Fish and Wildlife Coordination Act,⁷¹ the Corps increasingly took environmental concerns into account in dredged spoil disposal decisions.⁷² Rather than designating individual disposal sites for each project, the Corps began to designate regional sites that could be used for multiple dredging

64. See *Rapanos*, 547 U.S. at 734 (“The plain language of the statute simply does not authorize the ‘Land is Water’ approach to federal jurisdiction.”); *SWANCC*, 531 U.S. at 172 (“We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the Statute.”).

65. *Id.*

66. The six cases are *Los Angeles Cnty. Flood Cont. Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 43 ELR 20004 (2013); *Rapanos*, 547 U.S. 715; *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 34 ELR 20021 (2004); *SWANCC*, 531 U.S. 159; *International Paper Co. v. Ouellette*, 479 U.S. 481, 17 ELR 20327 (1987); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985). Of these six, *Rapanos*, *SWANCC*, and *Riverside Bayview* were all §404 decisions, and form the focus of the Article’s discussion.

67. Compare *United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007), decided after *Rapanos*, with *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 10 ELR 20184 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, F.2d 1317, 4 ELR 20784 (6th Cir. 1974); and *Sun Enters., Inc. v. Train*, 394 F. Supp. 1212 (C.D.N.Y. 1975), all decided before *Riverside Bayview*, the first Supreme Court CWA decision interpreting navigable water.

All four circuit court decisions involved discharges to remote tributaries, flowing through several intermediary tributaries to navigable water.

68. Compare Pub. L. No. 92-500, §404, 86 Stat. 816, 884 (1972), with 33 U.S.C. §1344 (2006).

69. 33 U.S.C. §403.

70. See 42 U.S.C. §§4321-4370h. NEPA requires federal agencies to consider environmental impacts when taking actions. Indeed, when an agency takes a major federal action, it must produce an environmental impact statement disclosing the environmental consequences of proposed action and alternative actions.

71. Fish and Wildlife Coordination Act, 16 U.S.C. §§661-666. This statute requires federal agencies taking actions that will alter a water body to consult with the U.S. Fish & Wildlife Service (FWS) to preserve wildlife resources.

72. See WANT, *supra* note 16, at §2.02[1]. The Corps’ “public interest review” began in 1968, when it began to take environmental and public interest factors into account in issuing permits. See 33 C.F.R. §209.120(d). For a description of one such disposal project, see *American Dredging Co. v. Dutchshyn*, 480 F. Supp. 957 (E.D. Pa. 1979).

projects in an area, thereby limiting the number of environmental reviews required for disposal areas. Hence, the Corps has authority to issue discharge permits “at specified disposal sites” in §404(a). Although dredged spoil could be disposed on land, it was more feasible to dispose of this semi-solid ooze in open water, including the ocean.⁷³ Hence, EPA has authority in §404(b) to develop guidelines for the Corps to use in designating “each such disposal site.” While environmental advocates were only becoming aware of environmental concerns from the disposal of dredged spoil in open waters, maritime interests were acutely aware that delays in the use of disposal sites would interrupt dredging necessary for maritime commerce.

The legislative history of §404 reflected a policy conflict between prevention of water pollution and promotion of waterborne commerce. The Senate bill, S. 2770, the primary model for much of the CWA, contained no §404, but instead treated dredged spoil as just another pollutant subject to the §402 permit program.⁷⁴ Senators proposed an amendment in the Public Works Committee to authorize the Corps rather than EPA to regulate the disposal of dredged spoil, but the Committee rejected the amendment.⁷⁵ In the Senate debate on S. 2770, Sen. Allen Ellender (D-La.) asserted that “strict adherence to the published standards [for pollution control] would result in 90 per cent of the ports and harbors of the United States being closed, until such time as land disposal areas are provided. This would create a catastrophic situation with respect to our foreign and domestic commerce.”⁷⁶ Senator Muskie, tacitly acknowledging the problem,⁷⁷ offered an amendment to the Senate bill adding §402(m), which basically required EPA to issue permits for the discharge of dredged material certified by the Corps unless EPA found that the disposal would adversely affect water supplies, fisheries, shellfish beds, and so forth. The Senate adopted this amendment.⁷⁸

Maritime interests had greater success in the House. The House bill authorized the Corps to issue permits for the discharge of “dredged or fill material” where it would not unreasonably affect human health or the environment.⁷⁹ Although it required the Corps to apply EPA guidelines for such discharge, it allowed the Corps to disregard the guidelines if there was no economically feasible alternative reasonably available.⁸⁰ Again, the concern was that “until

such time as economic and feasible alternative methods are available, no arbitrary or unreasonable restrictions shall be imposed on dredging activities essential for the maintenance of interstate and foreign commerce.”⁸¹ The wording of the Conference Committee Report underlined congressional intention to deal with spoil from dredging to maintain navigation. Thus “specific spoil” was to be deposited at a site; the section dealt with the “disposal of dredged spoil”; and advancing technology would eventually end the need for “dumping dredged spoil” in water.⁸²

The relationship between CWA §§403 and 404 underscores that §404 was aimed at open-water disposal of spoil from dredging rivers and harbors. Section 403(c) required EPA to develop guidelines to protect human health and welfare and *marine life* and diversity, from the discharge of pollutants into the territorial seas, contiguous zone, and ocean. Section 404(b) forbade the issuance of a §404 permit not meeting the §403 guidelines unless the “economic impact of the site on *navigation and anchorage*” (emphasis added) outweighs compliance with the guidelines. The §403 criteria are designed to protect marine waters and are irrelevant to filling wetlands, again suggesting that Congress intended §404 to regulate the open-water disposal of spoil from dredging rivers and harbors rather than filling wetlands. The Corps’ authority to override EPA’s criteria because of their economic impact on navigation and anchorage reiterates the section’s purpose to address spoil from dredging for navigation purposes.

Nevertheless, §404(a)-(c) authorized the Corps to regulate the discharge of “dredged *or fill* material” (emphasis added) into navigable waters. The entire wetlands protection tilt of CWA §404 derives from the inclusion of fill material in §404. That term, however, is at best ambiguous in addressing protection of wetlands from landfilling activities. Fill material could mean material to fill abutments, jetties, and other marine structures, but it has come to include material removed from high elevations in a wetland and then redeposited at lower elevations in the same wetland, thus converting it to fast land. The term originated in H.R. 11896, §404, which provided that discharges of dredged or fill material “will not unreasonably degrade or endanger . . . the *marine* environment,” (emphasis added) evidencing legislative intent to deal with dredged spoil disposed in marine waters rather than filling wetlands. The Report accompanying the bill expressed the intent of the House Committee on Public Works that the Corps “shall act promptly on the dredging permits essential for the maintenance of interstate commerce,”⁸³ emphasizing the same intent to regulate the dredging of navigable channels. The absence of congressional intent to regulate filling of wetlands in §404 is also evident from the disconnect between “fill” and “pollutant” in the CWA; the definition

73. See 1 LEGIS. HISTORY, *supra* note 48, at 177-78.

74. S. 2770, 92nd Cong. §§402, 504(f) (1971), *reprinted in* 2 LEGIS. HISTORY, *supra* note 48, at 1534, 1685, 1697.

75. S. REP. NO. 92-414, at 92 (rollcall votes during Committee consideration), *id.* at 1415, 1509.

76. 117 CONG. REC. S. 2770 (daily ed. Nov. 2, 1971) (statement of Sen. Ellender), *id.* at 1386-88.

77. After all, he was a senator from Maine, where Portland is one of the most active ports on the East Coast because it receives oil tankers offloading cargo for transfer by pipeline to Canada.

78. 117 CONG. REC. S. 2770 (daily ed. Nov. 2, 1971), *reprinted in* 2 LEGIS. HISTORY, *supra* note 48, at 1392-93.

79. H.R. 11896, *reprinted in* 1 LEGIS. HISTORY, *supra* note 48, at 1063.

80. H.R. REP. NO. 92-911, at 130 (1972), *reprinted in* 1 LEGIS. HISTORY, *supra* note 48, at 816.

81. *Id.* at 817.

82. 1 LEGIS. HISTORY, *supra* note 48, at 117, 236, 177.

83. H.R. REP. NO. 92-911, at 129-30 (1972), *reprinted in* 1 LEGIS. HISTORY, *supra* note 48, at 816-17.

of pollutant in §502(6) includes dredged spoil, but does not mention fill or dredged or fill material.⁸⁴

Even when the Corps first promulgated regulations to administer §404, the program it described was for disposing of dredged spoil from maintaining navigational waterways. Although those regulations acknowledged the importance of wetlands, the only wetland protections the regulations anticipated was care in discharging dredged spoil from navigational maintenance into wetlands. Indeed, the Corps did not include wetlands in its definitions of navigable waters.⁸⁵ EPA's initial regulatory definition of navigable water did not mention wetlands either.⁸⁶

Section 404 is so associated with wetlands protection today that its original goal to facilitate navigational dredging is forgotten or altogether unknown. The considerable legislative history expressing concern that §404 not interfere with the maintenance of navigation or anchorage and the complete absence of legislative concern that §404 not interfere with agriculture and development, points directly at disposal of spoil from navigational dredging, rather than filling wetlands, as the focus of §404. Even the story told by the Corps' general counsel when the agency began to administer the section to protect wetlands acknowledges that the section was not designed to protect wetlands from landclearing.⁸⁷

While protection of wetlands contributes to the control of pollution in navigable waters and provides other environmental and economic benefits, such a significant expansion of a statute's jurisdiction would not ordinarily be made without notice to both legislative chambers. Yet, there was no such notice in any of the following: the draft legislation; reports of the House Public Works Committee, Senate Public Works Committee, or Conference Committee; debates on the bills in either chamber; or the explanations of the Conference Committee's actions to either the House or the Senate. The omissions in this legislative history raise significant questions on the legitimacy of the entire initial wetlands protection orientation of EPA and the Corps' initial wetlands protection program under §404.

In 1977, Congress enacted a set of "mid-course correction" amendments to the CWA.⁸⁸ One of the chief controversies in the congressional deliberations was over the scope of §404. Farming and development interests, asleep at the switch when Congress enacted §404 in 1972, now launched a coordinated effort to scale back the scope of regulations on filling wetlands. While interest regarding §404 during the enactment of the 1972 legislation was focused entirely on allowing disposal of spoil from dredging rivers and harbors to maintain navigation, interest regarding §404 during the 1977 legislation was focused entirely on the scope of regulation on filling wetlands to promote agriculture and development.⁸⁹ Although efforts for significant reductions in the jurisdiction of the program were unsuccessful, considerable accommodations to agricultural and development interests were adopted,⁹⁰ increasing the section to more than nine times its original length.⁹¹ The depth of attention to §404 in 1977 suggests that if Congress had been aware in 1972 that the section could be used to regulate filling of wetlands, at least some legislative attention would have been devoted to wetlands in 1972.

IV. Administrative Action: Regulatory Definitions of Navigable Waters and Wetlands

A. Navigable Waters

Although EPA implements the CWA §402 permit program for the discharge of pollutants, EPA and the Corps share administration of the CWA §404 program for the discharge of dredged or fill material. Pursuant to §404(a) & (s), the Corps issues §404 permits and enforces against violations of the section. EPA, however, supervises the Corps' conduct of the program. Pursuant to §404(b), EPA issues guidelines that the Corps must follow in deciding whether to issue and how to condition permits; under §404(c), EPA may veto Corps-proposed permits as contrary to the requirements of the CWA; and it is authorized by §404(n) to enforce against the discharge of dredged or fill material without a §404 permit or in violation of the terms of a §404 permit. In §404(g), Congress also gave EPA authority to approve state programs to administer §404 in place of the Corps, except in traditionally navigable waters; and in §404(i), Congress authorized the Agency to withdraw approval if a state no longer meets the requirements for approval. Both EPA and the Corps have promulgated regu-

84. This omission does not affect the reach of the section's jurisdiction, because most fill material is composed wholly or partially of material defined as a pollutant in §502(6); for example, sand or rock. See Miller, *Pollutant*, *supra* note 7, at 10974-77.

85. The Corps' proposed regulations addressed "policy, practice and procedures . . . in connection with [the Corps'] performance of *Federal dredging projects*." 39 Fed. Reg. 6113 (Feb. 19, 1974) (emphasis added). The final regulations addressed those policies, practices, and procedures "in connection with . . . the review of Federal projects performed by the Corps of Engineers which involve the disposal of *dredged material* in navigable water." 39 Fed. Reg. 26635 (July 22, 1974) (emphasis added). Both required the Corps to consider the "effect on wetlands" of proposed projects, 39 Fed. Reg. 6114, 26637, but neither mentioned wetlands outside of that narrow paragraph. These regulations dealt only with "Federal dredging projects." The Corps traditionally had conducted projects to dredge navigable channels and harbors. Private landclearing activities to convert wetlands to other uses are not "Federal dredging projects."

86. 40 C.F.R. §125.1(o), 38 Fed. Reg. 13528, 13529 (May 22, 1973).

87. See Charles D. Abalard & Charles Boru O'Neill, *Wetlands Protection and Section 404 of the Federal Water Pollution Control Amendments of 1972*, 1 Vt. L. Rev. 51 (1975), at 71-74.

88. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 43, 9 ELR 20284 (D.C. Cir. 1978).

89. Pub. L. No. 95-217, 91 Stat. 1556 (1977). See H.R. REP. NO. 95-139 (1977), reprinted in 4 LEGIS. HISTORY, *supra* note 48, at 1195, 1215-20; and additional views of Reps. Robert Edgar and John Myers, *id.* at 1247-51.

90. Pub. L. No. 95-217, §67(a) & (b), 91 Stat. 1556, 1600-06 (1977).

91. Subsections 404(a)-(c) have changed little since their enactment in 1972. All the following subsections were added later. In the 2006 edition of the U.S. Code, §404 occupies nine page-long columns, of which §404(a)-(c) occupies less than one column. See *id.* at 950-54.

latory definitions of navigable waters⁹²; moreover, each has promulgated two definitions of the term, one for use only under §404, and one for use under other programs that the agencies administer.⁹³

Prior to the CWA's enactment, the Corps had promulgated a regulatory definition of navigable waters for use in all of its water-related programs, reflecting the traditional judicial interpretation of "navigable waters." A few weeks prior to the statute's enactment, the Corps amended that definition to reflect extensive, up-to-date research on judicial interpretation of the term: "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."⁹⁴ The Corps continued to use that definition under §404.⁹⁵

EPA's initial definition of navigable waters, adopted for the §402 permit program, expanded it beyond the traditional judicial interpretation to include: (1) tributaries of navigable waters; (2) interstate waters; and (3) intrastate waters (a) used by interstate travelers for recreation and other purposes, (b) from which fish or shellfish are taken and sold in interstate commerce, or (c) utilized for industrial purposes by industries in interstate commerce.⁹⁶ But that definition made no mention of wetlands. Shortly thereafter, EPA promulgated interim final guidelines under §404(b)(1), including a definition of navigable waters that did not mention wetlands or tributaries, but incorporated by reference the Corps' general definition of navigable waters.⁹⁷ EPA's guidelines, however, stated that destruction of wetlands was one of the most egregious results of discharges of dredged and fill material.⁹⁸ Although the interim final nature of the guidelines invited comments and promised revisions if warranted by the comments, EPA did not revise the guidelines for several years. When the Agency did revise, it adopted the definition it had subsequently developed for "waters of the United States" under §402, including tributaries and adding wetlands adjacent to other waters of the United States.⁹⁹

The significant differences between the Corps and EPA's initial definitions of navigable waters were contrary to the interpretive canon that words are interpreted con-

sistently throughout a statute unless the statute explicitly required otherwise. The introductory phrase in CWA §502, "[e]xcept as otherwise specifically provided, when used in this chapter . . ." a term, e.g., "navigable waters," reiterates the canon. Nothing in the CWA specifically provides that the term navigable waters has different meanings in §§402 and 404. The differences between EPA and the Corps' initial regulatory definitions of navigable water reflected the Corps' historical authority to make improvements in aid of navigation, covering traditional Commerce Clause highways of commerce jurisdiction; and EPA's recent mission to reduce water pollution in all of the nation's waters, reaching beyond traditional highways of commerce jurisdiction. The difference led to confusion and conflict within the executive branch and between the executive branch and the interested publics.

Both EPA and the U.S. Department of Justice (DOJ) believed that the Corps' initial definition of navigable waters was too narrow, particularly with regard to its failure to include wetlands, and they unsuccessfully urged the Corps to expand its definition. Environmental advocates won an early case challenging the Corps' regulations as too narrow, particularly because they did not include wetlands.¹⁰⁰ The Corps was dissatisfied with DOJ's representation in *Natural Resources Defense Council v. Callaway* because DOJ agreed with EPA; accordingly, DOJ allowed the Corps to present its views to the district court.¹⁰¹ Finding with little analysis that Congress intended to confer in the CWA "federal jurisdiction over the nations' waters to the maximum extent permissible under the Commerce Clause of the Constitution," the court ordered the Corps to promulgate a more expansive definition.¹⁰² That, plus some nudging by DOJ,¹⁰³ led the Corps to promulgate a definition of navigable waters parallel to EPA's, but including wetlands adjacent to navigable waters.¹⁰⁴ The Corps began a practice of publishing two definitions of navigable waters, one for all of its water-related programs except for §404, and another for §404. It continues that practice today.¹⁰⁵

EPA's initial regulations defined and used "navigable waters" and did not define or use "waters of the United States."¹⁰⁶ In 1980 amendments to its regulations, EPA ceased defining navigable waters or using that term; instead, the Agency defined and used the term waters of the United States.¹⁰⁷ EPA explained it did so "for the same

92. Compare 40 C.F.R. §122.2 (EPA definition), with 33 C.F.R. §328.3 (Corps definition).

93. EPA's 40 C.F.R. §122.2 definition applies to the §402 permit program and its 40 C.F.R. §230.3 definition applies to the §404 permit program. The Corps' 33 C.F.R. §328 definition applies to the §404 permit program and its 33 C.F.R. §329 definition applies to the programs it administers in aid of navigation.

94. Abalard & O'Neill, *supra* note 87, at 65. See also 37 Fed. Reg. 18289 (Sept. 9, 1972).

95. See the Corps' initial regulations under §404 at 33 C.F.R. §209.145(d)(1) (1975), 39 Fed. Reg. 26635, 26637 (July 22, 1974). In that definition of navigable waters, the Corps referenced and incorporated the more-detailed definition it had earlier developed for all its water-related programs, then contained in 33 C.F.R. §209.260. Neither definition mentioned wetlands adjacent to navigable waters or tributaries of navigable waters.

96. 40 C.F.R. §125.1(p) (1974).

97. 40 C.F.R. §230.2(b), 40 Fed. Reg. 41292-93 (Sept. 5, 1975).

98. 40 C.F.R. §320.4-1(a), 40 Fed. Reg. 41292, 41294 (Sept. 5, 1975).

99. 45 Fed. Reg. 85340, 85346 (Dec. 24, 1980).

100. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975). See also Abalard & O'Neill, *supra* note 87, at 63, n.68.

101. *Callaway*, 392 F. Supp. 685.

102. *Id.* at 686.

103. DOJ issued an opinion stating that EPA rather than the Corps had authority to interpret the term navigable waters in §404 because EPA administers the entire CWA, which is premised on navigable waters jurisdiction, while the Corps' role is limited to implementing §404, and the CWA authorizes EPA to oversee the Corps' administration of §404. See 43 U.S. Op. Att'y. Gen. 197 (Sept. 5, 1979).

104. See WANT, *supra* note 16, at §2.02[3].

105. 33 C.F.R. §328 (definition for the §404 program), 33 C.F.R. §329 (definition for other Corps programs).

106. 45 Fed. Reg. 33290, 33298 (May 19, 1980).

107. *Id.* at 33424.

reason that [“the waters of the United States”] is used in the Clean Water Act: the Act covers much more than waters that are traditionally ‘navigable.’”¹⁰⁸ The Corps’ regulations under §404 also switched from defining navigable waters to defining waters of the United States.¹⁰⁹ Neither EPA nor the Corps can amend the CWA to eliminate navigable waters from its text. Perhaps, the agencies hoped that if they began to articulate the jurisdictional basis of the CWA exclusively as waters of the United States rather than navigable waters, the world would follow. In any event, the Supreme Court did not.

As currently framed, EPA’s regulatory definition of the waters of the United States means: (a) traditionally navigable waters; (b) interstate waters, including wetlands; (c) other waters¹¹⁰ whose “use, degradation or destruction would . . . or could affect interstate or foreign commerce”¹¹¹; (d) impoundments of waters identified in (a)-(c); (e) tributaries of waters identified in (a)-(c); (f) the territorial sea; and (g) wetlands adjacent to waters identified in (a)-(f). The definition excludes “waste treatment systems, including treatments ponds or lagoons designed to meet the requirements of the CWA.”¹¹²

This definition was promulgated prior to the Supreme Court’s decisions in *SWANCC* and *Rapanos*. Subsequently, EPA and the Corps eventually issued a guidance document interpreting waters of the United States in light of those decisions, and followed with proposed revisions of the regulatory definitions.¹¹³ The proposed definitions are not identical to the guidance, but are largely based on it. Rather than describing the guidance, this Article analyzes the proposed regulations as the EPA’s latest interpretation of the jurisdictional term. The proposed definitions¹¹⁴ would include (a) traditionally navigable waters; (b) interstate waters, including interstate wetlands; (c) the territorial seas; (d) impoundments of navigable waters identified elsewhere in the definition; (e) tributaries of navigable waters identified in (a) through (c); (f) waters, including wetlands, adja-

cent to waters identified in (a) through (e); and (g) on a case-by-case basis other waters that, alone or aggregated with similarly situated waters, have a “significant nexus” to waters identified elsewhere in the definition. The proposal adds definitions of “adjacent” and “tributary” and provides that wetlands can be tributaries. Finally, EPA provides scientific justifications for its definitions, especially of adjacency and tributaries.¹¹⁵ (EPA’s current and proposed definitions are set forth in Appendix I.)

The proposal makes the most aggressive claim of jurisdiction possible for tributaries and wetlands after the two Supreme Court decisions. But it drops any claim of jurisdiction over discharges to groundwater. And it disclaims jurisdiction over waters because they are used for fishing and recreation or other activities affecting or potentially affecting interstate or foreign commerce. The proposal and its effects will be analyzed as they impact the categories of water discussed below.

B. Wetlands

EPA defines wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”¹¹⁶ The Corps’ definition is similar.¹¹⁷ The EPA/Corps’ proposed amendment of the definition of waters of the United States defines wetlands in the same manner.¹¹⁸ But the Corps and EPA went much further to develop a Wetlands Delineation Manual, detailing the types of soils and vegetation that are typical of saturated soil conditions.¹¹⁹ *Avoyelles Sportsmen’s League, Inc. v. Marsh* provides a good example of a hotly contested delineation.¹²⁰

V. Judicial Interpretation of Navigable Waters Under the CWA

Because courts have had no difficulty in finding that discharges into traditionally navigable water, such as tidal water,¹²¹ the territorial seas,¹²² and major inland waterways¹²³ are within the jurisdiction of the CWA, this Article will not discuss such decisions. Instead, it will focus on areas of controversy. Most decisions interpreting navigable waters have arisen in five contexts: (1) remote or dry tribu-

108. *Id.* at 33298.

109. Compare 33 C.F.R. §209.145(d)(1), 39 Fed. Reg. 26635, 26637 (July 22, 1974), with 33 C.F.R. §328.3 (2013).

110. Including “intrastate lakes, rivers streams (including intermittent streams), mudflats, sandflats, ‘wetlands,’ sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds.”

111. The definition includes the following uses as potentially affecting interstate commerce: (1) use by interstate or foreign travelers for recreational or other activities; (2) harvesting fish or shellfish for sale in interstate or foreign commerce; and (3) use or industrial purposes by industries in interstate or foreign commerce.

112. But “the exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States [] nor resulted from the impoundment of waters of the United States.”

113. The guidance document can be found at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.efm>. The proposed regulation appears at 79 Fed. Reg. 22188, 22267-68 (proposed Apr. 21, 2014).

114. The proposal would amend 10 different EPA and Corps regulations with identical or substantially identical definitions of navigable waters or waters of the United States. See 33 C.F.R. §328.3, 40 C.F.R. §§110.1, 112.2, 116.3, 117.9(i), 122.2, 230.3(s) & (t), 232.2, 300.5, 300 Appendix E to Part 300, 3.2.3 and 401.11, 79 Fed. Reg. 22188, 22262-74. References in this Article are to proposed amendments to 40 C.F.R. §122.2, EPA’s primary definition of waters of the United States, from which most of the other amendments are derived.

115. 79 Fed. Reg. 22188, 22222-52 (proposed Apr. 21, 2014).

116. 40 C.F.R. §122.2 (2013).

117. 33 C.F.R. §328.3.

118. 79 Fed. Reg. 22268(c)(6).

119. For the history of the Wetlands Delineation Manual, see WANT, *supra* note 16, at §4.09.

120. 715 F.2d 897, 13 ELR 20942 (5th Cir. 1983).

121. *United States v. Milner*, 583 F.3d 1174, 39 ELR 20232 (9th Cir. 2009) (expansion of jurisdiction above mean high tide). See also WANT, *supra* note 16, at 2-9 & n.1082; Abalard & O’Neill, *supra* note 87, at 85.

122. *Natural Res. Def. Council v. EPA*, 863 F.2d 1420, 19 ELR 20225 (9th Cir. 1998).

123. *Gibbons v. Ogden*, 9 Wheat. 1 (1866).

taries; (2) wetlands; (3) isolated waters; (4) groundwater; and (5) unitary navigable water.

The tributary and wetlands decisions are often intertwined and are analyzed together because to be within the jurisdiction of the CWA to reach the full extent of Congress, wetlands must be adjacent to navigable waters, often tributaries of traditionally navigable water. The Corps established the adjacency requirement in its regulations.¹²⁴ No court has explicitly suggested a statutory or constitutional requirement of adjacency, apart from this regulation, although the suggestion may be inherent in the *Rapanos* plurality's analysis.¹²⁵ Thus, whether a wetland is within CWA jurisdiction often depends on whether an adjacent tributary is navigable; accordingly, many decisions on the navigability of tributaries are §404 decisions. The lower courts' decisions on whether tributaries and wetlands are within the CWA's jurisdiction usually reflect the latest Supreme Court decision on the subject. This Article, therefore, considers tributary and wetlands decisions together and organizes them by reference to the latest preceding Supreme Court decision on the CWA's navigable water jurisdiction.

Prior to any Supreme Court decision interpreting navigable waters in the CWA, the lower courts followed the admonition of the CWA's legislative history to interpret the jurisdictional reach of the CWA to the extent of Congress' constitutional jurisdiction over waters of the United States. Lower courts interpreted the term broadly to extend to the following: primary tributaries, flowing directly into traditionally navigable waters; very remote tributaries, flowing eventually into traditionally navigable waters through a series of intermediate tributaries; and their adjacent wetlands. These expansive interpretations by the lower courts continued after *Riverside Bayview*,¹²⁶ the Supreme Court's first CWA decision interpreting §404 or navigable waters under the CWA. In that decision, the Court held that wetlands adjacent to tributaries of traditionally navigable waters were within the jurisdiction of the CWA. The decision did not define which tributaries were within the CWA's jurisdiction, but the tributaries at issue were remote and the decision suggested an expansive interpretation of navigable waters.

The Court's next §404 decision, *SWANCC*,¹²⁷ did not deal with wetlands or tributaries, but held that isolated waters were not navigable, signaling that there is a limit to the jurisdictional reach of "navigable waters." After *SWANCC*, a few lower courts began to narrow their interpretations of navigable waters, but only a few. *Rapanos*,¹²⁸ the Court's latest §404 decision, dealt directly with wetlands and tributaries of navigable waters and did so in a restrictive manner. Because the Court could not muster a

majority opinion, *Rapanos*' precedential value is uncertain; as a result, lower courts have spent much of their interpretive energies deciphering how to apply it. Nevertheless, lower courts have narrowed their interpretations of navigable water to varying degrees, sometimes startlingly so.

Courts have fairly consistently held that isolated waters are not navigable. Although courts also have fairly consistently held that groundwater is not navigable, some have held that when a defendant adds pollutants to groundwater that flows into a nearby navigable water or its tributary, the groundwater is navigable, a proposition that has not been retested since *Rapanos* in 2006 and that may have difficulty surviving that decision. EPA's proposed redefinition of waters of the United States excludes groundwater.¹²⁹ EPA's "unitary navigable waters" theory is raised at various points, but is particularly relevant to the Agency's water transfer rule and will be discussed in conjunction with that rule. Water diversions and transfers raise particular problems in the context of navigable waters.¹³⁰

A. Tributaries and Wetlands

The Supreme Court's traditional interpretation of Commerce Clause authority to regulate activities on navigable waters did not include tributaries or wetlands unless they independently meet the criteria for navigable waters. But the Court also has recognized that federally authorized activities on navigable waters, such as flood control, often can be accomplished only if they also take place on non-navigable tributaries to navigable waters. Indeed, the Court recognized the necessity of and constitutional permissibility of a watershed approach to flood control,¹³¹ an extension of Commerce Clause jurisdiction authorized by the Necessary and Proper Clause.¹³² Congress could not perform its Commerce Clause authority to promote and protect interstate and foreign commerce, including waterborne commerce, from flooding without flood control projects on non-navigable tributaries of navigable water.

I. Tributaries

Because the protection of navigable waters from pollution requires the protection of their tributaries from pollution, it is logical that the CWA's definition of navigable waters includes their tributaries. If the CWA does not control the addition of pollutants to the tributaries of a navigable water, pollutants added to those tributaries will flow into and pollute the navigable water, making it impossible for the CWA to control the pollution of traditionally navigable waters. Congress recognized this when it enacted the Refuse Act, prohibiting the deposit of refuse "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or

124. 33 C.F.R. §209(d)(2)(i)(b), 40 Fed. Reg. 31324 (1975).

125. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006).

126. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985).

127. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 31 ELR 20382 (2001).

128. *Rapanos*, 547 U.S. 715.

129. 79 Fed. Reg. 22188, 22268 (proposed Apr. 21, 2014). The proposed rule would be codified at 40 C.F.R. §122.2(b)(5)(vi), *Waters of the United States*.

130. See Miller, *Addition*, *supra* note 4, at 10780-94.

131. *Oklahoma ex rel. Phillips v. Atkinson*, 313 U.S. 508 (1941).

132. U.S. CONST., art. I, §8, cl. 18.

be washed into such navigable water.”¹³³ It also forbade the deposit of refuse on the banks of navigable waters or their tributaries from which it “is liable to be washed into” navigable waters.

The drafters of the CWA were equally aware of the need to make tributaries of navigable waters subject to CWA jurisdiction. The Senate bill did so explicitly. Although the final statute does not mention tributaries in its definition of navigable waters as the waters of the United States, that definition is at least expansive enough to cover tributaries. The congressional explanations of “navigable waters” accompanying the enactment of the CWA describe it as reaching far beyond its traditional meaning, to reach the limits of Congress’ jurisdiction over water, and many specify that it includes tributaries.

Assuming that tributaries of navigable waters are within the jurisdiction of the CWA, however, the question becomes *which* tributaries? The primary tributaries, the creeks that flow into the navigable river? The secondary tributaries, the streams that flow into the creeks? The tertiary tributaries? The trickles of water that eventually flow into the most remote stream, but only after rainfall events? Does it make a difference whether an identifiable drop of water from the trickle eventually flows into navigable water or if an identifiable molecule of a pollutant added to that trickle does? Justice Antonin Scalia warns that expanding the interpretation of navigable waters to include those trickles may “engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally whenever rain falls.”¹³⁴ He is correct in asserting that this is not what Congress intended. On the other hand, as he acknowledges, Congress did not intend to confine CWA jurisdiction to traditionally navigable waters. Alas, legal decisions are often exercises in line-drawing where there are no obvious places to draw lines.

EPA’s proposed amendments to its definition of “waters of the United States” include a definition of “tributary” as “a water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow, either indirectly or through another water,” to a water otherwise defined as “a water of the United States.” The Agency’s proposed definition specifies that wetlands, lakes, and ponds can be tributaries; and that a tributary does not lose its status as such because of natural or man-induced interruptions, such as underground flows, impoundments, or canals.¹³⁵ The areas encompassed in the proposed definition seem to stop short of Justice Scalia’s parade of horrors, but it does not tell us exactly how far short. How much of a bank or bed is necessary? EPA’s failure to provide a complete

and succinct answer to Justice Scalia’s concerns is a disappointing aspect of its rulemaking to date.

2. Wetlands

The traditional definition of navigable waters did not include wetlands as such. The Corps’ first regulatory definition of navigable waters did not include wetlands,¹³⁶ nor did EPA’s.¹³⁷ After *Natural Resources Defense Council v. Callaway*¹³⁸ overturned the Corps’ regulations as too narrow, the Corps promulgated new regulations substantially expanding its definition of navigable waters, most notably including wetlands adjacent to coastal or inland navigable waters,¹³⁹ and EPA followed suit.

3. Pre-Riverside Bayview Decisions

Twenty-nine of the 108 (27%) lower court decisions interpreting navigable waters under the CWA in the context of tributaries or wetlands were decided before the first Supreme Court decision on §404 and wetlands, *Riverside Bayview*,¹⁴⁰ issued in 1985. All but one of those 29 decisions (that is, 97%) decided that the waters at issue were navigable; the one negative decision was based on unusual equities rather than reflecting a narrow interpretation of navigable waters.¹⁴¹

One of the decisions was in a challenge by environmental groups to the Corps’ initial regulations claiming jurisdiction under §404 only for discharges to traditionally navigable waters. The court issued a terse decision ordering the Corps to promulgate a more expansive definition of navigable waters.¹⁴² Once the Corps did so, Wyoming and Puerto Rico unsuccessfully challenged its more expansive regulations as intruding on their jurisdictions over intrastate or intra-commonwealth waters.¹⁴³

a. Tributaries

No decisions during this period held that a stream, lake, or other tributary was not navigable. Six of the deci-

133. 33 U.S.C. §407. Discharge of refuse into a tributary of navigable water violated the statute even in the absence of proof that the refuse eventually flowed into navigable waters, when it was likely to have done so. See *United States v. American Cyanamid Co.*, 480 F.2d 1132, 3 ELR 20656 (2d Cir. 1973).

134. *Rapanos v. United States*, 547 U.S. 715, 722, 36 ELR 20116 (2006).

135. 79 Fed. Reg. 22268 (to be codified at 40 C.F.R. §122.2(c)(5)).

136. 33 C.F.R. §209.102(d)(1) (1975).

137. 40 C.F.R. §125.1(p) (1975).

138. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

139. 33 C.F.R. §209.120(d)(2)(b) & (h), 40 Fed. Reg. 31320, 31324 (July 25, 1975).

140. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985). See tbls. A & B at the end of the Article. In using tbl. B to confirm this and other calculations in the text or to make your own calculations, beware that the groupings of lower court decisions between Supreme Court decisions include more than just tributary and wetlands cases. For instance, the pre-*Riverside Bayview* groupings of circuit and district court decisions include 33 decisions, of which 29 are tributary or wetlands cases.

141. See tbl. B. The one exception is *United States v. City of Fort Pierre*, 747 F.2d 464, 15 ELR 20177 (8th Cir. 1984). The Corps’ own dredging and disposal of dredge spoil created a wetland on private property, where there had been no wetland before. The court viewed it as inequitable that the Corps could expand its jurisdiction by its own activities.

142. *Callaway*, 392 F. Supp. 685.

143. *Wyoming v. Hoffman*, 437 F. Supp. 114, 8 ELR 20001 (D. Wyo. 1977); *Commonwealth of Puerto Rico v. Alexander*, 438 F. Supp. 90, 7 ELR 20751 (D.D.C. 1977).

sions held that tributaries were navigable. Three of those decisions held that discharges to small streams, entering navigable water only after flowing through four or five intermediaries, were discharges to waters of the United States.¹⁴⁴ A fourth held that discharges to a normally dry arroyo, flowing eventually to navigable waters only after heavy rainfall, were to waters of the United States.¹⁴⁵ Two more held that discharge to canals leading to navigable water were to waters of the United States.¹⁴⁶ Although a 2,000- to 3,000-acre lake was not connected to other navigable water, the U.S. Court of Appeals for the Seventh Circuit held it to be navigable because interstate travelers used it for recreational boating.¹⁴⁷ Finally, another decision held that a small stream that began and ended in a single county was a water of the United States because it was used to produce agricultural crops sold in interstate commerce.¹⁴⁸

b. Wetlands

Most of the decisions during this period were in §404 cases where landowners argued that their wetlands were not navigable. Only one decision focused solely (and unsuccessfully) on whether the landowner's property factually met EPA and the Corps' definition of wetlands.¹⁴⁹ The remaining decisions determined whether wetlands were sufficiently connected to navigable waters or their tributaries to be waters of the United States. Nine of them held that various tidal wetlands were navigable.¹⁵⁰ Three recited that the wetland at issue was navigable because it was adjacent to navigable water, but did not explain what they meant by "adjacent."¹⁵¹ Others defined "adjacent" variously as bordering¹⁵²; having a hydrological connection¹⁵³; being in close proximity¹⁵⁴;

being contiguous¹⁵⁵; or neighboring.¹⁵⁶ Some held that a wetland was navigable because it was adjacent to navigable water even though it was never flooded by that navigable water¹⁵⁷ or was separated from it by a 30-foot-wide berm¹⁵⁸ or another tract of land.¹⁵⁹ They held that navigable waters could include an artificial wetland.¹⁶⁰

The government was a party to the case in all but two of these 29 decisions.¹⁶¹ The decisions used 10 interpretive devices: precedent (26 decisions); broad interpretation to serve statutory purposes (19 decisions); legislative history (15 decisions); deference (4 decisions); reading harmoniously with other statutes (4 decisions); plain meaning (3 decisions); interpreting the statute to avoid absurd results (2 decisions); structure of the statute (1 decision); give meaning to every word (1 decision); the exception proves the rule (1 decision); and equity (1 decision)—for an average of 2.7 interpretive devices per decision. Of the 25 decisions citing precedent,¹⁶² 12 cited *United States v. Ashland Oil & Transportation Co.*¹⁶³ and 10 cited *United States v. Holland*,¹⁶⁴ the first court of appeals and district court decisions, respectively, interpreting navigable water under the CWA. Many of the decisions not directly citing legislative history did so indirectly by citing *Ashland Oil* or *Holland*, both of which included an analysis of the pertinent legislative history. The decisions cited an average of 3.5 precedents.

None of these decisions suggested that courts were troubled by interpreting navigable water expansively to include even waters that could not float a boat, despite Congress' use of the term navigable waters as a jurisdictional phrase. The lower courts considered and took at face value the legislative history indicating that Congress was exercising its full constitutional authority to protect the nation's waters from pollution, and did not question the constitutionality of that authority.

4. Riverside Bayview and Subsequent Decisions

The Supreme Court's first decision interpreting navigable waters under the CWA was *Riverside Bayview*,¹⁶⁵ in which the Corps sought an injunction against defendants filling wetlands, without a §404 permit, to support the subsequent construction of a housing development. The U.S. Court of Appeals for the Sixth Circuit narrowly interpreted the Corps' regulations, defining navigable water to include only wetlands adjacent to navigable waters and periodically

144. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 10 ELR 20184 (10th Cir. 1980); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 4 ELR 20784 (6th Cir. 1974); *Sun Enters., Inc. v. Train*, 394 F. Supp. 211 (C.D.N.Y. 1975).

145. *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1185, 5 ELR 20308 (D. Ariz. 1975).

146. *United States v. St. Bernard Parish*, 589 F. Supp. 617, 14 ELR 20794 (E.D. La. 1984); *Bayou Des Familles Dev. Corp. v. U.S. Army Corps of Eng'rs*, 541 F. Supp. 1025, 13 ELR 20055 (E.D. La. 1982).

147. *United States v. Byrd*, 609 F.2d 1204, 9 ELR 20757 (7th Cir. 1979).

148. *United States v. Earth Sci., Inc.*, 599 F.2d 368, 9 ELR 20542 (10th Cir. 1979).

149. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 13 ELR 20942 (5th Cir. 1983).

150. *Leslie Salt Co. v. Froehle*, 578 F.2d 742, 8 ELR 20480 (9th Cir. 1978); *United States v. Ciampitti*, 583 F. Supp. 483 (D.N.J. 1984); *United States v. Robinson*, 570 F. Supp. 1157, 14 ELR 20056 (M.D. Fla. 1983); *Bayou Des Familles Dev. Corp. v. U.S. Army Corps of Eng'rs*, 541 F. Supp. 1025, 13 ELR 20055 (E.D. La. 1982); *United States v. Bradshaw*, 541 F. Supp. 880, 12 ELR 20629 (D. Md. 1981); *United States v. Weisman*, 489 F. Supp. 1331, 10 ELR 20698 (M.D. Fla. 1980); *Conservation Council of N.C. v. Costanzo*, 398 F. Supp. 653, 5 ELR 20666 (E.D.N.C. 1975); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975); *United States v. Holland*, 373 F. Supp. 665, 4 ELR 20710 (M.D. Fla. 1974).

151. *Robinson*, 570 F. Supp. 1157; *Weisman*, 489 F. Supp. 1331; *American Dredging Corp. v. Dutchyshyn*, 480 F. Supp. 957 (E.D. Pa. 1979).

152. *Byrd*, 609 F.2d 1204; *Bradshaw*, 541 F. Supp. 880.

153. *United States v. Lee Wood Contractors, Inc.*, 529 F. Supp. 119, 12 ELR 20421 (E.D. Mich. 1981).

154. *United States v. Lambert*, 589 F. Supp. 366, 14 ELR 20588 (D. Md. 1984).

155. *Byrd*, 609 F.2d 1204; *Lee Wood*, 529 F. Supp. 119.

156. *Lee Wood*, 529 F. Supp. 119.

157. *Byrd*, 609 F.2d 1204.

158. *United States v. Tilton*, 705 F.2d 429, 13 ELR 20583 (11th Cir. 1983).

159. *Lee Wood*, 529 F. Supp. 119.

160. *Track 12, Inc. v. District Eng'r*, 618 F. Supp. 448, 16 ELR 20163 (D. Minn. 1985).

161. In some of these decisions, an official of the United States is a named party; for example, in *Avoyelles Sportsmen's League, Inc. v. Marsh*, John Marsh was the Secretary of the Army.

162. See tbl. B.

163. 504 F.2d 1317, 4 ELR 20784 (6th Cir. 1974).

164. 373 F. Supp. 665, 4 ELR 20710 (M.D. Fla. 1974).

165. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985).

inundated or flooded by those adjacent waters.¹⁶⁶ Its purpose in interpreting the Corps' regulations narrowly was to avoid the question of whether §404 constituted an unconstitutional taking of the wetlands. In a unanimous opinion written by Justice Byron White, the Supreme Court reversed. The Court began its analysis by making clear there was no constitutional issue justifying a narrow interpretation of the regulations.¹⁶⁷ That decided, the Court had no trouble finding that the Corps' regulations covered the wetlands at issue.¹⁶⁸

The Court then addressed whether §404 authorized the Corps to regulate filling wetlands "adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'"¹⁶⁹ The Court specifically noted that it was not addressing the filling of nonadjacent wetlands,¹⁷⁰ and then commenced a quasi-*Chevron*¹⁷¹ analysis to determine whether the Corps' interpretation of §404 was subject to deference. Skipping step one of the *Chevron* analysis—determining whether the statute is ambiguous—the Court moved directly to *Chevron* step two—determining whether the agency's interpretation was a reasonable one. The Court began its analysis by observing that although "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters,'" the interpretation is "reasonable because there is no fine line dividing the waters of a navigable body of water and the waters in an adjacent wetland, both are intermixed parts of a continuum in the hydrological cycle."¹⁷² The Court concluded that a broad interpretation of navigable waters was supported by the CWA's broad definition of navigable waters and the unanimous legislative history that the term be interpreted as broadly as constitutionally possible.¹⁷³

Finally, the Court concluded that Congress' acquiescence in the Corps' broad interpretation of navigable waters during the 1977 amendments to the CWA supported the reasonableness of the Corps' interpretation. Although the Court was mindful that subsequent legislative history or legislative failure to act are not ordinarily helpful in interpreting earlier legislation, it concluded that the unsuccessful efforts in Congress to restrict the Corps' jurisdiction over wetlands in 1977 were pertinent because even the proponents of restricting that jurisdiction would not have divested the Corps of jurisdiction over wetlands adjacent

to navigable waters, the very waters at issue in *Riverside Bayview*. Thus, the Congress that amended §404 in 1977 specifically intended that §404 protect such wetlands, even if the Congress that enacted §404 in 1972 had no articulated intent with regard to them.

The Court's recognition that Congress "chose to define the waters covered by the Act broadly,"¹⁷⁴ and the Court's deference to the interpretations of navigable waters by the Corps and EPA¹⁷⁵ were taken by lower courts as signals to continue construing navigable waters broadly in the context of tributaries and wetlands. Nineteen of the 23 (83%) lower court decisions interpreting navigable waters in the context of tributaries or wetlands after *Riverside Bayview*, and prior to the next Supreme Court decision interpreting navigable waters, held that the waters at issue were navigable.¹⁷⁶ The decisions holding the waters at issue not to be navigable did so primarily because the plaintiff did not carry its factual burden of proof, rather than because the courts narrowly interpreted the term navigable waters.¹⁷⁷

a. Tributaries

Nine of the decisions considered only whether tributaries were navigable. Two of these held that creeks and bayous flowing directly into ocean bays or sounds were navigable¹⁷⁸ and one held that an unnamed tributary to interstate waters was navigable.¹⁷⁹ Two held that discharges to intermittently flowing ditches eventually connecting with navigable water were navigable,¹⁸⁰ but one held that a dry arroyo was not navigable, absent proof of a nexus to interstate commerce or tributaries to interstate waters.¹⁸¹ Three held that discharges to or subsequently flowing through ditches, canals, or other man-made waterways were discharges to navigable waters.¹⁸² In holding that a creek was navigable, one court commented that "virtually any surface water, navigable or not" is within the jurisdiction of the CWA.¹⁸³

b. Wetlands

Three decisions upheld the government's delineation of wetlands,¹⁸⁴ two of them deferring to the agency's exper-

166. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 14 ELR 20365 (6th Cir. 1984).

167. *Riverside Bayview*, 474 U.S. at 127-28. Just because the Corps may deny a §404 permit does not mean that it will do so. If the Corps does deny a fill permit, there is no taking of the property unless it is deprived of all economic value. Even if there is a taking, it is not unconstitutional unless no just compensation is given.

168. *Id.* at 129-30.

169. *Id.* at 131.

170. *Id.* at 131, n.8.

171. *Id.* at 131. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984).

172. *Riverside Bayview*, 474 U.S. at 132. The Court also deferred to the expertise of the Corps and EPA in dealing with the hydrological cycle, noting that the agencies were more capable than courts in determining whether there are lines between particular navigable waters and their adjacent wetlands. *Id.* at 134.

173. *Id.* at 133-34.

174. *Id.* at 133.

175. *Id.* at 131-34.

176. See tbl. B.

177. *Id.*

178. *United States v. Gulf Park Water Co., Inc.*, 972 F. Supp. 1056 (S.D. Miss. 1997) (bayou to Mississippi Sound); *United States v. Zanger*, 767 F. Supp. 1030, 22 ELR 20231 (N.D. Cal. 1991) (creek to San Francisco Bay).

179. *Georgia v. City of East Ridge, Tenn.*, 949 F. Supp. 1571, 27 ELR 20782 (N.D. Ga. 1996) (sewer overflow to unnamed tributary to interstate creek).

180. *Driscoll v. Adams*, 181 F.3d 1285, 29 ELR 21387 (11th Cir. 1999); *United States v. Eidson*, 108 F.3d 1336, 27 ELR 20853 (11th Cir. 1997).

181. *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. 1995).

182. *Driscoll*, 181 F.3d 1285; *Eidson*, 108 F.3d 1336; *United States v. TGR Corp.*, 171 F.3d 108, 29 ELR 21059 (2d Cir. 1999) (channelized natural brook, in places carried below ground in pipes).

183. *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 26 ELR 20639 (D. Mont. 1996).

184. *Golden Gate Audubon Soc'y, Inc. v. U.S. Army Corps of Eng'rs*, 796 F. Supp. 1306, 23 ELR 20267 (N.D. Cal. 1992); *United States v. Malibu*

tise.¹⁸⁵ Another court, however, held the wetlands at issue were not within the Corps' jurisdiction, because it had failed to carry the burden of proof on delineation.¹⁸⁶ The remaining decisions considered mixed issues of whether tributaries and wetlands were navigable. Most considered whether wetlands were adjacent to navigable water. Three held that wetlands were adjacent to a tidal lake, a tidal pool, or other navigable water.¹⁸⁷ One held that adjacent meant "bordering, contiguous, or neighboring" and that a wetland was adjacent to navigable water, although one-half mile away, because there was a groundwater connection and a surface water connection during hurricanes.¹⁸⁸ Three held that isolated wetlands were not within the Corps' jurisdiction.¹⁸⁹

The government was a party in all but four of the 22 decisions on tributaries and wetlands during this period. The decisions used a total of eight interpretive devices: precedent (applied in 19 decisions); broad interpretation to serve legislative purpose (8 decisions); deference (5 decisions); structure of the statute (2 decisions); interpret statutory exemptions narrowly (2 decisions); statutory history (1 decision); avoid constitutional issues (1 decision); plain meaning (1 decision); and legislative history (1 decision). The decisions used an average of 1.8 interpretive devices. Of the 19 decisions citing precedent, nine used *Riverside Bayview*¹⁹⁰ and three used *Ashland Oil*.¹⁹¹

What differences are observable in lower court decisions before and after *Riverside Bayview*? While the pre-*Riverside Bayview* set of decisions on tributaries and wetlands used a total of 10 and an average of 2.8 interpretive devices, the set of decisions immediately after *Riverside Bayview* used a total of eight and an average of 1.8 devices to interpret navigable waters. While the earlier set of decisions used an average of 3.4 precedents, the latter set used 1.8. While in the earlier set of decisions, 15 cited legislative history, only one cited it in the latter set of decisions. This diminution in the depth of the courts' analyses of the meaning of "navigable waters," including their almost complete disregard of legislative history, suggests that after *Riverside Bayview* the "navigable waters" status of tributaries of navigable waters, even remote

tributaries, and of wetlands adjacent to tributaries had become routine and required little analysis.

5. SWANCC and Subsequent Decisions

The Supreme Court next interpreted the CWA's "navigable waters" term in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC).¹⁹² In that case, local governments challenged the Corps' denial of a \$404 permit to fill a series of ponds remaining from a sand and gravel mining operation, to construct a municipal landfill. The Corps had found the 31 acres of relatively shallow ponds to be navigable under its Migratory Bird Rule, which extended its \$404 jurisdiction to intrastate waters used as habitat by birds protected by migratory bird treaties to which the United States is a party or that migrated across state lines.¹⁹³ The five-to-four majority opinion, written by Chief Justice William Rehnquist, held that isolated waters were not subject to the Corps' jurisdiction. The majority first emphasized that *Riverside Bayview* addressed wetlands adjacent to navigable water rather than ponds wholly isolated from navigable water. It noted that the *Riverside Bayview* opinion specifically disclaimed addressing waters not adjacent to navigable waters.¹⁹⁴ While noting that *Riverside Bayview* had commented "the word 'navigable' in the statute was of 'limited import,'" the SWANCC majority retorted that the definition of "navigable waters" as the "waters of the United States," does not "constitute a basis for reading the term 'navigable waters' out of the statute."¹⁹⁵

The Court then denied *Chevron* deference to the Corps' regulations and interpretation because the Corps' interpretation had been inconsistent over time: first adopting the traditional interpretation of navigable waters in 1974, then adopting a more expansive interpretation the next year,¹⁹⁶ and finally adopting the Migratory Bird Rule in 1986.¹⁹⁷ The Court noted that deference is particularly inappropriate when an agency interpretation extends jurisdiction to the farthest reaches of the Commerce Clause, and alters the traditional federal/state balance that leaves regulation of land use to state and local authorities.¹⁹⁸ The Court also

192. 531 U.S. 159, 31 ELR 20382 (2001).

193. 531 U.S. at 164.

194. SWANCC, 531 U.S. at 167-68.

195. *Id.* at 172 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 16 ELR 20086 (1985)). Justice Scalia commented similarly in his dissent to *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 718-19, 25 ELR 21194 (1995) (Scalia, J., dissenting), that "take" in the Endangered Species Act, could not be deprived of its traditional meaning with regard to wildlife by an expansive interpretation of "harm" in the statutory definition of "take."

196. The Court failed to note that, as discussed above, a court ordered the Corps to expand its interpretation of navigable waters, or that EPA adopted a much broader definition than the Corps from the outset.

197. SWANCC, 531 U.S. at 172-74. This appears to be contrary to *Riverside Bayview*, which had given deference to the Corps' second interpretation, although that interpretation was far more expansive than its first interpretation. At the time, the Corps' 1986 migratory bird amendment to the regulatory definition had yet to be promulgated and accordingly was not considered in *Riverside Bayview*.

198. Query whether the CWA significantly interferes with state land use decisions? If states want to control CWA permitting decisions, they may administer the \$402 program and much of the \$404 program. The \$402 program

Beach, Inc., 711 F. Supp. 1301, 19 ELR 21247 (D.N.J. 1989); *United States v. Larkins*, 657 F. Supp. 76, 17 ELR 20783 (W.D. Ky. 1987).

185. *Golden Gate*, 796 F. Supp. 1306; *Larkins*, 657 F. Supp. 76.

186. In *United States v. Hallmark Constr. Co.*, 30 F. Supp. 2d 1033, 28 ELR 21438 (N.D. Ill. 1998), the court characterized the wetland as isolated, but appeared willing to consider the Corps' argument that the pond was within its jurisdiction because it was used by migratory birds. However, the Corps did not carry its burden of proof that the pond actually was used by migratory birds.

187. *Hanson v. United States*, 710 F. Supp. 1105, 19 ELR 21074 (E.D. Tex. 1989) (tidal lake); *Malibu Beach*, 711 F. Supp. 1301 (tidal pool); *Conant v. United States*, 786 F.2d 1008, 16 ELR 20453 (11th Cir. 1986) (unspecified navigable water).

188. *United States v. Banks*, 873 F. Supp. 650, 25 ELR 20776 (S.D. Fla. 1995).

189. *Hoffman Homes, Inc. v. Administrator, EPA*, 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993); *United States v. Wilson*, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 22 ELR 21337 (1st Cir. 1992).

190. See tbl. B.

191. *Id.*

noted that the Commerce Clause did not grant unlimited jurisdiction to Congress, citing *United States v. Morrison*¹⁹⁹ and *United States v. Lopez*,²⁰⁰ both decided after *Riverside Bayview*. It rejected the relevance of the same legislative history of the CWA 1977 Amendments that was cited in *Riverside Bayview* in support of that decision. While that legislative history may not have been relevant to the Migratory Bird Rule, promulgated a decade later, the Court rejected it on a far broader basis.²⁰¹

The *SWANCC* dissent by Justice John Paul Stevens, joined by three other Justices, reads as if they had used a different translation of *Riverside Bayview* than did the majority. The dissent even interpreted different sections of the statute: Whereas the majority interpreted navigable waters in §404, the dissent interpreted waters of the United States in §502(7).²⁰² The dissent did not characterize the wetland at issue in the Court's earlier *Riverside Bayview* decision as adjacent to navigable waters, but instead characterized it as "not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water."²⁰³ The dissent also laid out the argument that the Migratory Bird Rule was well within Commerce Clause jurisdiction, because of the aggregate effects of piecemeal elimination of habitats essential to the multibillion-dollar recreational commerce connected to bird-watching and fishing.²⁰⁴

SWANCC did not discuss tributaries or wetlands, but merely held that isolated ponds were not navigable waters. Nevertheless, the decision's refusal to defer to the Corps' interpretation of the statute²⁰⁵ and its observation that the CWA's broad definition of navigable waters did not read "the term 'navigable waters' out of the statute"²⁰⁶ signaled to lower courts that there are limits to which tributaries to

navigable waters and their adjacent wetlands are navigable. The Court stated: "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."²⁰⁷

In response to the Court's first restrictive opinion on the CWA's navigable waters jurisdiction, 22 of 24 lower court decisions (86%) held the waters at issue to be navigable,²⁰⁸ a slight increase over the 83% decided between *Riverside Bayview* and *SWANCC*. Some lower courts interpreted *SWANCC* as narrowly as they had interpreted navigable waters broadly, reading *SWANCC* only to hold that isolated waters are outside the CWA's jurisdiction.²⁰⁹ Other courts, however, took *SWANCC*'s reading of *Riverside Bayview* to limit the CWA's jurisdiction to waters that are navigable in fact or are adjacent to navigable-in-fact open waters.²¹⁰ Others wrestled with the meaning of adjacency, noting that the Supreme Court did not define it in either of its §404 decisions.²¹¹ One district court sought to reconcile the Court's two rulings by holding that when "a drop of rainwater landing in the [wetlands] is certain to intermingle with water from the [adjacent navigable river]," the relationship is direct and therefore a "significant nexus."²¹² *SWANCC*, however, provided more conservative courts with the opportunity to fashion narrower interpretations of "navigable waters."

a. Tributaries

Narrower interpretations of navigable waters by lower courts were particularly pronounced with regard to tributaries. In three of these decisions, the courts held tributaries not to be within navigable waters jurisdiction,²¹³ based on facts very similar to both earlier and contemporary decisions that had held tributaries to be navigable. In a fourth decision, the court held the tributary at issue to be navigable, but rejected the government's expansive interpretation of navigable waters.²¹⁴

does not involve land use. The permit applicant can make whatever use of the land it wants, as long as it treats resulting water pollution to federal and state standards. The §404 permit program does not prohibit particular uses of land, but it does prevent filling wetlands for any use without a permit. If, as Justice Scalia claims, the Corps interprets §404 to include "ripples of sand in the desert . . . engulf[ing] entire cities and immense arid wastelands," see *Rapanos v. United States*, 547 U.S. 715, 722, 36 ELR 20116 (2006), then §404's interference with state land use decisions could be real. However, as this Article discusses, that description is overblown.

199. 529 U.S. 598 (2000).

200. 514 U.S. 549 (1995). In the course of invalidating a federal statute prohibiting possession of firearms near a school, the Court explained that the Commerce Clause authorized only federal statutes regulating: (1) highways of interstate or foreign commerce; (2) instrumentalities of interstate commerce; or (3) activities having a substantial effect on interstate commerce. In a §4 decision, it held that the effect on interstate commerce of educational disruption caused by gun-related violence near schools was too tangential to support Commerce Clause jurisdiction.

201. *SWANCC*, 531 U.S. at 169-71. The Court generally disavowed the relevance of failed amendments in interpreting a statute, especially failed amendments in a later Congress. This was only part of a broader attack on the relevance and reliability of legislative history, which has suffered a decline in use since the enactment of the CWA. See Miller, *Pollutant*, *supra* note 7, at 967-68.

202. Compare the majority's statement of the case, "We are asked to decide whether the provision of §404(a) may be fairly extended to the isolated ponds," *SWANCC*, 531 U.S. at 161, with the dissent's: "[It] is the definition [§502(7)] that is the appropriate focus of our attention," *SWANCC*, 531 U.S. at 182 (Stevens, J., dissenting).

203. *SWANCC*, 531 U.S. at 175.

204. *Id.* at 192-97.

205. *Id.* at 168-69.

206. *Id.* at 172.

207. *Id.* (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)).

208. See tbl. B.

209. *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654 (E.D.N.C. 2003). The U.S. Court of Appeals for the Ninth Circuit in *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001), agreed that an isolated vernal pool was not navigable under *SWANCC*, but its other decisions cited in this segment of the Article continue with an expansive interpretation of navigable waters.

210. In re Needham, 354 F.3d 340 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001); *FD & P Enters., Inc. v. U.S. Army Corps. of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003); *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002).

211. *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003); *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843, 31 ELR 20750 (D. Md. 2001).

212. *United States v. Rueth Dev. Co.*, 189 F. Supp. 2d 874, 877-78 (N.D. Ind. 2002), *aff'd*, 335 F.3d 598 (7th Cir. 2003).

213. *Rice*, 250 F.3d 264; *RGM Corp.*, 222 F. Supp. 2d 780; *United States v. Newdunn Assocs., LLC*, 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002). The significance of the two district court decisions, by the same judge, is undercut by their invective against the Corps.

214. In re Needham, 354 F.3d 340.

In *Rice v. Harken Exploration Co.*,²¹⁵ one of the three narrow decisions, the plaintiff brought suit under the citizen suit provision of the Oil Pollution Act (OPA),²¹⁶ which prohibits the discharge of oil into navigable waters. He alleged that the defendant discharged oil into intermittent streams leading to navigable waters. But there was nothing in the record, the U.S. Court of Appeals for the Fifth Circuit concluded, “that could convince a reasonable trier of fact that . . . any of the . . . intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA.”²¹⁷ While this appears to be merely a case in which the plaintiff failed to carry his burden of proof that the intermittent streams at issue ever reached navigable water, the Fifth Circuit stated with regard to tributaries that “a body of water is protected under the Act only if it is actually navigable or is *adjacent* to an open body of navigable water.”²¹⁸ This is a narrow interpretation of navigable waters with regard to wetlands, but it is untenable with regard to tributaries, as discussed below. Because the court searched the record for evidence that the “intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA,”²¹⁹ its use of “adjacent to . . . navigable water” may not have been an accurate description of the Fifth Circuit’s perception of how tributaries must be related to navigable waters to be within the jurisdiction of the statute. Unfortunately, the court repeated this misleading adjacency concept in a later decision.

In *re Needham*²²⁰ was an appeal from the denial by a bankruptcy court of the U.S. claim for its costs of remediating an oil spill. The government argued that navigable waters included all tributaries “that have any hydrological connection with ‘navigable waters.’”²²¹ In the Fifth Circuit’s view, however, CWA jurisdiction did not extend “over ‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters,” citing its *Rice* decision.²²² The government “may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* ‘a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water,’”²²³ the court said. It continued: “[T]he proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water.”²²⁴ Because “Bayou Folse flows directly into the Company Canal,” which is navigable in fact, the court allowed the govern-

ment’s claim.²²⁵ Thus, the Fifth Circuit may be using “adjacent” to mean “flowing into,” at least for tributaries.

Determining whether tributaries are navigable waters by asking if they are adjacent to navigable-in-fact or open water is misdirected for several reasons. First, the focus on adjacency originates in the Corps’ §404 regulations, which use adjacency only to claim jurisdiction over wetlands adjacent to navigable waters, not over tributaries adjacent to navigable waters.²²⁶ Second, the Supreme Court in *Riverside Bayview* held that only wetlands adjacent to navigable waters were subject to §404’s jurisdiction, not that tributaries adjacent to navigable waters were subject to §402’s jurisdiction.²²⁷ Third, “adjacent” means “having a common border” or “abutting,”²²⁸ which may describe the relationship between wetlands and navigable waters, such as a river, for wetlands are often next to rivers. Non-wetland tributaries of rivers, such as creeks and streams, however, cannot be adjacent to those rivers because those tributaries do not flow *next to*, but rather *into* rivers.

Most lower courts continued to interpret the term navigable waters with regard to tributaries and wetlands as if *SWANCC* had never happened. Courts interpreted navigable waters to include the following: primary tributaries to navigable waters²²⁹; remote tributaries to navigable waters²³⁰; intermittent flows²³¹; man-made or man-improved flows, including irrigation canals²³²; ditches²³³; and waters channelled²³⁴ or pumped²³⁵ through pipes and culverts under roads.

b. Wetlands

Lower court wetlands decisions were largely confined to decisions regarding tributaries. Decisions held that wetlands adjacent to both primary and remote tributaries were navigable waters.²³⁶ One court held a wetland to be adjacent to navigable water despite being separated from it by a

215. 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001). This opinion does not interpret navigable waters under the CWA; instead, it interprets the same jurisdictional phrase in the Oil Pollution Act. That statute and §311 of the CWA, 33 U.S.C. §1321, both address oil spills into the “navigable waters” and are intimately intertwined.

216. 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001.

217. *Rice*, 250 F.3d at 271.

218. *Id.* at 270 (emphasis added).

219. *Id.* at 271.

220. 354 F.3d 340 (5th Cir. 2003).

221. *Id.* at 345.

222. *Id.*

223. *Id.* at 345-46.

224. *Id.* at 345.

225. *Id.* at 343.

226. 33 C.F.R. §328.3.

227. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 16 ELR 20086 (1985).

228. WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 11 (1967).

229. *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006); *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001).

230. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (9th Cir. 2004); *United States v. Adams Bros. Farming, Inc.*, 369 F. Supp. 2d 1166 (C.D. Cal. 2003); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001); *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001).

231. *California Sportfishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002).

232. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001); *Adams Bros.*, 369 F. Supp. 2d 1166; *Idaho Rural Council*, 143 F. Supp. 2d 1169.

233. *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

234. *Treacy*, 344 F.3d 407; *Adams Bros.*, 369 F. Supp. 2d 1166; *California Sportfishing*, 209 F. Supp. 2d 1059.

235. *United States v. Adams Bros. Farming, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002).

236. *Treacy*, 344 F.3d 407; *Deaton*, 332 F.3d 698; *North Carolina Shellfish Growers Ass’n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654 (E.D.N.C. 2003); *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001) (the discharge was 240 miles from traditionally navigable waters).

70-foot-wide berm.²³⁷ The government was a party in only 14 of the 22 cases interpreting navigable waters in the context of tributaries and wetlands. The increased proportion of citizen suits did not affect their outcomes, however, as all three decisions interpreting navigable waters narrowly were in cases in which the government was a party.²³⁸ The decisions used 20 interpretive devices: precedent (applied in 22 decisions); broad interpretation (6 decisions); legislative history (6 decisions); deference (6 decisions); plain meaning (5 decisions); finality (4 decisions); avoid constitutional issues (4 decisions); structure of statute (3 decisions); lenity (1 decision); and read harmoniously with other statutes (1 decision). The decisions used an average of 2.6 interpretive devices. All 22 decisions cited precedent; 20 cited *SWANCC* and 10 cited *Riverside Bayview*.²³⁹ The decisions cited an average of 5.2 precedents.

While the lower court decisions dating between *Riverside Bayview* and *SWANCC* used a total of 8 and an average of 1.8 interpretive devices, the decisions between *SWANCC* and *Rapanos* used a total of 10 and an average of 2.6 interpretive devices. While the earlier set of decisions cited an average of 1.8 precedents, the lower court decisions issued between *Riverside Bayview* and *SWANCC* cited an average of 6.4. What conclusions can we draw from this quantitative analysis? Decisions on tributaries and wetlands after *SWANCC* undertake their legal and factual analysis in considerably more depth than do decisions issued between *Riverside Bayview* and *SWANCC*. If *SWANCC* did not prompt lower courts to find more frequently that waters were non-navigable, it did remind them that expansive interpretations of navigable waters were not to be made or accepted without careful scrutiny.

6. *Rapanos* and Subsequent Decisions

The 2006 *Rapanos* decision²⁴⁰ arose out of enforcement actions for filling wetlands without §404 permits. The wetlands at issue were adjacent to man-made drainage ditches that flowed into a succession of other ditches and creeks and ultimately into Lake Michigan. The plurality opinion, written by Justice Scalia and joined by three other Justices, held that the wetlands at issue were not within the jurisdiction of the CWA. In a concurring opinion, Justice Anthony Kennedy agreed with the plurality's result, but not with its reasoning. Chief Justice John Roberts joined the plurality opinion, but filed a short concurrence lamenting that there was no majority opinion and acknowledging the difficulty that would pose to lower courts. Justice Stevens wrote a dissent joined by three Justices. In addition to joining Justice Stevens' dissenting opinion, Justice Stephen Breyer filed his own dissenting opinion.

As discussed above, the lack of a majority opinion in *Rapanos* has required lower courts to spend more of their

energy interpreting *Rapanos* than interpreting the CWA. Although the holding of *Rapanos* is opaque, it is clear that the Court's interpretation of navigable waters has become increasingly restrictive since *Riverside Bayview*.

Two distinct but related questions are at issue in *Rapanos*. First, and most important, when is a tributary to a traditionally navigable water within the CWA's jurisdiction (that is, a jurisdictional tributary)? Second, when is a wetland sufficiently connected to a traditionally navigable water or a jurisdictional tributary for the wetland to be within the CWA's jurisdiction (that is, a jurisdictional wetland)? Although the plurality opinion addressed these questions, its answers are incomplete. One reason is that the plurality's analyses conflated different elements of §301(a). Another reason is that the plurality's analyses are sometimes obscured by vituperative outbursts against the Corps, lower courts, and the dissenting and primary concurring opinions.

Justice Scalia began his plurality opinion with what can only be described as a tirade designed to demonstrate that the Corps "exercises the discretion of an enlightened despot"²⁴¹ by claiming §404 jurisdiction over "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years . . . engulf[ing] entire cities and immense arid wastelands."²⁴² Scalia complained mightily that the Corps and the lower courts have continued to expand §404 jurisdiction "to include 'ephemeral streams' and 'drainage ditches' as 'tributaries'. . . [extending] to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the

241. *Id.* at 720.

242. *Id.* at 722. In particular, Justice Scalia's plurality opinion criticized *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *Community Ass'n for the Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 234 F.3d 526, 31 ELR 20535 (9th Cir. 2001); *United States v. Eidson*, 108 F.3d 1336, 27 ELR 20853 (11th Cir. 1997); and *Quivira Mining Co. v. EPA*, 765 F.2d 126, 15 ELR 20530 (10th Cir. 1985). See *Rapanos*, 547 U.S. at 725-27. Part of Justice Scalia's ire is probably attributable to the fact that lower court decisions more frequently used expansive interpretations of navigable waters after *SWANCC* than before it. This could also reflect plaintiffs' greater care in bringing and arguing cases after *SWANCC*. See also the Fifth Circuit's diatribe in *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003), against the Corps for claiming jurisdiction over "puddles, sewers, roadside ditches and the like."

Many of Justice Scalia's outlandish examples of Corps overreach are hyperbole. The Corps does not and never has claimed jurisdiction over mud puddles or ripples of sand in the desert. For one thing, sand ripples in deserts and dunes are created by wind; when precipitation falls on them, it generally percolates down through the sand rather than flowing down the outsides of dunes. But when tempered, Justice Scalia's concerns are understandable. Most land is covered at times with water, however thinly, although Congress did not claim jurisdiction for the CWA over most land: Most land is neither navigable water nor water of the United States. Justice Scalia's inconsistent focus on the permanence of waterways elsewhere in the opinion may be seeking a distinction between stormwater runoff and water bodies. That is analogous to the distinction Congress established between point sources and nonpoint sources. Unfortunately, neither distinction is a bright line, any more than the edge between a river and an adjacent wetland is a bright line. Sheetwater runoff is stormwater and few would claim that it is a tributary of navigable water, although much of it may flow to navigable water. On the other hand, many would claim that a desert gully, roaring with a flash flood after rains, is a tributary of the navigable river into which its flash floods flow.

237. *Baccarat Freemont Devs., LLC v. U.S. Army Corps. of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005).

238. See tbls. A & B.

239. *Id.*

240. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006).

presence of litter and debris,” despite the Court’s narrowing of §404 jurisdiction in *SWANCC*.²⁴³

Justice Scalia acknowledged that Congress intended CWA jurisdiction to extend beyond traditional navigable waters, as the Court had recognized in both *Riverside Bayview* and *SWANCC*. On the other hand, he noted that in *SWANCC*, the Court took pains to emphasize “that the qualifier ‘navigable’ is not devoid of significance”²⁴⁴ and that CWA jurisdiction is limited to ‘waters,’ whether qualified by ‘navigable’ or ‘of the United States.’²⁴⁵ He then launched into a counterintuitive demonstration that the definitions of “water” and “waters” in the 1954 edition of *Webster’s New International Dictionary* lead to the conclusion that “the waters of the United States” is a subset of “water of the United States.”²⁴⁶ (Query: How can the plural “waters” be a subset of the singular “water”?)

In short, Scalia argues, the CWA’s incorporation of the term navigable waters confers jurisdiction “only over relatively *permanent* bodies of water” and “does not authorize [a] ‘Land Is Water’ approach to federal jurisdiction.”²⁴⁷ (Query: Assuming that the term “the waters of the United States” is a subset of “water of the United States,” how does that suggest that “navigable waters” include only permanent bodies of water? That is a non sequitur.) Justice Scalia posits that the statute’s definition of another element of the water pollution offense confirms this, because ditches, channels, and conduits, which typically convey transitory waters, are defined as “point sources” and therefore discharge into “navigable waters” rather than carry “navigable waters.”²⁴⁸ (Again, this is a non sequitur. Granted that point sources convey polluted water to navigable waters, how does that establish that the conveyed waters are not themselves navigable?) Scalia supports his analysis with the need to narrowly interpret statutes when their jurisdictions extend to the outer edges of Congress’ constitutional authority or intrude on states’ traditional authority over land use without an explicit statement by Congress of its intent to do so.²⁴⁹

Justice Scalia then summarizes the plurality’s conclusions. Jurisdictional waters (presumably including tributaries)

include[] only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers [and] lakes.” [The juris-

diction] does not include channels, through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.²⁵⁰

He asserts that this narrower definition of navigable waters will not jeopardize the reach of the §402 program, because the discharge of pollutants into an intermittent stream from which they will wash downstream into navigable waters would still be covered: The statute does not require that the discharge be directly into navigable water.²⁵¹ Jurisdictional wetlands are “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”²⁵² The plurality opinion does not directly address the question of whether tributaries of navigable waters are waters of the United States, but tributaries are easily susceptible to the analysis that the plurality poses for jurisdictional waters. Moreover, the plurality commented that “the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates §1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters.”²⁵³ Pollutants discharged to tributaries of navigable water naturally wash downstream into those navigable waters.

It is difficult to discern the *Rapanos* plurality’s precise conclusion with regard to jurisdictional tributaries, in part because its analysis is abstract and largely divorced from the facts of the cases before it and in part because it does not sharply separate its analysis of whether a tributary is jurisdictional from its analysis of whether a wetland is jurisdictional. Finally, the plurality opinion is inconsistent on what constitutes a navigable tributary. It begins by stating that navigability connotes “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows . . . [and does not] encompass[] transitory puddles or ephemeral flows of water.”²⁵⁴ The opinion does not define what it means by “ephemeral flows.” The plurality continues:

[A]pplying the definition [of “navigable waters”] to “ephemeral streams,” “wet meadows,” storm sewers and culverts, “directional sheet flow during storm events,” drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term “waters of the United States” beyond parody. The plain language of the statute simply does not authorize this “Land is Waters” approach to federal jurisdiction.²⁵⁵

While some of these examples are admittedly far-fetched to deem as tributaries to navigable waters, others

243. *Rapanos*, 547 U.S. at 724-29.

244. *Id.* at 731 (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 172, 31 ELR 20382 (2001)).

245. *Rapanos*, 547 U.S. at 731-36.

246. *Id.* at 732-33 (emphasis added).

247. *Id.* at 734.

248. *Id.* at 735-36. Ditches, channels, and conduits convey water that is transitory in the sense that the water they convey is in transit. But is the water transitory in a temporal sense, as Justice Scalia seems to be using the term? Roadside ditches normally flow during and after storm events, but in places, they continually convey streamwater that has been rerouted, for instance, to pass under roads in culverts. The English Channel is always wet, as is the main channel of the Mississippi River, and both are navigable. Moreover, Justice Scalia’s argument is a non sequitur, as pointed out in the text.

249. *Id.* at 738.

250. *Id.* at 739.

251. *Id.* at 742-45. See also Amil Anthony, *Shotguns, Spray, and Smoke: Regulating Atmospheric Deposition of Pollution Under the Clean Water Act*, 29 UCLA J. ENVT’L. L. & POL’Y 215, 235-37 (2011).

252. *Rapanos*, 547 U.S. at 742.

253. *Id.* at 743.

254. *Id.* at 733.

255. *Id.* at 734.

are not. Storm sewers, culverts, and drainage ditches, for example, often replace or channel existing natural streams that otherwise might be easily categorized as tributaries. The opinion dwells on the necessity of “at bare minimum, the ordinary presence of water.”²⁵⁶ While the plurality acknowledges that ditches, channels, and conduits can carry constant flows, it asserts that when they do, they are called rivers, creeks, streams, or moats, implying they may be navigable waters under those circumstances.²⁵⁷ (Query: What about the English Channel, which carries a constant flow; should we call it the English River or English moat?)

Finally, the opinion states that “waters of the United States” “does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”²⁵⁸ The plurality only examined two aspects of whether a tributary is navigable: whether it forms a “geographic feature”; and whether its flow is permanent. But in a footnote, the plurality admitted that it did not “necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.”²⁵⁹ Indeed, the opinion did not distinguish between the intermittency of flow that would include or exclude a water body from being “waters of the United States,” beyond “[c]ommon sense and common usage.”²⁶⁰

The *Rapanos* plurality did not address what constitutes a wetland, but limited itself to addressing what types of wetlands are jurisdictional wetlands. A jurisdictional wetland must be adjacent to a navigable water or a jurisdictional tributary of a navigable water. Wetlands adjacent to such a water are “*only* those wetlands with a continuous surface connection to . . . ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”²⁶¹ The plurality’s test applies to whether a wetland is a jurisdictional wetland, not to whether a tributary is a jurisdictional tributary. At the same time, the plurality’s concern with whether a water is permanent, seasonal, or ephemeral was in the context of whether tributaries were jurisdictional tributaries, not to whether a wetland is permanent, seasonal, or ephemeral, although it is not much of an additional step to consider the issue in that context, given the plurality’s concern that water not be classified as dry land.

The analysis in the concurring opinion by Justice Kennedy focused almost entirely on wetlands. His reading of *Riverside Bayview* and *SWANCC* is that the Corps’ “jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”²⁶² Wetlands have a significant nexus with navigable waters “if the wet-

lands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”²⁶³ Adjacency of a wetland to navigable-in-fact waters is sufficient to establish a significant nexus, and adjacency to major tributaries may be sufficient. But adjacency to other tributaries requires the Corps to “establish a significant nexus on a case-by-case basis.”²⁶⁴

Justice Kennedy would have remanded the cases for a determination of whether the wetlands in question had a significant nexus to navigable-in-fact waters. His opinion does not indicate when a tributary is sufficiently “major” for adjacency to satisfy his “significant nexus” test. He rejected the plurality’s conclusions that tributaries must be permanently flowing and have a continuous surface connection to be waters of the United States,²⁶⁵ pointing out that the requirement of permanent flow “makes little practical sense in a statute concerned with downstream water quality.”²⁶⁶

The dissenting opinion of Justice Stevens and three other Justices accorded *Chevron* deference to the Corps’ regulations defining navigable waters to include wetlands adjacent to navigable waters and their tributaries. Like Justice Kennedy’s concurring opinion, the dissenting opinion provides a point-by-point refutation of the plurality opinion. Not surprisingly, the focus of the plurality is on the meaning of navigable waters, while the focus of both Justice Kennedy’s concurrence and the dissent is on the meaning of waters of the United States.²⁶⁷

Thus, in regard to tributaries, the plurality in *Rapanos* developed a test under which most tributaries of navigable waters, even remote tributaries, would be navigable waters, but inconsistently drew a line at intermittent tributaries. With regard to intermittent tributaries, it suggested that the discharge of pollutants into intermittent waters from which the pollutants naturally wash downstream into navigable waters are indirect discharges to navigable water, violating §301(a). The concurrence did not focus on tributaries. The dissent concluded that tributaries of navigable water, major or remote, are navigable water, and argued that even intermittent tributaries could be navigable waters. None of the Justices argued that tributaries to navigable waters were not themselves waters of the United States. As to intermittent tributaries, the plurality’s guidance is negative, but also ambiguous and in the minority.

Post-*Rapanos* lower court decisions perceive *Rapanos* as game-changing for the interpretation of the terms navigable waters and waters of the United States, and focus their interpretations of those terms on *Rapanos*. Of the 34 lower court decisions issued after *Rapanos*, 25 of those decisions

256. *Id.*

257. *Id.* at 736 n.7. Justice Scalia’s plurality opinion seeks to dismiss this issue by commenting that when ditches do flow constantly, they are called streams, a dubious proposition for which he offers no authority.

258. *Id.* at 739.

259. *Id.* at 733 n.5.

260. *Id.*

261. *Id.* at 742.

262. *Id.* at 779 (Kennedy, J., concurring).

263. *Id.* at 780.

264. *Id.* at 782.

265. *Id.* at 769-71.

266. *Id.*, at 769.

267. Compare *Rapanos*, 547 U.S. at 723 (plurality), with *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring), and *Rapanos*, 547 U.S. at 787 (Stevens, J., dissenting).

(74%) held the waters at issue to be navigable, a decrease from the findings in 86% of the decisions dating between *SWANCC* and *Rapanos*. Unfortunately, a large part of the lower courts' attention to *Rapanos* is devoted to determining what its holding means in the absence of a majority opinion. Chief Justice Robert's short concurring opinion lamented that without a majority opinion, the "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis," citing *Marks v. United States*.²⁶⁸ *Marks* directed lower courts that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding . . . may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."²⁶⁹

Lower courts struggled mightily to determine whether to use the plurality test, the concurrence test, or both. The U.S. Court of Appeals for the Eleventh Circuit has followed the concurrence's significant nexus test.²⁷⁰ The U.S. Courts of Appeals for the First, Third, and Eighth Circuits have applied alternately either the plurality or the concurrence tests.²⁷¹ The Fifth and Sixth Circuits apparently require plaintiffs to prove both tests.²⁷² And the Seventh Circuit and U.S. Court of Appeals for the Ninth Circuit have preferentially employed the concurrence test, but if that is not met will look to the plurality test.²⁷³

These courts misperceive the Kennedy concurrence's significant nexus test, however, when they apply it to determine whether a tributary is a water of the United States. Justice Kennedy developed and used that test only to determine whether a wetland is a water of the United States. As to tributaries, his concurrence only commented that the plurality's insistence that tributaries must be permanent to be waters of the United States was ill-founded. On that issue, he joined the four dissenting Justices. A few courts have recognized the inapplicability of the significant nexus test to tributaries.²⁷⁴ Justice Kennedy's significant nexus test requires a jurisdictional wetland to affect significantly the water quality of a wetland and presumes such an effect if the wetland is *adjacent* to traditionally navigable water or a major tributary thereof. Because tributaries flow directly into navigable-in-fact waters, tributaries inevitably affect the water quality of navigable waters; in the aggregate, even remote tributaries do so, echoing Justice Kennedy's conclusion that it "makes little practical sense in a statute concerned with downstream water quality"²⁷⁵ to require a

nexus showing for tributaries.²⁷⁶ In this light, EPA's scientific study²⁷⁷ demonstrating that 60% of the flow of rivers and streams in the northeast originate in headwaters, confirming the presumption of a nexus to primary tributaries, does not make sense.

The government was a party in 20 of the 34 lower court tributary and wetland decisions after *Rapanos*.²⁷⁸ All 34 decisions used precedent and all cited *Rapanos*, the first time that all precedent-citing decisions cited the same decision. Fourteen of the decisions cited *Riverside Bayview* and 12 of them cited *SWANCC*. The decisions cited an average of 5.9 precedents. The number of precedents cited by the post-*Rapanos* decisions was comparable to the number of decisions cited by lower court decisions issued between *SWANCC* and *Rapanos*, but the importance of precedent as an interpretive device was far greater in the post-*Rapanos* decisions. Although 34 post-*Rapanos* lower-court decisions cited precedent, only 11 used deference,²⁷⁹ 10 employed a broad interpretation to achieve the statute's objective,²⁸⁰ 6 each used the structure of the statute,²⁸¹ 5 used its plain meaning,²⁸² 3 used reading harmoniously with another statute,²⁸³ 2 interpreted exceptions narrowly,²⁸⁴ and 1 used avoiding constitutional issues.²⁸⁵ While this set of decisions used precedent as an interpretive device 34 times, they used all other interpretive devices in the aggregate only 38 times, compared to the decisions issued between *SWANCC* and *Rapanos*, which used precedent as an interpretive device 22 times and all the other interpretive devices in the aggregate 36 times.²⁸⁶ Similarly, 19 of the post-*Rapanos* decisions used precedent as their sole interpretive device, while only four of the earlier decisions did so.²⁸⁷

Why did precedent become preeminent as an interpretive device after *Rapanos*? In part, it is because there were by then four Supreme Court decisions interpreting navigable waters under the CWA (three of them under §404), twice as many as interpreted any of the other elements of the water pollution offense. Unfortunately, it is also in part because the principal focus of the lower courts is how *Rapanos* applies to the facts of their cases, a question whose

268. 430 U.S. 188 (1977).

269. *Id.* at 193.

270. *United States v. Robinson*, 505 F.3d 1208, 1219-21 (11th Cir. 2011).

271. *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Donovan*, 661 F.3d 174, 76, 42 ELR 20328 (3d Cir. 2011); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006).

272. *United States v. Cundiff*, 535 F.3d 200, 210, 39 ELR 20025 (6th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 24 (5th Cir. 2008).

273. *Northern Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

274. *United States v. Vierstra*, 2011 WL 1064526, *5 (D. Idaho); *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1215 (D. Or. 2009).

275. *Rapanos v. United States*, 547 U.S. 715, 769, 36 ELR 20116 (2006) (Kennedy, J., concurring).

276. While Justice Kennedy made that comment with regard to the plurality's test of permanence and continuing surface connection, the comment applies as well in this context.

277. See U.S. EPA, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (2013). The draft version of this study is summarized in Appendix A to the preamble of EPA's proposed rule, 79 Fed. Reg. 22188, 22222-52 (Apr. 21, 2014). The document may be found at http://yosemite.epa.gov/sab/sab-product.nsf/fedrgstr_activities/Watershed%20Connectivity%20Report?. The study was conducted by EPA's Office of Research and Development. It underwent peer review under the supervision of EPA's Science Advisory Board (SAB). SAB review was completed in October 2014, and EPA released the final study in January 2015. 80 Fed. Reg. 2100 (Jan. 15, 2015).

278. See *tbl. B*.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

answer is far from clear due to the lack of a majority decision and the opaqueness of the plurality opinion.

In the wake of *SWANCC* and *Rapanos*, EPA and the Corps jointly issued a guidance document on their regulatory definitions of waters of the United States,²⁸⁸ and more recently have published proposed amendments to them. This Article focuses on the proposed amendments as the latest indication of the agencies' thinking. For the most part, they deal with tributaries and wetlands and continue to claim as much jurisdiction as possible in light of the decisions. The proposed amendments continue to claim jurisdiction over traditionally navigable waters, interstate waters, the territorial seas, and their tributaries. For the first time, however, the proposed amendments define "tributary". A tributary is "a water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow, either directly or through another water, to a water" that is traditionally navigable, interstate, a territorial sea, or an impoundment of such water.²⁸⁹

The proposed amendments add that "wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a traditionally navigable water, interstate water, or territorial sea."²⁹⁰ They add that a tributary does not lose its jurisdictional status if its flow is interrupted by human causes, such as culverts or dams, or natural causes, such as debris piles or underground flow.²⁹¹ Finally, they provide that jurisdictional tributaries include "rivers, streams, lakes, ponds, impoundments, canals and ditches" not otherwise excluded in the proposed regulation.²⁹² The exclusions include several categories of ditches and all groundwater.²⁹³ The guidance document and the preamble to the proposed regulation include both legal and scientific justifications for these provisions, although the preamble's are far more extensive.

How does the EPA/Corps joint proposal square with the Supreme Court's two recent decisions? In some respects, it follows the decisions. For instance, the Court in *SWANCC* held that the CWA did not extend to waters solely because they are habitats for migratory birds. In response, the proposed amendments drop the present claim over other waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including . . . waters which are or could be used by interstate or foreign travelers for recreational or other purposes . . ." Although there are strong arguments that Congress has the authority to cover such waters, under either the Commerce Clause or

the Treaty Powers Clause, the Court concluded that Congress did not exercise such powers in the CWA. That leaves it open for Congress to explicitly exercise such powers over these waters, an action that Congress is unlikely to take in the present political climate. For these waters, EPA's proposed definition substitutes jurisdiction over other waters that the Agency determines on a case-by-case basis have a significant nexus to traditionally navigable waters and jurisdictional tributaries, following Justice Kennedy's suggestion. That results in an exercise of Agency jurisdiction over a narrower set of waters.

The plurality in *Rapanos* repeatedly demanded that jurisdictional waters have continuous surface connections to traditionally navigable waters. In response, the EPA/Corps proposed amendments specifically exclude groundwater, although tributaries will not lose their jurisdictional status merely because they flow underground for parts of their courses due to natural or human-induced conditions. The Court did not consider such situations, but they are reasonably in keeping with the nature of tributaries. The proposed amendments also dropped EPA's earlier claim over intermittent streams and playa lakes affecting interstate commerce, but they did not exclude intermittent streams meeting the definition of tributaries. Moreover, the proposed amendments claim jurisdiction over "waters located within the . . . floodplain" of a traditionally navigable water, interstate water, the territorial seas, or a tributary or impoundment of the same.²⁹⁴

Query whether EPA claims jurisdiction over mud puddles on floodplains or standing water after rains in farmers' fields on floodplains? If so, the *Rapanos* plurality will surely demur. The proposed definition's inclusion of ditches, unless specifically excluded, also runs afoul of the *Rapanos* plurality's observation that ditches are point sources and therefore cannot be navigable waters. The plurality further observed that ditch flows are intermittent and are called streams if their flows are permanent. The Court did not deal with the fact that many ditches are rerouted streams, no less tributaries than in their original natural beds. All of this suggests further litigation on the status of ditches. Many ditches fall within the proposed definition or the plain meaning of tributaries, especially those that are rerouted streams or creeks.

The proposed amendments to EPA and the Corps' definitions of waters of the United States continue to claim jurisdiction over "all waters, including wetlands adjacent to" traditionally navigable waters, interstate waters, the territorial seas, and impoundments of and tributaries to such waters.²⁹⁵ This changes the tone of the definition from focusing on wetlands to focusing on all adjacent waters, including wetlands. The proposal uses both the plurality's direct connection test and Justice Kennedy's significant nexus tests for adjacency. The proposed definition is closer

288. U.S. EPA and U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U. S. Supreme Court Decision in *Rapanos v. United States* & *Carabell v. United States* (June 2007 Legal Memorandum), available at <http://www2.epa.gov/cleanwaterrule/documents-related-proposed-definition-waters-united-states-under-clean-water-act>.

289. 79 Fed. Reg. 22188, 22268 (proposed Apr. 21, 2014), to be codified at 40 C.F.R. §122.2(c)(5).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*, to be codified at 40 C.F.R. §122.1(b)(4) & (5).

294. *Id.*, to be codified at 40 C.F.R. §122.2(a)(6), (c)(1), (2) & (4).

295. *Id.*, to be codified at 40 C.F.R. §122.2(a)(6).

to Justice Kennedy's test than it is to the plurality's test.²⁹⁶ The plurality test for adjacency is whether the surface waters from the wetland and the adjacent navigable water or tributary intermingle to the extent that they cannot be separated. The proposed definition of adjacent is "bordering, contiguous or neighboring," picking up on many lower court definitions of the term. It provides that separation by natural or human-made dikes, berms, "and the like" does not affect adjacency, again drawing on many lower court definitions of adjacency. The proposed definition even provides that waters in floodplains of jurisdictional waters with "a shallow subsurface hydrologic connection" to the jurisdictional waters are neighboring and therefore adjacent to those jurisdictional waters.²⁹⁷ This goes beyond the *Rapanos* plurality's expressed concept of adjacency. Moreover, it seemingly conflicts with the agencies' expressed exclusion of groundwater from the definition. These differences will undoubtedly be resolved by further litigation.

The agencies' special regard for wetlands is expressed in their proposed amendments to the definition of waters of the United States. For the first time, the agencies assert that wetlands themselves often are tributaries.²⁹⁸ They are in essence piggybacking §404 jurisdiction on §402 jurisdiction because both the plurality and Justice Kennedy's concurring opinions appreciate that pollution flows downstream; thus, to be effective, §402 jurisdiction must include all tributaries, at least all relatively permanent ones. Although this is a clever move by the agencies to bolster their §404 jurisdiction, it may have the unfortunate effect of undercutting their §402 jurisdiction by narrowing judicial interpretations of tributary.²⁹⁹

B. Isolated Waters

Neither the CWA nor its legislative history state explicitly whether the statute's jurisdiction includes discharges to isolated water bodies. EPA and Corps regulations do not explicitly claim jurisdiction over isolated waters, but EPA's current regulations include the following: natural ponds, which could be isolated; playa lakes, which are usually isolated; and "other waters" which "could affect interstate commerce."³⁰⁰ Both regulatory definitions include intrastate waters that are used by interstate travelers for recreation, which could describe many isolated waters. Isolated waters could also affect interstate commerce under the second or third prong of *Lopez*. The CWA's use of the jurisdictional term navigable waters, however, suggests to the courts that Congress relied on the first prong of *Lopez*, in which jurisdiction rarely extends to isolated waters because

few are highways or parts of highways of interstate or foreign commerce.³⁰¹

The isolation of a water body alone, however, does not always defeat its status as navigable water under the first prong of *Lopez*. For instance, the Court held in *Utah v. United States* that the Great Salt Lake is navigable, despite its isolation from other waters, because it had been used as a highway or part of a highway of interstate commerce, squarely within the first prong of *Lopez*.³⁰² The Seventh Circuit held in *United States v. Byrd*³⁰³ that a 2,000-to 3,000-acre isolated lake in Indiana was subject to CWA navigable water jurisdiction because interstate travelers used it for recreational boating, also placing it within the first prong of *Lopez*, but not as clearly so because the use was recreational rather than commercial.³⁰⁴

Such claims cannot be made for most isolated waters, however, especially small isolated water bodies. Isolated waters, even smaller ones, might be within the second or third *Lopez* prongs of Commerce Clause jurisdiction, but the Court has not recognized that Congress intended to use such jurisdiction for the CWA. An example of such a claim is the U.S. Court of Appeals for the Tenth Circuit's decision in *United States v. Earth Sciences, Inc.*,³⁰⁵ holding that an intrastate stream, located totally within one county and unconnected with other waters, was navigable based on the use of its waters for agricultural irrigation from which products were sold in interstate commerce. Isolated water bodies might have an aggregate effect on recreational or other interstate commerce, exemplified by fishing from boats.

The Supreme Court's decision in *SWANCC* on the issue of isolated water bodies is not unique, but it is determinative. The facts of the case involved a site proposed for a landfill that included an aggregate of 31 acres of shallow ponds remaining from a sand and gravel operation, with no connections to other waters. The Corps did not claim jurisdiction over them as natural ponds, presumably because they were created by the former mining operations. The Corps' only jurisdictional claim was its Migratory Bird Rule, which the Court held was beyond the authority Congress delegated to the Corps in §404. The Court implicitly interpreted the CWA to limit Congress' claim to Commerce Clause jurisdiction to be within the first prong of the *Lopez* test,³⁰⁶ while the dissent would have extended the claim to the second and third prongs of the *Lopez* test and would have found that claim to be constitutional.³⁰⁷

Several lower courts have held that the CWA's jurisdiction does not extend to isolated waters. After *Rapanos*, the

296. *Id.*, to be codified at 40 C.F.R. §122.2(c)(6).

297. *Id.*, to be codified at 40 C.F.R. §122.2(c)(1), (2).

298. *Id.*, to be codified at 40 C.F.R. §122.2(c)(5). In the definition of "Tributary" the proposed regulations provide that "wetlands . . . are tributaries . . . if they contribute flow" to a navigable water.

299. After all, as discussed above, all of the Court's narrow interpretations of navigable waters have been §404 decisions and two have been wetlands cases.

300. 33 C.F.R. §323.2(a)(5); 40 C.F.R. §122.2. Playa lakes are usually dry and without outlets.

301. For an argument to the contrary, see Jon Devine et al., *The Intended Scope of Clean Water Act Jurisdiction*, 41 ELR 11118, 11124 (Dec. 2011).

302. *Utah v. United States*, 403 U.S. 9, 1 ELR 20250 (1971).

303. 609 F.2d 1204, 9 ELR 20757 (7th Cir. 1979).

304. Query: How compelling a distinction is this, when recreational boating is a multibillion-dollar business and some recreational boaters rent their vessels from commercial mariners?

305. 599 F.2d 368, 9 ELR 20542 (10th Cir. 1979).

306. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 171-74, 31 ELR 20382 (2001).

307. *Id.* at 192-96.

Ninth Circuit held in *San Francisco Baykeeper v. Cargill Salt Division*³⁰⁸ that a 17-acre artificial pond was not navigable although it was adjacent to admittedly navigable water, because the adjacency test applied only to wetlands, not to ponds. In *Borden Ranch Partnership v. U.S. Army Corps of Engineers*,³⁰⁹ the Corps, after *SWANCC*, withdrew the portion of its action that had claimed filling a vernal pond violated §404, and the Ninth Circuit reversed the lower court's ruling that the vernal pond was navigable water.

Before *SWANCC*, the Seventh Circuit in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*³¹⁰ held that a six-acre retention pond built to collect stormwater runoff from a shopping mall parking lot, with no connection to other surface water, was not navigable water. The court noted that EPA's definition of navigable water included natural ponds and thereby by implication excluded artificial ponds such as the pond at issue. The tenor of the opinion, however, suggests that the court would have reached the same conclusion even if the pond had been natural. In *Hoffman Homes, Inc. v. Administrator, EPA*,³¹¹ the Seventh Circuit held there was no CWA jurisdiction over an isolated wetland. Although the opinion, issued prior to *SWANCC*, appeared willing to accept a jurisdictional claim under the Corps' Migratory Bird Rule, the government made no showing that the wetland was actually used by migratory birds or had other effects on interstate commerce. In *United States v. Hallmark Construction Co.*,³¹² a district court held that an isolated five-acre wetland was beyond the Corps' jurisdiction in the absence of proof of a connection with interstate commerce.³¹³

EPA's proposed amendments to its definition of waters of the United States do not explicitly include or exclude isolated waters. But they no longer include the existing claim to jurisdiction over

other waters such as intrastate . . . lakes, prairie potholes, wet meadows, playa lakes or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce; . . . [including use] by interstate or foreign travelers for recreational or other purposes; . . . [use for taking] fish or shellfish . . . [for sale] in interstate or foreign commerce; . . . [or use] for industrial purposes by industries in interstate commerce.³¹⁴

Thus, EPA is abandoning the argument that in enacting the CWA, Congress exercised its Commerce Clause jurisdiction under the second or third prongs of *Lopez*, the jurisdictional claim most likely to support regulating some isolated waters. Although the proposal notes that ponds

can be tributaries,³¹⁵ isolated ponds would not benefit from the definition of tributaries.

On the other hand, the proposal includes "other waters," which EPA determines on a case-by-case basis "alone or in combination with other similarly situated waters" have a significant nexus to other waters within the definition of waters of the United States. EPA's scientific justification for the proposal includes studies suggesting that many "unidirectional wetlands," such as prairie potholes, vernal pools, and playa lakes with subsurface connections to waters of the United States, may be shown to have a significant nexus to waters of the United States.³¹⁶ Indeed, EPA leaves open and seeks comments on the option to determine by rule that prairie potholes and other specified categories of waters do have a significant nexus to "waters of the United States."³¹⁷ Because such examples lack surface connections to navigable waters, the *Rapanos* plurality is unlikely to agree with the Agency's reasoning. However, Justice Kennedy and the *Rapanos* minority (who together form a majority of the Justices) may well agree with it.

The decisions discussed above in this section deal with both natural and artificial bodies of water. They suggest that, even absent *SWANCC*, courts have not been receptive to holding isolated waters to be within the CWA's jurisdiction, unless they are used as parts of a traditional highway of commerce. In any event, *SWANCC* now requires that result. In the unusual case where isolated waters have been used, may currently be used, or with reasonable improvements could be used in the future as parts of highways of interstate commerce, those isolated waters are arguably navigable. But showing that uses of isolated water bodies have an aggregate impact on interstate commerce will not make them navigable because the Court has in effect ruled that Congress did not intend to exercise the second or third *Lopez* prongs of its Commerce Clause jurisdiction in the CWA. Moreover, EPA has impliedly acceded to this conclusion in its proposed amendments to its regulatory definition of waters of the United States.

Congress could claim expanded jurisdiction by eliminating the use of navigable waters as a jurisdictional term in the CWA, perhaps substituting waters of the United States, and making findings that water pollution control of isolated waters, or at least some classes of isolated waters, meet the second or third prong of the *Lopez* test. Congress could also claim expanded jurisdiction under the Constitution's federal treaty powers and the implementing Migratory Bird Treaty Act to protect migratory birds, including protection of their habitats.³¹⁸ In the meantime, the question of whether transporting boats or fishermen across state lines to fish, hunt, or engage in other recreational activities on isolated waters makes those waters part of the highways of interstate commerce

308. 481 F.3d 700 (9th Cir. 2007).

309. 261 F.3d 810, 816, 32 ELR 20011 (9th Cir. 2001).

310. 24 F.3d 962, 24 ELR 21080 (7th Cir. 1994).

311. 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993).

312. 30 F. Supp. 2d 1033, 28 ELR 21438 (N.D. Ill. 1998).

313. See also *United States v. Wilson*, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997), in which the U.S. Court of Appeals for the Fourth Circuit held that an isolated wetland was not navigable water.

314. 40 C.F.R. §122.21, *Waters of the United States* (c).

315. 79 Fed. Reg. 22268, to be codified at 40 C.F.R. §122.2(c)(6).

316. *Id.* at 22225-26.

317. *Id.* at 22250-52.

318. U.S. CONST. art. II, §2, cl. [2]; Migratory Bird Treaty Act, 16 U.S.C. §§703-711. See Scott Finet, *Habitat Protection and the Migratory Bird Protection Act*, 10 TUL. ENVTL. L.J. 1 (2003).

subject to Commerce Clause jurisdiction remains undecided.³¹⁹ Although the Court interprets the CWA not to claim such jurisdiction, the Court has not addressed, and has not needed to address, whether Congress has authority to claim it.

C. Groundwater

Neither the CWA's general prohibition against the discharge of pollutants to navigable waters in §301(a) nor the definition of navigable waters in §502(7) mention groundwater. The statute, however, is replete with references to groundwater.³²⁰ These frequent references indicate that Congress was aware of groundwater and groundwater pollution when it drafted the statute, suggesting that its failure to mention groundwater in §301(a) or the definition of navigable waters was an intentional choice not to regulate discharges of pollutants to groundwater. Moreover, the statute's frequent coupling of "navigable waters and ground waters" indicates that Congress viewed them as distinct rather than overlapping categories of water.³²¹ Finally, repeated legislative history explicitly stated that the CWA did not regulate discharges of pollutants to groundwater, and Congress rejected amendments that would have included regulation of discharges of pollutants to ground-

water.³²² Legislative history did not distinguish between isolated groundwater and tributary groundwater,³²³ a distinction courts subsequently developed to justify holding discharges to tributary groundwater to be within the jurisdiction of the CWA, while discharges to isolated groundwater are held not to be.

On the other hand, the legislative history is clear that Congress intended that the term navigable waters be given its full constitutional reach. The few courts considering whether groundwater can be within federal Commerce Clause jurisdiction concluded that it could be,³²⁴ although not under the first prong of the *Lopez* test, which Congress apparently chose by using "navigable waters" in the CWA as its jurisdictional claim. Highways of interstate commerce are inherently surface waters. One twist in the CWA suggests congressional intent to regulate some discharges to groundwater. Section 402(b)(1)(D) provides that EPA can approve a state program for administering and enforcing the §402 permit program only if the state has authority to issue permits to "control the disposal of pollutants into wells." In the absence of an approved state §402 program, §402(a)(3) provides that EPA is to administer the

319. One commenter lays out the argument that such recreational use of isolated waters will not render them navigable under any prong of *Lopez*. See FUNK, *supra* note 40, at §13:117. Indeed, he argues that Congress may not have the authority to regulate pollution on traditionally navigable waters unless it has a negative impact on navigation because the Commerce Clause does not give Congress plenary power to regulate navigable waters, but only power to protect and promote interstate commerce on navigable waters. For a contrary perspective, see *FPL Energy Marine Hydro, LLC v. Federal Energy Reg. Comm'n*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (three canoe trips establish potential for navigational use).

320. For example, CWA §§102(a), 104(a)(5), & 106(e)(1), 33 U.S.C. §§1252(a), 1254(a)(5), & 1256(e)(1), authorize plans for improving water quality in groundwater, monitoring water quality in groundwater, and making grants to state agencies to do the same. CWA §§202(a)(2) & 208(b)(2)(K), 33 U.S.C. §§1282(a)(2) & 1288(b)(2)(K) authorize grants to state agencies for programs to protect groundwater quality. CWA §304(a)(1) & (e), 33 U.S.C. §1314(a)(1) & (e), authorize EPA to establish water criteria for groundwater, factors to restore groundwater quality, and methods to control pollution from disposal of pollutant in wells.

Rep. Les Aspin (D-Wis.), stated on the House floor that groundwater appears in the bill in every section, in every title, except Title IV. It is under the title which provides EPA can study ground water. It is under the title dealing with definitions. But when it comes to enforcement, Title IV, the section on permits and licenses, then ground water is suddenly missing.

92 CONG. REC. 10,666 (1972) (statement of Rep. Aspin), *reprinted in* 1 LEGIS. HISTORY, *supra* note 48, at 727. The author cannot find groundwater mentioned in Title V, in which the definitional §502 is located. Most lawyers would label §309, 33 U.S.C. §1319, the enforcement section rather than the sections authorizing permit issuance in Title IV. And many sections in Titles I, II, and III do not mention groundwater, e.g., §§102A, 103, 206, 207, 307, & 308, 33 U.S.C. §§1252a, 1253, 1286, 1287, 1317, & 1318. Although the statement is demonstrably wrong in several respects, it has been uncritically repeated. See, e.g., Anna Makowski, *Beneath the Surface of the Clean Water Act: Exploring the Depth of the Act's Jurisdictional Scope of Ground Water Pollution*, 91 OR. L. REV. 495, 513 (2012); Thomas L. Casey, *Reevaluating "Isolated Waters": Is Hydrologically Connected Ground Water "Navigable Water" Under the Clean Water Act*, 54 ALA. L. REV. 159, 171 (2002).

321. All of the statutory references immediately above, except §208(b)(2)(K), contain either the phrase "navigable waters and ground waters" or "navigable waters or groundwaters."

322. In the report accompanying S. 2770 from the Committee on Public Works to the Senate, the Committee stated that it recognized that the distinction between surface and groundwaters was artificial. Although the Committee was concerned with groundwater pollution, it rejected several proposals to establish federal standards because "the jurisdiction regarding groundwaters is so complex and varied from State to State." S. REP. NO. 414, at 73 (1971), *reprinted in* 2 LEGIS. HISTORY, *supra* note 48, at 1491. The Committee also stated that the problem of groundwater pollution, although serious, was not as acute as the problem of surface water pollution. *Id.* It did so after hearings on the effect of deep well injection on groundwater pollution. See *Hearing on S. 2770 Before the Subcomm. on Air and Water Pollution of the S. Comm. on Pub. Works*, 92nd Cong. pt. 7 (1971). See also *Exxon Corp. v. Train*, 554 F.2d 1310, 1329, 7 ELR 20594 (5th Cir. 1977).

After passage of S. 2770, the House Committee on Public Works held hearings on H.R. 11896, the House counterpart to S. 2770, but differing in some respects. During the hearings, Representative Aspin proposed amendments adding groundwater control to the bill, because he understood both the House and Senate bills not to authorize regulation of groundwater pollution. See *Hearing on H.R. 11896 Before the H. Comm. on Pub. Works*, 92nd Cong. 727-28 (1972) (statement of Rep. Aspin), *reprinted in* 1 LEGIS. HISTORY, *supra* note 48, at 597. Those amendments were not adopted by the Committee. The only mention of groundwater in the Committee Report accompanying H.R. 11896 to the House floor is its expectation that EPA will be diligent in gathering information on deep well injection. See H.R. REP. NO. 911, at 109 (1972). When the bill reached the House floor, Representative Aspin again introduced his amendment to include groundwater pollution control in the legislation. See 118 CONG. REC. 10666 (1972). Members supporting and opposing the amendment held a lively debate, but all agreed that the bill as written did not regulate discharges of pollutants to groundwater. Opposition to the amendment focused primarily on the lack of information on which to base a regulatory program. After the debate, the House rejected the proposed amendment. See 118 CONG. REC. 10666-69 (1972), *reprinted in* 1 LEGIS. HISTORY, *supra* note 48, at 597.

323. "Tributary groundwater" is groundwater that flows into surface water; "isolated groundwater" is groundwater that does not flow into surface water.

324. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965, 24 ELR 21080 (7th Cir. 1994); *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422, 20 ELR 20889 (7th Cir. 1990). Indeed, groundwater may be interstate. Many aquifers underlie and flow between multiple states. The best known is the Ogallala aquifer, underlying eight states: Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming. Groundwater may not ordinarily be a highway of interstate commerce, but it is used in interstate commerce. The Ogallala aquifer, for example, provides irrigation water that is a key component in the region's agriculture. The Supreme Court held in *Sporhase v. Nebraska*, 458 U.S. 941, 12 ELR 20749 (1982), that groundwater also can be an article in interstate commerce.

program in the state under the same terms and conditions as an approved state program. This provision implies that if EPA is administering the §402 program, it also has authority to issue permits for disposing of pollutants into wells. Two references to “well” in the definition section of the statute support this argument,³²⁵ suggesting that Congress intended CWA §402 to regulate discharges through wells. Because wells lead to groundwater rather than to surface water, congressional intent to regulate discharges through wells necessarily includes congressional intent to regulate discharges to groundwater.

Predictably, the issue of whether the CWA regulates discharges to groundwater was first raised with regard to discharges of pollutants into groundwater through waste disposal wells, a waste disposal method known as deep well injection. In the first reported case, *United States v. GAF Corp.*, EPA sought injunctive relief against the construction of deep wells for chemical waste disposal without a §402 permit.³²⁶ EPA relied on the inclusion of discharges through wells in §§402 and 502, while the defendant relied on the legislative history. The district court held that “[d]isposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters does not constitute a ‘discharge of a pollutant’ within the meaning of” §301(a).³²⁷ It so held because of explicit legislative history that the CWA did not regulate discharges to groundwater, while EPA’s §§402 and 502 arguments were “back-door.”³²⁸ “Congress could not possibly have meant to achieve in roundabout fashion what it expressly declined to accomplish straightforwardly,”³²⁹ the court said. While legislative history may not trump statutory content as easily today,³³⁰ it was quite the fashion at the time.³³¹ It is significant, however, that the district court in *GAF* noted the polluted groundwater at issue was not tributary groundwater, suggesting that the court might have been open to a different result if the groundwater was tributary.

In the next deep well decision, *U.S. Steel Corp. v. Train*,³³² the petitioner sought judicial review of EPA’s per-

mit for discharges of pollutants to surface water and for discharges to groundwater from a deep injection well at the same facility. Upholding EPA’s action, the Seventh Circuit distinguished *GAF* as an action against discharge to groundwater alone, not in conjunction with the control of discharges to surface water.³³³ The Seventh Circuit was convinced by EPA’s argument that §402(a)(1) authorizes the Agency, in the absence of an approved state permit program, to issue permits “subject to the same terms, conditions and requirements” as apply to approved state permit programs, including the authority to regulate pollutants discharged into wells in §402(b)(1)(D).³³⁴ The court found support for that interpretation of the statute in the definition of pollutant in §502(6), which excludes material injected into wells in association with the production of oil and gas, an exclusion that would have no meaning unless the material would be a pollutant when discharged into wells absent the exclusion.³³⁵ Finally, the court found support for that interpretation in the limited CWA legislative history referring to deep well injection, although it ignored substantial contrary legislative history regarding discharges to groundwater generally.³³⁶

The Fifth Circuit came to the opposite conclusion in *Exxon Corp. v. Train*,³³⁷ when it reviewed EPA’s claim of authority to regulate discharges of wastes through deep wells to groundwater as part of a §402 permit that the Agency issued to regulate discharges of pollutants to surface waters from the same facility. EPA did not argue that §301(a) prohibited discharges to groundwater, but only that the Agency had ancillary authority to issue permits for deep well injection by facilities also requiring CWA permits to discharge into surface navigable water under §402(a)(3) and (b)(1)(D).³³⁸ This limited claim of authority was articulated in an opinion by EPA’s Office of General Counsel.³³⁹ While the court commented that EPA’s interpretation was “not implausible,” it concluded that the distinction the Agency drew between deep well injection at a facility with a surface water discharge and injection at a facility with no surface water discharge had “the strange result of dividing jurisdiction over deep-well injections between federal and state authorities, based on the apparently fortuitous factor of whether the person engaging in the deep-well injection also happens to be engaging in ‘associated’ surface discharges.”³⁴⁰

325. The definition of “point source” gives “well” as an example of conveyances included in that term, CWA §502(14). The definition of “pollutant” excludes “material which is injected into a well to facilitate the production of oil or gas” under stated conditions, CWA §502(6). There would be no reason to exclude the injection of material into wells if injection of materials into groundwater was not otherwise prohibited by the CWA.

326. *United States v. GAF Corp.*, 389 F. Supp. 1379, 5 ELR 20581 (S.D. Tex. 1975).

327. *Id.* at 1383.

328. *Id.* at 1384. In his majority opinion in *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468, 31 ELR 20512 (2001), Justice Scalia made a similar point more colorfully, saying that Congress does not “hide elephants in mouseholes.”

329. *GAF*, 389 F. Supp. at 1385.

330. See ESKRIDGE, *supra* note 17, at 207-38; SCALIA & GARNER, *supra* note 17, at 369-90 (discussing one of their Thirteen Falsities Exposed).

331. See *Train v. Colorado Pub. Interest Research Grp.*, 426 U.S. 1, 10-23, 6 ELR 20549 (1976), in which the Court held that the inclusion of radioactive materials in the definition of pollutant in CWA §502(6) did not authorize EPA to regulate the discharge of “radioactive materials from nuclear power plants,” largely because explicit legislative history trumped the plain meaning of the statute.

332. 556 F.2d 822, 7 ELR 20419 (7th Cir. 1977).

333. *Id.* at 851 n.60.

334. *Id.* at 852.

335. *Id.*

336. *Id.* at 852-53. This legislative history was from House and Senate Committee Reports explaining the exclusion from the definition of pollutant in §502(6)(B) of material pumped into a deep well incident to the production of oil or gas.

337. 554 F.2d 1310, 7 ELR 20594 (5th Cir. 1977). Despite its earlier publication in the *Federal Reporter*, *Exxon* was decided six weeks after the Seventh Circuit’s decision in *U.S. Steel Corp.*, 556 F.2d 822, although that decision does not mention *U.S. Steel*.

338. *Exxon*, 554 F.2d at 1318-19.

339. EPA Gen’l Counsel Op. (Dec. 13, 1973), quoted in *Exxon*, 554 F.2d at 1320 n.21. The General Counsel reiterated this interpretation of the CWA in 1975, distinguishing *United States v. GAF Corp.*, 389 F. Supp. 1379, 5 ELR 20581 (S.D. Tex. 1975). See *Exxon*, 554 F.2d at 1320 n.21.

340. *Exxon*, 554 F.2d at 1322.

Consequently, the Fifth Circuit proceeded with an exhaustive examination of the statute's structure and legislative history. It stated that references to groundwater in the CWA establish a "pattern . . . of federal information gathering and encouragement of state efforts to control groundwater pollution but not of direct federal control over groundwater pollution."³⁴¹ Moreover, the court said that the legislative history "demonstrates conclusively that Congress believed it was not granting the Administrator any power to control disposals into groundwater."³⁴² Acknowledging the logic of EPA's argument based on §402(a)(3) and (b)(1)(D), the court concluded that "[w]e cannot attribute to Congress an intention to achieve silently and by indirection that which it constantly refused to do directly."³⁴³ Like the Texas district court in *GAF*, the Fifth Circuit left the door open to the argument that discharges to tributary groundwater were prohibited.³⁴⁴

The controversy over EPA's authority to regulate deep well injection under the CWA subsequently disappeared because Congress gave EPA direct regulatory authority over deep well injection in the Safe Drinking Water Act of 1974.³⁴⁵ The controversy resurfaced tangentially when EPA ordered a steel company to take corrective remedial action with regard to its leaking hazardous waste injection wells under the Resource Conservation and Recovery Act (RCRA).³⁴⁶ In *Inland Steel Co. v. EPA*,³⁴⁷ the respondent raised as a defense an exemption in RCRA §6903(27) for materials in "industrial discharges which are point sources subject to permits under" CWA §402, claiming that the well was a point source adding pollutants to groundwater.³⁴⁸ The Seventh Circuit's decision by Judge Richard Posner suggested that its earlier *U.S. Steel* decision might be "all wet" and held the RCRA exemption inapplicable for a variety of reasons unrelated to this discussion.³⁴⁹

The issue of whether unpermitted discharges to groundwater are prohibited by CWA §301(a) shifted from deep well injection to the discharge of pollutants from surface activities into groundwater. In this context, courts have frequently distinguished between discharges to groundwater with no known or alleged connection with surface navigable water, often called isolated groundwater, and groundwater known or alleged to be tributary to nearby surface navigable water, often called tributary groundwater.³⁵⁰

A small number of decisions hold that the CWA does not regulate discharges into any groundwater, isolated

or tributary.³⁵¹ The most considered of those decisions, *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*,³⁵² concerned discharges into allegedly tributary groundwater. The district court recited the legislative history that Congress rejected legislation covering discharges to groundwater in the CWA,³⁵³ and the statute's repeated use of the phrase "navigable waters and ground waters,"³⁵⁴ suggesting Congress recognized these to be two distinct categories of water. Finally, the decision noted that "EPA has offered no formal or consistent interpretation of the CWA that would subject discharges to groundwater to the [National Pollutant Discharge Elimination System] NPDES permitting requirement."³⁵⁵ Indeed, the district court quoted from the Opinion of EPA's General Counsel referred to in the *U.S. Steel* and *Exxon* decisions that "discharges into ground waters are not included" in the definition of "discharge of a pollutant" in CWA §502(12).³⁵⁶

Umatilla cited two instances in which EPA restricted its regulatory authority over discharges to groundwater to conform to EPA's general counsel opinion,³⁵⁷ although the court ignored the fact that the Agency had sued *GAF Corp.* for unpermitted deep well injection into isolated groundwater, as well as the preamble to an EPA rulemaking in which the Agency noted that the NPDES program did not apply to groundwater "unless there is a hydrological connection between the ground water and a nearby surface water body"—in other words, unless the groundwater is tributary to nearby surface water.³⁵⁸ *Umatilla* criticized opinions holding that discharges to tributary groundwater were covered by the CWA's permitting program for failing to deal with EPA's disavowal of authority over discharges to groundwater.³⁵⁹ It noted, however, that if EPA amended its CWA regulations to cover discharges to tributary ground-

341. *Id.*

342. *Id.* at 1329.

343. *Id.*

344. *Id.* at 1312, n.1.

345. Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.

346. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

347. 901 F.2d 1419, 20 ELR 20889 (7th Cir. 1990).

348. The exclusion is in the definition of solid waste, of which hazardous waste is a subset.

349. *Inland Steel*, 901 F.2d at 1423-24.

350. Makowski, *supra* note 320, at 506, suggests a possibly more useful set of classifications of groundwater, drawn from state groundwater regulation statutes: underground streams; percolating groundwater; and subflow from surface streams.

351. *Town of Norfolk v. U.S. Army Corps. of Eng'rs*, 968 F.2d 1438, 22 ELR 21337 (1st Cir. 1992), is sometimes said to be such a precedent. The decision did not consider whether a CWA permit was required for a discharge into groundwater, but whether groundwater was navigable water in the context of the Corps' consideration of alternatives in determining whether to issue a CWA §404 permit for the filling of wetlands. The First Circuit's analysis of the issue was terse, covering only 10 lines. A subsequent district court decision analyzing *Town of Norfolk* concluded that the decision did not hold "that groundwater is categorically excluded from consideration as 'waters of the United States,' but rather that such a determination requires an 'ecological judgment,' to be made according to the particular characteristics of the site." *Hernandez v. Esso Standard Oil Co.*, 599 F. Supp. 2d 175, 179 (D.P.R. 2009). Moreover, the First Circuit was not interpreting the CWA, but instead the Corps' regulations, and it was not considering whether discharges to groundwater constituted discharges to navigable water for purposes of CWA jurisdiction. On close examination, *Town of Norfolk* appears to be wholly irrelevant to the inquiry here.

352. 962 F. Supp. 1312, 27 ELR 21411 (D. Or. 1997).

353. *Id.* at 1318-19.

354. *Id.* at 1318.

355. *Id.* at 1319. Subsequently, the preamble to EPA's proposed effluent guidelines for Concentrated Animal Feeding Operations (CAFOs) stated that EPA applied a direct hydrologic connection test to determine whether a discharge required a §402 permit, *see* 66 Fed. Reg. 2960 (Jan. 12, 2001), but did not reflect that statement in its final rule, *see* 40 C.F.R. pt. 412.

356. *Umatilla*, 962 F. Supp. at 1319 (emphasis added by the district court).

357. *Id.* *See* 38 Fed. Reg. 13528 (May 22, 1977); 44 Fed. Reg. 32854 (June 7, 1979).

358. 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990).

359. Note that the court itself failed to recognize that in *GAF*, EPA asserted jurisdiction over discharges to isolated groundwater.

water, the court would give that interpretation *Chevron* deference.³⁶⁰ A second district court decision, *Kelley v. United States*,³⁶¹ covered much the same ground, but in lesser detail. The plaintiffs in both cases alleged that pollutants discharged to groundwater flowed into nearby surface navigable water.³⁶²

Other decisions have held that the CWA's jurisdiction does not extend to groundwater because the plaintiffs did not allege the discharges were to tributary groundwater³⁶³ or alleged only "the possibility" of a hydrological connection between the groundwater and surface navigable water.³⁶⁴ These decisions do not explicitly foreclose the assertion of jurisdiction over discharges to tributary groundwater.

Encouraged by a pioneering law review article,³⁶⁵ a number of decisions hold that discharges of pollutants to tributary groundwater are within the jurisdiction of the CWA.³⁶⁶ They all accept that the CWA's legislative history establishes Congress had no intent to protect groundwater generally from pollution or to generally regulate discharges to groundwater. They counter, however, that, in the words of an Idaho district court, "Congress's decision not to comprehensively regulate groundwater as part of the CWA, does not require the conclusion that Congress intended to exempt groundwater from all regulation—particularly under circumstances where the introduction of pollutants into the groundwater adversely affects the adjoining sur-

face waters."³⁶⁷ Although none of the decisions discuss it, the legislative history simply does not deal with tributary groundwater or pollution of surface water by groundwater.

The decisions distinguish most negative precedents as dealing with isolated rather than with tributary groundwater, and conclude that the logic of the decisions holding tributary groundwater to be protected by the statute is, in the words of a Washington district court, "compelling: since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation."³⁶⁸ They might add that allowing such pollution without a permit creates a giant loophole in the CWA; a factory adjacent to a river can evade the CWA simply by aiming its discharge pipe to dry land rather than the river, at least if its flow is low enough to percolate into the soil rather than simply running off over the surface into the river. (The same could be said of pollution of surface waters by converting point source discharges to nonpoint source discharges.³⁶⁹) Although some of these decisions held that discharges to the tributary groundwater in question were regulated by the CWA, most were decisions on preliminary motions. When the plaintiffs prevailed on preliminary motions, the courts often commented that they would hold plaintiffs to a high standard of proof at trial that the pollutants discharged to groundwater actually reached navigable surface water.³⁷⁰ Courts sometimes denied the plaintiffs' motions for summary judgment because of conflicting evidence on the facts.³⁷¹

The plurality in *Rapanos* did not address these situations, but its repeated insistence that tributaries or wetlands must have *surface connections* with navigable water to be navigable themselves³⁷² suggests that those Justices would not be amenable to the argument that groundwater tributary to nearby surface water could be navigable. The plurality, however, did suggest that additions to navigable water need not be direct, implying they may be indirect.³⁷³ This invites the argument that the direct addition of a pollutant to groundwater flowing to nearby navigable water is an indirect addition to the navigable water into which the groundwater flows. That, however, is an interpretation of the "addition" element of the CWA offense, rather than of the "navigable waters" element. Because neither Justice

360. *Umatilla*, 962 F. Supp. at 1319 n.2. Another court refusing to interpret navigable waters to include groundwater commented that if EPA amended its regulations to include tributary groundwater, that would "pose a harder question." *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 966, 24 ELR 21080 (7th Cir. 1994). *But see id.* at 966 (concurring op.).

361. 618 F. Supp. 1103, 16 ELR 20080 (W.D. Mich. 1985).

362. *Umatilla*, 962 F. Supp. at 1313-14; *Kelley*, 618 F. Supp. at 1104-05.

363. In *GAF*, for instance, EPA did not allege contaminated groundwater flowed into navigable waters. *See United States v. GAF Corp.*, 389 F. Supp. 1379, 1383, 5 ELR 20581 (S.D. Tex. 1975). In *Exxon*, EPA did not allege contaminated groundwater flowed into navigable waters and the court specifically noted that it voiced no opinion on whether CWA jurisdiction would exist if the discharge was to tributary waters. *Exxon Corp. v. Train*, 554 F.2d 1310, 1312 n.1, 7 ELR 20594 (5th Cir. 1977).

364. *Village of Oconomowoc Lake*, 24 F.3d at 966. The "possibility" of contaminated pond water entering groundwater and thereafter migrating to surface navigable waters does not establish CWA jurisdiction.

365. Mary Christina Wood, *Regulating Discharges Into Groundwater: The Critical Link in Pollution Control Under the Clean Water Act*, 12 HARV. ENV'T L. REV. 369-426 (1988). She has been followed by others, all arguing for the recognition of tributary groundwater as navigable. *See, e.g.*, Makowski, *supra* note 320; James W. Hayman, *Regulating Point Source Discharges to Ground Water Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act*, 5 BARRY L. REV. 95 (2005); and Casey, *supra* note 320.

366. *Quivira Mining Co. v. EPA*, 765 F.2d 126, 15 ELR 20530 (10th Cir. 1985); *Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 599 F. Supp. 2d 175 (D.P.R. 2009); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001), *aff'd on other grounds*, 305 F.2d 943 (9th Cir. 2002); *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. 1995); *Washington Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 25 ELR 20661 (E.D. Wash. 1994); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 24 ELR 20749 (D. Colo. 1993); *McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F. Supp. 431, 20 ELR 20870 (E.D. Cal. 1989), 707 F. Supp. 1182, 19 ELR 20124 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325, 25 ELR 20628 (9th Cir. 1995). *See also New York v. United States*, 620 F. Supp. 374, 381, 16 ELR 20142 (E.D.N.Y. 1985) (commenting that discharges to tributary groundwater may be subject to CWA jurisdiction, but not reaching the question).

367. *See, e.g., Idaho Rural Council*, 143 F. Supp. 2d at 1180 (emphasis added).

368. *See, e.g., Washington Wilderness Coal.*, 870 F. Supp. at 990.

369. *See the dissent in United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 653-54, 23 ELR 21526 (2d Cir. 1993) (dissenting op.).

370. *See, e.g., Idaho Rural Council*, 143 F. Supp. 2d at 1180; *Washington Wilderness Coal.*, 870 F. Supp. at 990.

371. *See, e.g., Friends of Santa Fe Cnty.*, 892 F. Supp. at 1358; *McClellan Ecological Seepage Situation*, 763 F. Supp. at 428, 707 F. Supp. 1182, *vacated on other grounds*, 47 F.3d 325.

372. *Rapanos v. United States*, 547 U.S. 715, 742, 36 ELR 20116 (2006).

373. *Rapanos*, 547 U.S. at 743 ("The Act does not forbid 'the addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'"). The argument for indirect addition by aerial spraying of pesticides near water and other discharges to air that reach water is developed in Amil Anthony, *Shotguns, Spray, and Smoke: Regulating Atmospheric Deposition of Pollutants Under the Clean Water Act*, 29 UCLA J. ENVTL. L. & POL'Y 215 (2011). The argument is criticized in Miller, *Addition*, *supra* note 4, at 10797-98.

Kennedy's concurring opinion nor the dissenting opinion insisted on surface connections to navigable waters, a majority of the Supreme Court might be persuaded that tributary groundwater is a jurisdictional tributary.

The easy answer to whether unpermitted discharges to groundwater are prohibited by CWA §301(a) is that they are not. That conclusion is supported by the legislative history, the structure of the statute, and the failures of both Congress and EPA to mention groundwater in their definitions of navigable water. The significance of the Agency's omission is underscored by the length and detail of its definition of waters of the United States, by far the longest and most detailed of EPA's definitions of the CWA's jurisdictional terms. Some groundwater could be covered by the "tributaries" part of EPA's definition. The easy answer is also supported by the plurality decision in *Rapanos*, which twice states that only wetlands "with a continuous surface connection" with navigable water are within the regulatory jurisdiction of §404.³⁷⁴ (*Rapanos* is a §404 case and the plurality did not consider the jurisdiction of §402.) But the relevant canon of construction is to interpret a term in the same manner throughout a statute.³⁷⁵ Supporting this canon, CWA §502 provides that its definitions are to be applied throughout the statute unless otherwise specifically indicated in the statute.

The difficult answer to the question of whether unpermitted discharges to groundwater are prohibited by CWA §301 is that unpermitted discharges to tributary groundwater are prohibited, but not discharges to other groundwater, including isolated groundwater. In addition to the legal arguments against it, this answer requires determining when groundwater is connected to nearby surface navigable water. Such a determination is difficult both in proof and in legal distinction. The flow of surface tributaries to navigable waters may be traced visibly by walking beside them or by taking images of them from an aerial camera. Tracing the flow of underground tributaries is much more uncertain. But even when such underground connections are known, are there geographic or temporal lines between tributary and non-tributary groundwater? Human-caused pollution of soil on property adjacent to navigable water, when the pollutants visibly enter surface water from the flow of groundwater through the bank, either below or above the surface of the navigable water, is easy and logical to classify as tributary water. But what about polluted waters that, as the Tenth Circuit put it, "soak into the earth's surface, become part of the underground aquifers, and after a lengthy period, perhaps centuries, the underground water moves toward eventual discharge" into tributaries of navigable water miles away?³⁷⁶ Because of its

adjacency, the riverside example might even be approved under the plurality opinion in *Rapanos*, but the remote example surely would not.³⁷⁷

Perhaps the tributary groundwater theory should be confined to situations where the pollution originates on property adjacent to navigable water or its tributary. That would prevent most polluters from evading the CWA's permit requirements by dumping pollutants on the ground near a navigable water where they percolate to groundwater, which in turn takes them to that navigable surface water. The adjacency requirement is analogous to the Refuse Act, which prohibits depositing refuse on the bank of navigable water or its tributary from which it may wash into the navigable water.³⁷⁸ Legislative history suggests that Congress intended the CWA to regulate at least as much pollution as the Refuse Act regulated.³⁷⁹ This limited application is also analogous to the adjacency requirement for wetlands under §404. Such cases would not involve the parties and the courts in protracted and difficult factual inquiries. This is a fairly easy limiting principle to apply, unless, of course, the adjacent property is the King Ranch or some other very large property.

EPA should reconsider its un-nuanced exclusion of all groundwater in its proposed definition of navigable waters. The Agency could make a credible case for including a groundwater tributary to nearby or adjacent surface navigable water within its definition of waters of the United States. Indeed, although EPA's proposed amendment to its definition specifically excludes groundwater, it does provide that shallow subsurface hydrological connection between a wetland and a jurisdictional water may make the wetland jurisdictional,³⁸⁰ very much the same as tributary groundwater. Most courts holding groundwater not to be navigable waters did so in cases where there were no allegations that the discharges were to tributary groundwater, and commented that they may have held differently if the discharges had been to tributary groundwater.³⁸¹ Such courts may well have ruled otherwise if EPA had promulgated a rule including tributary groundwater in its definition of waters of the United States.

377. The plurality opinion in *Rapanos* specifically disapproves of *Quivira*. *Rapanos*, 547 U.S. at 726.

378. 33 U.S.C. §407.

379. The Senate Committee Report accompanying S. 2770 indicated that the prohibition of the CWA adopted "the basic formula [from the Refuse Act, but added] . . . municipal discharges to it, so [that] before any material can be added to navigable waters authorization must first be granted by the Administrator." S. REP. NO. 92-414, reprinted in 1972 U.S.C.C.A.N. 3742. See *United States v. Hamel*, 551 F.2d 107, 110-11, 7 ELR 20253 (6th Cir. 1977). The comment was made specifically with regard to the definition of pollutant, but applies as well to the broader definition of "discharge of a pollutant."

380. 79 Fed. Reg. 22188, 22268 (proposed Apr. 21, 2014), to be codified at 40 C.F.R. §122.2(b)(5)(vi) [the exclusion of groundwater] and (c)(2) & (3) [shallow subsurface hydrologic connections].

381. See, e.g., *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 966, 24 ELR 21080 (7th Cir. 1994); *Exxon Corp. v. Train*, 554 F.2d 1310, 1312 n.1, 7 ELR 20594 (5th Cir. 1977); *Umatilla Waterquality Prot. Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1319, 27 ELR 21411 (D. Or. 1997) (groundwater at issue was tributary, but EPA rule did not cover it); *United States v. GAF Corp.*, 389 F. Supp. 1379, 1388, 5 ELR 20581 (S.D. Tex. 1975).

374. *Rapanos*, 547 U.S. at 742 (emphasis added). Justice Kennedy's concurring opinion rejected this conclusion, see *Rapanos*, 547 U.S. at 772-74 (Kennedy, J., concurring), as did the dissenting opinion, see *Rapanos*, 547 U.S. at 804-06 (Stevens, J., dissenting).

375. See ESKRIDGE, *supra* note 17 at 324; SCALIA & GARNER, *supra* note 17, at 170-73.

376. See *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129, 15 ELR 20530 (10th Cir. 1985).

Instead, the Agency's proposed amendment to its definition of waters of the United States simply excludes groundwater even if it otherwise meets the definition of waters of the United States.³⁸² This exclusion is unnecessary to meet the Supreme Court's concerns: It has never considered a case in which a defendant added pollutants to groundwater that was tributary to nearby navigable water, evading the CWA's regulatory program. The majority of the Court in *Rapanos* (that is, all of the Justices other than those in the plurality) was not fixated on surface connections and might be persuaded that such groundwater could be a tributary to waters of the United States. Even if groundwater flowing into nearby navigable water is not itself navigable, adding pollutants to that groundwater could be an indirect addition of the pollutants to navigable water, a proposition with which the plurality in *Rapanos* might conceivably agree. In any event, if the pollutants are hazardous, many of the discharges to groundwater would be subject to RCRA.³⁸³

D. EPA's Unitary Navigable Waters Theory and Water Transfer Rule

A water transfer is the diversion of some or all of the water from one water body to another for intervening or subsequent human use. Water transfers are often accomplished by point sources: pumps; pipes; canals; and ditches. Assuming that the first water body is heavily polluted and the second is pristine, under traditional CWA analysis, the discharge of the polluted water into the pristine water through a point source would require a §402 permit. Under EPA's recently promulgated water transfer rule, however, the discharge is exempted from requiring a permit unless pollutants are added by human use (except for agricultural purposes) of the water between diversion and discharge.

EPA justified the rule with two theories. The first and better-articulated theory is that when viewed as a whole, the CWA strikes a grand balance between its federal program to improve and protect water quality and preexisting state programs to allocate the uses of scarce water resources, highly developed private property systems, at least in the western United States.³⁸⁴ Water resource management in the arid West, where water diversions are criti-

cal to irrigated agriculture and municipal water supplies, is an important aspect of the area's economy and state legal systems. This is the Agency's "holistic theory" of the CWA. EPA's second theory supporting the water transfer rule is that all navigable waters are one, so that when polluted navigable water is discharged into a pristine navigable water, the polluted navigable water adds no pollutants to the pristine water because both waters are the same water. This is the Agency's "unitary navigable water theory."

The Agency bases its holistic theory on four brief passages in the CWA, which it argues create a balance between water quality and water quantity, thereby removing water transfers from the definition of "addition" and exempting them from requiring CWA permits.³⁸⁵ None of the four passages suggests that "addition" excludes water transfers or that water transfers are exempt or can be exempted from requiring a CWA permit when they add pollutants from one water body to another water body. EPA's water transfer rule is such a significant departure from the pattern and concerns of the CWA that it should not be upheld unless Congress clearly intended it. That intent is not clear from the four brief statutory passages proffered by EPA, consisting of three subsections and one paragraph in a 200-page statute with more than 500 subsections and 800 paragraphs, the rest of which are unambiguously focused on promoting pollution control.

The Southern District of New York recently heard a consolidated challenge to the rule and vacated it in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. Environmental Protection Agency*.³⁸⁶ The Eleventh Circuit, however, in *Friends of the Everglades v. South Florida Water Management District*,³⁸⁷ had earlier accorded *Chevron* deference to the rule when it was raised as a defense in a citizen suit against an unpermitted water transfer of polluted water. *Catskill Mountains* is the most recent, and also the most comprehensive, decision on the water transfer issue. It has been appealed to the U.S. Court of Appeals for the Second Circuit.³⁸⁸

EPA enunciated its unitary navigable waters theory in its amicus brief in *South Florida Water Management District v. Miccosukee Tribe of Indians of Florida*.³⁸⁹ Although its brief suggested that the Agency had always subscribed to the theory, the earlier instances it cited merely foreshadowed the theory rather than articulating it.³⁹⁰ Indeed, former EPA officials including former Administrator Carol Browner filed an amicus brief indicating that EPA had

382. 79 Fed. Reg. 22188, 22269 (proposed Apr. 21, 2014), to be codified at 40 C.F.R. §122.2, *Waters of the United States*, (b)(5)(vi). At the same time, it defines waters of the United States to include wetlands and other waters "adjacent" to navigable waters; defines "adjacent" to include "neighboring"; and defines "neighboring" to include a "shallow subsurface hydrologic connection" between a wetland and navigable water. See (a)(6), (c)(1) & (2). Query: Is that an exception to the exclusion of groundwater? Does the shallow hydrological connection exception treat wetlands more favorably than traditional tributaries?

383. 42 U.S.C. §6925(a).

384. Western water law provides that the right of the first person to divert and use water from a particular water source is superior to the rights of persons later diverting and using water from the same source. Subsequent diverters may exercise their rights only when the senior diverter has used his full allocation of water. Eastern water law, based on common law, traditionally limits the right to divert and use water to landowners adjoining a water body and requires them to share and share alike during times of water scarcity. For a detailed descriptions of both western and eastern water law, see TARLOCK, *supra* note 32.

385. The four passages are CWA §§101(b), 101(g), 304(f) & 510(2); 33 U.S.C. §§1251 (b), 1251(g), 1314(f) & 1370(2).

386. 8 F. Supp. 3d 500 (S.D.N.Y. 2014), 2014 WL 128544.

387. 570 F.3d 1210 (11th Cir. 2009).

388. The Second Circuit is already on record as holding that the CWA unambiguously requires permits for water transfers, *Catskill Mtns. Chapter of Trout Unlimited, Inc. v. City of New York*, 102 F.3d 1273 (2d Cir. 1996), making it likely that it will affirm the district court's decision. If it does so, then because that would create a circuit split between the Second Circuit in *Catskill Mtns.* and the Eleventh Circuit in *Friends of the Everglades*, and because the Supreme Court left the unitary navigable water theory open in *Miccosukee*, the Court may well grant certiorari.

389. 541 U.S. 95, 105-06, 34 ELR 20021 (2004).

390. *Id.* at 107-08.

not subscribed to the theory during their tenures there.³⁹¹ EPA did not evoke the theory in its Water Transfer Interpretation³⁹² or in its proposed Water Transfer Rule or the preamble accompanying it³⁹³; additionally, some of the wording used in the preamble to the proposed rule³⁹⁴ and repeated more than once in the preamble to the final rule are inconsistent with the theory.³⁹⁵

Moreover, the Water Transfer Interpretation and the preamble to the proposed rule both stated that the “precise legal question addressed” was whether a water transfer was an addition; nowhere was it suggested that the definition of navigable waters was at issue. Finally, the Interpretation stated explicitly that it did “not address the meaning of . . . navigable waters.”³⁹⁶ Although all three documents reiterated that the precise³⁹⁷ or principal³⁹⁸ legal issue was the definition of addition, none of them enunciated the meaning of addition. Instead, all three justified the water transfer policy or rule’s exclusion of water transfers from the requirement of a CWA §402 permit on the basis of a holistic interpretation of the statute favoring water transfers being regulated by authorities other than federal and state pollution control authorities.³⁹⁹ EPA’s frequent shifting between the elements it is interpreting and the theories it uses to interpret them in this contest is a shell game.⁴⁰⁰

EPA’s preamble to its final rule embraces the unitary navigable waters theory as a justification for the water transfer rule, although as a subsidiary argument and in a conclusory manner:

Thus, there is no “addition”; nothing is being added “to” “the waters of the United States” by virtue of the water transfer, because the pollutant at issue is already part of “the waters of the United States” to begin with When a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as “waters of the United States,” and nothing is added to those waters from the outside world.⁴⁰¹

This preamble is drawn directly from EPA’s brief in *Friends of the Everglades v. South Florida Water Management District*,⁴⁰² with no further authority or justification except an implicit reference to *National Wildlife Federation v. Consumers Power Co.*⁴⁰³

EPA’s unitary navigable waters theory is a startling and counterintuitive notion. If Congress intended to incorporate such an unexpected theory or policy into the CWA, surely it would have explicitly articulated it in the statute or at least discussed it in the legislative history. However, Congress did not mention or even hint at the theory in either the statute or its legislative history. The only wording EPA can point to in the statute to support the notion is an inference from the presence of the word “any” before the terms “addition,” “pollutant,” “point source,” and “person,” but not before the term “navigable waters” in §§301(a) and 502(12). EPA argues that, for example, “any” before “pollutant” signifies there are many different pollutants, any one of which could support a violation of the CWA. By the same token, the Agency argues that the absence of the word “any” before “navigable waters” signifies that there is only one aggregate navigable waters that can support a violation, not many individual navigable waters. EPA argues that this is consistent with use of the singular nouns “addition,” “pollutant,” and “point source,” and of the plural noun “waters” in §§301(a) and 502(12). Congress did not explain why it used the plural form of navigable waters and the singular forms of the other elements.

The difference between “navigable water” and “navigable waters” is not at all clear. Indeed, in his plurality opinion in *Rapanos*, Justice Scalia used dictionary definitions to argue that the singular “water” is more extensive than the plural “waters.”⁴⁰⁴ However, Congress used the words water and waters interchangeably in the statute,⁴⁰⁵ and elsewhere provided that unless “the context indicates otherwise,” the use of a singular noun in a statute incorporates the plural of that noun, and the use of a plural noun in a statute incorporates the singular of that noun.⁴⁰⁶ This parallels the canon of statutory construction that absent a contrary indication in a statute, “the singular includes the plural (and vice versa).”⁴⁰⁷ Nothing in the definitions of “discharge of a pollutant” or “navigable waters” indicates differently.⁴⁰⁸ Indeed, the CWA’s water quality standards and §404 programs would be rendered meaningless by EPA’s unitary navigable water theory.⁴⁰⁹ The argument that

391. See Brief for Carol Browner et al. as Amici Curiae Supporting Miccosukee Tribe of Indians of Fla., South Fla. Water Mgmt. Dist., v. Miccosukee Tribe of Indians of Fla. 541 U.S. 95, 34 ELR 20021 (2004), 2003 WL 22793539. Former EPA Administrator Browner was joined in the amicus brief by two former assistant administrators for EPA’s Water Programs, and two former general counsels.

392. EPA Interpretation on Applicability of CWA §402 to Water Transfers (2005) [hereinafter EPA Interpretation], available at http://www.epa.gov/ogc/documents/water_transfers.pdf.

393. 71 Fed. Reg. 32887 (June 6, 2006).

394. A water transfer “conveys waters of the United States to another water of the United States.” (Emphasis added.) *Id.* at 32891.

395. 73 Fed. Reg. 33697, 33699 (a water transfer “diverts a water of the United States to a second water of the United States.”) (emphasis added). *Id.* at 33704.

396. EPA Interpretation, *supra* note 392, at 18, n.19.

397. See Miller, *Addition*, *supra* note 4, at 10784-85.

398. *Id.*

399. *Id.*

400. Or perhaps it is evidence the documents were written by different members of a committee with insufficient editorial control to produce consistent documents.

401. 73 Fed. Reg. 33697, 33701.

402. See *id.*; *Friends of the Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

403. 862 F.2d 580, 19 ELR 20235 (6th Cir. 1988).

404. *Rapanos v. United States*, 547 U.S. 715, 732, 36 ELR 20116 (2006).

405. For example, CWA §101(a) uses “waters” in (1) and “water” in (2).

406. 1 U.S.C. §1.

407. See SCALIA & GARNER, *supra* note 17, at 129-31.

408. CWA §502(7) & (12); 33 U.S.C. §1362(7) & (12).

409. It is most likely that Congress used “navigable waters” in the CWA definition of “discharge of a pollutant” only because it consciously adopted the jurisdiction and the permit program from the Refuse Act, and the Refuse Act forbade the discharge of refuse into the plural “navigable waters” without a permit from the Corps. Congress most likely used “navigable waters” in the Refuse Act because Congress used the term throughout the Rivers and Harbors Act of 1899. See, e.g., 33 U.S.C. §407.

the absence of “any” before “navigable waters” in §502(12) exempts water transfers from §402 or creates one unitary body of water from all navigable waters is countered by Justice Scalia’s comment that Congress does not “hide elephants in mouse holes.”⁴¹⁰

The CWA is premised on treating navigable waters into which pollutants are discharged as singular waters rather than as one whole navigable water. This is most evident in the CWA’s water quality standards program and in the §404 permit program for filling wetlands. The CWA’s water quality standards program is based on the strategy of the earlier FWPCA to regulate the discharge of pollutants to interstate waters. The basic strategy of this program is for states to designate how they desire particular waterways to be used—for example, drinking water without treatment, body contact sports, fish propagation, non-body contact sports, or agricultural and industrial use. Next, the state designates pollutant criteria for each use, primarily concentrations of pollutants in the water that are safe for the particular use designated. Thus, different water bodies will have different uses designated and different criteria for the pollutants found in them. The states are then to reduce pollution from point and nonpoint sources in a particular water body sufficiently to meet the criteria designated for that water body.

This is inherently a regulatory strategy that requires treating each water body as a separate entity rather than as a part of one whole unitary water body. Treating navigable waters as unitary navigable water suggests one use and one set of criteria. The CWA is replete with requirements for states to regulate the water pollution of separate water bodies or portions thereof rather than of one whole body of water.⁴¹¹ EPA’s unitary navigable water theory is inconsistent with this strategy of water pollution control. Because Congress established the water quality standards strategy but did not mention the incompatible unitary navigable waters theory, that theory is a chimera.

If the unitary navigable water theory is inconsistent with the water quality strategy, it reads much of §404 out of the CWA. Section 404 requires a permit for adding dredged or fill material to navigable waters. The provision was enacted to regulate the disposal of dredged spoil by Corps-permitted projects to enhance waterborne transportation by deepening navigation channels and harbors. The dredged spoil was most easily and economically disposed of in water or low-lying coastal wetlands. If all navigable waters were one, no §404 permit would be needed to redeposit dredged spoil from one navigable water to another because both navigable waters would be one. Most recent §404 enforcement actions arise from unpermitted wetland clearing activities. In the typical wetland clearing case, a developer removes vegetation, levels the land, and perhaps digs a drainage ditch, redepositing the vegetative mate-

rial and soil on other parts of the wetland. This redeposit is held to be the addition of material to navigable waters from a point source that requires a permit.⁴¹² If all navigable waters are one, however, no §404 permit would be needed for redeposit of material in landclearing operations, because all parts of the wetland would be the same navigable water.

In the wetlands land-filling cases, another EPA theory would thwart prosecution: the Agency’s theory that “addition” must be from the “outside world.” Removing material from a wetland and redepositing it elsewhere in the same wetland does not add it from elsewhere.⁴¹³ Together, these two EPA theories could narrow §404 jurisdiction only to cases in which fill material from dry land is discharged into water.

EPA contends that because “Congress explicitly forbade discharges of dredged material except in compliance with” a §404 permit, the unitary navigable water theory and the outside world theory have no effect on the §404 program.⁴¹⁴ But its contention only tells us that dredged material is a pollutant, not whether the water into which it is deposited is navigable or whether the deposit is an addition. Perhaps the Agency is suggesting that its theory does not apply to §404, but only to §402. But EPA does not explicitly make that argument, and the argument cannot survive either the canon of statutory interpretation that one word or term must be interpreted to have the same meaning throughout a statute unless the statute provides otherwise,⁴¹⁵ or the statement to the same effect in the lead-in to the CWA’s definition of navigable waters in §502.⁴¹⁶

VI. Conclusion

Congress defined navigable waters as the waters of the United States, intending that the jurisdiction of the CWA extend as far as constitutionally possible. At first, courts followed EPA’s lead and legislative history to interpret the terms expansively under both §§402 and 404. The Supreme Court, however, gradually narrowed the CWA’s navigable waters jurisdiction, mindful of the fact that the Court itself had developed the meaning of that term as a highway of interstate and foreign waterborne commerce under the Commerce Clause over the course of more than one-and-a-half century of its opinions. By basing the CWA’s jurisdiction on a term with an already-developed meaning under the Commerce Clause, Congress invited courts to interpret the CWA’s jurisdiction with some regard to its traditional connection with waterborne commerce. That effectively narrowed “navigable waters” under the CWA to the first of the three *Lopez* prongs of interstate and foreign commerce

410. See *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 468, 31 ELR 20512 (2001).

411. See CWA §302(a), 33 U.S.C. §1312(a), providing for “attainment or maintenance of . . . water quality in a specific portion of the navigable waters . . .” (emphasis added). See also *Miller, Addition*, *supra* note 4, at 10789-90.

412. *Miller, Addition*, *supra* note 4, at 10800-01.

413. *Id.* at 10778-79.

414. 73 Fed. Reg. 33697, 33703 (June 13, 2008).

415. *ESKRIDGE*, *supra* note 17, at 324; *SCALIA & GARNER*, *supra* note 17, at 167-69.

416. 33 U.S.C. §1362 (“Except as otherwise specifically provided, when used in this chapter: . . . (7) the term ‘navigable waters,’ means the waters of the United States. . .”).

jurisdiction: use as a highway of commerce. The tension between congressional intent and judicial interpretation has been particularly acute under §404, where agricultural landclearing activities in wetlands sometimes appear to be moving dirt on or to dry land, rather than placing it on the nation's waters.

A less textual Supreme Court could reach a more expansive interpretation of navigable waters. Congress could erase any mention of navigable water from the CWA and explicitly state in the legislative history that it is using all of the jurisdiction it has under the Commerce Clause under any of the three prongs of *Lopez*, as well as its treaty powers, which it has used to protect migratory birds and their habitats. None of these changes is likely in the near future. In the meantime, EPA and the Corps have no choice but to amend their regulatory definitions of navigable waters, acknowledging some limitations to their jurisdiction.

The agencies have proposed a new regulatory definition of waters of the United States that includes traditionally navigable waters, their tributaries, and adjacent wetlands. It defines tributaries and adjacent wetlands and provides scientific justifications for the definitions. The scientific justifications may justify judicial deference.⁴¹⁷ The agencies also abandon any claim to jurisdiction over groundwater that is tributary to navigable waters or to waters within the second and third prongs of *Lopez* Commerce Clause jurisdiction, including isolated waters used by interstate travelers for purposes related to interstate commerce. EPA could recapture some of those waters on a case-by-case basis by demonstrating that, alone or in combination with similarly situated waters in the same watershed, they have a significant nexus in terms of flow and water quality to other waters defined as waters of the United States. Finally, because EPA does not mention its unitary navigable water theory in its proposed new, comprehensive definition or in the preamble, it can be argued that the Agency has abandoned the theory.

Appendix I

Note to readers: The body of this text is the definition of “waters of the United States” as it currently appears in 40 C.F.R. §122. The portion of the text in brackets indicates text that is deleted in EPA’s proposed revision of the definition, published at 79 Fed. Reg. 22188 (proposed Apr. 21, 2014). The italicized portion identifies text that is added in EPA’s proposed revision.

Waters of the United States or waters of the U.S. means:

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusion in paragraph (b) of this definition, the term “waters of the United States” means:

([a]1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

([b]2) All interstate waters, including interstate “wetlands;”

(3) *The territorial sea;*

[(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(1) Which are or could be used by interstate of foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;]

[(d)4] All impoundments of waters [otherwise defined as waters of the United States under] *identified in paragraphs (a)(1) through (3) and (5) of this definition*

[(e)5] [All] [T]ributaries of waters identified in paragraphs (a)(1) through [(d)] (4) of this definition;

[(f) The territorial sea; and]

(6) *All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this definition; and*

(7) *On a case by case basis, other waters, including wetlands, provided that those waters alone, or in combination with similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition.*

[(g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.] The proposed definition lists eleven specific exclusions, including groundwater, and defines “adjacent,” “neighboring,” “riparian area,” “floodplain,” “tributary,” “wetland” and “significant nexus.”

417. EPA’s study is a monumental review by its Office of Research and Development of modern, peer-reviewed literature on the hydrology of water quality and water pollution. It is presently in draft form and in the process of review by EPA’s SAB. See *infra* note 277. EPA will not promulgate the final version of its rule until the SAB’s review is complete and the study is in final form. See 79 Fed. Reg. 22188, 22190. A cynical reader may find some of the science little more than “most water is connected in the hydrological cycle”; “surface water flows downhill”; “groundwater flows downgradient”; “organisms that live in water can’t live on dry land”; and “organisms that live in pristine water can’t live in polluted or muddy water.”

TABLE A

Decisions Interpreting “Navigable Waters”

U.S. Supreme Court Decisions	
1.	Los Angeles County Flood Control District v. Natural Resources Defense Council, 133 S. Ct. 710, 43 ELR 20004 (2013)
2.	Rapanos v. United States, 547 U.S. 715, 36 ELR 20116 (2006)
3.	South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 34 ELR 20021 (2004)
4.	Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 31 ELR 20382 (2001)
5.	United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 16 ELR 20086 (1985)
U.S. Circuit Court Decisions	
6.	United States v. Donovan, 2011 WL 5120605, 42 ELR 20328 (3d Cir. 2011)
7.	Precon Development Corp. v. U.S. Army Corps of Engineers, 633 F.3d 278, 41 ELR 20071 (4th Cir. 2011)
8.	United States v. Agosto-Vega, 617 F.3d 541, 40 ELR 20222 (1st Cir. 2010)
9.	United States v. Milner, 583 F.3d 1174, 39 ELR 20232 (9th Cir. 2009)
10.	Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009)
11.	United States v. Bailey, 571 F.3d 791 (8th Cir. 2009)
12.	Friends of the Everglades v. South Florida Water Management District, 570 F.3d 1210 (11th Cir. 2009)
13.	Ohio Valley Environmental Coalition v. Aracoma Coal Co., 556 F.3d 1717 (4th Cir. 2009)
14.	United States v. Cundiff, 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009)
15.	United States v. Lucas, 516 F.3d 316 (5th Cir. 2008)
16.	United States v. Robinson, 505 F.3d 1208 (11th Cir. 2007)
17.	North California Water Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007)
18.	United States v. Moses, 496 F.3d 984 (9th Cir. 2007)
19.	San Francisco Baykeeper v. Cargill Salt Division, 481 F.3d 700 (9th Cir. 2007)
20.	United States v. Johnson, 467 F.3d 56 (1st Cir. 2006)
21.	United States v. Gerke Excavation, Inc., 464 F.3d 723 (7th Cir. 2006)
22.	Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006)
23.	Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006)
24.	United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006)
25.	Baccarat Freemont Development, LLC v. United States Army Corps of Engineers, 425 F.3d 1150 (9th Cir. 2005)
26.	Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004)
27.	United States v. Phillips, 367 F.3d 846 (9th Cir. 2004)
28.	In re Needham, 354 F.3d 340 (5th Cir. 2003)
29.	Treacy v. Newdunn Associates, LLP, 344 F.3d 407 (4th Cir. 2003)
30.	United States v. Rueth Development Co., 335 F.3d 598 (7th Cir. 2003)
31.	United States v. Deaton, 332 F.3d 698 (4th Cir. 2003)
32.	Community Assn. for Restoration of the Environment v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002)
33.	United States v. Krilich, 303 F.3d 784 (7th Cir. 2002)
34.	Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001)
35.	Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001)
36.	Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001)
37.	Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001)
38.	Driscoll v. Adams, 181 F.3d 1285, 29 ELR 21387 (11th Cir. 1999)
39.	United States v. TGR Corp., 171 F.3d 762, 29 ELR 21059 (2d Cir. 1999)
40.	United States v. Wilson, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997)
41.	United States v. Eidson, 108 F.3d 1336, 27 ELR 20853 (11th Cir. 1997)
42.	Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 27 ELR 20622 (1st Cir. 1996)
43.	Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.2d 962, 24 ELR 21080 (7th Cir. 1994)
44.	United States v. Pozsgai, 999 F.2d 719, 23 ELR 21012 (3d Cir. 1993)
45.	Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency, 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993)

46. *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 22 ELR 21337 (1st Cir. 1992)
47. *Inland Steel Co. v. U.S. Environmental Protection Agency*, 901 F.2d 1419, 20 ELR 20889 (7th Cir. 1990)
48. *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 863 F.2d 1420, 19 ELR 20225 (9th Cir. 1988)
49. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 19 ELR 20235 (6th Cir. 1988)
50. *Conant v. United States*, 786 F.2d 1008, 16 ELR 20453 (11th Cir. 1986)
51. *Quivira Mining Co. v. U.S. Environmental Protection Agency*, 765 F.2d 126, 15 ELR 20530 (10th Cir. 1985)
52. *United States v. City of Fort Pierre*, 747 F.2d 464, 15 ELR 20177 (8th Cir. 1984)
53. *Utah v. Marsh*, 740 F.2d 799, 14 ELR 20683 (10th Cir. 1984)
54. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 13 ELR 20942 (5th Cir. 1983)
55. *United States v. Tilton*, 705 F.2d 429, 13 ELR 20583 (11th Cir. 1983)
56. *Deltona Corp. v. United States*, 657 F.2d 1184, 11 ELR 20905 (Ct. Cl. 1981)
57. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 10 ELR 20184 (10th Cir. 1979)
58. *United States v. Byrd*, 609 F.2d 1204, 9 ELR 20757 (7th Cir. 1979)
59. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 9 ELR 20542 (10th Cir. 1979)
60. *Leslie Salt Co. v. Froehilke*, 578 F.2d 742, 8 ELR 20480 (9th Cir. 1978)
61. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 7 ELR 20419 (7th Cir. 1977)
62. *Exxon Corp. v. Train*, 554 F.2d 1310, 7 ELR 20594 (5th Cir. 1977)
63. *California v. U.S. Environmental Protection Agency*, 511 F.2d 963 (9th Cir. 1975)
64. *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317, 4 ELR 20784 (6th Cir. 1974)

U.S. District Court Decisions

65. *Stillwater of Crown Point Homeowners Association v. Kovich*, 2011 WL 4818511 (N.D. Ind. 2011)
66. *Deerfield Plantation Phase II-B Property Owners Association v. U.S. Army Corps of Engineers*, 2011 WL 2746232 (D.S.C. 2011)
67. *United States v. Brink*, 2011 WL 2412577 (S.D. Tex. 2011)
68. *San Francisco Baykeeper v. West Bay Sanitary District*, 791 F. Supp. 2d 719 (N.D. Cal. 2011)
69. *United States v. Freedman Farms, Inc.*, 786 F. Supp. 2d 1016 (E.D.N.C. 2011)
70. *Ohio Valley Environmental Coalition, Inc. v. Coal-Mac, Inc.*, 775 F. Supp. 2d 900, 41 ELR 20141 (S.D. W. Va. 2011)
71. *United States v. Vierstra*, 2011 WL 1064526 (D. Idaho 2011)
72. *Gulf Restoration Network v. Hancock County Development, LLC*, 772 F. Supp. 2d 761 (S.D. Miss. 2011)
73. *United States v. Donovan*, 2010 WL 3000058 (D. Del. 2010)
74. *National Association of Home Builders v. U.S. Army Corps of Engineers*, 699 F. Supp. 2d 209 (D.D.C. 2010)
75. *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210 (D. Or. 2009)
76. *Stephens v. Koch Foods, LLC*, 667 F. Supp. 2d 768 (E.D. Tenn. 2009)
77. *Precon Development Corp. v. U.S. Army Corps of Engineers*, 658 F. Supp. 2d 752 (E.D. Va. 2009)
78. *Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 599 F. Supp. 2d 175 (D.P.R. 2009)
79. *American Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008)
80. *United States v. Fabian*, 522 F. Supp. 2d 1078, 37 ELR 20083 (D. Ind. 2007)
81. *United States v. Robison*, 521 F. Supp. 2d 1247 (N.D. Ala. 2007)
82. *United States v. Bailey*, 516 F. Supp. 2d 990 (D. Minn. 2007)
83. *United States v. Cundiff*, 480 F. Supp. 2d 940 (W.D. Ky. 2007)
84. *Simsbury-Avon Preservation Society, LLP v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219 (D. Conn. 2007)
85. *Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F. Supp. 2d 803 (N.D. Cal. 2007)
86. *United States v. Marion L. Kincaid Trust*, 3 F. Supp. 2d 680 (E.D. Mich. 2006)
87. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006)
88. *United States v. Adam Bros. Farming, Inc.*, 369 F. Supp. 2d 1166 (C.D. Cal. 2003)
89. *North Carolina Shellfish Growers Association v. Holly Ridge Associates, LLC*, 278 F. Supp. 2d 654 (E.D.N.C. 2003)
90. *FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp. 2d 509 (D.N.J. 2003)
91. *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002)
92. *California Sportfishing Protecting Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002)
93. *United States v. Newdunn Associates, LLP*, 195 F. Supp. 2d 751 (E.D. Va. 2002)
94. *United States v. Rueth Development Co.*, 189 F. Supp. 2d 874 (N.D. Ind. 2002)

95. *United States v. Interstates General Co.*, 152 F. Supp. 2d 843 (D. Md. 2001)
96. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001)
97. *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001)
98. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001)
99. *United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 28 ELR 21438 (N.D. Ill. 1998)
100. *United States v. Gulf Park Water Co., Inc.*, 972 F. Supp. 1056 (S.D. Miss. 1997)
101. *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997)
102. *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 27 ELR 21411 (D. Or. 1997)
103. *Georgia v. City of East Ridge, Tenn.*, 949 F. Supp. 1571, 27 ELR 20782 (N.D. Ga. 1996)
104. *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 26 ELR 20639 (D. Mont. 1995)
105. *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. 1995)
106. *United States v. Banks*, 873 F. Supp. 650, 25 ELR 20776 (S.D. Fla. 1995)
107. *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 25 ELR 20661 (E.D. Wash. 1994)
108. *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 24 ELR 20749 (D. Colo. 1993)
109. *Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers*, 796 F. Supp. 1306, 23 ELR 20267 (N.D. Cal. 1992)
110. *United States v. Zanger*, 767 F. Supp. 1030, 22 ELR 20231 (N.D. Cal. 1991)
111. *McClellan Ecological Seepage Situation v. Cheney*, 763 F. Supp. 431, 20 ELR 20870 (E.D. Cal. 1989)
112. *West Virginia Coal Association v. Reilly*, 728 F. Supp. 1276, 20 ELR 20642 (S.D. W. Va. 1989)
113. *United States v. Malibu Beach, Inc.*, 711 F. Supp. 1301, 19 ELR 21247 (D.N.J. 1989)
114. *Hanson v. United States*, 710 F. Supp. 1105, 19 ELR 21074 (E.D. Tex. 1989)
115. *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 19 ELR 20124 (E.D. Cal. 1988)
116. *United States v. Larkins*, 657 F. Supp. 76, 17 ELR 20783 (W.D. Ky. 1987)
117. *Kelley v. United States*, 618 F. Supp. 1103, 16 ELR 20080 (W.D. Mich. 1985)
118. *Track 12, Inc. v. District Engineer*, 618 F. Supp. 448, 16 ELR 20163 (D. Minn. 1985)
119. *United States v. Saint Bernard Parish*, 589 F. Supp. 617, 14 ELR 20794 (E.D. La. 1984)
120. *United States v. Lambert*, 589 F. Supp. 366, 14 ELR 20588 (M.D. Fla. 1984)
121. *United States v. Ciampitti*, 583 F. Supp. 483 (D.N.J. 1984)
122. *United States v. Robinson*, 570 F. Supp. 1157, 14 ELR 20056 (M.D. Fla. 1983)
123. *Bayou Des Familles Development Corp. v. U.S. Army Corps of Engineers*, 541 F. Supp. 1025, 13 ELR 20055 (E.D. La. 1982)
124. *United States v. Bradshaw*, 541 F. Supp. 880, 12 ELR 20629 (D. Md. 1981)
125. *United States v. Lee Wood Contractors, Inc.*, 529 F. Supp. 119, 12 ELR 20421 (E.D. Mich. 1981)
126. *United States v. Weisman*, 489 F. Supp. 1331, 10 ELR 20698 (M.D. Fla. 1980)
127. *American Dredging Co. v. Dutchyshyn*, 480 F. Supp. 957 (E.D. Pa. 1979)
128. *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976)
129. *Commonwealth of Puerto Rico v. Alexander*, 438 F. Supp. 90, 7 ELR 20751 (D.P.R. 1977)
130. *Wyoming v. Hoffman*, 437 F. Supp. 114, 8 ELR 20001 (D. Wyo. 1977)
131. *Conservation Council of North Carolina v. Costanzo*, 398 F. Supp. 653, 5 ELR 20666 (E.D.N.C. 1975)
132. *Sun Enterprises, Inc. v. Train*, 394 F. Supp. 211 (S.D.N.Y. 1975)
133. *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975)
134. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975)
135. *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 5 ELR 20308 (D. Ariz. 1975)
136. *United States v. GAF Corp.*, 389 F. Supp. 1379, 5 ELR 20581 (S.D. Tex. 1975)
137. *United States v. Holland*, 373 F. Supp. 665, 4 ELR 20710 (M.D. Fla. 1974)

TABLE B
Analysis of Decisions

Decision Number	Year	+/- ^a	Type of Case ^b	Type of Water ^c	Canons Used	Number of Canons Used ^d	Number of Decisions Cited ^e	CWA §
Supreme Court Decisions								
1	2013	+	Jud. Rev.		I	1	2	402
2	2006	—	Enf.	T, W	I, 3, 4, 5, 6, 8, 9, 11, 13	9	19	404
3	2004	+	Cit. S.	U	I, 4, 5, 6, 11	5	5	402
4	2001	-	Jud. Rev.	I	I, 2, 3, 6, 8, 9, 11, 12	8	2	404
5	1985	+	Enf.	T, W	2, 3, 4, 5, 6, 8, 9	7		404
U.S. Circuit Court Decisions								
6	2011	+	Enf.	T, W	I	1	5	404
7	2011	-	Jud. Rev.	W	I, 4	2	6	404
8	2010	+	Crim.	T	I, 2	2	4	402/404
9	2009	-	Enf.		I, 2, 5, 7	4	5	404
10	2009	+	Cit. S.	W	I, 2, 4	3	5	402
11	2009	+	Enf.	W	I	1	6	404
12	2009	-	Cit. S.	U	I, 2, 4, 5, 6, 7, 8, 11, 13	9	10	402
13	2009	-	Cit. S.		I, 4, 7, 10	4	2	402
14	2009	+	Enf.	T, W	I	1	8	404
15	2008	+	Crim.	W	I	1	3	404
16	2007	-	Crim.	T	I	1	6	402
17	2007	+	Cit. S.	T, W	I, 2, 10	3	7	402
18	2007	+	Crim.	T	I, 4	2	9	402/404
19	2007	-	Cit. S.	W	I, 4, 16, 19	4	9	402
20	2006	+	Enf.	W	I	1	3	404
21	2006	-	Enf.	W	I	1	2	404
Rapanos								
22	2006	+	Cit. S.	W	I, 10	2	6	402
23	2006	+	Cit. S.	U	I, 4, 6, 8, 11	5	4	402
24	2006	+	Crim.	T	I, 2, 4, 9, 13	5	17	404
25	2005	+	Jud. Rev.	W	I	1	5	404
26	2004	+	Cit. S.	T	I, 3	2	3	402
27	2004	+	Crim.	T	I, 3, 4, 20	4	7	402
28	2003	+	Bankr.	T, W	I, 4, 5, 9	4	7	OPA
29	2003	+	Enf.	T, W	I, 2	2	5	404
30	2003	+	Enf.	W	I, 14	2	6	404
31	2003	+	Enf.	T, W	I, 4, 9	3	13	404
32	2002	+	Cit. S.	T	I	1	3	402
33	2002	+	Enf.	W	I, 14	2	4	404
34	2001	+	Cit. S.	U	I, 4, 8	3	2	402
35	2001	+/-	Enf.	W	I	1	7	404
36	2001	-	Cit. S.	G	I, 3, 5, 7	4	8	OPA

Decision Number	Year	+/- ^a	Type of Case ^b	Type of Water ^c	Canons Used	Number of Canons Used ^d	Number of Decisions Cited ^e	CWA §
SWANCC								
37	2001	+	Cit. S.	T	I, 5	2	8	402
38	1999	+	Cit. S.	T	I	1	2	402
39	1999	+	Crim.	T	I, 2, 10	3	5	402
40	1997	-	Crim.	T, W	I, 9	2	1	404
41	1997	+	Crim.	T	I, 2	2	9	402
42	1996	+	Cit. S.	U	I, 2, 6, 8	4	4	402
43	1994	-	Cit. S.	G, I	I, 2, 3, 4, 19	5	7	402
44	1993	+	Enf.	T, W	I, 2, 3, 4, 5, 6	6	12	404
45	1993	-	Jud. Rev.	W	4	1		404
46	1992	-	Jud. Rev.	W	I	1	4	404
47	1990	-	Enf.	G	I, 4, 5, 8, 10	5	5	402
48	1988	+	Jud. Rev.		I, 3, 5, 7	4	3	402
49	1988	-	Cit. S.	U	I, 4	2	3	402
50	1986	+	Enf.	W	I, 2, 10	3	1	404
51	1985	+	Jud. Rev.	G, T	I, 2, 4	3	3	402
Riverside Bayview								
52	1984	-	Enf.	W	2, 8, 17	3	1	404
53	1984	+	Decl. Jud.	T	I, 2	2	12	404
54	1983	+	Cit. S.	W	I, 2, 3, 4	4	8	404
55	1983	+	Enf.	W	I, 3, 5	3	1	404
56	1981	+	Taking	W	I, 2	2	7	404
57	1980	+	Enf.	T	I	1	1	402
58	1979	+	Enf.	W	I, 2, 3	3	4	404
59	1979	+	Enf.	T	I, 2, 3	3	2	402
60	1978	+	Enf.	W	I, 2, 3, 7, 8	5	2	404
61	1977	+	Jud. Rev.	G	3, 4, 6, 10, 13	5	1	402
62	1977	-	Jud. Rev.	G	I, 3, 4, 5, 6, 7, 12	7	1	402
63	1975	+	Jud. Rev.	T	I, 3	2	2	402
64	1974	+	Enf.	T	I, 2, 3	3	4	402
U.S. District Court Decisions								
65	2011	+	Cit. S.	T, W	I	1	4	404
66	2011	-	Jud. Rev.	I, W	I, 4	2	3	404
67	2011	+	Enf.	T	I	1	7	404
68	2011	+	Cit. S.	T	I	1	5	402
69	2011	-	Crim.	W	I	1	7	404
70	2011	+	Cit. S.	T	I, 6	2	3	402
71	2011	+	Crim.	T	I, 2, 5, 6	4	10	402
72	2011	+	Cit. S.	T, W	I	1	5	404
73	2010	+	Enf.	T, W	I	1	8	404
74	2010	+	Jud. Rev.	T	I, 6, 15	3	3	404
75	2009	+	Cit. S.	T, W	I, 2	2	7	402
76	2009	+	Cit. S.	T	I, 2	2	2	402
77	2009	+	Jud. Rev.	W	I, 4	2	7	404
78	2009	+	Cit. S.	G	I, 2, 3, 4	4	14	402

Decision Number	Year	+/- ^a	Type of Case ^b	Type of Water ^c	Canons Used	Number of Canons Used ^d	Number of Decisions Cited ^e	CWA §
79	2008	-	Jud. Rev.		I	1	5	404
80	2007	+	Enf.	T, W	I, 4	2	9	404
81	2007	+	Crim.	W	I	1	6	404
82	2007	+	Enf.	W	I, 4	2	8	404
83	2007	+	Enf.	W	I	1	4	404
84	2007	-	Cit. S.	W	I	1	1	404
85	2007	-	Cit. S.	T	I	1	4	402
86	2006	+	Enf.	W	I	1	6	404
87	2006	-	Enf.	T	I, 2, 5, 9	4	8	402
Rapanos								
88	2003	+	Enf.	T, W	I, 2	2	6	404
89	2003	+	Cit. S.	T, W	I	1	10	402/404
90	2003	-	Jud. Rev.	W	I, 2, 4	3	12	404
91	2002	-	Enf.	W	I, 3, 4, 8, 9	5	2	404
92	2002	+	Cit. S.	G, T	I	1	6	402
93	2002	-	Enf.	T, W	I, 3, 4, 5, 9	5	2	404
94	2002	+	Enf.	W	I, 14	2	3	404
95	2002	+	Enf.	W	I, 14	2	1	402
96	2001	+	Cit. S.	G, T	I, 2, 3	3	9	404
97	2001	+	Crim.	T, W	I, 2, 3	3	8	404
98	2001	+	Cit. S.	T	I, 5	2	6	402
SWANCC								
99	1998	—	Enf.	W	I	1	2	404
100	1997	+	Enf.	T	I, 2	2	1	402
101	1997	+	Cit. S.	G, W	I, 2	2	4	402
102	1997	-	Cit. S.	G	I, 2, 3, 4, 5, 6, 18	7	11	402
103	1996	+	Cit. S.	T	I, 2	2	4	402
104	1995	+	Cit. S.	T	I	1	3	402
105	1995	+/-	Cit. S.	G	I, 2, 5	3	13	402
106	1995	+	Enf.	W	I	1	3	404
107	1994	+	Cit. S.	G	I, 2, 3, 4, 5, 6	6	9	402
108	1993	+	Cit. S.	G	I, 2	2	9	402
109	1992	+	Cit. S.	W	4	1		404
110	1991	+	Enf.	T	I	1	3	404
111	1989	+	Cit. S.	G	2	1		402
112	1989	+	Jud. Rev.	T	4, 6	2		404
113	1989	+	Enf.	W	I	1	2	404
114	1989	+	Enf.	T, W	I	1	1	404
115	1988	+	Cit. S.	G	I, 2, 3, 4, 5, 6	6	7	402
116	1987	+	Enf.	W	4	1	1	404
117	1985	-	Cit. S.	G	I, 2, 3, 4, 6	5	4	402
Riverside Bayview								
118	1985	+	Jud. Rev.	W	I, 5	2	2	404
119	1984	+	Enf.	T, W	I, 2, 3	3	7	404
120	1984	+	Enf.	W	I, 4	2	3	404

Decision Number	Year	+/- ^a	Type of Case ^b	Type of Water ^c	Canons Used	Number of Canons Used ^d	Number of Decisions Cited ^e	CWA §
121	1984	+	Enf.	W	1, 2, 3	3	3	404
122	1983	+	Enf.	W	1, 2	2	8	404
123	1982	+	Jud. Rev.	W	1, 3, 4, 7	4	3	404
124	1981	+	Enf.	W	1	1	1	404
125	1981	+	Enf.	W	1, 2	2	2	404
126	1980	+	Enf.	W	1, 2, 3	3	5	404
127	1979	+	Jud. Rev.		1	1	10	404
128	1976	+	Enf.	T	2, 3	2		402
129	1977	+	Jud. Rev.	W	1, 2, 3, 7	4	2	404
130	1977	+	Jud. Rev.	T	1, 2, 3	3	8	404
131	1975	+	Cit. S.	W	1, 4	2	5	404
132	1975	+	Cit. S.	W	1, 2	2	2	404
133	1975	+	Jud. Rev.	W	3	1		404
134	1975	+	Jud. Rev.	W	13	1		402
135	1975	+	Crim.	T	1, 2, 5	3	1	402
136	1975	-	Enf.	G	2, 3, 5, 6	4	2	402
137	1974	+	Enf.	W	1, 2, 3, 6, 7	5	5	404

- a. Plus (+) indicates an expansive interpretation of “navigable waters”; minus (-) indicates a restrictive interpretation. Although an interpretation of navigable waters may be expansive, the environmental party may have lost the case for other reasons.
- b. Cit. S. means citizen suit; Crim. means criminal prosecution; Enf. means civil enforcement; Jud. Rev. means judicial review.
- c. G means groundwater; I means isolated water; T means tributary; U means unitary navigable water; W means wetlands.
- d. Canons used to interpret “navigable waters”: (1) precedent; (2) broad interpretation to achieve statutory purpose; (3) legislative history; (4) deference; (5) plain meaning; (6) structure of statute; (7) harmonize with other statutes; (8) avoid absurd results; (9) avoid constitutional issues; (10) interpret exceptions narrowly; (11) honor federalism; (12) exception proves the rule; (13) give every word meaning; (14) interpret waivers narrowly (finality); (15) inclusiveness of definition; (16) exclusiveness of definition; (17) equity; (18) avoid administrative difficulties; (19) inclusion of one implies exclusion of another; and (20) rule of lenity.
- e. Refers only to Supreme Court precedent interpreting navigable waters or lower court precedent interpreting navigable waters in the CWA.