

“Navigable Waters” Does Not Include Mud Puddles: The Clean Water Act’s Legislative History Supports a Narrow, Commercial-Focused Interpretation

By
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I. INTRODUCTION

What is a navigable water? This question has been at the center of much litigation, including a trilogy of Supreme Court decisions, dating back to the 1980s.² The Clean Water Act of 1972³ (CWA) authorized the Environmental Protection Agency (EPA) to regulate pollution in the nation’s “navigable waters.”⁴ This authority gave the EPA, along with the Army Corps of Engineers (Army Corps), power to regulate the dumping, filling, and altering of the navigable waters.⁵ The CWA, however, was not especially clear on the scope of the waters these agencies could regulate. The CWA defines “navigable waters” as “waters of the United States, including the territorial seas.”⁶ This definition has created much speculation as to exactly what “waters of the United States” means.⁷ While some have argued that “navigable waters” (and thus “waters of the United States”) is a broad term encompassing wetlands, tributaries, swamps, etc., others argue it is limited to traditionally navigable waters.⁸

¹ J.D. candidate 2022, Wake Forest University School of Law. A very special thanks to Tony Francois. This comment is his brainchild, and he was gracious enough to suggest I write it. He thought it; I just put his thoughts to paper. Also a special thanks is owed to Charles Yates, whose research of the use of the different words in the legislative history was very helpful as I tried to appreciate the landscape of this project.

² *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

³ 33 U.S.C. §1251 et seq., Pub. L. No. 92-500 (1972).

⁴ § 1252(a).

⁵ § 1344, 92-500, § 404. (This Comment will cite to both the U.S.C. and the Public Law Number when referencing § 404.

⁶ § 1362(7).

⁷ See, eg. Lorraine C. Friedlein Buck, *Narrowing “Navigable Waters”: The Fifth Circuit Limits Federal Jurisdiction Under the Clean Water and the Oil Pollution Acts*. In re Needham, 12 MO. ENV’T. L. & POL’Y REV. 48, 49 (2004) (stating that “navigable waters” in the CWA was to be defined the same as in the Oil Pollution Act); Kimberly Breedon, *The Reach of Raich: Implications for Legislative Amendments and Judicial Interpretations of the Clean Water Act*, 74 U. CIN. L. REV. 1441, 1442 (2006) (describing the interpretive difficulties Congress’s definition of “navigable waters”); William W. Sapp et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term Navigable Waters*, 36 ENV’T. L. REP. NEWS & ANALYSIS 10190, 10191, 10202 (2006).

⁸ Compare Sapp, *supra* note 6 at 10202, and Mark Squillace, *From “Navigable Waters” to “Constitutional Waters”*: *The Future of Federal Wetlands Regulation*, 40 U. MICH. J.L. REFORM 799, 799–800, 814 (2007), with Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right: A New Look at the Legislative History of the Clean Water Act*, 32 ENV’T. L. REP. NEWS & ANALYSIS 11042, 11048–49 (2002).

Since the EPA and Army Corps can regulate “navigable waters,”⁹ the scope of that phrase directly impacts the scope of these agencies’ jurisdiction. Both agencies have issued multiple regulations defining “navigable waters” since the CWA was passed, most of which define the term very broadly.¹⁰ Those who support a broad definition often cite to the legislative history of the CWA, where a conference report states that the “conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation.”¹¹ However, in a 2001 Supreme Court decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,¹² the Court cited this statement from the conference report and determined that despite the “broadest possible constitutional interpretation” language, Congress was only interested in regulating waters that were used in navigation.¹³ Unfortunately, the Supreme Court did not reference any portion of the legislative history to support its assertion. This Comment fills this gap, showing that Congress’s use of different terms is analyzed, including “navigable waters,” “lakes,” “rivers,” “tributaries,” and “wetlands,” indicates Congress’s intent to regulate actually navigable waters used in commercial navigation, not small bodies of water upstream from such waters.

This Comment will first provide a brief overview of the CWA and the regulations interpreting “navigable waters” and explain why the scope of the definition is so important to all Americans. Then, this Comment will examine the trilogy of cases interpreting the regulations and the scope of the CWA. Finally, the bulk of this Comment will analyze the use of certain terms in the legislative history of the CWA. In the end, it will be clear that Congress was concerned with regulating pollution in actually navigable waters used in navigation, not difficult to define small bodies of water not used in navigation.

⁹ 40 C.F.R. 230.3 (1986) (EPA); 33 C.F.R. 328.3 (1987) (Army Corps); *see infra* Section I.B.

¹⁰ *See infra* Section I.B.

¹¹ Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-1236, at 144 (1972).

¹² 531 U.S. 159 (2001).

¹³ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 n.3 (2001).

A. *The Clean Water Act*

The Clean Water Act's full title is The Federal Pollution Control Act Amendments of 1972.¹⁴ It amended the Federal Pollution Control Act of 1948,¹⁵ which granted federal support for state enforcement of pollution regulation.¹⁶ Rather than creating a federal water pollution regulatory system, the 1948 Act required states to create their own regulatory plans.¹⁷ In 1972, Congress decided to create a robust federal pollution regulation scheme after public outcry over polluted waters became deafening in the 1960s.¹⁸ This included outrage over the thirteenth fire on the Cuyahoga River in Ohio within 101 years.¹⁹ Congress responded by passing the CWA, the purpose of which was to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”²⁰ The CWA centralized pollution management, and charged the EPA with determining limitations on point source discharges, installing pollution control devices, and completely eliminating pollution discharges by 1985.²¹ As part of their duties under the CWA, the Army Corps and EPA were assigned to regulate the discharge of fill or dredge materials into the navigable waters under § 404.²² Regulating discharges into navigable waters and § 404 have become the center of the litigation over the CWA, and this litigation has been largely over what constitutes “navigable waters.”²³ While the CWA references “navigable waters” 49 times,²⁴ the definition within the CWA is limited to merely “the waters of the United

¹⁴ See CONG. RSCH. SERV. LIBR. CONG., 93D CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF AMENDMENTS OF 1972, at 1 (Comm. Print 1973).

¹⁵ Pub. L. No. 80-845, 62 Stat. 1155 (1948).

¹⁶ Elaine Eichlin Henninger, *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.: Congressional Ambiguity Allows EPA's Safety Valve to Remain Open*, 35 CATH. U.L. REV. 595, 601 (1986).

¹⁷ Stephen M. Johnson, *From Protecting Water Quality to Protecting States' Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation*, 74 SMU L. REV. 359, 365 (2021).

¹⁸ *Id.* at 361.

¹⁹ *History of the Clean Water Act (CWA)*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2571, (last visited Oct. 15, 2021).

²⁰ 33 U.S.C. § 1251(a).

²¹ Henninger, *supra* note 15, at 603-04.

²² § 1344, Pub. L. 92-500, § 404.

²³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

²⁴ See § 1251 et seq., Pub. L. 92-500.

States, including the territorial seas.”²⁵ One of the main regulatory tasks the EPA and Army Corps have undertaken is defining “navigable waters.”²⁶

B. History of “Waters of the United States” Regulations

In 1973, the EPA first released a regulation defining “navigable waters” as navigable waters and their tributaries, interstate waters, intrastate lakes, rivers, and streams used by interstate travelers, and intrastate lakes, rivers, and streams which are fished and used for industrial purposes in interstate commerce.²⁷ In 1974, the Army Corps defined navigable waters as those used or usable “for purposes of interstate or foreign commerce.”²⁸ After litigation over the limited 1974 regulation, the Army Corps expanded the definition of “waters of the United States” to include “[c]oastal and inland waters, lakes, rivers and streams” that were navigable, “including adjacent wetlands,” tributaries of navigable waters, and “interstate waters and their tributaries, including adjacent wetlands.”²⁹ Finally, as a catch all, the regulation also defined “navigable waters” as “all other waters of the United States not identified . . . above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.”³⁰

In 1986 and 1987, the EPA and Army Corps respectively passed identical regulations expanding “waters of the United States” to include “mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds” (1) which could be used by interstate travelers for recreational purposes, (2) from which fish or shellfish could be taken

²⁵ § 1362(7).

²⁶ See 40 C.F.R. § 125.1(o) (1973).

²⁷ *Id.* § 125.1(o) (1973).

²⁸ 33 C.F.R. 209.260 (1972) (“Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.”).

²⁹ 33 C.F.R. § 323.2(a)(2)–(4) (1978).

³⁰ *Id.* § 323.2(a)(5).

and sold in interstate commerce, or (3) which could be used for industrial purposes in interstate commerce.³¹ Ever since, their regulations have been nearly identical.³² While regulations have been promulgated since then, most recently the Navigable Waters Protection Rule in 2020,³³ the 1986 and 1987 regulations are the ones currently being applied at the time of this writing.³⁴

C. Why the Definition of Navigable Waters Matters

As the definition of the “waters of the United States” has varied, so has the scope of the power the EPA and Army Corps can wield. This regulatory power has real life consequences for real people, because under a broader definition these agencies can more heavily restrict people’s ability to use their property.

Take the situation of the Sacketts, for example. The Sacketts own 2/3 of an acre in Idaho, and they have been trying to build on their property since 2007.³⁵ Their property is west of Priest Lake, but it is not adjacent to it, as a few parcels separate them from the lake.³⁶ They prepared to build a home by filling in their property, only to receive a compliance order from the EPA ordering them to stop filling because it was a wetland adjacent to navigable water and waters of the United States.³⁷ The EPA also informed the Sacketts that they were violating the CWA by “discharg[ing] pollutants into the waters of the United States without a permit.”³⁸ The Sacketts sought a hearing with the EPA, but it was denied.³⁹ They sued in federal court, arguing that the compliance order was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (APA), as well as a due process violation under the Fifth Amendment.⁴⁰

³¹ 40 C.F.R. 230.3 (1986) (EPA); 33 C.F.R. 328.3 (1987) (Army Corps).

³² See 85 Fed. Reg. 22250, 22254 (Apr. 21, 2020).

³³ See 85 Fed. Reg. 22250.

³⁴ Current Implementation of the Waters of the United States, ENV’T. PROT. AGENCY, <https://www.epa.gov/wotus/current-implementation-waters-united-states> (last updated Sept. 16, 2021).

³⁵ *Sackett v. Env’t. Prot. Agency*, 566 U.S. 120, 124 (2012).

³⁶ *Id.*

³⁷ *Id.* The EPA determined their filling project fell under these regulations: 33 C.F.R. § 328.4(b) (1994) (adjacent wetland); 33 U.S.C. § 1362(7) (1972) (navigable water), 40 C.F.R. 323.2 (1986) (waters of the United States). *Sackett*, 566 U.S. at 124.

³⁸ *Sackett*, 566 U.S. at 124–25

³⁹ *Id.* at 125.

⁴⁰ *Id.*

The District Court for the District of Idaho and the Ninth Circuit Court of Appeals both dismissed their claims for lack of subject matter jurisdiction because the APA did not permit pre-enforcement review.⁴¹ The Sacketts sought relief at the United States Supreme Court, which determined they were entitled to judicial review as this compliance order was a judicially reviewable final agency action.⁴² Since the 2012 Supreme Court decision, the Sacketts have continuously been in litigation on the merits, trying to build their dream home.⁴³ At the time of this writing, the Ninth Circuit had recently rejected the Sacketts' claims that their property was not covered by the regulation.⁴⁴ The Sacketts had challenged the validity of the compliance order and argued that the order lacked legal authority under a narrow interpretation of § 404's authority to regulate "waters of the United States."⁴⁵ The Ninth Circuit reasoned that the compliance was lawful under a broader interpretation of "waters of the United States."⁴⁶ The Ninth Circuit concluded that the Sacketts' property was a wetland under § 404 and was therefore subject to the permitting requirements.⁴⁷ The Sacketts petitioned the Supreme Court to hear their case again, this time on the merits,⁴⁸ and certiorari was granted.⁴⁹

For the Sacketts, the EPA's authority—or lack thereof—has had a tremendous impact on their daily lives, and it has prohibited them from building their dream home for many years. If the definitions of "navigable waters" and "waters of the United States" were limited to waters used in commercial navigation, as the legislative history suggests, the Sacketts would not be within the EPA's jurisdiction, and they would have been able to build their home years ago.

⁴¹ *Id.*

⁴² *Id.* at 131.

⁴³ *Sackett v. U.S. Env't Prot. Agency*, No. 19-35469, slip op. at 9–11 (9th Cir. Aug. 16, 2021).

⁴⁴ *Id.* at 33.

⁴⁵ *Id.* at 20–22. The Sacketts alleged that the compliance order was unlawful under the *Rapanos* plurality. See *infra* text accompanying notes 74–85.

⁴⁶ *Sackett*, slip op. at 28–30. The Ninth Circuit determined the order was lawful under Justice Kennedy's concurrence in *Rapanos*. See also *infra* text accompanying notes 75–87.

⁴⁷ *Sackett*, slip op at 33.

⁴⁸ Petition for Writ of Certiorari, *Sackett v. Env't Prot. Agency*, (No. 21-454) (petition for cert. filed Sept. 22, 2021).

⁴⁹ Supreme Court Order List, 3, Jan. 24, 2022, https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf.

This expansion of the agencies' regulatory authority to include lands like wetlands is not authorized by the CWA, and as the legislative history indicates, Congress never intended it. The CWA was intended to regulate waters used in navigation, not land like the Sacketts' property.

Not only does this broad interpretation have a direct impact on people like the Sacketts (who need to meet the EPA's requirements so they can build on property containing mud puddles), this is a restriction on basic property rights. It is a restriction of the right to use, which is one of the most fundamental property rights.⁵⁰ Also, the agencies have overstepped the bounds of what their authority was intended for—limiting the dispersion of pollutants into actually navigable waters. A broad interpretation of “navigable waters” allows the EPA and Army Corps to expand their reach far beyond what Congress originally intended, which violates the separation of powers.

II. THE TRILOGY

The Supreme Court has addressed these regulations three times.⁵¹ The first two cases addressed the legislative history of the CWA,⁵² while the third only focused on the text of the statute.⁵³ At issue in all of them, and in *Sackett*, was § 404 of the CWA⁵⁴, which prohibits discharging fill or dredge material into the navigable waters without a permit from the Army Corps.

A. *Riverside Bayview*

⁵⁰ *Dickman v. Comm'r*, 465 U.S. 330, 336 (1984) (stating that the right to use is “perhaps of the highest order” of property rights).

⁵¹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

⁵² *See Riverside Bayview*, 474 U.S. at 132–33, *SWANCC*, 531 U.S. at 168 n.3, 170.

⁵³ *Rapanos*, 547 U.S. at 730–39. Although the dissent addressed legislative history. *See Rapanos*, 547 U.S. at 804 (Stevens, J., dissenting).

⁵⁴ 33 U.S.C. § 1344, 92-500, § 400.

In 1985, the Supreme Court held that the Army Corps had the authority under the CWA to regulate the discharge of fill material into “adjacent wetlands.”⁵⁵ The Court also determined that the regulation’s definition of “wetlands”⁵⁶ was a proper expansion of the Army Corps’ authority under § 404.⁵⁷ The Court further decided that the trial court’s findings established that the respondent’s property was sufficiently saturated to be a wetland under the regulation.⁵⁸

Importantly, the Court looked at the legislative history to justify this broad authority under the CWA.⁵⁹ The Court stated that the legislative history supported “the reasonableness of the Corps’ approach of defining adjacent wetlands as ‘[navigable] waters’ within the meaning of § 404(a).”⁶⁰ The Court claimed that Congress “define[d] the waters covered by the Act broadly” and that “the term ‘navigable’ as used in the Act [was] of limited import.”⁶¹ The Court determined Congress intended to regulate some waters that would not traditionally be considered navigable, and the Court decided that the regulation’s interpretation of “adjacent wetlands” as such waters was reasonable.⁶²

B. *SWANCC*

In 2001 the Court again looked at the scope of the waters of the United States and the CWA, this time regarding the 1986 regulation.⁶³ At issue was an interpretation of the regulation, referred to as the Migratory Bird Rule, that allowed the EPA to regulate waters that could be used by migratory birds and endangered species.⁶⁴ As part of the analysis, the Court

⁵⁵ *Riverside Bayview*, 474 U.S. at 123.

⁵⁶ “The 1977 definition reads as follows: ‘The term “wetlands” means those 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.’ 33 CFR § 323.2(c) (1978).” *Riverside Bayview*, 474 U.S. at 124.

⁵⁷ *Id.* at 129.

⁵⁸ *Id.* at 130–32.

⁵⁹ *Id.* at 132.

⁶⁰ *Id.*

⁶¹ *Id.* at 133.

⁶² *Id.* at 133–34.

⁶³ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 164 (2001).

⁶⁴ 51 Fed. Reg. 41217 (Nov. 13, 1986).

examined the Army Corps' 1974 regulation, which defined navigable waters as those that could be used in commerce or transportation.⁶⁵ The Court affirmed the 1974 limitation to waters used in navigation: "Respondents put forward no persuasive evidence that the Corps mistook Congress' [s] intent in 1974."⁶⁶ In Footnote 3, the Court explained that there was no evidence in the legislative history that Congress intended to exert anything more than its commerce power over navigation,⁶⁷ which is part of its authority over channels of interstate commerce,⁶⁸ rather than its broader power over things affecting commerce.⁶⁹ The Court left open the possibility that "navigable waters" in § 404 also included non-navigable waters adjacent to navigable waters, like streams and tributaries.⁷⁰ However, the Court emphasized that this was unclear and not at issue.⁷¹ While "navigable" could have a limited import (as the Court expounded in *Riverside Bayview*⁷²), it still "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."⁷³ The Court was clear that Congress was interested in waters that were or could be used in the transportation of goods in commerce.⁷⁴ The Court ultimately determined that isolated ponds that were habitats for migratory birds were not within the authority conveyed by the CWA, and it held the Migratory Bird Rule outside the statutory authority of the CWA.⁷⁵

C. *Rapanos*

⁶⁵ *SWANCC*, 531 U.S. at 168.

⁶⁶ *Id.* at 168.

⁶⁷ *Id.* at 168 n.3.

⁶⁸ *Id.* at 173.

⁶⁹ Virginia S. Albrecht & Stephen M. Nickelsburg, *Was SWANCC Actually Right? An Overview of the Legislative History of the Clean Water Act and What It Means for SWANCC and Its Progeny*, SG096 ALI-ABA 1, 3 (2002).

⁷⁰ *SWANCC*, 531 U.S. at 171.

⁷¹ *Id.*

⁷² *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

⁷³ *SWANCC*, 531 U.S. at 172.

⁷⁴ *Id.* at 168 n.3, 172.

⁷⁵ *Id.* at 171–72.

In this fractured opinion, the Court split 4-1-4.⁷⁶ This time, the issue was whether under § 404’s grant of permits to dump into navigable waters, wetlands located near intermittently dry ditches that drained into navigable waters were “adjacent wetlands” and regulatable as “navigable waters.”⁷⁷ Writing for the plurality, Justice Scalia recognized that while broader than traditionally navigable waters, “navigable waters” still meant something.⁷⁸ “*The waters of the United States,*” rather than just “*water of the United States,*” referred to something more specific than general water.⁷⁹ Justice Scalia determined that “waters of the United States” referred to “continuously present, fixed bodies of water,” like oceans, lakes, and rivers, rather than intermittently flowing dry waterbeds.⁸⁰ After determining that the ditches were not navigable waters, Justice Scalia analyzed whether the wetlands were adjacent to navigable waters.⁸¹ He determined that “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, are ‘adjacent to’ such waters and covered by the Act.”⁸²

Justice Kennedy concurred only in the judgment and applied a “significant nexus” test to determine if the wetlands could be regulated as “navigable waters.”⁸³ Justice Kennedy determined that waters would be treated as “navigable water” if they had a significant nexus with waters that are navigable in fact.⁸⁴ There is a significant nexus “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood

⁷⁶ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁷⁷ *Id.* at 723, 729.

⁷⁸ *Id.* at 731.

⁷⁹ *Id.* at 732.

⁸⁰ *Id.* at 733, 739.

⁸¹ *Id.* at 739–42.

⁸² *Id.* at 742 (Kennedy, J., concurring in the judgment).

⁸³ *Id.* at 760.

⁸⁴ *Id.*

as ‘navigable.’”⁸⁵ The Court ultimately vacated for the lower courts to determine if the ditches were “waters of the United States” and if the wetlands were adjacent.⁸⁶

That is where things stand today. The fractured *Rapanos* decision has left the state of the definition of “navigable waters” in limbo. There is a circuit split over which test for navigable waters to apply.⁸⁷ While *Rapanos* is fascinating, it is largely beyond the scope of this Comment. Rather, the rest of this Comment will be spent addressing Footnote 3 in *SWANCC*, which indicated that Congress was only concerned with regulating the channels of commerce—navigable waters used in commercial navigation.

III. THE LEGISLATIVE HISTORY OF THE CWA

In *SWANCC*, the Court stated that the legislative history suggests Congress was only interested in commercial navigation when considering the CWA, but the Court did not offer any support for that assertion.⁸⁸ The purpose of this Comment is to show that the Court was indeed correct, and Congress was only concerned with waters used in navigation.

While many scholars have analyzed the legislative history of the CWA, mostly concluding it supports an expansive interpretation including wetlands,⁸⁹ this Comment takes a different approach. Rather than just looking at the statements made in reports and floor statements, this Comment examines the number of times, and the different ways, certain words were used to get a broad scope of what Congress intended in the CWA. In this Comment, the

⁸⁵ *Id.* at 780.

⁸⁶ *Id.* at 757.

⁸⁷ The circuits have generally split into four camps: holding that Justice Kennedy’s concurrence and his “significant nexus” test is the controlling opinion, *see* *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *Sackett v. United States Environmental Protection Agency*, No. 19-35469, slip op. at 23–28 (9th Cir. Aug. 16, 2021); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007), applying Justice Kennedy’s concurrence but not ruling out Justice Scalia’s “continuous surface connection” test, *see* *Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011), determining a wetland is within the CWA’s jurisdiction if it meets either test, *see* *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 183 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); or applying both but not endorsing either. *See* *United States v. Lucas*, 516 F.3d 316, 326–27 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009).

⁸⁸ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 n.3 (2001).

⁸⁹ *See* *Breedon*, *supra* note 6; *Sapp et al.*, *supra* note 6; *Squillace*, *supra* note 7.

number of times words constituting a commercial use for navigable waters—words like “navigable waters,” “oceans,” “lakes,” and “river,”—will be compared with words indicating an expanded meaning of navigable waters—like “tributary,” “wetland,” and “pond.”

Within this legislative history analysis, first, this Comment will examine the legislative history’s use of the phrase “navigable waters” to show that Congress at large, as well as most individual members of Congress, used “navigable waters” as the shorthand reference because Congress was actually interested in truly navigable waters, not smaller bodies of water. Secondly, this Comment will compare the use of “navigable waters” with the use of “tributaries,” “wetlands,” and “ponds” to show that Congress intended to regulate large bodies of water, not smaller bodies upstream of navigable in fact waters. Third, this Comment will contrast the uses of the words “lakes,” “rivers,” and “oceans” with the uses of “tributaries” and “wetlands” and “ponds” to demonstrate that Congress was interested in large, commercial bodies of water, not smaller ones. Finally, this Comment will analyze the way Congress used the words “tributaries” and “wetlands”, further showing Congress’s lack of interest in these bodies of water.

It is important to note that different types of legislative history carry different interpretive weight. The Supreme Court has given much guidance on the credence that should be paid to different types of legislative history.⁹⁰ Throughout this analysis, as the different pieces of legislative history are analyzed, this Comment will point out the different weight given to each type and the usefulness of each. Even when not conclusive, like individual floor statements, each type of legislative history can provide some perspective to show what the general conception of “navigable waters” was.

A. “Navigable Waters” Throughout the Legislative History.

⁹⁰ See *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012).

The extensive use of “navigable waters” throughout the legislative history suggests that Congress gave great weight to the word “navigable” and was interested in waters that were actually navigable. “Navigable waters” is used 231 times on 201 different pages throughout the legislative history.⁹¹ It is used throughout the history, as can be seen by the high ratio of pages it appears on compared to the number of times used.⁹² Its appearance on so many pages signals that “navigable waters” was the working phrase Congress used when referring to regulatable waters. In comparison, “navigable waters” is defined as “waters of the United States,”⁹³ and yet “waters of the United States” only appears 47 times.⁹⁴ “Waters of the United States” would make sense for a place holder phrase when discussing it during deliberations, if that is what is meant, but that is not the phrase chosen. The 47 uses of “waters of the United States” compared to the 231 uses of “navigable waters” clearly shows that “navigable waters” was the working phrase Congress decided to use. In fact, Congress did not even try to use the popular acronym “WOTUS.”⁹⁵ Instead, the phrase of choice was “navigable waters.”⁹⁶ This implies Congress was interested in actually “navigable” waters. Every time this phrase is used, Congress was signaling a limitation on the types of waters regulated. If Congress had not intended to limit waters to those that were “navigable,” Congress would have used a different phrase.

There are three main types of material in the legislative history that contain the term “navigable waters.” These are committee reports, floor speeches, and letters.

1. Committee Reports

⁹¹ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13. Included in this number are four quotations from the bill itself. Since these are from the bill, and do not provide any insight into Congress’s analysis when debating over the bill, these four references are not analyzed. Within the committee print there are four other uses of “navigable waters” that were not included in this number, because those are included in an appendix of other proposed bills, so they are not truly part of the legislative history.

⁹² CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

⁹³ 33 U.S.C. § 1362(7).

⁹⁴ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

⁹⁵ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

⁹⁶ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

Committee reports contain the most references to “navigable waters,” with 106 uses. Committee reports are the most authoritative type of legislative history when determining Congress’s intent.⁹⁷ While not conclusive of Congressional intent, committee reports are a result of a detailed deliberation process, and the product contains much of the compromise and nuance Congress addressed in passing legislation that other forms of legislative history do not capture.⁹⁸

While Congress did not define “navigable waters,” in committee reports,⁹⁹ the Senate conference report makes an oft-repeated statement about the scope of the definition of “navigable waters:” “Navigable waters” is to “be given the broadest possible constitutional interpretation.”¹⁰⁰ This is in fact the portion of the legislative history Justice Rehnquist was addressing in Footnote 3 of *SWANCC* when he wrote that even this did not support the claim that Congress intended to do anything more than regulate waters used in navigation.¹⁰¹ And while many scholars reference this statement from the report to support an interpretation beyond regulating the channels of commerce,¹⁰² this statement does not necessarily support such a broad interpretation. The full statement in the conference report is as follows: “The conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”¹⁰³ By stating “broadest possible constitutional interpretation,” Congress dodged the question of how broad to define “navigable waters” and left it to the courts to determine its scope.¹⁰⁴

⁹⁷ See *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

⁹⁸ See *Garcia*, 469 U.S. at 76; *Zuber*, 396 U.S. at 186. See also Squillace, *supra* note 7, at 814–30.

⁹⁹ See CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 178. In his summary of the committee report, Senator Muskie states, “The conference agreement does not define [navigable waters of the United States].” *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *supra* text accompany notes 64–67.

¹⁰² See Breedon, *supra* note 6; Sapp et al., *supra* note 6; Squillace, *supra* note 7.

¹⁰³ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 327.

¹⁰⁴ Sapp et al., *supra* note 6, at 10202.

Although not a definition, this statement deserves further analysis and can provide insight into Congress's intentions. The second half of this statement, from "possible constitutional interpretation" onward, appears to address a controversy over whether Congress could regulate intrastate waters usable in navigation when connected with overland transportation. It was well established in an 1870 Supreme Court opinion, *The Daniel Ball*, that Congress could regulate interstate navigable waters that served as channels of commerce.¹⁰⁵ But there were questions as to whether a water could be a "channel of commerce" if it was an intrastate water that was only usable in commercial navigation when connected with overland transportation, like highways, railroads, etc.¹⁰⁶ And while this would expand what could be regulated, these waters still had to be usable in navigation and transportation of cargo.¹⁰⁷

It seems that this controversy is what the committee report was referring to in two ways. First, the report states that "navigable waters" was to be given the "broadest constitutional meaning." When the CWA was passed, there was much debate about the constitutionality of regulating intrastate waters.¹⁰⁸ Therefore, when the committee report mentioned "constitutional meaning," the report was likely referring to that constitutional debate, and rather than addressing it, just stated that "navigable waters" should be defined as broad as constitutionally permissible. Secondly, the reference to the "agency determinations" is probably referring to the EPA's position at the time that it lacked the authority to regulate

¹⁰⁵ 77 U.S. 557, 563 (1870) ("Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.")

¹⁰⁶ Albrecht & Nickelsburg, *supra* note 7, at 11045–46.

¹⁰⁷ See *Utah v. United States*, 403 U.S. 9, 11 (1971) ("The [waterway] was used as a highway and that is the gist of the federal test.")

¹⁰⁸ Albrecht & Nickelsburg, *supra* note 7, at 11046.

intrastate waters over constitutional concerns,¹⁰⁹ and the EPA's reluctance to regulate was central to this debate.¹¹⁰

It appears then, this statement was directed to the courts to determine what could be regulated under "navigable waters" and to ignore the agencies' limitations on "navigable waters."¹¹¹ If this is indeed what Congress was doing, first, Congress was intentionally being vague,¹¹² since that sentence is not indicative of specifically how broadly Congress wanted to define "navigable waters." Second, Congress was still concerned with commercial navigation and was regulating channels of commerce, not things that affect commerce.¹¹³ So even if this sentence is understood to mean that Congress wanted to regulate intrastate waters involved in navigation through overland routes, Congress was still only focused on regulating the channels of commerce, as Footnote 3 in *SWANCC* states.

While that section of the conference report suggests the definition was limited to channels of commerce, the way the report uses "navigable waters" in connection with "oceans," "territorial seas," and the "waters of the contiguous zone," further supports the conclusion that Congress only intended to regulate waters used in navigation. The term "navigable waters" is used 19 times with "ocean/s,"¹¹⁴ 17 times with "waters of the contiguous zone" or the "contiguous zone,"¹¹⁵ and 6 times with "territorial seas."¹¹⁶ Often, these bodies of water are

¹⁰⁹ EPA General Counsel Opinion (Dec. 9, 1971) ("[T]here must be a water connection between states" in order to regulate "navigable in fact waters.").

¹¹⁰ Albrecht & Nickelsburg, *supra* note 7, at 11045–46, 11048.

¹¹¹ This Comment does not concede that federal regulation of intrastate waters is constitutional, or even that the CWA permits such an interpretation. Rather the scope of this Comment is whether the legislative history suggests Congress limited its jurisdiction to navigable waters used in navigation. Even if Congress does have the authority to expand the jurisdiction to include waters connectable via overland transportation, both the committee report and Senator Muskie's statements were only concerned with regulating the channels of commerce. This expansion is a very limited expansion.

¹¹² Most likely because there were not enough votes for a completely broad or completely narrow interpretation.

¹¹³ Albrecht & Nickelsburg, *supra* note 7, at 11047–48.

¹¹⁴ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

¹¹⁵ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13. "Contiguous zone" is defined as "the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone." 33 U.S.C. § 1362(9).

¹¹⁶ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13. "Territorial seas" is defined as the waters from the low water mark of the coast extending seaward for three miles. 33 U.S.C. § 1362(8).

all listed together as a group.¹¹⁷ This grouping, and the comparison of navigable waters with these other terms for large bodies of water, also indicates that Congress considered navigable waters to be large bodies of water that are used in commerce.

Therefore, the extent of the use of “navigable waters” throughout the committee reports, the way its scope was limited to commercial navigation, and its use with other large bodies of water all indicate that Congress was interested in actually navigable bodies of water.

2. Floor Speeches

Members of Congress used “navigable waters” 97 times in floor speeches in the legislative history.¹¹⁸ Speeches are not a reliable type of legislative history to show intent, because Congress members can say anything, regardless of what Congress as a whole wishes.¹¹⁹ However, statements from the bill’s sponsor are given some weight.¹²⁰ The bill’s sponsor here, Senator Edmond Muskie, is one of the Congressmen who wanted “waters of the United States” to be interpreted very broadly. Senator Muskie gave a speech summarizing the committee report when he introduced it, and in that summary he defined “navigable waters” expansively.¹²¹ But even though he sponsored the bill and his statements carry more weight than other members of Congress, his statements are still not controlling indicators of what Congress intended.¹²² His summary contained the following paragraph:

The Conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes. . . . *It is intended that the term “navigable waters” include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters*

¹¹⁷ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

¹¹⁸ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

¹¹⁹ *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931) (“[S]uch individual expressions [(committee or floor statements by Congress members)] are with out [sic] weight in the interpretation of a statute”); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012) (“[T]he views of a single legislator, even a bill’s sponsor, are not controlling.”).

¹²⁰ *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202–03 (1976).

¹²¹ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 161–84.

¹²² *Mims*, 565 U.S. at 385 (“[T]he views of a single legislator, even a bill’s sponsor, are not controlling.”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (same); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) (same).

*in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried or with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.*¹²³

This language is based on language from *The Daniel Ball*, which had provided the first real definition of “navigable waters.”¹²⁴ However, there are a couple of key differences between *The Daniel Ball*’s definition and Senator Muskie’s. First, Senator Muskie’s definition expands the channels of commerce to include waters connected to overland routes, rather than just waterways.¹²⁵ Second the Senator said that navigable waters would have a “substantial economic effect on interstate commerce.” While this phrase could imply he was interested in regulating waters that affected interstate commerce,¹²⁶ this needs to be taken in context with the immediately prior limitations on “navigable waters.” “Effect on interstate commerce” is not another way for waters to be considered “navigable;” rather “effect on interstate commerce” is a result of being a “navigable water.” If a water is used to transport goods, even in connection with highways, railroads, etc., it is a navigable water and *will therefore* have an “economic effect on interstate commerce.” It is an effect, not the cause of being a “navigable water.”

So, even if Senator Muskie’s oft-cited remarks are the definitive definition of the scope of “navigable waters”¹²⁷ (which they are not since this is merely one Congress member’s opinion), “navigable waters” was expanded but still limited to waters used in commercial navigation. And this is consistent with Footnote 3 in *SWANCC*. Moreover, this expansion is

¹²³ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 178 (emphasis added).

¹²⁴ *The Daniel Ball*, 77 U.S. 557, 563 (1870); *see supra* note 101.

¹²⁵ *See supra* text accompanying notes 101–08.

¹²⁶ Rather than just channels of commerce.

¹²⁷ *See supra* note 109.

limited to Congress's commerce power over channels of commerce, rather than over things affecting commerce, as the Court claimed in *Riverside Bayview*.¹²⁸

Representative John Dingell, one of the cosponsors of the House bill,¹²⁹ also argued that the definition Congress created expanded the "limited view of navigability" in *The Daniel Ball*.¹³⁰ Representative Dingell stretched the definition of "navigable waters" to include tributaries of main streams, because a waterway merely needs to be "a link in the chain of commerce," rather than "part of a navigable interstate or international commercial highway."¹³¹ But he never explained how a non-navigable tributary could be used as a link in the chain of commerce. And not only was Representative Dingell focused on regulating the "channels of commerce," but like Senator Muskie, his remarks have little weight.¹³²

Turning more broadly to the speeches, when discussing whether "waters of the United States" includes "ground waters," members of Congress differentiated "ground waters" from "navigable waters."¹³³ The separation here emphasizes the limitations on "navigable waters." It was not a catchall term for any and all waters in the United States. "Navigable" means something, which is further evidence Congress was concerned with waters used in navigation.

Thirty-five different Congressmen referred to "navigable waters" in their floor speeches, including one letter from a Senator that was read into the record.¹³⁴ This vast array of members of Congress all referring to "navigable waters" shows the extent to which Congress used this phrase. This constant reference to "navigable" indicates that Congress did not intend to regulate all waters but was interested in waters used as channels of commerce.

¹²⁸ Albrecht & Nickelsburg *supra* note 67, at 7–8.

¹²⁹ Sapp et al., *supra* note 6, at 10202.

¹³⁰ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 250.

¹³¹ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 250, quoting *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

¹³² *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012) ("[T]he views of a single legislator, even a bill's sponsor, are not controlling."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (same); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) (same).

¹³³ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 589–92.

¹³⁴ *Id.* at 1389.

3. Letters

There are twenty-five references to “navigable waters” in the letters to Congress contained in the legislative history. Thirteen of these are in letters to Congress from the EPA, while the others are from various people and newspapers.¹³⁵ In the EPA’s letters, it referred to “navigable waters” four times in connection with “oceans,” as well as two times with “contiguous zone” while analyzing the statute.¹³⁶ The EPA did differentiate “navigable waters” from “interstate waters” once,¹³⁷ but that does not mean it was interested in regulating non-navigable waters.¹³⁸ Also, letters have very little probative value regarding Congress’s intent, since they are not even written by members of Congress.¹³⁹ Still, the comparison of “navigable waters” with other bodies of water used in commercial navigation is further support that “navigable waters” was generally understood to be limited to waters used in navigation.

B. “Navigable waters” compared with “tributaries” and “wetlands”

Further evidence of the commercial intent of Congress can be seen in the number of times “navigable waters” was used compared with the use of “tributary/ies” and “wetlands,” as well as “pond/s.” “Navigable waters” was used 231 times.¹⁴⁰ “Tributary” and “tributaries” were used a total of 13 times.¹⁴¹ “Wetlands” appeared twice.¹⁴² The vast disparity here is strong evidence that Congress did not intend to regulate small bodies of water like tributaries and wetlands. The words “pond” and “ponds” were used 19 times, but all but one of those references are clearly to man-made ponds, like fish ponds, holding ponds, and lagoons.¹⁴³ Adding the one non-man-made pond reference with tributaries and wetlands, that is 16 times

¹³⁵ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1192.

¹³⁸ *See supra* text accompanying notes 101–08, discussing the use of intrastate waters in navigation.

¹³⁹ *United States v. Reilly*, 827 F. Supp. 1076, 1078 (D. Del. 1993) (“In any event, the opinions of Executive Agencies expressed to Congressional committees, while meriting some weight in considering legislative history, are merely evidence of opinions which may have been considered by Congress in passing a law.”).

¹⁴⁰ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

the legislative history refers to these small bodies of water.¹⁴⁴ This low number, compared to the 231 uses of “navigable waters” is strong evidence that Congress did not intend to regulate these bodies of water, and that they were not considered “navigable waters.”

C. Comparison of “Oceans,” “Seas,” “Lake/s,” and “Waterways” with “Tributaries,” “Wetlands,” and “Ponds.”¹⁴⁵

Throughout the legislative history, Congress referred to the terms “seas,” “oceans,” “lakes,” and “waterways” with such frequency that it demonstrates that Congress intended to regulate large bodies of water usable in commercial navigation. “Lake/s” was used 703 times.¹⁴⁶ Among those uses of “lake/s” were 76 references to “Lake Erie,” 48 references to “Lake Tahoe,” 17 references to “Lake Michigan,” and 126 references to “Great Lakes.”¹⁴⁷ While “lake” may also be used to refer to smaller lakes, 267 of these 703 references to “lake/s” referred to massive lakes that would be considered navigable in fact due to their size.¹⁴⁸

Congress used “ocean/s” a total of 203 times.¹⁴⁹ “Sea/s” appeared 100 times.¹⁵⁰ “Waterway/s” was used 200 times.¹⁵¹ All of these are large bodies of water that would refer to actually navigable waters.¹⁵²

Congress spent extensive time discussing large, navigable bodies of water that were regularly used in commerce. In contrast, Congress mentioned three different types of water—“tributaries,” “wetlands,” and “ponds”—that are upstream of actually navigable water, 16 times.¹⁵³ The drastic difference between the number of times actually navigable waters used in

¹⁴⁴ *Id.*

¹⁴⁵ The term “stream/s” is used 251 times, but without analyzing each use it is hard to tell if what is being referred to is a small body of water, similar to a tributary, or whether it is a larger body like a “navigable stream.” For an example of this challenge, the phrase “navigable stream” appears seven times. Therefore, without further analysis beyond the scope of this Comment, examining the number of times “stream/s” is used is not determinative.

¹⁴⁶ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

¹⁴⁷ *Id.*

¹⁴⁸ See Sapp et al., *supra* note 6, at 10191.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

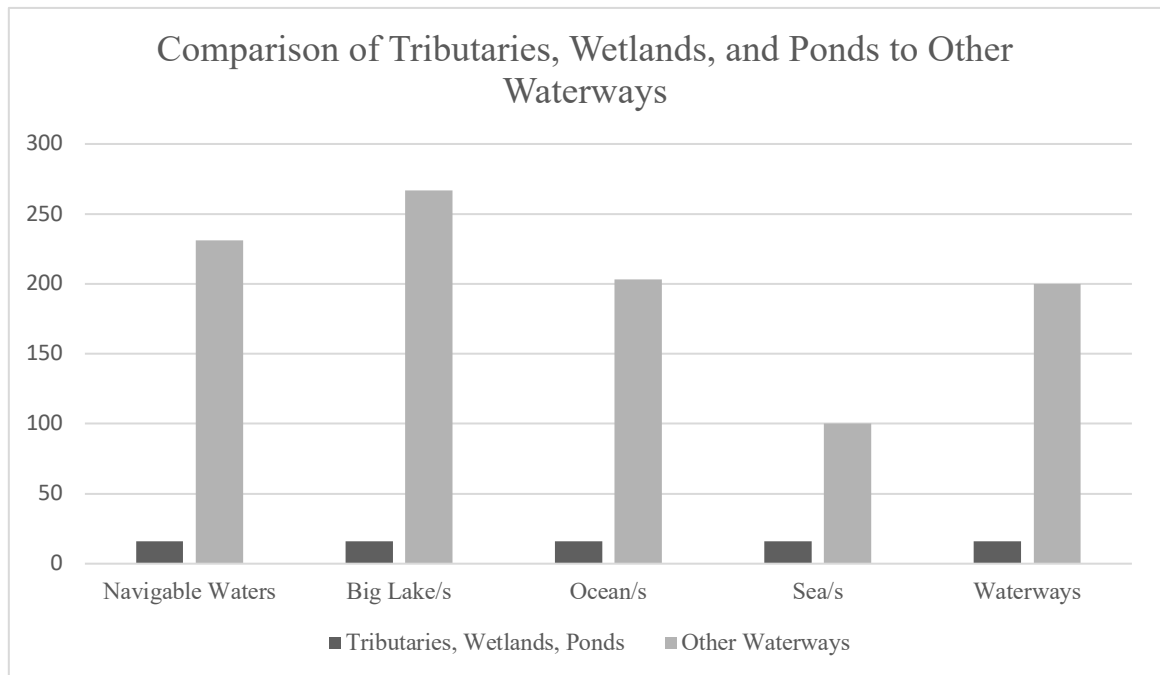
¹⁵¹ *Id.*

¹⁵² See Sapp et al., *supra* note 6, at 10191.

¹⁵³ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

navigation were referenced compared to small bodies of water not associated with navigation is strong support that Congress was interested in actually navigable waters used in navigation.

Before turning to the last section, the chart below gives a visual image of the stark differences between the number of times words for small bodies of water were used compared with words for actually navigable waters used in commerce.



D. Analysis of the 15 Uses of “Tributaries” and “Wetlands.”

The 15 occurrences of “tributaries” and “wetlands” are not conclusive evidence that Congress intended the phrase “navigable waters” to extend to them. First, only one of these references is to a citable¹⁵⁴ committee report, and it merely discusses the pollution in the Passaic River Basin and its tributaries.¹⁵⁵ Eleven of these uses are from speeches by members of Congress, none of which are by bill sponsors, so their interpretive weight is *de minimis*.¹⁵⁶ Two instances are from letters, which again, offer almost no value in determining the intentions of

¹⁵⁴ This is “citable” because the other reference discusses a definition that was not adopted in the final law, and therefore does not indicate the intentions of Congress. See *infra* text accompanying notes 157–159.

¹⁵⁵ H.R. REP. NO. 92-911, (1972), as reprinted in CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 770.

¹⁵⁶ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13. See sources cited *supra* note 114–15.

Congress.¹⁵⁷ Finally, one reference is to a committee report that examined a Senate version of a bill that defined navigable waters much more broadly than the CWA did when actually passed.¹⁵⁸ This report was written on October 28, 1971 in support of S. 2770 (1971).¹⁵⁹ However, that bill was not passed in the House of Representatives, and the definition of “navigable waters,” which included tributaries, was changed.¹⁶⁰ Therefore, any reference to that definition is worthless, as it never became law—in fact, Congress rejected that definition.

But not only are the sources of these references weak support for legislative intent, their content also does not provide any support for the notion that “navigable waters” includes “tributaries” or “wetlands.” Representative Dingell is the only member of Congress who argued that “navigable waters” should include tributaries.¹⁶¹ Representative Ichrod mentioned that a Nixon executive order¹⁶² expanded a prior statutory definition¹⁶³ of “navigable waters” “to include tributaries of navigable streams.”¹⁶⁴ However, he was not advocating for an expansion of regulation over tributaries, but rather expressing his frustration with the impact the regulations of tributaries had on fish hatcheries.¹⁶⁵ This executive order was not something Congress considered much while debating the CWA.¹⁶⁶

All of the other references to “tributaries” or “wetlands” do not implicate the extent of “navigable waters.” A number of instances were in the context of concerns about pollution in waters and tributaries, but neither Congressmen (other than Representative Dingell), letters, or

¹⁵⁷ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13. See *United States v. Reilly*, 827 F. Supp. 1076, 1078 (D. Del. 1993) (“In any event, the opinions of Executive Agencies expressed to Congressional committees, while meriting some weight in considering legislative history, are merely evidence of opinions which may have been considered by Congress in passing a law.”).

¹⁵⁸ S. REP. NO. 92-414 (1971), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 1495.

¹⁵⁹ *Id.*

¹⁶⁰ Compare S. 2770, § 502(h) (1971) *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 1698, with 92-500 § 502(7)(1972). See also Sapp et al., *supra* note 6, at 10201–02.

¹⁶¹ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 250. See also *supra* text accompanying notes 122–30.

¹⁶² Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (Dec. 25, 1970).

¹⁶³ Refuse Act of 1899, 33 U.S.C. § 407.

¹⁶⁴ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 427.

¹⁶⁵ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13, at 427-28.

¹⁶⁶ Further, while the Refuse Act is discussed in detail throughout the legislative history (343 times), this Executive Order was only mentioned 6 times, and only the one comment by Mr. Ichrod discussed the application of it to tributaries. CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

the committee report claim Congress was regulating these small, non-navigable bodies of water.¹⁶⁷ Rather, these references to tributaries focus more broadly on the extent of pollution occurring in these waters.¹⁶⁸ While an argument could be made that Congress members would not discuss the pollution in the tributaries if they were not interested in regulating them, they never mentioned an intent to regulate these small bodies of water. Further, only eight Congressmen referred to either “wetlands” or “tributaries.”¹⁶⁹ This limited number, combined with the limited interpretive value of such floor statements,¹⁷⁰ provides no support for an argument that Congress intended to broadly regulate small bodies of water. For that reason, the references to “tributaries” and “wetlands” are outliers and not indicative of an intent to regulate them. Rather, Congress intended to regulate large bodies of water used in navigation.

IV. CONCLUSION

Despite citations to a report that Congress intended the term “navigable waters” to have its broadest constitutional interpretation, Congress never intended to regulate more than waters used in navigation. The extensive use of “navigable waters” demonstrates Congress’s concern with navigability. Both the vast number of uses and the way in which the term is used indicate Congress’s recognition of the limitations of the term “navigable.” Further, although Congress did not define “navigable waters” beyond “waters of the United States, including the territorial seas,” it only intended the term to extend to waters used as channels of commerce. The large number of times “navigable waters” and other large, commercial bodies of water like “oceans,” “seas,” and “lake/s” appear in the legislative history compared to the 16 times “tributaries,” “wetlands,” and “ponds” were used is still further supporting evidence. Finally, the individual

¹⁶⁷ CONG. RSCH. SERV. LIBR. CONG., *supra* note 13.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931) (“[S]uch individual expressions [(committee or floor statements by Congress members)] are with out [sic] weight in the interpretation of a statute”); *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *Nat’l. Lab. Rel. Bd. v. Sw. Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (describing why individual floor statements are “the least illuminating forms of legislative history” after two Senators contradicted each other).

uses of “tributaries” and “wetlands” do not indicate Congress intended to regulate these small bodies of water.

So when the legislative history is examined as a whole, rather than when one phrase is cherry picked out of context, the commercial concerns of Congress are clear. The narrow scope Congress was concerned with is widely misunderstood in the scholarship, and the Supreme Court needs to address it—the *Sackett* case is a perfect opportunity. An inappropriately broad interpretation of “navigable waters” has been used to justify overly extensive regulations, which have imposed immense burdens on property owners like the Sacketts who seek to build on their property. Therefore, the Supreme Court should honor the original intent of Congress and clarify that the CWA only applies to actually navigable waters used in commercial navigation.