

POLICY BRIEF SERIES

Examining the Term “Waters Of The United States” in Its Historical Context

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January 2022

Policy Brief No. 4



THE C. BOYDEN GRAY //

Center *for the* Study
of the Administrative State

ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

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Examining the Term “Waters of the United States” in its Historical Context

By Susan Parker Bodine

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Executive Summary: No statute pursues its objective at all costs. Congress is far more chary when granting authority to administrative agencies. Yet, many judges have relied on the goals of the Clean Water Act when interpreting the definition of “navigable waters.” Adopting the same approach, in 2015 EPA even relied on scientific studies of dispersal of biological material through animals and birds to help support a broad definition of “water of the United States.” This purposive approach to Clean Water Act jurisdiction is not supported by the text, structure, or historical context of the Clean Water Act.

In January 2001, the U.S. Environmental Protection Agency (EPA) developed a proposed rule that was intended to require permits for communities that, under contracts, send their sewage to larger, consolidated municipal treatment systems for treatment and discharge. At the time I was the staff director for the Water Resources and Environment Subcommittee of the House Transportation and Infrastructure Committee. EPA Office of Water staff came to the Hill to brief congressional staff on their proposal. I pointed out to the EPA staff that, because the “satellite communities” did not discharge pollutants into navigable waters from their municipal sewer systems, EPA could not require them to obtain permits. The EPA staff acknowledged that point but defended EPA’s proposal saying, “but it’s the right thing to do.”¹

No statute grants an executive branch agency the authority to take whatever action they believe to be “the right thing.” Most statutes are legislative compromises that prescribe in detail the authorities granted. Conversely, no statute need enumerate the authority that is *not* granted and need not proscribe actions that fall outside the reach of the executive branch. Executive branch agencies have only the authority granted to them by Congress. Environmental laws, in particular, often rely on state and local authorities to establish locally and regionally

appropriate measures to address situations outside the scope of federal law.²

Despite the structure of our Constitution, with separate branches of government, and the federalism structure of many statutes, we continue to see attempts by agencies to go beyond their authorities in order to “do the right thing.” These attempts may be bolstered by less than precise use of language in legislative texts or even deliberate ambiguity by legislative drafters seeking the appearance of consensus. These attempts also may be validated by federal judges, swayed by their own personal policy inclinations.

In fact, some jurists have openly embraced the notion that they can create law through judicial interpretation to advance an agency or even a personal view of “the right thing” unless expressly prohibited. This “purposive” approach would require legislative drafters to not only prescribe authorities granted by Congress, but also to enumerate all the actions that are *proscribed*.³ That is not how laws are drafted, nor should it be how they are interpreted.

Debate over the Jurisdictional Reach of the Clean Water Act

One statutory term that has fallen victim to “purposivism” is the definition of “navigable waters” under the Clean Water Act (CWA).

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The CWA’s regulatory authority only applies to “navigable waters,” which are defined in the statute as “the waters of the United States.” As many courts have noted, the definition is ambiguous.⁴ Accordingly, the jurisdictional reach of the Act has been the subject of much debate and interpretation.

In the *Solid Waste Agency of Northern Cook County (SWANCC)*, Justice Rehnquist opined that whatever this definition means, it must have something to do with navigable water.⁵ In *Rapanos*, Justice Scalia opined that, to be regulated, water that flows to navigable water must be present at least regularly.⁶ In *Sackett*, Justice Alito chastised Congress for failing to provide the needed clarity.⁷

Some jurists have argued that the Act regulates any water if such regulation would advance the Act’s goal of restoring and maintaining “the chemical, physical, and biological integrity of the Nation’s waters.”⁸ For example, in his *Rapanos* concurrence, Justice Kennedy held that wetlands that “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’” fall within the definition of “navigable waters.”⁹

Since the 2006 *Rapanos* decision, advocates, EPA, the Corps of Engineers, and the Department of Justice have used Justice Kennedy’s *Rapanos* concurrence to embrace a purposive interpretation of the words “waters of the United States.” The argument goes as follows: federal jurisdiction over water is as broad as the objective of the CWA set forth in section 101(a) (stating that the objective of the Act is “to restore and maintain the chemical, physical and

biological integrity of the Nation’s waters”). Continuing the logic: a “significant nexus” to navigable water can be formed by any chemical, physical, or biological connection.¹⁰ To support applying this logic by rule thereby avoiding the need to demonstrate a “significant nexus” on a case-by-case basis, EPA conducted a literature search of connections and unsurprisingly found all water is connected, including through dispersal of biological material by the movement of birds and mammals.¹¹ This factual conclusion is undisputedly supported by science.¹² However, it does not necessarily follow that any water that is connected to a navigable water must also be subject to federal jurisdiction.

The leap from the factual conclusion that all water that is connected to the legal conclusion that physical, chemical, and biological connections are sufficient to establish federal jurisdiction is not supported by the text, structure, or historical context of the CWA. First, this argument turns an objective into a jurisdictional statement, despite admonitions against doing so by the Supreme Court.¹³ Second, it violates a standard canon of statutory interpretation by reading the terms “chemical, physical, and biological integrity” in section 101 of the Act to refer to the *scope* of waters to be protected even though in the seven other places where that phrase is used in the Act, it refers to the *level* of protection for the waters that are subject to the Act.¹⁴ Even Justice Kennedy considered this broad interpretation of his “significant nexus” test to be an overreach.¹⁵

While the definition of “navigable waters” in the CWA is “notoriously unclear,” that fact does not mean that a reviewing court must abandon the text and go elsewhere in search of meaning.

The court could interpret the term “waters of the United States” in its historical context.¹⁶

The 1972 Amendments to the CWA: the Oral History

Lester Edelman was the majority (Democrat) counsel for the House Public Works Committee during the development of the 1972 Amendments to the CWA. In 2017, he gave an interview in which he stated that he, Leon Billings (Democrat majority counsel for the Senate Public Works Committee) and Thomas Jorling (Republican minority counsel for the same) invented the definition of navigable waters at the 11th hour faced with the impending adjournment of the 92nd Congress and the need to complete the Conference Committee negotiations between the House and Senate on the 1972 amendments to the CWA in time to overturn the expected Presidential veto.¹⁷ Mr. Edelman claims he proposed the enacted definition to signal that jurisdiction extended beyond traditional navigable waters, but without saying how far beyond.

Mr. Edelman’s description of the development of the definition of “navigable waters” is supported by Mr. Billings and Mr. Jorling. In the eleventh of a series of lectures they delivered at Columbia University on “Origins of Environmental Law” they agreed that Mr. Edelman proposed defining navigable waters as “waters of the United States.”¹⁸ Mr. Billings said that the House and Senate staff could not agree on a definition that achieved the Senate goal of regulating non-navigable tributaries of navigable waters, so they punted and left it to the courts.¹⁹

As described by Mr. Billings and Mr. Jorling, the Senate wanted to prevent degradation of navigable waters and to do so believed that discharges of pollutants into surface waters upstream of navigable waters needed to be regulated.²⁰ They both believed that the Senate position was affirmed by Justice Scalia’s opinion in *Rapanos* and were amazed that the Supreme Court went that far.²¹ Mr. Jorling also was concerned with the constitutional basis for CWA jurisdiction and believed that reaching further into the business of ordinary life could amount to a regulatory taking.²²

On November 17, 2015, Mr. Billings and Mr. Jorling sat for an interview with the Environmental Law Institute (ELI) for an oral history project.²³ In that interview, Mr. Billings repeated the view that Justice Scalia’s *Rapanos* opinion “certainly exceeds anything I thought we would get out of the courts.”²⁴ Mr. Billings again repeated that view in an article that he wrote for the *Maine Law Review* in 2015 honoring his former boss, Senator Muskie.²⁵ The article says: “the Supreme Court has acknowledged a scope that is at least as far as we had imagined and, in my view, broader than we had reason to hope.” In the ELI interview, Mr. Billings further said that at the time of their negotiations the House and Senate staff had believed that scope the federal jurisdiction authorized by the 1972 amendments was more constrained than the scope identified in *SWANCC* and *Rapanos*.²⁶

In the 2015 ELI interview, Mr. Billings said he recalled a specific discussion with the members where they said a nondraining wetland or pond was not a navigable water. He said the members

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wanted to avoid claiming jurisdiction over isolated waters, noting concerns over constitutional limitations.²⁷

The oral history of the 1972 Amendments to the CWA does not support a broad or “purposivist” interpretation of the term “waters of the United States.”

The 1972 Amendments to the CWA: the Written History

The oral history of the 1972 Amendments to the CWA is supported by the written history. In the 92nd Congress, the Senate bill to amend the Federal Water Pollution Control Act, S. 2770, defined navigable waters in section 502(h) to include tributaries: “The term ‘navigable waters’ means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.” The Senate Committee Report explained that the Senate’s intent was to give EPA broader regulatory authority over the discharge of pollutants than the existing (1965) law:

The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.²⁸

The House moved its legislation to amend the Federal Water Pollution Control Act after the Senate passed S. 2770. The House bill, H.R. 11869, defined navigable waters in section 502(8) of the bill without referring to tributaries: “The term ‘navigable waters’ means the navigable waters of the United States, including the territorial seas.” Although not reflected in the language of the bill, the House report explained that the committee’s intention was to displace existing EPA and Corps of Engineers interpretations of the term “navigable waters of the United States” that the House committee believed to be too narrow because they excluded wholly intrastate navigable waters.

One 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. However, this is not the Committee’s intent. The Committee fully intends that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.²⁹

The Conference Report for the 1972 Amendments similarly said: “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.”³⁰

Three administrative “agency determinations” were in effect at the time of the 1972 Amendments to the CWA. In 1968, the Corps of Engineers had adopted an interpretation of the term “navigable waters” that did not include navigable waters of a state, which,

although navigable, are not “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. 33 CFR § 209.260 (1968) (33 Fed. Reg. 18,670, 18,692, Dec. 18, 1968). A December 9, 1971, EPA General Counsel opinion similarly refused to include inland lakes within the scope of “navigable waters” even if they linked to rail or automotive transportation systems, determining that there must be a water connection between states. U.S. EPA, Office of General Counsel, A Collection of Legal Opinions, Vol. 1, at 400 (General Counsel Opinion, “Definition of Navigable Waters,” Dec. 9, 1971). Finally, according to a May 1972, EPA Office of General Counsel “Primer on the Law, Evidence, and Management of Federal Water Pollution Control Cases,” “navigable waters” are waters that are navigable in fact or waters that have been or could be made to be navigable in fact while “navigable waters of the United States” are the narrower set of navigable waters that could be used as a highway for interstate commerce. EPA Primer, at Appendix A (citing cases including *Utah v. United States*, 403 U.S. 9 (1971) (“The lake was used as a highway and that is the gist of the federal test.”)). Congress overturned these “agency interpretations” in 1972 with a new definition of “navigable waters.”

As suggested by Mr. Edelman, the Conference Report for the 1972 Amendments defined navigable waters as “the waters of the United States.” Senator Muskie, who was chairman of the Senate subcommittee with jurisdiction over the CWA, provided an explanation of the new definition as follows:

It is intended that the term ‘navigable waters’ include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition

by themselves or by *uniting with other waters or other systems of transportation, such as highways or railroads*, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.”³¹

Remarks on the House floor, by Congressman Dingell provided a similar explanation and was careful to point out that the 1972 Amendments, unlike the 1965 Act, regulate portions of waters that do not cross a state or international boundary. Congressman Dingell noted that the full extent of Commerce Clause jurisdiction can extend to intrastate waters if they are a link in a channel of transportation.³²

Shortly after the 1972 Amendments, jurists began to cite this legislative history to support the idea that CWA jurisdiction is co-extensive with Congress’ Commerce Clause authority.³³ However, that interpretation is not supported by the contemporaneous understanding of the amendments. In fact, at the time of the 1972 Amendments, it was understood that CWA jurisdiction did not extend to intrastate, non-navigable water. For example, in its 1973 report to the President and Congress, the congressionally chartered National Water Commission identified jurisdiction over intrastate, non-navigable water as a gap in federal regulation.³⁴

The draft report issued in 1971 and the final report issued in 1973 (after the 1972 Amendments to the CWA became law) both recommended that isolated wetlands be regulated by states to fill this gap.³⁵

This historical context makes it clear that the term “navigable waters” remains bound by Congress’ authority over transportation.³⁶ Accordingly, giving the “broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes” to the

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term “navigable waters” simply means the term includes waters that “by uniting with other waters or other systems of transportation” are part of an interstate transportation system. This focus on Congress’ traditional transportation-based authority over navigable waters was adopted by the Supreme Court in *SWANCC*, rejecting expansion of CWA jurisdiction to isolated, intrastate, waters based on use by migratory birds, endangered species, or for irrigation.³⁷

At the time of the 1972 Amendments, it also was settled law that Congress’s jurisdiction over navigable waters included authority to protect such waters from pollution, supporting jurisdiction over tributaries as well.³⁸ This view was adopted by Justice Scalia in his plurality opinion in *Rapanos*, which recognized CWA jurisdiction goes beyond navigable waters and extends to non-navigable tributaries.³⁹

In 2003, after the Supreme Court’s ruling in *SWANCC*, EPA and the Corps continued to claim they had authority to exercise federal jurisdiction over hydrologically isolated waters and wetlands on a case-by-case basis, interpreting *SWANCC* to preclude only certain uses of water as a basis for jurisdiction.⁴⁰ However, this claim was more theoretical than real. In 2014 the U.S. Fish and Wildlife Service acknowledged that 88% of prairie potholes are isolated and therefore not regulated so they work with farmers throughout the upper Midwest on cooperative conservation measures to address habitat.⁴¹ Further, the Corps did not exercise its claimed federal jurisdiction over isolated waters until asserting jurisdiction by rule in the 2015 Clean Water Rule.⁴² This written history also does not support a broad or “purposivist” interpretation of the term “waters of the United States.”

Where Are We Now?

In 2019, EPA repealed the 2015 Clean Water Rule and, in 2020, replaced it with the Navigable

Waters Protection Rule.⁴³ The 2020 rule adopts a definition of “waters of the United States” that regulates navigable waters and their tributaries, as well as hydrologically connected wetlands. The current EPA administrator has stated that the Biden administration will replace the 2020 rule with a new rule that will incorporate parts of both the 2015 and the 2020 rules.⁴⁴ On December 7, 2021, EPA and the Corps of Engineers published in the Federal Register a notice of proposed rulemaking (NPRM) to revise the regulatory definitions of “waters of the United States.”⁴⁵ The agencies purport to be returning to pre-2015 regulations and guidance. However, the NPRM would amend the regulations to codify a “significant nexus” test based on Justice Kennedy’s *Rapanos* concurrence in a manner very similar to the 2015 rule, but putting specific direction on what counts as a connection in the preamble rather than the proposed rule text.⁴⁶ The agencies plan to promulgate a second rulemaking to revise the definition further. While the EPA administrator has said the agency will not simply return to the 2015 rule, the NPRM cites the Connectivity Report that purported to support the 2015 rule over a dozen times (renaming it the “Science Report”).

If past is precedent, the definition of waters of the United States will return to the Supreme Court. When it does, the Court may choose to interpret the words “navigable waters” and “waters of the United States” in their historical context. The Court also may refuse to agree that any water with a chemical, physical, or biological connection to a navigable water may be federally regulated. It may be telling that in his opinion in *County of Maui v. Hawaii Wildlife Fund*, Justice Breyer rejected the idea that the CWA would regulate “in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird’s feathers.”⁴⁷ Yet, in the 2015 rule and again in the 2021 NPRM, EPA relied in part on bird

droppings to justify a broad definition of “waters of the United States.”⁴⁸

Endnotes

1. See fact sheet entitled “Proposed Rule to Protect Communities from Overflowing Sewers, EPA 833-01-F-001 (Jan. 2001). EPA never finalized that proposal.
2. For example, the Clean Water Act is “a program of cooperative federalism” that “anticipates a partnership between the States and the Federal Government.” *New York v. United States*, 505 U.S. 144, 168 (1992); see also *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).
3. “Purposivism” endorses the concept that a judge may interpret a statute to advance its purpose, even if the resulting interpretation goes beyond the authorities granted by the text. See generally O’Scannlain, Remarks, “We are all Textualists Now: The Legacy of Justice Antonin Scalia,” 91 St. John’s Law Review 303 (2017) (comparing a purposive approach to a textualist approach to statutory interpretation); Robert A. Katzmann, *Judging Statutes* (2014), at 31 (describing the purposive approach favorably). As then Judge Kavanaugh pointed out in his review of *Judging Statutes*, a view that an executive branch agency can do what they wish unless an action is clearly forbidden is a consequence of *Chevron* deference. See Brett Kavanaugh, Book Reviews, *Fixing Statutory Interpretation, Judging Statutes*, Harvard Law Review, Vol. 129:2118, at 2151.
4. See, e.g., *Sackett v. EPA*, 566 U.S. 120, 131 (2012) (concurring, Justice Alito referred to the jurisdictional reach of the CWA as “notoriously unclear” and “hopelessly indeterminate”). Justice Kennedy echoed this sentiment in his concurring opinion in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1816-17 (2016).
5. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (“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”).
6. *Rapanos v. United States*, 547 U.S. 715, 732-33 (2006) (“Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over ‘waters’” and “the waters of the United States must include only relatively permanent, standing or flowing bodies of water.”).
7. *Sackett*, 566 U.S. at 131 (“For 40 years, Congress has done nothing to resolve this critical ambiguity....”).
8. CWA sec. 101(a).
9. *Rapanos v. United States*, 547 U.S. 715, 780 (2006) (Justice Kennedy, concurring)
10. EPA and U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008); *Clean Water Rule, Definition of Waters of the United States*, 80 Fed. Reg. 37,054 (June 29, 2015).
11. “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,” EPA 2015. This Report includes nearly 50 studies that document biological connections used by the Agencies to justify the scope of jurisdiction claimed in 2015 Clean Water Rule. The studies include: Figuerola, J., A. J. Green, and T. C. Michot, “Invertebrate eggs can fly: Evidence of waterfowl mediated gene flow in aquatic invertebrates,” *The American Naturalist* 165:274-280 (2005); Frisch, D., A. J. Green, and J. Figuerola, “High dispersal capacity of a broad spectrum of aquatic invertebrates via waterbirds,” *Aquatic Sciences* 69:568-574 (2007); and Roscher, J. P., “Alga dispersal by muskrat intestinal contents,” *Transactions of the American Microscopical Society* 86:497-498 (1967). *Connectivity Report* at 1-9, 4-31, 4-32, 4-34, B-64.
12. The water cycle is taught to elementary school students.
13. The Supreme Court has stated, “it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”

Rodriguez v. United States, 480 U.S. 522, 526 (1987). The *Rapanos* plurality made the same point: “This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose. ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that “significantly affect the chemical, physical, and biological integrity of” waters of the United States. It did not do that, but instead explicitly limited jurisdiction to “waters of the United States.” *Rapanos*, 547 U.S. at 755-56 (2006) (Scalia, J., plurality).

14. See 33 U.S.C. § 1362(11), § 1362(15), § 1362(19), § 1314(a)(1)(B), § 1314(b)(1)(A), § 1254(b), and § 1255(d)(3). A term appearing in several places in a statutory text is generally read the same way each time it appears.” See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at 170 (discussing the “Presumption of Consistent Usage” canon).

15. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (concurring opinion by Justice Kennedy “point[ing] out that, based on the Government’s representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern” and referring to the “ominous reach” of the Act).

16. See *Reading Law*, at 399-402 (discussing the use of historical inquiry to identify the original interpretation of legal texts).

17. Article available at <https://www.eenews.net/stories/1060056818>.

18. Provisions in the Clean Water Act, Nov.

12, 2014, available at <https://spm.ei.columbia.edu/education/origins-environmental-law-course-videos> (Class II, Fall 2014 at 38:15).

19. *Id.* at 39:06.

20. *Id.* at 10:39; 27:57.

21. *Id.* at 28:40; 39:40.

22. *Id.* at 27:40; 31:12.

23. Available at <https://www.eli.org/celebrating-pioneers-in-environmental-law/leon-billings-tom-jorling?fbclid=IwAR3rav-rANHy-cZ268kAdLcr3E83prdmkyg7mUVnkrAAqMPqyrHbyUdGoioq>.

24. ELI interview at 59:26.

25. Leon G. Billings, Edmund S. Muskie: A Man with A Vision, 67 *Maine L. Rev.* 243 (2015), available at <https://mainelaw.maine.edu/academics/wp-content/uploads/sites/3/11-Billings.pdf>.

26. ELI interview at 1:00.

27. See ELI interview at 1:02.

28. S. Rept. 92-414, 92nd Cong. 1st Sess. 77.

29. H. Rept. No. 92-911, 92nd Cong. 2d. Sess.

30. Conference Report to accompany S. 2770, S. Rept. 92-1236 (92nd Cong., 2d Sess.), at 144.

31. 118 Cong. Rec. 33699 (1972) (Muskie Statement) (emphasis added).

32. 118 Cong. Rec. 33756-57 (1972) (Dingell statement).

33. See *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (vacating the Corps of Engineers 1974 CWA regulations).

34. “Water Policies For The Future: Final Report to the President and to the Congress of

the United States by the National Water Commission” (June 1973), at 200-201.

35. *Id.* at 279.

36. This history is why jurisdiction over the CWA in the House of Representatives lies with the Transportation and Infrastructure Committee, not the Energy and Commerce Committee.

37. SWANCC, 531 U.S. at 172.

38. *See United States v. Standard Oil Co.*, 384 U.S. 224, 228-30 (1966) (interpreting section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407).

39. *Rapanos*, 547 U.S. at 732-33 (Scalia, J., plurality).

40. *See* 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003) (allowing case-by-case federal jurisdiction over intrastate, non-navigable waters on grounds other than use by migratory birds, use by endangered species, or use for irrigation, with headquarters approval).

41. *See* Dahl, T.E. 2014. Status and trends of prairie wetlands in the United States 1997 to 2009. U.S. Department of the Interior; Fish and Wildlife Service, Ecological Services, Washington, D.C., at 48.

42. *See* letter dated August 28, 2015, from Assistant Secretary Jo-Ellen Darcy to Senator James M. Inhofe (“to the best of my knowledge, since the SWANCC decision, the Army has not asserted jurisdiction over any isolated, intrastate, non-navigable waters”); *see also* 86 Fed. Reg. 69,372, 69,440 (Dec. 7, 2021) (“As a matter of practice since the issuance of the SWANCC Guidance, the Corps has not asserted jurisdiction over such ‘other waters’”).

43. 84 Fed. Reg. 56,626 (Oct. 22, 2019) (repeal rule) and 85 Fed. Reg. 22,250 (Apr. 21, 2020) (replacement rule).

44. *See* transcript for the February 3, 2021, hearing of the Senate Committee on Environment and Public entitled, “Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection Agency,” available at https://www.epw.senate.gov/public/_cache/files/b/b/bb8ad566-12ca-4ff6-adb5-e3f61d-44b3ab/736007F6C59AEDCCF63FD6C-63517DAD5.spw-02032021-nomination-hearing.pdf.

45. 86 Fed. Reg. 69,373 (Dec. 7, 2021).

46. *See* 86 Fed. Reg. at 69,438

47. *Cty. Of Maui, Hawaii v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020).

48. *See supra* note 11 and Supplementary Materials to the Technical Support Document for the Proposed “Revised Definition of ‘Waters of the United States’” Rule (U.S. EPA and the Department of the Army, Nov. 18, 2021), at 17, available at https://www.epa.gov/system/files/documents/2021-12/supplementarymaterial_tsd_508.pdf.