"NAVIGABLE WATERS" DOES NOT INCLUDE MUD PUDDLES: THE CLEAN WATER ACT'S LEGISLATIVE HISTORY SUPPORTS A NARROW, COMMERCIAL-FOCUSED INTERPRETATION

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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.[1] The Clean Water Act of 1972[2] ("CWA") authorized the Environmental Protection Agency ("EPA") to regulate pollution in the nation's "navigable waters."[3] This authority gave the EPA, along with the Army Corps of Engineers ("Army Corps"), the power to regulate the dumping, filling, and altering of the navigable waters.[4] 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."[5] This definition has created much speculation as to exactly what "waters of the United States" means.[6] While some have argued that "navigable waters"

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1. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–24 (1985); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 161 (2001); Rapanos v. United States, 547 U.S. 715, 716 (2006).

2. Clean Water Act, 33 U.S.C. §§ 1251–1357; Pub. L. No. 92-500 (1972).

3. Clean Water Act, 33 U.S.C. § 1252(a).

4. *Id.* § 1344; Pub. L. No. 92-500 § 404 (1972). This Comment cites to both the U.S. Code and the Public Law Number when referencing § 404.

5. Clean Water Act, 33 U.S.C. § 1362(7).

6. *See, e.g.*, Lorraine C. Friedlein Buck, *Narrowing "Navigable Waters": The Fifth Circuit Limits Federal Jurisidiction 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.

(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.[7]

Since the EPA and Army Corps can regulate "navigable waters,"[8] the scope of that phrase directly impacts the scope of these agencies' jurisdictions. Both agencies have issued multiple regulations defining "navigable waters" since the CWA was passed, most of which define the term very broadly.[9] 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."[10] However, in a 2001 Supreme Court decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 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.[11] Unfortunately, the Supreme Court did not reference any portion of the legislative history to support its assertion. This Comment fills that gap, showing that Congress's use of different terms, 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 first provides a brief overview of the CWA and the regulations interpreting "navigable waters" and explains why the scope of the definition is so important to all Americans.

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).

7. *Compare* Sapp et al., *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, 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, 11048–50 (2002).

8. 40 C.F.R. § 230.3 (2021) (EPA); 33 C.F.R. § 328.1 (2021) (Army Corps); *see infra* Part I.B.

9. *See infra* Part I.B.

10. S. REP. NO. 92-1236 (1971), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., 93D CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 144 (Comm. Print 1973).

11. Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 168 n.3 (2001).

Then, this Comment examines the trilogy of cases interpreting the regulations and the scope of the CWA. Finally, the bulk of this Comment analyzes 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.

A. The Clean Water Act

The Clean Water Act's full title is The Federal Pollution Control Act Amendments of 1972.[12] It amended the Federal Pollution Control Act of 1948,[13] which granted federal support for state enforcement of pollution regulation.[14] Rather than creating a federal water pollution regulatory system, the 1948 Act required states to create their own regulatory plans.[15] In 1972, Congress decided to create a robust federal pollution regulation scheme after public outcry over polluted waters became deafening in the 1960s.[16] This included outrage over the thirteenth fire on the Cuyahoga River in Ohio within 101 years.[17] 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."[18] 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.[19] 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.[20] Regulating discharges into navigable waters under §

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

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

14. *See* 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).

15. 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).

16. *Id.* at 361.

17. *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).

18. 33 U.S.C. § 1251(a).

19. Henninger, *supra* note 14, at 603–04.

20. 33 U.S.C. § 1344; Pub. L. 92-500, § 404 (1972).

404 has become the center of the litigation over the CWA, and this litigation has been largely over what constitutes "navigable waters."[21] While the CWA references "navigable waters" forty-nine times,[22] the definition within the CWA is limited to merely "the waters of the United States, including the territorial seas."[23] One of the main regulatory tasks the EPA and Army Corps have undertaken is defining "navigable waters."[24]

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.[25] In 1974, the Army Corps limited navigable waters to those used or usable "by the public for purposes of transportation or commerce," including "interstate or foreign commerce."[26] 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."[27] Finally, as a catchall, the regulation also defined "navigable waters" as "[a]ll 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

21. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–24 (1985); Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 161 (2001); Rapanos v. United States, 547 U.S. 715, 716 (2006).

22. Clean Water Act, 33 U.S.C. §§ 1251–1357.

23. *Id.* § 1362(7).

24. *See* 40 C.F.R. § 125.1(o) (1973).

25. *Id.*

26. 33 C.F.R. § 209.260(e)(1) (1974) ("It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor, and not the time, extent or manner of that use."); § 209.260(c) ("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.").

27. 33 C.F.R. § 323.2(a)(2)–(4) (1978).

of the United States, the degradation or destruction of which could affect interstate commerce."[28]

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) that could be used by interstate travelers for recreational purposes, (2) from which fish or shellfish could be taken and sold in interstate commerce, or (3) that could be used for industrial purposes in interstate commerce.[29] Ever since, their regulations have been nearly identical.[30] While regulations have been promulgated since then—most recently in 2020 by the Navigable Waters Protection Rule[31]—the 1986 and 1987 regulations are the ones currently being applied at the time of this writing.[32]

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 a person's ability to use their property.

Take the situation of the Sacketts, for example. The Sacketts own two-thirds of an acre in Idaho, and they have been trying to build on their property since 2007.[33] Their property is west of Priest Lake, but it is not adjacent to it as a few parcels separate them from the lake.[34] 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 the property was a wetland adjacent to navigable water and waters of the United States.[35] The EPA also

28. *Id.* § 323(a)(5).

29. 40 C.F.R. § 230.3(s)(3) (1986) (EPA); 33 C.F.R. § 328.3(a)(3) (1987) (Army Corps).

30. *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. at 22254.

31. *See id.* at 22250.

32. *See Current Implementation of the Waters of the United States*, ENV'T. PROT. AGENCY, https://www.epa.gov/wotus/current-implementation-waters-united-states (Dec. 20, 2021).

33. Sackett v. U.S. Env't Prot. Agency, 566 U.S. 120, 124 (2012).

34. *Id.*

35. *Id.* The EPA determined their filling project fell under these regulations: 33 C.F.R. § 328.3(c) (1994) (adjacent wetland); 33 U.S.C. § 1362(7) (1972) (navigable water), 40 C.F.R. § 232.2 (1986) (waters of the United States). *Sackett*, 566 U.S. at 124.

informed the Sacketts that they were violating the CWA by "discharg[ing] pollutants into the waters of the United States without a permit."[36] The Sacketts sought a hearing with the EPA, but it was denied.[37] 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.[38] 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.[39] 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.[40] Since the 2012 Supreme Court decision, the Sacketts have continuously been in litigation on the merits in an attempt to build their dream home.[41] At the time of this writing, the Ninth Circuit had recently rejected the Sacketts' claim that their property was not covered by the regulation.[42] 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."[43] The Ninth Circuit reasoned that the compliance was lawful under a broader interpretation of "waters of the United States."[44] The Ninth Circuit concluded that the Sacketts' property was a wetland under § 404 and was therefore subject to the permitting requirements.[45] The Sacketts petitioned the Supreme Court to hear their case again, this time on the merits,[46] and certiorari was granted.[47]

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36. *Sackett*, 566 U.S. at 124–25.

37. *Id.* at 125.

38. *Id.*

39. *Id.*

40. *Id.* at 131.

41. *See* Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1082 (9th Cir. 2021).

42. *Id.* at 1093.

43. *See id.* at 1089. The Sacketts alleged that the compliance order was unlawful under the *Rapanos* plurality. *Id.* at 1087–88; *see also infra* Part II.C.

44. *Sackett*, 8 F.4th at 1092–93. The Ninth Circuit determined the order was lawful under Justice Kennedy's concurrence in *Rapanos*; *see also infra* Part II.C.

45. *Sackett*, 8 F.4th at 1093.

46. Petition for Writ of Certiorari, Sackett v. U.S. Env't Prot. Agency (*Sackett II*), 142 S. Ct. 896 (2022) (No. 21-454).

47. *Sackett II*, 142 S. Ct. 896.

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. 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 such authority.[48] The CWA was intended to regulate waters used in navigation, not land like the Sacketts' property.[49]

Not only does a broad interpretation have a direct impact on people like the Sacketts, who must meet the EPA's requirements to build on property containing mud puddles, but it also restricts basic property rights. It is a restriction of the right to use, which is one of the most fundamental property rights.[50] Further, the agencies have overstepped the bounds of what their authority was intended for—limiting the dispersion of pollutants into actually navigable waters.[51] 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.[52]

II. THE TRILOGY

The Supreme Court has addressed these regulations three times.[53] The first two cases addressed the legislative history of the CWA,[54] while the third focused only on the text of the statute.[55] At issue in all of these cases, and in *Sackett*, was § 404 of the CWA, which

48. *See infra* Part III.

49. *See infra* Part III.

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. *See infra* Part III.

52. *See infra* Part III.

53. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985); Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 162 (2001); Rapanos v. United States, 547 U.S. 715, 722–23 (2006).

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

55. *Rapanos*, 547 U.S. at 730–39; *but see id.* at 804 (Stevens, J., dissenting) (addressing legislative history).

prohibits discharging fill or dredge material into the navigable waters without a permit from the Army Corps.[56]

A. Riverside Bayview

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.[57] The Court also determined that the regulation's definition of "wetlands"[58] was a proper expansion of the Army Corps' authority under § 404.[59] 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.[60]

Importantly, the Court looked at the legislative history to justify this broad authority under the CWA.[61] The Court stated that the legislative history supported "the reasonableness of the [Army] Corps' approach of defining adjacent wetlands as '[navigable] waters' within the meaning of § 404(a)."[62] 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."[63] 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.[64]

B. SWANCC

In 2001, the Court again looked at the scope of the waters of the United States under the CWA, this time regarding the 1986

56. 33 U.S.C. § 1344 (providing the current amended version of the provision).

57. *Riverside Bayview*, 474 U.S. at 139.

58. *Id.* at 124 ("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.'").

59. *Id.* at 129.

60. *Id.* at 130–31.

61. *Id.* at 132.

62. *Id.*

63. *Id.* at 133.

64. *Id.* at 133–34.

regulation.[65] 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.[66] As part of the analysis, the Court examined the Army Corps' 1974 regulation, which defined navigable waters as those that could be used in commerce or transportation.[67] The Court affirmed that the 1974 regulation was limited to waters used in navigation: "Respondents put forward no persuasive evidence that the Corps mistook Congress'[s] intent in 1974."[68] 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,[69] which is part of its authority over channels of interstate commerce,[70] rather than its broader power over things affecting commerce.[71] The Court left open the possibility that "navigable waters" in § 404 also included non-navigable waters adjacent to navigable waters, like streams and tributaries.[72] However, the Court emphasized that this was unclear and not at issue.[73] While "navigable" could have a limited import, as the Court expounded in *Riverside Bayview*,[74] 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."[75] The Court was clear that Congress was interested in waters that were or could be used in the transportation of goods in commerce.[76] The Court ultimately determined that isolated ponds that were habitats for migratory birds were not within the scope of the CWA, and thus, it held the Migratory Bird Rule was outside the statutory authority of the CWA.[77]

65. Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 164 (2001).

66. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

67. *SWANCC*, 531 U.S. at 168.

68. *Id.*

69. *Id.* at 168 n.3.

70. *Id.* at 173.

71. Albrecht & Nickelsburg, *supra* note 7, at 11042.

72. *SWANCC*, 531 U.S. at 171.

73. *Id.*

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

75. *SWANCC*, 531 U.S. at 172.

76. *Id.* at 168 n.3, 172.

77. *Id.* at 171–72.

C. Rapanos

In this fractured opinion, the Court split 4-1-4.[78] 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."[79] Writing for the plurality, Justice Scalia recognized that while the Act's term "navigable waters" is broader than traditionally navigable waters, "navigable" still meant something.[80] "*The waters* of the United States," rather than just "*water* of the United States," referred to something more specific than general water.[81] 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.[82] After determining that the ditches were not navigable waters, Justice Scalia analyzed whether the wetlands were adjacent to navigable waters.[83] 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."[84]

Justice Kennedy concurred only in the judgment and applied a "significant nexus" test to determine if the wetlands could be regulated as "navigable waters."[85] Justice Kennedy determined that waters would be treated as "navigable water" if they had a significant nexus with waters that are navigable in fact.[86] 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 as 'navigable.'"[87] The Court ultimately

78. Rapanos v. United States, 547 U.S. 715, 718 (2006).
79. *Id.* at 729.
80. *Id.* at 731.
81. *Id.* at 732 (emphasis added).
82. *Id.* at 733, 739.
83. *Id.* at 739–42.
84. *Id.* at 742.
85. *Id.* at 759 (Kennedy, J., concurring in the judgment).
86. *Id.*
87. *Id.* at 780.

vacated for the lower courts to determine if the ditches were "waters of the United States" and if the wetlands were adjacent.[88]

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.[89] While *Rapanos* is fascinating, it is largely beyond the scope of this Comment. Rather, the rest of this Comment addresses 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.[90] 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,[91] 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 number of

88. *Id.* at 757.

89. The circuits have generally split into four camps. The first camp has held that Justice Kennedy's concurrence and his "significant nexus" test is the controlling opinion. *See, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006); United States v. Robison, 505 F.3d 1208, 1221–22 (11th Cir. 2007); Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1088–91 (9th Cir. 2021). The second camp has applied Justice Kennedy's concurrence without ruling out Justice Scalia's "continuous surface connection" test. *See, e.g.*, Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288 (4th Cir. 2011). The third camp has determined that a wetland is within the CWA's jurisdiction if it meets either test. *See, e.g.*, 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). The fourth camp has applied both tests without endorsing either. *See, e.g.*, 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).

90. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 168 n.3 (2001).

91. *See, e.g.*, Breedon, *supra* note 6, at 1442; Sapp et al., *supra* note 6, at 10191; Squillace, *supra* note 7, at 814.

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

Within this legislative history analysis, this Comment first examines the way the phrase "navigable waters" was used to show that Congress at large, as well as most individual members of Congress, used "navigable waters" as the shorthand reference because it was actually interested in truly navigable waters, not smaller bodies of water. Second, this Comment compares 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 contrasts 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 analyzes 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.[92] Throughout this analysis, as the different pieces of legislative history are analyzed, this Comment points out the different weight and usefulness of each type. 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 at the time.

A. "Navigable Waters" Throughout the Legislative History

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

92. *See, e.g.*, 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).

pages throughout the legislative history.[93] It was used throughout the history, as can be seen by the high ratio of pages it appears on compared to the number of times used.[94] 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,"[95] and yet "waters of the United States" only appears forty-seven times.[96] "Waters of the United States" would make sense for a placeholder phrase when discussing it during deliberations, if that is what is meant, but that is not the phrase chosen. The forty-seven 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."[97] Instead, the phrase of choice was "navigable waters."[98] This implies Congress was interested in actually "navigable" waters. Each time Congress used this phrase, it signaled a limitation on the types of waters regulated. If Congress had not intended to limit waters to those that were "navigable," it would have used a different phrase.

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

i. Committee Reports

Committee reports contain the most references to "navigable waters," with 106 uses.[99] Committee reports are the most authoritative type of legislative history when determining Congress's intent.[100] While not conclusive of Congressional intent,

93. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12. 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 they are included in an appendix of other proposed bills, so they are not truly part of the legislative history.

94. *Id.*

95. 33 U.S.C. § 1362(7).

96. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

97. *Id.*

98. *Id.*

99. *Id.*

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

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.[101]

While Congress did not define "navigable waters" in committee reports,[102] 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."[103] 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 interpretation of "navigable waters" did not support the claim that Congress intended to do anything more than regulate waters used in navigation.[104] And while many scholars reference this statement from the report to support an interpretation beyond regulating the channels of commerce,[105] 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."[106] By stating the "broadest possible constitutional interpretation," Congress dodged the question of how broadly to define "navigable waters" and left it to the courts to determine its scope.[107]

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*,

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

102. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, 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.*

103. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

104. *See supra* Part II.B.

105. *See* Breedon, *supra* note 6, at 1443; Sapp et al., *supra* note 6, at 10202; Squillace, *supra* note 7, at 829–30.

106. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 327.

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

that Congress could regulate interstate navigable waters that served as channels of commerce.[108] 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.[109] And while this would expand what could be regulated, these waters still had to be usable in navigation and transportation of cargo.[110]

It seems that this controversy is what the conference report was referring to in two ways. First, the report states that the term "navigable waters" was to be given the "broadest *constitutional* meaning."[111] When the CWA was passed, there was much debate about the constitutionality of regulating intrastate waters.[112] 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 broadly as constitutionally permissible. Second, the reference to the "agency determinations" is probably referring to the EPA's position at the time that it lacked the authority to regulate intrastate waters over constitutional concerns,[113] and the EPA's reluctance to regulate was central to this debate.[114]

It appears then, Congress used this statement to direct the courts to determine a permissible construction of "navigable

108. 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.").

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

110. *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.").

111. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 327 (emphasis added).

112. Albrecht & Nickelsburg, *supra* note 7, at 11046–47.

113. U.S. ENV'T PROT. AGENCY, OFF. OF GEN. COUNS., OPINION: DEFINITION OF NAVIGABLE WATERS (1971) ("[T]here must be a water connection between states" in order to regulate "navigable in fact waters.").

114. *See* Albrecht & Nickelsburg, *supra* note 7, at 11048–49.

waters" and to ignore the agencies' limitations.[115] If this is indeed what Congress was doing, first, Congress was intentionally being vague,[116] since that sentence in the conference report 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.[117] 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 committee 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 nineteen times with "ocean/s,"[118] seventeen times with "waters of the contiguous zone" or the "contiguous zone,"[119] and six times with "territorial seas."[120] Often, these bodies of water are all listed together as a group.[121] 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

115. 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.

116. Congress was vague most likely because there were not enough votes for a completely broad or completely narrow interpretation.

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

118. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

119. *See id.*; 33 U.S.C. § 1362(9) (defining "contiguous zone" 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").

120. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12; 33 U.S.C. § 1362(8) (defining "territorial seas" as the waters from the low water mark of the coast extending seaward for three miles).

121. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

commercial navigation, and its use alongside other large bodies of water all indicate that Congress was interested in actually navigable bodies of water.

ii. Floor Speeches

Members of Congress used "navigable waters" ninety-seven times in floor speeches in the legislative history.[122] Floor speeches are generally not a reliable type of legislative history to show legislative intent because members of Congress can say anything, regardless of what Congress as a whole wishes.[123] Statements from the bill's sponsor, however, are afforded some weight.[124] 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.[125] In Senator Muskie's speech summarizing the committee report, he defined "navigable waters" expansively.[126] 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 Congressional intent.[127] 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 in law which are navigable in fact. It is further intended that such waters shall be considered to be*

122. *Id.*

123. McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 494 (1931) (holding that committee or floor statements by Congress members are "individual expressions . . . 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.").

124. *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).

125. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

126. *Id.* at 161–84.

127. *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).

> *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.*[128]

This definition is based on language from *The Daniel Ball*, which had provided the first real definition of "navigable waters."[129] However, there are notable 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.[130] Second, the Senator said that navigable waters would have a "substantial economic effect on interstate commerce."[131] While this phrase could imply that he was interested in regulating waters that affected interstate commerce,[132] 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."[133] 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."[134]

So, even if Senator Muskie's oft-cited remarks are the definitive definition of the scope of "navigable waters"[135] (which they are not since this is merely one congressperson's opinion), "navigable waters" was expanded but still limited to waters used in commercial navigation. And this is consistent with Footnote 3 in

128. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178 (emphasis added).

129. The Daniel Ball, 77 U.S. 557, 563 (1870).

130. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178; *see also supra* notes 104–16 and accompanying text.

131. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

132. Rather than just channels of commerce.

133. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

134. *Id.*

135. *See supra* note 115.

SWANCC. Moreover, this expansion is limited to Congress's commerce power over channels of commerce, rather than over things affecting commerce, as the Court claimed in *Riverside Bayview*.[136]

Representative John Dingell, one of the cosponsors of the House bill,[137] also argued that the definition Congress created expanded the "limited view of navigability" in *The Daniel Ball*.[138] 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."[139] 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.[140]

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."[141] 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.[142] 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.

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136. *See* Albrecht & Nickelsburg *supra* note 7, at 11047, 11052.

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

138. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 250.

139. *Id.* (first quoting Utah v. United States, 403 U.S. 9, 11 (1971); then U.S. v. Underwood, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972)).

140. *See* 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).

141. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 589–92.

142. *Id.* at 1389.

iii. 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.[143] 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.[144] The EPA did differentiate "navigable waters" from "interstate waters" once,[145] but that does not mean it was interested in regulating non-navigable waters.[146] Also, the letters have very little probative value regarding Congress's intent, since they are not even written by members of Congress.[147] Still, the comparison of "navigable waters" with other bodies of water used in commercial navigation further supports 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.[148] "Tributary" and "tributaries" were used a total of thirteen times.[149] "Wetlands" appeared twice.[150] 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 nineteen times, but all but one of those references are clearly to man-made ponds, like fish ponds, holding ponds, and lagoons.[151] Adding the one non-man-made pond reference with tributaries and

143. *See id.* at 141.
144. *Id.*
145. *Id.* at 1192.
146. *See supra* Part III.A.1 (discussing the use of intrastate waters in navigation).
147. 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.").
148. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.
149. *Id.*
150. *Id.*
151. *Id.*

wetlands, that is sixteen times the legislative history refers to these small bodies of water.[152] This low number, compared to the 231 uses of "navigable waters," is strong evidence that Congress did not intend to regulate these small 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"[153]

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.[154] Among those uses of "lake/s" were seventy-six references to "Lake Erie," forty-eight references to "Lake Tahoe," seventeen references to "Lake Michigan," and 126 references to "Great Lakes."[155] 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.[156]

Congress spent extensive time discussing large, navigable bodies of water that were regularly used in commerce. Congress used "ocean/s" a total of 203 times.[157] "Sea/s" appeared 100 times.[158] "Waterway/s" was used 200 times.[159] All of these are large bodies of water that would refer to actually navigable waters.[160] In contrast, Congress mentioned three different types of water—"tributaries," "wetlands," and "ponds"—that are upstream of

152. *Id.*

153. 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.

154. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

155. *Id.*

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

157. *See* CONG. RSCH. SERV. LIBR. *supra* note 12.

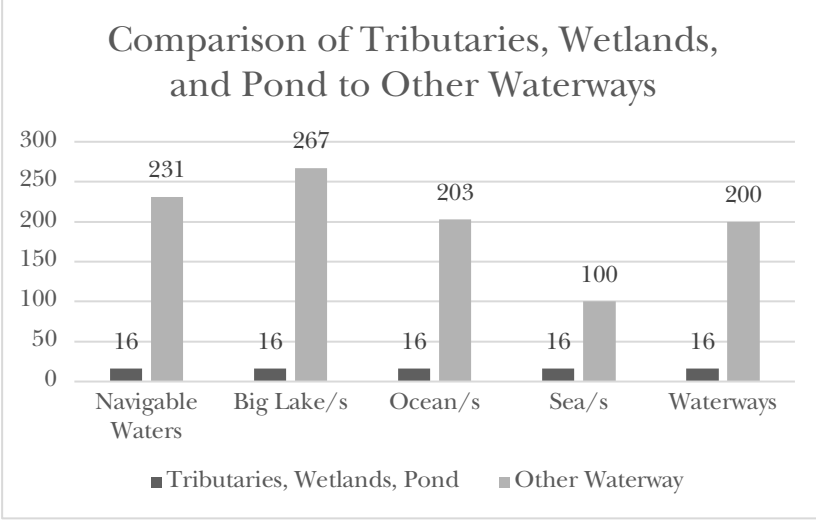
158. *See id.*

159. *See id.*

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

actually navigable water only sixteen times.[161] The drastic difference between the number of times actually navigable waters used in navigation was 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 Fifteen Uses of "Tributaries" and "Wetlands"

The fifteen occurrences of "tributaries" and "wetlands" are not conclusive evidence that Congress intended the phrase "navigable waters" to extend to these bodies of water. First, only one of these references is to a citable committee report,[162] and it merely discusses the pollution in the Passaic River Basin and its tributaries.[163] Eleven of the uses of "tributaries" and "wetlands" are from speeches by members of Congress, none of which are by bill

161. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

162. There are two references, but 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* Part III.D.

163. H.R. REP. NO. 92-911 (1972), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 803.

sponsors, so their interpretive weight is de minimis.[164] Two instances are from letters, which, again, offer almost no value in determining the intentions of Congress.[165] 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.[166] This report was written on October 28, 1971, in support of Senate Bill 2770 (1971).[167] However, that bill was not passed in the House of Representatives, and the definition of "navigable waters," which included tributaries, was changed.[168] 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.[169] Representative Ichrod mentioned that a Nixon executive order[170] expanded a prior statutory definition[171] of "navigable waters" "to include tributaries of navigable streams."[172] 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.[173] This executive order was not something Congress substantially considered while debating the CWA.[174]

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164. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12; *see also supra* notes 123–24 and accompanying text.

165. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12; *see also* 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.").

166. S. REP. NO. 92-414 (1971), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 1419.

167. *Id.*

168. *Compare* S. 2770, § 502(7) (1971) *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 1698, *with* 92-500 § 502(7)(1972), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., supra note 12, at 73; *see also* Sapp et al., *supra* note 6, at 10201–02.

169. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 250; *see also supra* Part III.A.ii.

170. Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (Dec. 23, 1970).

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

172. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 427.

173. *See id.* at 427–28.

174. 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. *See id.*

All of the other references to "tributaries" or "wetlands" do not implicate the extent of "navigable waters." A number of these references appear in the context of concerns about pollution in waters and tributaries, but neither members of Congress (other than Representative Dingell) nor letters nor the committee report claim Congress was regulating these small, non-navigable bodies of water.[175] Rather, these references to tributaries focus more broadly on the extent of pollution occurring in these waters.[176] While an argument could be made that members of Congress 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."[177] This limited number, combined with the limited interpretive value of such floor statements,[178] 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

175. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

176. *See id.*

177. *Id.*

178. 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).

large, commercial bodies of water like "oceans," "seas," and "lakes" appear in the legislative history compared to the sixteen times "tributaries," "wetlands," and "ponds" appear is still further supporting evidence. Finally, the individual uses of "tributaries" and "wetlands" do not indicate Congress intended to regulate these small bodies of water.

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 must address it—the *Sackett II* 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 congressional intent and clarify that the CWA only applies to actually navigable waters used in commercial navigation.