A Compendium of Case Law:

Federal Jurisdiction over "Navigable Waters"/"Waters of the United States"

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PREFACE

This document is intended to provide an overview of the body of case law related to the federal government's jurisdiction under the Clean Water Act. Specifically, this document traces the origins in case law of the scope of jurisdiction over "navigable waters"/"waters of the United States." This document includes some very early cases related to the federal government's regulation of waterways as highways of interstate commerce. These cases do not relate to environmental regulation; they are provided simply to provide some historical perspective.

This document is by no means exhaustive. While it does include select unpublished decisions, there may be other cases related to this topic that are not included. Furthermore, this document should not be used as a substitute for legal research. Any parties interested in analyzing the case law related to this topic should read the relevant cases, check each case for any subsequent history, and consult legal counsel.

Included as Appendix A is a matrix of the cases; Appendix B is the *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* 68 Fed. Reg. 1991 (Jan. 15, 2003), which contains clarifying guidance on Clean Water Act jurisdiction (*See Appendix A* of the *Advance Notice* at page 1995); Appendix C is a memorandum issued jointly by the Environmental Protection Agency and the Army Corps of Engineers, entitled *EPA and Army Corps Issue Wetlands Decision*, which announced that a rule would not be proposed on federal regulatory jurisdiction under the CWA; Appendix D is a breakdown of the thirteen federal judicial circuits; and Appendix E is an Alphabetical Index of Cases.

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EXECUTIVE SUMMARY

This compendium provides brief summaries of the cases, presented in chronological order, involving the federal government's jurisdiction over "navigable waters" or "waters of the United States." The executive summary divides the cases categorically, as well as chronologically, and is designed to provide a more complete picture and understanding of the legal interpretations of the definition of "navigable waters" or "waters of the United States."

Rivers and Harbors and Flood Control Cases

The early case law concerning federal jurisdiction over navigable waters focused on the federal government's control over waterways as highways of interstate commerce. *Gibbons v. Ogden*[1], the 1824 landmark decision in which the Supreme Court held that federal authority under the Commerce Clause extends beyond mere buying and selling of goods, was the first case to discuss the federal government's power over navigation and over navigable waters. In terms of navigable waters, the Court discussed how the federal government's regulation of activities on navigable waters is limited to the same extent as its power to regulate activities on land. In 1837, in *New York v. Miln*, the Supreme Court found that the power to regulate navigation extends to all navigable waters of the United States. Subsequent Supreme Court decisions extended the federal government's authority beyond waterways that are navigable-in-fact to waterways that are susceptible to being used as highways for commerce, or capable of being used as such highways by changes or improvement of conditions, or by artificial construction. *See The Daniel Ball*; *Economy Light & Power Co. v. United States*; and *United States v. Appalachian Electric Power Co*. In *Oklahoma ex. rel. Phillips v. Atkinson Company*, decided in 1941, the Supreme Court ruled that the federal government has jurisdiction over tributaries of navigable streams for flood control purposes. Then, in *United States v. Rand*, decided in 1960, the Supreme Court held that the federal government's power to regulate navigation, commonly referred to as the navigational servitude, extends to a waterway's high water mark, but not beyond it. There exists additional, subsequent case law concerning the federal government's power over navigation and flood control, but the above cases are the primary decisions leading up to, and cited in, those cases involving federal water pollution control.

Tributary Cases

In cases involving a surface water link between a land feature or waterway and navigable waters, courts have consistently found the waterway to be a tributary and have routinely upheld jurisdiction over the waterway.

The case of *United States v. Stoeco Homes, Inc*., decided in 1974, appears to be the first case involving federal jurisdiction exercised pursuant to water pollution control, which in this case involved the regulation of dredge and fill operations on property adjacent to harbor areas. In this case, the Third Circuit determined that the government could regulate estuarine areas that are subject to the ebb and flow of the tide as well as lagoons that are tributaries to navigable waters, but refused to allow the government to extend jurisdiction beyond the harbor lines to

[1] Except for quotations, citations are intentionally omitted from the Executive Summary. Readers may refer to the Table of Contents, the actual case summaries, or the Alphabetical Index of Cases at Appendix E for cites.

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land that was once a tidal marsh. Later that same year, in the case of *United States v. Ashland Oil and Transportation,* the Sixth Circuit determined that the Federal Water Pollution Control Act (FWPCA) applies to tributaries of navigable streams. According to the Sixth Circuit, if the power of flood control extends to tributaries, then so does the power of pollution control. *Stoeco* and *Ashland Oil* are the first of a long line of cases where federal courts have broadly upheld jurisdiction over tributaries of navigable waters.

In the 1975 case *United States v. Phelps Dodge Corporation*, the District of Arizona asserted that "navigable waters" includes any waterway, even a normally dry arroyo that eventually makes its way to public waters. In 1979, the Tenth Circuit upheld jurisdiction over an oil spill into Boggie Creek, which is a distant tributary of the Arkansas River. *Ward v. Coleman*. Shortly after *Ward v. Coleman*, the Tenth Circuit found jurisdiction over a nonnavigable tributary of the Red River in Oklahoma, even though the tributary flows intermittently. *United States v. Texas Pipeline Company*. In the *Texas Pipeline* case, the Tenth Circuit was unpersuaded by the fact that the tributary was dry at times and emphasized the importance of the fact that the tributary would flow to the Red River during times of significant rainfall. Five years later, in June 1984, the Eastern District of Louisiana decided the case of *United States v. Saint Bernard Parish*, which concerned the discharge of pollutants into a large, nonnavigable canal. Water from the canal is pumped by the Levee District into a wetland that is adjacent to navigable waters. The court determined that the Clean Water Act (CWA) extends to any waterway where the water flow could end up in a water body over which there is some public interest. Consequently, the court found the canal to be a tributary of adjacent wetlands and therefore a "water of the United States." The court also found the canal to be a waterway with the potential to affect interstate commerce. Then, in a case decided on June 10, 1985, the Tenth Circuit followed the *Texas Pipeline* decision in finding jurisdiction over an arroyo and creek with a surface connection to navigable waters that exists only during times of intense rainfall. *Quivira Mining Co. v. EPA*.

The expansion of federal jurisdiction over tributaries continued in *State of Georgia v. City of East Ridge, Tennessee*. In this case, decided in 1996, the Northern District of Georgia found jurisdiction over a storm drain that flows into an unnamed tributary, which flows and intersects with a creek, which then flows across state lines into Tennessee. Similarly, in the 1997 case *United States v. Eidson*, the Eleventh Circuit extended jurisdiction to a storm sewer that drains into a drainage ditch, which flows into a drainage canal, which flows into Tampa Bay. The *Eidson* court relied upon the following statement from the legislative history: "[w]ater 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." *Eidson*, 108 F.3d at 1341 (quoting S.Rep. No. 92-414, at 77 (1972), reprinted in, 1972 U.S.C.C.A.N.N. 3668, 3742-43). In a similar vein, in 1999, the Second Circuit found that tributaries of navigable waters qualify as "waters of the United States" in *United States v. TGR Corporation*. That same year, the Eleventh Circuit relied upon its previous holding in *Eidson* in finding jurisdiction over a stream that flows intermittently and connects to navigable waters through a chain of ponds and tributaries. *Driscoll v. Adams*.

On January 9, 2001, the Supreme Court decided the landmark case *Solid Waste Agency of Northern Cook County v. United States* (*SWANCC*) and held that the Clean Water Act (CWA) was not intended to regulate nonnavigable, isolated, intrastate waters. While the case would appear to have a narrowing affect on CWA jurisdiction, the *SWANCC* decision did

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little to affect jurisdictional determinations concerning tributaries. On March 12, 2001, the Ninth Circuit decided *Headwaters, Inc. v. Talent Irrigation District* and found jurisdiction over irrigation canals that exchange water with natural streams, because in the court's mind, the irrigation canals are tributaries to the natural streams. In *Aiello v. Town of Brookhaven*, the Eastern District of New York found that a pond and a stream that connect to a navigable lake are tributaries of navigable waters, and therefore, are navigable waters themselves. In *United States v. Buday*, also decided in 2001, the District of Montana upheld jurisdiction over a seasonal creek, stating that "[t]here is no limitation on federal jurisdiction over open waters that flow into interstate waters or waters that are navigable-in-fact." 138 F.Supp.2d at 1295.

On March 21, 2002, the Eastern District of California decided *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, and determined that a creek that flows into an underground pipe that connects to a navigable water is a tributary to navigable waters and is thus a navigable water itself. On September 9, 2002, in the same circuit, the District of Oregon followed suit and found a ditch to be a tributary and thus part of the "waters of the United States." In the Oregon case, *United States v. New Portland Meadows*, the defendant utilized a system of ditches and pipes to move wastewater to the drainage district pumping station. The wastewater from defendant's operations was being discharged into a drainage ditch. The water in the drainage ditch intersects with another drainage ditch and then flows through a series of open channels and pipes to a pond at the pumping station. When the water in the pond reaches a certain level, the water in the pond is pumped into the Lower Columbia Slough, a navigable water. The court found the fact that the water is pumped into navigable waters irrelevant. In finding the drainage ditch is a tributary, the court focused on the fact that the wastewater eventually ended up in a navigable water. The Ninth Circuit continued in this direction in *Community Association for Restoration v. Bosma Dairy*. In this case, decided on September 16, 2002, the Ninth Circuit upheld jurisdiction over a drain that connects to an irrigation canal, which flows into the Yakima River. The Ninth Circuit relied upon its previous holding in *Headwater*, which held that irrigation canals are "waters of the United States" because they are tributaries to other "waters of the United States." Likewise, the Middle District of Georgia looked to the ultimate destination of the pollutants. *United States v. Jones*. The facts of *Jones* show that the defendant had discharged oil into a storm drain on the street, which flowed into a storm drain system, which flowed into a ditch, which emptied into a wetland, which was adjacent to and emptied into a navigable water, the Ocmulgee River. The court relied upon the Eleventh Circuit's decision in *Eidson* and found that the flow of pollution into the storm drainage system was a discharge into navigable waters.

The above group of tributary cases demonstrates a generally expansive view of CWA jurisdiction. Perhaps the only federal jurisdiction to diverge from this broad line of thinking and view CWA jurisdiction narrowly is the Fifth Circuit. In *Rice v. Harken Exploration Company*, decided April 25, 2001, the Fifth Circuit refused to uphold jurisdiction over discharges of oil onto dry land that eventually could reach surface waters through a groundwater connection. The Fifth Circuit asserted that "a body of water is protected under the Act only if it is actually navigable or is adjacent to a navigable water." This language appears to expressly limit the scope of the term "navigable waters" in the Fifth Circuit. 250 F.3d at 270. *Rice v. Harken* concerned property that contained intermittent streams. With regard to these intermittent streams, the court asserted, "there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently connected to an open body of navigable

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water as to qualify for protection under the [Oil Pollution Act (OPA)]."[2] *Id.* at 271. Subsequently, on December 16, 2003, the Fifth Circuit upheld jurisdiction over a spill into a drainage ditch. *United States v. Needham*. However, the *Needham* court refused to read *SWANCC* narrowly. Instead, the court found jurisdiction over the drainage ditch because the drainage ditch is adjacent to an open body of navigable water. In the court's words, the "CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither navigable nor truly adjacent to navigable waters." 354 F.3d at 345-46.

Wetlands

There is a significant overlap between cases involving wetlands and cases involving tributaries. This is because jurisdiction is often asserted over wetlands because of an adjacent tributary's connection to navigable waters. Similar to the line of tributary cases discussed above, federal courts routinely uphold CWA jurisdiction over wetlands that have a surface connection to navigable waters.

One of the earliest cases involving wetlands, *United States v. Byrd*, addressed the filling of wetlands and the resulting potential effect on interstate commerce. Decided on October 15, 1979, *Byrd* involved wetlands adjacent to a lake used by interstate travelers. In this case, according to the Seventh Circuit, the filling of the wetlands may be local, but could have a substantial effect on interstate commerce. The court stated that the filling of the wetlands could degrade water quality and discourage interstate travelers from frequenting the lake. Based on this commerce clause analysis, the court found that the wetlands were subject to Corps regulation. In *Avoyelles Sportsmen's League, Inc. v. Marsh*, decided September 26, 1983, the Fifth Circuit faced the question of whether areas that are subject to substantial flooding throughout the year fit the definition of wetlands. The Fifth Circuit determined that such areas should be recognized as wetlands and that the Corps and EPA could regulate such areas under the CWA.

On December 4, 1985, the Supreme Court decided the landmark case of *United States v. Riverside Bayview Homes*. In stating that the term "navigable" is of "limited import," the Court upheld Corps regulation of adjacent wetlands. The Court felt that the Corps permissibly included adjacent wetlands in its definition of "waters of the United States," and found the Corps' determination that adjacent wetlands are "inseparably bound" with the "waters of the United States" to be reasonable. The Court also discussed the importance of regulating the aquatic system as a whole, without regard to "artificial" lines of separation.

On June 25, 1993, the Third Circuit rejected the novel argument that wetlands are not water and therefore should not be subject to regulation under the CWA. *United States v. Pozgai*. The defendant in *Pozgai* stated that the definition of pollutant requires discharges "*into water*," which is different from the definition of "discharge of pollutants" which requires the addition of any pollutant "to *navigable waters*." The Third Circuit was unpersuaded and found that Congress intended the term "navigable" to be controlling. Thus, the Third Circuit

[2] The Fifth Circuit also found that the term "navigable waters" also governs the scope of the OPA and that the term has the same meaning under both the CWA and the OPA. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001).

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ruled that the CWA allowed the Corps to include wetlands in the definition of "waters of the United States."

In an unpublished opinion dated July 2, 2002, the Fourth Circuit determined that *SWANCC* did not affect jurisdiction over wetlands that eventually flow into traditional navigable waters. *United States v. Interstate General Company*. The court in this case upheld the assertion of jurisdiction over discharges into wetlands adjacent to small streams that flow through creeks into the Potomac River. Then, on January 15, 2003, without ruling on the specific facts of the case, the District of New Jersey stated that jurisdiction applies to wetlands adjacent to nonnavigable tributaries if the evidence shows a substantial nexus between the wetlands and navigable waters. *FD & P Enterprises, Inc. v. United States Army Corps of Engineers*. In *Carabell v. United States Army Corps of Engineers*, the Eastern District of Michigan upheld jurisdiction over wetlands connected to navigable waters through a ditch and drain. In *Carabell*, decided March 27, 2002, the court found the ditch and drain to be tributaries to navigable waters. The court found that jurisdiction applies to wetlands that are adjacent to such tributaries and that a significant nexus existed in the case. In *United States v. Hummel*, the Northern District of Illinois upheld jurisdiction over a wetland that is "two steps" – connected by a nonnavigable creek -- from navigable water. In this April 2003 case, the court determined that "two steps" from navigable waters provides a significant nexus.

In *United States v. Deaton*, decided June 12, 2003, the Fourth Circuit upheld jurisdiction over a wetland and a roadside ditch adjacent to the wetland, where the roadside ditch connects to navigable waters through an 8-mile chain, connected by a culvert, another ditch, a creek, a second creek, and then the navigable Wicomico River. In *United States v. Rueth Development*, decided July 1, 2003, the Seventh Circuit upheld a consent decree involving discharges into wetlands that are adjacent to Dyer Ditch, which flows to Hart ditch, which flows to the navigable Little Calumet River. In *United States v. Rapanos*, decided August 5, 2003, the Sixth Circuit found jurisdiction and reinstated the conviction of Rapanos for discharges into wetlands that are connected to a drain, which flows into Hoppler Creek, which then flows into the navigable Kawkawlin River. In *Treacy v. Newdunn Associates*, decided September 10, 2003, the Fourth Circuit followed its previous holding in *Deaton* and found jurisdiction over wetlands connected to navigable waters through the intermittent flow of surface water through 2.4 miles of natural streams and manmade ditches. The Supreme Court denied the petitions for writ of certiorari in each of the above four cases, leaving those holdings intact.

In *North Carolina Shellfish v. Holly Ridge*, the defendants engaged in ditching and excavation work on Morris Landing Tract without applying for any permits. The tract contains wetlands and an impoundment lake and the tract borders the navigable Stump Sound and Atlantic Intercoastal Waterway. In addition, the tract borders a perennial stream that indirectly flows to navigable water. In this case, decided by the Eastern District of North Carolina on July 25, 2003, the court determined that the impoundment lake is a navigable water because it drains into Stump Sound. The court also found that jurisdiction applied to all of the ditches on the tract because they flow to and are tributaries to the impoundment lake. The court found that the wetlands are adjacent to navigable waters, and therefore subject to jurisdiction, because the wetlands exchange waters with the tidal marsh. Then, in a case decided on January 23, 2002, the Northern District of California determined that a pond formed from and an old mining pit and wetlands surrounding the pond are subject to CWA

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jurisdiction. *Northern California River Watch v. Healdsburg*. The court in this case found jurisdiction because: (1) the pond and wetlands are adjacent to the navigable Russian River; (2) there is a hydrological connection between the pond, wetlands and the Russian River; and (3) the pond, wetlands and river share the same ecosystem.

In a rare departure from the broad view of jurisdiction outlined in the above wetland cases, the Eastern District of Virginia refused to uphold the Corps' assertion of jurisdiction over wetlands, even though there may be a hydrological connection, in the case *United States v. RGM Corp*. In this case, decided on July 26, 2002, the Corps asserted jurisdiction on the basis of a hydrological connection between the wetlands and navigable waters. However, the court found that the wetlands are not adjacent to navigable waters and do not have a continuous surface connection to navigable waters, and that the Corps failed to establish jurisdiction. The court also ruled that the Corps acted impermissibly when it promulgated regulations that eliminated jurisdiction based on the upstream ordinary high water mark.

Groundwater

The courts have been split as to whether groundwater is subject to regulation under the CWA. Some courts have clearly ruled that groundwater is not subject to regulation. In *Exxon v. Train*, a 1975 case decided by the Fifth Circuit, and in *United States v. GAF Corporation*, a 1977 case decided by the Eastern District of Texas, the court found that the legislative history conclusively shows that the FWPCA does not apply to subsurface wells. On September 20, 1985, the Western District of Michigan, also, found that Congress rejected federal jurisdiction over groundwater, even though the facts of the case involved groundwater contamination that could reach navigable waters. *Kelley v. United States*. On May 18, 1994, the Seventh Circuit found that while the possibility of a hydrological connection could very well exist, the CWA precludes regulation of groundwater. *Village of Oconomowoc Lake v. Dayton Hudson Corp*. The District of Oregon likewise held that jurisdiction does not extend to discharges to groundwater, even if there is a hydrological connection to surface water in *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods*, decided in 1997. In *Wademan v. Concra*, a 1998 case involving exposure to benzene that resulted from groundwater contamination, the Northern District of New York relied upon *Village of Oconomowoc Lake* in finding that groundwater is excluded from the CWA. In addition, as discussed above, the *Rice v. Harken* court rejected arguments for jurisdiction based on a connection to groundwater.

In contrast to the above cases, some courts have interpreted the CWA to include groundwater. In *McClelland Ecological Seepage Situation v. Weinberger*, decided in 1988, the Eastern District of California found that groundwater is covered by the CWA if a hydrological connection can be established. In 1993, the District of Colorado found that while isolated/nontributary groundwater has been unequivocally excluded by some courts, the Tenth Circuit has broadly interpreted the scope of the CWA. The court then ruled that the goals and policies of the CWA dictate that jurisdiction applies to discharges that reach navigable waters through groundwater. *Sierra Club v. Colorado Refining Company*. Similarly, in a 1994 case, the Eastern District of Washington upheld jurisdiction over discharges that migrate through groundwater into navigable waters because the goal of the CWA is to protect the quality of surface waters. *Washington Wilderness Coalition v. Hecla Mining Company*. However, the *Washington Wilderness* court did state that the pollutants must be traced from their source to surface waters in order to fall under the jurisdiction of the

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CWA. In other words, according to the Washington Wilderness, jurisdiction under the CWA cannot be established over groundwater by merely stating that all waters are hydrologically connected. In *Friends of Sante Fe County v. LAC Minerals, Inc.*, decided on July 12, 1995, the District of New Mexico found that groundwater is subject to regulation if the pollutants can find their way from groundwater to surface water, no matter how sporadically. Subsequent cases that follow this line of decisions include *Williams Pipe Line v. Bayer Corporation* (Southern District of Iowa, decided April 14, 1997), *Mutual Life Insurance Company of New York v. Mobil Corporation* (Northern District of New York, decided March 31, 1998), and *Idaho Rural Council v. Bosma* (District of Idaho, decided June 4, 2001). All three cases relied upon the *Washington Wilderness* decision. The *Idaho Rural Council* case also involved jurisdictional determinations over seasonal and tributary waters. The court found these waters to be sufficiently connected to navigable waters to warrant regulation.

Finally, in a case decided by the First Circuit, the court decided not to rule on the groundwater issue, and instead granted deference to a Corps decision to issue a section 404 permit. *Town of Norfolk v. United States Army Corps of Engineers*. In this 1992 case, the Corps did not consider the adverse impacts on groundwater in conducting the practical alternatives test and the plaintiffs brought suit claiming that this omission was unreasonable and argued that the permit should not have been granted. The court found that a determination as to whether groundwater should be considered to fall under the "waters of the United States" involves an ecological judgment which is best left to the EPA and the Corps.

Other Cases and Issues

In the 1975 case *National Resources Defense Council v. Callaway*, the District Court of the District of Columbia struck down the Corps' definition of navigable waters as unduly narrow. In a one-page opinion, the court held that the Secretary of the Army and the Chief of the Corps of Engineers acted in derogation of their duties by adopting such a narrow definition of navigable waters in the regulations at 33 C.F.R. section 209.210(d)(1). In *United States v. Phelps Dodge Corporation*, in addition to finding jurisdiction over a normally dry arroyo, the court rejected the defendant's argument that the CWA and the term "waters of the United States" violate due process because the term is too vague. *In United States v. Earth Sciences, Inc.*, the Tenth Circuit found that jurisdiction extends to any waters that may in any way affect interstate commerce, even absent a link to navigable waters. This 1979 case involved a stream located entirely in Colorado and flows into two reservoirs. The court found jurisdiction under the Commerce Clause because: the stream supports trout and beaver; the reservoirs are used for agricultural purposes; and the end products are sold in interstate commerce. The court rejected the defendant's argument that the stream does not have a significant link to interstate commerce and stated that all that is necessary is some interstate impact. On the other hand, the Fourth Circuit struck down the Corps' regulation at 33 C.F.R. section 328.3(a)(3) because the Corps exceeded its authority in promulgating a definition of "waters of the United States" that includes waters that "could" affect interstate commerce. *United States v. Wilson.* The *Wilson* court held that the Corps expanded the statutory phrase "waters of the United States" beyond its definitional limit by including "intrastate waters that need have nothing to do with navigable or interstate waters." 133 F.3d at 257 (decided 1997). In *Colvin v. United States*, decided December 28, 2001, the Central District of California upheld jurisdiction over an intrastate lake because the lake is used by interstate or foreign travelers for recreation. In *United States v. Krilich*, a 2002 case, the Seventh Circuit

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refused to vacate a consent decree entered into to resolve a suit brought for violations of the CWA. According to the Seventh Circuit, the Court in *SWANCC* simply held that the Corps exceeded its authority in promulgating the Migratory Bird Rule and that *SWANCC* should not be read so broadly as to eliminate jurisdiction over waters that are not adjacent to open bodies of water.

Conclusion

This executive summary gives a brief glimpse at the evolution of "navigable waters" case law. The individual case summaries that follow briefly highlight the holdings as they relate to the "navigable waters" definitional issue. It is important to keep in mind the fact that such jurisdictional determinations must be made on a case-by-case basis, giving careful consideration to the specific facts and applicable case law. Furthermore, in a joint memorandum filed on January 14, 2003, the Corps and EPA issued clarifying guidance on the legal issues surrounding CWA jurisdiction. *Appendix A, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* 68 Fed. Reg. 1991, at 1995 (Jan. 15, 2003). This document is an important resource as it traces the case law, outlines factors in determining jurisdiction, and provides instruction to Corps and EPA field staff (and is located for your reference at Appendix B of this compendium).

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1. Gibbons v. Ogden, 9 Wheat. 1, 22 U.S. 1, 6 L.Ed. 23 (1824)

Supreme Court, decided March 12, 1824

Extended jurisdiction under the Commerce Clause to beyond mere buying and selling

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This is the first Supreme Court case interpreting the Commerce Clause, as well as the first case that mentioned the term "navigable waters." In this case, the state of New York granted to Odgen a monopoly to operate steamboats between New York and New Jersey. At the same time, Gibbons was operating steamboats between New York and New Jersey under a federal license. Ogden received an injunction in New York court ordering Gibbons to stop his steamboat operations. The Supreme Court, in an opinion by Justice Marshall, found the injunction to be invalid because it was based on a monopoly that conflicted with a federal statute, amounting to a violation of the Supremacy Clause. Justice Marshall took a broad view of the Commerce Clause and stated that commerce extends beyond mere buying and selling, and applies to all commercial intercourse.

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2. *New York v. Miln*, 36 U.S. 102, 9 L.Ed. 648 (1837)

Supreme Court, decided January 1837

Extended power to regulate navigation to all navigable waters of the United States

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In this case, the Supreme Court stated that the power to regulate commerce encompasses the power to regulate navigation, and that the power to regulate navigation extends to all navigable waters of the United States.

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3. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 18 L.Ed. 96 (1865)

Supreme Court, decided December 1865

Extended jurisdiction to all navigable waters that are accessible from another state

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This case concerned the authority of a state to diminish the navigability of a river that is located wholly within the limits of the state. This case specifically concerned the building of a bridge over the Schuylkill River. The owner of valuable coal wharves brought this suit to prevent erection of the bridge based on the argument that erection of the bridge would be an unlawful obstruction to the navigation on the river. The Court discussed federal authority over navigation:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, the occurrence of the evil and for the punishment of offender….
>
> 'Commerce among the States' does not stop at a State line. Coming from abroad it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever 'commerce among the States' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights.

70 U.S. (3 Wall.) at 724-25.

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4. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870)

Supreme Court, decided December 1870

Defined navigable waters as those that are navigable-in-fact. Defines navigable-in-fact waters as those that are used or susceptible of being used as highways for commerce

In what may be the earliest case devoted to the term "navigable waters," the Supreme Court faced the issue of what is meant by the term "navigable waters of the United States." According to the Court:

> 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 conditions 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.

77 U.S. (10 Wall.) at 563.

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

Supreme Court, decided April 11, 1921

Extended jurisdiction to waters that are capable of being used in future navigation by reason of changed conditions or artificial constructions

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Facts: United States brought suit to stop appellant from constructing a dam in the Desplaines River without the consent of Congress or authority of the legislature of the state and without approval of the location and plans by the Chief of Engineers and the Secretary of War. United States alleged that the Deplaines River is a navigable waterway of the United States and that the construction thereon was in violation of federal law prohibiting construction of dams without consent.

Issue: Appellant argued that the Desplaines River is not navigable-in-fact and not within the description of "navigable river, or other navigable water of the United States" as provided in the federal statute.

Ruling: "[A] river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial constructions." 256 U.S. at 123.

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6. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940)

Supreme Court, decided December 16, 1940

Extended jurisdiction to waters that can be made navigable through improvements

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Facts: Sections 9 and 10 of the Rivers and Harbors Act of 1899 make it unlawful to construct a dam in any navigable water of the United States without first obtaining consent from Congress. In this case, the United States filed suit to enjoin the construction or maintenance of a proposed dam because the river at issue, the New River, was navigable.

Issue: Should a stretch of river be considered "navigable" if it can be made navigable by improvements, which have not in fact been made.

Ruling: "In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made." 311 U.S. at 409. The Court found that a waterway's availability for navigation must be considered and found that the New River is a navigable water, because the type of boats used on less obstructed portions of the river could navigate through the section at dispute by reasonable improvement.

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7. Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941)

Supreme Court, decided June 2, 1941

Extended jurisdiction for flood control purposes to tributaries of navigable streams

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Facts: This case concerned the building of a reservoir on the Red River in Oklahoma. The Red River was not and had never been navigable. The state wanted to stop the development of the reservoir, which was authorized by Congress "to control the watershed of one of the principal tributaries of the Mississippi in alleviation of floods in the lower Red River and Mississippi Valleys." 313 U.S. at 520.

Issue: Constitutionality of Congressional authorization of the reservoir project.

Ruling: "We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself. We have recently recognized that 'Flood protection, watershed development, recovery of the cost of improvements through utilization of power are…parts of commerce control.' *United States v. Appalachian Power Co., supra* page 426. And we now add that the power of flood control extends to the tributaries of navigable streams." *Id.* at 525-26.

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8. United States v. Grand River Dam Authority, 363 U.S. 229 (1960)

Supreme Court, decided June 13, 1960

Upheld federal government's navigational servitude/preemption of state property rights over navigable waters

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Facts: The State of Oklahoma wanted to develop power projects along the Arkansas River. Oklahoma had franchised a site for a power project to a state agency, but Congress preemptively adopted the site for flood control. The state agency sued for compensation.

Issue: Are state property rights preempted by the control of navigable waterways, including nonnavigable waters, by the federal government?

Ruling: This case essentially upholds the decision in, and relies upon the language laid out by *Oklahoma ex rel. Phillips v. Atkinson Co.*: "When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising prerogatives and it is beholden to no one." 363 U.S. at 233.

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9. United States v. Rands, 389 U.S. 121, 88 S.Ct. 265 (1967)

Supreme Court, decided November 13, 1967

Extended navigational servitude of the federal government to the ordinary high-water mark

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This case concerned the duty of the United States under the constitution to pay compensation when it condemns riparian land. The land at issue included a port site and, therefore, the case contemplated the navigational servitude of the United States. In finding that the navigation servitude extends to the ordinary high-water mark, the court stated:

> The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary of all the navigable waters of the United States. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress.' *Gilman v. City of Philadelphia*, 3 Wall. 713, 724-25, 18 L.Ed. 96 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249, 74 S.Ct. 487, 493, 98 L.Ed. 686 (1954), where to the entire stream and the stream bed below ordinary high-water mark…. The navigational servitude of the United States does not extend beyond the high-water mark.

389 U.S. at 122-23.

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10. United States v. Holland, 373 F.Supp. 665 (M.D.Fla.1974)

Middle District of Florida (part of 11th Cir.), decided March 27, 1974

Extended FWPCA jurisdiction to manmade canals and adjacent wetlands that discharged pollutants into navigable waters

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Facts: United States brought action to stop unlawful landfilling operations in Harbor Isle, St. Petersburg, Florida. The government alleged that the defendants were filling the waters of Papy's Bayou with sand, dirt, dredged soil and biological materials without permits as required by section 404 of the FWPCA. The defendants were developing a 281 acre tract of land that included artificial mosquito canals containing water, and the water in the mosquito canals was connected to Papy's Bayou.

Issue: Did Congress intend the FWPCA to reach activities such as the pollution of non-navigable mosquito canals and mangrove wetland areas?

Ruling: The court engaged in a lengthy discussion of the history of federal water regulation, including the Congressional intent behind the FWPCA. The court focused on the continued expansion of the definition of navigable waters and the concept of the mean high water line. In reference to the FWPCA, the court stated "Even though it seems certain that Congress sought to broaden federal jurisdiction under the Act, it did so in a manner that appears calculated to force courts to engage in verbal acrobatics." 373 F.Supp. at 671. The court determined that Congress intended to define away the old "navigability" restriction associated with the Rivers and Harbors Act based on the Conference Report and the testimony of Representative Dingell.

The court then focused on the constitutionality of a broad reading of "navigable waters" under the Commerce Clause. According to the court, "a statute's validity is upheld by determining first if the general activity sought to be regulated is reasonably related to, or has an effect on, interstate commerce and, second, whether the specific activities in the case before the court are those intended to be reached by Congress through the statute." *Id.* at 673 (citing *Perez v. United States*, 402 U.S. 146 (1970)).

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The court concluded that "It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution." *Id.* The court then ruled, based on the legislative history, that Congress intended to reach sources of pollution such as the canals that emptied into the bayou arm of Tampa Bay and the mangrove wetlands above the high water line in this case. The court found it irrelevant that the canals were manmade and stated that it did not matter that some discharge of pollutant was onto land above the mean high water line. The court focused on the fact that the pollutant was introduced into the waters of the United States without a permit and quoted the legislative history in that Congress found it "essential that the discharge of pollutants be controlled at the source." *Id.* at 675 (quoting Legislative History Vol. 2, p. 1495). The court ruled that the mean high water mark is no limit to federal authority under the FWCPA.

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11. United States v. Stoeco Homes, Inc., 498 F.2d 597 (3rd Cir. 1974), *cert. denied*, 420 U.S. 927 (1975)

Third Circuit, decided May 23, 1974

Extended jurisdiction to areas that are subject to the ebb and flow of the tide/also extended jurisdiction to tributary lagoons of navigable harbor

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Facts: Stoeco Homes was developing waterfront homesites in Ocean City, New Jersey by dredging and bulkheading lagoons and pumping the dredged materials into adjoining uplands. Stoeco acquired the property in 1951, at which time the land was substantially above the mean high tide. The government brought suit alleging violations of the Rivers and Harbors Act of 1899. The government claimed that Stoeco violated the Act by discharging silt into South Harbor, because the Act prohibits discharges of refuse material into any navigable water of the United States. The government also claimed that the excavation of the lagoons violated the Act, because the entire premises is within the navigable waters of the United States.

Issue: Are the entire premises within the navigable waters even though the land is above the mean high tide mark, and did the discharges to South Harbor require a permit?

Ruling: The court first confronted the issue concerning the jurisdiction over the entire premises. According the Corps' regulation in effect at the time, the harbor lines would define navigation interests and only work done shoreward of the harbor lines would require a permit. However, the lower court did not consider this regulation and the court here went forward assuming this regulation did not apply. The government argued that the entire premises is subject to the permitting requirements because prior to 1927 the entire premises was an estuarine tidal marsh. The Corps' definition of navigable waters at the time of this case was consistent with "the government's position that estuarine tidal marshland which was at anytime subject to inundation by mean high tide is perpetually subject to the navigational servitude of the United States." 498 F.2d at 605. Stoeco challenged the constitutionality of such a navigational servitude.

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In the course of making its ruling, the court made an interesting statement on the Commerce Clause:

> We can put aside the question of whether under the Commerce Clause, Congress could extend the regulatory jurisdiction of the Army Corps of Engineers to excavations on solid uplands. In the statute on which the government relies Congress did not do so. It extended that jurisdiction only to the navigable waters of the United States. What those waters comprise has been the subject matter of an extensive jurisprudence, not all of it completely reconcilable.

Id. at 608. Stoeco relied upon the definition applied in The Daniel Ball, which establishes an actual or potential use for maritime commerce. The government argued the other extreme, that the occupants of the homes on the developed portion of the premises could only remain in occupation as long as the federal government chose not to assert it navigable servitude. The court ended up ruling for Stoeco on this issue, that any work on the land is not subject to the Corps' jurisdiction on the basis that the United States consented to encroachments beyond the harbor lines in 1927 and did not make any reservations with respect to that property. However, the court ruled that the Corps did have jurisdiction over estuarine areas that were subject to the ebb and flow of the tide, because the Corps published new regulations asserting the navigational servitude to its fullest extent.

In addition, the court held that South Harbor and its tributary lagoons are part of the navigable waters of the United States and the discharge of dredge material into those waters is prohibited without a permit.

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12. United States v. Ashland Oil and Transp., 504 F.2d 1317 (6th Cir. 1974)

Sixth Circuit, decided November 1, 1974

Extended jurisdiction under the FWPCA to tributaries of navigable streams

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Facts: Ashland Oil and Transportation discharged oil into a small tributary to Little Cypress Creek at a point 100 feet from where the tributary meets the creek. Little Cypress Creek is a tributary to Cypress Creek. Cypress Creek is a tributary to Pond River. Pond River is a tributary to Green River. Green River is navigable in fact at the point that Pond River empties into it.

Issue: Did Congress intend to control discharges of pollutants into nonnavigable tributaries that flow into navigable rivers and does Congress have constitutional authority to do so?

Ruling: This case included a significant discussion of the Congressional intent in enacting the FWPCA. In doing so, the court highlighted the broad sweep of the Act: "[W]e believe Congress knew exactly what it was doing and that it intended the Federal Water Pollution Control Act to apply, as Congressman Dingell put it, 'to all water bodies, including main streams and their tributaries.'" 504 F.2d at 1325. The court cited previous Supreme Court cases discussed in this compendium and stated: "If 'the power of flood control extends to the tributaries of navigable streams,' then we believe that the power of pollution control extends to the tributaries of navigable streams likewise." *Id.* at 1327.

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13. United States v. GAF Corporation, 389 F.Supp. 1379 (S.D.Tex. 1975)

Southern District of Texas (part of 5th Circuit), decided Feb. 5, 1975

Held that jurisdiction does not extend to subsurface wells

Facts: GAF Corporation was in the process of drilling two deep wells for the subsurface disposal of organic chemical wastes by injection without EPA approval. The United States brought action for permanent injunctive relief. GAF moved to have the action dismissed for lack of subject matter jurisdiction.

Issue: Whether the FWCPA applies to subsurface wells?

Ruling: The court here began by discussing the definition of "navigable waters," which are defined as "the waters of the United States, including the territorial seas." The court made the strong statement that "This definition effectively excludes from consideration any concept of navigability, in law or in fact." 389 F.Supp. at 1383. However, the court went on to say that the legislative history shows conclusively that the FWCPA does not apply to subsurface wells. The court relied upon Senate Report No. 92-414, the report for the bill which became the FWCPA:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

U.S.Code Cong. & Admin.News (1972) p. 3739. The court added that an amendment to fill this gap was rejected. 118 Cong.Rec. 10,669 (1972). The court ultimately held that permits are not required for "disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters." 389 F.Supp. at 1383.

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14. People of St. of Cal., Etc v. EPA, 511 F.2d 963 (9th Cir. 1975) [*cert. granted, judgment reversed and remanded* on grounds unrelated to jurisdiction over navigable waters, *see* 426 U.S. 200]

Ninth Circuit, decided February 13, 1975

Reiterated expansive interpretation of navigable waters as including all tributaries of rivers which substantially affect interstate commerce

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This case concerned the application of state water control procedures to federal agencies. In terms of the "navigable waters" issue, the court propounded an expansive interpretation of the term "navigable waters" in footnote 1:

> Congress has used the phrase "navigable waters of the United States" in several senses, ranging from the narrowest and most literal interpretation of that phrase ("navigable in fact") to the most expansive one permitted by the constitutional grant, U.S.Const. Art. I, sec. 8, cl. 3. *Compare, e.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed.2d 99 (1870) *with Kalur v. Resor*, 335 F.Supp. 1, 11 (D.C.D.C.1971). *Cf. also Gibbons v. Ogden*, 22 U.S. (9Wheat.) 1, 6 L.Ed. 34 (1984). Section 502(7) of the Act [33 U.S.C. § 1362(7)] speaks of the term "navigable waters" as encompassing "the waters of the United States, including the territorial seas." S.Conf.Rep.No.92-1236, 1972 U.S.Code Cong. & Admin.News, p. 3821. Thus Congress clearly meant to extend the Act's jurisdiction to the constitutional limit, to include all tributaries of rivers which, "when combined with other waters or systems of transportation, . . . the commerce on such waters would have a substantial effect on interstate commerce." Report on the Conference Committee on S. 2770, reported in A Legislative History of the Water Pollution Control Act Amendments of 1972, 166, 178 (Comm. on Publ. Works Print, 1973) [hereinafter cited as Legislative History].

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The Act thus contemplates regulation of any activity within the class of streams noted above or the class of pollution discharges into such streams, without regard to whether either the particular discharge or the individual receiving waters discernibly affect interstate commerce. *See United States v. Ashland Oil & Transportation Co*., 364 F.Supp. 349 (W.D.Ky.1973); *United States v. Holland*, 373 F.Supp. 665 (M.D.FLA.1974). The legislative history expressly discloses an intention to avoid the limitations on implementation of the 1965 Act which had been occasioned by a narrow interpretation of the phrase "navigable waters" as used in the Act. S.Rep.No. 92-414, 1972 U.S.Code Cong. & Admin.News, p. 3742.

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15. National Resources Defense Council v. Callaway, 392 F.Supp. 685 (D.D.C. 1975)

District Court of the District of Columbia (part of the District of Columbia Circuit), decided March 27, 1975

Struck down Corps of Engineers' definition of navigable waters as unduly narrow, meaning that the Corps and EPA acted in derogation of responsibilities by failing to define navigable waters as broadly as Congress intended

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In a brief, 1-page opinion, the court struck down the Corps' regulatory definition of navigable waters as unduly narrow:

> 1. Congress by defining the term "navigable waters" in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972…(the "Water Act") to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.
>
> 2. Defendants Howard H. Callaway, Secretary of the Army, and Lt. Gen. William C. Gribble, Chief, Army Corps of Engineers, are without authority to amend or change the statutory definition of navigable waters and they are hereby declared to have acted unlawfully and in derogation of their responsibilities under Section 404 of the Water Act by adopting the definition of navigability described at 33 C.F.R. § 209.210(d)(1)….

392 F.Supp. at 686.

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16. United States v. Phelps Dodge Corporation, 391 F.Supp. 1181 (D. Ariz. 1975)

District of Arizona (part of 9th Circuit), decided April 8, 1975

Upheld FWPCA and rejected "void for vagueness argument" over the term "waters of the United States"/language of decision would extend jurisdiction to any waterway, including a normally dry arroyo, that could lead to waters that have public interest, including groundwater

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Facts: Defendant was charged with polluting navigable waters in violation of sections 301 and 309 of the FWPCA.

Issue: Is the term "waters of the United States" so vague and indefinite that it fails to give notice of the criminal conduct and therefore violates the Due Process Clause of the Fifth Amendment.

Ruling: The court found that the statute is not void for vagueness because Congress clearly stated the goals and policies behind the Act and that "waters of the United States" means just what it says: "all waters of the United States including the territorial seas."

Furthermore, the court stated:

> For purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters….
>
> Thus a legal definition of "navigable waters" or "waters of the United States" within the scope of the Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will

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> ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States.

391 F.Supp. at 1187.

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17. Exxon v. Train, 554 F.2d 1310 (5th Cir. 1977)

Fifth Circuit, decided June 27, 1977

Held that EPA does not have authority under the FWPCA to control discharges to groundwater

Facts: Natural gas producer Exxon sought review of EPA's denial of a permit to allow disposal of wastes into deep wells and review of a claim by EPA that it had jurisdiction to control disposal of wastes into deep wells under certain circumstances.

Issue: Whether the EPA, under authority under section 402(a) of the FWPCA to issue permits authorizing discharge of pollutants into surface waters, has authority to place conditions in such permits that control the disposal of pollutants into deep wells.

Ruling: Under section 402 of the CWA, EPA is authorized to regulate the "discharge of any pollutant." "Discharge of any pollutant" is defined in the FWPCA as the addition of any pollutant to "navigable waters." Exxon's argument was that the disposal of waste into deep wells is not addition of a pollutant to "navigable waters," because Congress did not intend to extend federal control over subsurface waters.

The court went into an analysis of the congressional intent, because "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there can be no 'rule of law' which forbids [the use of legislative history], however clear the words may appear" on the surface. 554 F.2d at 1322 (quoting *Train v. Colorado Public Interest Research Group*, 426 US 1, 10 (1976) (alterations in original)). The court found that "the congressional plan was to leave control over subsurface pollution to the states until further studies, provided for in the Act, determined the extent of the problem and possible methods for dealing with it. In [the court's] view, the evidence is so strong that Congress did not mean to substitute federal authority over groundwater for state authority that the Administrator's construction, although not unreasonable on its face, must give way because 'it is contrary

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to congressional intentions.'" *Id.* (quoting *EPA v. State Water Resources Control Board*, 426 US 200, 227 (1976).

The court cited an oft-quoted passage from the legislative history:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the committee did not adopt this recommendation.

554 F.2d at 1325 (quoting S.Rep.No.414, 92d Cong., 1st Sess. 73 (1971), 2 Leg.Hist. 1491, U.S.Code Cong. & Admin. News 1972, p. 3739). The court concluded by saying "the legislative history demonstrates conclusively that Congress believed it was not granting any power to control disposals into groundwater" and ruled that the EPA "does not have the authority to place conditions in such permits that control the disposal of wastes into deep wells." *Id.* at 1329, 1331.

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18. Leslie Salt Co. v. Sierra Club, 578 F.2d 742 (9th Cir. 1978)

Ninth Circuit, decided May 11, 1978

Held that federal jurisdiction under FWPCA is not limited by tidal water lines

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Facts: The Sierra Club sued Leslie Salt seeking judgment that the company's dike evaporation ponds in and around San Francisco Bay were built in violation of the Rivers and Harbors Act because the company failed to obtain permits from the Corps. Leslie Salt then sued the Corps seeking judgment that the regulatory jurisdiction of the Corps under the Rivers and Harbors Act and the FWPCA over tidal marshlands is limited by the line of mean high water.

Issue: How far does the jurisdiction of the Corps extend with regard to tidal water lines?

Ruling: The court began its discussion of FWPCA jurisdiction by stating that the Corps' scope of jurisdiction under section 404 of the FWPCA is broader than its jurisdiction under the Rivers and Harbors Act. Leslie Salt agreed but argued that the use of the mean higher high water line (there are two high tides each lunar cycle and this is a measure of only the higher line) extends Corps authority significantly further than is authorized by the FWCPA because the Corps could then regulate discharges onto dry lands.

The court found that the full extent of the Corps's jurisdiction over the "waters of the United States" is in some cases not limited to the mean high water or the mean higher high water line. The court found the Corps regulations to be consistent with the intent of Congress and not contrary to the Constitution. Therefore, the court found that the Corps' jurisdiction extended at least to waters that are no longer subject to tidal inundation (because of the dikes created by Leslie Salt), without regard to the location of historic tidal water lines in their unobstructed, natural state. 578 F.2d at 756.

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19. Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979) [*cert granted, judgment reversed* on grounds unrelated to jurisdiction over navigable waters, *see* 448 U.S. 242]

Tenth Circuit, decided May 10, 1979

Extended jurisdiction to a tributary of a navigable water

This case involved an appeal from an assessment of civil penalties under the FWPCA based on an oil spill into Boggie Creek (Garfield County, Oklahoma), which is a distant tributary of the Arkansas River. The court addressed the issue of jurisdiction over the tributary in Footnote 1: "The Arkansas River is navigable in fact. Therefore, Boggie Creek, as its tributary, is also a navigable water of the United States for purposes of the FWPCA. *See* 33 U.S.C.A. 1362(7); *United States v. Ashland Oil and Transportation Co*., 504 F.2d 1317 (6th Cir. 1974)." 598 F.2d at 1188.

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20. United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979)

Tenth Circuit, decided May 23, 1979

Extended jurisdiction to waters that may in any way affect interstate commerce, even absent a link to navigable waters

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Facts: EPA brought action against Earth Sciences for discharging pollutants from gold leaching operations into the Rito Seco Creek. Earth Sciences argued that the Rito Seco is not a "navigable water" subject to regulation. The Rito Seco is not navigable in fact and is not used to transport any goods or materials. It is located entirely in one county in Colorado. Downstream from the Earth Sciences facility are two reservoirs that collect all of the stream flow.

Issue: Is the Rito Seco covered by the FWCPA's definition of navigable waters?

Ruling: The court referred to the legislative history and the language that navigable waters should "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." 599 F.2d at 375 (quoting S.Rep.No.92-1236, 92d Cong., 2d Sess., Reprinted in (1972) U.S.Code Cong. & Admin. News pp. 3668, 3776, 3822). The court discussed the commerce effects of the stream:

> [T]he stream supports trout and some beaver; the water collected in the reservoir is used for agricultural irrigation, and the resulting products are sold in interstate commerce. It seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce. Every court to discuss the issue has used a commerce approach and agreed upon that interpretation.

Id. The court then discussed the Sixth Circuit decision in *United States v. Ashland Oil* and stated that "[b]odies of water less substantial than the Rito Seco have been held to be under the ambit of the Act." *Id.* Earth Sciences

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argued that the Rito Seco does not have a very significant link to interstate commerce. The court responded by saying that all that is necessary under the Act is some interstate impact from the stream and found that the FWPCA covered the Rito Seco.

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21. United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979)

Seventh Circuit, decided October 15, 1979

Extended jurisdiction to wetlands that adjoin or are contiguous to intrastate lakes used by interstate travelers for recreational purposes

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Facts: Byrd was a land developer who owned a golf course bordering Lake Wawasee in Indiana. Lake Wawasee is a 2,500 – 3,000 acre lake used by interstate travelers and seasonal residents for recreational purposes. Byrd discharged fill material without a permit into wetlands bordering Lake Wawasee for the purposes of developing the land for residential purposes. The Corps filed suit to enjoin Byrd from placing fill in the waters and wetlands without first obtaining a permit. Under new Corps regulations, the Corps could assert jurisdiction over adjacent wetlands and intrastate lakes that are used by interstate travelers. Byrd argued that the land being filled did not constitute "wetlands" within the meaning of the Corps regulation. Byrd claimed that there was no proof that the wetlands were inundated with water from the lake. He based this argument on the fact that "his land was higher than the water level and there was a natural barrier that prevented his land from ever being inundated by water from the lake." 609 F.2d at 1208. Byrd also claimed that regulation of these activities violated the Commerce Clause.

Issue: May the Corps regulate the filling of the wetlands adjacent to a lake that is used by interstate travelers?

Ruling: The court first discussed the legislative history of the FWPCA amendments, stating that Congress wanted to give the term "navigable waters" the "broadest possible constitutional interpretation." (quoting the Conference Report). As to the reach of the Commerce Clause, the court stated, "Byrd's filling activities, although they are local, have the potential for exerting a substantial economic effect on interstate commerce by an easily traced chain of causation." 609 F.2d at 1210. The court then stated that destruction of the wetlands around Lake Wawasee could significantly degrade the quality of the lake, which could result in reduced visitors to the

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lake, which is an effect on interstate commerce. The court ruled that the Corps had jurisdiction over the wetlands and could require a permit here:

> We conclude that Congress constitutionally may extend its regulatory control of navigable waters under the Commerce Clause to wetlands which adjoin or are contiguous to intrastate lakes that are used by interstate travelers for water-related recreational purposes defined by 33 C.F.R. s 209.120(d)(2)(i)(G) and (H) (1977). Furthermore, these regulatory definitions promulgated by the Corps are reasonably related to Congress' purpose: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Id. at 1210-11 (footnotes omitted).

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22. United States v. Texas Pipeline Co., 611 F.2d 345 (10th Cir. 1979)

Tenth Circuit, decided December 21, 1979

Extended jurisdiction to nonnavigable tributaries that flow intermittently

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Facts: 600 barrels of oil spilled from the company's pipeline into an unnamed tributary of Caney Creek, which is a tributary of the Red River, in Atoka County, Oklahoma. There was a small flow of water in the unnamed tributary at the time of the spill. The company was fined under section 311 of the CWA for the spill (the company was not at fault for the spill and was commended for speedy clean-up and reporting of the incident. Nonetheless, the Coast Guard assessed a $2,500 fine).

Issue: Does the FWCPA cover nonnavigable tributaries?

Ruling: The court held that the FWCPA covered the unnamed tributary: "Whether or not the flow continued into the Red River at that time, it obviously would during significant rainfall. The intent of the Act was to cover all tributaries to waters like the Red River. It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense." 611 F.2d at 347 (citation omitted).

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23. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983)

Fifth Circuit, decided September 26, 1983

Upheld definition of wetlands as consistent with the statute and found application of definition to areas of substantial flooding to be reasonable

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Facts: Plaintiffs brought this citizen suit against the Corps, the EPA and private landowners, claiming that the landclearing activities of the landowners would result in discharges to waters of the United States, in violation of sections 301, 402 and 404 of the CWA. The plaintiffs requested a declaration that the scope of land at issue was a wetland under the scope of the CWA and a permit was required for clearing the wetland. The district court found that a permit was required.

Issue: Are EPA and Corps definitions of wetlands consistent with the CWA and may the EPA and the Corps apply these definitions to areas that are substantially flooded during the year?

Ruling: In citing the goals and the legislative history of the CWA, the court deferred to the EPA and Corps, finding their definitions and the application of their definitions reasonable:

> The EPA and the Corps expanded the wetlands definition in order to control "the discharge of pollutants at the source." We cannot say that the EPA's application of the definition to areas, like the Lake Long Tract, which experience significant flooding during a substantial portion of the year and serve as major overflow or backwater areas for the nation's rivers, or its conclusion that the discharge of pollution into such areas would have a significant effect on the nation's waters, was an unreasonable application of the statute. The EPA's decision is therefore entitled to our respect.

715 F.2d at 916. The court held that the landowners' landclearing activities could not be carried out without a dredge-and-fill permit.

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