

**Interstate Waters are "Waters of the United States" Under Section (a)(2)
of the Agencies' Regulations**

I. Summary

Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Corps) regulations define “waters of the United States” to include “interstate waters.” Interstate waters were defined by the federal water pollution control statutes prior to the Clean Water Act (CWA) as “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.”

The language of the CWA is clear that Congress intended the term “navigable waters” to include interstate waters. While EPA and the Corps believe congressional intent is clear, the agencies' interpretation of the CWA to include interstate waters within the scope of CWA jurisdiction also is reasonable and entitled to deference. The agencies' interpretation was promulgated contemporaneously with the passage of the CWA, it is consistent with the statutory and legislative history of the Act, and is the type of interpretation which is particularly due deference under principles of administrative law. Furthermore, the Supreme Court’s decisions in *SWANCC* and *Rapanos* do not impose additional jurisdictional requirements on interstate waters.

II. Congress Clearly Intended the Term “Navigable Waters” to Include Interstate Waters

A. The Language of the Clean Water Act, the Statute as a Whole, and the Statutory History Demonstrate Congress’ Clear Intent to Include Interstate Waters as “Navigable Waters” Subject to the Clean Water Act

Under *Chevron*, when interpreting a statute, the first inquiry is whether “the intent of Congress is clear” as to “the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, “that is the end of the matter.” *Id.* In making the threshold determination under *Chevron*, “‘a reviewing court should not confine itself to examining a particular statutory provision in isolation.’ Rather, ‘[t]he meaning - or ambiguity - of certain words or phrases may only become evident when placed in context.....It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

While as a general matter, the scope of the terms “navigable waters” and “waters of the United States” is ambiguous, the language of the CWA, particularly when read as a whole, demonstrates that Congress clearly intended to continue to subject interstate waters to federal regulation. The statutory history of federal water pollution control place the terms of the CWA in context and provide further evidence of Congressional intent to include interstate waters within the scope of the “navigable waters” protected by the Act. Congress clearly intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be

traditional navigable waters themselves or be connected to traditional navigable waters.¹ The CWA itself is clear that interstate waters that were previously subject to federal regulation remain subject to federal regulation. The text of the CWA, specifically the CWA's provision with respect to interstate waters and their water quality standards, in conjunction with the definition of navigable waters, provides clear indication of Congress' intent. Thus, interstate waters are "navigable waters" protected by the CWA.

- (1) *The Plain Language of the Clean Water Act and the Statute as a Whole Clearly Indicate Congress' Intent to Include Interstate Waters within the Scope of "Navigable Waters" for Purposes of the Clean Water Act*

Under well settled principles, the phrase "navigable waters" should not be read in isolation from the remainder of the statute. As the Supreme Court has explained:

The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006); *see also United States Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

While the term "navigable waters" is, in general, ambiguous, interstate waters are waters that are clearly covered by the plain language of the definition of "navigable waters."² Congress defined "navigable waters" to mean "the waters of the United States, including the territorial seas." Interstate waters are the waters of the several States and, thus, the United States. While the 1972 Act was clearly not limited to interstate waters, it was clearly intended to include interstate waters.

Furthermore, the CWA does not simply define "navigable waters." Other provisions of the statute provide additional textual evidence of the scope of the primary jurisdictional term of the Act. Most importantly, there is a specific provision in the 1972 CWA establishing requirements for those interstate waters which were subject to the prior Water Pollution Control acts.

¹ For purposes of the CWA, EPA and the Corps have interpreted the term "traditional navigable waters" to include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka MN). This Section II explains why EPA and the Corps do not interpret the CWA or the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States*, 547 U.S. 715 (2006), to restrict CWA jurisdiction over interstate waters to only those interstate waters that are traditional navigable waters or that connect to traditional navigable waters.

² The Supreme Court has found that the term "waters of the United States" is ambiguous in some respects. *Rapanos*, 547 U.S. at 752 (plurality opinion), 804 (dissent).

The CWA requires States to establish water quality standards for navigable waters and submit them to the Administrator for review.³ Under section 303(a) of the Act:

In order to carry out the purpose of this Act, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

CWA section 303(a)(1) (*emphasis added*).

Under the 1965 Act, as discussed in more detail below, States were directed to develop water quality standards establishing water quality goals for interstate waters. By the early 1970s, all the States had adopted such water quality standards. Advanced Notice of Proposed Rulemaking, Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36745 (July 7, 1998). In section 303(a), Congress clearly intended for existing federal regulation of interstate waters to continue under the amended CWA. Water quality standards for interstate waters were not merely to remain in effect, but EPA was required to actively assess those water quality standards and even promulgate revised standards for interstate waters if States did not make necessary changes. By the plain language of the statute, these water quality standards for interstate waters were to remain in effect “in order to carry out the purpose of this Act.” The purpose of the Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA section 101(a). It would contravene Congress’ clearly stated intent for a court to impose an additional jurisdictional requirement on all rivers, lakes, and other waters that flow across, or form a part of, State boundaries (“interstate waters” as defined by the 1948 Act, § 10, 62 Stat. 1161), such that interstate waters that were previously protected were no longer protected because they lacked a connection to a traditional navigable water. Nor would the existing water quality standards be “carry[ing] out the purpose of this Act,” if only those water quality standards established for interstate waters that are also traditional navigable waters or that connect to traditional navigable waters could be implemented under the Act through, for

³ Section 303 of the Act requires the States to submit revised and new water quality standards to the Administrator for review. CWA section 303(c)(2)(A). Such revised or new water quality standards “shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters.” *Id.* If the Administrator determines that a revised or new standard is not consistent with the Act’s requirements, or determines that a revised or new standard is necessary to meet the Act’s requirements, and the State does not make required changes, “[t]he Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved.” CWA section 303(c)(4).

example, National Pollutant Discharge Elimination System permits under Section 402 of the Act. Nowhere in Section 303(a) does Congress make such a distinction.

(2) *The Federal Water Pollution Control Statute That Became the Clean Water Act Covered Interstate Waters*

In 1972, when Congress rewrote the law governing water pollution, two federal statutes addressed discharges of pollutants into interstate waters and traditional navigable waters, and tributaries of each: the Water Pollution Control Act of 1948, as amended, and Section 13 of the Rivers and Harbors Act of 1899 (known as the “Refuse Act”). Of the two, the Water Pollution Control Act extended federal authority over interstate waters and their tributaries. In contrast, the Refuse Act extended federal jurisdiction over the “navigable waters of the United States” and their tributaries. These two separate statutes demonstrate that Congress recognized that interstate waters and “navigable waters of the United States” were independent lawful bases of federal jurisdiction.

a. The Federal Water Pollution Control Act Prior to 1972

From the outset, and through all the amendments pre-dating the 1972 Amendments, the federal authority to abate water pollution under the Water Pollution Control Act, and the Federal Water Pollution Control Act (FWPCA) as it was renamed in 1956, extended to interstate waters. In addition, since first enacted in 1948, and throughout all the amendments, the purpose of the Act has been, inter alia, to protect public water supplies, propagation of fish and aquatic life, recreation, agricultural, industrial, and other legitimate uses. *See* 62 Stat. 1155 and 33 U.S.C. § 466 (1952), 33 U.S.C. § 466 (1958), 33 U.S.C. § 466 (1964), 33 U.S.C. § 1151 (1970).

In 1948, Congress enacted the Water Pollution Control Act “in connection with the exercise of jurisdiction over the waterways of the Nation and in the consequence of the benefits to public health and welfare by the abatement of stream pollution.” *See* Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948). The Act authorized technical assistance and financial aid to States for stream pollution abatement programs, and made discharges of pollutants into interstate waters and their tributaries a nuisance, subject to abatement and prosecution by the United States. *See* § 2(d)(1),(4), 62 Stat. at 1156-1157 (declaring the pollution of interstate waters, “whether the matter causing or contributing to such pollution is discharge directly into such waters or reaches such waters after discharge into a tributary of such waters,” which endangers the health or welfare of persons to be a public nuisance, subject to abatement provided by the Act, including suit by the United States); § 2(a), 62 Stat. 1155 (requiring comprehensive programs for “interstate waters and tributaries thereof”); § 5, 62 Stat. 1158 (authorizing loans for sewage treatment to abate discharges into “interstate waters or into a tributary of such waters”). Under the statute, “interstate waters” were defined as all rivers, lakes, and other waters that flow across, or form a part of, State boundaries. § 10, 62 Stat. 1161.

In 1956, Congress strengthened measures for controlling pollution of interstate waters and their tributaries. Pub. L. No. 84-660, 70 Stat. 498 (1956) (directing further cooperation between the federal and State governments in development of “comprehensive programs for

eliminating or reducing the pollution of interstate waters and tributaries . . . and improving the sanitary condition of surface and underground waters,” and authorizing the Surgeon General to make joint investigations with States into the conditions of and discharges into “any waters of any State or States.”).

In 1961, Congress amended the FWPCA to substitute the term “interstate or navigable waters” for “interstate waters.” *See* Pub. L. No. 87-88, 75 Stat. 208 (1961). Accordingly, beginning in 1961, the provisions of the FWPCA applied to all interstate waters and navigable waters and the tributaries of each, *see* 33 U.S.C. §§ 466a, 466g(a) (1964).⁴

In 1965, Congress approved a second set of major legislative changes, requiring each State to develop water quality standards for interstate waters within its boundaries by 1967. Pub. L. No. 89-234, 79 Stat. 908 (1965).⁵ Failing establishment of adequate standards by the State, the Act authorized establishment of water quality standards by federal regulation. *Id.* at 908. The 1965 Amendments provided that the “discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement” through procedures specified in the Act, including (after conferences and negotiations and consideration by a Hearing Board) legal action in the courts. *Id.* at 909.⁶

b. The Refuse Act

Since its original enactment in 1899, the Refuse Act has prohibited the discharge of refuse matter “into any navigable water of the United States, or into any tributary of any navigable water.” Ch. 425, 30 Stat. 1152 (1899). It also has prohibited the discharge of such material on the bank of any tributary where it is liable to be washed into a navigable water. *Id.* Violators are subject to fines and imprisonment. *Id.* at 1153 (codified at 33 U.S.C. § 412). In 1966, the Supreme Court upheld the Corps’ interpretation of the Refuse Act as prohibiting discharges that pollute the navigable waters, and not just those discharges that obstruct navigation. *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966). In 1970, President Nixon signed an Executive Order directing the Corps (in consultation with the Federal Water Pollution Control Administration⁷) to implement a permit program under Section 13 of the RHA

⁴ Congress did not define the term “navigable waters” in the 1961 Amendments, or in subsequent FWPCA Amendments, until 1972.

⁵ In 1967, the State of Arizona created the Water Quality Control Council (Council) to implement the requirements of the 1965 FWPCA. The Council adopted water quality standards for those waters that were considered “interstate waters” pursuant to the existing federal law. The Council identified the Santa Cruz River as an interstate water and promulgated water quality standards for the river in accordance with federal law.

⁶ The 1966 Amendments authorized civil fines for failing to provide information about an alleged discharge causing or contributing to water pollution. Pub. L. No. 89-753, 80 Stat. 1250 (1966); *see also* S. Rep. No. 414, 92d Congress, 1st Sess. 10 (1972) (describing the history of the FWPCA).

⁷ In December 1970, administration of the Federal Water Pollution Control Administration was transferred from the Secretary of the Interior to EPA. S. Rep. No. 414, 92d Congress, 1st Sess. (1972).

“to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks.” E.O. 11574, 35 Fed. Reg. 19,627 (Dec. 25, 1970). In 1971, the Corps promulgated regulations establishing the Refuse Act Permit Program. 36 Fed. Reg. 6564, 6565 (April 7, 1971). The regulations made it unlawful to discharge any pollutant (except those flowing from streets and sewers in a liquid state) “into a navigable waterway or tributary,” except pursuant to a permit. Under the permit program, EPA advised the Corps regarding the consistency of a proposed discharge with water quality standards and considerations, and the Corps evaluated a permit application for impacts on anchorage, navigation, and fish and wildlife resources. *Id.* at 6566.

c. The Federal Water Pollution Control Act of 1972

When Congress passed the Federal Water Pollution Control Act amendments of 1972 (referred to hereinafter as the CWA or CWA), it was not acting on a blank slate. It was amending existing law that provided for a federal/state program to address water pollution. The Supreme Court has recognized that Congress, in enacting the CWA in 1972, “intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Riverside Bayview Homes*, 474 U.S. at 133; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 486, n.6 (1987).

The amendments of 1972 defined the term “navigable waters” to mean “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). While earlier versions of the 1972 legislation defined the term to mean “the navigable waters of the United States,” the Conference Committee deleted the word “navigable” and expressed the intent to reject prior geographic limits on the scope of federal water-protection measures. Compare S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 911, 92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that “[t]he term ‘navigable waters’ means the navigable waters of the United States, including the territorial seas”); *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 77 (“Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. . . . Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.”). Thus, Congress intended the scope of the 1972 Act to include, at a minimum, the waters already subject to federal water pollution control law – both interstate waters and traditional navigable waters. Those statutes covered interstate waters, defined interstate waters without requiring that they be traditional navigable waters or be connected to traditional navigable waters, and demonstrated that Congress knew that there are interstate waters that are not traditional navigable waters. In fact, Congress amended the Water Pollution Control Act in 1961 to substitute the term “interstate or navigable waters” for “interstate waters,” demonstrating that Congress wanted to be very clear that it was asserting jurisdiction over both types of waters: interstate waters even if they were not traditional navigable waters, and traditional navigable waters even if they were not interstate waters. At no point were the interstate waters already subject to federal water pollution control authority required to be navigable or to connect to a traditional navigable water. Further, as discussed above, the legislative history clearly demonstrates that Congress believed it was expanding jurisdiction – not narrowing it – with the

1972 amendments. Thus, it is reasonable to conclude that by defining “navigable waters” as “the waters of the United States” in the 1972 amendments, Congress intended to include not just traditionally navigable waters, but all waters previously regulated under the FWPCA, including non-navigable interstate waters.

Thus, based on the statutory definition of navigable waters, Section 303(a)’s requirement for water quality standards for interstate waters to remain in effect, the purposes of the Act, and the more than three decades of federal water pollution control regulation that provides a context for reading those provisions of the statute, the intent of Congress is clear that the term “navigable waters” includes “interstate waters” as an independent basis for CWA jurisdiction, whether or not they themselves are traditional navigable waters or are connected to traditional navigable waters.

B. Supreme Court Precedent Supports CWA Jurisdiction Over Interstate Waters Without Respect to Navigability

In two seminal decisions, the Supreme Court established that resolving interstate water pollution issues was a matter of federal law and that the CWA was the comprehensive regulatory scheme for addressing interstate water pollution. *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). In both of these decisions, the Court held that federal law applied to interstate waters. Moreover, these cases analyzed the applicable federal statutory schemes and determined that the provisions of the Federal Water Pollution Control Act and the Clean Water Act regulating water pollution applied generally to interstate waters. EPA and the Corps interpret the holdings of these cases as together recognizing the federal interest in interstate water quality pollution; and, in *City of Milwaukee*, recognizing that CWA jurisdiction extends to interstate waters without regard to navigability.

In *Illinois v. Milwaukee*, the Court considered a public nuisance claim brought by the State of Illinois against the City of Milwaukee to address the adverse effects of Milwaukee’s discharges of poorly treated sewage into Lake Michigan, “a body of interstate water.” 406 U.S. at 93. In relevant part, the Court held that the federal common law of nuisance was an appropriate mechanism to resolve disputes involving interstate water pollution. 406 U.S. at 107 (“federal courts will be empowered to appraise the equities of suits alleging creation of a public nuisance by water pollution”). The Court further noted that in such actions the Court could consider a State’ interest in protecting its high water quality standards from “the more degrading standards of a neighbor.” *Id.*

In reaching this conclusion, the Court examined in detail the scope of the federal regulatory scheme as it existed prior to the October, 1972 CWA amendments. In its April, 1972 decision, the Court concluded that the Federal Water Pollution Control Act “makes clear that it is federal, not state, law that in the end control the pollution of *interstate or navigable waters.*” 406 U.S. at 102 (*emphasis added*). The Court, in this case, concluded that the regulatory provisions of the Federal Water Pollution Control Act did not address the right of a state to file suit to protect water quality. However, this was not because this statute did not reach interstate waters. The Court specifically noted that Section 10(a) of the Federal Water Pollution Control Act “makes pollution of *interstate or navigable waters* subject ‘to abatement’” 406 U.S. at 102

(*emphasis added*). Rather, the Court noted that the plaintiff in this action was seeking relief outside the scope of the Federal Water Pollution Control Act and that statute explicitly provided that independent “state and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not ... be displaced by Federal enforcement action.” 406 U.S. at 104 (citing section 10(b) of the Federal Water Pollution Control Act).

In addition, in *Illinois v. Milwaukee*, the Court acknowledged that it was essential for federal law to resolve interstate water pollution disputes, citing with approval the following discussion from *Texas v. Pankey*:

Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of State against improper impairment by sources outside its domain... Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

406 U.S. at 107 n. 9, citing *Texas v. Pankey*, 441 F.2d 236, 241-242.

In *City of Milwaukee*, the Court revisited this dispute and addressed the expanded statutory provisions of the CWA regulating water pollution. The scope of the CWA amendments led the Court to reverse its decision in *Illinois v. Milwaukee*. In reaching this result, the Court concluded that Congress had elected to exercise its authority under federal law to occupy the field of water pollution regulation. As a result, the Court concluded that there was no basis for maintaining a federal common law of nuisance.

Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law “touching interstate waters”... Rather, the Amendments were viewed by Congress as a “total restructuring” and “complete rewriting” of the existing water pollution legislation considered in that case.

451 U.S. at 317.

The Court’s analysis in *Illinois v. Milwaukee* made clear that federal common law was necessary to protect “the environmental rights of States against improper impairment by sources outside its domain”. 406 U.S. at 107, n. 9. In the context of interstate water pollution, nothing in the Court’s language or logic limits the reach of this conclusion to only navigable interstate waters. In *City of Milwaukee*, the Court found that the CWA was the “comprehensive regulatory program” that “occupied the field” (451 U.S. 317) with regard to interstate water pollution, eliminating the basis for an independent common law of nuisance to address interstate water pollution. Since the federal common law of nuisance (as well as the statutory provisions regulating water pollution in the Federal Water Pollution Control Act) applied to interstate

waters whether navigable or not, the CWA could only occupy the field of interstate water pollution if it too extended to nonnavigable as well as navigable interstate waters.

With regard to the specifics of interstate water pollution, the *City of Milwaukee* Court noted that, in *Illinois v. Milwaukee*, it had been concerned that Illinois did not have a forum in which it could protect its interests in abating water pollution from out of state, absent the recognition of federal common law remedies. 451 U.S. at 325. The Court then went on to analyze in detail the specific procedures created by the CWA “for a State affected by decisions of a neighboring State’s permit-granting agency to seek redress.” 451 U.S. at 326. The Court noted that “any State whose waters may be affected by the issuance of a permit” is to receive notice and the opportunity to comment on the permit. *Id* (citing to CWA § 402(b)(3)(5)); In addition the Court noted provisions giving EPA the authority to veto and issue its own permits “if a stalemate between an issuing and objecting state develops.” *Id* (citing to CWA §§ 402(d)(2)(A),(4)). In light of these protections for States affected by interstate water pollution, the court concluded that

[t]he statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to "write their own ticket" under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them.

451 U.S. at 326.

Nothing in the language or the reasoning of this discussion limits the applicability of these protections of interstate waters to navigable interstate waters or interstate waters connected to navigable waters. If these protections only applied to navigable interstate waters, a downstream State would be unable to protect many of its waters from out of state water pollution. This would hardly constitute a comprehensive regulatory scheme that occupied the field of interstate water pollution.

For these reasons, EPA and the Corps interpret the holdings and the reasoning of these decisions as necessarily concluding that the regulatory reach of the CWA extends to all interstate waters without regard to navigability.⁸

C. The Supreme Court’s Decisions in *SWANCC* and *Rapanos* Do Not Limit Further Constrain Clean Water Act Jurisdiction Over Nonnavigable Interstate Waters.

⁸ Nothing in subsequent Supreme Court case law regarding interstate waters in any way conflicts with the agencies’ interpretation. See *International Paper v. Ouellette*, 479 U.S. 481 (1987); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). In both of these cases, the Court detailed how the CWA had supplanted the federal common law of nuisance to establish the controlling statutory scheme for addressing interstate water pollution disputes. Nothing in either decision limits the applicability of the CWA to interstate water pollution disputes involving navigable interstate waters or interstate waters connected to navigable waters.

As noted above, the Supreme Court has recognized that Congress, in enacting the CWA, “intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Riverside Bayview*, 474 U.S. at 133; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6, (1987). In *Riverside Bayview*, and subsequently in *SWANCC* and *Rapanos*, the Court addressed the proper construction of the CWA terms “navigable waters” and “the waters of the United States.” In none of these cases did the Supreme Court address interstate waters, nor did it overrule prior Supreme Court precedent which addressed the interaction between the CWA and federal common law to address pollution of interstate waters. Therefore, EPA and the Corps reasonably do not interpret the statute, even in light of *SWANCC* and *Rapanos*, to impose an additional requirement that interstate waters must be traditional navigable waters or connected to traditional navigable waters to be jurisdictional waters for purposes of the CWA.

At the outset, it is worth noting that neither the *SWANCC* case nor the *Rapanos* case dealt with the jurisdictional status of interstate waters. Repeatedly in the *SWANCC* decision the Court emphasized that the question presented concerned the jurisdiction status of nonnavigable *intrastate* waters located in two Illinois counties. *SWANCC* 531 U.S. at 165-166, 171 (“we thus decline to... hold that isolated ponds, some only seasonal, *wholly located within two Illinois counties* fall under § 404(a) definition of navigable waters...”) (*emphasis added*). Nowhere in Justice Rehnquist’s majority opinion in *SWANCC* does the Court discuss the Court’s interstate water case law.⁹ The Court does not even discuss the fact that CWA jurisdictional regulations identify interstate waters as regulated waters of the United States. In fact, the repeated emphasis on the intrastate nature of the waters at issue can be read as an attempt to distinguish *SWANCC* from the Court’s interstate water jurisprudence.

In *Rapanos*, the properties at issue were located entirely within the State of Michigan. 547 U.S. 715, 762-764. Thus, the Court had no occasion to address the text of the CWA with respect to interstate waters or the agencies’ regulatory provisions concerning interstate waters. In addition, neither Justice Kennedy nor the plurality discusses the impact of their opinions on the Court’s interstate waters jurisprudence. The plurality decision acknowledges that CWA jurisdictional regulations include interstate waters. 547 U.S. 715, 724. However, the plurality did not discuss in any detail its views as to the continued vitality of regulations concerning such waters.

Moreover, one of the analytical underpinnings of the *SWANCC* and *Rapanos* decisions is irrelevant to analysis of regulations asserting jurisdiction over interstate waters. In *SWANCC*, the Court declined to defer to agency regulations asserting jurisdiction over isolated waters because

[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result...This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to push the limit of Congressional authority... This concern is heightened where the administrative

⁹ It is worth noting the Justice Rehnquist was also the author of *City of Milwaukee*.

interpretation alerts the federal-state framework by permitting federal encroachment upon a traditional state power.

531 U.S. at 172-173 (citations omitted).

However, the Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create federal law to resolve interstate water pollution disputes. As discussed above, the Court in *Illinois v. Milwaukee*, invited further federal legislation to address interstate water pollution, and in so doing concluded that state law was not an appropriate basis for addressing interstate water pollution issues. 406 U.S. at 107 n. 9(citing *Texas v. Pankey*, 441 F.2d 236, 241-242). In *City of Milwaukee*, the Court indicated that central to its holding in *Illinois v. Milwaukee* was its concern "that Illinois did not have any forum to protect its interests [in the matters involving interstate water pollution]." 451 U.S. 325. As discussed above, the Court cited with approval the statutory provisions of the CWA regulating water pollution as an appropriate means to address that concern.

The *City of Milwaukee* and *Illinois v. Milwaukee* decisions make clear that assertion of federal authority to resolve disputes involving interstate waters does not alter "the federal-state framework by permitting federal encroachment on a traditional state power." 531 U.S. at 173. "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, have been recognized as presenting federal questions." *Illinois v. Milwaukee*, 406 U.S. at 105 (internal quotations and citations omitted).

The Supreme Court's analysis in *SWANCC* and *Rapanos* materially altered the criteria for analyzing CWA jurisdictional issues for wholly *intrastate* waters. However, these decisions by their terms did not affect the body of case law developed to address interstate waters. The holdings in the Supreme Court's interstate waters jurisprudence, in particular *City of Milwaukee*, apply CWA jurisdiction to interstate waters without regard to, or discussion of, navigability. In *City of Milwaukee*, the Court held that the CWA provided a comprehensive statutory scheme for addressing the consequences of interstate water pollution. Based on this analysis, the Court *expressly* overruled its holding in *Illinois v. Milwaukee* that the Federal common law of nuisance would apply to resolving interstate water pollution disputes. Instead, the Court held that such disputes would now be resolved through application of the statutory provisions of the CWA regulating water pollution.

It would be unreasonable to interpret *SWANCC* or *Rapanos* as overruling *City of Milwaukee* with respect to CWA jurisdiction over nonnavigable interstate waters. Such an interpretation would result in no law to apply to water pollution disputes with regard to such waters, unless one were to assume that the Court intended (without discussion or analysis) to restore the Federal common law of nuisance as the law to apply in such matters. Moreover, *SWANCC* and *Rapanos* acknowledge that CWA regulatory jurisdiction extends to at least some nonnavigable waters. *See, e.g.*, 547 U.S. at 779 (Kennedy, J.). Neither the *SWANCC* Court nor the plurality or Kennedy opinions in *Rapanos* purports to set out the complete boundaries of CWA jurisdiction. *See, e.g.*, 547 U.S. at 731 ("[w]e need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.") (plurality opinion).

In addition, as the Supreme Court has repeatedly admonished, if a Supreme Court precedent has direct application in a case yet appears to rest on a rationale rejected in some other line of decisions, lower courts should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its precedents. *Agostino v. Felton*, 521 U.S. 203, 237 (1997); *United States v. Hatter*, 532 U.S. 557, 566-567(1981). Moreover, when the Supreme Court overturns established precedent, it is explicit. See, *Lawrence v. Texas*, 539 U.S. 558, 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

III. The Agencies' Interpretation of the Term “Navigable Waters” to Include “Interstate Waters” is Reasonable and Entitled to Deference

While EPA and the Corps believe the CWA unambiguously includes interstate waters within the scope of “navigable waters,” the agencies also believe their interpretation is reasonable “in light of the goals and purposes of the statute,” and is entitled to *Chevron* deference.

EPA, the agency charged with implementing the CWA, has always interpreted the 1972 Act to cover interstate waters. Final Rules, 38 Fed. Reg. 13528 (May 22, 1973) (the term “waters of the United States” includes “interstate waters and their tributaries, including adjacent wetlands”). While the Corps of Engineers initially limited the scope of coverage for purposes of section 404 of the CWA to those waters that were subject to the Rivers and Harbors Act of 1899, after a lawsuit, the Corps amended its regulations to provide for the same definition of “waters of the United States” that EPA’s regulations had always established. In 1975, the Corps’ revised regulations defined “navigable waters” to include “[i]nterstate waters landward to their ordinary high water mark and up to their headwaters.” In their final rules promulgated in 1977, the Corps adopted EPA’s definition and included within the definition of “waters of the United States” “interstate waters and their tributaries, including adjacent wetlands.” The preamble provided an explanation for the inclusion of interstate waters:

The affects [sic] of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government’s traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.

Final Rules, 42 Fed. Reg. 37122 (July 19, 1977).

“The view of the agency charged with administering the statute is entitled to considerable deference,” *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985), and “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency,” *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984). The

term “waters of the United States” is not an established term of art. The choice among reasonable alternative constructions is therefore the province of EPA, the executive agency charged with the Act’s administration. In *Riverside Bayview*, for example, the Supreme Court held that in light of the well-established rule of deference to administrative judgments, judicial “review [wa]s limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters.’” 474 U.S. at 131. n.19. The Court observed that “faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority.” *Id.* at 132. Furthermore, the Supreme Court has repeatedly recognized that Congress, in enacting the CWA, “evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Riverside Bayview*, 474 U.S. at 133; *see also SWANCC*, 531 U.S. at 172 (CWA’s coverage extends beyond waters that are “navigable” in the traditional sense). In *Rapanos*, all Members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. 547 U.S. at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

As explained in Section II, the CWA’s statutory provisions, statutory history, and the history of federal jurisdiction over interstate waters prior to the 1972 CWA provide support for the reasonableness of the agencies’ interpretation including interstate waters within the scope of the CWA’s protected waters. This is particularly true when the Supreme Court has already determined that Congress’ intent in enacting the CWA was to “repudiate limits that had been placed on federal regulation by earlier water pollution control statutes.” *Riverside Bayview*, 474 U.S. at 133. It would subvert that intent to interpret the term “navigable waters” not to include interstate waters when those waters had been subject to regulation under the statutes Congress thought were too limited in their scope.

The legislative history similarly provides support for the agencies’ interpretation. Congress in 1972 concluded that the mechanism for controlling discharges and, thereby abating pollution, under the FWPCA and Refuse Act “has been inadequate in every vital aspect.” S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1972). The Senate Committee on Public Works reported that development of water quality standards, assigned to the States under the 1965 FWPCA Amendments, “is lagging” and the “1948 abatement procedures, and the almost total lack of enforcement,” prompted the search for “more direct avenues of action against water polluters and water pollution.” *Id.* at 5. The Committee further concluded that although the Refuse Act permit program created in 1970 “seeks to establish this direct approach,” it was too weak because it applied only to industrial polluters and too unwieldy because the authority over each permit application was divided between two Federal agencies. *See id.* at 5; *see also id.* at 70-72 (discussing inadequacies of Refuse Act program).

In light of the poor success of those programs, the Committee recommended a more direct and comprehensive approach which, after amendment in conference, was adopted in the

1972 Act. The text, legislative history and purpose of the 1972 Amendments all show an intent – through the revisions – to broaden, improve and strengthen, not to curtail, the federal water pollution control program that had existed under the Refuse Act and FWPCA.¹⁰ The 1972 FWPCA Amendments were “not merely another law ‘touching interstate waters’” but was “viewed by Congress as a ‘total restructuring’ and ‘complete rewriting’ of the existing water pollution legislation.”¹¹

As the legislative history of the 1972 Act confirms, Congress’ use of the term “waters of the United States” was intended to repudiate earlier limits on the reach of federal water pollution efforts: “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.” *See* S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). The House and Senate Committee Reports further elucidate the Conference Committee’s rationale for removing the word “navigable” from the definition of “navigable waters,” in 33 U.S.C. § 1362(7). The Senate report stated:

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

See S. Rep. 414, 92d Cong., 1st Sess. 77 (1971); *see also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972) (“The Committee fully intends that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”). These passages strongly suggest that Congress intended to expand federal protection of waters. There is no evidence that Congress intended to exclude interstate waters which were protected under federal law if they were not traditional navigable waters or connected to traditional navigable waters. Such an exclusion would be contrary to all the stated goals of Congress in enacting the sweeping amendments which became the CWA.

Not only is the agencies’ interpretation consistent with the language of the CWA and its legislative history, its longstanding interpretation is due deference under established

¹⁰ *See id.* at 9 (“The scope of the 1899 Refuse Act is broadened; the administrative capability is strengthened.”); *id.* at 43 (“Much of the Committee’s time devoted to this Act centered on an effort to resolve the existing water quality program and the separate pollution program developing under the 1899 Refuse Act.”). Congress made an effort “to weave” the Refuse Act permit program into the 1972 Amendments, *id.* at 71, as the statutory text shows. *See* 33 U.S.C. 1342(a) (providing that each application for a permit under 33 U.S.C. 407, pending on October 18, 1972, shall be deemed an application for a permit under 33 U.S.C. 1342(a)).

¹¹ *City of Milwaukee v. Illinois*, 451 U.S. at 317; *see also id.* at 318 (holding that the CWA precluded federal common-law claims because “Congress’ intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation”); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981) (existing statutory scheme “was completely revised” by enactment of the CWA).

administrative law principles. The courts have identified a number of factors which generally support giving an agency deference: the interpretation is by the regulatory agency charged with administering the statute; the interpretation is issued contemporaneously with passage of the statute; the agency interpretation has been consistent; the statute requires, and the interpretation reflects, the agency's particular expertise; there is a thorough record of the interpretation; and there has been congressional acquiescence to the interpretation. In this case, all the factors support granting substantial deference to EPA's interpretation of the CWA in its regulatory definition of "waters of the United States."

The CWA was enacted in 1972. EPA's regulatory definition of "waters of the United States" which included interstate waters was promulgated in 1973. Such contemporaneous construction is entitled to increased deference. *Gorsuch*, 693 F.2d at 167; *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986) ("as the CFTC's contemporaneous interpretation of the statute it is entrusted to administer, considerable weight must be accorded the CFTC's position").

The definition has been the Agency's interpretation of the geographic jurisdictional scope of the CWA for more than 35 years. The consistency of EPA's position also entitles its interpretation to deference. *Gorsuch*, 693 F.2d at 167 (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)).

Courts have acknowledged the need for deference to EPA in light of "the complexity and technical nature of the statutes and the subjects they regulate . . . and EPA's unique experience and expertise." *E.I. du Pont de Nemours & Co. v. Train*, 97 S.Ct. 965, 978 n.25 (1977) (internal quotes omitted). Such expertise is due deference even when the question is one of statutory interpretation and jurisdiction. *Schor*, 106 S.Ct. at 3253 ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference." (internal quotes omitted)).

The thoroughness of the Agency's position is demonstrated by the fact that the Agency went through notice and comment procedures to examine the nature of the regulatory provision. (The public had further opportunity for notice and comment when the Corps revised its regulations.)

Finally, Congress has been aware of and has supported the Agency's longstanding interpretation of the CWA. "Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *North Haven Board of Education v. Bell*, 102 S.Ct. 1912, 1924 (1982) (quoting *United States v. Rutherford*, 99 S.Ct. 2470 (1979) (internal quotes omitted)).

The 1977 amendments to the CWA were the result of Congress' thorough analysis of the scope of CWA jurisdiction in light of EPA and Corps regulations. The 1975 interim final

regulations promulgated by the Corps in response to *NRDC v. Callaway*, aroused considerable congressional interest. Hearings on the subject of Section 404 jurisdiction were held in both the House and the Senate.¹² An amendment to limit the geographic reach of Section 404 to traditional navigable waters and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee, H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 97-105 (1977). Congress rejected the proposal to limit the geographic reach of Section 404 because it wanted a permit system with “no gaps” in its protective sweep. 123 Cong. Rec. 26707 (1977) (remarks of Sen. Randolph). Rather than alter the *geographic* reach of Section 404, Congress amended the statute by exempting certain *activities* -- most notably certain agricultural and silvicultural activities -- from Section 404's permit requirements. *See* 33 U.S.C. § 1344(f)

Other evidence abounds to support the conclusion that when Congress rejected the attempt to limit the geographic reach of Section 404, it was well aware of the jurisdictional scope of EPA and the Corps' definition of “waters of the United States.” For example, Senator Baker stated (123 Cong. Rec. 26718 (1977)):

Interim final regulations were promulgated by the corps [on] July 25, 1975. . . . Together the regulations and [EPA] guidelines established a management program that focused the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the corps revised its regulations to further streamline the program and correct several misunderstandings. . . .

Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries

This legislative history leaves no room for doubt that Congress was aware of the agencies' definition of navigable waters. While there was controversy over the assertion of jurisdiction over all adjacent wetlands and some isolated wetlands, the agencies' assertion of CWA jurisdiction over interstate waters was uncontroversial.

Finally, the constitutional concerns which led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos* are not present here where the agency is asserting jurisdiction over interstate waters. In *SWANCC*, the Court declined to defer to agency regulations asserting jurisdiction over isolated waters because the Court felt such an

¹² *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works, 94th Cong., 2d Sess. (1976); Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 94th Cong., 1st Sess. (1975).*

interpretation of the statute invoked the outer limits of Congress' power. The Court's concern "is heightened where the administrative interpretation alerts the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 172-173 (citations omitted). Authority over interstate waters is squarely within the bounds of Congress' Commerce Clause powers.¹³ Further, the federal government is in the best position to address issues which may arise when waters cross State boundaries, so this interpretation does not disrupt the federal-state framework in the manner the Supreme Court feared that the assertion of jurisdiction over an isolated, intrastate body of water based on the presence of migratory birds did. Indeed, the Supreme Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create federal law to resolve interstate water pollution disputes. Therefore, as discussed in Section II.B above, it is appropriate for the agencies to adopt an interpretation of the extent of CWA jurisdiction over interstate waters that gives full effect to *City of Milwaukee* unless and until the Supreme Court elects to revisit its holding in that case.

Thus, based on the language of the statute, the statutory history, the legislative history, and the caselaw, the agencies' longstanding interpretation of "navigable waters" to include interstate waters is reasonable and entitled to deference.

¹³ In *Illinois v. Milwaukee*, the Supreme Court noted that "Congress has enacted numerous laws touching interstate waters." 406 U.S. at 101.