Do Waters Have to Be "Navigable" under the Clean Water Act?

No, and the Supreme Court Agrees.

America's Commitment to Clean Water Act, H.R. 5088, confirms the actions of Congress in 1972, and the opinions of the Supreme Court since, that waters do not have to be "navigable" to be covered by the Clean Water Act.

America's Commitment to Clean Water Act would strike the word "navigable" from the Clean Water Act for the sole purpose of restoring Congress' original intent concerning the waters covered by that Act.

Opponents of ACCWA would have you believe that striking "navigable" would be a gross expansion of the Clean Water Act. These opponents would rather generate baseless fears than address the facts.

Facts and Fiction Surrounding the Term "Navigable"

Fiction:

Deleting the word "navigable" eliminates the sole limit on the Federal government's authority.

Fact:

The sole limit on the Federal government's authority is the power granted to it under the Constitution as interpreted by the Supreme Court, as it has been for 220 years. Despite what some opponents claim, the Clean Water Act has never been limited to only those waters that are "navigable." The Supreme Court has considered "navigable waters" in the context of the Clean Water Act three times. In each case, all nine justices agreed that "navigable waters" is not limited to navigation.

Fiction:

Deleting the word "navigable" will make every drop of water in the United States subject to Federal jurisdiction.

Fact:

Since 1972, the Clean Water Act has applied to discharges of pollutants and dredged or fill material into the "waters of the United States, including the territorial seas." ACCWA does not expand that definition – it uses that definition. In fact, ACCWA would limit Clean Water Act jurisdiction to specific Constitutional authorities for the first time.

Fiction:

Congress intended to leave certain waters out of the scope of the Clean Water Act by using the term "navigable waters".

Fact:

The first sentence of the Clean Water Act clearly states, "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (*Emphasis added.*)

When the House and Senate developed their versions of what would become the Federal Water Pollution Control Act Amendments of 1972 (the Clean Water Act) in their respective chambers, the bills used the term "navigable waters" to be consistent with the Refuse Act (the common name for section 13 of the Rivers and Harbors Act of 1899), and the underlying Federal Water Pollution Control Act of 1948. The bills also defined the term "navigable waters" as "navigable waters of the United States."

However, when the committee on the conference reported the final language to the House and Senate, the final language did not include the term "navigable" in the definition. Congress excised it from the definitions of the Act because it did not want the Act limited to the navigable-in-fact waters. Congress in 1972 said what it wanted "navigable waters" to mean within the context of the Clean Water Act – it wrote "navigable" out of the definition.

In the case of *NRDC* v. *Callaway*, 392 F. Supp. 685 (1975), the case that told the Corps of Engineers that the Clean Water Act extended beyond the traditionally navigable waters, the court wrote:

> Congress by defining the term "navigable waters" in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, *33 U.S.C. § 1251 et seq.* (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. (*Emphasis in original.*)

In *U.S.* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) the unanimous opinion of the Supreme Court said:

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA 301(a), 404(a), 502(12), 33 U.S.C. 1311(a), 1344(a), 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress 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. (*Citation Omitted.*)

Fiction:

Deleting the word “navigable” will cause confusion, uncertainty, and litigation.

Fact:

It is the Supreme Court’s insistence on giving meaning to “navigable” after Congress dropped it from the definition in the Clean Water Act, but then failing to agree on a meaning, that has created confusion and uncertainty.

In *SWANCC*, the court insisted on ascribing some meaning to “navigable”, but did not say what that meaning is.

In *Rapanos*, Justice Scalia concedes that “’navigable waters’ includes something more than traditional navigable waters.” But, the opinion continues, “We need not decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act.”

No majority of the court could agree what “navigable” means. In fact, the level of confusion on the court is reflected in that there were **five** separate opinions filed in the case, and no opinion with more than four supporters.

The resulting confusion in interpreting the Clean Water Act is apparent to the regulated community and the regulators.

That is why America’s Commitment to Clean Water Act uses the current regulatory definition of “waters of the United States,” being purposefully careful to avoid new terms or concepts that could be misinterpreted.

Congress has the ability and an obligation to eliminate the confusion over the statute caused by the Supreme Court decisions.