The National Agricultural Law Center

A research project from The National Center for Agricultural Law Research and Information of the University of Arkansas • NatAgLaw@uark.edu • (479) 575-7646 • www.NationalAgLawCenter.org

An Agricultural Law Research Article

How the Concept of Navigability May Determine The Rights of Landowners Along Streams

by

J. W. Looney

The National Agricultural Law Center
University of Arkansas School of Law
1 University of Arkansas
Fayetteville, AR 72701

August 2002

A National AgLaw Center Research Article

How the Concept of Navigability May Determine the Rights of Landowners Along Streams

J. W. Looney
Distinguished Professor of Law, Emeritus
University of Arkansas School of Law

I. INTRODUCTION

Landowners who own land next to streams or through which streams run are often faced with difficult questions concerning the extent of their rights to control or manage activities on or in the streams. These question may include whether the owner of the land is also owner of the stream bed and to what extent the landowner may control use of the stream by members of the public. A related question often focuses on the extent to which the federal or state government may regulate activities on the stream itself.

Those with special interest in the environment may express concerns as to how activities of landowners on such streams affect fish and wildlife or the stream itself. State or federal agencies with water quality responsibility may assert a right to regulate activities in or on the stream, and recreational users may wish to see the stream open for public use. Cattlemen or other landowners along the stream may see any restrictions on their control of the stream as an infringement of their property rights.

This clash of interests illustrates the extent to which a seemingly simple concept, navigability, can be important in various legal contexts: (1) it will determine the ownership of the stream bed and, thus, the landowner's rights to make use of the bed and the surface of the stream; (2) it may determine the public's right to use the stream for recreational purposes; and (3) it will be relevant to the implementation of government regulatory controls affecting either the use of the stream or the stream bed.

The determination of the navigability status of a stream for these purposes does not depend upon a designation by statute or regulation, although such designations would be of value. Even in the absence of a statute or regulation, courts may evaluate the actual navigability status of a particular stream for the purpose of resolving a specific dispute. In fact, state legislatures, particularly in the 1800s, frequently designated streams or parts of streams as navigable, but this designation alone will not answer the complex questions confronted by the landowner.

II. WHAT IS A NAVIGABLE STREAM?

If the concept of "navigability" is important in answering the questions posed above, then a definition of what is meant by a "navigable stream" must be established. Initially, the United States Supreme Court found waters to be "navigable" for federal purposes using a "tidal waters" test. This

test came from England where government control was limited to waters within the ebb and flow of the tide.[1] In 1851, this test was clearly expanded in this country when the United States Supreme Court held that federal jurisdiction extended to all navigable lakes and rivers regardless of tidal effects.[2] In 1870, the Court further expanded the test in a well-known case, *The Daniel Ball,* [3] to find that navigable waters are those that are navigable-in-fact. Rivers are navigable-in-fact:

> when they are used or 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.[4]

In general, the test for navigability is comprised of four criteria: (1) the waterbody should be susceptible to navigation, not that it was ever used for navigation; (2) the navigation should be for commercial purposes, not merely navigation for any purpose; (3) the waterbody should be susceptible to navigation in its ordinary condition; and (4) the waterbody should be navigable by the customary mode of transportation in the area.[5]

In 1874, the basic test was expanded by removing the requirement that commerce be conducted by any particular mode of trade and travel and by placing greater reliance upon the past history of actual navigability, rather than upon the fact of present non-navigability.[6] The Court stated:

> The true test of navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation .... The capability of use by the public for purposes of transportation and commerce affords the true criteria of the navigability of a river, rather than the extent and manner of that use .... It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is navigable, but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture. [7]

---

1. The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat) 428 (1825).
2. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).
3. 77 U.S. (10 Wall.) 557 (1870).
4. *Id*. at 563.
5. *Id*.
6. The Montello, 87 U. S. (20 Wall.) 430 (1874).
7. *Id*. at 441-42.

This language points toward the relationship between the Commerce Clause of the United States Constitution [8] and the federal test for navigability: there must exist some kind of substantial commerce before activity upon waterways is sufficient to make them navigable-in-fact and in law.

The most sweeping statement of the federal test for navigability is given in a 1940 case, *United States Appalachian Electric Power Co.,*[9] where the Court indicated that navigability could not be determined by a formula which "fits every type of stream under all circumstances and at all times." The Court indicated that if the making of reasonable improvements would make the stream navigable for commerce, then it may be held to be navigable-in-fact.[10]

The Supreme Court has also held that a waterway once found to be navigable remains so,[11] even though necessary improvements are not completed or even authorized.[12] This variation in the federal test can be seen in the Arkansas federal district court case of *In re River Queen*.[13]

The court was called upon to determine whether a river that had been dammed and had thereby become a part of a federally-owned lake had ever been used commercially to a sufficient extent to allow a finding of navigability. The lake, though wholly owned by the United States through purchase and condemnation proceedings, was found non-navigable because "the only possible use of the lake [was] for fishing and other means of recreation"[14] and the stream which formed the lake had never afforded a channel for "useful commerce" between states or to and from foreign countries.[15]

III. HOW DOES NAVIGABILITY AFFECT TITLE TO THE BED OF A STREAM?

The question of navigability determines the riparian landowners' rights to the stream bed. The state owns the stream beds of navigable streams with the riparian owners' rights extending only to the high water mark, a point indicated by vegetation and the nature of the soil.[16] The riparian owner may "wharf out" into the navigable stream by constructing piers and wharfs in order to make use of the surface, but the right to do so is not absolute. In fact, the state may restrict this right (because of

---

8. U.S. Const., art. I, § 8, cl. 3: The Congress shall have Power ... to regulate Commerce ... among the several States...." The power to regulate commerce was held to include, by necessity, the power to regulate navigation in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Leovy v. United States, 177 U.S. 621, 623 (1900). *See also* Texarkana & Ft. S. Ry. Co. v. Parsons, 74 F. 408, 410 (8th Cir. 1896).

9. 311 U.S. 377 (1940).

10. *Id*. at 407.

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

12. United States v. Appalachian Electric Power Co., 311 U.S. 377, 408 (1940).

13. 275 F. Supp. 403 (W.D. Ark. 1967), *aff'd sub nom* George v. Beavark, Inc., 402 F.2d 977 (8th Cir. 1968).

14. 275 F. Supp. at 409.

15. *Id.* at 410.

16. St. Louis, Iron Mountain and Southern Railway Co. v. Ramsey, 653 Ark. 314, 13 S.W.931 (1890).

state ownership of the stream bed) or the federal government may prohibit it (under its power to regulate navigation).

The idea of state ownership of the beds of navigable streams (or lakes) derives from the common law of England as applied in the early history of this country. Under the common law, the Crown owned the beds of navigable water below the high water mark or those affected by the ebb and flow of the tide. This concept became part of the law of the original colonies and was later extended to newly admitted states. To put the new states on "equal footing," the idea developed that if a body of water was navigable at statehood, the state acquired ownership of the bed and banks to the high water mark.

Prior to the 1920s the state courts adhered to the view that the test to be applied in determining navigability for title purposes was a test as announced by each state supreme court.[17] No United States Supreme Court case had squarely faced the issue until a series of cases in the 1920s and 1930s.[18] It was only with these cases that the United States Supreme Court finally decided that the questions of navigability for title was to be determined by the federal test as pronounced by the federal courts. In applying this rule to the thirteen original states, navigability for ownership purposes is determined at the time the Union was formed. Subsequently, as new states joined the Union, navigability for ownership purposes is determined at the time of their admission to the Union.[19]

Once again, as in other areas of federal law, the [20]test of *The Daniel Ball* has been employed in the watercourse bed ownership cases.[21] In other words, under federal law the states took title to the beds underlying waters which *at the time of statehood* were used, or susceptible of being used, as highways for commerce conducted in the customary modes of trade and travel on water. The legal underpinnings of the rule were that navigable bodies of water were important for fishing and "for highways of navigation and commerce."[22] Thus, the beds of navigable lakes and rivers were held in public trust by the King of England, or by the people and later the states in America.[23] If the federal government conveyed the beds prior to statehood in order to meet some international obligation, to

---

17. St. Louis I.M. & S. Ry. v. Ramsey, 53 Ark. 314, 13 S.W. 931 (1890); Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499 (1908); Lamprey v. Metcalf, 52 Minn 181,52 N.W. 1139 (1893); Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921): Guilliams v. Beaver Lake Club, 90Ore. 13, 175 Pac.437 (1918); Welder v. State, 196 S.W. 868, (Tex.Civ. App. 1917); Griffith v. Holman, Wash. 347, 63 Pac. 239 (1900).

18. Brewer-Elliot Oil & Gas Co. v. United States, 260 U. S. 77 (1922); United States v. Holt State Bank, 270 U. S. 49 (1926); United States v. Utah, 283 U. S. 63 (1931).

19. *See, e.g.*, Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Arizona v. California, 377 U.S. 921 (1964); United States v. Holt State Bank, 270 U.S. 49 (1926); Shively v. Bowlby, 152 U.S. 1 (1894); Hardin v. Jordan, 140 U.S. 371 (1991); Barney v. Keokuk, 94 U.S. 324 (1876); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Goodtitle v. Kibbe, 50 U.S. (9 How.) 471 (1850).

20. 77 U.S. (10 Wall.) 557, 563 (1870).

21. United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77 (1922); Oklahoma v. Texas, 258 U.S. 574 (1922); Utah v. United States, 304 F.2d 23 (10th Cir. 1962).

22. Shively v. Bowlby, 152 U.S.1, 11 (1894).

23. Martin v. Waddell, 41 U.S. (16 Pet.) 367 at 410.

improve commerce with foreign nations or among states, or to carry out other public purposes, the title to the beds of navigable lakes and rivers did not pass to the states upon admission to the union.[24]

Congress, in the Submerged Lands Act of 1953,[25] applied the concept. Under this Act, lands within states covered by non-tidal waters that were navigable at the time of statehood and tidal lands (to the three mile limit) are granted to the states. It was not until 1988 that the Supreme Court determined that the states also took ownership of land beneath non-navigable tidal waters (the tidal for title test). [26]

In most cases, the states have not conveyed their interest in the beds and banks of their inland rivers and streams. As insurers of the public trust, the states have the responsibility of protecting the public's right to use state bodies of water. The public trust responsibility extends to the soils beneath navigable waterbodies and to the minerals in these soils.[27]

By contrast, the general rule for non-navigable riparian lands is that the recipient of a federal patent to such lands takes title to the center of the waterbody.[28] It applies equally to non-navigable lakes.[29] Thus, if a particular stream or lake did not meet the federal test for navigability at the time of statehood, the landowner owns and controls the stream bed, completely or to the center thread of the stream if the owner has land on only one side of the stream. It is important to note that land descriptions in deeds may be relevant here as well. In some deeds, the land may be described is such a way that the stream itself is excluded from the land conveyed.

IV. WHAT RIGHTS DO MEMBERS OF THE PUBLIC HAVE TO USE THE SURFACE OF THE STREAM FOR RECREATIONAL PURPOSES?

In most states, the right of the public to use the surface of a stream or lake may also depend on a navigability test. This test, however, is not necessarily the same test as that applied to determine the question of stream bed ownership. In many states recreational use of water has led to greater recognition of public rights through a state test of navigability that may extend the concept beyond the traditional "commercial use" concept.

---

24. United States v. Holt State Bank, 270 U.S. 54 (1926)

25. Act May 22, 1953, 67 Stat. 29 (codified as amended at 43 U.S.C. Sec. 1301-1315 (1988)

26. Phillips Petroleum v. Mississippi , 484 U.S. 469 (1988).

27. *See* Illinois Central R.R. v. Illinois, 146 U. S. 387 (1892). States may convey beds of navigable lakes and rivers to private parties under limited circumstances but must insure that the rights of the public to unfettered navigability be preserved.

28. Whitaker v. McBride, 197 U. S. 510 (1905); See also, Hardin v. Shedd, 190 U. S. 508 (1903).

29. *See* Grand Rapids & Ind. R.R. v. Butler, 159 U. S. 87 (1895). The problem is how to apportion the bed among littoral owners when the shoreline is irregular.

For example, in Arkansas this concept was expanded in the 1980 case of *Arkansas v. McIlroy* [30] involving the Mulberry River. The evidence introduced in the case showed that the Mulberry had been used by the public for recreational purposes for many years. This included fishing, swimming, and canoeing. The court evaluated the standard definition of navigability but adopted what might be called the "pleasure boat" definition of navigability. For this purpose, the court suggested that it is not necessary that the stream be floatable at all times, but it can be deemed navigable based on its capability during part of the year for use by flat-bottomed boats for fishing or canoes for floating or both. The court acknowledged the traditional definition of navigability, which focused on the usefulness of the stream for transporting articles of commerce, but indicated that navigability may be influenced by recreational as well as commercial use of a stream. In the end, the court joined several other states that had ruled that a stream which supported recreational boating on a consistent basis was navigable. Thus, the riparian landowner was enjoined from interfering with the passage of recreational boaters on the Mulberry.

The Arkansas court joined courts in California,[31] Idaho,[32] and Missouri,[33] among others,[34] in applying a state test of navigability for recreational purposes that is less restrictive than the traditional federal test. Other states have expanded public use under somewhat different legal logic. For example, the Wyoming Court determined that under the state constitution the legislature could authorize use of a stream by members of the public.[35] Some states have passed legislation along these lines.[36] Two states have extended public use on grounds that relate to their interpretation of state ownership of some or all non-navigable stream beds.[37] A few states have made reference to the concept of "public trust" that, in effect, makes all waters property of the state, regardless of stream bed ownership or navigability.[38]

---

30. 268 Ark. 227, 595 S.W. 2d 659 (1980).

31. People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).

32. Southern Idaho F & G Association v. Picabo Livestock, Inc. 96 Idaho 360, 528 P. 2d 1295 (1974).

33. Elder v. Delcour, 265 S. W. 2d 17 (Mo. 1954).

34. Similar results have been seen in *Attorney General v. Hallden*, 214 N. W. 2d 856 (Mich. Ct. App. 1974) (Michigan); *State v. Red River Valley Co*., 51 N. M. 207, 182 P. 2d 421 (1945) (New Mexico); *Coleman v. Schaeffer*, 126 N. E. 2d 444 (Ohio 1955) (Ohio); *Lusher v. Reynolds*, 153 Ore. 625, 56 P. 2d 1158 (1936) (Oregon); 48 Wash. 2d 815, 296 P. 2d 1015 (1956) (Washington); and *Muench v. Public Service Commission*, 261 Wis. 492, 53 N. W. 2d 514 (1952) (Wisconsin). This is not intended as an exhaustive list but illustrative only.

35. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

36. *See e.g.* Minnesota Stat. Ann. Sec. 103G.005(15)(b) and Ind. Code. Ann. Sec. 14-26-2-3, § 14-26-2-5.

37. *See* Shortell v. Des Moines Co., 172 N. W. 649 (Iowa 1919) and Hillebrand v. Knapp, 65 S. D. 512, 274 N. W. 821 (S. D. 1937).

38. *See e.g.* Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P. 2d 163 (1984).

Some state courts have rejected the idea of expanding recreational use by court decree, leaving the issue to the legislative branch. [39] The issue has not been addressed in all states by either the courts or the legislature, but it is fair to conclude that there is a trend toward increased recognition of public rights.

V. MUST A STREAM BE NAVIGABLE IN ORDER FOR THE GOVERNMENT TO IMPLEMENT REGULATORY CONTROLS?

Through the commerce clause of the United States Constitution, the federal government has considerable power related to development activities within watercourses. These include the planning, construction and operation of flood control, irrigation, hydroelectric and water supply projects. The power to regulate interstate commerce is broad and easily encompasses these development activities.

In early cases the courts focused on the question of whether the particular waterway was navigable as a means of determining whether an activity was within the federal power. In particular, the power to regulate commerce, given to Congress in the Constitution, necessarily included power over navigation. However, it is clear that congressional authority over water does not depend solely on the streams's navigability. The navigation power certainly gives that authority, but "interstate commerce" is much broader than navigation. As a result, more recent interpretations allow the extension of federal regulatory authority to both navigable streams and lakes *and* their non-navigable tributaries. For example, federal reclamation, hydroelectric projects, and federal water pollution control can be justified on grounds broader than navigation regulation and encompasses non-navigable streams as well..

Traditionally, Congress limited the exercise of its regulatory reach to activities in navigable waters. But the courts initially began to broaden jurisdiction by expanding the definition of "navigability." For example, as indicated above, the test of navigability was expanded in the 1874 case to include waters that had the capability of commercial use, not merely those in actual use. [40] The definition was again expanded in 1921 to bring in water bodies whose history of commercial use made it navigable despite subsequent physical or economic changes preventing present use for commerce.[41]

Then, in the 1940 case of *United States v. Appalachian Electric Power Company*, [42] the court found that a waterway would be deemed navigable-in-fact if by "reasonable improvements" it could be made navigable. Thus, the jurisdictional basis broadened until only the most insignificant body of water could escape the test of navigability.

One consequence of a determination of Commerce Clause regulatory authority relates to the federal government's direct control over navigation and the so-called "navigation servitude."

---

39. *See e.g.* People v. Emmert, 198 Colo. 137, 597 P. 2d 1025 (1975) (Colorado) and Kansas v. Meek, 246 Kan. 99, 785 P. 2d 1356 (1990) (Kansas).

40. The Montello, 87 U. S. 430 (1874).

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

42. 311 U. S. 377 (1940).

Essentially, this concept means that the federal government has a right to make improvements on navigable waters between the high water marks for the purpose of enhancing navigation and can do so without compensation to riparian owners. This is the result of a "lawful exercise of a power to which the interests of riparian owners have always been subject." [43] This power is not limited to navigable waters in which the stream bed is owned by the state but may apply to riverbed interests however acquired.[44] And, according to some authorities, navigability is actually immaterial if Congress exercises power over a non-navigable tributary to protect the navigable capacity of a navigable stream.[45]

The regulatory reach of Congress was extended beyond navigation when Congress enacted the Clean Water Act(CWA) [46] establishing regulatory programs to combat pollution of the nation's waters. The CWA was adopted by Congress to provide the legislative vehicle for regulating the discharge of pollutants into surface waters by municipal sources, industrial sources and other specific and non-specific sources. The national goal is that the discharge of pollutants be eliminated.[47] Congress made unlawful "the discharge of any pollutant by any person" except as in compliance with the CWA.[48] It defined "discharge of a pollutant," in part, as "any addition of any pollutant to navigable waters from any point source...."[49]

Congress included in the statute a definition of navigable waters as "the waters of the United States."[50] The term "waters of the United States" has been judicially interpreted to include almost all surface waters, permanent and transient, navigable and non-navigable.

For example, in a case involving an early interpretation of this statute,[51] the defendant, Ashland Oil, was indicted for failing to immediately report the discharge of 3,200 gallons of oil into a creek. Ashland Oil claimed that Congress did not have the constitutional power to control pollution on non-navigable tributaries of navigable streams. They claimed the creek was non-navigable in fact, and that the discharge never reached "navigable water." The Court indulged in generous quotations from the statutory language of the CWA to make the following point:

---

43. United States v. Rands, 389 U.S. 121 (1967) at 123 citing United States v. Chicago, 312 U. S. 592, 596-97 (1941). *See also* Shafer, *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 WAYNE L. REV. 9 (1999).

44. *See*, United States v. Cherokee Nation of Oklahoma, 480 U. S. 700.

45. *See*, Johnson and Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1 (1967).

46. The Clean Water Act, originally the Federal Water Pollution Control Act Amendments of 1972, is now codified at 33 U.S.C § 1251-1387.

47. 33 U. S. C. § 1251(a)(1).

48. 33 U. S. C. § 1311(a).

49. 33 U.S.C. § 1362(12).

50. 33 U.S.C. § 1362 (7).

51. United States v. Ashland Oil and Transportation Company, 504 F. 2d 1317 (6th Cir. 1974).

> Congress' clear intention as revealed in the Act itself was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution a part of a navigable stream.[52]

The Court squarely addressed the issue of Congressional intent by stating:

> We believe Congress knew exactly what it was doing and that it intended the Federal Water Pollution Control Act [CWA] to apply, as Congressman Dingell put it, "to all waterbodies, including main streams and their tributaries."[53]

This gave rise to the following two questions: (1) Did Congress intend to define away the old "navigability" restriction? and (2) Does Congress have such power? The court in *United States v. Holland*,[54] citing the *Ashland Oil* decision, answered affirmatively to both.[55]

In *Holland*, the government contended that defendants filled the waters of a bayou with sand, dirt, dredged spoil and biological materials without the permits required under the CWA. The court indicated that the waters receiving the impact of the prohibited conduct were indeed within the jurisdiction of the CWA.[56]

The Supreme Court in the 1985 "takings" case of *United States v. Riverside Bayview Homes*,[57] further demonstrated that regulation under the CWA was not tied to "navigability." The plaintiffs claimed that the Army Corps of Engineers' permitting requirement was a taking without just compensation in violation of the Fifth Amendment. The Court held that neither the imposition of the permit requirement itself nor the denial of a permit necessarily constitutes a taking.[58] The Court was also persuaded that the language, policies and history of the CWA compelled a finding that the Corps acted reasonably in interpreting the CWA to require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." [59]

However, in its most recent effort to deal with the question, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,*[60] the United States Supreme Court gave the

---

52. *Id.*

53. *Id.* at 1325.

54. 373 F. Supp. 665 (M.D. Fla.1974).

55. *Id*. at 671-72.

56. *Id*. at 673-74.

57. 474 U. S. 121 (1985).

58. *Id*. at 126.

59. *Id*. at 131.

60. 531 U. S. 159 (2000). For an insightful analysis of this case, see Margaret A. Johnston, *Environmental Law-Clean Water Act-The Supreme Court Scales Back the Army Corps of Engineers' Jurisdiction over "Navigable Waters" Under the Clean Water Act*: Solid Waste Agency v. United States Army Corps of Engineers, 531 U. S. 159 (2001) 24 UALR L. REV. 329 (2002).

CWA provisions a less expansive reading and refused to extend the authority of the Corps to regulate wetlands not adjacent to open water. In this case the Corps had asserted jurisdiction over the site of an abandoned sand and gravel pit mining operation that had since abandonment, evolved into permanent and seasonal ponds that were used as habitat by migratory bird species. The Corps recognized that this site was not one containing wetlands but asserted that it qualified as "waters of the United States" and that its jurisdiction could be upheld on intrastate waters that provide habitat for migratory birds.

The Court determined that the Corps' argument that it could regulate the filling of the area because it provided habitat for migratory birds was not supported by the CWA and indicated that the previous decision in *Bayview Homes* was premised upon a "significant nexus" between the wetlands and "navigable waters."[61] While *Bayview Homes* recognized that Congress intended to include in the CWA some waters that would not meet the traditional test of navigability, the Court was not willing to agree that the use of the phrase "waters of the United States" in the CWA could "constitute a basis for reading the term 'navigable waters' out of the statute.[62] Chief Justice Rehnquist, writing for the majority, said:

> But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[63]

The Court was unwilling to find that Congress had acquiesced to the Corps' regulations that included the more expansive definition and assertion of jurisdiction.

While this more restrictive view of the language used in the CWA raises questions about congressional intent, it does not alter the underlying fact that the authority to regulate under the Clean Water Act is based on the broad power of the Commerce Clause, although the majority suggests that when Congress passed the CWA it was exerting nothing more than its power over navigation. As the dissenting opinion points out, the goals of the CWA have nothing to do with navigation at all [64] but is about environmental regulation, "an accepted exercise of federal power."[65]

The CWA requires permits from the Army Corps of Engineers for dredging and filling operations in any "navigable waters," [66] as well as certification related to water quality standards by the state or the Environmental Protection Agency. [67] In many states, state law authorizes an appropriate

---

61. *Id*. at 680.

62. *Id*. at 682.

63. *Id.*

64. *Id.* at 688.

65. I*d.* at 693.

66. 33 U.S. C. § 1344. Under the Supreme Court's reading of the statute, this includes traditionally navigable waters, their non-navigable tributaries and adjacent wetlands.

67. 33 U. S. C. § 1341.

department of state government to administer, on behalf of the state, its own permit program for discharges into waters, with its jurisdiction in lieu of that of the Environmental Protection Agency. [68]

In addition, the CWA requires states to promulgate water quality standards protecting fishable and swimmable uses in all streams. [69] State law treats this mandate as an administrative rulemaking function that will be assigned to the pollution control agency.[70]

When the states act pursuant to any of these purposes outlined in the CWA, a federal statute enacted by Congress, they are acting pursuant to specific authority delegated by Congress under its broad Commerce Clause jurisdiction. The concept of "navigability," then, is related only in a general way to the authority of the state to regulate water quality under the delegated authority.

VI. CONCLUSION

What first appears to be a simple concept -- whether a stream is navigable -- can, in fact, become a complex matter. Not only is the concept of navigability subject to multiple definitions, the definition used varies depending on the issue confronted. For example, if the issue is stream bed ownerhip, the concept of navigability will determine the outcome, but the test used is the federal test applied as of the date of statehood. This makes it necessary to offer proof of a particular stream's status at a historical point. If the question is public use of the surface of the stream for recreational purposes, the navigability test used may be a state definition less restrictive than the traditional federal "commercial usefulness" test. And the state may permit access on other grounds. Last, if the question is one of regulatory authority under some federal statute, the test will be the federal test applied to current situation. A federal agency's authority (or that of a state agency if delegated by federal statute) may be premised on navigability but, in fact, derives from the Commerce Clause of the United States Constitution.

This work is largely drawn from "Of Cows, Canoes and Commerce: How the Concept of Navigability Provides an Answer if You Know Which Question to Ask," to be published in the UALR Law Review (2002) that was co-authored with Steven Zraick of the Arizona Department of Agriculture.

This article was prepared in August, 2002.

---

68. *See e.g.* Ark. Code. Ann. § 8-4-208.

69. 33 U.S.C. § 1313.

70. *See e. g.* Ark. Code. Ann. § 8-4-202(b)(3).

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

The National AgLaw Center is a federally funded research institution
located at the University of Arkansas School of Law

Web site: www.NationalAgLawCenter.org • Phone: (479)575-7646 • Email: NatAgLaw@uark.edu