

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN PETROLEUM INSTITUTE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-2247 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
PETROLEUM MARKETERS)	
ASSOCIATION OF AMERICA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 02-2249 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
MARATHON OIL COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-2254 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**MOTION OF PLAINTIFFS AMERICAN PETROLEUM INSTITUTE AND
MARATHON OIL COMPANY FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and LCvR 56.1, Plaintiffs American Petroleum Institute (“API”) and Marathon Oil Company (“Marathon”) respectfully move for summary judgment against Defendants United States Environmental Protection Agency (“EPA”) and Michael O. Leavitt, Administrator of EPA, on Claim I and Claim II in API’s Complaint and Claim I and Claim II in Marathon’s Complaint. Pursuant

to LCvR 7(f), Plaintiffs request oral argument before the Court on this motion.

The Complaints seek judicial review of several aspects of a final rule promulgated by the Defendants under section 311 of the Clean Water Act, 33 U.S.C. § 1321, entitled “Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities.” 67 Fed. Reg. 47042 (July 17, 2002). The challenged rule amends and readopts existing rules in 40 C.F.R. Part 112, popularly known as the “SPCC” rules (for oil “Spill Prevention Control and Countermeasure”).

API and the Defendants have reached a settlement as to Claims III - V in API’s Complaint, and Marathon and the Defendants have reached a settlement as to Claims III - VII in Marathon’s Complaint, and it will not be necessary to litigate those claims. Claims I and II in both Complaints, the subject of this motion, concern the rule’s definition of the term “navigable waters,” codified in 40 C.F.R. § 112.2 (2003). The applicability of the SPCC rules in 40 C.F.R. Part 112 (2003) depends upon that definition.

Plaintiffs request that the court vacate and remand the rule’s definition of “navigable waters.” As explained in detail in the accompanying Memorandum In Support Of Motion Of Plaintiffs American Petroleum Institute And Marathon Oil Company For Partial Summary Judgment and Statement Of Material Facts As To Which Plaintiffs American Petroleum Institute And Marathon Oil Company Contend There Is No Genuine Issue, summary judgment is appropriate because there are no genuine issues of material fact, and Plaintiffs are entitled to judgment as a matter of law.

On its face, the rule’s definition of “navigable waters” reaches areas that are neither navigable waters in the traditional sense, nor adjacent to such waters, nor having even a significant nexus to such waters. In fact, to be covered by the definition, it is not necessary that an area have more than a minimal potential effect on interstate commerce.

EPA’s promulgation of the definition was arbitrary and capricious because it did not reflect the reasoned decision-making required of federal agencies under controlling precedents of the Supreme Court and the District of Columbia Circuit. Additionally, the definition is contrary to law, in excess of EPA’s statutory authority, and in excess of federal power under the Constitution.

WHEREFORE, Plaintiffs respectfully request that the Court grant summary judgment against Defendants on Claims I and II in API's Complaint and on Claims I and II in Marathon's Complaint, and vacate and remand the definition of "navigable waters" in 40 C.F.R. § 112.2 (2003) to the extent that definition includes areas that are neither traditional navigable waters, nor wetlands adjacent to traditional navigable waters. In the alternative, Plaintiffs respectfully request that the Court vacate and remand the definition of "navigable waters" to the extent that definition includes areas that lack a significant nexus to traditional navigable waters.

Respectfully submitted,

// s //

Thomas Sayre Llewellyn (D.C. Bar No. 332338)
LAW OFFICE OF
THOMAS SAYRE LLEWELLYN
5125 MacArthur Boulevard, NW Suite 32A
Washington, DC 20016
(202) 237-7291 (telephone)
(202) 237-7884 (facsimile)

Harry M. Ng (D.C. Bar No. 416604)
M. Elizabeth Cox (D.C. Bar No. 417535)
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8250 (telephone)
(202) 682-8033 (facsimile)

Attorneys for Plaintiff American Petroleum Institute

// s //

John C. Martin (D.C. Bar No. 358679)
Peter D. Robertson (D.C. Bar No. 395488)
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6032 (telephone)

Edward Strenkowski
Office of General Counsel
MARATHON OIL COMPANY
5555 San Felipe Road
Houston, TX 77056
(713) 296-2529 (telephone)

Attorneys for Plaintiff Marathon Oil Co.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN PETROLEUM INSTITUTE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-2247 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	
PETROLEUM MARKETERS)	
ASSOCIATION OF AMERICA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 02-2249 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	
MARATHON OIL COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-2254 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
OF PLAINTIFFS AMERICAN PETROLEUM INSTITUTE AND MARATHON
OIL COMPANY FOR PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

INDEX OF EXHIBITS ix

NATURE AND STAGE OF THE PROCEEDING 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT16

ARGUMENT18

 I. EPA’S PROMULGATION OF AN ALL-ENCOMPASSING DEFINITION OF “NAVIGABLE WATERS” IN THE SPCC RULES WAS ARBITRARY AND CAPRICIOUS, AND WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW.....18

 II. THE DEFINITION OF “NAVIGABLE WATERS” IN THE SPCC RULES IS IN EXCESS OF EPA’S STATUTORY AUTHORITY.....24

 A. The CWA Section 502(7) Definition Of “Navigable Waters” Does Not Extend To Areas That Are Neither Traditional Navigable Waters Nor Adjacent To Such Waters, Nor Which Lack Even A Significant Nexus To Such Waters.....24

 B. Assuming That The CWA Section 502(7) Definition Reaches Far Beyond Traditional Navigable Waters, That Definition Does Not Govern The Applicability Of CWA Section 311.....34

 III. THE DEFINITION OF “NAVIGABLE WATERS” IN THE SPCC RULES EXCEEDS FEDERAL POWER UNDER THE CONSTITUTION.....38

 A. The Definition Of “Navigable Waters” Exceeds Congressional Authority To Regulate Intrastate Activity, In Contravention Of Constitutional Principles Of Federalism39

 B. Because The Regulated Activity At Issue Does Not Substantially Affect Interstate Commerce, EPA’s Interpretation Exceeds Commerce Clause Authority41

 IV. THE PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.....43

CONCLUSION44

TABLE OF AUTHORITIES

Note: Authorities upon which we chiefly rely are marked with asterisks (*)

CASES

<i>American Petroleum Inst. v. EPA</i> , 216 F.3d 50 (D.C. Cir. 2000)	18
<i>Appalachian Power Co. v. EPA</i> , 135 F.3d 791 (D.C. Cir. 1998)	23
<i>Association of Data Processing Serv. Orgs. v. Camp</i> , 397 U.S. 150 (1970)	44
<i>Avoyelles Sportsmen’s League v. Marsh</i> , 715 F.2d 897 (5th Cir. 1983)	9
<i>Bell Atl. Tel. Cos. v. FCC</i> , 206 F.3d 1 (D.C. Cir. 2000)	18, 19
* <i>City of Kansas City, Mo. v. HUD</i> , 923 F.2d 188 (D.C. Cir. 1991)	18-19
<i>Continental Air Lines v. DOT</i> , 843 F.2d 1444 (D.C. Cir. 1988)	19
* <i>Economy Power & Light v. United States</i> , 256 U.S. 113 (1921)	2, 29
* <i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council</i> , 485 U.S. 568 (1988)	38
<i>Ex parte Boyer</i> , 109 U.S. 629 (1884)	39
<i>FD&P Enters. Inc. v. Army Corps of Eng’rs</i> , 239 F. Supp. 2d 509 (D.N.J. 2003)	33
* <i>FPC v. Transcontinental Gas Pipe Line Corp.</i> , 423 U.S. 326 (1976)	23
<i>Gibbs v. Babbitt</i> , 214 F.3d 483 (4th Cir. 2000), <i>cert. denied</i> , 531 U.S. 1145 (2001)	42
<i>Hunt v. Washington State Apple Advertising Comm’n</i> , 432 U.S. 333 (1977)	43
<i>Independent Tanker Owners Comm. v. Dole</i> , 809 F.2d 847 (D.C. Cir.), <i>cert. denied</i> <i>sub nom. Atlantic Richfield Co. v. Independent U.S. Tankers Owners Comm.</i> , 484 U.S. 819 (1987)	18
<i>International Ladies’ Garment Workers’ Union v. Donovan</i> , 722 F.2d 795 (D.C. Cir. 1983), <i>cert. denied</i> , 469 U.S. 820 (1984)	19
<i>International Longshoremen’s Ass’n v. Nat’l Mediation Bd.</i> , 870 F.2d 733 (D.C. Cir. 1989)	19, 20, 23
<i>International Union, UMW v. FMSHA</i> , 920 F.2d 960 (D.C. Cir. 1990)	24

<i>ITT Industries, Inc. v. NLRB</i> , 251 F.3d 995 (D.C. Cir. 2001)	18, 20
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979)	39
<i>Leslie Salt Co. v. United States</i> , 55 F.3d 1388 (9th Cir. 1995)	8
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	43
<i>Marathon Oil Co. v. EPA</i> , No. 97-CV-267-D, 1009 WL 34075426 (D. Wyo. Aug. 20, 1998)	38
<i>Maryland v. Wirtz</i> , 392 U.S. 183 (1968)	42
* <i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.</i> , 463 U.S. 29 (1983)	18
<i>National Wildlife Fed'n v. Costle</i> , 629 F.2d 118 (D.C. Cir. 1980)	23-24
<i>New York State Bar Ass'n v. FTC</i> , 276 F. Supp. 2d 110 (D.D.C. 2003)	20
<i>Northern Cal. River Watch v. City of Healdsburg</i> , 2004 U.S. Dist. LEXIS 1008 (N.D. Cal. Jan. 23, 2004)	1
<i>NRDC v. Callaway</i> , 392 F. Supp. 685 (D.D.C. 1975)	7, 17, 31
<i>Panhandle E. Pipe Line Co. v. FERC</i> , 890 F.2d 435 (D.C. Cir. 1989)	19
<i>Production Workers Union of Chicago v. NLRB</i> , 793 F.2d 323 (D.C. Cir. 1986)	18
<i>Rancho Viejo, LLC v. Norton</i> , 323 F.3d 1062 (D.C. Cir. 2003), <i>cert. denied</i> , 72 U.S.L.W. 3551 (U.S. March 1, 2004) (No. 03-761)	39, 40
* <i>Rettig v. PBGC</i> , 744 F.2d 133 (D.C. Cir. 1984)	18, 19
* <i>Rice v. Harken Exploration Co.</i> , 250 F.3d 264 (5th Cir. 2001)	22, 23
<i>Quivira Mining Co. v. EPA</i> , 765 F.2d 126 (10th Cir. 1985), <i>cert. denied</i> , 474 U.S. 1055 (1986)	8-9
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947)	19
<i>Sierra Club v. EPA</i> , 292 F.3d 895 (D.C. Cir. 2002)	43
<i>Small Refiner Lead Phase-Down Task Force v. EPA</i> , 705 F.2d 506 (D.C. Cir. 1983)	19
* <i>Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs</i> , 531 U.S. 159 (2001)	<i>passim</i>
<i>South Carolina v. Georgia</i> , 93 U.S. 4 (1876)	39
<i>Tabor v. Joint Bd. for Enrollment of Actuaries</i> , 566 F.2d 705 (D.C. Cir. 1977)	24

* <i>The Daniel Ball</i> , 77 U.S. (10 Wall.) 557 (1871)	2, 28, 29, 39
<i>The Montello</i> , 87 U.S. (20 Wall.) 430 (1874)	39
* <i>United States v. Appalachian Elec. Power Co.</i> , 311 U.S. 377 (1940)	2, 28, 39
<i>United States v. Ashland Oil & Transp. Co.</i> , 504 F.2d 1317 (6th Cir. 1974)	9, 37
<i>United States v. Byrd</i> , 609 F.2d 1204 (7th Cir. 1979)	9
<i>United States v. Deaton</i> , 332 F.3d 698 (4th Cir. 2003), <i>cert. denied</i> , 72 U.S.L.W. 3632 (U.S. April 5, 2004) (No. 03-701)	34
<i>United States v. Eidson</i> , 108 F.3d 1336 (11th Cir. 1997)	8
<i>United States v. Holland</i> , 373 F. Supp. 665 (M.D. Fla. 1974)	35
* <i>United States v. Lopez</i> , 514 U.S. 549 (1995)	39, 40, 41
<i>United States v. Menasche</i> , 348 U.S. 528 (1955)	36
* <i>United States v. Morrison</i> , 529 U.S. 598 (2000)	39-40
<i>United States v. Needham</i> , No. 6:01-CV-01897, 2002 WL 1162790 (W.D. La. Jan. 23, 2002), <i>rev'd</i> , 354 F.3d 340 (5th Cir. 2003)	22
<i>United States v. Newdunn</i> , 195 F. Supp. 2d 751 (E.D. Va. 2002), <i>rev'd</i> , 344 F.3d 407 (4th Cir. 2003), <i>cert. denied</i> , 72 U.S.L.W. 3632 (U.S. April 5, 2004) (No. 03-637).....	22
<i>United States v. Rapanos</i> , 190 F. Supp. 2d 1011 (E.D. Mich. 2002), <i>rev'd</i> , 339 F.3d 447 (6th Cir. 2003), <i>cert. denied</i> , 72 U.S.L.W. 3632 (U.S. April 5, 2004) (No. 03-929).....	22
<i>United States v. Riverside Bayview Homes</i> , 474 U.S. 121 (1985)	10, 13, 14, 31, 32, 33
<i>United States v. Stoeco Homes, Inc.</i> , 498 F.2d 597 (3d Cir. 1974)	25, 35
<i>United States v. Texas Pipe Line Co.</i> , 611 F.2d 345 (10th Cir. 1979)	9, 36-37
<i>United States v. TGR Corp.</i> , 171 F.3d 762 (2d Cir. 1999)	8
* <i>United States v. Wilson</i> , 133 F.3d 251 (4th Cir. 1997)	12, 21, 22, 42
<i>United States Information Agency v. FLRA</i> , 960 F.2d 165 (D.C. Cir. 1992)	18, 20
<i>Ward v. Coleman</i> , 598 F.2d 1187 (10th Cir. 1979), <i>rev'd</i> , 448 U.S. 242 (1980)	37
<i>Wyoming v. Hoffman</i> , 437 F. Supp. 114 (D. Wyo. 1977)	37

CONSTITUTION

U. S. Const. art. I, § 8, cl. 3	18, 38, 39
---------------------------------------	------------

STATUTES

* 5 U.S.C. § 553(c) (2000)	19
5 U.S.C. § 702 (2000)	1
* 5 U.S.C. § 706(2)(A) (2000)	19
33 U.S.C. § 403 (2000)	1, 25
33 U.S.C. § 407 (2000)	1
33 U.S.C. § 1161 (1970)	2
33 U.S.C. § 1161(b)(2) (1970)	3
33 U.S.C. § 1161(b)(4) (1970)	3
33 U.S.C. § 1161(f) (1970)	3
33 U.S.C. § 1161(j)(1)(C) (1970)	3
33 U.S.C. § 1251(b) (2000)	41
33 U.S.C. § 1318 (2000)	16
33 U.S.C. § 1311 (2000)	3
* 33 U.S.C. § 1321 (2000)	<i>passim</i>
33 U.S.C. § 1321(b)(1) (2000)	34, 37
33 U.S.C. § 1321(b)(3) (2000)	3, 8, 34, 37
33 U.S.C. § 1321(b)(5) (2000)	3
33 U.S.C. § 1321(f) (2000)	3
* 33 U.S.C. § 1321(j)(1)(C) (2000)	3, 5, 37
33 U.S.C. § 1321(j)(5) (2000)	37
33 U.S.C. § 1321(n) (2000)	1
33 U.S.C. § 1342 (2000)	3
33 U.S.C. § 1344 (2000)	3, 6, 7, 10, 12
33 U.S.C. § 1344(a) (2000)	13, 31, 33
33 U.S.C. § 1344(g) (2000)	8
* 33 U.S.C. § 1362(7) (2000)	<i>passim</i>
33 U.S.C. § 1362(8) (2000)	8
33 U.S.C. § 1362(12) (2000)	3
33 U.S.C. § 2701(21) (2000)	37

SESSION LAWS

Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977)	8, 10, 31
Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948)	2
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972)	3
Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990)	11, 37
Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (1899)	1

Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965)	25
Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970)	2, 34

LEGISLATIVE HISTORY

* 116 Cong. Rec. 8985 (March 24, 1970)	35
* Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972 (1973)	4, 25, 26, 27, 28, 32, 36
H.R. 11896, 92d Cong., 2d Sess. (1972)	26
H.R. Rep. No. 911, 92d Cong., 2d Sess. (1972)	25-26
* H.R. Rep. No. 917, 91st Cong., 2d Sess. (1970)	28
* H.R. Rep. No. 1323, 92d Cong., 2d Sess. (1972)	29
S. 2770, 92d Cong., 1st Sess. (1971)	3, 36
S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972)	13, 25, 32, 36
S. Doc. No. 248, 79th Cong., 2d Sess. (1946)	19

CODE OF FEDERAL REGULATIONS

33 C.F.R. 209.120(d)(1) (1974)	6, 13, 32
33 C.F.R. § 209.150	29
33 C.F.R. § 209.260(e)(1) (1974)	6, 13, 32
33 C.F.R. § 328.3 (2003)	10
33 C.F.R. § 328.3(a)(3) (1993)	12, 21
40 C.F.R. Part 110	11
40 C.F.R. Part 112 (2003)	1, 11, 14
* 40 C.F.R. § 112.2 (2003)	<i>passim</i>
40 C.F.R. § 112.20 (2003)	37
40 C.F.R. § 122.2 (2003)	10
40 C.F.R. § 122.3(t) (1979)	9
40 C.F.R. § 125.1(o) (1973)	5

FEDERAL REGISTER

35 Fed. Reg. 8280 (May 27, 1970)	29
38 Fed. Reg. 13528, 13529 (May 22, 1973)	4
38 Fed. Reg. 19334 (July 19, 1973)	5

38 Fed. Reg. 19335 (July 19, 1973)	5
38 Fed. Reg. 34164, 34165 (Dec. 11, 1973)	6
42 Fed. Reg. 37122, 37144 (July 19, 1977)	7
42 Fed. Reg. 37127 (July 19, 1977)	7
43 Fed. Reg. 37078, 37079 (Aug. 21, 1978)	10
44 Fed. Reg. 32854, 32901 (June 7, 1979)	9
45 Fed. Reg. 33814, 33821 (May 20, 1980)	10
45 Fed. Reg. 33815 (May 20, 1980)	10
50 Fed. Reg. 9776 (March 11, 1985)	11, 20
51 Fed. Reg. 41206, 41217 (Nov. 13, 1986)	13
52 Fed. Reg. 10712 (April 2, 1987)	20
52 Fed. Reg. 10712, 10719 (April 2, 1987)	11
56 Fed. Reg. 54612, 54618 (Oct. 22, 1991)	11
56 Fed. Reg. 54631, 54632 (Oct. 22, 1991)	11
58 Fed. Reg. 45039 (Aug. 25, 1993)	6
66 Fed. Reg. 7702 (Jan. 24, 2001)	12
67 Fed. Reg. 47042 (July 17, 2002)	1, 14
67 Fed. Reg. 47075 (July 17, 2002)	14, 16, 20, 21
67 Fed. Reg. 47142 (July 17, 2002)	14, 21
68 Fed. Reg. 1991 (Jan. 15, 2003)	15, 16
68 Fed. Reg. 1993 (Jan. 15, 2003)	15
68 Fed. Reg. 1995 (Jan. 15, 2003)	15
68 Fed. Reg. 1995-97 (Jan. 15, 2003)	22
68 Fed. Reg. 1995-98 (Jan. 15, 2003)	16
68 Fed. Reg. 1996 (Jan. 15, 2003)	15, 23
68 Fed. Reg. 1997 (Jan. 15, 2003)	15, 23
68 Fed. Reg. 1998 (Jan. 15, 2003)	23

EXECUTIVE AGENCY OPINIONS

EPA General Counsel Opinion (Dec. 9, 1971)	30, 35
EPA General Counsel Opinion (Feb. 6, 1973)	4, 36

LEGAL DICTIONARIES

Black's Law Dictionary (4th ed. rev. 1968)	35
--	----

LEGAL PERIODICALS

Albrecht and Nickelsburg, <i>Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act</i> , 32 <i>Envtl. L. Rep.</i> 11042 (2002)	28
---	----

INDEX OF EXHIBITS

- EXHIBIT 1 Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) (EXCERPT)
- EXHIBIT 2 EPA General Counsel Opinion (Feb. 6, 1973)
- EXHIBIT 3 40 C.F.R. § 125.1(o) (1973)
- EXHIBIT 4 38 Fed. Reg. 19334 (July 19, 1973)
- EXHIBIT 5 38 Fed. Reg. 34164 (Dec. 11, 1973)
- EXHIBIT 6 33 C.F.R. § 209.120(d)(1) (1974)
- EXHIBIT 7 33 C.F.R. § 209.260 (1974)
- EXHIBIT 8 42 Fed. Reg. 37122 (July 19, 1977) (EXCERPT)
- EXHIBIT 9 44 Fed. Reg. 32854 (June 7, 1979) (EXCERPT)
- EXHIBIT 10 43 Fed. Reg. 37078 (Aug. 21, 1978) (EXCERPT)
- EXHIBIT 11 33 C.F.R. § 328.3 (2003)
- EXHIBIT 12 40 C.F.R. § 122.2 (2003) (EXCERPT)
- EXHIBIT 13 45 Fed. Reg. 33814 (May 20, 1980) (EXCERPT)
- EXHIBIT 14 56 Fed. Reg. 54612 (Oct. 22, 1991) (EXCERPT)
- EXHIBIT 15 52 Fed. Reg. 10712 (April 2, 1987)
- EXHIBIT 16 50 Fed. Reg. 9776 (March 11, 1985)
- EXHIBIT 17 Withdrawn SPCC Rule Of January 2001 (EXCERPT)
- EXHIBIT 18 Response To Comments Document (Jan. 11, 2001) (EXCERPT)
- EXHIBIT 19 66 Fed. Reg. 7702 (Jan. 24, 2001)
- EXHIBIT 20 51 Fed. Reg. 41206 (Nov. 13, 1986) (EXCERPT)
- EXHIBIT 21 Memorandum From Gary S. Guzy, Robert M. Anderson, *Re: Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters* (Jan. 19, 2001)
- EXHIBIT 22 67 Fed. Reg. 47042 (July 17, 2002) (EXCERPT)
- EXHIBIT 23 40 C.F.R. § 112.2 (2003) (EXCERPT)

- EXHIBIT 24 68 Fed. Reg. 1991 (Jan. 15, 2003)
- EXHIBIT 25 H.R. Rep. No. 917, 91st Cong., 2d Sess. (1970)
- EXHIBIT 26 35 Fed. Reg. 8280 (May 27, 1970)
- EXHIBIT 27 H.R. Rep. No. 1323, 92d Cong., 2d Sess. (1972) (EXCERPT)
- EXHIBIT 28 EPA General Counsel Opinion (Dec. 9, 1971)
- EXHIBIT 29 116 Cong. Rec. 8983-85 (March 24, 1970)
- EXHIBIT 30 Statement of Michele Rinn
- EXHIBIT 31 Statement of Richard John Stephen Hart
- EXHIBIT 32 Statement of Gordon Reid Smith
- EXHIBIT 33 Statement of Donald R. Sellars
- EXHIBIT 34 Declaration of Marvin Blakesley

NATURE AND STAGE OF THE PROCEEDING

This is an action under section 311(n) of the Clean Water Act (“CWA”), 33 U.S.C. § 1321(n) (2000), and section 10(a) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702 (2000), seeking judicial review of several aspects of a final rule promulgated by the Defendants, entitled “Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities.” 67 Fed. Reg. 47042 (July 17, 2002). The challenged rule amends and readopts existing rules in 40 C.F.R. Part 112, popularly known as the “SPCC” rules (for oil “Spill Prevention Control and Countermeasure”).

Plaintiff American Petroleum Institute (“API”) and the Defendants have reached a settlement as to Claims III - V in API’s Complaint, and Plaintiff Marathon Oil Company (“Marathon”) and the Defendants have reached a settlement as to Claims III - VII in Marathon’s Complaint, and it will not be necessary to litigate those claims. Claims I and II in both complaints concern the definition of the term “navigable waters” in 40 C.F.R. § 112.2 (2003), which governs the scope of 40 C.F.R. Part 112 (2003). API and Marathon maintain herein that the Defendants’ promulgation of the definition of “navigable waters” was arbitrary and capricious; without observance of procedure required by law; contrary to law; in excess of statutory authority; and in excess of federal power under the Constitution.

STATEMENT OF FACTS

Background on “the Navigable Waters of the United States”

The phrase “navigable waters of the United States” has an established meaning in the federal common law. As one court concisely explained it, the term

[D]efines a federal servitude, derived from the commerce clause, that overlays what might otherwise be considered state waters. After decades of federal common-law usage, Congress adopted the term to set the jurisdictional limits of numerous river, harbor, and waterway laws.

Northern Cal. River Watch v. City of Healdsburg, 2004 U.S. Dist. LEXIS 1008, *18 (N.D. Cal. Jan. 23, 2004). The laws in which Congress used the term include the Rivers and Harbors Appropriation Act of 1899 (“Rivers and Harbors Act”), ch. 425, 30 Stat. 1121 (1899). See 33 U.S.C. §§ 403, 407 (2000).

The classic explanation of the term appeared in the case of *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871):

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Later decisions of the Supreme Court clarified that “navigable waters of the United States” include waters that had once been used for navigation, although no longer so used because of obstructions to navigation, *Economy Power & Light v. United States*, 256 U.S. 113, 117-23 (1921); and waters that could be used for navigation with reasonable improvements, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940).

The issue in this case is the scope of the term “navigable waters of the United States” and the term “navigable waters,” *as those terms are used in the CWA*. To avoid confusion, “navigable waters of the United States,” *as defined in the above-cited Supreme Court cases* to include waters that were or had been navigable in fact or which could reasonably be so made, will hereinafter be referred to as “traditional navigable waters” or “navigable in fact waters.”

Origins of Section 311

The Federal Water Pollution Control Act (“FWPCA,” now commonly known as the Clean Water Act or “CWA”) was originally enacted in 1948, ch. 758, 62 Stat. 1155 (1948), and has been amended many times. Current section 311, 33 U.S.C. § 1321 (2000), traces its roots to the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970). That Act added to FWPCA a new section 11, entitled “Control Of Pollution By Oil” and codified at 33 U.S.C. § 1161 (1970) (current version at 33 U.S.C. § 1321 (2000)).

The new section 11 prohibited the discharge of oil in harmful quantities “into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.” 33 U.S.C. § 1161(b)(2) (1970) (current version at 33 U.S.C. § 1321(b)(3) (2000)). It also required reporting of discharges; established liability for discharges; and directed the President to issue regulations “establishing procedures, methods, and requirements for equipment to prevent discharges.” 33 U.S.C. §§ 1161(b)(4), (f), and (j)(1)(C) (1970) (current versions at 33 U.S.C. §§ 1321(b)(5), (f), and (j)(1)(C) (2000)).

Although the term “navigable waters of the United States” was used throughout section 11, the term was not defined by statute.

Federal Water Pollution Control Act Amendments Of 1972

Two years later, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (hereafter, “1972 Amendments”). Pub. L. No. 92-500, 86 Stat. 816 (1972). The 1972 Amendments added significant new water quality-related regulatory programs to FWPCA and are generally considered to represent a major turning point in federal regulation of water pollution. In particular, the 1972 Amendments established the National Pollutant Discharge Elimination System (“NPDES”), which requires a permit from EPA for the discharge of “pollutants” to the “navigable waters;” and the section 404 program, which requires a permit from the Army Corps of Engineers (“Corps”) for the discharge of “dredged or fill material” to the “navigable waters.” Pub. L. No. 92-500, § 2, 86 Stat. 844, 880, 884, 886 (1972) (current versions at 33 U.S.C. §§ 1311, 1342, 1344, 1362(12) (2000)). In a new section 502(7), the 1972 Amendments defined the term “navigable waters” as “the waters of the United States, including the territorial seas.” Pub. L. No. 92-500, § 2, 86 Stat. 886 (current version at 33 U.S.C. § 1362(7) (2000)).

The 1972 Amendments carried forward the oil pollution control provisions of section 11, with some amendments not relevant here, and redesignated section 11 as section 311. Pub. L. No. 92-500, § 2, 86 Stat. 862 (1972) (current version at 33 U.S.C. § 1321 (2000)). The Senate bill, S. 2770, would have

substituted the term “navigable waters” for the term “navigable waters of the United States,” but that proposed change did not survive the conference. *See* 2 Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972, at 1534, 1646 (1973) (hereafter, “1972 Legislative History”) {Exhibit 1}.

Thus, section 311 continued to apply to discharges of oil to “the navigable waters of the United States,” as well as adjoining shorelines and the waters of the contiguous zone. The 1972 Amendments did not provide a definition of the term “navigable waters of the United States.”

1973 Definition Of “Navigable Waters” For The NPDES Program

On February 6, 1973, EPA’s General Counsel issued an opinion concerning the term “navigable waters” in section 502(7), 33 U.S.C. § 1362(7). EPA General Counsel Opinion (Feb. 6, 1973) {Exhibit 2}. The opinion noted that early versions of the House and Senate bills that led to the 1972 Amendments had defined “navigable waters” to include “navigable waters of the United States.” The opinion found it “significant” that as enacted, section 502(7) simply defined “navigable waters” as “the waters of the United States, including the territorial seas” (thereby deleting the “navigable” qualifier). The opinion concluded that “[t]he only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce.”

Following the General Counsel’s opinion, EPA promulgated a definition of “navigable waters” for purposes of the NPDES program. 38 Fed. Reg. 13528, 13529 (May 22, 1973). The definition read as follows:

The term “navigable waters” includes:

- (1) All navigable waters of the United States;
- (2) Tributaries of navigable waters of the United States;
- (3) Interstate waters;
- (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;

(5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

40 C.F.R. § 125.1(o) (1973) {Exhibit 3}.

1973 Definition Of “Navigable Waters” For The SPCC Program

On July 19, 1973, EPA proposed the first oil Spill Prevention Control and Countermeasure (“SPCC”) regulations, to implement section 311(j)(1)(C) of FWPCA, 33 U.S.C. § 1321(j)(1)(C). 38 Fed. Reg. 19334 (July 19, 1973) {Exhibit 4}. The proposed regulations were to require the adoption and implementation of SPCC plans.

Consistent with section 311(j)(1)(C), the proposed SPCC regulations were to apply to facilities that could reasonably be expected to discharge oil in harmful quantities into or upon “the navigable waters of the United States” or adjoining shorelines. 38 Fed. Reg. 19335 (proposed 40 C.F.R. § 112.3(a)). EPA did not propose a definition of “the navigable waters of the United States.” Instead, it proposed to define the term “navigable waters” as “the waters of the United States, including the territorial seas.” *Id.* (proposed 40 C.F.R. § 112.2(l)).

The proposed definition of “navigable waters” was the same as the definition of that term in section 502(7) of FWPCA, as added by the 1972 Amendments. EPA did not explain whether or why it thought the term “navigable waters” (defined in section 502(7) to mean “the waters of the United States, including the territorial seas”) was the same as the term “navigable waters of the United States,” used in section 311.

On December 11, 1973, EPA promulgated a final SPCC rule. The final rule included a more detailed definition of “navigable waters”:

The term “navigable waters” of the United States means “navigable waters” as defined in section 502(7) of the FWPCA, and includes:

(1) all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92-500), and tributaries of such waters;

(2) interstate waters;

(3) intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

38 Fed. Reg. 34164, 34165 (Dec. 11, 1973) {Exhibit 5}.

In the preamble to the final 1973 SPCC rule, EPA again did not explain why it apparently decided to equate the term “navigable waters of the United States” in section 311 with the term “navigable waters,” defined in section 502(7) as “the waters of the United States, including the territorial seas.” EPA only said that its proposed definition of “navigable waters” was “expanded to the more descriptive definition used by the National Pollutant Discharge Elimination System.” 38 Fed. Reg. 34164. But for an amendment not relevant here,¹ the 1973 definition remained the same until EPA promulgated the 2002 amendments to the SPCC rules.

1974 Corps Definition Of “Navigable Waters” For The Section 404 Program

CWA section 404 authorizes the Corps to issue permits for the discharge of “dredged or fill material” to the “navigable waters.” 33 U.S.C. § 1344 (2000). In 1974, the Corps construed the section 502(7) term, “navigable waters,” differently from the way EPA construed the term. The Corps’ 1974 regulations defined “navigable waters” as:

[T]hose waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.

33 C.F.R. § 209.120(d)(1) (1974) {Exhibit 6}. The Corps stated that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” 33 C.F.R. § 209.260(e)(1) (1974) {Exhibit 7}. Thus, the Corps’ 1974 construction of the term “navigable waters” included an element of navigability.

¹ At 58 Fed. Reg. 45039 (Aug. 25, 1993), EPA added an exclusion from the definition for “prior converted cropland.”

NRDC v. Callaway

The Natural Resources Defense Council (“NRDC”) challenged the Corps’ 1974 section 404 definition of “navigable waters” in this Court. In a brief order, the Court struck down the Corps’ definition as unduly narrow, finding that:

Congress by defining the term “navigable waters” in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972 . . . 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.

NRDC v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

In response to *NRDC v. Callaway*, the Corps promulgated a much broader definition, that no longer was tied to navigability. *See* 42 Fed. Reg. 37122, 37144 (July 19, 1977) {Exhibit 8}. The Corps’ 1977 regulations defined the term “waters of the United States”² as:

- (1) The territorial seas;
- (2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;
- (3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition);
- (4) Interstate waters and their tributaries, including adjacent wetlands; and
- (5) All other waters of the United States not identified in paragraphs (1) – (4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

2 The Corps defined the term “waters of the United States” in place of “navigable waters” in an attempt to distinguish clearly between its CWA section 404 jurisdiction over “navigable waters” and its Rivers and Harbors Act jurisdiction over “navigable waters of the United States.” 42 Fed. Reg. 37127 (July 19, 1977) {Exhibit 8}.

Clean Water Act of 1977

In 1977, the Clean Water Act of 1977 was enacted, again substantially amending FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977). The 1977 amendments did not change the section 502(7) definition of “navigable waters.” Nor did they alter the operative phrase “navigable waters of the United States” in section 311.

The amendments did expand the coverage of section 311 to off-shore waters beyond the contiguous zone.³ For example, the general prohibition on discharges of oil in harmful quantities in section 311(b)(1) was expanded to cover -- in addition to discharges to the navigable waters of the United States, adjoining shorelines, or the contiguous zone – discharges:

in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

Pub. L. 95-217, § 58(a)(3), 91 Stat. 1594 (1977) (current version at 33 U.S.C. § 1321(b)(3) (2000)).

The 1977 amendments also added a subsection (g) to section 404, providing a mechanism for the implementation by states of permitting programs for the discharge of dredged or fill material to certain “navigable waters.” Pub. L. 95-217, § 67(b), 91 Stat. 1600-01 (1977) (current version at 33 U.S.C. § 1344(g) (2000)).

Historical Treatment Of “Navigable Waters” In The Federal Circuits

From shortly after enactment of the 1972 Amendments through the late 1990’s, the federal circuit courts of appeals more or less uniformly held that the section 502(7) definition of “navigable waters” was to be read as broadly as the Commerce Clause of the Constitution would allow, and without regard to traditional tests of navigability. *United States v. TGR Corp.*, 171 F.3d 762, 764-65 (2d Cir. 1999); *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394-95 (9th Cir. 1995); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129-30 (10th Cir. 1985), *cert. denied*,

³ The contiguous zone extends nine miles seaward of the territorial seas. *See* 40 C.F.R. § 112.2 (2003). The territorial seas extend from the coast to three miles offshore. 33 U.S.C. § 1362(8) (2000).

474 U.S. 1055 (1986); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 914-916 (5th Cir. 1983); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Byrd*, 609 F.2d 1204, 1209-11 (7th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974).

1979 Revised Definition Of “Navigable Waters” For The NPDES Program

In 1979, EPA promulgated a revised definition of “navigable waters” for purposes of the NPDES program. 44 Fed. Reg. 32854, 32901 (June 7, 1979) {Exhibit 9} (codified at 40 C.F.R. § 122.3(t) (1979)). The new, more expansive definition read as follows:

“Navigable waters” means “waters of the United States, including the territorial seas.” This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (1)--(4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (1)--(5) of this section

.....

40 C.F.R. § 122.3(t) (1979). During the rulemaking, EPA explained that:

The definition of “navigable waters” has been revised to more accurately reflect which waters are subject to the requirements of the Clean Water Act. Consistent with legislative history, judicial interpretations, and long-standing EPA policy, the term covers all waters which may be regulated by the Federal Government within constitutional limits, including but not limited to wetlands, intermittent streams, and impoundments.

43 Fed. Reg. 37078, 37079 (Aug. 21, 1978) {Exhibit 10}.

Although EPA has since further amended it, the 1979 NPDES definition was substantially the same as the NPDES definition today. *See* 40 C.F.R. 122.2 (2003).⁴ Over time, the Corps’ section 404 definition evolved such that it is the same as EPA’s NPDES definition. *Compare* 33 C.F.R. § 328.3 (2003) {Exhibit 11} *with* 40 C.F.R. § 122.2 (2003) {Exhibit 12}.

1980 Proposed Amendments To The SPCC Rules

In 1980, EPA proposed revisions to the SPCC rules, including a definition of “navigable waters” that was essentially the same as the 1979 NPDES definition. 45 Fed. Reg. 33814, 33821 (May 20, 1980) {Exhibit 13}. In the preamble, EPA said that it was proposing a revised definition so as to “match” the 1979 revised NPDES definition. *Id.* at 33815. EPA did not take action on this proposal until July 2002.

United States v. Riverside Bayview Homes

In 1985, the Supreme Court decided *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). The Court upheld the Corps’ section 404 definition of “navigable waters” to the extent it covered wetlands adjacent to waters that are navigable in fact. The Court found it significant that in section 502(7), Congress had defined “navigable waters” as “the waters of the United States”:

[T]he 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.

474 U.S. at 133. The Court also found that in the 1977 Clean Water Act, Congress had acquiesced in the Corps’ inclusion of adjacent wetlands in its definition. *Id.* at 135-39.

⁴ The current NPDES regulations define “waters of the United States,” rather than “navigable waters.” 40 C.F.R. § 122.2 (2003).

Oil Pollution Act of 1990

In 1990, the Oil Pollution Act of 1990 (“OPA”) was enacted. Pub. L. No. 101-380, 104 Stat. 484 (1990). OPA was generally designed to streamline and enhance federal law on oil spill clean-up and liability. Among other things, OPA amended section 311 of the CWA to require the preparation of enhanced oil spill response plans by facilities that, because of their location, could be expected to cause “substantial” harm in the event of a discharge of oil into or upon “the navigable waters, adjoining shorelines, or the exclusive economic zone.” Pub. L. No. 101-380, § 4202(a)(6), 104 Stat. 528-31 (1990).

1991 Proposed Amendments To The SPCC Rules

In 1991, EPA again proposed revisions to the SPCC rules. In particular, EPA proposed to enlarge the definition of “navigable waters” so that it would “conform with revisions to [40 C.F.R. Part 110],” 56 Fed. Reg. 54612, 54618 (Oct. 22, 1991) {Exhibit 14}. *See id.* at 54631, 54632 (proposed to be codified at 40 C.F.R. §§ 112.2(g) and (y)). Title 40 C.F.R. Part 110 is the regulation defining “harmful” quantities of oil – the discharge of which is to be prevented by SPCC plans under the SPCC rules (40 C.F.R. Part 112).

In fact, EPA had recently added a definition of “navigable waters” to 40 C.F.R. Part 110 that was essentially the same as the 1979 NPDES definition of the term (as well as the same as the current NPDES definition of the term). 52 Fed. Reg. 10712, 10719 (April 2, 1987) {Exhibit 15}. No explanation of the basis for that definition accompanied the proposed or final Part 110 rule revisions. *See id.*; 50 Fed. Reg. 9776 (March 11, 1985) {Exhibit 16}.

Thus, as of 1991, the 1973 definition of “navigable waters” in the SPCC rules remained in effect. With the 1991 proposed rule, EPA proposed to expand the 1973 definition to cover intrastate non-navigable waters (including wetlands) lacking any connection to navigable in fact waters, if harm to those non-navigable waters could have any effect on interstate commerce. 56 Fed. Reg. 54631 (proposed to be codified at 40 C.F.R. § 112.2(g)(3)). Also, EPA proposed to cover tributaries of, and wetlands adjacent to, those same non-navigable waters. *Id.* (proposed to be codified at 40 C.F.R. §§ 112.2(g)(5) and (7)).

United States v. Wilson

In 1997, the Fourth Circuit decided *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). There, the court found that the Corps' section 404 definition of "waters of the United States" exceeded the Corps' statutory authority to the extent that the definition reached intrastate, non-navigable waters with no connection to navigable in fact waters, and solely on the basis of any potential effect on interstate commerce. The specific provision at issue, 33 C.F.R. § 328.3(a)(3), was essentially the same as the proposed 40 C.F.R. § 112.2(g)(3) in EPA's 1991 SPCC proposal.

The Fourth Circuit noted first that if the Corps' regulation were a statute, it would present serious constitutional difficulties, because in reaching waters solely on the basis of a potential effect on interstate commerce, and not even a *substantial* effect on interstate commerce, "it would appear to exceed congressional authority under the Commerce Clause." 133 F.3d at 257. The court found it unnecessary to resolve the constitutional issue, finding that the regulation simply exceeded the Corps' authority under the statute:

Even as a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters. When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.

Id.

2001 Near-Final SPCC Rule And Decision Of The Supreme Court In Solid Waste Agency of Northern Cook County v. Corps of Engineers

In the final days of the Clinton administration, the Administrator of EPA signed a final rule making numerous amendments to the SPCC regulations in 40 C.F.R. Part 112, including the expanded definition of "navigable waters" that EPA had proposed in 1991. {Exhibit 17}. A Response To Comments document was placed in the rulemaking docket on January 11, 2001. {Exhibit 18}. The Bush administration held the 2001 rule back from publication in the Federal Register, pending its own review of the rule. *See* 66 Fed. Reg. 7702 (Jan. 24, 2001) {Exhibit 19}.

During the same period of time, specifically, on January 9, 2001, the Supreme Court decided the case of *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (“*SWANCC*”). There, the Court struck down the so-called “Migratory Bird Rule” as exceeding the Corps’ authority under the CWA. The Migratory Bird Rule was actually an interpretation by the Corps of its regulation defining “waters of the United States.” 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986) {Exhibit 20}. Under this interpretation, “waters of the United States” (or “navigable waters”) included intrastate waters or wetlands not connected to navigable in fact waters, which may be used as habitat by birds protected by migratory bird treaties. *Id.*

In its opinion, the court pointed to the Corps’ 1974 definition of “navigable waters” as “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce,” 33 C.F.R. § 209.120(d)(1) (1974), together with the Corps’ explanation in 1974 that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor,” 33 C.F.R. § 209.260(e)(1) (1974). 531 U.S. at 168. The Court said that the Corps “put forward no persuasive evidence that the Corps mistook Congress’ intent in 1974.” *Id.*

The Court noted that the Conference Report on the 1972 Amendments had stated that the conferees “intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation,” S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). 531 U.S. at 168 n.3. The Court then said that “neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation.” *Id.*

The Court noted that in its 1985 opinion in *Riverside Bayview Homes*, it had “held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway” and that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” 531 U.S. at 167. The Court then said:

In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

531 U.S. at 168 (emphasis in the original).

The Court acknowledged that in *Riverside Bayview Homes*, it had said that the word “navigable” in the statute was of “limited effect.” 531 U.S. at 172. The Court then explained:

[I]t 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.

531 U.S. at 172.

On January 19, 2001, the chief lawyers of both EPA and the Corps issued a joint memorandum describing *SWANCC* as a “significant new ruling by the Supreme Court pertaining to the scope of regulatory jurisdiction under the Clean Water Act.” {Exhibit 21}.

July 2002 Final SPCC Rule

On July 17, 2002, EPA promulgated final amendments to the 40 C.F.R. Part 112 SPCC rules, including a revised definition of “navigable waters.” 67 Fed. Reg. 47042, 47142 (July 17, 2002) (codified at 40 C.F.R. § 112.2 (2003)) {Exhibits 22, 23}. The revised definition is the same, in all respects material to this case, as the definition EPA had proposed in 1991. Thus, in addition to traditional navigable waters and wetlands adjacent thereto, the Part 112 definition asserts authority over non-navigable tributaries; non-navigable interstate waters; non-navigable intrastate waters (including wetlands), unconnected to traditional navigable waters (“isolated waters”); and tributaries of, and wetlands adjacent to, isolated waters.

In the preamble, EPA noted that some commenters had argued that the definition should be tied to navigability. 67 Fed. Reg. 47075. EPA then said that “The case law supports a broad definition of navigable waters, such as the one published today, and that definition does not necessarily depend on navigability in fact.” *Id.* EPA did not further discuss this conclusion.

EPA's January 2003 Statement On The State Of The Law

Six months after promulgating the 2002 amendments to the SPCC rules, EPA and the Corps published an advance notice of proposed rulemaking (“ANPRM”), soliciting public comment on the effect of the *SWANCC* decision on the scope of all the major CWA programs, including the section 311 SPCC program. 68 Fed. Reg. 1991, 1993 (Jan. 15, 2003) {Exhibit 24}.

Accompanying the ANPRM was a “Joint Memorandum” providing interim guidance on the significance of *SWANCC*. 68 Fed. Reg. 1995. The memorandum said “the case law on the precise scope of federal CWA jurisdiction in light of *SWANCC* is still developing.” *Id.* at 1996. Concerning isolated waters, the memorandum said that beyond the Migratory Bird Rule:

[I]n light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (*i.e.*, use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce).

Furthermore, in the states comprising the Fourth Circuit, CWA jurisdiction under 33 C.F.R. § 328.3(a)(3) in its entirety has been precluded since 1997 by the Fourth Circuit’s ruling in *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (invalidating 33 C.F.R. § 328.3(a)(3)).

Id.

Concerning non-navigable tributaries of traditional navigable waters, the memorandum stated that several post-*SWANCC* court decisions had held that *SWANCC* did not affect jurisdiction over such non-navigable tributaries. *Id.* at 1997. The memorandum also stated that:

Some courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and waters immediately adjacent to navigable waters are involved. *Rice v. Harken* is the leading case taking the narrowest view of CWA jurisdiction after *SWANCC*. 250 F.3d 264 (5th Cir. 2001). . . . The analysis in *Harken* implies that the Fifth Circuit might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water.

Id.

The January 2003 memorandum went on to discuss several other cases questioning the extent of CWA jurisdiction over non-adjacent, non-navigable tributaries. *Id.* Most of those cases had been decided *before* EPA promulgated the July 2002 amendments to the SPCC rules.

EPA's Enforcement Of Its Definition Of "Navigable Waters"

EPA is enforcing its definition of "navigable waters." For example, EPA has made numerous requests for information under CWA section 308, 33 U.S.C. § 1318 (2000), from Marathon, in connection with spills to intermittent streams, remote tributaries and ephemeral streams. *See* Declaration of Marvin Blakesley ¶¶ 11, 16, 17 {Exhibit 34}. EPA has sent the State of Wyoming letters on numerous occasions requesting that the state fine Marathon. *See, e.g., id.* at ¶¶ 11, 16. EPA's enforcement actions have occurred both before and after EPA promulgated the July 2002 SPCC regulations. *See, e.g., id.* at ¶¶ 11, 16, 17; Statement of Richard John Stephen Hart ¶ 8 {Exhibit 31}.

SUMMARY OF ARGUMENT

Assuming, for the sake of argument, that the definition of "navigable waters" in the SPCC rules does not plainly exceed EPA's statutory authority and exceed federal power under the Constitution, EPA nonetheless failed to support the definition with any reasoned analysis. EPA did not discuss the statutory language or its legislative history, address highly relevant recent decisions of the Supreme Court and the lower federal courts, or even provide any policy reasons for the breadth of the definition. Moreover, EPA's unqualified statement that "[t]he case law supports a broad definition of navigable waters, such as the one published today," 67 Fed. Reg. 47075 (July 17, 2002) {Exhibit 22}, was contradicted by EPA itself in another, nearly contemporaneous Federal Register notice, 68 Fed. Reg. 1991, 1995-98 (Jan. 15, 2003) (Exhibit 24).

A rule not supported by reason is necessarily arbitrary and capricious. Because EPA's action was arbitrary and capricious, and because EPA's omission was extremely serious, the Court should vacate the definition of "navigable waters" in 40 C.F.R. § 112.2 (2003) {Exhibit 23}.

Had EPA carried out its duty to engage in reasoned decision-making, it would necessarily have concluded that the SPCC definition of “navigable waters” is in excess of EPA’s authority under the CWA, and promulgated a much narrower definition. The language and legislative history of section 502(7) establish that Congress only intended to assert jurisdiction over traditional navigable waters and adjacent wetlands. This analysis was confirmed by the Supreme Court in *SWANCC*. At a bare minimum, an aquatic area must have a *significant nexus* with traditional navigable waters in order to be covered by the CWA. To the extent this Court’s summary decision in *NRDC v. Callaway* was to the contrary, after *SWANCC* it is no longer good law.

Moreover, assuming, *arguendo*, that the section 502(7) definition is as broad as EPA would apparently read it, then that definition does not govern the scope of section 311. Section 311, which pre-dates the 1972 Amendments, controls discharges of oil to “the navigable waters of the United States.” The term “navigable waters of the United States” has an established meaning in federal common law and in the construction of federal statutes. The term means traditional navigable waters, and the 1970 legislative history shows Congress deliberately used the term in that sense.

The very reason some courts formerly attached great significance to the section 502(7) definition, *i.e.*, that it defines “navigable waters” as the “waters of the United States,” rather than the “navigable waters of the United States,” obviously does not apply to section 311, because section 311 uses the different term “navigable waters of the United States.” It is a fundamental rule of statutory construction that every word used must have some meaning. If the section 502(7) definition of “navigable waters” (*i.e.*, “the waters of the United States”) were applied to section 311, section 311 would contain meaningless surplusage. The scope of section 311 would be “the waters of the United States *of the United States*.” Congress could not have intended this result.

The definition of “navigable waters” in the SPCC rules goes far beyond traditional navigable waters, and thus exceeds EPA’s statutory authority. An agency rule in excess of statutory authority is

void *ab initio*. Accordingly, the court should vacate the definition of “navigable waters” in the SPCC rules.

If, on the contrary, the Court finds the SPCC definition of “navigable waters” to be within EPA’s authority under the CWA, then the definition and the CWA are in excess of federal power under the Commerce Clause of the Constitution. The definition purports to reach aquatic areas (*e.g.*, intermittent streams, remote tributaries, ephemeral streams and isolated water deposits) that are not navigable and activities that do not substantially affect interstate commerce. As the decisions of the Supreme Court make clear, the Commerce Clause does not empower the federal government to regulate local matters with only insubstantial effects on interstate commerce.

ARGUMENT

I. EPA’S PROMULGATION OF AN ALL-ENCOMPASSING DEFINITION OF “NAVIGABLE WATERS” IN THE SPCC RULES WAS ARBITRARY AND CAPRICIOUS, AND WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW.

It is axiomatic that a federal agency must cogently explain, in the record before the agency, the reasons for its actions. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983); *ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 997, 1004-05 (D.C. Cir. 2001); *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 8-9 (D.C. Cir. 2000); *American Petroleum Inst. v. EPA*, 216 F.3d 50, 57-58 (D.C. Cir. 2000); *United States Information Agency v. FLRA*, 960 F.2d 165, 170 (D.C. Cir. 1992); *Independent Tanker Owners Comm. v. Dole*, 809 F.2d 847, 851-54 (D.C. Cir.), *cert. denied sub nom. Atlantic Richfield Co. v. Independent U.S. Tankers Owners Comm.*, 484 U.S. 819 (1987); *Production Workers Union of Chicago v. NLRB*, 793 F.2d 323, 331-32 (D.C. Cir. 1986).

This is so, whether the agency is carrying out essentially a legislative function, *State Farm*, 463 U.S. at 48, or interpreting the statute which it is charged with implementing, *Rettig v. PBGC*, 744 F.2d 133, 151 (D.C. Cir. 1984). As the D.C. Circuit has explained:

“Arbitrary and capricious” review under *State Farm* . . . demands evidence of reasoned decisionmaking *at the agency level*; agency rationales developed for the first time during litigation do not serve as adequate substitutes. . . . We can see no reason to demand

anything less of agencies when we review their statutory interpretations under the second prong of *Chevron*.

City of Kansas City, Mo. v. HUD, 923 F.2d 188, 192 (D.C. Cir. 1991).

This requirement is founded upon two separate provisions of the Administrative Procedure Act (“APA”). First, the APA’s scope of review section provides that reviewing courts shall hold unlawful those agency actions found to be arbitrary or capricious. 5 U.S.C. § 706(2)(A) (2000). A “rule without a stated reason is necessarily arbitrary and capricious.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 551 (D.C. Cir. 1983).

Second, the section of the APA governing rulemaking procedures provides that final rules must be accompanied by “a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c) (2000).

The legislative history of the APA, dating to 1946, explained that:

The statement of the “basis and purpose” of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the object or objects sought.

S. Doc. No. 248, 79th Cong., 2d Sess. 20 (1946). See *International Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 815 n.35 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984).

The requirement that an agency show that it has engaged in reasoned decision-making is not an extremely demanding one. However, “The basis for an administrative decision . . . must be clear enough to permit effective judicial review. ‘It will not do for a court to be compelled to guess at the theory underlying the agency’s action.’” *International Longshoremen’s Ass’n v. Nat’l Mediation Bd.*, 870 F.2d 733, 735 (D.C. Cir. 1989) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)). The agency must show that it has taken a “hard look at the salient problems before it,” *Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435, 439 (D.C. Cir. 1989) (quotation marks and citations omitted), and that it has “considered the matter in a detailed and reasoned fashion,” *Rettig*, 744 F.2d at 151 (quotation marks and citation omitted).

Where the issue is one of statutory construction, the agency must address the text of the statute, and, where appropriate, the legislative history. *Bell Atl.*, 206 F.3d at 9; *Continental Air Lines v. DOT*, 843

F.2d 1444, 1449 (D.C. Cir. 1988). If there is case law bearing on the issue at hand, the agency must explain how it has dealt with that case law. *ITT Industries*, 251 F.3d at 997, 1004-05; *United States Information Agency v. FLRA*, 960 F.2d at 170.

Here, the vagueness of EPA's explanation for the definition of "navigable waters" in the SPCC rules "reflects a complete lack of any thoughtful deliberations," *New York State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 139 (D.D.C. 2003). EPA has never addressed the language of the statute or its legislative history in connection with the definition of "navigable waters" in the SPCC rules. In the preamble to the July 2002 amendments, EPA said its rationale had been "to have the part 112 definition track the definition of 'navigable waters' in 40 C.F.R. part 110." 67 Fed. Reg. 47075 (July 17, 2002) {Exhibit 22}. The part 110 rulemaking, however, was itself silent on the language of the statute and its legislative history, or any other rationale for a definition of "navigable waters" unqualified by any connection to navigability in fact. *See* 52 Fed. Reg. 10712 (April 2, 1987) (final rule); 50 Fed. Reg. 9776 (March 11, 1985) (proposed rule) {Exhibits 15, 16}.

Perhaps the Agency thought it implicit that its reasons for adopting a broad definition of "navigable waters" for the NPDES program in 1973 and 1979 were also its reasons for adopting such a definition for the SPCC program in 2002. But the Agency is obligated to "do more than 'implicitly' apply the terms of the Act; it must articulate the reasons for its decisions in a manner that enables a reviewing court to discern the basis for its actions." *International Longshoremen's Ass'n*, 870 F.2d at 736.

Moreover, there are significant reasons why EPA's basic rationale for its historic NPDES definition would not apply to the SPCC program, anyway. EPA (and early court decisions) attached great significance to the fact that in section 502(7), Congress had defined "navigable waters" as "the waters of the United States," thereby purportedly removing any condition of "navigability." Even if this interpretation of section 502(7) were correct (which, as discussed below, it is not), in section 311

Congress used a *different* phrase, undefined except in the federal common law: “navigable waters of the United States.”

In fact, if the section 502(7) definition of “navigable waters” were applied to section 311, then the waters covered by section 311 would be “the waters of the United States *of the United States.*” EPA never addressed these problems, nor did it address the separate origins of section 311 in the Water Quality Improvement Act of 1970, or the fact that during the 1972 legislative process Congress had proposed to amend the phrase “navigable waters of the United States” in section 311 to read simply “navigable waters,” but then declined to do so.

Concerning the case law, EPA said in 2002 only that “The case law supports a broad definition of navigable waters, such as the one published today, and that definition does not necessarily depend on navigability in fact.” 67 Fed. Reg. 47075 (July 17, 2002) {Exhibit 22}. That statement would have been unremarkable, and may have required little elaboration, had it been made before the Fourth Circuit’s 1997 decision in *United States v. Wilson*, and before the Supreme Court’s 2001 decision in *SWANCC*. However, those decisions and later decisions rendered before July 2002 cried out for analysis and reconciliation (if indeed, reconciliation were possible) with EPA’s all-encompassing definition of “navigable waters.”

In *United States v. Wilson*, the Fourth Circuit found 33 C.F.R. § 328.3(a)(3), which asserts authority over isolated, non-navigable waters, to be beyond the Corps’ authority under the CWA. That section is the same as subparagraph (1)(iii) in the SPCC definition that EPA promulgated on July 17, 2002. 67 Fed. Reg. 47142 (codified at 40 C.F.R. § 112.2 (2003)) {Exhibits 22, 23}. This was significant case law -- given EPA’s application of the section 502(7) definition of “navigable waters” to the section 311 SPCC program -- that EPA should have dealt with in explaining the 2002 SPCC rule. But EPA was silent on *United States v. Wilson*.

More importantly, even to ardent defenders of an expansive construction of the CWA, the Supreme Court’s 2001 decision in *SWANCC* would have raised questions about the extent to which the

CWA reaches any water that is neither a traditional navigable water nor adjacent to a traditional navigable water. Although *SWANCC* only expressly struck down the Migratory Bird Rule, the Court’s reasoning strongly suggests that any definition of “navigable waters” that goes beyond traditional navigable waters and adjacent wetlands will not survive review in the Supreme Court in future cases. *See, e.g., SWANCC*, 531 U.S. at 168:

In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

Indeed, shortly after *SWANCC* was decided, EPA’s General Counsel labeled *SWANCC* a “significant new ruling . . . pertaining to the scope of regulatory jurisdiction under the Clean Water Act,” and said that *SWANCC* “affects the scope of regulatory jurisdiction under . . . the section 311 oil spill program.” {Exhibit 21}. Yet in promulgating the SPCC program definition in July 2002, the Agency was silent as to this major Supreme Court decision.

Following *SWANCC*, the case law has been mixed. However, as of July 2002, there were a number of new federal court cases that should have given EPA pause in promulgating a definition of “navigable waters” unrelated to navigability. These included *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *United States v. Newdunn*, 195 F. Supp. 2d 751 (E.D. Va. 2002), *rev’d*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3632 (U.S. April 5, 2004) (No. 03-637); *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), *rev’d*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3632 (U.S. April 5, 2004) (No. 03-929); and *United States v. Needham*, No. 6:01-CV-01897, 2002 WL 1162790 (W.D. La. Jan. 23, 2002), *rev’d on other grounds*, 354 F.3d 340 (5th Cir. 2003). Again, EPA gave no clue as to how it was reconciling this case law with its July 2002 final SPCC rule.

In EPA’s and the Corps’ “Joint Memorandum” of January 2003 (nearly contemporaneous with the July 2002 SPCC rule), EPA admitted that there were serious open questions about the scope of the CWA in light of the case law. 68 Fed. Reg. 1995-97 {Exhibit 24}. In light of *SWANCC* and *United States v. Wilson*, EPA said “it is uncertain whether there remains any basis for jurisdiction . . . over

isolated non-navigable, intrastate waters.” *Id.* at 1996. Concerning non-navigable tributaries, EPA seemed generally more confident of its authority, but acknowledged that “[s]ome courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and waters immediately adjacent to navigable waters are involved.” *Id.* at 1997. Although EPA and the Corps concluded that field staff should “generally speaking” continue to assert CWA authority over non-navigable “tributary systems,” *id.* at 1998, they did not attempt to explain why, if at all, they thought cases such as *Rice v. Harken Exploration* were wrongly decided.

Thus, EPA promulgated a rule in July 2002 -- demanding compliance by the regulated community -- that *EPA itself* believed was of questionable lawfulness in significant respects. It is difficult to conceive of a more arbitrary use of power.

This is not to say that an agency may never act in the face of legal uncertainty. Agencies must make difficult choices every day, never knowing until completion of any available judicial review whether those choices will be upheld. But in making a choice in the face of legal uncertainty, an agency must expressly *confront* the uncertainty, and cogently explain why it believes its choice is the correct or most reasonable one.⁵

EPA has failed to carry out its duty to engage in reasoned decision-making. It is not right to demand compliance by the public with a rule not grounded in reason.

The Appropriate Remedy

In general, “[i]f the decision of the agency ‘is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.’” *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (citation omitted). See *Appalachian Power Co. v. EPA*, 135 F.3d 791, 819-822 (D.C. Cir. 1998); *National Wildlife Fed’n v. Costle*, 629 F.2d

⁵ Cf. *International Longshoremen’s Ass’n*, 870 F.2d at 737 (“A reviewing court can have zero tolerance of a statutory interpretation that wiggles and waffles from case to case and is never clearly staked out by the agency administering the statute”).

118, 135-36 (D.C. Cir. 1980); *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 711-712 (D.C. Cir. 1977). The Court should vacate the definition of “navigable waters” in 40 C.F.R. § 112.2 (2003), to the extent it reaches areas that are neither traditional navigable waters, nor adjacent to such waters, and remand the definition to EPA.

The Court retains discretion to remand the rule without vacating it in appropriate cases. *See International Union, UMW v. FMSHA*, 920 F.2d 960, 966-67 (D.C. Cir. 1990). However, this is not an appropriate case. In light of *SWANCC* and other recent case law, and in light of EPA’s own admissions, EPA’s omission here was very serious, and EPA is unlikely to be able to support the same rule when it deliberates on remand. *See id.*

This is not a case where the Agency simply needs to express an explanation it has already developed. Rather, this is a case where the Agency has yet even to deliberate on the subject. It would be fundamentally unfair to require the regulated community to make the time commitment and capital investment to prepare and implement SPCC plans for facilities potentially affecting areas unrelated to traditional navigable waters, when there is so much doubt about the lawfulness of such a requirement.

II. THE DEFINITION OF “NAVIGABLE WATERS” IN THE SPCC RULES IS IN EXCESS OF EPA’S STATUTORY AUTHORITY.

A. The CWA Section 502(7) Definition Of “Navigable Waters” Does Not Extend To Areas That Are Neither Traditional Navigable Waters Nor Adjacent To Such Waters, Nor Which Lack Even A Significant Nexus To Such Waters.

As shown above, the definition of “navigable waters” in the SPCC rules must be vacated because there is no evidence that EPA engaged in reasoned decision-making in adopting it. Moreover, if EPA had engaged in such reasoned decision-making, it inevitably would not have promulgated a definition that extends to areas that are neither traditional navigable waters nor adjacent to such waters, nor which lack even a significant nexus to such waters.

1. The statutory language implies an element of navigability.

Assuming, for the sake of argument, that the term “navigable waters” in section 502(7) governs the scope of section 311, Congress did not intend by that term to reach far beyond traditional navigable waters. Exactly why Congress defined “navigable waters” as “the waters of the United States,” is not clear from the face of the statute. However, the fact that Congress even used the term “navigable waters” strongly suggests some connection with navigation.

Congress certainly knew that not all waters are navigable in fact, and if Congress had intended to reach waters completely unrelated to navigation or navigability, it knew how to say so. For example, in the Water Quality Act of 1965, Congress had provided for development grants to states and cities for controlling discharges of inadequately treated sewage into “any waters.” Pub. L. No. 89-234, § 3, 79 Stat. 903, 905 (1965).

That Congress defined “navigable waters” as “the waters of the United States” in section 502(7) could simply mean that Congress meant to distinguish the waters of the United States from the waters of the states. Congress had previously used the terms “waters of the United States” and “navigable waters of the United States” interchangeably in section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403. Section 10 has been held only to apply to traditional navigable waters. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608-10 (3d Cir. 1974).

2. The 1972 legislative history clarifies Congress’ intent to reach traditional navigable waters, as described in modern federal case law.

The Conference Report on the 1972 Amendments stated, cryptically, that:

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.

S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), *reprinted in* 1 1972 Legislative History at 327 {Exhibit 1}. This could have meant either that 1) Congress intended to regulate waters to the full extent of the commerce power, or 2) Congress intended to regulate waters to the full extent of the commerce

power *over navigation*. Also, the Conference Committee was evidently concerned about previous “agency determinations” limiting the term “navigable waters,” but it did not identify those determinations.

The House bill, H.R. 11896, would have defined “navigable waters” as “the navigable waters of the United States, including the territorial seas.” *See* H.R. Rep. No. 911, 92d Cong., 2d Sess. 373 (1972), *reprinted in* 1 1972 Legislative History at 1069 {Exhibit 1}. The accompanying House report, like the later Conference Report, said, “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.” *Id.* at 131, *reprinted in* 1 1972 Legislative History at 818 {Exhibit 1}. Hence, the identical concerns about a broad interpretation and previous “encumber[ing]” agency determinations were expressed both where “navigable waters” was defined as “navigable waters of the United States” (the House bill) and where “navigable waters” was simply defined as “waters of the United States” (the Conference Report). This suggests very strongly that omission of the word “navigable” in the definition of “navigable waters,” as enacted, was not all that significant.

In fact, explanatory statements of the Senate and House floor managers show that Congress’ real concern was that “navigable waters” be construed to cover all the traditional navigable waters, *as defined in modern federal case law*. Congressman Dingell’s statement, while not entirely internally consistent, plainly shows a central concern with conforming to “recent judicial opinions which have substantially expanded [the former] limited view of *navigability*.” 1 1972 Legislative History at 250 (emphasis added) {Exhibit 1}. Congressman Dingell’s full statement on the issue was as follows:

[T]he conference bill defines the term “navigable waters” broadly for water quality purposes. It means all “the waters of the United States” in a geographical sense. It does not mean “navigable waters of the United States” in the technical sense as we sometimes see in some laws.

The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the Daniel Ball case (77 U.S. 557, 563) – to include waterways which would be “susceptible

of being used * * * with reasonable improvement,” as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F. 2d 743 (CA 7, 1945); *cert. den.* 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F. 2d 334 (CA 7, 1954) *cert. den.* 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F. 2d 509 (CA 7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F. 2d 43, 50-51 (CA 5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F. 2d 594 (CA 2, 1965); *The Montello*, 37 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution’s grant to Congress of “Power * * * To regulate commerce with Foreign Nations and among the several States * * *” (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation – highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of a navigable interstate or international commercial highway.” *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144:

“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.”

Id. at 250-51 {Exhibit 1}.

Senator Muskie’s statement similarly focused on traditional navigable waters and theretofore encumbering “agency determinations”:

One matter of importance throughout the legislation is the meaning of the term “navigable waters of the United States.”

The conference agreement does not define the term. 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.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term “navigable waters” include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

1 1972 Legislative History at 178 {Exhibit 1}.

While these floor statements evince a concern with a formerly narrow treatment of traditional navigable waters, and Dingell’s statement points to the Corps as a culprit, the 1972 Legislative History compiled by the Congressional Research Service does not further explain the matter. However, a broader look at the legislative history provides a relatively clear picture of what was bothering Congress in 1972, as demonstrated in detail in a recent study of the subject. *See* Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 *Envtl. L. Rep.* 11042, 11044-46, 11048-49 (2002).

As Albrecht and Nickelsburg point out, reports of the House of Representatives in the early 1970’s reflect frustration with the Corps’ implementation of the Rivers and Harbors Act. Before enactment of the 1972 amendments to FWPCA, the Rivers and Harbors Act had been viewed as a potentially useful federal mechanism for controlling water pollution.

For one thing, until 1970, the Corps had not regulated dredging or filling in aquatic areas shoreward of harbor lines, even though under the old *Daniel Ball* definition of “navigable waters of the United States,” the Corps plainly had the authority to regulate such areas. The House Committee on Government Operations expressly found fault with the Corps’ policy, as reflected in its report of March 1970, entitled “Our Waters And Wetlands: How The Corps of Engineers Can Help Prevent Their Destruction And Pollution.” H.R. Rep. No. 917, 91st Cong., 2d Sess. 6-10 (1970) {Exhibit 25}. In May

1970, the Corps changed course and promulgated a rule regulating activities shoreward of harbor lines. 35 Fed. Reg. 8280 (May 27, 1970) (amending 33 C.F.R. § 209.150) {Exhibit 26}.

Another concern was that the Corps' had not been regulating waters not presently navigable in fact, even though under cases such as *Economy Power & Light Co.* and *Appalachian Elec. Power Co.*, the "waters of the United States" included waters that had at one time been navigable in fact (although presently obstructed) and waters that could be navigable, with reasonable improvement. In 1972, the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations held hearings "concerning the role of the Corps of Engineers in administering and protecting our Nation's wetlands and waterways," and in August the full committee issued a report, entitled "Increasing Protection For Our Waters, Wetlands, And Shorelines: The Corps Of Engineers." H.R. Rep. No. 1323, 92d Cong., 2d Sess. 1 (1972) {Exhibit 27}. In its report, the committee criticized the Corps for its narrow approach:

The corps' regulations currently define navigable waters as those "which are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition," for conducting trade or travel "in the customary modes of trade and travel on water." (33 C.F.R. 209.260 (a).) That language is based on similar language used over 100 years ago in the Supreme Court's opinion in *The Daniel Ball*

However, more recent judicial opinions have substantially expanded that limited view of navigability to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc.

Id. at 29-30.⁶

Finally, the Corps had declined to exercise jurisdiction over intrastate lakes, even if navigable, because such lakes did not, in the precise words of *The Daniel Ball*, "form . . . by themselves, or by uniting with other waters, a continued highway over which commerce is . . . conducted by water," 77 U.S. (10 Wall.) at 563. The Committee on Government Operations apparently believed that railroad or

⁶ Significantly, language from this hearing report was repeated by Congressman Dingell in his floor statement on the 1972 FWPCA Amendments. *See supra*.

highway links between navigable intrastate lakes and other states should be sufficient to establish federal jurisdiction, and that modern case law supported this view:

Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal communication, waterways, etc.). The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of a navigable interstate or international commercial highway.” *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

H.R. Rep. No. 1323, 92d Cong., 2d Sess. 30 (1972) {Exhibit 27}.

Although Congress’ expressed discontent was focused on the Corps, Congress presumably also was aware that in 1971, EPA’s General Counsel had issued an opinion concerning the scope of the term “navigable waters of the United States” in then section 13 of the FWPCA, which regulated sewage discharges from vessels. EPA General Counsel Opinion (Dec. 9, 1971) {Exhibit 28}. The opinion addressed navigable intrastate waters lacking a *water* connection to other states, which might nonetheless be linked to other states by railroads or highways. The opinion said that “[s]uch waters have never been held to be within the ‘navigable waters of the United States,’ and the possibility of securing such a holding is remote.” *Id.* Significantly, the General Counsel recommended against asserting authority over such waters because that action would only marginally increase federal regulatory coverage, and “[t]his additional margin . . . does not appear to justify the legal and *administrative difficulties* it presents.” *Id.* (emphasis added).

Thus, it is clear that the “agency determinations” made for “administrative purposes” about which Congress complained in the 1972 legislative process involved failure to employ a broad definition of “navigable waters of the United States,” as supported by modern federal case law. The focus of Congress’ frustration appears to have been the Corps, but Congress may also have been disappointed with EPA’s position.

Thus, in defining “navigable waters” as the “waters of the United States” in the 1972 FWPCA Amendments, Congress intended only to reach traditional navigable waters, although it intended that such waters be understood to be as extensive as described in modern federal case law. In other words, Congress wanted to ensure that the agencies would exercise their full constitutional power *over navigation*.

3. Later amendments to the CWA did not fundamentally alter its scope.

Later amendments to the CWA did not fundamentally change its scope. In the Clean Water Act of 1977, Congress acquiesced in the Corps’ assertion of jurisdiction over wetlands adjacent to traditional navigable waters, based on their significant nexus with such waters, *Riverside Bayview Homes*, 474 U.S. at 135-39, but Congress did not amend the definition of “navigable waters” in section 502(7) or otherwise expand CWA jurisdiction.

Thus, the CWA only reaches traditional navigable waters and adjacent wetlands. The CWA does not reach aquatic areas solely on the basis of potential effects on interstate commerce.

4. *SWANCC* confirms the CWA’s focus on traditional navigable waters and adjacent wetlands.

The foregoing analysis conflicts with that of a great many federal court decisions, rendered before *SWANCC*, including this Court’s decision in *NRDC v. Callaway*. See cases cited *supra* at 8-9. But *SWANCC* makes clear that this analysis is correct, after all.

In *SWANCC*, the Supreme Court found “§ 404(a) [of the CWA] to be clear.” *SWANCC*, 531 U.S. at 172. Section 404(a) authorizes the Corps to regulate discharges of dredged or fill material into “navigable waters.” What the Court *expressly* said was clear about section 404(a) is that it was not intended to regulate non-navigable, isolated, intrastate waters, such as the abandoned gravel pit at issue.

The Court reached its express conclusion as follows. First, it pointed out that in 1974, the Corps originally interpreted the term “navigable waters” to mean “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the

future susceptible for use for purposes of interstate or foreign commerce,” 33 CFR § 209.120(d)(1) (1974). *Id.* at 168. The Court highlighted the Corps’ position in 1974 that “it is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor,” 33 CFR § 209.260(e)(1) (1974). *Id.*

The Court then said that the respondents “put forward no persuasive evidence that the Corps mistook Congress’ intent in 1974.” *Id.* In other words, as of the 1972 version of the CWA, “navigable waters” meant traditional navigable waters.

Advocates of an expansive construction of the CWA, including the Corps in *SWANCC*, often point to the statement in the 1972 Conference Report that the conferees “intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation,” S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), *reprinted in* 1 1972 Legislative History at 327 {Exhibit 1}. Yet the Supreme Court in *SWANCC* found, quite to the contrary, that “neither this, nor anything else in the legislative history to which [the Corps] point[s], signifies that Congress intended to exert anything more than its commerce power over navigation.” 531 U.S. at 168 n.3.

Having found the intent of the 1972 Act to be clear, the Court next considered whether Congress took a new direction in the 1977 amendments. *Id.* at 168-71. It found that Congress did not take such a new direction.

The Corps had argued that in the 1977 amendments, Congress had broadly approved new regulations of the Corps that asserted CWA authority over waters and wetlands, without any consideration of navigability. *See id.* at 168-69. The Court found insufficient evidence of any such approval. *Id.* at 170-71. The Court found that the only aspect of the Corps’ 1977 regulations that Congress had approved was the assertion of authority over wetlands *adjacent to traditional navigable waters*. *Id.*

Wetlands adjacent to traditional navigable waters constitute a special case that the Court had addressed earlier in *Riverside Bayview Homes*. Indeed, in *SWANCC*, the Court was careful to dispel any

notion that its earlier ruling in *Riverside Bayview Homes* should be construed to extend federal authority to anything other than wetlands adjacent to navigable in fact waters, or as the Court put it, “adjacent to bodies of open water.” 531 U.S. at 167.

Although in *Riverside Bayview Homes* the Court had suggested that the term “navigable” in the CWA was of “limited import,” 474 U.S. at 133, in *SWANCC* the Court emphasized the continued importance of the word “navigable”:

[I]t 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.

531 U.S. at 172. To rule for the Corps in *SWANCC*, the Court said that it “would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water.” *Id.* at 168. However, the Court concluded that “the text of the statute will not allow this.” *Id.*

Thus, to reach its express conclusion that section 404(a) was not intended to regulate non-navigable, isolated, intrastate waters, such as the abandoned gravel pit at issue in *SWANCC*, the Court found that the 1972 Act clearly applied only to traditional navigable waters, and that Congress did not fundamentally change this in the 1977 amendments, although Congress did specifically authorize regulation of wetlands *adjacent to traditional navigable waters* in 1977. In other words, the Court found it clear that Congress intended to limit the scope of the CWA to traditional navigable waters and wetlands adjacent to traditional navigable waters.

5. At a bare minimum, *SWANCC* requires a “significant nexus” with traditional navigable waters.

Following *SWANCC*, some courts have held that an aquatic area that is not a traditional navigable water or a wetland adjacent to a traditional navigable water may nonetheless be covered by the CWA if there is at least a “significant nexus” with a traditional navigable water. *See, e.g., FD&P Enters. Inc. v. Army Corps of Eng’rs*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003). This is based on the Court’s explanation

in *SWANNC* that “[i]t was the *significant nexus* between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” 531 U.S. at 167 (emphasis added).

On its face, the definition of “navigable waters” in the SPCC regulations at 40 C.F.R. § 112.2 reaches areas lacking even such a “significant nexus” with traditional navigable waters. For example, any non-navigable tributary of a navigable water, no matter how far removed, appears to be covered. Indeed, the similar Corps definition has been construed to reach a drainage ditch connected only very remotely to a navigable in fact water. *United States v. Deaton*, 332 F.3d 698, 708-711 (4th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3632 (U.S. April 5, 2004) (No. 03-701). Also, isolated waters are covered by the definition, solely on the basis of *any potential effect on interstate commerce*, and without regard to any nexus with traditional navigable waters.

6. The definition of “navigable waters” in the SPCC rules should be vacated as *ultra vires*.

In sum, the definition of navigable waters in 40 C.F.R. § 112.2 (2003) reaches aquatic areas that are neither traditional navigable waters nor adjacent wetlands. Accordingly, the definition exceeds EPA’s statutory authority and should be vacated.

In the alternative, the definition reaches areas lacking even a significant nexus to traditional navigable waters. Accordingly, the definition exceeds EPA’s statutory authority and should be vacated.

B. Assuming That The CWA Section 502(7) Definition Reaches Far Beyond Traditional Navigable Waters, That Definition Does Not Govern The Applicability Of CWA Section 311.

Assuming, *arguendo*, that the section 502(7) definition of “navigable waters” reaches far beyond traditional navigable waters, that definition does not govern the scope of section 311. The scope of section 311 is governed by the term of art, “navigable waters of the United States” -- which includes only traditional navigable waters -- in addition to adjoining shorelines, the contiguous zone, and certain other offshore waters. *See* 33 U.S.C. §§ 1321(b)(1), (3) (2000).

Section 311 (originally section 11) was added to FWPCA by the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970). As of that time, the term “navigable waters of the

United States” had a well-established meaning in federal law, *i.e.*, those waters that are, were, or with reasonable improvements could be, used for navigation in interstate commerce. *See United States v. Stoeco Homes, Inc.*, 498 F.2d at 608-611; *United States v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974). *See also* Black’s Law Dictionary 1179 (4th ed. rev. 1968). Congress must be presumed to have used the term in this traditional sense, in the absence of powerful evidence to the contrary.

There is no evidence to the contrary. In fact, the Senate floor manager’s summary of conference action on the 1970 Water Quality Improvement Act confirmed that Congress used the term in its traditional sense:

One matter of importance throughout the legislation is the meaning of the term “navigable waters of the United States.”

The conference agreement does not define the term. Based on the history of consideration of this legislation it is obvious that its provisions and the extent of application should be construed broadly. It is intended that this term include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases, the commerce on such waters would have a substantial economic effect on interstate commerce.

116 Cong. Rec. 8985 (March 24, 1970) {Exhibit 29}.⁷ Moreover, in 1970, EPA’s General Counsel opined that the term “navigable waters of the United States” was used in its traditional sense in the 1970 Act. *See* EPA General Counsel Opinion (Dec. 9, 1971) {Exhibit 28}.

Nor does anything in the legislative history of the 1972 FWPCA amendments suggest that the term “navigable waters of the United States” in section 311 was then being used in other than its traditional sense. The various statements, discussed above, that the term “navigable waters” be “given the broadest possible constitutional interpretation,” all were made in connection with the definition of “navigable waters” in section 502(7). In fact, the legislative history dealing specifically with section 311

⁷ Note that Senator Muskie used similar language to describe the section 502(7) definition of “navigable waters” in his manager’s statement on the 1972 Amendments. *See supra* at 27.

stated that section 311 was intended to be “basically the same as existing law,” *i.e.*, basically the same as the 1970 enactment. S. Conf. Rep. No. 1236, 92d Cong. 2d Sess. 132, 133 (1972), *reprinted in* 1 1972 Legislative History at 315, 316 {Exhibit 1}. This would hardly be the case if Congress intended in 1972 dramatically to enlarge the term “navigable waters of the United States” in section 311, as used in the 1970 enactment.

Proponents of a construction of the term “navigable waters” in section 502(7) as being limited only by the outer bounds of the Commerce Clause usually attach significance to the omission of the word “navigable.” Thus, “navigable waters” are just “waters” of the United States. *See, e.g.*, EPA General Counsel Opinion (Feb. 6, 1973) {Exhibit 2}. Yet the operative phrase in section 311, “navigable waters of the United States” does not suffer from this omission, regardless of whether the omission in section 502(7) is otherwise of any great significance.

Nor can it be said that Congress simply “forgot” to amend section 311 to conform to its purported new scheme of things. In the first place, Congress may not, as a matter of statutory construction, be presumed to make such mistakes. More significantly, the Senate bill (S. 2770) would have substituted “navigable waters” for “navigable waters of the United States,” 2 1972 Legislative History at 1534, 1646, 1648 {Exhibit 1}, but that proposed change did not survive the 1972 conference. Thus, while Congress’ rejection of the change is unexplained, it is at least evident that Congress deliberately used “navigable waters of the United States” in section 311.

Moreover, it is a fundamental rule of statutory construction that if possible, meaning is to be given to every word used. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). If the section 502(7) definition of “navigable waters” (*i.e.*, “the waters of the United States”) were applied to section 311, section 311 would contain meaningless surplusage. The scope of section 311 would be “the waters of the United States *of the United States*.” Congress could not have intended this result.

The courts of two federal circuits have held that the section 502(7) definition of “navigable waters” does in fact govern the scope of section 311. *United States v. Texas Pipe Line Co.*, 611 F.2d 345,

347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974). *See Ward v. Coleman*, 598 F.2d 1187, 1188 n.1 (10th Cir. 1979) (dictum), *rev'd*, 448 U.S. 242 (1980); *Wyoming v. Hoffman*, 437 F. Supp. 114, 115-16 (D. Wyo. 1977) (dictum). However, those courts applied only sparse analysis, and in particular, it does not appear that those courts considered the full history of section 311, as discussed herein. In any event, this Court is not bound by the decisions of those other courts, and plaintiffs respectfully suggest that those courts were in error.

In the Oil Pollution Act of 1990, Congress added a separate requirement in section 311 for the preparation of enhanced oil spill response plans by facilities that could be expected to cause substantial harm in the event of a discharge to “the navigable waters.” Pub. L. No. 101-380, § 4202(a)(6) 104 Stat. 528-31 (1990) (codified at 33 U.S.C. § 1321(j)(5) (2000)).⁸ In a separate, stand-alone section, OPA defined “navigable waters” for purposes of OPA in the same terms as section 502(7) of the CWA: “waters of the United States, including the territorial sea.” Pub. L. No. 101-380, § 1001(21), 104 Stat. 486-87 (codified at 33 U.S.C. § 2701(21) (2000)).

However, OPA did not amend the basic scope of section 311. *See* 33 U.S.C. § 1321(b)(1), (3) (2000) (still referring to “the navigable waters of the United States”). Nor did OPA amend section 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) (2000), which is EPA’s authority for the SPCC rules.

Because the scope of section 311, and in particular, section 311(j)(1)(C), is governed by “the navigable waters of the United States” (*i.e.* traditional navigable waters), adjoining shorelines, and certain offshore waters, and the definition of “navigable waters” in 40 C.F.R. § 112.2 goes far beyond such waters, the section 112.2 definition in the SPCC regulation is beyond EPA’s statutory authority. The Court should vacate the section 112.2 definition, accordingly.

⁸ The so-called “facility response plan” or “FRP” regulation for onshore facilities, implementing this provision of OPA, appears in 40 C.F.R. § 112.20 (2003).

III. THE DEFINITION OF “NAVIGABLE WATERS” IN THE SPCC RULES EXCEEDS FEDERAL POWER UNDER THE CONSTITUTION.

As shown above, EPA’s promulgation of the definition of “navigable waters” in the SPCC rules was arbitrary and capricious, and the definition exceeds EPA’s authority under the CWA. Additionally, EPA has construed CWA section 311 in a way that exceeds the constitutional limits of federal power.

At least two aspects of the rule’s definition exceed Congress’ constitutional power. Under clause (1)(iii) of the definition of “navigable waters,” EPA has included “[a]ll other waters such as *intrastate* lakes, rivers, streams (including intermittent streams) . . . which could affect interstate . . . commerce.” 40 C.F.R. § 112.2 (2003) (emphasis added). Also, EPA construes the term “tributaries” in clause (1)(v) of the definition to include ephemeral streams that are extremely remote from any traditional navigable waters. *See, e.g., Marathon Oil Co. v. EPA*, No. 97-CV-267-D, 1009 WL 34075426 (D. Wyo. Aug. 20, 1998). *See also* Statement of Richard John Stephen Hart ¶ 8 {Exhibit 31}; Declaration of Marvin Blakesley ¶¶ 11, 16, 17 {Exhibit 34} (describing enforcement actions brought by EPA under its definition of “navigable waters.”) Accordingly, plaintiffs respectfully submit that the definition, as applied by EPA, would exceed congressional authority under the Commerce Clause of the Constitution. *See* U.S. Const. art. I, § 8, cl. 3.

It is a fundamental rule of statutory interpretation that a Court should construe a statute or regulation so as to avoid a constitutional problem. *SWANCC*, 531 U.S. at 173. “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). To interpret section 311 as EPA has presents a “constitutional problem” as that interpretation exceeds the limits of federal power. As such this Court should vacate and remand the definition of “navigable waters” with instructions to limit its language to constitutionally permissible terms.

A. The Definition Of “Navigable Waters” Exceeds Congressional Authority To Regulate Intrastate Activity, In Contravention Of Constitutional Principles Of Federalism.

Congress’ regulatory power under the Commerce Clause is divided into three categories. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Congress has the authority to regulate: (i) the channels of interstate commerce; (ii) the instrumentalities of commerce; and (iii) those activities that substantially affect interstate commerce. *Id.* See also *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1066 (D.C. Cir. 2003), *cert. denied*, 72 U.S.L.W. 3551 (U.S. March 1, 2004) (No. 03-761).

With the CWA, Congress exercised its constitutional authority to regulate the channels of interstate commerce. *SWANCC*, 531 U.S. at 168 n.3, 173. In a series of decisions, the Supreme Court has “define[d] the scope of Congress’ regulatory authority under the Interstate Commerce Clause” over navigable waters. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (citing *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *South Carolina v. Georgia*, 93 U.S. 4 (1876); *The Montello*, 87 U.S. (20 Wall.) 430 (1874); and *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871)). Under even the most expansive definition in cases decided under the Commerce Clause,⁹ isolated water deposits and remote tributaries covered by EPA’s SPCC rule cannot constitute “navigable waters.” Quite simply, these isolated water deposits and remote tributaries have nothing to do with commerce or the needs of commerce. See *Appalachian Power*, 311 U.S. at 426-27. They certainly do not comprise part of the “highway for commerce between ports and places in different States” (*Ex parte Boyer*, 109 U.S. 629, 632 (1884)) that justifies the exercise of federal power. Moreover, the regulation of these geographic entities and the protection of these resources are within the traditional powers of the states. *SWANCC*, 531 U.S. at 174.

Lopez provides the proper framework for analyzing whether a federal law properly regulates activity that substantially affects interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609

⁹ See *Appalachian Elec. Power*, 311 U.S. at 408-09, 426 (“navigable waters” include those waters that can be improved to make them “navigable in fact,” not just those that are actually navigable at any given point in time).

(2000). The Supreme Court held in *Lopez* and *Morrison* that the asserted connection to interstate commerce must not be so attenuated as to threaten the constitutional principle of enumerated powers. In *Lopez*, for example, the Court emphasized that the government's reasoning would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime," as well as any activity "related to the economic productivity of individual citizens." 514 U.S. at 564. In *Morrison*, the Court noted that the rationale supporting the Violence Against Women Act would justify federal regulation of "any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," along with other areas of traditional state regulation whose "aggregate effect . . . on the national economy is undoubtedly significant." 529 U.S. at 615-16.

As in *Lopez* and *Morrison*, the attenuated chain of reasoning necessary to reach an impact on interstate commerce would leave nothing that the federal government could not regulate. For example, tourists travel to New England each fall to view the turning leaves; under EPA's apparent theory, the federal government could therefore regulate a tourist discarding a candy wrapper. It is this attenuated relationship between the regulated activity and interstate commerce that led to the *Lopez* Court's concern about federalism.

In *Rancho Viejo*, the D.C. Circuit rejected the plaintiffs' argument that the Endangered Species Act is an unlawful assertion of Congressional power over local land use decisions. In contrast to this case, the *Rancho Viejo* court recognized that the regulation of the taking of endangered species was not a traditional state concern. 323 F.3d at 1078-79. By contrast, the states have traditionally regulated intrastate isolated waters. Indeed, the Supreme Court has expressly recognized the states' role in this area and acknowledged it to be a decisive factor in appraising Commerce Clause limits. *SWANCC*, 531 U.S. at 174. *Rancho Viejo*, in fact, relied on an entirely separate body of law applicable to the Endangered Species Act and did not address the reasoning of *SWANCC* on this issue.

SWANCC reasoned that the Migratory Bird Rule "would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. In drafting the

CWA, Congress did not disturb the state-federal relationship. “Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources’” *Id.* (quoting 33 U.S.C § 1251(b)). The CWA was “written to avoid the significant constitutional and federalism questions raised” by EPA’s interpretation. *Id.* Here, despite *SWANCC*’s instruction, EPA has promulgated a rule that regulates activity on lands that are purely intrastate and that have little or no connection to navigable waters. EPA thereby contradicts the Supreme Court’s ruling that the CWA does not disturb traditional state sovereignty (unlike the Endangered Species Act) with regard to these activities.

Because EPA’s rule reaches far beyond traditional navigable waters, and regulates activities that fall within the powers traditionally reserved to the States, the regulation exceeds the federal government’s constitutional authority. This Court should therefore avoid the constitutional problems implicated by EPA’s definition of navigable waters in the SPCC regulations and vacate and remand the rule to EPA instructing the agency to exclude intermittent streams, isolated water deposits, remote tributaries and ephemeral streams from its definition of “navigable waters.”

B. Because The Regulated Activity At Issue Does Not Substantially Affect Interstate Commerce, EPA’s Interpretation Exceeds Commerce Clause Authority.

Perhaps the only colorable argument available to the government would be that it is regulating activities that in the aggregate “substantially affect” interstate commerce. The Supreme Court’s jurisprudence makes it clear that Congress did not intend to regulate under this category of the Commerce power in the CWA. *SWANCC*, 531 U.S. at 168 n.3, 173. Nonetheless, even if this Court were to reach the aggregation analysis, EPA’s SPCC regulations interpret the CWA to regulate activity well beyond the Commerce power.

The *Lopez* decision places limits on the exercise of federal Commerce power through the application of four factors: (i) does the regulation by its terms reach commercial or economic activity; (ii)

is the link between the regulated activity and interstate commerce direct or attenuated; (iii) does the regulation include an express jurisdictional element that limits the regulation to a discrete set of activities; and (iv) did Congress make findings regarding the regulated activity's effect on interstate commerce. 514 U.S. at 559-63. A proper application of these factors demonstrates that the rules at issue in this case exceed the authority granted to the federal government under the Commerce Clause.

First, although the SPCC rules may reach commercial activity (*i.e.*, the storage of oil), that is not the activity to be aggregated for purposes of determining whether there is a substantial effect on interstate commerce in the present context. The constitutionality of the definition of "navigable waters" in the SPCC rules is in question *insofar as* it regulates potential spills of oil to intrastate, isolated water deposits and to remote tributaries of navigable waters (even where a spill could not be expected to reach a navigable body of water). It is the specific regulated activity of affecting such isolated and remote waters that is the proper subject of aggregation -- *see United States v. Wilson*, 133 F.3d at 256-57 -- and that specific regulated activity is not commercial in nature. *Cf. SWANCC*, 531 U.S. at 173 ("we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce").

Second, the link between the regulated activity and interstate commerce is far too attenuated. The Commerce Clause does not justify congressional use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) (Harlan, J.); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) ("where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power").

Third, EPA has not limited the definition of navigable waters in any way that would narrow its effects to a discrete set of activities having an actual effect on interstate commerce. The regulation would cover intrastate, non-navigable waters (including wetlands) lacking any connection to navigable in fact waters, and tributaries of, and wetlands adjacent to, those same non-navigable waters. By its terms,

clause (1)(iii) reaches isolated, intrastate waters the degradation of which merely “could” have some effect on interstate commerce. 40 C.F.R. § 112.2 (2003). *Cf. United States v. Wilson*, 133 F.3d at 257 (faulting the identical Corps definition on the same basis). Clause (1)(v) reaches tributaries without regard even to *any* potential effect on interstate commerce. 40 C.F.R. § 112.2 (2003).

Finally, there are no congressional findings that isolated waters or remote tributaries affect interstate commerce to a degree justifying their regulation. The only statement in the legislative history that touches on the subject is Senator Muskie’s statement (quoted in full *supra* at 27), that “commerce on” *traditional navigable waters* “would have a substantial economic effect on interstate commerce.”

IV. THE PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

API and Marathon have both Article III standing and prudential standing to bring this action. Because API’s members, including Marathon, are regulated by the SPCC rules, standing is “self-evident,” *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

In addition, plaintiffs offer the following analysis. API has standing to sue on behalf of its members because 1) at least one of API’s members has standing to sue in its own right (as demonstrated below); 2) the interests API seeks to protect are germane to API’s purpose, as shown by the Statement of Michele Rinn {Exhibit 30}; and 3) neither the claim asserted nor the relief requested herein requires the participation herein of an individual API member. *See Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 342-43 (1977); *Sierra Club*, 292 F.3d at 898.

As shown in Exhibits 31, 32, 33, and 34, Anadarko Petroleum Corporation, BP America Production Company, ChevronTexaco Corporation, and Marathon Oil Company are members of API. Each of these companies has Article III standing. These companies are injured because they must prepare (or revise) and implement SPCC plans, or risk the imposition of penalties for non-compliance. The injuries are traceable to the challenged SPCC rules, and in particular to the definition of “navigable

waters” in 40 C.F.R. § 112.2 (2003), and the injuries would be redressed if the Court granted the relief requested herein.

Each of these companies has one or more facilities that *but for* the expansive definition of “navigable waters” in 40 C.F.R. § 112.2 (2003) would not be required to prepare (or revise) and implement SPCC plans. Those facilities would not be required to prepare (or revise) and implement SPCC plans if the definition of “navigable waters” in the SPCC rules were limited to traditional navigable waters and wetlands adjacent to traditional navigable waters, or if the definition were limited to waters that at least have a significant nexus to traditional navigable waters.

Each of these companies also has prudential standing. Their interests are “within the zone of interests to be protected *or regulated by* the statute . . . in question.” *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added).

CONCLUSION

The Court should vacate the definition of “navigable waters” in 40 C.F.R. § 112.2 (2003) to the extent that definition includes areas that are neither traditional navigable waters, nor wetlands adjacent to traditional navigable waters. In the alternative, the Court should vacate the definition of “navigable waters” to the extent that definition includes areas that lack a significant nexus to traditional navigable waters.

Respectfully submitted,

// s //

Thomas Sayre Llewellyn (D.C. Bar No. 332338)
LAW OFFICE OF
THOMAS SAYRE LLEWELLYN
5125 MacArthur Boulevard, NW Suite 32A
Washington, DC 20016
(202) 237-7291 (telephone)
(202) 237-7884 (facsimile)

Harry M. Ng (D.C. Bar No. 416604)
M. Elizabeth Cox (D.C. Bar No. 417535)
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8250 (telephone)
(202) 682-8033 (facsimile)

Attorneys for Plaintiff American Petroleum Institute

// s //

John C. Martin (D.C. Bar No. 358679)
Peter D. Robertson (D.C. Bar No. 395488)
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6032 (telephone)

Edward Strenkowski
Office of General Counsel
MARATHON OIL COMPANY
5555 San Felipe Road
Houston, TX 77056
(713) 296-2529 (telephone)

Attorneys for Plaintiff Marathon Oil Co.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN PETROLEUM INSTITUTE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-2247 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	
PETROLEUM MARKETERS)	
ASSOCIATION OF AMERICA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 02-2249 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	
MARATHON OIL COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-2254 (PLF)
)	
MICHAEL O. LEAVITT, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**STATEMENT OF MATERIAL FACTS AS TO WHICH PLAINTIFFS AMERICAN
PETROLEUM INSTITUTE AND MARATHON OIL COMPANY CONTEND
THERE IS NO GENUINE ISSUE**

Pursuant to LCvR 7(h) and 56.1, Plaintiffs American Petroleum Institute (“API”) and Marathon Oil Company (“Marathon”) submit this statement of material facts as to which Plaintiffs contend there is no genuine issue. Plaintiffs incorporate by reference (1) the Statement of Facts in the accompanying

Memorandum Of Points And Authorities In Support Of Motion Of Plaintiffs American Petroleum Institute And Marathon Oil Company For Partial Summary Judgment; and (2) the statements of Michele Rinn, Richard John Stephen Hart, Gordon Reid Smith, Donald R. Sellars, and Marvin Blakesley, which appear as Exhibits 30, 31, 32, 33, and 34 to that Memorandum. Plaintiffs contend that there is no genuine issue as to the facts stated in said Statement of Facts and said Exhibits.

Respectfully submitted,

// s //

Thomas Sayre Llewellyn (D.C. Bar No. 332338)
LAW OFFICE OF
THOMAS SAYRE LLEWELLYN
5125 MacArthur Boulevard, NW Suite 32A
Washington, DC 20016
(202) 237-7291 (telephone)
(202) 237-7884 (facsimile)

Harry M. Ng (D.C. Bar No. 416604)
M. Elizabeth Cox (D.C. Bar No. 417535)
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8250 (telephone)
(202) 682-8033 (facsimile)

Attorneys for Plaintiff American Petroleum Institute

// s //

John C. Martin (D.C. Bar No. 358679)
Peter D. Robertson (D.C. Bar No. 395488)
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6032 (telephone)

Edward Strenkowski
Office of General Counsel
MARATHON OIL COMPANY
5555 San Felipe Road
Houston, TX 77056
(713) 296-2529 (telephone)

Attorneys for Plaintiff Marathon Oil Co.