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Examining the Record: Understanding the Clean Water Act's Waiver of Sovereign Immunity in Its Historical Context

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Examining the Record: Understanding the Clean Water Act’s Waiver of Sovereign Immunity in Its Historical Context

*Patrick A. Doyle**

Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress . . . if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.¹

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1. WILLIAM BLACKSTONE, COMMENTARIES *242–43. Blackstone provides the basic English doctrine of sovereign immunity that the United States adopted into its law. As shown by the above excerpt, English doctrine also provided a means for a limited waiver of sovereign immunity. English subjects could petition the king for relief, which the king could at his discretion as a matter of “grace.” *Id.*

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INTRODUCTION

Congress enacted the Clean Water Act (“CWA”) of 1972 to, “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”² The Act expressly waived sovereign immunity,

2. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 313, 86 Stat. 816, 875 (codified as amended at 33 U.S.C. § 1323 (2018)).

requiring all agencies and departments of the federal government to adhere to its standards.³ This Article discusses the scope of the waiver of sovereign immunity in Section 313 of the CWA. The scope of the waiver matters because plaintiffs continue to pursue CWA actions against the federal government in courts throughout the United States.⁴ The current version of Section 313 may allow for inconsistent interpretations because it uses the plain term “water” as opposed to the more descriptive legal term “navigable water” used elsewhere in the CWA.⁵ This language allows interested parties to dispute whether the waiver of sovereign immunity applies to all water, including groundwater, or is limited to navigable water. The best reading of the word “water” is clear when viewed in a larger context. The CWA’s purpose, legislative history, and historical context, when read with well-settled United States Supreme Court precedent, make clear Congress intended to limit its waiver of sovereign immunity to navigable waters rather than expand the scope of the waiver to include waters that are not even within the jurisdictional reach of the CWA.

The analysis in this Article begins in Section I by examining the text of Section 313 and the jurisdictional reach of the CWA. Next, in Section II, this Article discusses the Supreme Court’s practice of narrowly interpreting waivers of sovereign immunity in environmental law statutes in favor of the federal government. Then, Section III of this Article examines the historical context in which Congress passed the CWA and explains how that context combined with the CWA’s legislative history make clear the drafters never contemplated the scope of the waiver extending beyond navigable waters.

3. *Id.*

4. *See generally* Haw. Wildlife Fund v. Cty. of Maui, 881 F.3d 754 (2018), *amended*, 886 F.3d 737 (9th Cir.), *vacated*, 140 S. Ct. 1462 (2020). The Department of Defense is especially vulnerable to water law actions as public interest continues to grow in the issue of Perfluorooctane Sulfonate (PFOS) and Perfluorooctanoic Acid (PFOA) pollution surrounding many current and former military bases. Miranda Paley, *DOD Moving Forward with Task Force to Address PFAS*, DEFENSE.GOV (Aug. 9, 2019), <https://www.defense.gov/explore/story/Article/1930618/dod-moving-forward-with-task-force-to-address-pfas/> [<https://perma.cc/5P8M-LZUT>].

5. 33 U.S.C. § 1323(a) (2018). Congress did not include the word “water” in Section 313 of the 1972 CWA but later added it to the 1977 amendments. Clean Water Act of 1977, Pub. L. No. 95-217, §61, 91 Stat. 1566, 1598 (codified as amended at 33 U.S.C. § 1323 (2018)). This paper focuses on the original 1972 statute and argues its drafters in Congress clearly never would have read the scope of the waiver of sovereign immunity to extend beyond navigable waters.

I. THE CLEAN WATER ACT'S SECTION 313 WAIVER OF SOVEREIGN IMMUNITY

The current text of section 313 of the CWA contains an express waiver of federal sovereign immunity.⁶ The text of the waiver states:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.⁷

The problem with the language of the waiver, and the source of debate, is that the original and current CWA fail to define the term “water.”⁸ The CWA defines “navigable waters,” but not “water.”⁹ Section 502(7) of the CWA defines navigable waters as “waters of the United States, including the territorial seas.”¹⁰ The United States Army Corps of Engineers (“USACE”) periodically issues regulations defining the scope of the legal phrase “waters of the United States” (“WOTUS”).¹¹ The phrase is also

6. 33 U.S.C. § 1323(a) (2018).

7. *Id.*

8. Clean Water Act § 502, 33 U.S.C. § 1362 (2018).

9. *See* 33 U.S.C. § 1362(7).

10. *Id.*

11. Definition of Waters of the United States, 33 C.F.R. pt. 328 (2019). The Rivers and Harbors Act (RHA) of 1899 first tasked the US Army Corps of Engineers (USACE) with regulating the United States’ navigable waters. Specifically, Section 10 of the RHA stated, “That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any the waters of the United States is hereby prohibited . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.” ch. 425, § 10, 30 Stat. 1121, 1151 (1899). The USACE continues to maintain navigable waterways with the mission to, “provide safe, reliable, efficient, and environmentally sustainable waterborne transportation systems for the movement of commercial goods, for national security needs, and for recreation.” *Inland Marine Transportation System*, U.S. ARMY CORPS OF ENGINEERS, <https://>

continually interpreted by United States Supreme Court rulings.¹² USACE recently updated its WOTUS regulation in September 2019.¹³ The legal phrase currently includes traditional navigable waters, such as oceans, rivers, lakes, and tributaries and wetlands adjoining those waters, including some large lakes, ponds, and ditches.¹⁴ The new guidance also clearly explains what are *not* WOTUS, and lists them as, “features that only contain water during or in response to rainfall, groundwater; many ditches, including most roadside or farm ditches; prior converted cropland; storm water control features; and waste treatment systems.”¹⁵

Considering these definitions and the stated purpose of the CWA, the predominant view is that Section 313 limits “water” to surface water, or navigable waters, and does include non-navigable waters, such as groundwater.¹⁶ However, the minority view is that the drafters of the statute could have used the word “navigable waters,” but did not, meaning that the statute waives sovereign immunity for all varieties of water pollution, including groundwater. This minority view, however, cannot survive scrutiny when read against the United States Supreme Court’s narrow interpretation of waivers of sovereign immunity in various environmental protection statutes, the historical context of the CWA, and the CWA’s legislative history. Several Supreme Court rulings applying the traditional methods of statutory construction show the Court would use

www.usace.army.mil/Missions/Civil-Works/Navigation/IMTS/ [https://perma.cc/Y3AN-9TZH] (last visited Oct. 4, 2020).

12. See *Rapanos v. United States*, 547 U.S. 715 (2006); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

13. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328).

14. *Navigable Waters Protection Rule Overview*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/nwpr/navigable-waters-protection-rule-overview> [https://perma.cc/ZJB7-YEQV] (last visited Jan. 7, 2021).

15. *Id.*

16. See Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 ENVTL. L. REP. 10,326, 10,328 (1985). Breen states, “The statute does not define ‘water,’ though it does define ‘navigable waters,’ courts disagree over whether the regulatory provisions of the Act may be extended to regulation of groundwater. The principal focus of the Act is certainly surface water. Probably the better view is that the FWPCA waiver does not apply ‘clearly and unambiguously’ to groundwater, but this issue has apparently not been directly tested in court.” *Id.*

each of the above-mentioned factors to narrowly interpret Section 313 in favor of the federal government.¹⁷

II. SUPREME COURT INTERPRETATIONS OF WAIVERS OF SOVEREIGN IMMUNITY

A. Origins of the Sovereign Immunity Doctrine

Legal scholars reason the source of the modern doctrine of sovereign immunity traces back to our nation's English history.¹⁸ The English doctrine of sovereign immunity assumed the king could do no wrong because he was the one who made the laws.¹⁹ Federalist 81 provides an early discussion of the sovereign immunity doctrine in American jurisprudence and essentially adopts the English rule.²⁰ In Federalist 81, Alexander Hamilton wrote, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT."²¹ He then continues, "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal."²² The doctrine was cemented in American common law by 1907 when Justice Oliver Wendell Holmes wrote in *Kawananakoa v. Polyblank* that, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."²³

As shown above, the concept of sovereign immunity has deep historical roots that courts must consider when interpreting statutory

17. See *FAA v. Cooper*, 556 U.S. 284, 290 (2012); see also *Hancock v. Train*, 426 U.S. 176, 180 (1976).

18. See Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. R. 439, 443 (2005); see also BLACKSTONE, *supra* note 1.

19. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. R. 1201, 1201 (2001). To the contrary, as shown by the aforementioned article, some legal scholars reason the United States explicitly rejected the doctrine of sovereign immunity and that the Supreme Court never should have read it into our law. They argue the United States clearly chose not to have a king and to make the executive subject to the legislative branch, and therefore find the doctrine of sovereign immunity cannot logically exist in concert with Article I, Section 9 of the United States Constitution, which states, "No Title of Nobility shall be granted by the United States." *Id.* at 1202; U.S. CONST. art I, § 9.

20. THE FEDERALIST NO. 81 (Alexander Hamilton).

21. *Id.* (emphasis in original).

22. *Id.*

23. 205 U.S. 349, 353 (1907).

waivers of sovereign immunity. Courts considering issues of statutory construction typically consider the statute's text, structure, drafting history, and purpose.²⁴ The Supreme Court has never considered the application of the word "water" in the CWA's waiver. However, it has reviewed the waivers of sovereign immunity in the CWA and Clean Air Act ("CAA") for other reasons, specifically to determine whether the states can impose certain permitting requirements on the federal government.²⁵ Prior to exploring the CWA and CAA cases, it is useful to understand the general legal principles the Supreme Court uses when interpreting the breadth of waivers of sovereign immunity in federal statutes.

B. FAA v. Cooper: The Present State of the Sovereign Immunity Doctrine

FAA v. Cooper is a recent case that provides the rule for the Supreme Court's current approach to waivers of sovereign immunity in federal statutes, which include the CWA and other environmental protection laws.²⁶ In *Cooper*, the Court considered a waiver of sovereign immunity in the Privacy Act and applied its past precedent from a long line of cases.²⁷

In *Cooper*, Justice Alito wrote for the Court and held, "a waiver of sovereign immunity must be unequivocally expressed in statutory text," and "any ambiguities are to be construed in favor of immunity."²⁸ His ruling was based on a long history of well-settled law giving great deference to the government on the issue of waiver of sovereign immunity.²⁹

The Court reasoned that not even a favorable reading of legislative history can achieve a ruling against immunity when Congress' intent is not clear from the plain language of the statute.³⁰ In summary, the waiver must

24. *FAA v. Cooper*, 556 U.S. 284, 305 (2012).

25. *Hancock v. Train*, 426 U.S. 167, 168 (1976).

26. *Cooper*, 556 U.S. at 284. A review of *Cooper*'s Westlaw history indicates it is the most recent and controlling Supreme Court case on the interpretation of federal waivers of sovereign immunity.

27. *Id.*

28. *Id.* at 305 (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–86 (1983)).

29. *Cooper*, 556 U.S. at 290 (citing *Lane*, 518 U.S. at 192; *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33, (1992); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

30. *Cooper*, 556 U.S. at 290 (citing *Lane*, 518 U.S. at 192).

be clear from the plain text.³¹ Otherwise, when ambiguities exist, the Court applies traditional statutory interpretation tools, but ultimately takes the interpretation most favorable to the government.³²

The traditional tools of statutory construction the Court cites are the statute's text, structure, drafting history, and purpose.³³ Later sections of this Article will take a close look at drafting history and purpose. First, however, it is useful to review how the Court has ruled in two cases where states attempted to enforce the permit requirements in the CAA and CWA against the federal government.

C. *EPA v. California State Water Resources Control Board*

The Supreme Court decided *Hancock v. Train* and *EPA v. California ex rel. State Water Resources Control Board* on the same day—June 7, 1976.³⁴ Justice White wrote both opinions and reached the same legal conclusion.³⁵ The issue before the Court was whether states could require the federal government to obtain a permit from the states' regulatory agencies.³⁶ The answer in both cases was no.³⁷ Again, the cases considered the same legal question and reached the same conclusion, but *Hancock* has risen into prominence as the seminal case on the issue of sovereign immunity in environmental protection statutes.³⁸

Consistent with *Hancock*, the Court in *EPA v. California* held that federal activities are “subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous.”³⁹ *EPA v. California* discusses the “requirements” language in the “control and abatement” of water pollution clause of Section 313, but not the overall scope of the waiver or the definition of the word “water.”⁴⁰ Because *Hancock* is the more frequently cited case on the present topic, this paper will analyze *Hancock* rather than *EPA v. California*.

31. See *Cooper*, 556 U.S. at 290.

32. *Id.* at 291.

33. *Id.*

34. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976); *Hancock v. Train*, 426 U.S. 167, 167 (1976). *Hancock* considered the Clean Air Act and *EPA v. California* considered the Clean Water Act.

35. *State Water Res. Control Bd.*, 426 U.S. 200; *Hancock*, 426 U.S. at 167.

36. *State Water Res. Control Bd.*, 426 U.S. at 200.

37. *Id.* at 226; see also *Hancock*, 426 U.S. at 180.

38. See generally Breen, *supra* note 16, at 10,326.

39. *State Water Res. Control Bd.*, 426 U.S. at 210.

40. *Id.*

D. Hancock v. Train

1. *The Clean Air Act's Waiver of Sovereign Immunity*

Section 118 of the Clean Air Act of 1970 contains a waiver of sovereign immunity stating, “[The Federal Government] shall . . . comply with . . . Federal, State, interstate, and local requirements . . . respecting the control and abatement of air pollution.”⁴¹ The Supreme Court considered this waiver’s language in *Hancock v. Train*.⁴² In *Hancock*, Kentucky argued the language of the waiver required federal installations emitting air pollution to obtain a permit from the state.⁴³ The United States argued it did not need to obtain a permit from the state.⁴⁴ Specifically, the federal government’s position was that Section 118 required it to reduce its harmful emissions, but that it did not need to obtain permits from the state because the permitting requirement was not expressly included in the CAA’s waiver of sovereign immunity.⁴⁵ Kentucky argued the permits were necessarily included because they were the manner in which the CAA’s requirements were enforced.⁴⁶ Kentucky was concerned that without the permits, any attempt to enforce the CAA on federal installations would be futile.⁴⁷

2. *Narrow Interpretation*

In *Hancock*, the Court narrowly interpreted the scope of the CAA’s waiver and held Section 118 did not require the federal government to obtain permits from the state of Kentucky.⁴⁸ The Court’s opinion was grounded in precedent that Congress only waives sovereign immunity when there is a clear expression or implication of its intent to be bound, and otherwise the federal government must be left free of state

41. Clean Air Act § 118(a), 42 U.S.C. § 7418(a) (2018).

42. *Hancock v. Train*, 426 U.S. 167 (1976).

43. *Id.* at 167 (1976). *Permitting Under the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/caa-permitting> [<https://perma.cc/7D4N-TK2F>] (last visited Oct. 4, 2020) (The CAA uses permits to enforce the goals of the Act. The CAA allowed the states to implement many of these permit programs.).

44. *See Hancock*, 426 U.S. at 174; *see also Breen*, *supra* note 16, at 10,328.

45. *See Hancock*, 426 U.S. at 174, 182–83.

46. *Id.*

47. *Id.*

48. *Id.*

regulation.⁴⁹ The Court noted that the federal government could only be regulated by the state when there was “specific congressional action” that makes the authorization of state regulation “clear and unambiguous.”⁵⁰

3. Application to the CWA

The holding in *Hancock* applies to the scope of the waiver of sovereign immunity in the CWA. As discussed above, *Hancock* considered the scope of the CAA’s waiver of sovereign immunity in terms of state regulation of the federal government.⁵¹ While that specific issue is not the focus of this paper, this case stands for the legal principle that courts will narrowly interpret waivers of sovereign immunity in environmental statutes. Given this precedent, an examination of the legislative history and historical context of the CWA further clarifies that the scope of Section 313 is limited to navigable waters.

III. SECTION 313 MUST BE VIEWED IN THE CONTEXT OF THE ACT’S HISTORICAL PURPOSE

Congress appears to have recycled language from the CAA and used it in the CWA’s waiver of sovereign immunity.⁵² The CWA’s language is almost identical to the language used in the CAA two years earlier.⁵³ Therefore, to understand the scope of the waiver it is necessary to examine the historical context in which Congress passed the CWA, its legislative history, and its stated purpose.

A. Stated Purpose of the Act

The text of the CWA lists seven goals in its first paragraph.⁵⁴ The very first goal was to eliminate the discharge of pollutants into the navigable waters of the United States by 1985.⁵⁵ Other goals include the protection

49. *Id.* at 178–79. (citing *United States v. Wittek*, 337 U.S. 346, 359 (1949); *Mayo v. United States*, 319 U.S. 441, 445, (1943)).

50. *Id.* at 179. (citing *Paul v. United States*, 371 U.S. 245, 263, (1963)); *California ex rel. State Water Res. Control Bd. v. EPA*, 511 F.2d 963, 968 (9th Cir. 1975)).

51. *Id.*; see also Breen, *supra* note 16, at 10,328.

52. See S. REP. NO. 92-1236, at 3776 (1972) (Conf. Rep.).

53. Clean Water Act §313(a), 33 U.S.C. § 1323(a) (2018); Clean Air Act § 118(a), 42 U.S.C. § 7418(a) (2018).

54. Clean Water Act § 101(a), 33 U.S.C. 1251(a) (2018).

55. 33 U.S.C. § 1251(a)(1).

of fish, shellfish, wildlife, and to provide for recreation in and on the water.⁵⁶ A review of these enumerated goals makes clear Congress was focused on protecting navigable waters when it drafted the CWA, and this focus can logically flow to Congress' intent for the scope of the CWA's waiver of sovereign immunity.

B. Historical Context

The legislative history of the CWA reflects the popular sentiment that the nation was becoming increasingly concerned with the conditions of its lakes and rivers in the late 1960s and early 1970s.⁵⁷ Several highly visible incidents of water pollution had made it into the national spotlight. A review of materials from that era provides useful context to Congress' passing of the CWA in 1972.

1. President Lyndon Baines Johnson's Special Message to Congress, 1965

President Lyndon Baines Johnson wrote a letter to Congress in 1965 titled, "Conservation and Restoration of Natural Beauty."⁵⁸ The letter called for new national parks and recreation areas and, more directly related to this paper, discussed the impact of air and water pollution on the nation.⁵⁹ The letter arguably summarized the mood of many Americans in the late 1960s and set the stage for the passage of the CAA and the CWA.⁶⁰

President Johnson dedicated several sections of the letter to rivers in general, an entire section on the Potomac River, and water pollution generally.⁶¹ Regarding water pollution, his letter stated, "Every major river system is now polluted. Waterways that were once sources of pleasure and beauty and recreation are forbidden to human contact and objectionable to sight and smell. Furthermore, this pollution is costly, requiring expensive

56. 33 U.S.C. § 1251(a)(2).

57. Letter from the National League of Cities, U.S. Conference of Mayors, to the President of the United States (Oct. 10, 1972) (on file with author; available on HeinOnline). See also ROBERT W. ALDER, JESSICA C. LANDMAN, & DIANE M. CAMERON, *THE CLEAN WATER ACT 20 YEARS LATER* 7 (1st ed. 1993) (One author cited to the river, lake, and coastline pollution of the early 1970s, and argued that, "By 1972, the nation was ready for stronger medicine.").

58. Special Message to the Congress on Conservation and Restoration of Natural Beauty, 1965 PUB. PAPERS 155 (Feb. 8, 1965) [hereinafter Pres. Johnson Message].

59. *Id.*

60. See *The Cities: The Price of Optimism*, TIME, Aug. 1, 1969, at 41.

61. Pres. Johnson Message, *supra* note 58.

treatment for drinking water and inhibiting the operation and growth of industry.”⁶²

The use of the terms “river system” and “waterways” illustrates the categories of water President Johnson was concerned about.⁶³ His letter focused on navigable waters and the need for laws the federal government can enforce against private industry and manufacturing.⁶⁴ The letter certainly does not support the idea that Congress was focused on non-navigable water and groundwater when it drafted the CWA several years later.

2. Cuyahoga River Fire

President Johnson’s concerns about water pollution in his 1965 letter were illustrated by the situation in Cleveland, Ohio, several years later. In 1969, the Cuyahoga River caught fire in Cleveland, Ohio, and captured national attention.⁶⁵ Few photos can grab headlines like that of a river through a major city literally on fire.⁶⁶ On August 1, 1969, *Time* magazine published an article condemning the dismal state of the Cuyahoga River and other rivers in rust-belt industrial cities.⁶⁷ *Time* told America how these rivers had essentially become sewers for these cities’ industrial waste.⁶⁸

62. *Id.*

63. *Id.*

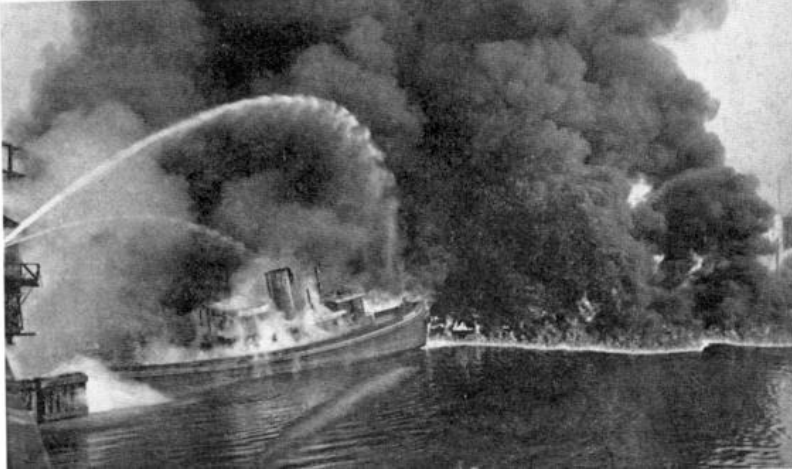
64. *Id.*

65. Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (Jun. 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/> [https://perma.cc/PG8Z-4K6D]; *The Cities: The Price of Optimism*, *supra* note 60, at 41.

66. Michael Rotman, *Cuyahoga River Fire*, CLEVELAND HIST. (Oct. 5, 2019), <https://clevelandhistorical.org/items/show/63> [https://perma.cc/UV9Q-3HZ6] (The photo published by *Time* magazine was actually from a fire on the river in 1952. Nonetheless, the *Time* article focused public attention on the 1969 fire despite incorrectly citing the date of the photo.)

67. *The Cities: The Price of Optimism*, *supra* note 60, at 41.

68. *Id.*



The Cuyahoga River on fire and engulfing a bridge in 1948. Boissoneault, *supra* note 65.

Oil almost completely covered the Cuyahoga River in 1969, and it burst into flames, destroying two bridges and causing at least \$100,000 in damage.⁶⁹ The Cuyahoga River had become so polluted that one local said, “there was a general rule that if you fell in, [G]od forbid, you would go immediately to the hospital.”⁷⁰

News of the fire quickly extended beyond *Time* magazine, and *National Geographic* featured it as the cover story in its December 1970 issue.⁷¹ The *National Geographic's* cover read, “Our Ecological Crisis.”⁷² In addition to these popular magazine articles, a recent Senate resolution celebrating fifty years of progress in the Cuyahoga River recalled the oil-laden state of the waterway, and its nickname “the burning river,” because of the thirteen total times the river caught fire.⁷³

69. Rotman, *supra* note 66.

70. Boissoneault, *supra* note 65; *The Cities: The Price of Optimism*, *supra* note 60, at 41.

71. Boissoneault, *supra* note 65; *The Cities: The Price of Optimism*, *supra* note 60, at 41; Gordon Young, *Pollution: Threat to Man's Only Home*, NAT'L GEOGRAPHIC, Dec. 1970, at 738.

72. *Id.* at 737 (The article argues the nation had not made enough progress towards cleaning its waters, and cites to a quote from the December 1897 issue of the *National Geographic*, which reads, “Until state or national legislation can be secured to regulate such matters, the Potomac . . . must serve as a sort of sewer into which towns and manufacturing establishments empty their refuse.”).

73. S. Res. 290, 116th Cong. (2019) (enacted).

The 1969 fire did not burn very long, but it enjoyed notoriety in the national media as illustrated by the *Time* and *National Geographic* articles.⁷⁴ The national interest in this story helps suggest that both the public and Congress were focused on navigable waters, such as the Cuyahoga River, when it passed the Clean Water Act three years later in 1972.

3. Great Lakes Contamination

In addition to the Cuyahoga River fires, another *Time* magazine article from May 1970 titled, *Endangered Great Lakes*, focused attention on the dangerous levels of mercury dumped into the Great Lakes by United States and Canadian industries.⁷⁵ The mercury contamination had become so bad in April 1970 that officials banned all fishing on Lake Saint Clair—a large lake located between Lake Huron and Lake Erie—because mercury levels were fourteen times the maximum amount safe for human consumption.⁷⁶ The issue had become so dire that the Secretary of the Interior ordered a federal investigation of all legal substances discharged into the Great Lakes.⁷⁷ By the 1970s, Lake Erie had become so polluted that it “oozed rather than flowed.”⁷⁸ Lake Erie had fallen victim to massive dumping and pollution from Cleveland, Toledo, and the other major industrial cities on its shores.⁷⁹

As with the river fire in Cleveland, another widely-read *Time* magazine article drew attention to the issue of pollution in the nation’s navigable waters.⁸⁰ A review of these articles and other historical publications supports the argument that Congress’ attention when drafting

74. Boissoneault, *supra* note 65.

75. *Endangered Great Lakes*, TIME, May 4, 1970, at 85.

76. *Id.*

77. *Id.*

78. Mary Griggs, *1970s Redux: Lake Erie Is So Polluted, Toledo’s Drinking Water Was Cut Off*, SMITHSONIAN MAG. (Aug. 4, 2014), <https://www.smithsonianmag.com/smart-news/toledos-water-supply-was-contaminated-toxins-algae-180952242/> [<https://perma.cc/V6L6-NDEG>].

79. See *Endangered Great Lakes*, *supra* note 75, at 85; R. DANA ONO, JAMES D. WILLIAMS, & ANNE WAGNER, VANISHING FISHES OF NORTH AMERICA 27 (1983) (The damage to the Great Lakes continued to persist after Congress passed the CWA in 1972. The author writes, “While the Great Lakes have an impressive capability of absorbing the punishing onslaught of Man’s activities, the overutilization of the lakes’ resources has grown at astronomical rates, further testing the lakes’ ability to recover.”).

80. *Endangered Great Lakes*, *supra* note 75, at 85.

the CWA was focused on protecting navigable waters, and waived its sovereign immunity accordingly.

C. Legislative History

1. Rivers and Harbors Act of 1899

The Rivers and Harbors Act (“RHA”) of 1899, officially the Rivers and Harbors Appropriation Act, was the original predecessor to the CWA of 1972. The RHA was an appropriation bill that set rules for the use of navigable waters in addition to funding many waterway construction projects.⁸¹ Section 13 of the RHA set the stage for the CWA that came over seventy years later. Specifically, Section 13 states,

That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship . . . any refuse matter of any kind or description whatever other than that flowing from streets or sewers and passing therefrom into any navigable water of the United States.⁸²

Interestingly, Section 13 of the RHA contains a waiver of sovereign immunity for the military, stating, “[t]hat the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned into *navigable waters*.”⁸³

In addition to Section 13, Sections 9 and 10 of the RHA prohibited any obstructions placed in navigable waters.⁸⁴ The focus of the RHA, including its waiver of sovereign immunity, was on navigable waters.⁸⁵ There is no reason to believe Congress intended the scope of its successor statute or its waiver of sovereign immunity to be anything different.

2. President’s Nixon’s 1970 Statement to Congress on Water Pollution

On April 15, 1970, President Nixon wrote a message to Congress urging legislation to combat the disposal of waste in the Great Lakes and

81. Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (1899).

82. *Id.*

83. Rivers and Harbors Act § 13 (emphasis added).

84. Rivers and Harbors Act §§ 9, 10, 13.

85. *See id.*

oceans.⁸⁶ President Nixon referred the letter to the House Committee on Public Works for its consideration.⁸⁷ The President began the letter with an emotional call for action,

The first of the Great Lakes to be discovered by the seventeenth century French explorers was Lake Huron. So amazed were these brave men by the extent and beauty of that lake, they named it “The Sweet Sea.” Today there are enormous sections of the Great Lakes (including almost all of Lake Erie) that make such a title ironic. The by-products of modern technology and large population increases have polluted the lakes to a degree inconceivable to the world of the seventeenth century explorers.⁸⁸

President Nixon’s letter outlined a proposed bill to Congress that closely resembled what would later become the CWA.⁸⁹ The scope of President Nixon’s proposed bill focused on dumping waste in the Great Lakes and oceans.⁹⁰ Interestingly, the language President Nixon used in the letter could easily be pulled from a 2020 presidential debate. He states, “we are only beginning to realize the ecological effects of ocean dumping and current technology is not adequate to handle wastes of a volume now being produced.”⁹¹ The letter never mentions groundwater or any other non-navigable water.⁹² In total, it can be inferred from this letter that the chief executive never intended the primary purpose of a new clean water bill, including its waiver of sovereign immunity, to include non-navigable waters.

3. Senate Public Works Committee Report, October 28, 1971

Congress appears to have been paying attention to navigable water pollution in 1971 because it was already working to pass the CWA. The Senate Public Works Committee published a report on proposed CWA legislation on October 28, 1971.⁹³ Section 313 received little discussion in

86. H.R. DOC. NO. 91-308 (1970) (This letter is included in the Legislative History section rather than the Historical Context section because President Nixon addressed the letter to Congress only about two years before it passed the CWA).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. S. REP. NO. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668.

the report.⁹⁴ The report recognizes the federal government as a major contributor to water pollution and states, “The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.”⁹⁵

The report does not discuss the scope of the waiver in terms of different types of waters.⁹⁶ The reference to “private citizens” would be more meaningful if the scope of the CWA extended to non-navigable water, but it does not, as made clear by the language of the bill and its historical context.

4. House and Senate Conference Committee, September 28, 1972

The United States House of Representatives and Senate often pass versions of the same bill with different language.⁹⁷ When this happens, the House and Senate will form a conference committee to reconcile differences in each chamber’s legislation.⁹⁸ Congress used this process to pass the Clean Water Act of 1972.⁹⁹

The Senate and House of Representatives issued a conference committee report on September 28, 1972.¹⁰⁰ The purpose of the committee was to identify and reconcile differences between House and Senate versions of the CWA.¹⁰¹ The conference report simply states, “[Section 313] is the same as the Senate bill and the House amendment.”¹⁰² As with the original Senate report, there is no debate or discussion on the scope of the waiver, nor any indication that the original drafters would mean “water” to mean anything other than “navigable water.”¹⁰³

Notably, the scope of both the House and the Senate’s declaration of policy goals is the same.¹⁰⁴ Both chambers used the phrase “United States

94. *Id.* at 3733–34.

95. *Id.*

96. *Id.*

97. *Conference Committee*, DISTRICT POL’Y GROUP, <http://www.districtpolicygroup.com/dewonkify-detail/conference-committee> [<https://perma.cc/594S-UXQ2>] (last visited Oct. 4, 2020).

98. *Id.*

99. S. REP. NO. 92-1236 (1972) (Conf. Rep.), *as reprinted in* 1972 U.S.C.C.A.N. 3776.

100. *Id.* at 3776.

101. *Id.*

102. *Id.* at 3813.

103. *Id.*

104. *Id.*

waters” when setting their goals.¹⁰⁵ United States waters, or Waters of the United States is a phrase with much legal significance.¹⁰⁶ The term “Waters of the United States” was a new phrase first found in the Clean Water Act of 1972 and was not defined by the EPA until May 1973.¹⁰⁷ Interestingly, the legislative history makes clear Congress chose to use “Waters of the United States” rather than list the actual scope of the Act.¹⁰⁸ However, neither chamber discusses groundwater or non-navigable water when setting their expressed policy goals in 1972, allowing for the argument that the intended scope of their proposed waiver was the same.¹⁰⁹

5. Senate Consideration of the Report of the Conference Committee, October 4, 1972

The Senate held a hearing on October 4, 1972, to consider the CWA’s conference committee report.¹¹⁰ The transcript of the debate provides an excellent understanding of the legislative intent of the CWA. Senator Edmund Muskie submitted the conference report to the Senate at the hearing.¹¹¹ Senator Muskie was an environmentalist and helped pass both the Clean Air Act and Clean Water Act.¹¹² Senator Muskie began the hearing by framing water pollution in terms of navigable waters, stating,

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment it has been prescribed in the past. The cancer of water pollution was engendered by our abuse of lakes, streams, rivers and oceans; it has thrived on our half-hearted attempts to control it, and like any other disease, it can kill us.¹¹³

105. *Id.*

106. *Id.*

107. STEPHEN MULLIGAN, CONG. RESEARCH SERV., R44585, EVOLUTION OF THE MEANING OF “WATERS OF THE UNITED STATES” IN THE CLEAN WATER ACT 6 (2019).

108. *Id.* (As early as 1899, Congress appears to have preferred to take a flexible approach to defining navigable waters because it allowed the United States Army’s engineers to set the definition by regulation, rather than defining it by statute.) *See* Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2018).

109. S. REP. NO. 92-1236, at 3813.

110. 118 CONG. REC. 33,692 (1972).

111. *Id.*

112. *Edmund Muskie*, BRITANNICA, <https://www.britannica.com/biography/Edmund-Muskie> [<https://perma.cc/JBD9-BEXZ>] (last visited Oct. 4, 2020).

113. 118 CONG. REC. 33,692 (1972) (statement of Sen. Muskie).

Senator Muskie continues to discuss pollution of lakes, rivers, bays, and oceans.¹¹⁴ The hearing discusses the Act in detail but never discusses any intent for water pollution to mean anything other than the term “navigable waters” discussed throughout the CWA.¹¹⁵

6. Executive Order 12088

In 1978, President Jimmy Carter issued an executive order that attempted to broaden the waivers of sovereign immunity in the CWA and other environmental protection statutes.¹¹⁶ The executive order requires the federal government to comply with all pollution control standards, meaning the same substantive and procedural requirements that would apply to any private person.¹¹⁷

An executive order alone, however, cannot waive sovereign immunity.¹¹⁸ Rather, Congress must pass legislation to accomplish this goal.¹¹⁹ The executive order appears to expand sovereign immunity on its face, but it is best viewed as policy guidance to the executive branch to ensure good faith compliance with environmental protection statutes.¹²⁰

D. Legislative History of Section 313 After 1972

Section I of this Article discusses the “current” version of the CWA to foreshadow the fact Congress has made changes to the law over time. Section 313 of the CWA has been amended twice since 1972. The 1972 version of Section 313 does not contain the word “water” when referring to pollution.¹²¹ It simply says “pollution.”¹²² The word “water” was added in the 1977 amendments to the CWA when the entire sentence was re-

114. *Id.*

115. *Id.*

116. Exec. Order No. 12,088, 3 C.F.R. 243–46 (1979).

117. *Id.*

118. Breen, *supra* note 16, at 10,331.

119. *Hancock v. Train*, 426 U.S. 167, 179 (1976). Federalist 81 provides an early presentation of the rules for sovereign immunity in American jurisprudence. Alexander Hamilton reasoned a state could only be subject to suit if the state's convention legislatively waived its sovereign immunity. THE FEDERALIST NO. 81 (Alexander Hamilton).

120. Breen, *supra* note 16, at 10,332.

121. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 313, 86 Stat. 816, 875 (codified as amended at 33 U.S.C. § 1323 (2018)).

122. *Id.*

written.¹²³ The sentence was re-written to make the federal government liable to the same extent as any non-government entity for any state procedural requirements and sanctions, to include recordkeeping and reports.¹²⁴

The House and Senate again used the conference committee process when they amended the CWA in 1977. In the 1977 conference report, the Senate amendment states, “This section clarifies [S]ection 313 of the Act to provide that all Federal facilities must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws.”¹²⁵ This was likely a response to the ambiguity addressed in the *Hancock* and *EPA v. California* cases. The 1977 conference report makes no indication that adding the word “water” was an intentional substantive change to the scope of the 1972 law.¹²⁶ It also does not discuss any changes to the scope of the waiver in terms of the types of waters it applies to.¹²⁷

CONCLUSION

The CWA’s legislative history, the historical events of the late 1960s and early 1970s, and Supreme Court precedent make clear the Act’s waiver of sovereign immunity is limited to navigable waters. The scope of the CWA itself is limited to navigable waters and there is no indication that Congress intended the scope of the waiver to extend beyond the jurisdiction of the Act itself. Plaintiffs have never directly challenged the scope of the waiver and the meaning of the word “water” in the current version of Section 313 before the Supreme Court. Such a challenge could focus on the issue of groundwater pollution around current and former military bases. However, if a plaintiff were to attempt to extend the scope of the waiver beyond the traditional jurisdiction of the CWA, then there is a strong argument the Court would rule in favor of the government and find the waiver in Section 313 is limited to navigable waters.

123. Clean Water Act of 1977, Pub. L. No. 95-217, §61, 91 Stat. 1566, 1598 (codified as amended at 33 U.S.C. § 1323 (2018)).

124. *Id.*

125. H.R. REP. NO. 95-830 (1977) (Conf. Rep.), as reprinted in 1977 U.S.C.C.A.N. 4424, 4466.

126. *Id.*

127. *Id.*