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Returning to Troubled Waters, Part 3: A Detour Back to Congress

Jonathan Coppess

Department of Agricultural and Consumer Economics
University of Illinois

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The Supreme Court's consideration of *Sackett v. Environmental Protection Agency* (Docket No. 21-454; Gerstein, October 3, 2022) presents an opportunity to reconsider the Clean Water Act's troubled definition of navigable waters in yet another dispute involving wetlands (*farmdoc daily*, October 13, 2022). This article detours back to Congress to review the debate over the regulation of wetlands by the Article I branch in 1977 amendments to the Act.

Background

To review: The Clean Water Act was enacted in 1972 by a Congress that overrode President Nixon's veto during an election year. In terms of the legislative process, this is the most difficult route to enactment and provides a strong demonstration of the support for the legislation in Congress. Congress was clear in the conference report that the term "navigable waters" was to "be given the broadest possible constitutional interpretation" and not limited by any previous definition or meaning of that term (*farmdoc daily*, October 13, 2022). Congress revisited the issue five years later. Among the changes to the Clean Water Act in the 1977 amendments, the most relevant were the provisions specifically focused on the discharge of dredge and fill material, including for wetlands, regulated under Section 404 (33 U.S.C. §1344).

As discussed previously, the Supreme Court first considered the term "navigable waters" in the Clean Water Act context in a 1985 decision (*United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985); *farmdoc daily*, November 17, 2022). The Court considered the Congressional debate over amendments enacted by Congress in 1977. The Army Corps of Engineers had attempted to require a housing developer to get a permit to discharge fill material into a wetland and the developer challenged whether the Corps had properly defined wetland as navigable waters under the statute (*Riverside Bayview Homes*, 474 U.S., at 123). The "question whether the regulation at issue requires respondent to obtain a permit before filling its property is an easy one," the Court found, and accepted the Corps' definition and regulatory jurisdiction (*Id*., at 129). The Court recognized the significant scope of the Clean Water Act and "conclude[d] that a definition of 'waters of the United States' encompassing all wetlands

adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act" (*Riverside Bayview Homes*, 474 U.S., at 135). To support its conclusion, the Court looked to the 1977 debate and the different approaches by the House and Senate (*Id*., at 135-36). Specifically, the Court focused on attempts to redefine "navigable waters" which were included in the House bill but rejected by the Senate (*Id*., at 136-37). The Court understood that the final conference agreement accepted the Senate's version and concluded that Congress had "acquiesced in the administrative construction" because the Corps' regulatory reach was "brought to Congress' attention and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that the protection of wetlands would be unduly hampered" by a more narrow definition (Id., at 135-7).

Discussion

A close read of the legislative history—predominantly the explanations in committee reports—offers a more complete perspective on the 1977 amendments. The House and Senate approaches to amending the Clean Water Act for dredge and fill material were strikingly similar; both were seeking to address controversies that had arisen in the five years under the new vast regulatory approach of 1972. The House Committee on Public Works and Transportation (House PWT) explained it was seeking to address the "[u]nresolved controversy over the scope of Corps of Engineers' regulatory authority over activities affecting wetlands and non-navigable streams," which, it added, "poses the threat of needless bureaucratic overregulation of farming, forestry and other practices" (*H. Rept*. 95-139, Id., at 2). The Senate Committee on Environment and Public Works (Senate EPW) noted that "implementation has been uneven, often contrary to congressional intent, and, frequently more the result of judicial order than administrative initiative" (*S. Rept*. 95-370, at 1). House PWT was concerned that an expanding regulatory program would "result in a substantial increase in permit applications and that the program will prove impossible of effective administration and that more will be lost than gained in the protection of the Nation's water" and that they didn't want federal government to "assume the entire responsibility for environmental protection" (*H. Rept*. 95-139, at 22).

Revision was not a complete rewrite or abandonment of the 1972 goals, however. Senate EPW explained that Congress had commissioned a study of achieving the goals set in 1972 and held hearings, the results of which did not justify "major change in the direction established in 1972" or the "basic structure," but that did not mean changes weren't needed or that a "mid-course correction" was unnecessary; the "overall thrust and objectives of the program should not be abandoned, and that the correction required is modest at best" (*S. Rept*. 95-370, at 1-2). House PWT emphasized the "commitment to restore and preserve the quality of our waters" and that alternatives methods for doing so should be "considered only after exhaustive analysis and in terms of consistency with the fundamental purposes of the Act" (*H. Rept*. 95-139, at 1-2). Additionally, Senate EPW emphasized that the 1972 Act "exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent" and to "protect the physical, chemical, and biological integrity of the Nation's waters," but that "[r]estriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render this purpose impossible to achieve" (*S. Rept*. 95-370, at 75).

First, both committees modified the Section 404 permit program for dredge and fill material by removing from regulation some activities, such as those involved in farming and construction. House PWT noted that "[n]ormal farming, ranching and silviculture activities, the maintenance of structures such as dikes, dams and levees, and the construction and maintenance of farm or stock ponds and irrigation ditches" should be exempted from permitting requirements (*H. Rept*. 95-139, at 20). The Senate also exempted activities such as "seeding, cultivating, and harvesting, or for upland construction of soil and water conservation measures, or certain minor drainage" as well as some road and other construction activities so long as they "have no serious adverse impact on water quality" because "performed in a manner that will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody, and that will not reduce the reach of the affected waterbody" (*S. Rept*. 95-370, at 76-77). Both continued regulation for any dredge or fill materials that contained toxic substances (*H. Rept*. 95-139, at 20; *S. Rept*. 95-370, at 77).

Second, both committees shifted some of the regulation of dredge and fill material to a regulatory program operated by the States, but their methods were different. The House generally exempted dredge and fill discharges into "non-navigable waters and wetlands adjacent to them" unless the State and Corps agreed that "regulation is needed because of their ecological or environmental importance" (*H.*

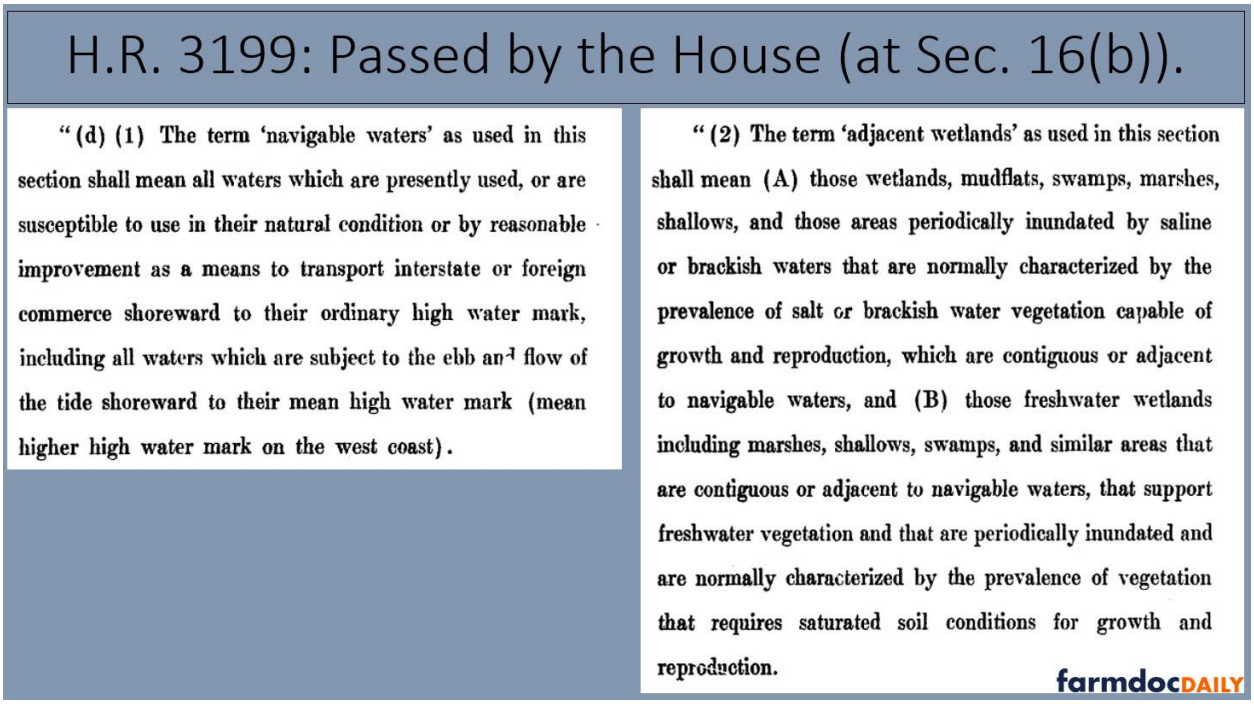
Rept. 95-139, at 20). Permitting authority could also be delegated to the State for wetlands adjacent to navigable waters or freshwater lakes located within the State's boundaries, if the State had the "authority, responsibility and capability" to regulate and "the delegation is in the public interest" (*H. Rept*. 95-139, at 20). By comparison, Senate EPW authorized a State program by which the Governor would request approval to administer a dredge and fill permitting program for those navigable waters and adjacent wetlands within the State, except for coastal waters. EPW's goal was to "maintain the primary thrust" of the regulatory system to protect "wetlands from spoil and fill discharges where wetlands protection is an important public need," while also seeking to "free from the threat of regulation those kinds of manmade activities which are sufficiently de minimus as to merit general attention at State and local level and little or no attention at the national level" (*S. Rept*. 95-370, at 10-11). Figure 1 provides a snapshot comparison between the House and Senate approaches on this matter.

Figure 1. Comparing House and Senate Versions of 1977 Amendments

H.R. 3199: Passed by the House (at Sec. 16(b)).	S.1952: Senate Amendment to H.R. 3199 (at Sec. 53).
"(f) If the Secretary of the Army, acting through the Chief of Engineers, and the Governor of a State enter into a joint agreement that the discharge of dredged or fill material in waters other than navigable waters and in wetlands other than adjacent wetlands of such State should be regulated because of the ecological and environmental importance of such waters, the Secretary, acting through the Chief of Engineers, may regulate such discharge pursuant to the provisions of this section. Any joint agreement entered into pursuant to this subsection may be revoked, in whole or in part, by the Governor of the State who entered into such joint agreement or by the Secretary of the Army, acting through the Chief of Engineers.	*"(5) State programs for discharges of dredged or fill material that are subject to approval under this subsection shall include all navigable waters within the State except any coastal waters of the United States subject to the ebb and flow of the tide, including any adjacent marshes, shallows, swamps, and mudflats, and any inland waters of the United States that are used, have been used or are susceptible to use for transport of interstate or foreign commerce, including any adjacent marshes, shallows, swamps, and mudflats.* farmdocDAILY

As the Supreme Court noted, the most notable difference between the House and Senate bills was the decision by the House to redefine navigable waters. House PWT removed from regulation the discharge of any dredge or fill material "to the extent that they occur waters other than navigable waters and adjacent wetlands" because such waters "are more appropriately and more effectively subject to regulation by the States" and the "States should be encouraged to assume this responsibility" (*H. Rept*. 95-139, at 23). The committee made certain to distinguish between the different parts of the statute in terms of regulatory reach. For all discharges other than those from dredge and fill, the term "navigable waters" was intended to include "all of the waters of the United States including their adjacent wetlands" (*H. Rept*. 95-139, at 24). The main definition "physically encompasses" both categories of navigable waters and adjacent wetlands, but that the dredge and fill regulations encompassed a narrower subsection of those navigable waters and adjacent wetlands as redefined. This reinforces the view that the original definition and the application for navigable waters for all discharges other than dredge and fill was extraordinarily broad and all-encompassing. Most helpful in understanding these terms, House PWT explained that "intrastate waters would also meet the test of navigability if they are or could be used as a link in interstate commerce" and that the "creation of artificial obstructions such as dams does not render an otherwise navigable water nonnavigable" (*H. Rept*. 95-139, at 24). Figure 2 provides the terms as redefined by the House.

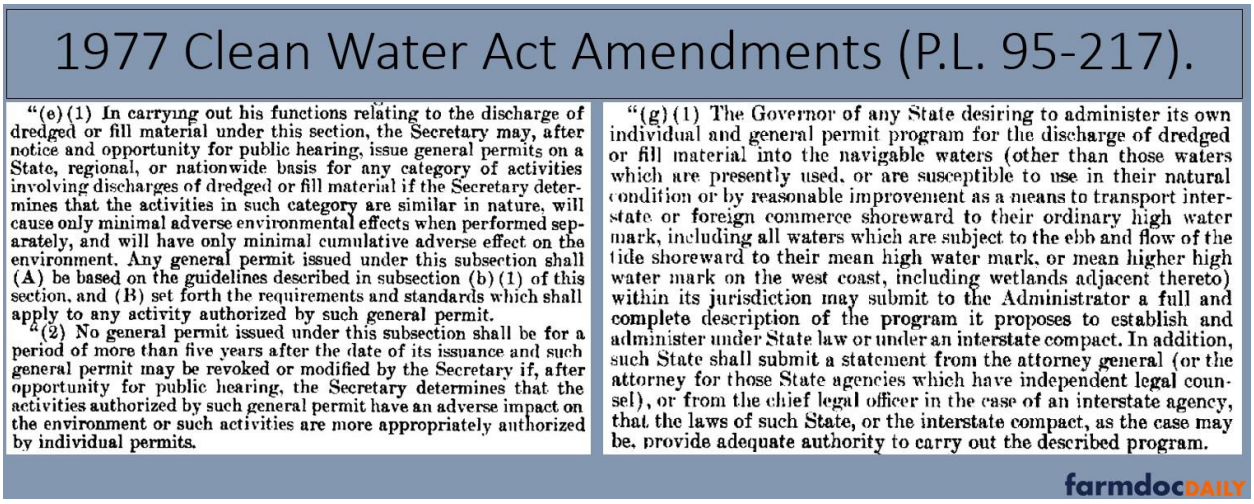
Figure 2. Revised Definitions in House Version of 1977 Amendments



Instead of redefining the term "navigable waters," Senate EPW's approach was the split jurisdiction, referred to above (see, Figure 1) that would "allow[] States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters" within the State, once a State's regulatory program was approved (*S. Rept*. 95-370, at 75). Senate EPW emphasized its concern for wetlands: "There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage," and that the "unregulated destruction of these areas is a matter which needs to be corrected" but that the States needed to shoulder more of the responsibility (*S. Rept*. 95-370, at 10). Discharging dredge and fill material "into lakes and tributaries of these waters can physically disrupt the chemical and biological integrity of the Nation's waters and adversely affect their quality" and the presence of toxic materials made matters worse. Critically, "the adverse effects of such materials must be addressed where the material is first discharged into the Nation's waters" and that limiting "the jurisdiction of the Federal Water Pollution Control Act with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives" (*S. Rept*. 95-370, at 75). Regulatory exemption was only for those activities that "should have no serious adverse impact on the water quality if performed in a manner that will not impair the flow and circulation patters and the chemical and biological characteristics of the affected waterbody, and will not reduce the reach of the affected waterbody" (*S. Rept*. 95-370, at 76). In addition to exempted activities and State programs, the Senate also provided authority for a general permit issued by the Corps or the State, under certain circumstances.

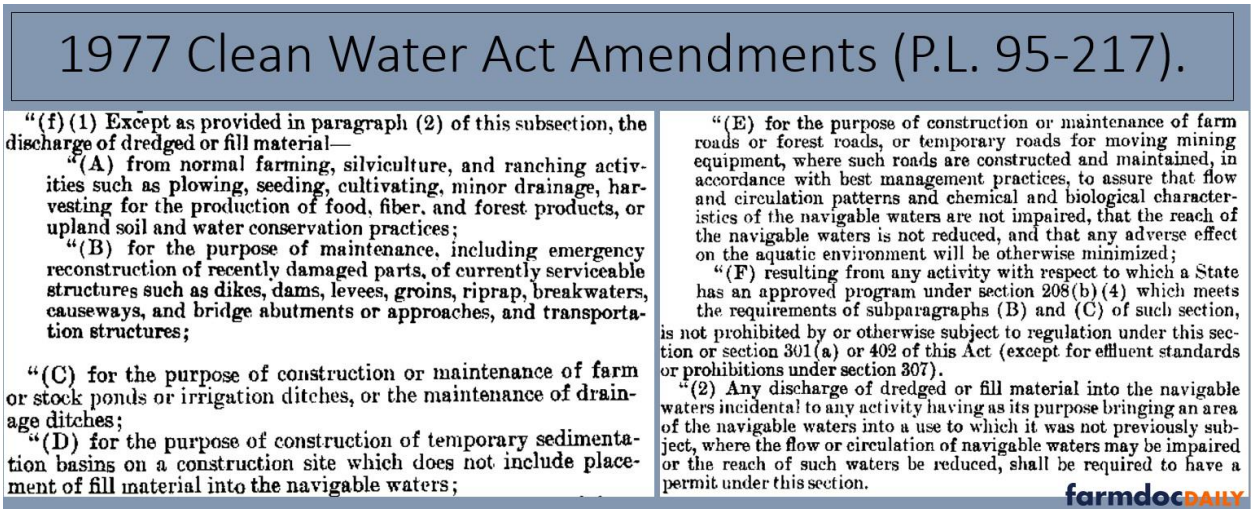
The Conference Committee produced a slightly modified version of the Senate regulatory scheme. First, conference provided for the issues of general permits to cover dredge or fill material and created a program by which a State could request assumption of the regulation of dredge or fill. Conference managers explained that general permits were for "any category of activities involving discharges of dredge or fill material" based upon a determination that the activities "are similar in nature, and cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment" (*H. Rept*. 95-830, at 100). Additionally, the conference agreement "establish[es] a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material . . . after the approval of a program by the Administrator" (*H. Rept*. 95-830, at 101). These provisions of the enacted law are highlighted in Figure 3 (P.L. 95-217).

Figure 3. Final Provisions of the 1977 Amendments



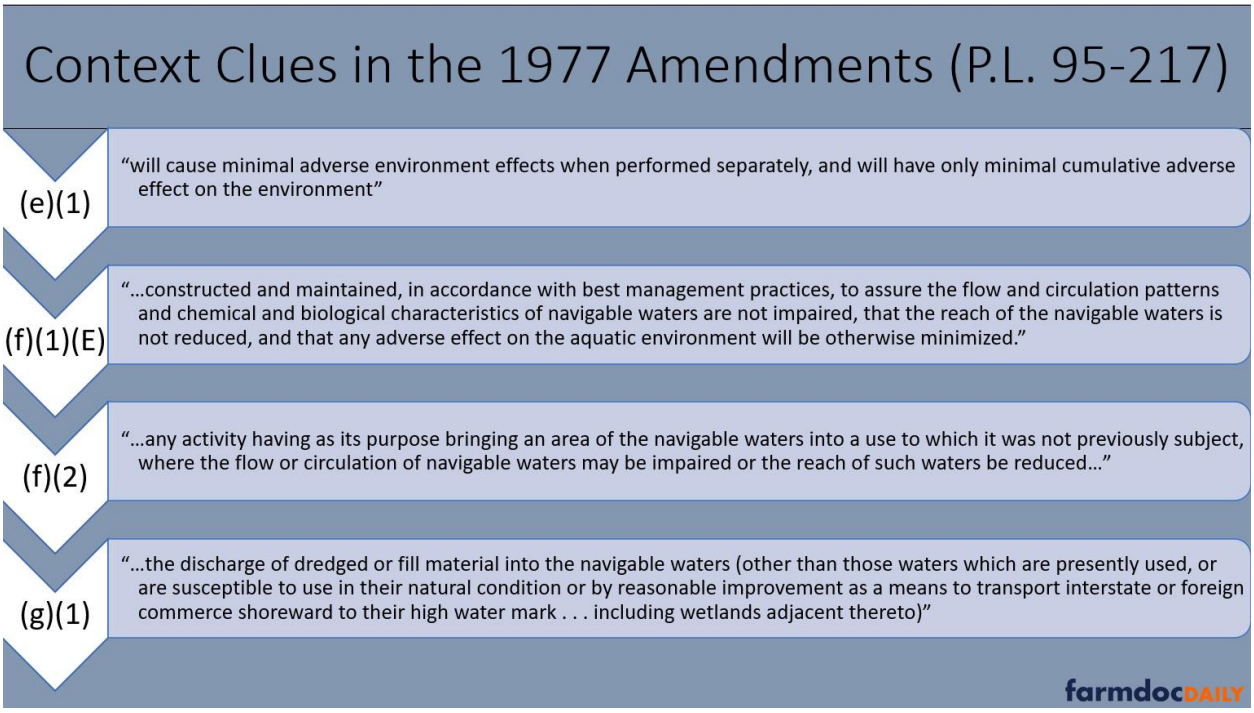
Second, Congress exempted certain discharges of dredge or fill material from regulation, such as from normal farming activities, but continued to require permits for any dredge or fill discharges if they were part of any activity that changed the nature of navigable waters. The final bill also exempted discharges of dredge and fill material from construction of federal projects authorized by Congress. These exemptions were an "attempt to clarify that many of the normal activities included within these categories were never intended by the Congress in the 1972 Act to be within the section 404 permit program" but were limited in that "permits are required for discharges of dredged or fill material containing toxic pollutants" (*H. Rept*. 95-830, at 105). These provisions are highlighted in Figure 4 (P.L. 95-217).

Figure 4. Exemptions in the Final 1977 Amendments



The final enactment of amendments to the Clean Water Act closely aligned with the bill written and passed by the Senate, but there were many similarities between the House and Senate approaches. The Supreme Court focused on the definitional revisions proposed by the House, which were not accepted by the Senate and were not included in the final legislative text enacted by Congress. Focusing on this difference misses the strong agreement between the two chambers on the general regulatory scheme for discharges of dredge and fill material. Arguably, a court searching for contextual clues as to Congressional intent and the meaning of certain words could find plenty to work with in the final text of the 1977 amendments, beginning with the phrase in the State permitting program. Figure 5 highlights these contextual clues.

Figure 5. Highlights of Contextual Clues in the 1977 Amendments



Concluding Thoughts

For questions about the reach of federal regulatory jurisdiction over dredge and fill material, as well as to wetlands and other non-navigable waters, the 1977 Amendments provide plenty to understand the intent and meaning of the words of Congress. In effect, the scope of federal jurisdiction for these materials was for the traditional navigable waters and those wetlands adjacent to them, while the State permitting program was for other waters (intrastate, navigable, non-navigable and wetlands). But this limit on federal regulatory jurisdiction went only so far. Congress reserved jurisdictional reach where adverse environmental effects could be significant because the activities substantially changed navigable waters or adjacent wetlands, such as the reach, flow and circulation patterns or the chemical and biological characteristics of traditionally navigable waters and the wetlands adjacent to them. Future articles will continue to trace the developments in Supreme Court interpretations of the term "navigable waters" in the wetlands context, which can be compared back to the directions from Congress in 1977 and 1972.

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