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Susan Harris

susan.harris@bc.edu

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“PIGS WILL FLY”: PROTECTING THE LOS ANGELES RIVER BY DECLARING NAVIGABILITY

SUSAN HARRIS*

Abstract: In 2010, the Environmental Protection Agency (EPA) declared the Los Angeles River “navigable” for purposes of enforcing Clean Water Act (CWA) protections, which could limit destruction of the river’s tributaries and wetlands and expand recreational opportunities for the city. The EPA’s declaration was criticized by some as regulatory overreach—“like declaring that pigs will fly”—because the Los Angeles River does not fit within traditional notions of navigability. Others have attempted to remove navigability language from the CWA, suggesting that it is not the appropriate test for environmental protection. After examining the history of the Los Angeles River and providing a background on CWA jurisprudence, this Note argues that the EPA’s case by case approach to declaring navigability is an effective way to uphold the goals of the CWA while expanding CWA protection for the Los Angeles River and other urban and western rivers.

INTRODUCTION

Today, most of the Los Angeles River looks like a large gutter, a storm drain surrounded by concrete.¹ Those residents who are aware that their city has a river know it not as a natural feature of their urban landscape but as the gritty scene of car chases in films such as *Grease* and *Terminator 2*.² In the 1930s, though, the willow-covered banks of the Los

* Managing Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2011–12.

¹ BLAKE GUMPRECHT, *THE LOS ANGELES RIVER: ITS LIFE, DEATH, AND POSSIBLE REBIRTH* 1 (2001).

² See Judith Coburn, *Whose River Is It Anyway?: More Concrete Versus More Nature: The Battle over Flood Control on the Los Angeles River Is Really A Fight for Its Soul*, L.A. TIMES (Nov. 20, 1994), http://articles.latimes.com/1994-11-20/magazine/tu-2490_1_los-angeles-river (noting that the article’s author “grew up on the Mississippi, lived on a houseboat on Virginia’s Anacostia and passed time on the Mekong, but she never knew there was a Los Angeles River when she lived in L.A.”); Paul Quinlan, *EPA Declares LA River ‘Navigable,’ Stretches Regulatory Reach*, N.Y. TIMES (July 9, 2010), <http://www.nytimes.com/gwire/2010/07/09/09greenwire-epa-declares-la-river-navigable-stretches-regu-42022.html>.

Angeles River stood in for the jungle habitat in the movie *Tarzan*.³ The river's transformation, caused by a confluence of high water demand and flood control efforts, has been aided and abetted in recent years by a lack of federal protection for water quality.⁴ Because the Clean Water Act (CWA) only applies to "navigable" waters, an unfavorable decision by the Army Corps of Engineers concerning the river's navigability made CWA protections inapplicable to the Los Angeles River.⁵

In response, community activists have fought to prove that the Los Angeles River is in fact a real river, worthy of protection.⁶ Conan O'Brien, as host of *The Tonight Show*, joined the controversy when he and sidekick Andy Richter went canoeing in the Los Angeles River.⁷ More seriously, a group of kayakers made a fifty-one mile, three-day journey down the length of the Los Angeles River in 2008 to lend support to the notion that the river is navigable.⁸ The regatta included Heather Wylie, a biologist for the Army Corps of Engineers, who commented, "I picked up a paddle to make a point about protecting the integrity of our waters."⁹

On July 9, 2010, Environmental Protection Agency (EPA) Administrator Lisa Jackson finally declared the Los Angeles River navigable, enabling the EPA to enforce CWA protections for the river.¹⁰ Jackson's navigability declaration was embraced by some, who noted that the declaration would be instrumental to limiting destruction of the Los Angeles River's tributaries and wetlands, as well as expanding recreational

³*The Los Angeles River: An Original Hollywood Star*, LA STORMWATER BLOG (Nov. 4, 2010), <http://www.lastormwater.info/blog/2010/11/04/the-los-angeles-river-an-original-hollywood-star/>.

⁴ See GUMPRECHT, *supra* note 1, at 6; Quinlan, *supra* note 2.

⁵ David Beckman, *A River Runs Through It*, NRDC SWITCHBOARD (July 8, 2010), http://switchboard.nrdc.org/blogs/dbeckman/the_los_angeles_river.html.

⁶ Zach Behrens, *Group to Kayak LA River Today Through Sunday*, LAIST (July 25, 2008), http://laist.com/2008/07/25/kayaking_the_la_river_beings_today.php.

⁷ See Zach Behrens, *Conan Shows the World the Lovely LA River*, LAIST (June 9, 2009), http://laist.com/2009/06/09/conan_shows_the_world_the_lovely_la.php. Mr. O'Brien said afterwards, "[I]et's never do that again." *Id.*

⁸ Zach Behrens, *supra* note 6; Zach Behrens, *Kayaking the LA River, Day 3: Marsh Park to Long Beach*, LAIST (July 28, 2008), http://laist.com/2008/07/28/kayaking_the_la_river_day_3_marsh_p.php. Photographs of these kayakers were included in the EPA's case study determining the navigability of the L.A. River. EPA, SPECIAL CASE EVALUATION REGARDING STATUS OF THE LOS ANGELES RIVER, CALIFORNIA, AS A TRADITIONAL NAVIGABLE WATER 23–26 (July 1, 2010) [hereinafter EPA EVALUATION].

⁹ Heather Wylie, *Floating to Save the L.A. River*, L.A. TIMES, (Oct. 30, 2008), <http://www.latimes.com/news/opinion/la-oe-wylie30-2008oct30,0,712832.story>.

¹⁰ Quinlan, *supra* note 2.

opportunities for the city.¹¹ Others, however, criticized the declaration as regulatory overreaching.¹² Daniel Riesel, an environmental attorney who represents developers and agricultural interests on CWA issues, said, “[w]hether it is or was a navigable body of water is a fact. [Jackson’s] declaration doesn’t change that fact. It’s like her saying ‘I’m going to declare that pigs will fly.’ You can, but it doesn’t change the fact.”¹³

Part I of this Note explains the history of the Los Angeles River and its transformation from an eighteenth-century oasis to a modern-day concrete channel. Part II provides the necessary background of CWA jurisprudence, including recent interpretations of “navigability.” Part III discusses the constitutionality and political feasibility of efforts to strike language concerning navigability from the CWA. Finally, Part IV demonstrates that a case by case approach to declarations of navigability is an effective way to uphold the goals of the CWA, and to expand CWA protection for the Los Angeles and other western rivers that may not appear navigable under a traditional understanding of the word. Contrary to the skepticism of Riesel and others, if the Los Angeles River is a pig who can’t fly, this navigability declaration will at least put it in the cockpit.

I. THE LOS ANGELES RIVER: PAST, PRESENT, FUTURE

A. *A River Transformed*

Geographer Blake Gumprecht stated that “[t]he Cuyahoga River in Cleveland may have once been so polluted that it caught fire, and the Chicago River was so filthy that long ago its flow was reversed to keep it from contaminating Lake Michigan, but at least those rivers, even at their worst, looked like rivers.”¹⁴ In Los Angeles, though, one politician campaigned on the promise to paint the bed of the river blue.¹⁵

Nevertheless, areas surrounding the Los Angeles River were once a center of wine production, where orange groves irrigated with river water produced fruit to be shipped back east.¹⁶ Wild roses and grapes grew along the edge of the river, amid stands of sycamore, cottonwood,

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ GUMPRECHT, *supra* note 1, at 2.

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 5.

oak, alder, willow, berries, and grass.¹⁷ Two-foot long trout could be caught in the river as late as 1940.¹⁸ The transformation of the river from this idyllic state into the “gigantic concrete gutter” it is today occurred primarily for two reasons—first, Los Angeles’s growing population’s increasing demand for water, and second, the necessity for flood control to protect the city.¹⁹

1. Demand for Water

Before European settlement, the Los Angeles River supported a rich diversity of plant and animal life, as well as one of the largest concentrations of native peoples in North America, the Gabrieleños.²⁰ In the mid-eighteenth century the Spanish government planned to establish a *presidio*, or military fort, as well as a mission in what is now California.²¹ One member of the expedition party, Father Juan Crespi, kept a diary of the scouted locations and referred to what is now present-day Los Angeles as “this pleasing spot among the trees on this pleasant river.”²² An agricultural village was founded there by the Spanish to provide food to the missions and *presidios*.²³

By 1850, Los Angeles was under U.S. control but remained a small town.²⁴ At that time the city’s population was only 1694, and continued as a settlement based around agriculture, surrounded by vineyards, corn, pasture, vegetable gardens, and fruit orchards.²⁵ Los Angeles County was, in fact, the top winemaking county in the nation in 1850—Secretary of State William H. Seward, the negotiator of the Alaska Purchase, declared in 1869 that the vineyards in Los Angeles were the best in the world.²⁶

¹⁷ PAT MORRISON, RÍO L.A.: TALES FROM THE LOS ANGELES RIVER 29 (2001).

¹⁸ GUMPRECHT, *supra* note 1, at 5. “For California grizzly bears, the river was an all-you-can-eat [smorgasbord] of steelhead trout . . . The carnivorous ursines who once foraged here were big as bulls, with claws like steak-knives and a roar like an earthquake.” MORRISON, *supra* note 17, at 33–34.

¹⁹ See GUMPRECHT, *supra* note 1, at 6; Quinlan, *supra* note 2.

²⁰ GUMPRECHT, *supra* note 1, at 26. “If these Indians called themselves anything . . . it was probably Tongva. To the Spanish, they were all wards of the San Gabriel Mission, and so Gabrieleños they became.” MORRISON, *supra* note 17, at 37.

²¹ GUMPRECHT, *supra* note 1, at 35.

²² *Id.* at 36, 38.

²³ *Id.* at 41.

²⁴ *Id.* at 56.

²⁵ *Id.* at 56–57.

²⁶ Treaty with Russia for Purchase of Alaska, U.S.-Russ., Mar. 30, 1867, 15 Stat. 539, available at <http://www.loc.gov/rr/program/bib/ourdocs/Alaska.html>; GUMPRECHT, *supra* note 1, at 49, 51.

The 1876 completion of the transcontinental railroad link to Los Angeles, however, spurred dramatic population growth, exponentially increasing the demand for water.²⁷ This was perhaps ironic, as the lush image of Los Angeles as a kind of Californian Eden, made possible by the river oasis, drew the very newcomers who would quickly destroy the river.²⁸ Between 1902 and 1906, the population of Los Angeles increased from 128,000 to 240,000.²⁹ As a result of the increasing demand for water, the flow of the river near downtown Los Angeles was reduced to a trickle—at times the entire surface flow of the Los Angeles River was diverted for domestic use.³⁰ In 1904, for example, the entire surface and subsurface flow of the river were tapped in order to meet Los Angeles's water demands.³¹

2. Flood Control Projects

As depleted as the Los Angeles River was during dry times, the risk of flooding during the rainy season further defined the Los Angeles River of today.³² There existed “twinned fears . . . of drought and flood, of too little water and of too much.”³³ Because of the historically low flow of the river during the dry season—even prior to the increased water demand that would threaten the river—the Los Angeles River lacked a defined channel.³⁴ This meant that the river varied widely in its route to the sea, and, during rains, might break from its path and cut a new course.³⁵ During the last half of the nineteenth century, significant floods occurred in Los Angeles County an average of once every four-and-a-half years.³⁶ The editor of the *Daily and Weekly Herald*, John M. Baldwin, experienced such a flood in 1884, when the mansion he had built for himself on the banks of the river, complete with a private golf course, was carried to sea.³⁷

²⁷ GUMPRECHT, *supra* note 1, at 83.

²⁸ *See id.* at 81.

²⁹ TED ELRICK ET AL., LOS ANGELES RIVER 9 (2007).

³⁰ GUMPRECHT, *supra* note 1, at 3, 96.

³¹ *Id.* at 97.

³² *Id.* at 3.

³³ MORRISON, *supra* note 17, at 22.

³⁴ *See* GUMPRECHT, *supra* note 1, at 3, 12.

³⁵ *Id.* at 9, 12.

³⁶ *Id.* at 144.

³⁷ MORRISON, *supra* note 17, at 20. The author suggests that the “mercurial” nature of the river, which prevented the investment of wealth at its shores, had the effect of marginalizing the river from early on. *Id.*

While it is natural for a river to shift course during floods, this became an obvious problem for Los Angeles as the population near the river's banks increased.³⁸ Not only did Los Angeles's increase in population magnify the dangers of flooding, it also increased the likelihood of flooding.³⁹ The railroad's trestle bridges, on which Los Angeles's new citizens arrived, obstructed the free flow of water in the river.⁴⁰ Farmers' plowing removed natural grasses and increased erosion, irrigation channels weakened riverbanks, and willows and cottonwood lining the river and anchoring its banks were cut down.⁴¹

After floods in 1914, development of a county-wide flood control system commenced;⁴² two years later, another deluge forced residents in the area to use small boats for transportation.⁴³ Woody Guthrie wrote a song memorializing the Los Angeles flood on New Year's Day in 1934, in which flood waters and associated debris killed at least forty-nine people.⁴⁴ The final and most damaging flood in Los Angeles history occurred in March of 1938, throwing people to their deaths when a bridge in North Hollywood collapsed.⁴⁵ When it was over, 688 people were confirmed dead, property damage reached a current value of nearly one billion dollars, and Lucille Ball had to rescue her wire-haired terrier from four feet of water in her basement.⁴⁶ The only flood controls that held were those constructed of reinforced concrete.⁴⁷ In response, Los Angeles turned to the federal government and the Army Corps of Engineers for help.⁴⁸

Over the course of twenty years, the Army Corps of Engineers poured two million cubic yards of concrete along the river.⁴⁹ By 1960, Los Angeles was the owner of "a fifty-one-mile storm drain that is still flatteringly called the Los Angeles River."⁵⁰ These flood control projects have come to visually define the Los Angeles River, which can be per-

³⁸ GUMPRECHT, *supra* note 1, at 148.

³⁹ *Id.* at 150.

⁴⁰ *Id.* at 151.

⁴¹ *Id.*

⁴² MORRISON, *supra* note 17, at 73.

⁴³ GUMPRECHT, *supra* note 1, at 183.

⁴⁴ *Id.* at 203-04; WOODY GUTHRIE, *Los Angeles New Years Flood*, on LIBRARY OF CONGRESS RECORDINGS (Elektra Records 1964) ("Our highways were blockaded/Our bridges all washed down/Our houses wrecked and scattered/As the flood came a-rumblin' down").

⁴⁵ GUMPRECHT, *supra* note 1, at 216.

⁴⁶ ELRICK, *supra* note 29, at 27.

⁴⁷ GUMPRECHT, *supra* note 1, at 220.

⁴⁸ ELRICK, *supra* note 29, at 27; GUMPRECHT, *supra* note 1, at 221.

⁴⁹ MORRISON, *supra* note 17, at 74.

⁵⁰ GUMPRECHT, *supra* note 1, at 173.

ceived today as nothing but “runoff inside broad expanses of graffiti-covered concrete.”⁵¹ In this new state, the river slipped from public consciousness:

No one speaks of “the Los Angeles” as one speaks of “the Thames” or “the Nile.”

No one gives directions using the river. People say they live north of some boulevard, or west of some freeway, but the river . . . occup[ies] no point on the civic compass. Say “the river” in Los Angeles, and you get only blank looks.⁵²

B. *The Promises and Perils of Urban and Western Rivers*

In the arid West, ecologically important river systems have differing levels of water throughout the year, and at times may not contain any water at all.⁵³ The western character of the Los Angeles River, with its seasonal differences in flow, combined with a growing population dependent on its waters, led to its lack of a defined river channel.⁵⁴ Swelling in one season and shrinking in the next, western rivers like the Los Angeles River are different from other rivers.⁵⁵ Moreover, western rivers have an additional propensity to run dry as they are tapped for irrigation and drinking supplies.⁵⁶

Meanwhile, the Los Angeles River’s urban setting, which necessitated flood control projects to define the river and protect the city’s population, also posed its own hazards.⁵⁷ The Los Angeles River has been said to symbolize all the ills of America’s urban rivers,⁵⁸ including water quantity problems, habitat loss, channelization, and inadequate substrate.⁵⁹ An 1899 letter-writer to the *Los Angeles Times*, for example, referred to the river as “the natural and proper outlet for the sewage of Los Angeles city”—today, eight thousand tons of trash must be skimmed annually from the river’s mouth.⁶⁰

⁵¹ See ELRICK, *supra* note 29, at 7.

⁵² MORRISON, *supra* note 17, at 20.

⁵³ Quinlan, *supra* note 2.

⁵⁴ See GUMPRECHT, *supra* note 1, at 3, 97.

⁵⁵ See MORRISON, *supra* note 17, at 33.

⁵⁶ Quinlan, *supra* note 2.

⁵⁷ See GUMPRECHT, *supra* note 1, at 3, 244–45.

⁵⁸ *Id.* at 245 (quoting a statement by the late CBS-TV commentator Charles Kuralt).

⁵⁹ *Problems Facing Urban Streams*, METRO. SEWER DIST., <http://www.msdlouky.org/inside/msd/wqurban.htm> (last visited Jan. 24, 2012).

⁶⁰ MORRISON, *supra* note 17, at 54.

1. Success Stories

Other rivers (urban, western, and both) have recovered from their plights—the Chicago River is a tremendous success story of an urban river.⁶¹ Since the implementation of a project to reduce discharges of raw sewage into the river, the number of fish species living there has quadrupled.⁶² Protection of urban rivers can create “urban nature” where open spaces are otherwise rare.⁶³ Denver has transformed areas along the South Platte into a greenway, with hiking and biking trails, parks, and boat chutes.⁶⁴ In San Jose, California, the Army Corps of Engineers and local government agencies built Guadalupe River Park to provide flood protection and create a ten-mile network of trails.⁶⁵

Improvements for urban and western rivers need not be undertaken solely for environmental or aesthetic reasons.⁶⁶ It is important to note that water pollution regulation has produced significant economic benefits for the United States.⁶⁷ Those benefits can come in many forms, including increased recreational spending, boons to commercial fish and shellfish industries, or the use of clean water to irrigate farmlands.⁶⁸ San Antonio’s “Paseo del Rio,” or “River Walk,” became the center of its tourism industry.⁶⁹ Detroit and Cleveland each based their plans for urban renewal at least in part on riverfront development.⁷⁰ Indeed, as the 1998 Clean Water Action Plan recognized, “[i]mprovements have resulted in economic gains on even the most infamous of polluted waters.”⁷¹

2. Revitalization Efforts in Los Angeles

As early as the 1930s, Frederick Law Olmsted, Jr. proposed a system of parkways to abut the Los Angeles River—similar to Frederick Law Olmsted, Sr.’s “Emerald Necklace” for Boston—though the recom-

⁶¹ GUMPRECHT, *supra* note 1, at 257.

⁶² *Id.*

⁶³ Judith Lewis Mermitt, *A River Again?*, HIGH COUNTRY NEWS (Aug. 2, 2010), <http://www.hcn.org/issues/42.13/a-river-again>.

⁶⁴ GUMPRECHT, *supra* note 1, at 257.

⁶⁵ *Id.*

⁶⁶ *See id.* at 258.

⁶⁷ *See* ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC’S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 2 (2009).

⁶⁸ *Id.*

⁶⁹ GUMPRECHT, *supra* note 1, at 258.

⁷⁰ *Id.*

⁷¹ CRAIG, *supra* note 67, at 2.

mendation was ignored.⁷² In 1986, a group called the Friends of the Los Angeles River was formed; today it is a preeminent environmental organization in Southern California, advocating for efforts to turn the Los Angeles River into a greenway and opposing proposals that would degrade the river.⁷³ Throughout the ensuing decade, Friends of the Los Angeles River and other environmental groups promoted awareness of the river as a natural resource, thus putting pressure on Los Angeles County and the Army Corps of Engineers.⁷⁴

Although a proposal was made in 1989 to use the river as a truck route and automobile expressway, it only had the effect of galvanizing the river's supporters.⁷⁵ For example, bonds were issued to develop the Los Angeles River Center and Gardens, parks and trails were created by the nonprofit organization NorthEast Trees, and the city of Los Angeles created a master plan for beautifying blighted areas along the river.⁷⁶ Thus, some progress has already been made, though nearly all of the improvements have been outside of the banks of the river itself.⁷⁷

C. *The Navigability Declaration*

1. Making the Call

In March of 2008, the Army Corps of Engineers responded to a property owner's request for a determination of jurisdiction, and found that fewer than two miles of the Los Angeles River would be considered "traditionally navigable water."⁷⁸ This finding reflected the upper limit of tidal influence on the river.⁷⁹ In making such a limited determination of navigability, the Army Corps of Engineers noted that the only documented boating in the Los Angeles River was in "small canoe-type craft" in an unlined area of the Sepulveda Basin.⁸⁰ It found that no organized boating or concession was associated with that activity, which it called "technically illegal."⁸¹ Subsequently, in June of 2008, it also de-

⁷² GUMPRECHT, *supra* note 1, at 265–69.

⁷³ *Id.* at 252–53, 256.

⁷⁴ See Louis Sahagun, *A Journey of Discovery on the L.A. River*, L.A. TIMES (Aug. 1, 2010), <http://www.latimes.com/news/local/la-me-river-20100729,0,6138290.story>.

⁷⁵ GUMPRECHT, *supra* note 1, at 273.

⁷⁶ *Id.* at x.

⁷⁷ *Id.* at xiii.

⁷⁸ EPA EVALUATION, *supra* note 8, at 3.

⁷⁹ U.S. ARMY CORPS OF ENGINEERS, FILE NO. 2008-218-AJS, DETERMINATION OF TNW STATUS OF THE LOS ANGELES RIVER para. 6 (2008).

⁸⁰ See *id.* para. 4.

⁸¹ *Id.*

clared two miles of the river in the Sepulveda Basin “traditionally navigable.”⁸² Thus, according to the Army Corps of Engineers, only an approximately four-mile stretch of the fifty-one mile length of the Los Angeles River was navigable, implying that most of the river was not a river at all.⁸³

In the summer of 2010, however, EPA Administrator Jackson overruled the decision of the Army Corps of Engineers.⁸⁴ From Chatsworth to Long Beach, the entire Los Angeles River was declared navigable, and therefore protected by the CWA.⁸⁵ In making that determination, the EPA looked beyond whether the river’s depth and flow could support navigation and considered factors such as recreational and commercial opportunities, public access, susceptibility to restoration, and the presence of ongoing restoration and educational projects.⁸⁶

The EPA found that the river was historically susceptible to navigation by Native Americans during years and seasons where there was sufficient surface flow.⁸⁷ The EPA also found that the river is currently navigable by small recreational watercraft, such as canoes and kayaks, even during the dry weather months from April to October.⁸⁸ The EPA’s navigability determination specifically relied on the reports of the kayakers who traveled the river in 2008, noting that over ninety percent of the river was navigable by kayaks in low-flow conditions.⁸⁹ Analysis of water flows and depths further supported this conclusion.⁹⁰ The EPA also recognized that the river currently supports boating and non-boating recreational uses available to the interstate public, with parking and trail access adjacent to interstate highways.⁹¹ In addition, the City of Los Angeles has a thirty-year plan in place to expand boating and water recreation on the river.⁹²

⁸² EPA EVALUATION, *supra* note 8, at 3.

⁸³ Beckman, *supra* note 5; Behrens, *supra* note 6.

⁸⁴ Quinlan, *supra* note 2.

⁸⁵ Sahagun, *supra* note 74.

⁸⁶ Louis Sahagun, *L.A.’s River Clears Hurdle*, L.A. TIMES (July 8, 2010), <http://articles.latimes.com/2010/jul/08/local/la-me-Compton-Creek-20100708>.

⁸⁷ EPA EVALUATION, *supra* note 8, at 35.

⁸⁸ *Id.*

⁸⁹ *Id.* at 23, 35.

⁹⁰ *Id.* at 35.

⁹¹ *Id.*

⁹² *Id.*

2. Impact of Declaring Navigability

In the case of the Los Angeles River, the EPA's declaration of navigability may have a significant impact on the course of the river's future.⁹³ Extending CWA protections to the Los Angeles River could expand recreational opportunities and limit destruction of the river's tributaries and wetlands.⁹⁴ With regard to the river's tributaries, the navigability declaration will not stop every attempt at alteration, but it will impose "an extra layer of pollution limits, subjecting development plans in the creek beds and floodplains to more lengthy and costly review processes."⁹⁵ The EPA's declaration could be considered a reflection of the city's beginning to value nature in its urban center.⁹⁶

Moreover, the impact of the EPA's navigability declaration for Los Angeles could extend beyond that particular watershed.⁹⁷ The decision could be taken as a signal for how other urban and western rivers will be viewed.⁹⁸ Many other rivers flow seasonally and are currently constrained by concrete-lined channels.⁹⁹ Navigability declarations are pending for other rivers; in Arizona, for example, the EPA has said they are reviewing the navigability of the Santa Cruz River.¹⁰⁰

II. REGULATING A RIVER

The current framework of federal water quality legislation requires that a river be "navigable" to receive protection, though that requirement is hotly debated.¹⁰¹ "Navigability" is subject to interpretation by courts, which must attempt to follow the muddy legal rules handed down by the Supreme Court on the issue.¹⁰²

⁹³ See Tibby Rothman, *L.A. River Really Floats Their Boats*, L.A. WEEKLY (July 30, 2008), <http://www.laweekly.com/2008-07-31/news/l-a-river-really-floats-their-boats/>.

⁹⁴ Quinlan, *supra* note 2.

⁹⁵ Mernit, *supra* note 63.

⁹⁶ *Id.*

⁹⁷ See Quinlan, *supra* note 2.

⁹⁸ See *id.*

⁹⁹ Molly Peterson, *EPA Navigates New Policy Designating Los Angeles River a 'Traditionally Navigable Waterway*, S. CAL. PUB. RADIO (July 8, 2010), <http://www.scpr.org/news/2010/07/08/navigable-river/>.

¹⁰⁰ Quinlan, *supra* note 2.

¹⁰¹ See Paul Quinlan, *Fight Brewing over Bill to Cover All U.S. Waters Under Clean Water Act*, E&E PUBL'G (Apr. 21, 2010), <http://www.eenews.net/public/eenewspm/2010/04/21/2>.

¹⁰² See *id.*

A. *History and Purpose of the CWA*

Federal water quality legislation first debuted under the guise of regulating water transportation and commerce as the Rivers and Harbors Act of 1899 (RHA).¹⁰³ Section 13 of the RHA, known as the Refuse Act, established the authority of the United States to prevent pollution of its waters, though its intention was to preserve navigation.¹⁰⁴ Thus, the “navigability” requirement first arose in the RHA, which only encompassed waters that were or could be made navigable.¹⁰⁵

The Federal Water Pollution Control Act (FWPCA) was the first federal statute to explicitly regulate water quality.¹⁰⁶ It represented a shift in focus from protecting navigability of the nation’s waters to protecting the nation’s environment.¹⁰⁷ It provided loans to state and local governments for the construction of publicly-owned treatment works and sewage treatment facilities.¹⁰⁸ In 1972 and 1977, amendments to the FWPCA transformed it into what is now known as the CWA.¹⁰⁹ Indeed, the states’ unwillingness to control pollution in the nation’s waterways motivated Congress to pass the CWA.¹¹⁰

The CWA enacted comprehensive federal standards and permitting programs, and established the EPA and the Army Corps of Engineers as permitting and enforcement agencies.¹¹¹ The stated objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹¹² Thus, the CWA set as a national goal the attainment of water quality that would provide for “the

¹⁰³ Adam Redder, *Protecting America’s Wetlands Under Rapanos: Defining “The Waters of the United States,”* 23 ST. JOHN’S J. LEGAL COMMENT. 293, 295 (2008); see 33 U.S.C. §§ 401, 403–404, 406–409 (2006).

¹⁰⁴ Redder, *supra* note 103, at 294; see 33 U.S.C. § 407; Michael G. Proctor, *Section 10 of the Rivers and Harbors Act and Western Water Allocations—Are the Western States Up a Creek Without a Permit?*, 10 B.C. ENVTL. AFF. L. REV. 111, 131–38 (1982).

¹⁰⁵ CRAIG, *supra* note 67, at 10–12; see 33 U.S.C. § 403.

¹⁰⁶ CRAIG, *supra* note 67, at 12. See generally Federal Water Pollution Control Act of 1948, Pub L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1357).

¹⁰⁷ See *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 179 (2001) (Stevens, J., dissenting).

¹⁰⁸ CRAIG, *supra* note 67, at 13.

¹⁰⁹ *Id.* at 9.

¹¹⁰ Heather Keith, *United States v. Rapanos: Is “Waters of the United States” Necessary for Clean Water Act Jurisdiction?*, 3 SETON HALL CIRCUIT REV. 565, 578 (2007).

¹¹¹ 33 U.S.C. § 1256; see CRAIG, *supra* note 67, at 22. See generally Kenneth M. Murchison, *Learning from More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527 (2005) (describing the evolution of federal water pollution legislation and regulation in the United States).

¹¹² 33 U.S.C. § 1251(a) (2006).

propagation of fish, shellfish, and wildlife” and “recreation in and on the water”¹¹³—the “fishable/swimmable” goal.¹¹⁴ The CWA does provide, however, that it is the policy of Congress to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources”¹¹⁵

Specifically, the CWA sought to eliminate the discharge of pollutants into navigable waters.¹¹⁶ The “discharge of a pollutant[s]” includes “any addition of any pollutant to navigable waters from any point source,” and the definition of “pollutant” includes “dredged spoil, solid waste, incinerator residue, sewage, garbage . . . chemical wastes, biological materials, radioactive materials” and so forth.¹¹⁷ Most discharges into a navigable waterway require a permit, and obtaining such a permit can be a lengthy and difficult process involving government agencies as well as the public.¹¹⁸ The CWA imposes civil and criminal liability on a broad range of industrial and commercial activities.¹¹⁹

In 1978, a U.S. Senator authored a piece entitled “The Meaning of the 1977 Clean Water Act.”¹²⁰ In it, the Senator referenced the importance of stopping pollution and restoring the quality of the environment: “We live today in what an engineer might call a closed system. Some of our resources, once used, cannot be replaced. Others of our resources are renewable, but finite. No one is likely to invent more clean water, more clean air, more arable land.”¹²¹ The EPA’s publication of this piece reflects at least part of the intellectual background and political context in which the CWA emerged.¹²²

¹¹³ *Id.* § 1251(a)(2).

¹¹⁴ CRAIG, *supra* note 67, at 9.

¹¹⁵ 33 U.S.C. § 1251(b).

¹¹⁶ *Id.* § 1251(a)(1).

¹¹⁷ *Id.* § 1362(6), (12)(A).

¹¹⁸ *Id.* § 1342; Sedina L. Banks, *What’s Coming Down the River—How EPA’s Designation of the Los Angeles River as a “Navigable Waterway” May Impact Future Development*, GREENBERG BLAWG (July 9, 2010), http://environmentallawblog.greenbergglusker.com/2010/07/whats_coming_down_the_river_ho.html.

¹¹⁹ *Rapanos v. United States*, 547 U.S. 715, 721 (2005).

¹²⁰ Edmund S. Muskie, *The Meaning of the 1977 Clean Water Act*, ENVTL. PROT. AGENCY (July–Aug. 1978), <http://www.epa.gov/history/topics/cwa/04.html>.

¹²¹ *Id.*

¹²² *See id.*

B. *The “Navigability” Limitation on Federal Water Quality Regulation*

Many legal challenges to the CWA revolve around the question of what water is covered by the statute.¹²³ The CWA itself uses the term “navigable waters,”¹²⁴ but defines the term only as “the waters of the United States, including the territorial seas.”¹²⁵ CWA conference committee notes indicate that “waters of the United States,” and thus “navigable waters,” were to be given the “broadest possible constitutional interpretation.”¹²⁶ Although the CWA’s language on navigability was borrowed from the RHA, it has been argued that the two Acts had very different purposes—the former, to protect against obstructions in navigation, and the latter, to protect the quality of the nation’s waters.¹²⁷

Current federal regulations broadly define waters of the United States to include “intrastate lakes, rivers, streams . . . prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.”¹²⁸ This includes any such waters “[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes”¹²⁹ The Army Corps of Engineers, in the first instance, normally determines which waters are protected by the CWA,¹³⁰ and both Corps and EPA regulations have historically taken a broad view of “navigability.”¹³¹

In a sense, the CWA’s reference to navigability is a touchstone for grounding the Act in Congress’s constitutional authority.¹³² The Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”¹³³ Congress’s authority to legislate under the commerce clause exists in three scenarios: 1) the use of channels of interstate commerce, 2) instrumentalities of interstate commerce or persons and things in

¹²³ CRAIG, *supra* note 67, at 117.

¹²⁴ 33 U.S.C. §§ 1251(a)(1), 1362(12)(A) (2006).

¹²⁵ *Id.* § 1362(7).

¹²⁶ S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822; *see* CRAIG, *supra* note 67, at 118.

¹²⁷ *See* SWANNC, 531 U.S. at 179–80 (Stevens, J., dissenting); Gregory H. Morrison, Comment, *A Nexus of Confusion: Why the Agencies Responsible for Clean Water Act Enforcement Should Promulgate a New Set of Rules Governing the Act’s Jurisdiction*, 42 MCGEORGE L. REV. 397, 412 (2011).

¹²⁸ 40 C.F.R. § 230.3(s)(3) (2010).

¹²⁹ *Id.* § 230.3(s)(3)(i).

¹³⁰ Beckman, *supra* note 5.

¹³¹ CRAIG, *supra* note 67, at 118.

¹³² *Id.* at 5.

¹³³ U.S. CONST. art. I, § 8.

interstate commerce, or 3) activities having substantial relation to interstate commerce.¹³⁴

Here, traditional navigable waters fit into the first scenario, channels of interstate commerce.¹³⁵ As a practical matter, prohibiting pollution of the nation's navigable waters prevents injuries to these channels of interstate commerce¹³⁶—injuries like the ignition of Ohio's Cuyahoga River, which may have been an impetus for enactment of the CWA.¹³⁷ It has been argued that the legislative history of the CWA indicates Congress's awareness that increased commercial activity was tied to increased water pollution.¹³⁸

Waters that are not traditionally navigable, however, may still fall into the third scenario of commerce clause regulation.¹³⁹ Even isolated intrastate waters can have a substantial relation to interstate commerce, either through interstate recreation or by filtering pollutants and thereby reducing pollution in downstream waters that are themselves channels of interstate commerce.¹⁴⁰

C. Recent Interpretations of Navigability

1. A Broad View of Navigability in *Riverside Bayview*

In the 1985 case *United States v. Riverside Bayview Homes*, the Supreme Court suggested that the CWA's definition of the word "navigable" as "the waters of the United States" made the term of "limited import."¹⁴¹ The Court held that it was reasonable for the Army Corps of Engineers to interpret the term "waters" to include "wetlands" because of the "evident breadth of congressional concern for protection of water quality and aquatic ecosystems . . ."¹⁴² The Court thus deferred to the agency's determination that wetlands adjacent to traditionally navigable waters could be regulated under the CWA, noting "the breadth of federal regulatory authority contemplated by the Act itself," the technical expertise offered by the Army Corps of Engineers and the EPA, as

¹³⁴ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

¹³⁵ CRAIG, *supra* note 67, at 143.

¹³⁶ *Id.* at 144.

¹³⁷ Redder, *supra* note 103, at 296.

¹³⁸ CRAIG, *supra* note 67, at 146.

¹³⁹ *Id.* at 147.

¹⁴⁰ *See id.* at 147–48.

¹⁴¹ 474 U.S. 121, 133 (1985).

¹⁴² *Id.*

well as the difficulties in defining precise boundaries for which waters are “regulable.”¹⁴³

2. The More Restrictive View of SWANCC

In 2001, the Court reconsidered which waters were included in the CWA in *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*.¹⁴⁴ In *SWANCC*, the Court found that the Migratory Bird Rule was not fairly supported by the CWA.¹⁴⁵ Under the Rule, the Army Corps of Engineers announced that its CWA jurisdiction extended to intrastate waters that provided habitat for migratory birds.¹⁴⁶ Before *SWANCC* reached the Supreme Court, the Seventh Circuit upheld the Migratory Bird Rule, finding that the CWA reaches as many waters as the commerce clause allows, noting that millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds.¹⁴⁷

In its decision in *SWANCC*, the Supreme Court backed away from its more expansive interpretation of the CWA in *Riverside Homes*.¹⁴⁸ *SWANCC* demonstrated the tension between achieving a proper state-federal balance and maintaining congressional intent with respect to the definition of navigability in the CWA.¹⁴⁹ Whereas it was “one thing to give a word limited effect,” the Court held, it was “quite another to give it no effect whatever.”¹⁵⁰ Rather, the Court stated that Congress’s use of “navigable” in the statute “ha[d] 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.”¹⁵¹ Read broadly, the Court’s holding in *SWANCC* might eliminate federal jurisdiction over isolated, non-navigable intrastate waters.¹⁵²

¹⁴³ *Id.* at 134.

¹⁴⁴ 531 U.S. at 159.

¹⁴⁵ *Id.* at 167.

¹⁴⁶ Keith, *supra* note 110, at 586.

¹⁴⁷ *SWANCC*, 531 U.S. at 166.

¹⁴⁸ CRAIG, *supra* note 67, at 126.

¹⁴⁹ *Id.* at 130–31.

¹⁵⁰ *SWANCC*, 531 U.S. at 172.

¹⁵¹ *Id.*

¹⁵² CRAIG, *supra* note 67, at 127.

3. The Divided Decision in *Rapanos*

In 2006, the Supreme Court once again addressed the navigability issue in *Rapanos v. United States*.¹⁵³ This case addressed the issue of jurisdiction over wetlands adjacent to tributaries of traditionally navigable waters, and produced a 4-1-4 split on the Court.¹⁵⁴

The *Rapanos* plurality emphasized the CWA's use of the "traditional phrase" of "navigable waters."¹⁵⁵ The Court held that the term "navigable waters" under the CWA includes only "relatively permanent, standing, or flowing bodies of water," and does not include channels through which waters flow only "intermittent[ly] or ephemeral[ly]."¹⁵⁶ Taking a derisive tone for a broader application of the CWA, the Court referenced a scene from the film *Casablanca* "which portrays most vividly the absurdity of finding the desert filled with water[]":

"Captain Renault [Claude Rains]: "What in heaven's name brought you to Casablanca?"

"Rick [Humphrey Bogart]: "My health. I came to Casablanca for the waters."

"Captain Renault: "The waters? What waters? We're in the desert."

"Rick: "I was misinformed."¹⁵⁷

Justice Stevens' dissent attacked the plurality for an approach that "endangers the quality of waters which Congress sought to protect . . ." ¹⁵⁸ Justice Stevens would have preferred to maintain the deferential standard set out in *Riverside Bayview*.¹⁵⁹

The concurrence, written by Justice Kennedy, advocated a case by case approach to determining navigability, in which wetlands with a "significant nexus" to traditional navigable waters would be included.¹⁶⁰ He strongly criticized the plurality's imposition of a requirement of permanent standing water or continuous flow for a finding of navigability.¹⁶¹ Justice Kennedy drew on the western United States as an exam-

¹⁵³ 547 U.S. at 729.

¹⁵⁴ *Id.* at 718, 729.

¹⁵⁵ *Id.* at 734.

¹⁵⁶ *Id.* at 732-34.

¹⁵⁷ *See id.* at 727 n.2 (quoting *Save Our Sonoran Desert, Inc. v. Flowers*, 408 F.3d 1113, 1117 (9th Cir. 2005)).

¹⁵⁸ *Id.* at 806 (Stevens, J., dissenting).

¹⁵⁹ *Rapanos*, 547 U.S. at 809 (Stevens, J., dissenting).

¹⁶⁰ *Id.* at 782 (Kennedy, J., concurring).

¹⁶¹ *Id.* at 769.

ple, suggesting that irregular flows of rivers located there would not fit into the majority's definition of navigability, but are not "too insignificant to be of concern in a statute focused on 'waters'" ¹⁶² Justice Kennedy also took issue with the dissent for reading out the navigability requirement entirely. ¹⁶³ He argued that the dissent's approach would permit federal regulation "whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters." ¹⁶⁴

Under Justice Kennedy's concurrence, CWA jurisdiction over wetlands depends on the "existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." ¹⁶⁵ This nexus is to be assessed according to the goals and purposes of the CWA. ¹⁶⁶ Justice Kennedy would not require a wetland to have a surface connection with a permanent, flowing body of water, as the majority preferred; rather, he would require a significant nexus with a navigable water—that the wetlands be "integral parts of the aquatic environment." ¹⁶⁷ In effect, he strikes a balance between rigid rules and generous deference. ¹⁶⁸

Justice Kennedy would not have judicial interpretation part with the CWA's ties to navigability, though his definition of the term would lie somewhere in between permanent, flowing bodies of water and remote ditches and drains. ¹⁶⁹ Implicitly, Justice Kennedy's analysis could be used for determining traditional navigable waters as well. ¹⁷⁰

4. The Navigability Test After *Rapanos*

Given the plurality in *Rapanos*, circuit courts have disagreed regarding whether Justice Kennedy's opinion controls. ¹⁷¹ Implementing agencies and the lower courts are free to apply the standard articulated either by Justice Scalia's plurality or Justice Kennedy's concurrence,

¹⁶² *Id.*

¹⁶³ *Id.* at 778.

¹⁶⁴ *Id.*

¹⁶⁵ *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 769, 779.

¹⁶⁸ Bren Mollerup, *Rapanos v. United States: "Waters of the United States" Under the Clean Water Act*, 12 DRAKE J. AGRIC. L. 521, 534 (2007).

¹⁶⁹ *Rapanos*, 547 U.S. at 769, 778 (Kennedy, J., concurring).

¹⁷⁰ *See id.* at 779–82.

¹⁷¹ Keith, *supra* note 110, at 606.

though it is possible for a lone concurring opinion to become the controlling rule of law.¹⁷²

In 2007, the Ninth Circuit adopted Justice Kennedy's concurrence as the controlling opinion in *Northern California River Watch v. City of Healdsburg*.¹⁷³ The court found that a pond had a significant nexus to navigable waters "not only because the Pond waters seep into the navigable Russian River, but also because they significantly affect the physical, biological, and chemical integrity of the [r]iver."¹⁷⁴ In that case, the navigability of the Russian River was not disputed.¹⁷⁵ In *Northern California River Watch v. Wilcox*, however, the Ninth Circuit noted that it had not "foreclose[d] the argument that [CWA] jurisdiction may also be established under the plurality's standard."¹⁷⁶

III. AMENDING THE ACT

The concern underlying efforts to amend the CWA is the need for clear guidance for implementing agencies.¹⁷⁷ Those in favor of amending the CWA, thereby "refitting the ship," point to congressional revision as a stable and workable solution.¹⁷⁸ Perhaps unsurprisingly, amendment is favored by those who prefer to expand the scope of the CWA.¹⁷⁹ Both *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers* and *Rapanos v. United States* were decisions of statutory, rather than constitutional, interpretation.¹⁸⁰ Thus, Congress retains the ability to amend the CWA to strike language about navigability and clarify that federal jurisdiction extends to the limits of the commerce clause.¹⁸¹

A. Independent Commerce Clause Basis

The CWA's reference to navigability has been called a "red herring."¹⁸² While the debate over navigability attracts attention by courts

¹⁷² Redder, *supra* note 106 at 319, 343 (citing *Regents of Univ. of Cal. v. Bakke*, 436 U.S. 265 (1978) and *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

¹⁷³ 496 F.3d 993, 995 (9th Cir. 2007).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 996.

¹⁷⁶ 633 F. 3d 766, 769 (9th Cir. 2011).

¹⁷⁷ See Beckman, *supra* note 5.

¹⁷⁸ Keith, *supra* note 110, at 607.

¹⁷⁹ See Quinlan, *supra* note 101.

¹⁸⁰ CRAIG, *supra* note 67, at 140.

¹⁸¹ See *id.*

¹⁸² *Id.* at 130 (quoting *United States v. Gerke Excavating*, 412 F.3d 804, 807 (7th Cir. 2005)).

and agencies, it may have no special constitutional significance.¹⁸³ Some have argued that the jurisdictional, geographical implication of “navigable waters” is in fact unnecessary to the CWA.¹⁸⁴ “Navigability” in the Rivers and Harbors Act (RHA) described waters that could be used for travel or trade, which Congress would have had the power to regulate under the commerce clause.¹⁸⁵ The CWA borrowed the RHA’s terminology.¹⁸⁶ By 1972, Congress’s power to regulate navigation under the commerce clause was firmly established.¹⁸⁷

The legislative history of the CWA suggests that it should be given the broadest possible constitutional interpretation, which likely means something more than traditional jurisdiction over traditional navigable waterways.¹⁸⁸ Rather, an amended CWA could constitutionally apply to non-navigable waters so long as it regulates an economic activity having a substantial relation to interstate commerce.¹⁸⁹ The CWA could therefore function on an independent commerce clause basis.¹⁹⁰

The Endangered Species Act (ESA) is an example of a statute that operates on an independent commerce clause basis.¹⁹¹ Particular geography does not limit the ESA in the way that navigability of water limits the CWA.¹⁹² A violation of the ESA by the illegal taking of an endangered species may occur anywhere.¹⁹³ The takings provision of the ESA is consistently upheld by courts that engage in the doctrine of cumulative effects aggregation in order to link intrastate species preservation and interstate commerce.¹⁹⁴ In *Gibbs v. Babbitt*, for instance, the Fourth Circuit considered a U.S. Fish and Wildlife Service regulation on the taking of red wolves on private lands, holding that such a regulation was a valid exercise of federal power under the commerce clause because the regulated activity substantially affected interstate commerce.¹⁹⁵

¹⁸³ *See id.*

¹⁸⁴ *See, e.g.,* Keith, *supra* note 110, at 568 (recommending that Congress dispense with the unnecessary geographical jurisdictional link).

¹⁸⁵ CRAIG, *supra* note 67, at 117, 143.

¹⁸⁶ Morrison, *supra* note 127.

¹⁸⁷ *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting).

¹⁸⁸ *See id.*

¹⁸⁹ *See United States v. Lopez*, 514 U.S. 549, 558–59 (1995); Keith, *supra* note 110, at 609–12.

¹⁹⁰ Keith, *supra* note 110, at 569.

¹⁹¹ *Id.*

¹⁹² *Id.* at 612.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 611–12.

¹⁹⁵ 214 F.3d 483, 486–87 (4th Cir. 2000).

Similarly, on an independent commerce clause basis, Congress could regulate any local instance of a commercial activity that has a substantial effect on interstate commerce through the CWA.¹⁹⁶ The CWA may operate constitutionally within the bounds of Congress's commerce clause power without any reference to navigability.¹⁹⁷ Thus the debate over removing the statutory language of navigability persists not on constitutional but on political grounds.¹⁹⁸

B. Stalled Amendment Efforts

In response to the EPA declaration that the Los Angeles River is navigable, a senior attorney with the National Resources Defense Council (NRDC) commented, “[a]ll of this is just a case study in how messed up the law has become What it really does is underscore the need to fix the problem.”¹⁹⁹ Another NRDC attorney wrote that this decision represented “how much in need of clarification the Clean Water Act is,” suggesting that an amendment would be a “more sensible way to oversee something . . . than expecting [the] EPA to look over the shoulder of the Army Corps and ensure that its analyses don’t give short shrift to western rivers.”²⁰⁰

Efforts to remove navigability from the CWA are underway, though they have repeatedly failed because of opposition from agricultural lobbyists and other industry opponents.²⁰¹ Most recently, a member of the U.S. House of Representative proposed legislation to drop the word “navigable” from the CWA in order to expand its jurisdiction to all U.S. waters.²⁰² The proposal is the fifth in a series of House attempts to eliminate the CWA’s language about navigability.²⁰³ If the amendment were to pass, the CWA would secure protection for all rivers, streams, and wetlands, regardless of their size.²⁰⁴ Despite including exemptions for wastewater treatment systems and prior converted croplands, this bill appears to be stalled.²⁰⁵ Some of the debate over amending the CWA persists on economic grounds, with opponents concerned about in-

¹⁹⁶ See Keith, *supra* note 110, at 613.

¹⁹⁷ *Id.* at 569.

¹⁹⁸ See Quinlan, *supra* note 101.

¹⁹⁹ Quinlan, *supra* note 2.

²⁰⁰ Beckman, *supra* note 5.

²⁰¹ Quinlan, *supra* note 2.

²⁰² America’s Commitment to Clean Water Act, H.R. 5088, 111th Cong. (2010).

²⁰³ Quinlan, *supra* note 101.

²⁰⁴ *Id.*

²⁰⁵ *Id.*; Quinlan, *supra* note 2.

creasing costs on businesses in a faltering economy.²⁰⁶ Some parties also dispute the question of what the CWA is meant to protect and how broadly Congress intended for it to apply.²⁰⁷ The experience of these five amendment attempts indicate that, at least for the time being, removing navigability language from the CWA is not politically feasible.²⁰⁸

IV. CASE BY CASE NAVIGABILITY DECLARATIONS AS AN EFFECTIVE AND DESIRABLE ALTERNATIVE TO AMENDING THE CLEAN WATER ACT

A. Pitfalls of Amending the Clean Water Act

When the EPA, constrained by its case by case system, declared navigability for the Los Angeles River, environmentalists greeted the decision as a positive development that did not go far enough.²⁰⁹ The EPA and the Army Corps of Engineers can declare navigability for a particular river or wetland, but they cannot apply CWA protection on an independent commerce clause basis without a navigability analysis until Congress amends the CWA.²¹⁰ Beyond the political impracticality of amending the CWA to eliminate the navigability requirement, there would be negative consequences to such an amendment.²¹¹

I. Eliminating “Navigability” Could Broaden the Scope of the CWA Beyond Congress’s Intent

While eliminating navigability from the CWA might clarify jurisprudence on the issue, it is not clear that the geographic, jurisdictional element of the CWA is present only as a basis for constitutional authority.²¹² As the Supreme Court held in *United States v. Riverside Bayview Homes, Inc.*, “it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of ‘waters’”²¹³ Rather than solely protecting navigability, Congress intended the CWA to protect the environmental

²⁰⁶ Quinlan, *supra* note 101.

²⁰⁷ *Id.*

²⁰⁸ *See id.*

²⁰⁹ *See* Beckman, *supra* note 5.

²¹⁰ *See* Keith, *supra* note 110, at 616.

²¹¹ *See supra* notes 199–208 and accompanying text.

²¹² *See* *United States v. Rapanos*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring); Keith, *supra* note 110, at 616.

²¹³ 474 U.S. 121, 133 (1985).

quality of the nation's waters from degradation.²¹⁴ Although the CWA protects the quality of the nation's waters, if there were no limitation beyond the commerce clause, the EPA could regulate all waters—every transient mud puddle—that could somehow have a substantial effect on interstate commerce.²¹⁵

In *Rapanos v. United States*, Justice Kennedy criticized Justice Stevens' dissent for reading out the requirement of navigability, which he considers a "central requirement" of the CWA.²¹⁶ According to Justice Kennedy, Justice Stevens' dissent would have allowed federal regulation "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."²¹⁷ Amending the CWA by eliminating navigability would be more than a judicial "reading out" of that requirement; it would be an explicit codification of Justice Kennedy's fear.²¹⁸ Water over which federal jurisdiction could not be asserted by case by case determinations of navigability could still be regulated pursuant to an amended CWA.²¹⁹

2. Eliminating "Navigability" Could Result in the Exclusion of Waters Covered or Potentially Covered by Navigability Declarations

Conversely, eliminating navigability from the CWA and relying on commerce clause authority might leave some waterways, which could otherwise be included on the basis of a navigability analysis, excluded from CWA jurisdiction.²²⁰ In *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, Justice Stevens' dissent in support of the Migratory Bird Rule relied in part on the fact that the causal connection between the destruction of the wetlands and the decline in commercial activity associated with migratory birds was not "attenuated."²²¹ The destruction of wetlands had a substantial effect on interstate commerce that was direct and concrete.²²² In *Gibbs v. Babbitt*, the Fourth Circuit held that the relationship between red wolf takings and interstate commerce was direct because "with no red wolves, there will

²¹⁴ See 33 U.S.C. § 1251(a)(2) (2006).

²¹⁵ See *Rapanos*, 547 U.S. at 733–34.

²¹⁶ *Id.* at 778 (Kennedy, J., concurring).

²¹⁷ *Id.*

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *United States v. Lopez*, 514 U.S. 549, 557 (1995) (noting that "the power to regulate commerce, though broad indeed, has limits").

²²¹ 531 U.S. 159, 195 (2001) (Stevens, J., dissenting).

²²² *Id.*

be no red wolf related tourism, no scientific research, and no commercial trade in pelts.”²²³ The court did not have to “pile inference upon inference” to find there would be a substantial effect on interstate commerce.²²⁴

At first blush, removing the navigability language from the CWA might seem to ensure that a waterway like the Los Angeles River would be protected; a river perceived as a “concrete ditch” would seem to have a better chance of protection under a legislative scheme that would not consider its navigability in fact.²²⁵ Yet on an independent commerce clause basis, CWA protections could only apply to the Los Angeles River only if there were direct, particular harms to commercial activities like recreation and transport.²²⁶ Given its current condition, however, the Los Angeles River is not frequently used for recreation or transport.²²⁷ Public access to the Los Angeles River is not officially sanctioned, and is explicitly prohibited at some locations.²²⁸

A finding that an activity violated the CWA would have to be predicated on a court’s reasoning that the activity had a substantial effect on interstate commerce, but the relationship between the current activity and interstate commerce might be only “attenuated” because of the state of the river.²²⁹ Thus, a finding of substantial effects on interstate commerce might have to be based on assumptions about how the river could be used in ways that would affect interstate commerce in the future.²³⁰ For example, commercial activities such as dumping pollutants in the Los Angeles River could harm the potential for future recreation.²³¹ Because of the possibility of interstate tourists engaging in recreation on the river, that harm might have a substantial effect on inter-

²²³ 214 F.3d 483, 492 (4th Cir. 2000).

²²⁴ *Id.* (citing *Lopez*, 514 U.S. 549). In *Lopez*, the Supreme Court considered whether firearms possession in a local school zone substantially affected interstate commerce. 514 U.S. at 567. The Court held that a finding in favor of the government would require piling inference upon inference, such as to “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.*

²²⁵ See Quinlan, *supra* note 2.

²²⁶ See *Gibbs*, 214 F.3d at 492.

²²⁷ See Behrens, *supra* note 6. The fact that it is news when a group of kayakers enjoy the river points to a general lack of river-related recreation. See *id.*

²²⁸ EPA EVALUATION, *supra* note 8, at 30.

²²⁹ *Cf. Gibbs*, 214 F.3d at 492 (describing where red wolf takings “implicate[d] a variety of commercial activities”).

²³⁰ See, e.g., EPA EVALUATION, *supra* note 8, at 30 (noting that “it is likely that a restored Los Angeles River will attract interstate and international visitation and commerce”).

²³¹ See *id.*; Sahagun, *supra* note 74 (explaining that the Army Corps of Engineers and the Los Angeles County Department of Public Works do not normally allow voyages on the Los Angeles River because of “safety and water-quality concerns”).

state commerce.²³² Alternatively, a court could find that damage to the river could reduce its ability to filter pollutants and therefore increase pollution downstream in the Pacific.²³³ The recreation, shipping, and transportation that might be thereby impacted could have a substantial effect on interstate commerce.²³⁴ For example, Justice Kennedy noted in *Rapanos* that nutrient-rich runoff from the Mississippi River created a hypoxic (oxygen depleted) “dead zone” in the Gulf of Mexico “the size of Massachusetts and New Jersey.”²³⁵

Regardless, predicating the application of the CWA on interstate commerce alone could require a court to inexcusably “pile inference upon inference” or leave the Los Angeles River and others like it unprotected.²³⁶ Absent CWA protection, pollution limits would not be enforced, adjacent tributaries and wetlands would be threatened, and recreational opportunities would not be expanded.²³⁷ The use of a commerce-based test would therefore be an ineffective approach to protect the Los Angeles River and other urban and western rivers.²³⁸

B. Benefits of Case by Case Navigability Declarations

1. Case by Case Navigability Declarations Are Not Examples of Regulatory Overreaching

The case by case approach that the EPA currently employs is ultimately an application of Justice Kennedy’s *Rapanos* concurrence, and therefore strikes an appropriate balance between the plain language of the CWA and its purposes.²³⁹ A case by case determination continues to give the term “navigability” meaning, while acknowledging Congress’s intent to create a comprehensive regulatory scheme.²⁴⁰

Justice Kennedy used the Los Angeles River as an example in his *Rapanos* concurrence, citing it as a river which, because it “ordinarily carries only a trickle of water and often looks more like a dry roadway

²³² See EPA EVALUATION, *supra* note 8, at 30.

²³³ See CRAIG, *supra* note 67, at 147–48; Mernit, *supra* note 63 (mentioning that cattails in a tributary of the L.A. River “consume nitrogen from fertilizer runoff bound for the ocean”).

²³⁴ See CRAIG, *supra* note 67, at 148.

²³⁵ 547 U.S. at 777 (Kennedy, J., concurring).

²³⁶ See *Lopez*, 514 U.S. at 567.

²³⁷ See *supra* notes 93–100 and accompanying text.

²³⁸ See *Lopez*, 514 U.S. at 567; *supra* notes 93–100 and accompanying text.

²³⁹ See 547 U.S. at 779–82 (Kennedy, J., concurring); Redder, *supra* note 103, at 353.

²⁴⁰ Redder, *supra* note 103, at 353.

than a river,” only might satisfy the plurality’s test of navigability.²⁴¹ While the plurality in *Rapanos* implied that “navigability” requires permanent standing water or continuous flow, urban and western rivers do not fit that mold of traditional navigability.²⁴² Justice Kennedy’s substantial nexus test would allow for wetlands or waters that “significantly affect the chemical, physical, and biological integrity of other covered waters” to be considered navigable.²⁴³ While Justice Kennedy refuses to ignore the navigability language from the statute, he disregards the definition of the plurality, allowing for the possibility of a broader definition of navigability.²⁴⁴

The EPA’s declaration of navigability for the Los Angeles River was permissible under Justice Kennedy’s concurrence.²⁴⁵ Ultimately, Justice Kennedy’s test “retains the opportunity for the Corps and other agencies, such as the EPA, to issue their own interpretation . . . for purposes of regulation.”²⁴⁶ Instead of solely relying on the presence of standing water or continuous flow, the EPA relied on factors such as the river’s flow and depth, history of navigation by watercraft, current commercial and recreational uses of the river, and plans for future development and use of the river which may affect its potential for commercial navigation in declaring that the Los Angeles River was a traditional navigable water.²⁴⁷ Under Justice Kennedy’s significant nexus test, the EPA presumably could have determined that the Los Angeles River had a “significant nexus” to the Pacific.²⁴⁸

While Justice Scalia feared the implementation of the CWA by the “enlightened despot[s]” of the implementing agencies, these very agency officials are better equipped than courts to employ their own scientific knowledge and make their own interpretations.²⁴⁹ The EPA, as an implementing agency with technological expertise, is better-suited to determine the extent to which a river can be considered naviga-

²⁴¹ *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring).

²⁴² *See id.*

²⁴³ *See id.* at 780.

²⁴⁴ *See id.* at 769, 778.

²⁴⁵ *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007) (adopting Justice Kennedy’s “substantial nexus” test for the Ninth Circuit, which includes Los Angeles).

²⁴⁶ *See Mollerup*, *supra* note 168, at 534.

²⁴⁷ *See EPA EVALUATION*, *supra* note 8, at 5.

²⁴⁸ *See Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Such a “significant nexus” finding might require more inferences, however, and therefore be more tenuous than the EPA’s declaration of navigability in this case. *See supra* notes 220–238 and accompanying text.

²⁴⁹ *Rapanos*, 547 U.S. at 721; *see Mollerup*, *supra* note 168, at 535.

ble.²⁵⁰ Taking a case by case approach and utilizing multiple factors, the EPA can assess whether a river is navigable and thus whether CWA protections are warranted.²⁵¹

2. Case by Case Navigability Declarations Can Expand CWA Protection for Urban and Western Rivers

One commentator suggests that the EPA's declaration that the Los Angeles River is navigable may be less a statement of fact than it is a reflection of the agency's underlying objective—to fold the Los Angeles River under the umbrella of protection provided by the CWA.²⁵² Certainly, the Los Angeles River may not appear traditionally navigable in the way that other rivers might.²⁵³ Although the Los Angeles River may not meet the *Rapanos* plurality's test of a permanent, continuously flowing body of water, it nevertheless falls closer to that end of the navigability spectrum than it does to the remote and insubstantial ditches that Justice Kennedy would disregard.²⁵⁴ As EPA Administrator Jackson announced in making the navigability determination for the Los Angeles River, “[this declaration] means that we recognize that this is water. Not only is this water, it needs to be thought of as part of our ecological system that services us.”²⁵⁵

The EPA's implicit application of Justice Kennedy's *Rapanos* concurrence has the potential to expand CWA protection for urban and western rivers.²⁵⁶ Given their unique characteristics, urban and western rivers like the Los Angeles River may have trouble meeting narrow definitions of traditional navigability.²⁵⁷ Given their unique challenges, however, establishing CWA protection for these rivers is all the more critical.²⁵⁸ A case by case approach to determining navigability can utilize the skills of the implementing agency to bring these waters appropriately within the scope of federal regulation and protection.²⁵⁹

²⁵⁰ See Mollerup, *supra* note 168, at 535.

²⁵¹ See generally EPA EVALUATION, *supra* note 8 (utilizing such factors as flow and depth, history of navigation, current commercial and recreation uses, and plans for future development and use).

²⁵² Quinlan, *supra* note 2.

²⁵³ See *id.*

²⁵⁴ See *Rapanos*, 547 U.S. at 769, 778 (Kennedy, J., concurring).

²⁵⁵ Peterson, *supra* note 99.

²⁵⁶ See Quinlan, *supra* note 2.

²⁵⁷ See *supra* notes 123–140 and accompanying text.

²⁵⁸ See *supra* notes 123–140 and accompanying text.

²⁵⁹ See *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring); Mollerup, *supra* note 168, at 535.

CONCLUSION

The EPA's navigability declaration for the Los Angeles River may at first glance seem to be as artificial as declaring that pigs will fly.²⁶⁰ However, strapping the wings onto a pig might be enough to cause it to fly.²⁶¹

The Los Angeles River has a powerful history, and given the appropriate federal protections, its beauty as well as its prominent role in Los Angeles life could be recaptured.²⁶² For other urban and western rivers, which may not fit into a strict mold of traditional navigability, case by case declarations can expand federal clean water protection while remaining true to the purposes of the CWA.²⁶³ The EPA's case by case determinations of navigability avoid the potential over- and under-inclusiveness of an amended CWA with no navigability component.²⁶⁴ Using a case by case approach, agencies have the freedom to consider multiple relevant factors to uphold the intent of the CWA in protecting the nation's waters.²⁶⁵

Thus, as impossible as it would have seemed to a *Gabrieleño* that the Los Angeles River would someday be transformed to its present state, and as improbable as it may be to a layman that a concrete-lined storm drain is a traditionally navigable waterway, somewhere in the sky, flying over the future of the Los Angeles River, is a pig.²⁶⁶

²⁶⁰ See Quinlan, *supra* note 2; *supra* notes 14–52 and accompanying text.

²⁶¹ See *supra* notes 252–259 and accompanying text.

²⁶² See *supra* notes 14–100 and accompanying text.

²⁶³ See *supra* notes 61–71, 252–259 and accompanying text.

²⁶⁴ See *supra* notes 209–238 and accompanying text.

²⁶⁵ See *supra* notes 239–259 and accompanying text.

²⁶⁶ See *supra* notes 14–52, 252–259 and accompanying text.