**Definition (and “Pecking Order”) of “Navigable” in the United States from 1789 to Present**

Federal Powers follow; a state could do anything Congress had not prohibited up until 1899.

1789 to 1850

Navigation is the ebb and flow of the tide, for both commerce clause regulation and for admiralty jurisdiction, because Congress has not spoken differently.

1851 to 1869

Navigation for commerce clause regulation remains the ebb and flow of the tide but for admiralty jurisdiction it is Congress wherever places it, without regard to the tide.

1870 to 1898

1. Those rivers are public navigable rivers in law which are navigable in fact.

2. Rivers are navigable in fact when they are used or are susceptible of being used in

their ordinary condition as highways for commerce over which trade and travel are or

may be conducted in the customary modes of trade and travel on water.

State Powers 1899 to present

Congress wholly occupied the field of navigation; states may no longer regulate it.

**On and after 1920 to present for Feds *and* States:**

Amend Rule 2 of 1870 to read:

2. Rivers are navigable in fact when they are

(a) used or

(b) are susceptible of being used in their ordinary condition or

(c) could reasonably be so made

as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

***The Thomas Jefferson***, 23 U.S. (10 Wheat.) 428 (1825); modified in 1870 by *Ball*.

All that happened here is that the U.S. Supreme Court found that the English common law rule that “navigation,” and hence “admiralty,” was “the ebb and flow of the tide” still applied in the United States, absent a contrary act by Congress.

As to states’ powers absent any act of Congress, see the Supreme Court of Pennsylvania in *Monongahela Bridge Co. v. Kirk*, 46 Pa.St. 112 (1863), at 120, 121.

***The Propeller Genesee Chief***, 53 U.S. (12 How.) 443 (1851). Syllabus:

The Act of Congress passed 26 February, 1845, 5 Stat. 726, extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same is

consistent with the Constitution of the United States.

***The Daniel Ball***, 77 U.S. (10 Wall.) 557, 19 L. Ed. 999 (1870), at 563:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute

navigable waters of the United States within the meaning of the acts of Congress, in **contradistinction from the navigable waters of the states** [emphasis added], when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

***U.S. v. Appalachian Elec. Power Co.***, 311 U.S. 377, (1940) at 407-408:

Approved the addition by Congress of the phrase “or which could reasonably be so made” in a Power Act from 1920, meaning “reasonably made navigable . . . .”

Congress has not changed the definition of “navigable” since 1920, although it has been invited to after *SWANCC* (2001), *Rapanos* (2006), and *Sackett* (2012).

So the ***actual*** pecking order is:

1. Congress

2. A federal judge

3. EPA [Ben. Civiletti, Asst US Atty Gen in Wash DC; 43 Op. Att’y Gen. 197 (1979)]

http://water.epa.gov/lawsregs/lawsguidance/cwa/wetlands/upload/1979-civiletti-

memorandum.pdf

4. Division at the Corps