MEMORANDUM

The legislative history of section 404(g)(1) of the Clean Water Act

I. Introduction

Section 404 of the Clean Water Act (CWA) authorizes the U.S. Army Corps of Engineers ("the Corps") to issue permits for the discharge of dredged or fill material "into the navigable waters…"[1]. Pursuant to section 404(g)(1), States, with approval from the Environmental Protection Agency (EPA), may assume authority to administer the permit program for discharges of dredged and fill material to some but not all navigable waters. The waters that a State may not assume, and which the Corps must retain even after a State has assumed the program, are defined in a parenthetical phrase in Section 404 (g)(1) as:

> "…those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto…"[2]

This memorandum explores the meaning of this parenthetical language by reviewing the legislative history of the 1977 CWA amendments which led to 404(g)(1). The legislative history summarized below includes the report of the House Committee on Public Works and Transportation, passages from earlier versions of both the House and Senate bills, and excerpts from the Conference Report regarding the final language of the amendments.

II. History of 404(g)(1)

The parenthetical language originated with section 10 of the Rivers and Harbors Act of 1899 (RHA) and the long line of cases interpreting the scope of federal jurisdiction over navigable waters.[3] This memo therefore begins with a discussion of the extent of jurisdiction over navigable waters of the US under RHA section 10. It then explains how the 404(g) parenthetical retained the language of RHA section 10, even narrowing to omit historically navigable waters, even as the CWA expanded federal jurisdiction to encompass all waters of the US.

A. The jurisdiction of the CWA expands beyond the "navigable waters of the US" that the RHA regulates.

The Rivers and Harbors Act was enacted to protect navigation and the navigable capacity of the nation's waters.[4] Section 10 of the RHA prohibits certain types of structures or work in or

[1] 33 U.S.C. § 1344(a).
[2] 33 U.S.C. § 1344(g)(1).
[3] *See* Committee on Public Works and Transportation, H.R. Rep. No. 94-1107, to accompany H.R. 9560, at 23 (May 7, 1976). The RHA did not, however, address adjacent wetlands.
[4] Final Rule, U.S. Army Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977)

affecting navigable waters of the United States without permits from the Corps.[5] Federal jurisdiction under section 10 of the RHA encompasses "navigable waters of the US."[6] This is the identical phrase that the Supreme Court had been using prior to the passage of that Act to describe the scope of the federal commerce power over navigable waters. Legislative history of the RHA indicates that the act was intended to restate existing law.[7] Therefore, jurisdiction pursuant to RHA section 10 is interpreted consistently with judicial opinions interpreting navigable waters of the US.[8]

On September 9, 1972, the Corps promulgated an administrative definition of the RHA section 10 term "navigable waters of the US."[9] The definition encompassed: (1) all waters presently used to transport interstate or foreign commerce (following *Daniel Ball v. United States*);[10] (2) all waters used in the past to transport interstate or foreign commerce (following *Econ. Light and Power Co. v. United States*);[11] (3) all waters susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce (following *United States v. Appalachian Elec. Power Co.*); and (4) all waters subject to the ebb and flow of the tide (*see United States v. Moretti*).[12]

On October 19, 1972, Congress passed the CWA with the goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.[13] Section 404 of the Act establishes a permit program administered by the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge of dredged and fill material into the navigable waters, which are synonymous in the Act with waters of the United States.[14] The Conference Report for the 1972 law stated that "waters of the United States" should be given "the broadest possible Constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[15] In 1974, the Corps

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[5] RHA section 10 states, "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same. 33 U.S.C. 403.

[6] 33 U.S.C. 403.

[7] See *US v. Pennsylvania Chem. Corp*., 411 U.S. 655, 666 (1973).

[8] *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 622-23 (8th Cir. 1979); *citing Case v. Los Angeles Lumber Products Co*., 308 U.S. 106, 115, 60 S. Ct. 1, 84 L. Ed. 110 (1939); *Hardy Salt Company v. Southern Pacific Trans. Co*., 501 F.2d 1156, 1168 (10th Cir.), cert. denied, 419 U.S. 1033, (1974).

[9] 37 Fed. Reg. 18,289 (Sept. 9, 1972).

[10] 77 U.S. 557 (1871).

[11] 256 U.S. 113 (1921).

[12] 478 F.2d 418 (5th Cir. 1975).

[13] 33 U.S.C. 1251 *et seq.*

[14] 33 U.S.C. 1344.

[15] S. Conf. Rep. No. 92-1236, p. 144 (1972), reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972, p. 327.

promulgated regulations to implement the section 404 permit program.[16] The 1974 regulations viewed the Conference Report language as referencing the century or more of case law interpreting the scope of the "navigable waters of the US" regulated under RHA section 10: waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher water mark on the west coast) and/or waters that are presently used, were used in the past, or are susceptible to use to transport interstate or foreign commerce.[17]

The Natural Resources Defense Council and National Wildlife Federation challenged the regulations as inconsistent with the intent of the Act to protect all of the waters of the United States. In March 1975, three years after the original CWA was enacted, the District Court for the District of Columbia held that the Corps' regulations defining "navigable waters" were inconsistent with the CWA. The court ordered the Corps to issue new regulations broadening the definition to accord with the goals of the CWA.[18]

As later explained in the Corps July 19, 1977, regulations:

> Concern was expressed over the need to regulate the entire aquatic system, including all of the wetlands that are part of it, … [as well as] the many tributary streams that feed into the tidal and commercially navigable waters… since the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material. And concern was expressed for the many other waters, including lakes, isolated wetlands, and potholes whose degradation, destruction, and disappearance continues to increase at alarming rates.[19]

B. The language of section 404(g)(1) originated as an amendment to redefine the term "navigable waters" for the entire 404 permit program.

On July 25, 1975, in compliance with the order in *NRDC v. Callaway*, the Corps issued revised regulations creating a phased schedule for expanding the program, as follows:

> Part 209.120 (e)(2)(i)(a) "Phase I [effective immediately]: …coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto...
> Part 209.120 (e)(2)(i)(b) Phase II [effective July 1, 1976]: …primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes...
> Part 209.120 (e)(2)(i)(c) Phase III [effective July 1, 1977]: …any navigable water [including intrastate lakes, rivers and streams landward to their ordinary high water mark and up to the headwaters that are used in interstate commerce]...."[20]

[16] 39 Fed. Reg. 12,115 (April 3, 1974).
[17] *Id.*
[18] *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).
[19] 42 Fed. Reg. 37,122, 37,123-24 (July 19, 1977).
[20] 40 Fed. Reg. 31,326 (July 25, 1975). The Corps' 19 July 1977 final rule characterized Phase I as including "all waters subject to the ebb and flow of the tide and/or waters that are, were, or are susceptible to use for commercial navigation purposes (waters already being regulated by the Corps) plus all adjacent wetlands to these waters (thus eliminating the artificial ordinary high water and mean high waters mark distinctions.)" 42 Fed. Reg. at 37,124.

In response, the House Committee on Public Works and Transportation began to craft legislation to amend the CWA to redefine "navigable waters" specifically for section 404.[21] The intent was to limit the jurisdictional scope of the Corps dredge and fill program.

According to the Committee, "full implementation of this permit program under the new regulations would have a dramatic effect" by increasing permit applications from 2,900 to 30,000 per year.[22] An expanded section 404 program would also "discourage the States from exercising their [] responsibilities in protecting water and wetland areas."[23] Lastly, the "Federal Government cannot and should not be expected to assume the entire responsibility for environmental protection. The states and local governments also have a significant role to play."[24] Therefore, Section 17 of the Committee's bill, H.R. 9560, amended the term "navigable waters" to exclude Phase II and III waters and to narrow Phase I waters by deleting wetlands and any waters that are deemed navigable solely due to their historical use:

> "The term 'navigable waters' as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher water mark on the west coast)."[25]

C. The new definition was intended to codify court decisions defining "navigable waters" except that it excluded the "historical use" test.

The Committee emphasized that the new definition for the 404 program was the same as the definition of navigable waters of the United States as it had evolved through court decisions over the years with one exception; the definition omitted the historical test for navigability.[26] The Committee noted that the historical test had been used to "classify as navigable [] many bodies of water …[that] were not capable of supporting interstate commerce in their existing condition or with reasonable improvement."[27] For example, waters that were used in the fur trade in the 1700's "where traders would transport their furs by trail to the lake, across the lake by boat, and then again by trail into another State."[28] Similarly, "small lakes located entirely within one State, which were part of a highway of commerce in the 1800's by virtue of their proximity to a railway track which led into another State," had been classified as navigable.[29] Thus, the Committee intended to exclude "small intra-state lakes…which could not conceivably be used

[21] *See* Committee on Public Works and Transportation, H.R. Rep. No. 94-1107, to accompany H.R. 9560, at 22 (May 7, 1976).
[22] *Id.*
[23] *Id*.
[24] *Id.*
[25] *Id.* at 63.
[26] *Id.* at 23.
[27] *Id.*
[28] *Id.*
[29] *Id.*

today or in the future for interstate commerce."[30] The Committee felt strongly that if "a water is not susceptible of use for the transport of interstate or foreign commerce in its *present* condition or with reasonable improvement, then it should not be considered a 'navigable water of the United States'"[31]

D. In order to pass H.R. 9560 in the House, the Committee's definition of "navigable waters" was broadened to include wetlands but certain activities were exempted from the 404 permit requirements.

Section 17 was debated vigorously on the House floor in 1976.[32] Many vehemently opposed restricting the Corps jurisdiction, while proponents of Section 17[33] feared the Corps infringement on States' authorities and farmers' operations.[34] In a compromise, the bill was amended to add protections for "coastal wetlands and [] those wetlands lying adjacent and contiguous to navigable streams."[35] But, the amendment also exempted from the permit program normal farming activities, ranching, and the construction or maintenance of farm or stock ponds and irrigation ditches.[36] Additionally, the amendment created a process for States to administer the program themselves whenever the Secretary of the Army found that they have sufficient legal authority and capability to carry out such functions and that the delegation of authority would be within the public interest.[37] The House of Representatives passed H.R. 9560 and approved these amendments to the 404 program on June 3, 1976.[38]

E. The Senate bill created a mechanism for States to assume the 404 program but did not modify the definition of navigable waters.

The Senate bill, S. 1952, did not amend "navigable waters."[39] Instead, it allowed States to assume the primary responsibility for implementing the permit program and regulating "phase 2 and phase 3 waters."[40] The assumption procedures were modelled on the 402 procedures for transfer of National Pollutant Discharge Elimination System (NPDES) authority to the States in the hopes that the familiar process would expedite state adoption of the program.[41] The amendment also exempted activities similar to those exempted in the House bill and provided for general permits to eliminate delays and administrative burdens associated with the program.[42] The Senate concluded that until the approval of a State program for phase II and phase III waters,

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[30] *Id.* at 23–24.
[31] *Id.* at 24. (emphasis added)
[32] *See* 122 Cong. Rec. 16514–16573 (June 3, 1976).
[33] Note: in the final bill the definition of "navigable waters" appears in Section 16. 122 Cong. Rec. 16572 (June 3, 1976).
[34] *See* 122 Cong. Rec. 16514–16573 (June 3, 1976).
[35] 122 Cong. Rec. 16553 (June 3, 1976).
[36] *Id.* at 16552.
[37] *Id.* at 16572.
[38] *Id*. at 16569.
[39] Committee on Environment and Public Works, S. Rep. No. 95-370, to accompany S. 1952, at 75 (July 28, 1977).
[40] *Id*.
[41] *Id.* at 77–78.
[42] *Id.* at 74.

the Corps would administer section 404 in all navigable waters.[43] The Senate passed S. 1952 on August 4, 1977.[44]

F. The final bill did not change the definition of "navigable waters" but did provide for State assumption that would effectively limit Corps jurisdiction in assumed States to Phase 1 waters.

Ultimately, the final bill, referred to as the 1977 Clean Water Act amendments, did not change the definition of navigable waters for the 404 program. But during conference, the two chambers agreed upon an amendment that would allow States to assume the program. If and when a State assumed the program, the State would regulate Phase II and III waters, and the Corps would retain authority in the Phase I waters.

The Conference Report explained that under the 1977 amendments the States can administer an individual and general permit program for the discharge of dredged or fill material into "phase 2 and 3 waters after the approval of a program by the Administrator."[45] The waters in which a State may not regulate the discharge of dredged or fill material under a State program "are those waters defined as the *phase I waters* in [the Corps] 1975 regulations, with the exception of waters considered navigable solely because of historical use."[46] The final bill inserted the language that the House Committee had originally used to limit Corps jurisdiction, except that the Conference Committee added "wetlands adjacent thereto" to the parenthetical phrase defining the waters over which the Corps would always retain authority. All other waters, the Committee indicated, would be "more appropriately and more effectively subject to regulation [by] the States."[47]

The legislative history evidences a Congressional expectation that most States would assume the 404 program, and therefore effectively limit Corps jurisdiction to phase I waters. "By using the established mechanism in section 402…, the committee anticipates the authorization of State management of the [404] permit program will be substantially expedited. At least 28 State entities which have already obtained approval of the national pollutant discharge elimination system under the section should be able to assume the program quickly."[48] Also, "the corps [conducted] a study [in 1976] to determine the scope of State programs similar to or duplicative of corps regulations and to determine the interest of the States in accepting delegation of the 404 program."[49] Based on the preliminary responses of 52 states and territories, 34 indicated their intent, under certain conditions, such as federal funding, to assume the dredge and fill program.[50] Only 6 responded that they would not seek assumption of the program and 12 were undecided.[51]

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[43] 123 Cong. Rec. 38461 (Dec. 6, 1977).
[44] 123 Cong. Rec. 26775 (Aug. 4, 1977).
[45] H.R. Rep. No. 95-830, at 101 (Dec. 6, 1977) (Conf. Rep.).
[46] 123 Cong. Rec. 38969 (Dec. 15, 1977). (emphasis added)
[47] Committee on Public Works and Transportation, H.R. Rep. No. 94-1107, to accompany H.R. 9560, at 22 (May 7, 1976).
[48] Committee on Environment and Public Works, S. Rep. No. 95-370, to accompany S. 1952, at 77–78 (July 28, 1977).
[49] Committee on Public Works and Transportation, H.R. Rep. No. 95-139, to accompany H.R. 3199, at 62 (Mar. 29, 1977).
[50] *Id*.
[51] *Id.*

Therefore, it appears Congress anticipated more States would assume the 404 program than has been the case.

III. Summary of Key Points

1. The language in the 404(g)(1) parenthetical phrase that defines the waters over which the Corps will retain jurisdiction in an assumed State is identical to the language used by the House Committee to narrow the definition of "navigable waters," except that it includes "wetlands adjacent thereto."

2. Congress intended that the parenthetical language be interpreted to mean the same waters as the Corps had defined as Phase I waters in its 1975 regulations, except those deemed navigable based solely on historical use. Thus, such waters are assumable by a State.

3. The 1977 Congress anticipated that most States would assume the 404 program and therefore regulate Phase II and III waters, leaving the Corps with authority over Phase I waters (including their wetlands).

4. The parenthetical waters are not the same as those waters defined in the Rivers and Harbors Act of 1899 nor the "(a)(1)" waters defined in the Corps and EPA regulations.