August 17, 2016

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 "navigable waters."[1] Pursuant to section 404(g)(1), States, with approval from the Environmental Protection Agency ("EPA"), may assume authority to administer the 404 permit program in 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 section 404(g)(1). The legislative history summarized below includes the reports of the House Committee on Public Works and Transportation and the Senate Committee on Environment and Public Works, passages from earlier versions of both the House and Senate bills, and excerpts from the Conference Report regarding the final language of the amendments. After careful review of this material, it is clear that the waters Congress intended the Corps to retain after a State assumed 404 authority are: (1) the waters identified by the Corps as Phase I waters in its 1975 regulations, *except* for those navigable waters of the United States deemed navigable based solely on historic uses, and (2) wetlands adjacent to the retained Phase I waters.[3]

II. History of Section 404(g)(1)

A. Responding to a court order, the Corps proposes to expand its definition of navigable waters for section 404.

After the CWA was enacted in 1972, the Corps promulgated regulations defining the CWA term "navigable waters" synonymously with the RHA term "navigable waters of the United States." The National Wildlife Federation and the Natural Resources Defense Council challenged the Corps' CWA definition, and in March 1975 the District Court for the District of Columbia ordered the Corps to issue new regulations broadening the definition to accord with

[1] 33 U.S.C. § 1344(a).

[2] 33 U.S.C. § 1344(g)(1).

[3] As described below, Phase I waters were understood to be "navigable waters of the United States" already regulated by the Corps under section 10 of the Rivers and Harbors Act ("RHA"), plus adjacent wetlands.

the broader water quality purposes of the CWA.[4] On July 25, 1975, in compliance with the court order, the Corps issued revised regulations creating a phased schedule for expanding the program, as follows:

> *(a) Phase I:* [effective immediately] discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States[5] and freshwater wetlands contiguous or adjacent thereto are subject to … regulation.
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> *(b) Phase II:* [effective July 1, 1976] discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to … regulation.
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> *(c) Phase III:* [effective after July 1, 1977] discharges of dredged material or of fill material into 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] are subject to … regulation.[6]

B. Responding to the Corps' regulations, the House Committee on Public Works writes a bill to limit 404 jurisdiction to Phase I waters.

Reviewing the new Corps regulations, the House Committee on Public Works and Transportation expressed concern that "full implementation of this permit program under the new regulations would have a dramatic effect on the overall Corps of Engineers permit program."[7] The Committee Report noted that permits under the RHA numbered close to 11,000

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[4] *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). The CWA defines the term "navigable waters" to mean "the waters of the United States." At the time the CWA was passed, the Corps had been regulating "navigable waters of the United States" under the Rivers and Harbors Act for more than 100 years. The strikingly similar language in the two statutes led to confusion. The Corps' initial post-CWA regulations treated the terms synonymously. 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). But the two statutes had different purposes – the RHA was focused on maintaining navigable capacity, the CWA on water quality. And the CWA Conference Report stated that the "term 'navigable waters' [should] be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. REP. NO. 92-1236, at 144 (1972), *reprinted in* COMM. ON PUB. WORKS, 93D CONG., 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 281, 327 (Jan. 1973).

[5] The term "navigable waters of the United States" is a term of art used to reference waters subject to the Corps jurisdiction under the RHA. The Corps defined the term in the 1975 regulations as "waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce landward to their ordinary high water mark and up to the head of navigation as determined by the Chief of Engineers, and also waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark…. See 33 CFR 209.260 … for a more definitive explanation of this term." 40 Fed. Reg. 31,320, 31,324 (July 25, 1975). The regulatory cross reference included in this definition was to the Corps' then current RHA regulations. Those regulations emphasized that, "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies." 33 C.F.R. § 209.260(b) (1973). Those regulations were later updated, and now read "[p]recise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies." 33 C.F.R. § 329.3 (2015).

[6] 40 Fed. Reg. at 31,326.

[7] H.R. REP. NO. 94-1107, at 22 (1976).

per year and were expected to remain constant, but the new 404 regulations would increase 404 applications from 2,900 to 30,000 per year as Phases II and III became effective.[8] The Committee was concerned that the expanded 404 program "will prove impossible of effective administration and … discourage the States from exercising their present responsibilities in protecting water and wetland areas."[9] The Committee report stated that environmental protection should be a shared responsibility of the States and the Federal government. Noting that "[t]he Federal government has traditionally had the responsibility of protecting the navigable waters of the United States for public use and enjoyment," the Committee concluded that "activities addressed by section 404, to the extent they occur in waters other than navigable waters of the United States … are more appropriately and more effectively subject to regulation [by] the States."[10]

C. The House bill tracks the RHA definition, except it omits "historic" navigable waters of the United States.

To address the concerns identified in the Committee report, section 17 of the Committee bill, H.R. 9560, added a definition of "navigable waters" to be applied to the 404 program that is "the same as the definition of navigable waters of the United States as it has evolved over the years through court decisions with one exception. [It] omits the historical test of navigability."[11] 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,"[12] 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."[13] 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."[14] Thus, the Committee intended to exclude "small intra-state lakes … which could not conceivably be used today or in the future for interstate commerce."[15] The Committee "fe[lt] 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.'"[16]

Reflecting these Congressional intentions, section 17 read as follows:

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[8] *Id*.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 23.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 23-24.

[16] *Id.* at 24.

> 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 high water mark on the west coast).[17]

As discussed below, section 17 morphed during the legislative process, and the above language ended up in 404(g)(1) and was used to describe the navigable waters the Corps would retain in a case of State assumption. The language "wetlands adjacent thereto" was added to the final bill separately.

D. During debate in the House, the 404 permit requirement is extended to certain wetlands, and certain activities are exempted.

Section 17 was debated vigorously on the House floor in 1976.[18] Many vehemently opposed restricting the Corps' jurisdiction, while proponents of section 17[19] feared the Corps' infringement on States' authorities and farmers' operations.[20] In a compromise, the final House bill included the Committee's definition of "navigable waters" (for 404 purposes), but protected wetlands by requiring 404 permits for dredge and fill activities in "coastal wetlands and … those wetlands lying adjacent and contiguous to navigable streams."[21] The bill did not include wetlands in the definition of navigable waters, however.

The bill also exempted from the permit program normal farming activities, ranching, and the construction or maintenance of farm or stock ponds and irrigation ditches.[22] Additionally, it 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.[23] The House of Representatives passed H.R. 9560 and approved these amendments to the 404 program on June 3, 1976.[24]

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

The Senate took up the bill in the summer of 1977. Emphasizing the ambitious water quality goals of the 1972 Clean Water Act, the Senate Committee on Environment and Public

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[17] *Id.* at 63.

[18] *See* 122 CONG. REC. 16,514-73 (June 3, 1976).

[19] Note: In the final bill, the definition of "navigable waters" appears in section 16. *Id.* at 16,572.

[20] *See id.* at 16,514-73.

[21] *Id.* at 16,553.

[22] *Id.* at 16,552.

[23] *Id.* at 16,572.

[24] *Id.* at 16,569.

Works declined to redefine "navigable waters" for purposes of the 404 program. Instead, the Senate bill, S. 1952, in section (l)(5), allowed States to assume the primary responsibility for implementing the permit program "outside the corps program in the so-called phase I waters."[25] The waters that would be retained by the Corps if a State assumed the program were the same waters the House bill had defined as "navigable waters" except section (l)(5) added adjacent wetlands:

> [A]ny 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.[26]

S. 1952 would allow the States to assume authority over "phase 2 and phase 3 waters."[27] The assumption procedures were modeled 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.[28] 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.[29] The Senate concluded that until the approval of a State program for Phase II and Phase III waters, the Corps would administer section 404 in all navigable waters.[30] The Senate passed S. 1952 on August 4, 1977.[31]

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

Ultimately, the final bill, H.R. 3199, referred to as the 1977 Clean Water Act Amendments, did not change the definition of navigable waters for the 404 program. Instead, the amendments were a combination of the House and Senate bills. While members of the House, and more specifically the House Committee on Public Works and Transportation, wanted to redefine "navigable waters" for the 404 program, others strongly opposed such restrictions. Both chambers agreed, however, that the States could properly assume authority for administering the 404 program in waters other than those called out in section 17 of the House bill and section (l)(5) of the Senate bill. Accordingly, the conferees agreed upon an amendment

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[25] S. REP. NO. 95-370, at 75 (1977) *reprinted in* COMM. ON ENV'T & PUBL. WORKS, 95TH CONG., 4 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 ("LEGIS. HISTORY 1977"), at 635, 708 (Oct. 1978).

[26] 4 LEGIS. HISTORY 1977, at 830.

[27] *Id.* at 708.

[28] *Id.* at 710-11.

[29] *Id.* at 707.

[30] *Id*. at 708.

[31] 123 CONG. REC. 26,775 (Aug. 4, 1977).

that would leave the definition of "navigable waters" unchanged, but would allow the States to assume the program in most waters.

Thus, 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."[32] If and when a State assumed the program, the Corps' permitting authority would be limited to "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."[33]

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 permitting authority.[34]

The legislative history in both the House and the Senate evidences a Congressional expectation that most States would assume the 404 program, and therefore effectively limit Corps permitting authority 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.[35]

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."[36] 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.[37] Only 6 responded that they would not seek assumption of the program, and 12 were undecided.[38]

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

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[32] H.R. REP. NO. 95-830, at 101 (1977) *reprinted in* 3 LEGIS. HISTORY 1977, at 185, 285.

[33] 123 CONG. REC. 38,969 (Dec. 15, 1977). The Corps' July 19, 1977 final regulations characterized Phase I as covering "waters already being regulated by the Corps[] plus all adjacent wetlands to these waters." 42 Fed. Reg. 37,122, 37,124 (July 19, 1977).

[34] H.R. REP. NO. 95-830, at 39, *reprinted in* 3 LEGIS. HISTORY 1977, at 285.

[35] S. REP. NO. 95-370, at 77-78, *reprinted in* 4 LEGIS. HISTORY 1977, at 710-11.

[36] H.R. REP. NO. 95-139, at 67, *reprinted in* 4 LEGIS. HISTORY 1977, at 1196, 1262.

[37] *Id.*

[38] *Id.*

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, waters deemed navigable based on historical use only are assumable by a State.

3. The 1977 Congress anticipated that most States would assume the 404 program and therefore regulate dredge and fill activities in Phase II and III waters, leaving the Corps with authority over Phase I waters (including their adjacent wetlands but excluding historical use waters).

4. The parenthetical waters identified by the Corps as Phase I waters in its 1975 regulations incorporated the description of "navigable waters of the United States" already regulated by the Corps under section 10 of the RHA, except the parenthetical excluded waters deemed navigable based solely on historical use, and included adjacent wetlands. The Corps' regulations at the time emphasized that "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies." 33 C.F.R. § 209.260(b) (1973). The language changed later, and the current regulation now states "[p]recise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies." 33 C.F.R. § 329.3 (2015).

For deliberation purposes only as background information for the Assumable Waters Subcommittee.
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