

# The History of Clean Water Act § 404(g)(1)

Which specifies those waters for which states may administer the permit program for the discharge of dredged or fill material.

# CWA Section 101(b)

**1251. Congressional declaration of goals and policy.**

**(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States.**

It is the policy of the 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 (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States ... implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

# CWA Section 404(g)(1)

1344. Permits for dredged or fill material

(g) State administration

"The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (**other than 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**) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact."

# Clean Water Rule Definition of “Waters of the US”

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

**(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;**

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in

paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. ....

(i) *Prairie potholes. ...*

(ii) *Carolina bays and Delmarva bays....*

(iii) *Pocosins. ...*

(iv) *Western vernal pools....*

(v) *Texas coastal prairie wetlands....*

STAFF DRAFT DELIBERATIVE Prepared for the Fall 2015 Meeting of the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark....

# Differences between CWR paragraph (a)(1) and CWA Section 404(g)(1)

Waters the Corps would retain under Section 404(g)(1):

“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, 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”

Current definition of “(a)(1)” waters:

All waters which are currently used, **were used in the past**, or may be **susceptible to use in interstate or foreign commerce**, including all waters which are subject to the ebb and flow of the tide;

# The History Behind Clean Water Act section 404(g)(1)



# Rivers and Harbors Act of 1899, Section 10

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.

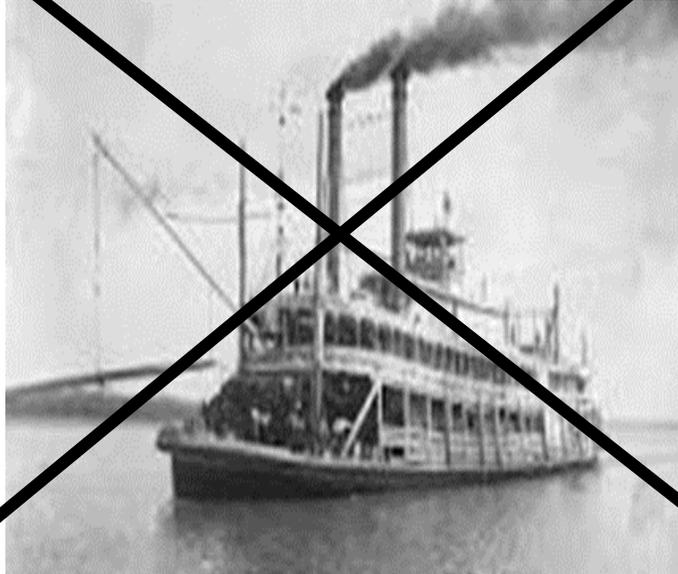
33 U.S.C. 403.

# 1974 Corps Regulations

- Defined “navigable waters” to mean “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”
- The regulations also explained that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.”



# The Corps' Limited Interpretation of its CWA Authority was Roundly Rejected



# 1975 Interim Corps Regulations

## **Phase I (beginning immediately):**

“all coastal waters and contiguous or adjacent wetlands as well as inland rivers, lakes and streams that are navigable waters of the United States (which the Corps of Engineers is already regulating) and their contiguous or adjacent wetlands.”

## **Phase II (beginning July 1, 1976):**

Phase I waters + “discharges of dredged or fill material in primary tributaries (the main stems of tributaries directly connecting to navigable waters of the United States), their contiguous or adjacent wetlands, and all lakes.”

## **Phase III (beginning July 1, 1977):**

Phases I and II + all discharges of dredged or fill material in navigable waters, including “isolated” or “intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters” that “the District Engineer determines necessitate regulation for the protection of water quality.”

# Corps Final 1977 Regulations

“Waters of the U.S.” was defined broadly to include all of the waters listed in Phases I-III of the 1975 interim regulations.

“Navigable waters of the U.S.” was defined as “those waters of the U.S. that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher water mark on the Pacific coast and/or are presently used, or **have been used in the past**, or may be susceptible to use **to transport** interstate or foreign commerce.”

# 1975 “Phase III”/1977 “Category 4” Waters

- “All waters of the US, i.e., waters that are used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the US. The quality of water in these other bodies of water will have an effect on interstate commerce. These waters include waters used:
  - By interstate travelers for water-related recreational purposes;
  - For the removal of fish sold in interstate commerce;
  - For industrial purposes by industries in interstate commerce;
  - In the production of agricultural commodities sold or transported in interstate commerce; and
  - Other waters the degradation or destruction of which could affect interstate commerce.

# The House Bill in Response to Corps' 1975/1977 Regs

- The House passed a bill that would have:
  - Limited the Corps' jurisdiction under § 404 to “navigable waters and adjacent wetlands. Navigable waters are defined as those waters which are presently used or are susceptible to use in their present condition or with reasonable improvement to transport interstate or foreign commerce.”
    - The House Report explained that the bill's definition of navigable waters “**omits the historical test of navigability.**”
  - Authorized regulation of discharges into non-navigable waters and adjacent wetlands if the Corps and the governor of the state where they are located agree that their regulation is needed because of their ecological importance.

# Discussion of Omission of Historical Test in 1977 House Bill

“Under the historical test many bodies of water -- particularly small lakes -- have been classified as navigable by the Corps of Engineers solely on the basis of their use some time in the past as part of a highway of commerce. For example”:

- Use in the fur trade in the 1700's. Traders would transport their furs by trail to the lake, across the lake by boat, and then again by trail into another State.
- Supply of army bases in the 1700's and 1800's, in the same manner as above.

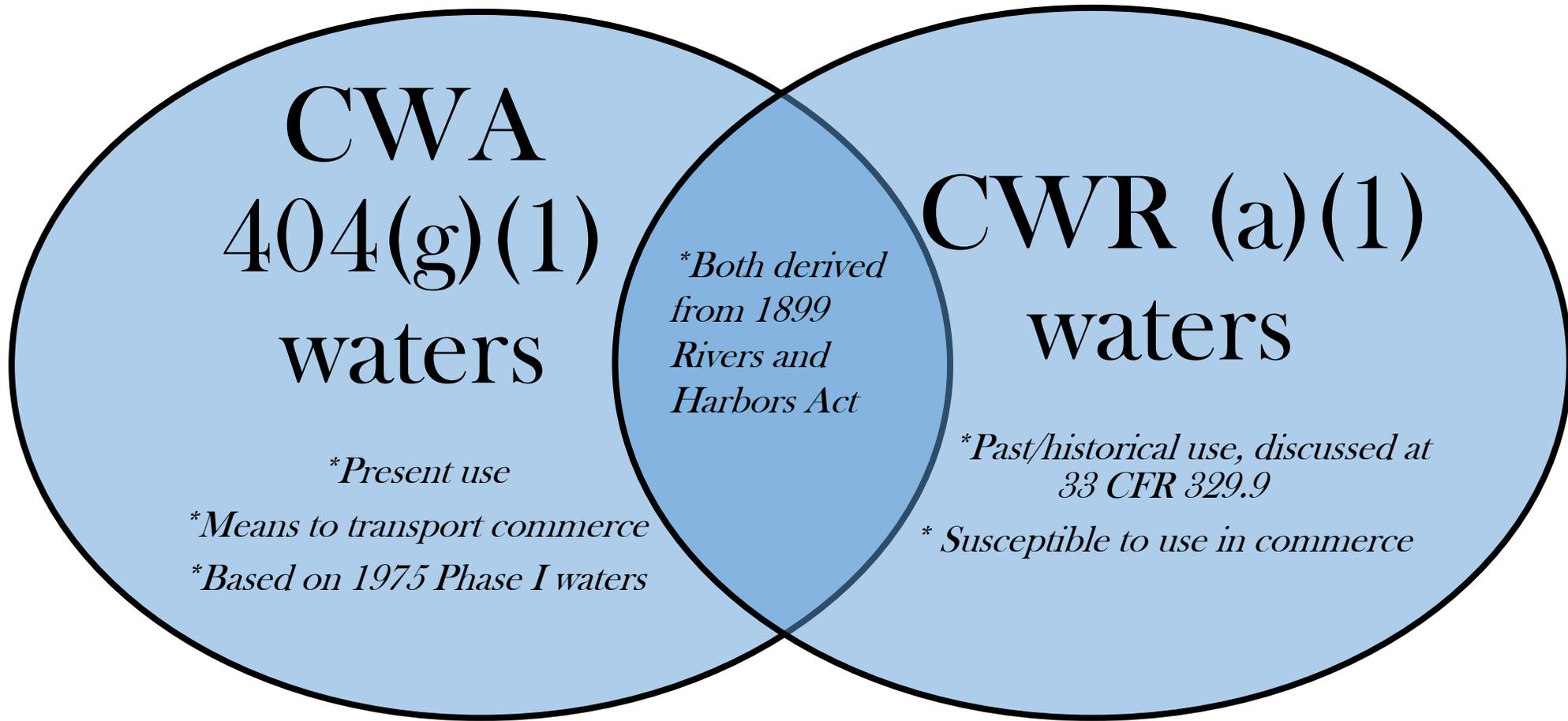


- Small lakes next to interstate railway tracks used in the 1800's.



# 1977 CWA Amendments

- Congress ultimately rejected the House’s efforts to limit Corps jurisdiction but provided for state autonomy by adopting § 404(g)(1).
  - § 404(g)(1) incorporated the omission of the historical test from the failed House bill.
  - It was intended to allow state control of Phase II and III waters.
    - Conf. Rep’t: § 404(g) “establishes a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into phase 2 and 3 waters after the approval of a program by the Administrator.”
    - Sen. Rep’t: § 404(g), “allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.”



CWA  
404(g)(1)  
waters

- \*Present use*
- \*Means to transport commerce*
- \*Based on 1975 Phase I waters*

CWR (a)(1)  
waters

- \*Past/historical use, discussed at 33 CFR 329.9*
- \*Susceptible to use in commerce*

*\*Both derived from 1899 Rivers and Harbors Act*

# Current Corps Regulations that Explain “Transport” and “Used in the Past”

## Section 329.1 - Purpose

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers.

## Section 329.4 - General definition

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

# Current Corps Regulations that Explain “Transport and “Used in the Past”, Cont’d

33 CFR section 329.6 - Interstate or foreign commerce

“... sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.”

# Current Corps Regulations that Explain “Transport and “Used in the Past”, Cont’d

## Section 329.9 - Time at which commerce exists or determination is made

a. **Past use.** A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in paragraph 329.8(b) of this Part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army.

# New Jersey's Implementation of 404(g)(1)

Memorandum of Agreement between the State of N.J. and the Dep't of Army (1993)

## State Waters To Be Regulated

All waters of the United States, as defined at 40 CFR section 232.2(q), within the state of New Jersey will be regulated by NJDEPE as part of their State Program with the exception of those waters which 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 highwater mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto. *For the purposes of this agreement, the Corps will retain regulatory authority over those wetlands that are particularly or entirely located within 1000 feet of the ordinary high water mark or mean high tide of the Delaware River, Greenwood Lake, and all water bodies which are subject to the ebb and flow of the tide.*

# Michigan's Implementation of 404(g)(1)

Memorandum of Agreement between the State of MI and the Dep't of Army (1993)

- “Consistent with the provisions of Section 404 (g) CWA, all waters within the State of Michigan shall be regulated by [the state agency] as part of this state program OTHER THAN 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 wetlands adjacent thereto. These waters are specifically identified in ATTACHMENT A—Navigable waters of the United States in U.S. Army Engineer District, Detroit, November 1981, attached to this Memorandum of Agreement, which will be regulated by DNR and COE under applicable state and Federal Statutes [a list of named waters.]