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MEMORANDUM

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

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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] The statute defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[2] 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…[3]

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. Legislative History of 404(g)(1)

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

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 and broaden

[1] 33 U.S.C. § 1344(a).
[2] *Id*. § 1362(7).
[3] *Id*. § 1344(g)(1).

the definition. [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]: …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. . . . .
> (b) Phase II [effective July 1, 1976]: …primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes . . . .
> (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 their headwaters that are used in interstate commerce] . . . ."[5]

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.[6] 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.[7] An expanded section 404 program would also "discourage the States from exercising their . . . responsibilities in protecting water and wetland areas."[8] 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."[9] Therefore, Section 17 of the Committee's bill, H.R. 9560, amended the term "navigable waters" in a way that would exclude Phase II and III waters and 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).[10]

B. 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.[11] The

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[4] *See Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).
[5] 40 Fed. Reg. 31,320, 31326 (July 25, 1975).
[6] *See* H. Comm. on Pub. Works and Transp., H.R. Rep. No. 94-1107, to accompany H.R. 9560, at 22 (May 7, 1976).
[7] *Id.*
[8] *Id*.
[9] *Id.*
[10] *Id.* at 63.
[11] *Id.* at 23.

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, the report cited 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 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.'"[16]

C. In order to pass H.R. 9560 in the House, the Committee amended the bill to recognize permits for wetlands but certain activities were exempted from the 404 permit requirements.

Section 17 was debated vigorously on the House floor in 1976.[17] Many vehemently opposed restricting the Corps jurisdiction, while proponents of Section 17[18] feared the Corps infringement on States' authorities and farmers' operations.[19] In a compromise, the bill was amended to apply the permit requirement for "coastal wetlands and [] those wetlands lying adjacent and contiguous to navigable streams."[20] 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.[21] 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.[22] The House of Representatives passed H.R. 9560 and approved these amendments to the 404 program on June 3, 1976.[23]

D. 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."[24] Instead, it allowed States to assume the primary responsibility for implementing the permit program and regulating "phase 2

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 23–24.
[16] *Id.* at 24. (emphasis added)
[17] *See* 122 Cong. Rec. 16514–16573 (June 3, 1976).
[18] Note: in the final bill the definition of "navigable waters" appears in Section 16. 122 Cong. Rec. 16572 (June 3, 1976).
[19] *See, e.g., id*. at 16532 and 16543.
[20] *Id.* at 16553.
[21] *Id.* at 16552.
[22] *Id.* at 16572.
[23] *Id*. at 16569.
[24] S. Comm. on Env't and Pub. Works, S. Rep. No. 95-370, to accompany S. 1952, at 75 (July 28, 1977).

and phase 3 waters."[25] 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.[26] 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.[27] 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.[28] The Senate passed S. 1952 on August 4, 1977.[29]

E. The final bill did not change the definition of "navigable waters" in the CWA 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."[30] 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."[31] To define the waters over which the Corps would always retain authority, 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. All other waters, the Committee indicated, would be "more appropriately and more effectively subject to regulation [by] the States."[32]

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."[33] 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

[25] *Id*. at 75.
[26] *Id.* at 77–78.
[27] *Id.* at 74.
[28] 123 Cong. Rec. 38461 (Dec. 6, 1977).
[29] 123 Cong. Rec. 26775 (Aug. 4, 1977).
[30] H.R. Rep. No. 95-830, at 101 (Dec. 6, 1977) (Conf. Rep.).
[31] 123 Cong. Rec. 38969 (Dec. 15, 1977). (emphasis added)
[32] H.R. Rep. No. 94-1107, at 22.
[33] S. Rep. No. 95-370, at 77–78 .

program."[34] 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.[35] Only 6 responded that they would not seek assumption of the program and 12 were undecided.[36] 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.

3. The parenthetical language does not include waters deemed navigable based solely on historical use. Thus, such waters are assumable by a State.

4. 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).

5. 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.

[34] H. Comm. on Pub. Works and Transp., H.R. Rep. No. 95-139, to accompany H.R. 3199, at 67 (Mar. 29, 1977).
[35] *Id*.
[36] *Id.*