"Civiletti Memorandum"
43 Op. Att'y. Gen. 197 (1979)

ADMINISTRATIVE AUTHORITY TO CONSTRUE § 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT

The Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe the jurisdictional term "navigable waters" under § 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344.

Similarly, the Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe § 404(f) of that Act, 33 U.S.C. § 1344(f).

SEPTEMBER 5, 1979.

THE SECRETARY OF THE ARMY.

MY DEAR MR. SECRETARY: I am responding to your letter of March 29, 1979, requesting my opinion on two questions arising under § 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344. You asked whether the Act gives the ultimate administrative authority to determine the reach of the term "navigable waters" for purposes of § 404 to you, acting through the Chief of Engineers, or to the Administrator of the Environmental Protection Agency; and similarly you ask whether the Act gives the ultimate administrative authority to determine the meaning of § 404(f) to you or to the Administrator. Although no specific provision in the Federal Water Pollution Control Act or specific statement in its legislative history speaks directly to your questions, I am convinced after careful consideration of the Act as a whole that the Congress intended to confer upon the administrator of the Environmental Protection Agency the final administrative authority to make those determinations. Before turning to the specific reasons for my conclusions, I believe that some background description is in order.

The basic objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As one means of achieving that objective, the Act makes the discharge of any pollutant unlawful except in accordance with standards promulgated or permits issued under the act. 33 U.S.C. § 1311(a). Permits for the discharge of pollutants may be ob-

tained under §§ 402 and 404 of the Act, 33 U.S.C. §§ 1342, 1344, if certain requirements are met. The administrator of the Environmental Protection Agency and the Secretary of the Army, acting through the Chief of Engineers, share responsibility for issuance of those permits and enforcement of their terms. The Administrator issues permits for point source discharges under the National Pollutant Discharge Elimination System (NPDES) program established by § 402; the Secretary of the Army issues permits for the discharge of dredged or fill material under § 404.[1]

During consideration of the legislative proposals that resulted in the Federal Water Pollution Control Act Amendments of 1972, the question whether the Secretary should play any role, through the Chief of Engineers, in issuing permits was hotly debated. The bill introduced in the Senate, S. 2770, gave the Administrator the authority to issue permits and treated discharges of dredged or fill material no differently from discharges of any other pollutant. During consideration of the bill both by the Senate Public Works Committee[2] and on the Senate floor,[3] amendments were proposed to give the authority to issue permits for discharges of dredged or fill material to the Secretary of the Army. These amendments were offered in recognition of the Secretary's traditional responsibility under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 401 *et seq.*, to protect navigation, including the responsibility to regulate discharges into the navigable waters of the United States. Concerned that the Secretary would have insufficient expertise to evaluate the environmental impact of a proposed dredge

[1] A point source is defined in the Act as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft. . . ." 33 U.S.C. § 1362(14).

Dredged and fill material are not defined in the Act, but are defined in regulations promulgated by the Corps of Engineers: Dredged material is "material that is excavated or dredged from waters of the United States," while fill material is "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 CFR § 323.2 (k),(m).

[2] Senate Comm. on Public Works, 93rd Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972* (1973), at 1509 (hereafter "Legislative History").

[3] *Id.* at 1386.

or fill operation, Senator Muskie, the author of S.2770, opposed those amendments.[4] He proposed instead that the Secretary certify the need for any permit for discharge of dredged material to the Administrator, who would retain permit issuing authority. The Senate adopted Senator Muskie's proposal.[5]

The House of Representatives bill, H.R. 11896, on the other hand, gave the Secretary complete responsibility over issuing permits for the discharge of dredged or fill material. Although the House bill required the Secretary to consult with the EPA on the environmental aspects of permit applications, the Secretary had the authority to make the final decision on permit issuance.[6]

The Conference Committee substitute, passed by the Congress as § 404 of the Federal Water Pollution Control Act Amendments of 1972, represented a compromise between the Senate and House positions. It established a separate permit procedure for discharges of dredged or fill material to be administered by the Secretary, acting through the Chief of Engineers. The Administrator, however, retained substantial responsibility over administration and enforcement of § 404. The EPA responsibilities were perhaps best summarized by Senator Muskie during the Senate's consideration of the Conference Report:

> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate Section 301(a).
>
> Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.

[4] *Id.* at 1387–88.

[5] *Id.* at 1393.

[6] *Id.* at 816.

> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.[7]

Subsequent amendment of § 404 by the Clean Water Act of 1977, 91 Stat. 1566, altered the relationship between the Secretary and the Administrator in only limited fashion. The amendments gave the Administrator authority comparable to the authority conferred on him by the § 402 NPDES program to approve and to monitor State programs for the discharge of dredged or fill material. 33 U.S.C. § 1344(g)-(l). New subsection (s) gave the Secretary of the Army explicit authority under the Act to take action to enforce those § 404 permits which he had issued. New subsection (n) cautioned that the amendments should not be considered to detract from the Administrator's enforcement authority under § 309 of the Act, 33 U.S.C. § 1319."[8]

With that background, I turn to your specific questions. First, you asked whether the Secretary or the Administrator has the authority under § 404 to resolve administrative disputes over interpretation of the jurisdictional term "navigable waters." That question is an important one, since the authority to construe that term amounts to the authority to determine the scope of the § 404 permit program.

The term "navigable waters," moreover, is a linchpin of the Act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402

[7] *Id.* at 177. This statement, which is often quoted in explanation of the relative responsibilities of the Corps and EPA under § 404, is included in the Congressional Record as a supplement to Senator Muskie's oral remarks.

[8] Section 309 empowers the Administrator to order compliance with the conditions or limitations of permits issued under § 402 and State permits issued under § 404, and to seek civil and criminal penalties with respect to such permits. Importantly, as the above-quoted history of § 404 indicates, the section also gives the Administrator the authority to bring enforcement actions to stop discharges without a required permit, since such discharges violate the basic prohibition set out in § 301 of the Act. 33 U.S.C. § 1319.

permit program for point source discharges,[9] the regulation of discharges of oil and hazardous substances in § 311, 33 U.S.C. § 1321, and the regulation of discharges of vessel sewage in § 312, 33 U.S.C. § 1322. Its definition is not specific to § 404, but is included among the Act's general provisions.[10] It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether—and to what extent—any particular water body comes within the jurisdictional reach of the Federal Government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement. Rather, understanding that "navigable waters" can have only one interpretation under the Act, the question is whether Congress intended ultimately for the Administrator or the Secretary to describe its parameters.

The question is explicitly resolved neither in § 404 itself nor in its legislative history. My conclusion that the Act leaves this authority in the hands of the Administrator thus necessarily draws upon the structure of the Act as a whole. First, it is the Administrator who has the overall responsibility for administering the Act's provisions, except as otherwise expressly provided. § 101(d), 33 U.S.C. § 1251(d). It is the Administrator as well who interprets the term "navigable waters" in carrying out pollution control responsibilities under sections of the Act apart from § 404.

Additionally, while the Act charges the Secretary with the duty of issuing and assuring compliance with the terms of § 404 permits, it does not expressly charge him with responsibility for deciding when a discharge of dredged or fill material into the navigable waters takes place so that the § 404 permit requirement is brought into play. Enforcement au-

[9] The Act, as stated above, contains a general prohibition against the "discharge of any pollutant" except in compliance with particular standards and permit procedures. § 301(a), 33 U.S.C. § 1311(a). The definition of the phrase "discharge of pollutants" includes a discharge from a point source into "navigable waters." § 502(12), 33 U.S.C. § 1362(12).

[10] "Navigable waters" is defined under the Act as meaning "the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. § 1362(7).

thority over permitless discharges of dredged and fill material is charged, moreover, to the Administrator.[11]

Finally, any argument in favor of the Secretary's authority to interpret the reach of the term "navigable waters" for the purposes of § 404 is substantially undercut by the fact that he shares his duties under the section with the Administrator. As outlined above, § 404 authorizes the Administrator to develop guidelines with respect to selection of disposal sites, to approve and oversee State programs for the discharge of dredged or fill material, and to veto on environmental grounds any permit the Secretary proposes to issue.

I, therefore conclude that the structure and intent of the Act support an interpretation of § 404 that gives the Administrator the final administrative responsibility for construing the term "navigable waters."

Your second question is whether the Secretary or the Administrator has the final authority to construe § 404(f) of the Act. 33 U.S.C. § 1344(f). That subsection exempts certain activities from regulation under §§ 404, 301(a), and 402. The Corps of Engineers has argued that the responsibility for interpretation of the subsection insofar as it relates to the issuance of the Corps' § 404 permits is vested in the Secretary. For reasons similar to those discussed in connection with your first question, I disagree. It is the Administrator who has general administrative responsibility under the Act, 33 U.S.C. § 1251(d), and who has general authority to prescribe regulations, 33 U.S.C. § 1361(a). In reviewing the statute and its legislative history, I find no indication that Congress intended that the Secretary have final authority to construe that subsection for purposes of his § 404 program. Absent such an indication, I believe that the Act would be strained by a construction allowing the Secretary to give a different content to § 404(f) than the Administrator gives that subsection as it relates to pollution control provisions apart from § 404. I therefore conclude that final authority under the Act to construe § 404(f) is also vested in the Administrator.

Sincerely,

BENJAMIN R. CIVILETTI.

[11] 33 U.S.C. §§ 1311, 1344(n). The Secretary does have enforcement authority with respect to permitless discharges into navigable waters under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §§ 407, 413. Navigable waters for purposes of that Act have a more restrictive meaning, however, than navigable waters under the Federal Water Pollution Control Act. *E.g.*, *National Resources Defense Council* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975).