# APPENDIX A

**85 FR 22262-22263; Section II.E.1**

To determine the scope of executive branch authority under the CWA, the agencies begin with the text of the statute. The objective of the CWA, as established by Congress, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As discussed in Section II.B, in order to meet that objective, Congress declared two national water quality goals and established several key policies that direct the work of the agencies. Congress also envisioned a major role for the States in implementing the CWA, carefully balancing the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.

The agencies have developed regulatory and non-regulatory programs designed to ensure that the full statute is implemented as Congress intended. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). This includes pursuing the overall "objective" of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), while implementing the specific "policy" directives from Congress to, among other things, "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." *Id.* at 1251(b); *see also* Webster's II, New Riverside University Dictionary (1994) (defining "policy" as a "plan or course of action, as of a government[,] designed to influence and determine decisions and actions;" an "objective" is "something worked toward or aspired to: Goal").[1] The agencies therefore recognize a distinction between the specific word choices of Congress, including the need to develop regulatory and non-regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress.[2] To do so, the agencies must determine what Congress

[1] The legislative history of the CWA further illuminates the distinction between the terms "policy" and "objective," or "goal." As Congress drafted the 1972 CWA amendments, the Senate bill set the "no-discharge of pollutants into the navigable water by 1985" provision as a policy whereas the House bill set it as a goal. The Act was ultimately passed with the "no-discharge by 1985" provision established as a goal. *See* 33 U.S.C 1251(a)(1). During the House's consideration of the Conference Report, Representative Robert E. Jones, Jr. captured the policy versus goal distinction in section 101(a)(1) as follows: "The objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters. The bill sets forth as a national goal the complete elimination of all discharges into our navigable waters by 1985, but . . . the conference report states clearly that achieving the 1985 target date is a goal, not a national policy. As such, it serves as a focal point for long-range planning, and for research and development in water pollution control technology . . . . While it is our hope that we can succeed in eliminating all discharge into our waters by 1985, without unreasonable impact on the national life, we recognized in this report that too many imponderables exist, some still beyond our horizons, to prescribe this goal today as a legal requirement." 118 Cong. Rec. H. 33749 (daily ed. October 4, 1972).

[2] *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

had in mind when it defined "navigable waters" in 1972 as "the waters of the United States."

Congress' authority to regulate navigable waters under the CWA derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *United States v. Lopez*, the Supreme Court explained that the Commerce Clause gives Congress the authority to regulate in three areas: the "channels of interstate commerce," the "instrumentalities of interstate commerce," and those additional activities having "a substantial relation to interstate commerce." 514 U.S. 549, 558-59 (1995). Some commenters stated that Congress' authority over "waters of the United States" is not tethered to navigable channels of interstate commerce, but is also derived from its authority over the "instrumentalities of interstate commerce" and activities that "substantially affect" interstate commerce. *See id.* The agencies disagree with these comments. The Supreme Court made clear in *SWANCC* that the term "navigable" indicates "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. 159, 172 (2001). The Court further explained that nothing in the legislative history of the Act provides any indication that "Congress intended to exert anything more than its commerce power over navigation." *Id.* at 168 n.3. The Supreme Court, however, has recognized that Congress intended "to exercise its powers under the Commerce clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also SWANCC*, 531 U.S. at 167.

The classical understanding of the term "navigable" was first articulated by the Supreme Court in *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Subsequently, this traditional test was expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement, *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had held that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves but could extend to activities necessary to protect the channels. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 523 (1941) ("Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions."). The Supreme Court had also clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are

not themselves navigable or do not cross state boundaries. *See Utah v. United States*, 403 U.S. 9, 11 (1971).

These developments were discussed during the legislative process leading up to the passage of the 1972 CWA amendments, and certain members referred to the scope of the amendments as encompassing waterways that serve as a "link in the chain" of interstate commerce as it flows through various channels of transportation, such as railroads and highways. *See, e.g.*, 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie).[3] Other references suggest that congressional committees at least contemplated applying the "control requirements" of the Act "to the navigable waters, portions thereof, and their tributaries." S. Rep. No. 92-414, at 77 (1971). Some commenters on this rulemaking stated that Congress' authority under the CWA is limited to waters that actually transport commerce, not their tributaries or adjacent wetlands, and that this limitation on CWA jurisdiction would fully preserve the authority of States to address pollution. The agencies disagree with these commenters based on the Supreme Court's holdings and the legislative history of the 1972 amendments discussed above, as well as the text of the 1977 amendments to the CWA. Specifically, in 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of waters that could be assumed by a State or Tribe by requiring the Corps to retain permitting authority over RHA waters (as identified by the test outlined in *The Daniel Ball*) plus wetlands adjacent to those waters, minus historic-use-only waters. *See* 33 U.S.C. 1344(g)(1).[4] This suggests that Congress had in mind a broader scope of waters subject to CWA jurisdiction than waters traditionally understood as navigable. *See SWANCC*, 531 U.S. at 171; *Riverside Bayview*, 474 U.S. at 138 n.11. Thus, Congress intended to assert federal authority over more than just waters traditionally understood as navigable, and Congress rooted that authority in "its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3. However, there must be a limit to that authority and to what water is subject to federal jurisdiction. How the agencies should exercise that authority has been the subject of dispute for decades, but the Supreme Court on three occasions has analyzed the issue and provided some instructional guidance for the agencies to consider in developing this final rule.

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[3] The agencies recognize that individual member statements are not a substitute for full congressional intent, but they do help provide context for issues that were discussed during the legislative debates. For a detailed discussion of the legislative history of the 1972 CWA amendments, *see* Albrecht & Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (Sept. 2002).

[4] For a detailed discussion of the legislative history supporting the enactment of CWA section 404(g), *see Final Report of the Assumable Waters Subcommittee* (May 2017), App. F., *available at* https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf < Caution- https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf.