

DEPARTMENT OF THE ARMY
Office of the Chief of Engineers
Washington, D. C. 20314

ER 1165-2-302

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*This was valid in 1983
but seems to be rescinded
as of 1986.*

Regulation
No. 1165-2-302

11 September 1972

Water Resource Policies and Authorities
DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

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. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters."
2. Applicability. It is applicable to all Corps of Engineers Districts and Divisions having Civil Works responsibilities.
3. General Policies. The term "navigable waters of the United States" is used to define the scope and extent of the regulatory powers of the Federal Government. Precise definitions of "navigable waters" or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this Regulation are in close conformance with the tests used by the Federal Courts and determinations made under this Regulation are considered binding in regard to the activities of the Corps of Engineers.
4. General Definition. Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.
5. General Scope of Determination. The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:
 - a. Past, present, or potential presence of interstate or foreign commerce;
 - b. physical capabilities for use by commerce as in subparagraph a above;
 - c. defined geographic limits of the waterbody.

This regulation supersedes ER 1165-2-302, 15 December 1965

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or by local interests. The Chief of Engineers cannot reimburse, or in any way credit, local interests for their expenditures on navigation improvements which they undertake prior to the approval and adoption of a project, unless specifically authorized by the Congress to do so. Project proposals will not recommend such reimbursement.

11-2. Navigable Waters of the United States. The term "navigable waters of the United States" is used to distinguish those waters over which certain Federal powers may be exercised. Its meaning has been developed and expanded over the years by the Federal courts, and now encompasses a variety of factors. The definition applied by the Corps of Engineers is in close conformance with the tests used by the Federal courts, and requires that a careful study be made to determine whether a particular waterbody is actually navigable. The report by the District Engineer, and determination made by the Division Engineer, are to be distinguished from declarations or findings of navigability made by state agencies or courts, or even by other Federal agencies, since the relevant objectives or responsibilities are often quite different among different governmental units. (ER 1165-2-302; 33 CFR 329)

Attached

a. 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. (33 CFR 329.4)

b. Geographic and Jurisdictional Limits. The jurisdictional limits of Corps of Engineers interest with respect to navigation and with respect to other Corps of Engineers regulatory responsibilities are not consistent. (see paragraph 21-4)

11-3. NED Benefit Evaluation for Inland Waterways. The basic National Economic Development (NED) benefit is the reduction in the value of resources required to transport commodities. Such benefit may be categorized as: cost reduction benefit (same origin, same destination; same mode); shift of mode benefit (same origin-destination; different mode); shift of origin-destination benefit; and new movement. The shift of mode benefit is the dominant benefit for new waterways while shift of mode and cost-reduction dominate replacement studies. (P&G 2.6.2)

6-8. Federal government water rights The Federal government derives its authority over streams from several sources. Federal authority over navigable waters is based on the Commerce Clause of the United States Constitution,¹ which states that Congress has the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." This places under Federal control all navigable streams which cross state boundaries, and all navigable streams which connect with the ocean. The only definition of a navigable stream prescribed by Congress appears in the Federal Power Act of 1920, which states that navigable streams are those which "... either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce"

The rapid expansion of Federal water-control activities in the 1930's led to numerous court interpretations defining navigability in more detail. Continuous use of a stream for navigation is not essential, and past use, as well as present use, establishes navigability. Navigation is established by a vessel of any type including rafting or floating of timber. Navigation need not be commercially important, private pleasure boats serving to demonstrate navigability. A river which is susceptible of improvements which would make it navigable is considered navigable. Numerous court decisions have also held that Federal authority over navigable streams extends to their tributaries as well, since diversion of flow on the tributaries might destroy the navigability of the main stream.

Federal interest in flood control as well as navigation has been based on the Commerce clause since floods are detrimental to navigation. Private utilities must be licensed by the Federal Power Commission before they may construct dams on navigable streams. Numerous decisions have emphasized the right of the Federal government to develop hydroelectric power at projects constructed for navigation or flood control. In the Ashwander case (1936) the Supreme Court ruled that Wilson Dam on the Tennessee River was legally constructed under the Commerce clause and that "The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal government . . . and the water power, the right to convert it into electric energy, and electric energy thus produced, constitute property belonging to the United States."

The Federal government does not, under the Commerce clause, have to compensate riparian owners for any damage resulting from work it may do below the ordinary high-water mark of a navigable stream, since the government holds an easement for navigation on the bed of navigable streams. A riparian owner may not even claim compensation for loss of streamflow from

¹ U.S. Const. Art. 1 §8, ¶3.

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a navigable stream by virtue of Federal activity. Federal activity which results in flooding of private land adjacent to a stream does require fair compensation to the landowners.

The Commerce clause is not the sole basis of Federal authority over streams. The Property clause of the Constitution¹ authorizes Congress to "dispose of and make all needful Rules and regulations respecting the Territory or other property belonging to the United States" The Reclamation Act of 1902, which is the basis of the Federal Reclamation program, was intended to develop public lands under the authorization of the Property clause. The Constitution² also gives Congress power to levy taxes and to appropriate funds for the "common Defense." Wilson Dam on the Tennessee River was built during World War I to produce nitrates for ammunition. The Constitution also delegates to the President with the approval of the Senate the authority to make treaties and specifies³ that treaties ". . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any state to the Contrary notwithstanding." Treaties with Canada and Mexico concerning such international streams as the Rio Grande, Colorado River, and Columbia River have been made under this authority. Certain water rights have also been recognized by the government as a result of treaties with Indian tribes.

Finally the powers of the government to "provide for the general welfare . . ." constitute authority under which it may control and develop the nation's rivers. In discussing this authority, the Supreme Court has stated,⁴ "Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, and other internal improvements, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation."

6-9. Interstate problems With many streams crossing state boundaries, it is inevitable that disputes over water rights will arise between states. In general these disputes take the form of a complaint by the downstream state that it is not getting its fair share of the water of the stream. Such disputes fall under the jurisdiction of the Supreme Court, and this Court has adhered consistently to a policy of *equitable apportionment* based on the facts of the controversy and without adherence to any particular formula. In a dispute between Kansas and Colorado (1907) Kansas claimed riparian rights to the water of the Arkansas River. The Court held that diversions in Colorado had not been detrimental to users in Kansas and refused to enjoin Colorado from use of Arkansas River water or to allocate the water between the states. In a subsequent suit between Colorado and Wyoming over waters of the

¹ U.S. Const. Art. 4, §3, ¶2.

² U.S. Const. Art. 1, §8, ¶1.

³ U.S. Const. Art. 6, ¶2.

⁴ *United States v. Gerlach Live Stock Co.*, 339 U.S. 738.

Laramie River the Court held that since both states adhered to the appropriation doctrine within their own boundaries, this same doctrine was a fair basis of allocation between the states. Subsequent decisions have all tended in the same direction. The Court has refused to allocate waters which have not been and may not be used or to enjoin existing beneficial uses without proof of serious detriment to the plaintiff.

The Supreme Court has also urged the use of interstate compacts as a basis of agreement between states. The Constitution¹ provides that "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State" In 1911, however, Congress passed a law² giving blanket consent to interstate compacts ". . . for the purpose of conserving the forests and water supply of the States." Numerous interstate compacts have evolved to govern the apportionment of flow of interstate rivers for irrigation and other uses and setting up machinery for the control of pollution on interstate rivers. A compact for flood control exists for the Red River of the North, and an early compact (1785) covers navigation on the Potomac River.

An interstate compact governing the allocation of water normally represents a mutual agreement between the states specifying the amount (or a formula by which the amount is determined) to which each state is entitled. The compact may also include provision for a commission or water master to supervise the terms of the compact and to determine in specific cases (under established rules) the quantities of water to which each state is entitled. The distribution of each state's allotment of water within its own boundaries is a matter for the state to determine. It has been held that the apportionment of water under a compact is binding on all citizens of the states involved even though it contravenes existing rights within the states. Because of the Federal interest in water problems, Federal representatives commonly participate in the negotiations for interstate water compacts.

6-10. State control of hydraulic projects Most states exercise their general welfare or police powers in connection with hydraulic projects. Many states require approval by the state engineer of plans for dams above some minimum size and also inspect the dam while under construction. These requirements are mainly to assure the safety of persons who are downstream of the dam.

Many states regulate the discharge of sewage into streams and lakes and the use of water for domestic purposes and for irrigation. Such control is usually exercised through the state department of health or through special water-pollution control boards. These controls are intended to prevent the spread of disease and to avoid nuisance through careless discharge of waste or inadequate sanitary precautions in a water-supply system. The provisions

¹ U.S. Const. Art. 1, §10, ¶3.

² Act of Mar. 1, 1911, 1, 35 Stat. 961, 16 U.S.C. 552.

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water-marketing ventures seeking profits. Governmental controls on water marketing are needed to keep things from getting out of hand.

6.9 Federal Government Water Rights

The federal government derives its authority over streams from several sources. Federal authority over navigable waters is based on the Commerce clause of the U.S. Constitution,¹ which states that Congress has the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." This places under federal control all navigable streams. One definition of a navigable stream was prescribed by Congress in the Federal Power Act of 1920, which states that navigable streams are those that "either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce."

Continuous use of a stream for navigation is not essential; and past use, as well as present use, establishes navigability. Navigation is established by a vessel of any type including rafting or floating of timber. Navigation need not be commercially important, private pleasure boats serving to demonstrate navigability. A river that is susceptible of improvements that would make it navigable is considered navigable. Numerous court decisions have also held that federal authority over navigable streams extends to their tributaries as well, since diversion of flow on the tributaries might destroy the navigability of the main stream.

Federal interest in flood mitigation as well as navigation has been based on the Commerce clause, since floods are detrimental to navigation. Private utilities must be licensed by the Federal Energy Regulatory Commission before they may construct dams on navigable streams. Numerous decisions have emphasized the right of the federal government to develop hydroelectric power at projects constructed for navigation or flood mitigation. In the *Ashwander* case (1936) the Supreme Court ruled that Wilson Dam on the Tennessee River was legally constructed under the Commerce clause and that "the power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal government . . . and the water power, the right to convert it into electric energy, and electric energy thus produced, constitute property belonging to the United States."

The federal government does not, under the Commerce clause, have to compensate abutting owners for any damage resulting from work it may do below the ordinary high-water mark of a navigable stream, since the government holds an easement for navigation on the bed of navigable streams. Such an owner may not even claim compensation for loss of streamflow from a navigable stream by

¹ U.S. Const. Art. 1, §8, ¶3.

virtue of federal activity. Federal activity that results in flooding of private land adjacent to a stream does require fair compensation to the landowners.

The Commerce clause is not the sole basis of federal authority over streams. The Property clause of the Constitution¹ authorizes Congress to "dispose of and make all needful Rules and regulations respecting the Territory or other property belonging to the United States." The Reclamation Act of 1902, which is the basis of the Federal Reclamation program, was intended to develop public lands under the authorization of the Property clause. The Constitution² also gives Congress power to levy taxes and to appropriate funds for the "common Defense." Wilson Dam on the Tennessee River was built during World War I to produce nitrates for ammunition. The Constitution also delegates to the president with the approval of the Senate the authority to make treaties and specifies³ that treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any state to the Contrary notwithstanding." Treaties with Canada and Mexico concerning such international streams as the Rio Grande, Colorado River, and Columbia River have been made under this authority. Certain water rights have also been recognized by the government as a result of treaties with Indian tribes.

Finally, the spending power of the government to "provide for the general welfare" constitutes authority under which it may control and develop the nation's rivers. In discussing this authority, the Supreme Court has stated,⁴ "Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, and other internal improvements, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation."

Although by legislation discussed in Sec. 6.5 Congress placed the administration of water rights under the states, it did not surrender the right of the federal government to make reservation of water for specific purposes, with a priority date when the reservation is created. A prior appropriation under state law is good against a subsequent federal reservation.

In the Winters case⁵ the Supreme Court ruled that the Indians of the Fort Belknap Reservation had a right to the water they required on the reservation and that right dated from the creation of the reservation in 1888. The Winters doctrine has resulted in a number of law suits currently underway in which the Indians contend that the U.S. government permitted others to usurp the rights of the Indians to water on their reservations. In *Arizona v. California*⁶ the concept

¹ U.S. Const. Art. 4, §3, ¶2.

² U.S. Const. Art. 1, §8, ¶1.

³ U.S. Const. Art. 6, ¶2.

⁴ *United States v. Gerlach Live Stock Co.*, 339 U.S. 738.

⁵ *Winters v. United States*, 207 U.S. 564 (1908).

⁶ *Arizona v. California*, 373 U.S. 546 (1963).

of the Winters doctrine was extended to cover the water required for parks, forests, monuments, water projects, etc., with a right dating from the establishment of the facility on the public lands. Only the magnitude of the right is unspecified. The issues are complex and could wipe out privately held rights that have been in effect for many years.^{1,2}

6.10 Federal Regulatory Law

States exercise control over water rights and other activities involving water-resources development, but they are always subject to the paramount authority of the federal government. Hence various federal government regulations play an important role in water-resources development. In addition to rights obtained under constitutional grounds and reserved rights to water, Congress has assigned to 42 different agencies some functions with regard to water in the United States.³ Most of these functions are related to the conduct of each agency's normal functions (e.g., Bureau of Indian Affairs, Farmer's Home Administration). Some important regulatory functions have also been created.

The Federal Energy Regulatory Commission⁴ must license all hydroelectric plants. Extensive hearings are held and all details of the project reviewed before a license is issued. The Water Pollution Control Act of 1965⁵ and the amendments of 1972 commonly referred to as the Clean Water Act⁶ and subsequent amendments give the Environmental Protection Agency (EPA) authority to regulate the discharge of pollutants into streams and lakes and to require development of plans for eliminating or reducing pollution levels. The EPA also has authority to provide grants to cities for the construction of wastewater-treatment facilities. The National Environmental Policy Act of 1969⁷ requires the preparation of Environmental Impact Statements in connection with all federal projects or federally licensed projects that may affect the environment. A Council on Environmental Quality was created to assist agencies in developing procedures to assure that environmental values are given proper consideration in project planning. Finally, the Corps of Engineers, U.S. Army, are required to issue permits for dredging or filling

¹ Frank J. Trelease, "Federal-State Relations in Water Law," No. PB 203 600, National Technical Information Service, Springfield, Va., 1971.

² Federal-State Jurisdiction in the Law of Waters, chap. 13 in "Water Policies for the Future," National Water Commission, U.S. Government Printing Office, Washington, D.C., 1973.

³ "A Summary Digest of the Federal Water Laws and Programs," National Water Commission, U.S. Government Printing Office, Washington, D.C., 1973.

⁴ The Federal Energy Regulatory Commission was created October 1, 1977, as part of the Department of Energy under P.L. 95-91, 91 Stat. 565. It retains most of the functions of the former Federal Power Commission.

⁵ P.L. 89-234, October 2, 1965, 79 Stat. 903.

⁶ P.L. 92-500, October 18, 1972, 86 Stat. 816.

⁷ P.L. 91-190, 1969, 83 Stat. 852.

of land under the navigable waters of the United States or the tributaries to navigable waters.

The Federal Emergency Management Agency (FEMA) has responsibility for the Federal Flood Insurance Program (FFIP) and as such sets standards for determination of the *flood plain*, issues maps for use by local agencies to regulate the use of the flood plain, and manages the federal flood insurance program (Sec. 20–22). The Comprehensive Environmental Response, Cleanup and Liability Act (CERCLA), also known as the “Superfund,” of 1980 and its consequent amendments apply to the release of hazardous materials to the groundwater. The CERCLA establishes a multi-billion-dollar fund the EPA can use to clean up contaminated sites. Reimbursement by responsible parties is obtained, by legal action, if necessary.

These regulatory powers are complex, and no attempt will be made to summarize them here. Interested persons can find a general summary in “A Summary Digest of Federal Water Laws and Programs”¹ and reference should be made to the appropriate congressional documents for more detail.

6.11 Interstate Problems

With many streams crossing state boundaries and others serving as state boundaries, it is inevitable that disputes over water rights will arise between states. In general, these disputes take the form of a complaint by the downstream state that it is not getting its fair share of the water of the stream. Such disputes fall under the jurisdiction of the Supreme Court, and this Court has developed a doctrine of *equitable apportionment* based on the facts of the controversy and without adherence to any particular formula. In a dispute between Kansas and Colorado (1907) Kansas claimed riparian rights to the water of the Arkansas River. The Court held that diversions in Colorado had not been detrimental to users in Kansas and refused to enjoin Colorado from use of Arkansas River water or to allocate the water between the states. In a subsequent suit between Colorado and Wyoming over waters of the Laramie River the Court held that since both states adhered to the appropriation doctrine within their own boundaries, this same doctrine was a fair basis of allocation between the states. Subsequent decisions have all tended in the same direction. The Court has refused to allocate waters that have not been and may not be used or to enjoin existing beneficial uses without proof of serious detriment to the plaintiff.

In *Arizona v. California* (1963), the Supreme Court announced a new method of apportioning interstate streams—by congressional action. The Court found that Congress had authorized legislation that provided for the construction of Hoover Dam the apportionment of the flow of the Lower Colorado River among Arizona,

¹ “A Summary of Digest of Water Laws and Programs,” National Water Commission, U.S. Government Printing Office, Washington D.C., 1973.

Navigable Streams

States exercise control over water rights and other activities involving water-resource development but they are always subject to the paramount authority of the federal government.

Federal government exercises control over **all navigable streams** that cross state boundaries and ones that connect with the oceans.

A **navigable stream** is a stream which in the past, present, or future can be used for the transport of goods.

- Considered navigable if a raft or floating timber can get down it
- Once a stream has been deemed “navigable” by the Feds, that classification cannot be revoked.

Federal government has control over the quality and quantity of water in these streams.

- Can construct dams for navigation and to control flooding. Any power generated from dams belongs to the Feds. If private utilities want to construct dams on navigable streams, they must first be licensed through the Federal Energy Regulatory Commission (FERC).
- Quantity – must maintain navigability, work with states
 - Feds do not have to compensate those with riparian water rights if they take their water. They do have to compensate people if they flood their land by creating a dam
 - Federal Emergency Management Agency (FEMA) determines and regulates the use of floodplains, and runs the Federal Flood Insurance Program (FFIP)
- Quality – Feds monitor and control water quality in navigable streams, for instance, through:
 - Clean Water Act (1972)
 - EPA regulates discharge of pollutants into streams and construction of wastewater treatment facilities.
 - Corps of Engineers monitors water quality and issues permits for dredging