



Memorandum: Analysis of the Rivers and Harbors Act

New York City's Department of Design and Construction

Town+Gown: NYC Water In and Water Out Innovative Water Research Working Group

Ilya Van Nieuwenhuyse, Brooklyn Law School, Class of 2027

October 10, 2025

To: Town+Gown:NYC Water In and Water Out Innovative Water Research Working Group

From: Ilya Van Nieuwenhuysse, Brooklyn Law School, Class of 2027

Re: Analysis of Rivers and Harbors Act

I. Introduction

The Rivers and Harbors Acts are one of the oldest frameworks for the federal regulation of U.S waterways. Originally Congress used the statute as a series of congressional appropriation measures for specific navigation improvements on key commercial routes. However, with the proliferation of industrialization, unregulated construction and waste disposal increasingly obstructed navigation and Congress ultimately evolved what had previously been used as a funding mechanism into a transformative regulatory statute. This evolution culminated in Rivers and Harbors act of 1899 (RHA), which consolidated decades of fragmented statutes into one of the first comprehensive statutes regulating the nations waterways. While the RHA was primarily enacted to preserve and enhance interstate commercial navigation, judicial interpretation and enforcement by the United States Army Corps of Engineers (Corps) progressively expanded its scope encompass the regulation of water pollution and shoreline alterations. Ultimately, the RHA laid the foundation for later environmental statues which further expanded and formalized federal jurisdiction over waste discharges, without displacing the RHA's permitting authority.

Given New York's complex network of commercial harbors and coastal infrastructure the RHA carved out unique provisions which create a d distinct administrative and permitting regime that remains in force today. Modern infrastructure and resilience projects, such as the East Side

Costal Resiliency Project (ESCR) and the Financial District and Seaport Climate Resilience Initiative (FiDi-Seaport Plan) continue to invoke the RHA’s permitting and compliance standards.

II. Analysis

A. Legislative History and Purpose

Historically, Congress used Rivers and Harbors Appropriation Acts as funding statutes for specific navigation improvement projects, rather than regulatory laws.¹ Congress passed the first Rivers and Harbors Act of 1824 for navigation improvements on the Ohio and Mississippi Rivers.² From the 1830s to the 1860s, Congress periodically passed Rivers and Harbor acts to fund specific projects across the country. Since the RHA’s inception, the Corps has served as the primary federal agency responsible for administering and enforcing compliance.³ Overtime, these acts extended federal authority beyond simply funding projects to regulating private actions that might interfere with navigation.

As the national economy began to proliferate in the 19th century, unregulated construction and refuse disposal along waterways increasingly obstructed navigation and placed a significant burden on interstate commerce. In response, Congress began to attach regulatory conditions to appropriations statutes, gradually moving beyond funding projects to assert federal control over navigable waters pursuant to the commerce power.⁴ For example, the Rivers and Harbors Act of 1888 and 1890 prohibited unauthorized obstructions, criminalized the dumping of refuse and

¹ John B. Miller, *Principles of Public and Private Infrastructure Delivery*, 146 (Springer 2000)

² U.S. ARMY CORPS OF ENGINEERS, *Brief Legislative History of the General Survey Act*, <https://www.usace.army.mil/About/History/Historical-Vignettes/Civil-Engineering/165-General-Survey-Act>

³ U.S. ARMY CORPS OF ENGINEERS, *Summary of Authorities for the Regulatory Program*, <https://www.spn.usace.army.mil/Missions/Environmental/Summary-of-Authorities-for-the/>

⁴ See U.S. CONST. ART. I, § 8, cl. 3

required advanced approval for bridges, wharves and similar structures on navigable waters.⁵ Such provisions, though scattered and piecemeal, marked the first exercise of federal regulatory power over water-based infrastructure. This incremental approach culminated in the Rivers and Harbors act of 1899, which consolidated prior enactments into a comprehensive and permanent regulatory framework.

B. Adoption of RHA in 1899

Although the RHA was enacted as an appropriations act, it eventually became the first permanent, comprehensive federal water quality statute. By the 1890s, Congress recognized that piecemeal regulation tied to appropriations did not sufficiently protect the nation's navigable waters as industrialization, rail bridges, and waste disposal practices were causing widespread navigation hazards. In response, Congress consolidated and codified these scattered provisions into the Rivers and Harbors Act of 1899 (RHA).⁶ RHA granted the Corps clear statutory authority to review and enforce permits for construction and discharges in navigable waters, an authority that remains foundational to Corps oversight today. The original act also set general standards for protecting navigation and preserving the public interest in waterways, including prohibitions on obstructions and measures to control refuse and debris.⁷

C. Key Provisions of RHA 1899

This section outlines the key provision of RHA, which establishes the Corps' authority over navigable waters and set the standards for protecting navigation and public use of the

⁵ Encyclopedia.com, Rivers and Harbors Appropriation Act of 1899, <https://www.encyclopedia.com/environment/energy-government-and-defense-magazines/rivers-and-harbors-appropriation-act-1899>

⁶ PUB. L. NO. 55-425, 30 Stat. 1121 was signed into law on March 3, 1899, by President William McKinley

⁷ Codified at 33 U.S.C. §§ 401,403,407

nation's waterways. RHA is a navigation-focused regulatory tool which gives the Corps jurisdiction over any structure, dredging or fill in navigable water and provides a legal basis for federal involvement in infrastructure and remediation projects.⁸ The RHA achieves its regulatory objectives through a series of statutory provisions, each defining specific restrictions on activities in navigable waters and granting the Corps authority to permit and enforce compliance.

The core function of the RHA prohibits the construction of dams, bridges or any similar structure over navigable waters without the consent of the Corps. RHA §9 allocates legislative approval authority between state legislatures and Congress.⁹ States have authority over structures in wholly intrastate waters, while Congress retains approval power for structures in interstate waters. Regardless, in both circumstances, the Corps have final approval discretion and must consent to the construction of a project in navigable waters.¹⁰ RHA §9 remains a foundational provision and is actively enforced today. RHA §4 provides the Corps with administrative rulemaking authority to promulgate regulations governing the use, administration, and navigation of navigable waters and harbors.¹¹ RHA §10 gives the Corps exclusive authority to approve dredging and filling operations. Together, RHA §§9-10 attempt to protect the federal interest in open and unfettered waterborne commerce between the states while simultaneously allowing for the accommodation of local interests. The Corps continues to require permits for any construction in navigable waters and violations can result in enforcement actions, including removal orders and or civil penalties.¹²

⁸ U.S. ARMY CORPS OF ENGINEERS, *Section 10 of the Rivers & Harbors Act*, <https://www.spl.usace.army.mil/Missions/Regulatory/Jurisdictional-Determination/Section-10-of-the-Rivers-Harbors-Act>

⁹ Codified at 33 U.S.C. §401

¹⁰ D.L. Hankey, *Sections 9 and 10 of the Rivers and Harbors Act of 1899*, 29 DUKE L.J. 1 (1980).

¹¹ Codified at 33 U.S.C. §1

¹² Enforcement actions for activities in navigable waters without required U.S. Army Corps of Engineers permit implemented at 33 C.F.R § 326 (2025)

Any person or entity found in violation of RHA §§9-10 shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500.¹³ RHA §12 authorizes the Corps to seek judicial enforcement against unlawful obstructions in navigable waters.¹⁴ Pursuant to this power, the Corps can request a district court to issue injunctions to require the removal of such obstructions and to pursue penalties for violations of RHA §§9-10.¹⁵ While RHA §12 focused on enforcing the removal of unlawful structures and obstructions, RHA §13, commonly referred to as the Refuse Act, extended the federal government's reach by prohibiting the discharge of waste materials into navigable waters, essentially making it one of the earliest instances of national pollution control.¹⁶

Although the RHA was not drafted as an environmental statute per se, courts upheld federal prosecutions for dumping industrial waste and other materials to the extent that such waste discharges were considered as obstructions to navigation. Until the Water Pollution Control Act of 1948 (WPCA), there was no dedicated pollution-control statute.¹⁷ As a result, for much of the first half of the 20th century, the RHA was the primary federal statutory tool for navigation protection, and pollution control. Courts and agencies broadly interpreted the RHA's navigation-based jurisdiction as a backdoor way to address waste discharges, particularly when they obstructed navigation. For example, in *United States v. Republic Steel Corp*, the court emphasized that the RHA's prohibition against obstructions in navigable waters encompassed any discharge or refuse that could potentially diminish navigable capacity.¹⁸

¹³ \$13,946 adjusted for inflation in accordance with Federal Civil Penalties Inflation Adjustment Act of 2015, which requires federal agencies to adjust penalties for inflation annually

¹⁴ Codified at 33 U.S.C. §406

¹⁵ Violations of laws protecting navigable waters implemented at 33 C.F.R § 209.170 (2025)

¹⁶ Codified at 33 U.S.C. §407

¹⁷ PUB. L. NO. 80-845, 62 Stat. 1155

¹⁸ 362 U.S. 482 (1960)

This broad judicial reading laid the groundwork for President Nixon’s 1970 effort to transform the Refuse Act into a comprehensive federal discharge permit program.¹⁹ Although not a formal legislative amendment, it marked an attempt by the executive branch to repurpose RHA authority. However, in *Kalur v. Resor*, the court enjoined the program holding that the executive branch did not have sufficient statutory authority under RHA §13 to require permit compliance.²⁰ The collapse of the Refuse Act permit program exposed the inadequacy of relying on a 19th century navigation statute to address the issue of modern pollution and highlighted the need for a comprehensive statutory framework. In turn, Congress swiftly moved to enact a series of environmental statutes in the 1970s.²¹ This moment directly led to the passage of the Clean Water Act (CWA), which in turn paved the way for various other environmental laws.²²

Until the enactment of the CWA, the Refuse Act functioned as the only federally imposed water pollution control law. Although still technically enforceable today, after 1972, the core function of the Refuse Act was largely displaced by the CWA’s National Pollutant Discharge Elimination System (NPDES) permitting system. In the modern day, RHA’s purpose is to preserve the integrity of the nation’s navigable waters for commerce, navigation, and public use, while regulating construction and alterations. It is a jurisdictional legal hook for federal involvement in infrastructure and remediation projects with navigation impacts. Moreover, RHA establishes the Corps’ ongoing role in permitting, enforcement and coordination with other federal and state agencies.

¹⁹ EXEC. ORDER NO. 11,574, 3 C.F.R. 939 (1966–1970), reprinted in 33 U.S.C. § 407 (1970)

²⁰ 335 F. Supp. 1 (D.D.C. 1971)

²¹ ENVIRONMENTAL PROTECTION AGENCY, *Overview of the Clean Water Act and the NPDES Program*, https://www.epa.gov/sites/default/files/2021-01/documents/overview_of_the_clean_water_act_and_the_npdes_program.pdf

²² PUB. L. NO. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1389)

III. New York Case Study

A. Role of the States in RHA Enforcement

The Corps is the primary implementing agency responsible for evaluating any construction, dredging, or filling activities in navigable waters under the RHA. To the extent that RHA §1 grants the Corps an exclusive authority to promulgate regulations governing the use of navigable interstate waters, any state law that conflicts with the RHA may ultimately be preempted by the supremacy clause.²³ Only when a new structure is constructed in wholly intrastate navigable waters can the state legislature approve of a design with Corps consent.

Enforcement actions under the RHA are left exclusively to the federal government. RHA §§12–13 only authorizes the Department of Justice, acting upon referral from the Corps, to bring civil or criminal enforcement actions to remove unlawful structures or prosecute illegal discharges. The Supreme Court in *California v. Sierra Club* held that RHA §10 did not create an implied private right of action.²⁴ As a result, states and private citizens are barred from directly enforcing the RHA. For example, in *United States v. Lozman*, a court order was issued in response to an enforcement action filed by the DOJ pursuant to the RHA.²⁵ Despite the RHA's enactment in the late 1800s, it remains the primary authority for the Corps to regulatory permit program to protect navigable waters

Until the enactment of the CWA in 1972, the Corps alone issued building permits in navigable waters. However, the CWA introduced a new permit program that did not repeal RHA §10 but rather expanded its scope. The CWA §404 program extended the Corps jurisdiction

²³ U.S. CONST. ART. VI.

²⁴ 451 U.S. 287 (1981)

²⁵ 2023 WL 11883730 (S.D. Fla. Nov. 21, 2023)

beyond navigation to regulate the discharge of dredged or filled material into navigable waters with mandatory state certification.²⁶ As a result, Corps permits under RHA §10 and CWA §404 now require state approval for water quality compliance, giving the states an increased role in regulating activities in navigable waters.²⁷

B. Role of the RHA in New York

The RHA continues to provide a federal statutory framework for protecting interstate navigable waters in New York. RHA §20(a) explicitly states that “[n]othing contained in ... this title shall be construed as repealing, modifying, or in any manner affecting the provisions of Subchapter III of this chapter.”²⁸ Subchapter III establishes a comprehensive regulatory framework for managing refuse disposal, navigation, and harbor improvements within certain harbors. It created specific inspectors and harbor supervisors who are tasked with enforcing the provisions its provisions to ensure that the local regulations for refuse disposal and navigation adhere to the federal standard.²⁹ Subchapter III also created a unique permitting system which specifies the exact location for disposal, ensuring controlled and regulated refuse management.³⁰ Deviation from the designative dumping site without proper authorization is considered a misdemeanor with penalties.³¹ The savings clause ensures that New York Harbors special protections remain intact, even as general RHA authority was supplanted by the CWA and other environmental statutes. Today, these provisions provide statutory justification for enhanced Corps scrutiny in city projects.

²⁶ Codified at 33 U.S. Code § 1344

²⁷ U.S. ARMY CORPS OF ENGINEERS, *Section 404/Section 10 Permits*, NAT’L PARK SERV., <https://npgallery.nps.gov/WSR/GetAsset/49b98840-2132-417d-b9c6-f365763434a7/original>

²⁸ Codified at 33 U.S. Code § 418

²⁹ Codified at 33 U.S. Code § 446

³⁰ Codified at 33 U.S. Code § 443

³¹ Codified at 33 U.S. Code § 449

C. East Side Coastal Resilience Project

One key example of Corps exercising its jurisdiction in New York is with the East Side Coastal Resiliency Project (ESCR). In 2012, Hurricane Sandy struck New York City, causing approximately \$19 billion in damage.³² In the aftermath, the ESCR emerged under the United States Department of Housing and Urban Development (HUD) Rebuild by Design Program which sought to develop innovative design solutions to increase the resiliency of Sandy-impacted communities.³³ The project is a major NYC initiative to reduce flood risk and enhance waterfront resiliency on Manhattan's Lower East Side. The ESCR will protect a 2.4-mile section of coastline along the East River and involves extensive modifications including levees, floodwalls, pedestrian pathways, and stormwater management infrastructure.³⁴ To the extent that the project included construction and fill in navigable waters, the Corps exercised its authority under §10 of the RHA to review, approve, and oversee the project's design and permitting.³⁵ Here, permitting required compliance with both navigation and environmental standards, consistent with historical harbor protections preserved by RHA's New York specific savings clause. The ESCR was not funded under the RHA congressional appropriation authority. Instead, the projects financing is derived from both federal and municipal sources. New York City was awarded \$335 million in HUD Community Development Block Grants. The city of New York subsequently allocated an additional \$710 million in city funds to complete the project. [I believed managed by DDC]

³² NYC ECONOMIC DEVELOPMENT CORPORATION, *ESCR – Project Background*, <https://www.nyc.gov/site/escr/about/project-background.page>

³³ U.S. DEP'T OF HOUS. & URBAN DEV., *Rebuild by Design: Hurricane Sandy Design Competition*, <https://rebuildbydesign.org/hurricane-sandy-design-competition>

³⁴ UNIV. OF PA. STUART WEITZMAN SCH. OF DESIGN, *East Side Coastal Resiliency Project*, <https://www.design.upenn.edu/work/east-side-coastal-resiliency-project>

³⁵ PERMITTING DASHBOARD FOR FED. INFRASTRUCTURE PROJECTS, *East Side Coastal Resiliency*, <https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/east-side-coastal-resiliency>