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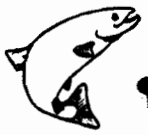

Anadromous Fish Law Memo

Issue 46 August 1988

A GUIDE TO FEDERAL WETLANDS PROTECTION UNDER SECTION 404 OF THE CLEAN WATER ACT

The link between wetlands protection and healthy fisheries is one often overlooked. Yet fully two-thirds of commercially harvested fish in the United States waters depend on wetlands for food or spawning and rearing grounds. Salmon are especially dependent on wetlands during the fresh water phase of their life cycle and in making the transition to the marine environment.

Although wetlands, such as swamps, marshes and bogs, are among the most productive sources of food protein -- more productive than the most fertile farms -- protecting wetlands has always been controversial. Wetland benefits are widely dispersed (although often poorly perceived) among fishers, hunters, and other users of water resources. But unlike most other areas of the aquatic environment, wetlands are capable of being privately owned. Since wetlands often supply attractive sites for industrial, agricultural, and residential developments, wetland owners have strong economic incentives to replace wetlands with airports, port facilities, soybean fields, and shoreland housing. It is therefore not surprising that around 55% of the nation's original wetland acreage has been lost, and we continue to lose over 300,000 acres a year.

Wetlands can be protected by government purchase; however, in an era of fiscal restraint it is impractical to purchase more than a fraction of wetlands threatened by developments. Conservation easements are another possibility, but these too usually require government appropriation, and generally supply only short-term protection. Consequently, regulation is the principal source of wetlands protection, and the chief regulatory program is a federal one, authorized by section 404 of the Clean Water Act.

This Memo comprehensively reviews the 404 program, its history, its current operation, and its future. It focuses special attention on the intergovernmental tension between the U.S. Army Corps of Engineers, charged with issuing 404 permits, and the Environmental Protection Agency, responsible for overseeing the Corps. This tension, largely the product of regulatory ambivalence on the part of the Corps, has characterized 404 regulation from its inception over 15 years ago and continues to pose troublesome questions concerning the program's jurisdictional scope, permit criteria, and enforcement. This Memo, written with the assistance of D. Bernard Zaleha, J.D. 1987, Lewis and Clark Law School, analyzes these issues in detail and makes suggestions about how the program can better fulfill its mission of protecting the nation's diminishing wetland resources.

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INSIDE: History of 404 Regulation; Jurisdictional Issues; Permit Criteria; EPA's 404(c) Powers; Enforcement; the Takings Issue.

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I. History of 404 Regulation

Many of the peculiarities and complexities of 404 regulation are due to its antecedents: few environmental regulatory programs can trace their roots to the Nineteenth Century. This history accounts for the Corps of Engineers role as the permitting agency, which in turn has produced a considerable amount of intergovernmental tension, as Congress has been unwilling to assign the Corps plenary authority over wetlands regulation. Instead, it has ratified a complex system of interagency coordination and checks, described by Professor Rodgers as an example of "multiple loci of decisional power."[1] These tensions have produced a regulatory ambivalence, perhaps the chief characteristic of the 404 program as it evolved over the past decade and a half.

A. The Nineteenth Century Antecedents

In 1802, Congress created the U.S. Army Corps of Engineers to erect and maintain frontier forts and other defense facilities.[2] Two decades later in 1824, Congress authorized the Corps to undertake river and harbor improvements promoting navigation.[3] In the post-Civil War Era, congressional navigation appropriations constituted the largest federal construction expenditures,[4] even though the era of large multiple use projects had not yet dawned.[5] At the same time that it entrusted navigation responsibilities to the Corps, Congress made draining and filling of wetlands for land reclamation national policy.[6]

While responsible for river and harbor civil works, the Corps had no regulatory role until 1890.[7] That year, prompted by a Supreme Court decision holding that in the absence of a federal regulatory scheme, Oregon could authorize or prohibit dams, bridges, or other obstructions to navigation,[8] Congress required the approval of the War Secretary of all construction activities and the desposition of refuse into navigable waters.[9] Nine years later, Congress revised the regulatory scheme in the Rivers and Harbors Act of 1899.[10] Section 10 of that Act authorized the Secretary to regulate dredging, filling, and construction activities in navigable waters, while section 13 prohibited the deposit of refuse without permission of the Secretary.[11] These provisions have remained essentially unchanged for nearly 90 years.[12]

B. The Evolving Permit Program

Until the 1960s, the Corps confined its permit authority to reviewing the effects on navigation of proposed activities in navigable waters.[13] The 1899 Act thus remained a rela-

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1. W. Rodgers, Environmental Law: Air and Water § 4.12 at 185 (1986).

2. Act of March 16, 1802, ch. 9, § 26, 2 Stat. 132, 137. On the evolution of the role of the Corps, see especially Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 Va. L. Rev. 503, 505-09 (1977).

3. Act of May 10, 1824, ch. 48, § 1, 2 Stat. 66, 67 (Act authorizing the Corps to deepen the harbor channel at Presque Isle, Pennsylvania and to restore Plymouth Beach, Massachusetts).

4. See Moser, Dig They Must, the Army Corps of Engineers, Securing Allies, and Acquiring Enemies, Smithsonian, Dec. 1976 at 43.

5. Large-scale dam building did not begin until the Progressive Era, when Congress passed the first Reclamation Act in 1902, Pub. L. No. 57-161, 36 Stat. 388 (codified in scattered sections of 43 U.S.C.). The Corps, which was slow to recognize the non-navigation benefits of water projects, was not given a role in the reclamation program. See S. Hays, Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920 at 108 (1959) (Corps wedded to single-use projects); A. Morgan, Dams and Other Disasters: A Century of Army Corps of Engineers in Civil Works 252-302 (1971) (Corps' resistance to reservoir development to control floods). The Corps' uneasy relationship with the Progressive conservationists is sketched in Blumm, The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act, 58 Wash. L. Rev. 175, 181-87 (1983).

6. The Swamp Lands Act of 1849, 1850, and 1860 granted 15 Western states nearly 65 million acres for swamp "reclamation." See U.S. Fish and Wildlife Service, U.S. Dep't of the Interior, Circular No. 39, Wetlands of the United States 5 (1956). Fortunately, because of the pervasive fraud in Nineteenth Century land grant programs, not all of the 65 million acres were actually wetlands, and much of what was wetland was never really reclaimed. See E. Dick, The Lure of the Land 358 (1970).

7. The Corps had sought such a role since 1877, however. See Power, above note 2, at 506 (describing the "Dolph Bill").

8. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

9. Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426, 453-54.

10. Act of March 3, 1899, ch. 425, 30 Stat. 1121. Although represented to Congress as a recodification of the 1890 Act, the 1899 Act enacted some significant changes, including the requirement in § 9 of congressional consent for bridges, dams or causeways. 33 U.S.C. § 401.

11. 33 U.S.C. §§ 403, 407.

12. However, § 13 has been superceded by the National Pollutant Discharge Elimination System (NPDES) permit authority of the Environmental Protection Agency and the states established by §§ 402 and 405 of the Clean Water Act, 33 U.S.C. §§ 1342, 1345. See generally W. Rodgers, above note 1, §§ 4.11-12; Barker, Sections 9 and 10 of the Rivers and Harbors Act of 1899: Potent Tools for Environmental Protection, 6 Ecology L.Q. 109 (1976); Want, Federal Wetlands Law: The Cases and the Problems, 8 Harv. Envtl. L. Rev. 1 (1984); 33 C.F.R. §§ 320.2, 321-22 (current Corps' regulations).

13. See generally Ablard & O'Neil, Wetland Protection and Section 404 of the Federal Water

tively uncontroversial federal control over aquatic development. However, three occurrences catapulted the old statute into the forefront of the burgeoning environmental movement in the 1960s and early 1970s.

First, the Supreme Court began to broadly construe the applicability of the Act to include industrial wastes, irrespective of any effect on navigation.[14] Thus, the Corps' permit program became a vehicle to control water pollution. Second, in 1967 the Secretaries of the Army and the Interior signed a Memorandum of Agreement in which the Army Secretary agreed to implement the Fish and Wildlife Coordination Act[15] by considering the views of Interior on the merits of proposed activities.[16] This led, a year later, to the promulgation of the Corps' fabled "public interest review" as the chief criteria for permit issuance.[17] Under this litmus, the Corps began to evaluate proposals on the basis of a broad-reaching nonquantative cost-benefit analysis, including balancing project benefits against environmental costs.[18] Its authority to deny permits because of adverse effects on fish and wildlife was confirmed in a landmark case in 1970.[19]

The third development was President Nixon's 1970 Executive Order directing the Corps to institute a comprehensive permit program regulating the discharge of water pollutants.[20] Although the program was quickly enjoined by a federal district court,[21] the Executive Order gave significant impetus to the passage of the 1972 Federal Pollution Control Act Amendments.[22]

C. The 1972 Federal Water Pollution Control Act Amendments and Their Aftermath

When Congress enacted its comprehensive regime to produce "fishable and swimmable" waters by 1983 and eliminate all pollutant discharges by 1985,[23] it defined "pollutant" extremely broadly. Because the definition included "dredged spoil,"[24] it was of no small concern to the Corps, the nation's largest nonnavigational dredger.[25] Not wishing to have its dredging operations subjected to regulation by the Environmental Protection Agency (EPA) and pointing out that it already was administering a permit system, the Corps succeeded in convincing Congress to create an exemption to the EPA pro-

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Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance, 1 Vt. L. Rev. 51, 54-58 (1976).

14. United States v. Republic Steel Corp., 362 U.S. 482 (1960) (discharge of industrial solids prohibited by § 10); United States v. Standard Oil, 384 U.S. 224 (1966) (discharge of gasoline prohibited by § 13).

15. 16 U.S.C. §§ 661-666c (promising "equal consideration" of wildlife conservation with other features of water resources development by requiring federal agencies to (1) consult with federal and state wildlife agencies, (2) give "full consideration" to their recommendations, and (3) include "justiable" measures considered by the federal action agency to maximize overall project benefits). For overviews of the Coordination Act, see Barton, Wetlands Preservation in National Audubon Society, The Audubon Wildlife Report 1985 at 218-29 [hereinafter Barton I]; Veiluva, The Fish Wildlife Coordination Act in Environmental Litigation, 9 Ecology L.Q. 489 (1980); Note, Environmental Protection Under the Fish and Wildlife Coordination Act: The Road Not Taken, 2 Va. Nat. Resources L. 53 (1982); The Fish and Wildlife Coordination Act and Columbia Basin Water Project Operations, Memo #6 (Mar. 1980).

16. Memorandum of Agreement between Secretary of the Army Stanley Resor and Secretary of the Interior Stewart Udall (July 13, 1967), reprinted at 33 Fed. Reg. 18,672-673 (1968). In the agreement the Army Secretary promised to "carefully evaluate" the advantages and benefits of the proposed activity when the Interior Secretary considered it to "unreasonably impair natural resources or the related environment." Id.

17. 33 Fed. Reg. 18, 672-673 (formerly codified at 33 C.F.R. § 209.120(d)(11)).

18. 33 C.F.R. § 320.4(a). See below notes 222-24 and accompanying text.

19. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). ("The Corps was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been routinely granted five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a Silent Spring-like disturbance of nature's economy.")

20. Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (1970).

21. Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971) (invalidating the permit program because it would have allowed the Corps to issue permits for discharges into tributaries of navigable waters, when § 13 authorized discharges only in navigable waters; also holding that the Corps could not issue permits without complying with the procedures established by the recently enacted National Environmental Policy Act).

22. Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251-1376. The Kalur decision (above note 21) placed thousands of dischargers in violation of the 1899 Act (due to decisions like those mentioned in note 14 above) without an administrative remedy, thus producing widespread interest in a congressional solution. In addition, the peculiar political dynamics of the day had numerous politicians competing for public credit as environmental defenders. See Elliott, Ackerman & Millian, Toward A Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J.L. Econ. & Org. 313, 324-26 (1985) (describing the competition among President Nixon, Senator Muskie, and Senator Jackson as the "Politicians' Dilemma").

23. 33 U.S.C. §§ 1251(a)(3), (1).

24. Id. § 1362(6).

25. W. Rodgers, above note 1, § 4.12, at 185. See also id. § 4.13, at 218-21.

gram for discharges of dredged or fill material in section 404 of the Act.[26] However, while section 404 authorized the Secretary of the Army, through the Corps, to regulate discharges of dredged or fill material, it also established an oversight role for EPA:[27] requiring EPA, "in conjunction" with the Corps, to promulgate "guidelines" governing the permit program[28] and authorizing EPA to veto permits.[29] However, it was not the EPA oversight role, but rather the geographic scope of the program that engendered controversy in the early 1970s.

Under the Rivers and Harbors Act, the Corps' regulatory jurisdiction is confined to activities affecting "navigable waters."[30] What constitutes a navigable water evolved over a century of judicial interpretation from those waters actually used to transport interstate or foreign commerce (navigable in fact)[31] to include also those waters that were navigable in the past[32] and that could become navigable with "reasonable improvements."[33] Although both the Corps and the courts increasingly recognized that activities outside navigable waters but affecting their course, condition, or capacity were subject to federal regulation,[34] the limits of navigable waters remained the ordinary high water mark for fresh waters and mean high water for tidal waters.[35] These limits placed numerous wetland areas not subject to regular inundation from navigable waters outside the reach of the Corps' jurisdiction.

In the 1972 Amendments, in an attempt to regulate companies discharging pollutants on small, non-navigable tributaries, Congress asserted jurisdiction over "the waters of the United States."[36] Although the Act simply equated this term with "navigable waters,"[37] the legislative history made plain that Congress intended a dramatic expansion in federal jurisdiction.[38] While EPA quickly embraced a broad jurisdiction for its permit program under section 402 of the Act,[39] the Corps resisted --

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26. 33 U.S.C. § 1344. See Sen. Comm. on Public Works, 93d Cong. 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 117 (Comm. Print 1973): "The Conferees were uniquely aware of the process by which dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." Congress gave no indication that it was concerned about the potential conflict of interest in the Corps' role as the nation's largest dredger and its role in regulating discharges of dredged spoil. Only two years later in 1974, similar conflict of interest led to the break-up of the Atomic Energy Commission. See W. Rodgers, above note 1, § 4.12, at 185 (warning that the Corps' dredging activities "may influence the scrutiny applied in its regulatory capacity"; cf. below note 94 and accompanying text -- Corps' exclusion of dredging from the scope of the regulatory program).

27. The EPA oversight role was imposed largely due to Senator Muskie's misgivings about exempting the Corps' program from EPA's National Pollutant Discharge Elimination System. For details on the legislative history, see Blumm, The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective, 8 Ecology L.Q. 409, 415 n.20 (1980) [hereinafter 404 Program Perspective].

28. 33 U.S.C. § 1344(b)(1); see below notes 58-60, 62-63, 73-76 and accompanying text and § III.D.

29. Id. § 1344(c) (vetoes based on unacceptable adverse effects "on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas"); see below IV.A.

30. Section 10 jurisdiction extends to activities affecting "the navigable capacity of any waters of the United States," 33 U.S.C. § 403. Section 13 regulates discharges "into any navigable water of the United States, or into any tributary from which the same shall float or be washed into such navigable water," 33 U.S.C. § 407.

31. The foundation case is the Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) (waters are navigable in fact "when they form in their ordinary condition by themselves, or uniting with other waters, a continued highway" in the chain of interstate and foreign commerce). Although waters located entirely within one state may still be capable of carrying interstate commerce (see 33 C.F.R. § 329.7), some courts have demanded a demonstrable connection with interstate waterborne commerce. Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979) (inland Minnesota lake not navigable).

32. Economy Light & Power Co. v. U.S., 256 U.S. 113 (1921).

33. U.S. v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

34. U.S. v. Sexton Cove Estates, 526 F.2d 1293 (5th Cir. 1976); Weizman v. Dist. Engineer, 526 F.2d 1302 (5th Cir. 1976); U.S. v. Moretti, 526 F.2d 1306 (5th Cir. 1976). See Note, Section 10 of the Rivers and Harbors Act: Jurisdiction Shoreward of Mean High Tide Line, 31 U. Miami L. Rev. 697 (1977).

35. 33 C.F.R. §§ 329.11-12.

36. 33 U.S.C. § 1362(12).

37. Id. See also id. §§ 1321, 1322.

38. The Conference Report intended navigable waters to be given the broadest possible interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes. Sen. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). The Senate Report expressly stated that the Act extended the definition of navigable waters because "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971). See also 118 Cong. Rec. 33,756-757 (1972) (remarks of Rep. Dingell), relied on by the court in U.S. v. Ashland Oils Transportation Co., 504 F.2d 1317 (6th Cir. 1974) (federal jurisdiction extends to a nonnavigable tributary of a nonnavigable tributary of a navigable water).

despite the fact that the same statutory terms governed the jurisdiction of both permit programs.[40] To the Corps, section 404 was simply an exemption from the new EPA permit system for its preexisting regulatory program.

C. NRDC v. Callaway and Its Aftermath

The Corps' narrow reading of the reach of section 404 was quickly rejected by some courts,[41] and in response to a suit by the National Resources Defense Council and the National Wildlife Federation, the District Court for the District of Columbia ordered the Corps to revise its regulations to reflect the full regulatory mandate contained in the 1972 Amendments.[42] Two years, one political furor, and several congressional hearings later, the Corps complied with the court's order.[43] However, to reduce the administrative burden of expanded jurisdiction, the Corps included a "general permitting" mechanism enabling classes of activities with "insignificant" impacts to be authorized without individual permit processing.[44] General permits have become an enduring, albeit controversial aspect of the 404 program.[45]

Another fallout of the Callaway litigation was the impetus it supplied to promulgate the "guidelines" Congress authorized in section 404(b) to supply the substantive criteria for 404 permit decisions.[46] Because they were to be promulgated by EPA "in conjunction with" the Corps, disagreements between EPA and the Corps over the function and content of the guidelines delayed their issuance for nearly three years.[47] However, on September 5, 1975, EPA finally published guidelines that, in addition to listing considerations and objectives to govern permit processing and technical evaluation procedures to assess the effects of dredged and fill material, established a pathbreaking presumption against wetland fills unless an activity was water dependent or other site or construction alternatives were impracticable.[48]

While Callaway produced a good deal of administrative activity, its chief legacy was to activate congressional interest in the 404 program. For two years, between 1975 and 1977, Congress debated the program's future.[49] At one point in 1976, the House of Representatives voted to confine 404 jurisdiction to traditionally navigable waters and adjacent wetlands.[50]

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39. See the definition of "navigable waters" promulgated by EPA in early 1973, U.S. E.P.A. General Counsel Opinion (Feb. 6, 1973).

40. See 39 Fed. Reg. 12,115, 12,119 (1974) (Corps' regulations).

41. See U.S. v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) (containing detailed examination of the legislative history of the 1972 Amendments, concluding that the 1972 Amendments extended federal jurisdiction to all waters that might affect commerce, without regard to traditional navigability tests).

42. NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (invalidating 33 C.F.R. §§ 209.210(d)(1) and 209.260 (1974)). The Callaway suit became necessary when the Corps refused to revise its regulations to reflect decisions like Holland, above note 41.

43. Unhappy with the Callaway result, the Corps issued a press release warning that the regulations the court was forcing upon it would require permits from "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion." Press Release, Dep't of Army, Office of Chief of Engineers (May 6, 1975), reprinted in Hearings on Section 404 of the Federal Water Pollution Control Act Amendments Before the Senate Public Works Committee, 94th Comm., 2d Sess. 517-20 (1976). On the subsequent political furor, see Caplin, Is Congress Protecting Our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972, 31 U. Miami L. Rev. 445 (1977) (detailed analysis of congressional reaction to Callaway). The Corps responded to the Callaway decision by promulgating interim final regulations on July 25, 1975, to take effect in 3 phases over 2 years. 40 Fed. Reg. 31,320 (1975); see Comment, Corps Issues Interim Final Rules for Discharges of Dredged or Fill Material, 5 Envtl. L. Rep. 10,143 (1975).

44. 40 Fed. Reg. at 31,335 (previously codified at 33 C.F.R. § 209.120(i)(2)(ix) (1976).

45. See below notes 55, 59, 81-82, 86 and accompanying text and § II.C.

46. 33 U.S.C. § 1344(b)(1) (guidelines to be based on "criteria comparable" to the ocean discharge criteria authorized by § 403 of the Act, 33 U.S.C. § 1343).

47. The Corps, never really accepting EPA's oversight function, believed that the guidelines should be merely advisory and the principal litmus for permit issuance should remain its public interest review, above note 18. EPA wanted the guidelines recognized as regulatory and binding on the Corps. The net result of this disagreement was that the 1975 interim guidelines evaded the issue and left it unresolved.

48. See 40 Fed. Reg. 41,292-298 (1975) (interim final guidelines). An example of the ambiguities in the guidelines (above note 47) is the strong suggestion (or weak directive) that discharges disrupting the aquatic food chain, destroying significant wetlands, degrading water quality, or damaging fish or shellfish populations were to be "avoid[ed]." Id. at 41,295.

49. See generally Caplin, above note 43, at 457-90.

50. Id. at 460-66 (discussing the "Wright Amendment" to H.R. 9560, which passed the House 234-121 on June 3, 1976 in response to Congressman Wright's analogy of 404 governmental overregulation to government abuses leading to the signing of the Magna Carta). This bill would also have (1) eliminated historically navigable waters (above note 32 and accompanying text) from the definition of navigable waters; (2) allowed the Corps and the governor of a state to authorize 404 regulation in areas other than navigable waters and adjacent wetlands; (3) enabled the Corps to approve any or all of 404

The Senate, however, sought to maintain broad federal jurisdiction but authorize EPA, rather than the Corps, to issue 404 permits in areas beyond traditional Rivers and Harbors Act jurisdiction.[51] Neither approach succeeded, and the 94th Congress adjourned in 1976 leaving the fate of the 404 program unresolved.[52]

D. The 1977 Clean Water Act Amendments

Congressional attempts to restrict 404 jurisdiction ultimately failed, as the 1977 Amendments reaffirmed program coverage over all waters of the United States.[53] Nevertheless, the amendments responded to many of the critics of 404 regulation by exempting two categorical types of activities from the program,[54] ratifying the Corps' practice of issuing general permits,[55] and authorizing EPA to approve state programs in areas beyond traditional Rivers and Harbors Act jurisdiction.[56]

Each of these concessions to concerns of overregulation was limited, however. The exemption for activities with minor aquatic impacts, such as normal farming, forestry, and ranching activities, was restricted to operations that do not convert wetlands to a new use.[57] The exemption for federal activities was made available only for specifically authorized federal activities entirely planned, financed, and constructed by a federal agency, and only if the project has been of an adequate environmental impact statement specifically evaluating the project in light of the 404(b) guidelines.[58] The ratification of the general permit concept was accompanied by restrictions limiting its use to activities of a similar nature, with minimal individual and cumulative impacts, that comply with the 404(b) guidelines.[59] Finally, approval of state permit programs was made EPA's responsibility, not the Corps', and Congress prescribed a detailed set of criteria for states to meet, including issuing permits in compliance with the 404(b) guidelines and expressly providing for review of both state programs and permits by the U.S. Fish and Wildlife Service.[60]

In addition to endorsing broad program jurisdiction, the 1977 Amendments provided the first statutory mention of wetlands and supplied extensive legislative history confirming the 404 program's role in wetlands protection.[61] The amendments also arguably ratified the presumption against wetland fills contained in the 404(b) guidelines[62] and clearly expanded the role of the guidelines.[63] Further, the amendments reinforced the notion that the 404 program is one built on shared agency powers. EPA's oversight role was expanded to include state programs, its role as 404(b) promulgator was preserved, as was its veto authority under section 404(c).[64] The Corps retained its role as permit issuer, while the states were afforded the opportunity to displace Corps regulation in certain upland areas.[65] Finally, the U.S. Fish

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regulation upon finding it to be in the "public interest"; (4) authorized Corps general permits; (5) and excluded from regulation "normal" farming, forestry and ranching activities, other minor activities (including construction of irrigation ditches), and discharges in connection with congressionally authorized projects. Id.

51. Id. at 480-89 (discussing the "Baker-Randolph Amendment" which passed the Senate by voice vote on Sept. 1, 1976). This bill would also have (1) authorized EPA approval of state 404 programs; (2) authorized general permits for activities with minor environmental effects; and (3) exempted from regulatory coverage "normal" farming, forestry and ranching activities, as well as other activities, including irrigation ditches.

52. Id. at 489-90 (describing a deadlock in Conference Committee).

53. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (amending 33 U.S.C. §§ 1251-1376). See Thompson, Section 404 of the Federal Water Pollution Control Act Amendments of 1977: Hydrologic Modification, Wetlands Protection, and the Physical Integrity of the Nation's Waters, 2 Harv. Envtl. L. Rev. 264 (1977); Note, Clean Water Act of 1977: Midcourse Corrections in the Section 404 Program, 57 Neb. L. Rev. 1092 (1978).

54. 91 Stat. at 1600-01, 1605 (codified at 33 U.S.C. §§ 1344(f), (r). See below notes 57-58 and accompanying text.

55. Id. at 1601 (codified at 33 U.S.C. § 1344(e)); see below note 59 and accompanying text.

56. Id. at 1601-03 (codified at 33 U.S.C. §§ 1344(g), (h), (i); see below note 60 and accompanying text.

57. 33 U.S.C. § 1344(f)(2) (requiring permits for discharges "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced ...").

58. Id. § 1344(r); see 404 Program Perspective, above note 27, at 424-28.

59. 33 U.S.C. § 1344(e) (authorizing general permits on a state, regional, or nationwide basis for up to 5 years); see 404 Program Perspective, above note 27, at 430-32.

60. 33 U.S.C. §§ 1344(g), (h), (i); see 404 Program Perspective, above note 27, at 454-60 (state program criteria).

61. 33 U.S.C. § 1344(e). On the legislative history, see Myhrum, Federal Protection of Wetlands Through the Legislative Process, 7 B.C. Envtl. Affairs 567, 620-25 (1979).

62. See above note 48 and accompanying text; U.S. v. Riverside Bayview Homes, 106 S. Ct. 455, 464 (1985) ("[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it").

63. See above text accompanying notes 58-60.

64. See above note 29 and accompanying text.

and Wildlife Service was statutorily recognized as a review agency, although Congress did include provisions to speed commenting and reduce delays in permit processing.[66] Congress thus consciously ratified a 404 program characterized by power sharing, or "multiple loci of decisional power."[67]

E. EPA/Corps Relations, 1977-81: Stabilizing Program Implementation

When it became clear that Congress would not restrict the geographic scope of section 404, the Corps promulgated amended regulations implementing the program.[68] These regulations included a revised definition of wetlands that extended federal jurisdiction to areas indicated either by surface or groundwater and containing a "prevalence" of vegetation "typically adapted for life in saturated soil conditions."[69] The regulations also adopted the presumption against filling wetlands initiated by EPA's 1975 404(b) guidelines,[70] although the regulations limited the applicability of the presumption to wetlands considered "important."[71]

Because Congress simply left unchanged the jurisdictional provisions of the Act in the 1977 Amendments, whether EPA or the Corps possessed final authority to interpret the geographic scope of the program remained unclear. Consequently, the Secretary of the Army formally requested an Attorney General's opinion on the issue. On September 5, 1979, Attorney General Civiletti concluded that EPA, not the Corps, had final authority over all jurisdictional questions under the Clean Water Act, including section 404.[72] This interpretation subsequently confirmed by the courts,[73] established EPA as the ultimate interpreter of the scope of 404 regulation.

On December 24, 1980, EPA published revised 404(b) guidelines.[74] Perhaps emboldened by the Attorney General's opinion, the 1980 revision not only restated the presumption against wetland alterations for nonwater dependent uses or where or site or construction alternatives were available, but expanded it to include "special aquatic sites" including important fish and wildlife habitats, marine sanctuaries, and refuges.[75] The 1980 guidelines also imposed a burden of proof against proposed discharges, stipulating that "dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact."[76] Moreover, EPA expressly declared that the guidelines were "regulatory," not advisory, in nature -- meaning that they were binding on the Corps -- and that they were an independent basis for prohibiting discharges, apart from the Corps' public interest review.[77]

F. Regulatory Relief and the NWF Settlement: Destabilizing Program Implementation

The election of Ronald Reagan brought new challenges to 404 implementation, as the 404

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65. The notion that states could assume permit responsibility only in areas outside traditional Corps' Rivers and Harbors Act jurisdiction first surfaced in the "Administration Bill," proposed by President Ford in 1976, and was carried over in the "Baker Amendment." See Caplin, above note 43, at 472, 479; see also Id. at 482 n.101 (discussing Senator Muskie's understanding of the extent of state jurisdiction).

66. 33 U.S.C. § 1344(m) (Fish and Wildlife Service comments required to be submitted to the Corps within 90 days); § 1344(q) (authorizing memoranda of agreement between the Corps and EPA, the Departments of Agriculture, Commerce, Interior and Transportation, and other appropriate federal agencies, to minimize delays in permit processing). These § 404(q) agreements became controversial, see below notes 83, 88-89, 239-46 and accompanying text. On the role of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in the federal program, see 404 Program Perspective, above note 27, at 442-45.

67. See above note 1 and accompanying text.

68. 42 Fed. Reg. 37,133 (1977) (codified at 33 C.F.R. §§ 320-29, revised by 51 Fed. Reg. 41,206-260 (1986)).

69. Id. at 37,144 (codified at 33 C.F.R. § 323.2(c)). This amendment expanded 404 jurisdiction over areas with wetland vegetation that failed to satisfy the previous requirement of being "periodically inundated." See Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 910-13 (5th Cir. 1983).

70. See note 48 and accompanying text.

71. Id. at 37, 137 (most recently codified at 33 C.F.R. § 320.4(b)((4) (1984)) (Corps District Engineers to "consider whether the proposed activity is primarily dependent on being located in, or in close proximity to, the aquatic environment and whether feasible alternatives are available").

72. 43 Op. Atty. Gen. no. 15 (1979), summarized in 10 Current Developments, Envt. Rep. (BNA) 1278-79 (1979) (the overall structure of the Clean Water Act impliedly places responsibility on EPA to determine the scope of "navigable waters" for the entire statute). However, subsequent to the Civiletti opinion, EPA and the Corps signed a memorandum of understanding allowing the Corps to make wetlands jurisdiction determinations unless EPA identifies an area as a "special case." See Barton I, above note 15, at 385 (noting bottomland hardwoods and a California bay as designated "special cases").

73. Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 903 n.12 (5th Cir. 1983); In Matter of Alameda County Assessor's Parcels, 672 F. Supp. 1278, 1285 (N.D. Cal. 1987).

74. 45 Fed. Reg. 85,336-357 (codified at 40 C.F.R. § 230); see generally Liebsman, The Role of EPA's Guidelines in the Clean Water Act's § 404 Permit Program -- Judicial Interpretation and Administrative Application, 14 Envt. L. Rep. 10,272 (1984).

75. 40 C.F.R. §§ 230.10, 230.3.

76. Id. at § 230.1(d).

77. 45 Fed. Reg. 85,336 (1980) (preamble).

program was quickly targeted for "reform" by the President's Task Force on Regulatory Reform in August 1981.[78] The Task Force's report, along with promulgation of Executive Order No. 12,291, requiring regulatory impact analysis,[79] encouraged the Corps to consider measures to expedite permit processing and expand the use of nationwide permits.[80] An expanded nationwide permit program was promulgated in July 1982,[81] an initiative that produced considerable controversy[82] and led the National Wildlife Federation and 15 other environmental groups to file suit, seeking to enjoin its implementation.[83] Also in 1982, the Corps signed new Memoranda of Agreement under section 404(q) with the federal fishery agencies and EPA to speed permit processing that sharply curbed opportunities for administrative appeals and effectively reduced mitigation measures in permit conditions.[84] The Corps even proposed more drastic reforms in May 1983 in regulations that would have substantially revised the entire program, omitting any reference to the 404(b) guidelines and reversing the presumption against wetland discharges by stating that "a permit will be granted unless its issuance is found to be contrary to the public interest."[85] At the same time, the Corps waged a battle within the Administration to have the 404(b) guidelines declared to be advisory, not regulatory.[86]

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78. See President's Task Force on Regulatory Reform, Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (May 7, 1982), described at 48 Fed. Reg. 21,466 (1983); see also Federal Notes, Section 404 Faces Test, National Wetlands Newsletter (Nov./Dec. 1981), at 2. In response to a request for comments from the Task Force, the American Petroleum Institute ranked the 404 program second in its "hit list" of burdensome regulatory programs. 13 Coastal Zone Mgmt. Newsletter no. 2, at 1 (Jan. 13, 1982).

79. 46 Fed. Reg. 13,193 (1981); see Comment, Reagan Orders Cost-Benefit Analysis of Regulations, Confers Broad Powers on O.M.B. and Regulatory Task Force, 11 Envtl. L. Rep. 10,044 (1981).

80. The Corps began considering these reforms prior to the completion of the Task Force report in May 1982. See Corps Reviews § 404, Nat l Wetlands Newsletter (Sept./Oct. 1981) at 6-7. In addition to expanding the use of nationwide permits, the Task Force recommended (1) revising 404(q) Memoranda of Agreement to streamline permit processing and to reduce interagency appeals; (2) increasing reliance on state programs by issuing general permits where states have regulatory programs substantially similar to the Corps'; (3) "simplifying" the 404(b) guidelines and shortening the time for state action on water quality centrification requests to reduce policy conflicts; and (4) redefining wetlands to "clarify" the program's scope. See Barton I, above note 15, at 240; see also Gianelli, Regulatory Reform Equals Good Government, Nat'l Wetlands Newsletter (July/Aug. 1983) at 6-7.

81. 47 Fed. Reg. 31,794 (1982) (interim final regulations, including 27 nationwide permits).

82. See, e.g., Parish & Morgan, History, Practice, and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act, 17 Land & Water L. Rev. 43 (1982); Blumm, Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response, 18 Land & Water L. Rev. 469 (1983).

83. National Wildlife Federation v. Marsh, No. 82-3632 (D.D.C. complaint filed Dec. 22, 1982), ELR Pend. Lit. 65,775; Federal Notes, Environmental Organizations Sue to Undo Reagan Administration Changes in Section 404 Program, National Wetlands Newsletter No. 6 (1982), at 4-6. The major concern of the environmental groups was the nationwide permits for isolated waters (waters not part of a surface tributary system and adjacent wetlands) and waters above the "headwaters" (where there is less than 5 cubic feet per second mean annual flow and adjacent wetlands). Prior to promulgation of the new regulations, the Corps required an individual permit in isolated waters with a surface area of 10 acres or larger. The change, according to the Fish and Wildlife Service, would remove individual permit requirements from 700,000 to 900,000 acres of prairie potholes, 1 to 2 million lakes and wetlands in the upper Midwest, 335,000 acres of wetlands adjacent to the Great Salt Lake, and 70% of the lakes in Alaska. See Barton I, above note 15, at 243. The environmental groups alleged that the new permits were inconsistent with § 404(e) which authorizes general permits only for categories of activities, not for classes of waters or wetlands, and then only if there are minimal cumulative impacts. See 33 U.S.C. § 1344(e)(2).

84. Prior to 1982, the 404(q) Memoranda enabled EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service request further review of Corps District Engineer permit decisions by higher authorities in the Corps (and ultimately to the Secretary of the Army). Although four levels of appeal were possible, in practice few permit "elevations" occurred, largely because the threat of delays in permit issuance encouraged applicants to incorporate satisfactory mitigation measures. The 1982 Memoranda (1) made elevation possible only where there was insufficient interagency coordination, significant new information, or national policy issues (not because of a discharge's environmental effects); (2) provided for only one level of appeal; and (3) made all permit elevation decisions discretionary with the Assistant Secretary of the Army for Civil Works. See generally Barton I, above note 15, at 240-42; Barton, Federal Wetlands Protection Programs in Nat'l Audubon Society, Audubon Wildlife Report 1986 at 396 [hereinafter Barton II].

85. 48 Fed. Reg. 21,466, 21,469 (1983). See Liebsman, above note 74, at 10,275-276 (discussing EPA's objections to the Corps' proposals); Nagle, Wetlands Protection and the Neglected Stepchild of the Clean Water Act: A Proposal for Shared Custody of Section 404, 5 Va. J. Nat. Resources L. 227, 241-45 (1985).

86. See generally Liebsman, above note 74, at 10,274-275.

But regulatory reform efforts reached their high water mark with the 1983 Corps proposal. First, when William Ruckelshaus became EPA Administrator in 1983, he identified the 404 program as an agency priority, resisted changes to the guidelines, maintained their regulatory status, and identified the 404 program as a high priority for EPA.[87] Second, the parties in the National Wildlife Federation v. Marsh suit agreed to a settlement in February 1984 in which the Corps promised to promulgate new regulations (1) acknowledging the mandatory nature of the 404(b) guidelines; (2) preserving the presumption against wetland discharges; (3) applying the decision in Avoyelles Sportsmen's League v. Marsh[88] -- extending 404 regulatory coverage over all clearing, drainage, and channeling of wetlands -- nationwide; (4) reinstating a 10-acre limit in the isolated waters and "headwaters" nationwide permits; (5) including a predischarge notification for activities causing the "loss or substantial modification" of from 1 to 10 acres; and (6) and requiring the Corps to seek the views of EPA and fish and wildlife agencies of proposed discharges affecting between 1 to 10 acres of special aquatic sites.[89] Third, the 404(q) Memoranda of Agreement were revised, in large measure due to congressional pressure,[90] to provide increased flexibility in the timing of permit issuance and increased consultation at the Corps District Engineer level, greater opportunities to request administrative appeals (including noncompliance with the 404(b) guidelines), and a requirement that the Corps supply a written, reasoned decision when denying requests for appeals.[91]

Thus, many of the Corps' regulatory reform initiatives were ultimately frustrated by congressional opposition, resistance of EPA and the federal fishery agencies, and the willingness of environmental groups to challenge the Corps in court. Current Corps regulations, issued on November 13, 1986, reflect the compromises reached in the NWF settlement,[92] although they fail to adopt the definition of "waters of the United States" contained in the 404(b) guidelines[93] and assume that dredging operations (such as those the Corps itself conducts) do not involve discharges and therefore do not require 404 permits.[94]

When Congress amended the Clean Water Act in 1987, it made only minor changes in section 404's enforcement authorities.[95] Nevertheless, a number of unresolved issues continues to hamper 404 implementation, including whether the Corps must accept EPA's interpretation of the 404(b) guidelines, and whether the Corps can determine on a case-by-case basis not to require permits of discharges into small waterbodies connected to a surface tributary system (isolated waters). Neither issue was resolved by the NWF settlement nor by the revised 404(q) memoranda. These issues are discussed further in the succeeding sections.[96]

II. Jurisdictional Issues

The issues of which waters and which activities are subject to 404 regulation have been at the heart of most of the controversy surrounding the program. Geographic jurisdiction concerns the scope the Clean Water Act's intent to assert regulatory control over all waters to the limits of the commerce clause;[97] that is, all waters affecting interstate and foreign commerce. Because of its constitutional dimensions, this issue is ultimately a matter for judicial interpretation. Jurisdiction over activities, on the other hand, involves a greater degree of administrative discretion. But here, too, the courts are playing an important role in ascertaining congressional intent.

A. Geographic Jurisdiction

In the wake of the Callaway decision,[98] the Corps promulgated final rules in 1977 expanding its jurisdiction to include not only wetlands adjacent to navigable waters but also wetlands adjacent to other waters, interstate wetlands, and intrastate wetlands "which could affect" interstate or foreign commerce.[99] In effect, this expansion of jurisdiction, which remains essentially unchanged,[100] seemed to assert federal control over all wetlands, since all wetlands arguably could affect interstate commerce. How-

87. Id. at 10,275; Barton I, above note 15, at 244; Barton II, above note 84, at 392-93.

88. 715 F.2d 897 (5th Cir. 1983).

89. 25 E.L.R. 20,262, ¶¶ 12, 16, 25 (D.D.C. Feb. 12, 1985). See Liebsman, above note 74, at 10,275; Barton I, above note 15, at 243-44; Barton II, above note 84, at 390-92; Court Approves Settlement Agreement in NWF v. Marsh, Nat'l Wetlands Newsletter (Mar./Apr. 1984) at 4.

90. Senators Chaffee and Mitchell blocked Robert Dawson's nomination for Assistant Secretary of the Army for Public Works until the Corps agreed to revise the memoranda. Barton II, above note 84, at 395-96.

91. Id. at 397.

92. 51 Fed. Reg. 41,206 (1986) (codified at 33 C.F.R. §§ 320-30). See Army Issues Final Clean Water Act § 404 Regulations, Nat'l Wetlands Newsletter (Jan./Feb. 1987) at 8-10. However, the National Wildlife Federation challenged a "grandfather" provision in the regulations allowing discharges previously authorized under nationwide permits to continue for 18 months under certain conditions. See 33 C.F.R. §§ 330.5(c). The court upheld the grandfather clause as allowing for "a reasonable, fair transition. National Wildlife Federation v. Marsh, 22 E.R.C. 1417 (D.D.C. 1984).

93. See above notes 39-40 and accompanying text; see also below note 114.

94. 51 Fed. Reg. at 41,210.

95. Pub. L. No. 100-4 § 313(d). See below note 318 and accompanying text.

96. See below notes 133-37, 275 and accompanying text.

97. U.S. Const., art. I, § 8 cl. 3.

98. See above § I.C.

99. 51 Fed. Reg. 37,122, 37,144 (1977) (formerly codified at 33 C.F.R. § 323.2(a)).

100. Now codified at 33 C.F.R. § 328.3(a).

ever, while the Supreme Court ratified Clean Water Act jurisdiction over adjacent wetlands, the Corps has refused to assert jurisdiction over all wetlands not adjacent to other waters, claiming the right to decide on a case-by-case basis whether a permit should be required.

1. U.S. v. Riverside Bayview Homes and the Extent of Wetlands Jurisdiction

In its first consideration of section 404, the Supreme Court unanimously reversed a narrow construction of Clean Water Act jurisdiction by the Sixth Circuit that required "frequent flooding" of wetlands.[101] The case concerned a fill in a tract of marshy land near Lake St. Clair, Michigan that the Corps considered an "adjacent wetland" requiring a 404 permit because of its vegetation and saturated soils. The Sixth Circuit disagreed with the Corps' jurisdictional determination, worrying that that broad federal jurisdiction could produce an unconstitutional taking of property.[102]

The Supreme Court rejected as "spurious" the appellate court's takings clause concerns, concluding that its narrow construction avoided no constitutional difficulty while frustrating application of Clean Water Act regulation.[103] Unencumbered by the takings issue, the Court considered the case as one of simple statutory and regulatory construction: whether the area at issue was a wetland under the Corps regulations and, if so, whether the Clean Water Act authorized the Corps to assert jurisdiction over such an area. Pointing to the Corps' expanded definition of wetlands in its 1977 regulations,[104] Justice White concluded that in fashioning its "frequent flooding" requirement the Sixth Circuit improperly second-guessed the Corps on a jurisdictional question it specifically sought to resolve in its regulations.[105] Since the regulations include wetlands dependent on groundwater, frequent flooding by an adjacent waterbody was clearly unnecessary and inconsistent with the "plain language" of the regulations.[106] As for whether Congress authorized Corps jurisdiction of wetlands adjacent to but not regularly flooded by "more conventionally identified waters," the Court held that the Corps' regulatory definition to be reasonable in light of language, policies, and legislative history of the Act.[107] Influencing the Court was the clear congressional intention to extend federal jurisdiction beyond traditionally navigable waters,[108] the repeated failure of attempts to amend the Act to restrict Corps' jurisdiction,[109] and reference to wetlands at two places in the Act, indicating congressional concern for the resource.[110]

Riverside Bayview thus confirmed federal jurisdiction over wetlands "adjacent" to other waterbodies, affirming the Corps' ecologically-based definition of wetlands.[111] This result is hardly surprising, since Congress clearly intended to regulate all waterbodies affecting interstate commerce,[112] and the flood and erosion

101. 474 U.S. 121 (1985), rev'g, 729 F.2d 391 (6th Cir. 1984) (ruling that it was not clear that Congress intended "navigable waters" to include bays, swamps, and marshes that are "rarely if ever flooded").

102. 729 F.2d at 397-98.

103. 106 S. Ct. at 459-60 (noting that "so long as compensation is available for those whose property is in fact taken" by regulation, the assertion of jurisdiction itself cannot be unconstitutional). See First English Evangelical Lutheran Church v. City of Los Angeles, 107 S. Ct. 2378 (1987) (compensation available for temporary regulatory taking).

104. See above note 69 and accompanying text.

105. 106 S. Ct. at 461.

106. Id. at 460. The Court thus affirmed the district court's conclusion that the wetland was an "adjacent wetland" within the terms of the Corps' regulation because of its wetland vegetation and saturated soil from groundwater. Id. at 460-61 (district court's determination not "clearly erroneous").

107. Id. at 461-62. ("In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulate waters, the Corps' ecological judgment provides an adequate basis for legal judgment that adjacent wetlands may be defined as waters under the Act.") Cf. Chevron, U.S.A. v. NRDC, 104 S. Ct. 2798 (1984) and Chemical Manufacturers Ass'n v. NRDC, 105 S. Ct. 1102 (1985) (federal courts must defer to agency construction of statutes where the interpretation is reasonable).

108. Id. at 464-65 (1972 Act demonstrates the "evident breadth of Congressional concern for protection of water quality and aquatic ecosystems").

109. Id. at 465 ("Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of navigable waters").

110. The Court cited §§ 404(g)(1) and 208(i)(2), 33 U.S.C. §§ 1344(g)(1), 1288(i)(2). The first provision withholds state 404 jurisdiction over traditionally navigable waters and adjacent wetlands. The latter provision authorizes a $6 million National Wetlands Inventory to assist local, state, and federal agencies in identifying wetlands. See Barton II, above note 84, at 381 (reporting that the Inventory had completed mapping for 40% of the lower 48 states by 1985).

111. 106 S. Ct. at 465 (quoting 33 C.F.R. § 320.4(b)(2)(i)). See U.S. v. Rivera Torres, 656 F. Supp. 251, 254 (D.P.R. 1987) (construing Riverside Bayview to sanction federal jurisdiction based on humidity of soil and prevalence of wetland vegetation); U.S. v. Larkins, 657 F. Supp. 76, 81 n.15 (jurisdiction based on hydric soils and vegetation). An "adjacent" wetland is one that is bordering, contiguous to, or "neighboring" another waterbody. 33 C.F.R. § 328.3(c). No hydrological connection is apparently required.

112. See above note 38 and accompanying text. Congressional assertion that wetland

control, water quality and fishery habitat values of wetlands ensure such an effect, especially considering the cumulative costs of wetland losses of between 300,000 and 450,000 acres annually.[113] In fact, EPA believes that Clean Water Act jurisdiction extends to all wetlands that could potentially supply habitat for migratory birds.[114] This would effectively assert federal jurisdiction over all wetlands -- both adjacent to other waterbodies and nonadjacent -- as a class. However, the Riverside Bayview Court expressly reserved judgment on the issue of nonadjacent wetland jurisdiction,[115] and the Corps maintains it must make jurisdictional determinations for such areas on a case-by-case basis.[116] The result is inconsistent assertions of regulatory jurisdiction by 36 different Corps districts, including a refusal to assert jurisdiction over 30-acre playa lake in Texas, as discussed in the following section.

Riverside Bayview will encourage two trends. First, it confirms judicial approval of broad assertions of federal jurisdiction. Recently, lower courts approved all of the following as "waters of the United States": (1) usually dry arroyos with only occasional surface flows;[117] (2) an isolated lake;[118] (3) an isolated wetland;[119] (4) wetlands adjacent to a recreational lake used by interstate travelers;[120] (5) private lands flooded by a federal dam;[121] (6) artificial wetlands;[122] (7) a mangrove forest;[123] (8) and bottomland hardwoods.[124] The second trend the Supreme Court result will con-

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fills substantially affect interstate commerce will be upheld if there is any rational basis for such a finding. Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 276; Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 258 (1964).

113. Barton II, above note 84, at 374. Congress may regulate activities having a substantial effect on interstate commerce as a class, even if individual activities have little or no effect on interstate commerce. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); Perez v. U.S., 402 U.S. 146, 154 (1971).

114. See Memorandum from Francis S. Blake, EPA Gen'l. Counsel to Richard E. Sanderson, EPA Acting Ass't, Office of External Affairs (Sept. 12, 1985) (Clean Water Act Jurisdiction Over Isolated Waters); see also 53 Fed. Reg. 20,764, 20765 (1988) (discussing the memorandum). The Corps sent this memorandum to its field staff under pressure from Congress, see Barton II, above note 84, at 399, and makes reference to its conclusions in the preamble to its current regulations, 51 Fed. Reg. 41,206, 41,217 (1986), but did not alter its wetlands definition, id. at 41,250 (33 C.F.R. § 328.3(a)(3)).

115. 106 S. Ct. at 458 n.2, 452. See Meyer, Navigating the Wetlands Jurisdiction of the Army Corps of Engineers, Resource Law Notes (Aug. 1986) (criticizing the Court for unnecessarily continuing the tortured development of wetlands jurisdiction and noting "[w]hile the Corps has edged along what it has perceived as a constitutional tightrope, it has in fact been treading on solid constitutional ground. Only poor vision and an apparent failure to read the case law made the ground seem so far away"). For other evaluations of Riverside Bayview, see Hedal, The Clean Water Act -- More Section 404: The Supreme Court Gets Its Feet Wet, 65 Boston U.L. Rev. 995 (1985); Adams, United States v. Riverside Bayview Homes, Inc.: Wetlands, Fish, or Waterfowl?, 32 Loyola L. Rev. 477 (1986); Rosenbaum, The Supreme Court Endorses a Broad Reading of Corps Wetland Jurisdiction Under FWPCA § 404, 16 E.L.R. 10,008 (1986); Nat'l Wetlands Newsletter (Jan./Feb. 1986), at 14.

116. See generally Jackson, The Constitutional Test for Wetlands Jurisdiction: Agencies In a Muddle, Nat'l Wetlands Newsletter (Sept./Oct. 1987) at 7 (noting that EPA and the Corps presume that all "adjacent" wetlands affect interstate commerce, but require an individual showing of an effect on interstate commerce for "nonadjacent" wetlands).

117. Quivira Mining Co. v. E.P.A., 765 F.2d 126, 129 (10th Cir. 1985) ("It is is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some").

118. Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984) (isolated lake providing migratory waterfowl habitat, recreational opportunities for interstate travelers, and irrigation for crops and habitat for a commercial fishery marketed in interstate commerce was within the Corps' jurisdiction); cf. EPA Memorandum, above note 114.

119. National Wildlife Federation v. Laubscher (Pond 12), 662 F. Supp. 548, 549 (S.D. Tex. 1987) ("[A] wetland visited by migratory birds is a wetland within the jurisdiction of the [EPA and the Corps]").

120. U.S. v. Byrd, 609 F.2d 1204 (7th Cir. 1979); Bailey v. U.S., 647 F. Supp. 44 (D. Ida. 1986).

121. Swanson v. U.S., 789 F.2d 1368 (9th Cir. 1986) ("The public right of navigation follows the stream and the authority of Congress goes with it," quoting Philadelphia Co. v. Stimson, 223 U.S. 605, 634-35 (1912)); see also Ninth Circuit Ruling on Corps Regulatory Jurisdiction, Nat'l Wetlands Newsletter (Nov./Dec. 1986), at 14.

122. U.S. v. Ciampitti, 583 F. Supp. 483, 492, 494 (D.N.J. 1984) ("Although the court is ... fascinated by the history of the site ..., for purposes of the present controversy that history is of purely scientific value and is not dispositive of the legal issues before the court. [F]ederal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands"); Track 12, Inc. v. District Engineer, U.S. Army, 618 F. Supp. 448 (D. Minn. 1985); Bailey v. U.S., 647 F. Supp. 44 (D. Ida. 1986); U.S. v. Akers, 651 F. Supp. 320, 323 (E.D. Cal. 1987) ("[T]he statutory and administrative definitions of 'waters' and 'wetlands' are broad enough to encompass so called, 'man-made' wetlands").

123. U.S. v. Rivera Torres, 656 F. Supp. 251 (D.P.R. 1987).

124. U.S. v. Larkins, 657 F. Supp. 76 (W.D. Ky. 1987).

tinue is a very deferential judicial attitude toward the government's jurisdictional determinations.[125] Although the Corps' administrative record on permit applications must demonstrate a thorough study of an area's soils, hydrology, and vegetation,[126] when the government seeks to enjoin an unauthorized discharge, a situation where no administrative record exists, courts are even more deferential to the government's experts.[127] One noted commentator has cautioned that such deferential should not, however, limit discovery and evidentiary review before a trial court to evaluate material facts, witness credibility, and ensure that the written record is not a mere fabrication supporting the government's jurisdictional conclusion.[128]

2. National Wildlife Federation v. Lambscher (Pond 12) and Jurisdiction Over Nonadjacent Wetlands

Riverside Bayview by no means ended the battles over the geographic scope of section 404. In fact, by declining to rule on the nonadjacent wetlands issue, the Court encouraged the Corps to continue to make jurisdictional decisions concerning these areas on a case-by-case basis on the basis of an area's connection to interstate commerce.[129] The result has been to sanction a number of fills of nonadjacent wetlands, especially playa lakes in the Great Basin and prairie potholes in the Northern Great Plains, by failing to assert jurisdiction. The authority of the Corps to decline jurisdiction over a 30-acre permanently inundated playa lake in Texas was recently affirmed by a district court, in a case known as Pond 12.

The Pond 12 case originated in January 1984, when officials of the U.S. Fish and Wildlife Service observed a channelization operation taking place without a 404 permit.[130] The Service requested that the Corps issue a cease and desist order, but the Corps declined, claiming its jurisdiction over isolated waters is "limited and not clearly defined."[131] Although the Service proceeded to document use of Pond 12 by some 50 species of waterfowl protected by the Migratory Bird Treaty Act, the Corps refused to assert jurisdiction, EPA did nothing, and Pond 12 was subsequently destroyed.

The National Wildlife Federation then filed suit, seeking to force the Corps and EPA to assert jurisdiction over all wetlands satisfying the regulatory definition and a declaration that all such wetlands are within the commerce clause power. The Corps admitted its determination that Pond 12 was not a "water of the United States" was erroneous but maintained that it possessed discretion to not take enforcement action against the discharge.[132] In a curious decision the court decided that because the case involved the issue of federal jurisdiction it

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125. See Avoyelles Sportmen's League v. Marsh, 715 F.2d 897, 905 (5th Cir. 1983) (Corps' decisions to grant or deny § 404 permits reviewed "under the arbitrary and capricious standard on the basis of the administrative record"); Texas Committee on Natural Resources v. Marsh, 736 F.2d 262, 270 (5th Cir. 1984) ("Case law binds [the courts] to uphold the Corps' decision [regarding what alternatives to discuss in an EIS] unless it is arbitrary and capricious"); but see U.S. v. Brassey, No. 81-1072 (D. Ida. 1982) ("What is required in the opinion of this Court is that an area be saturated or inundated by water with sufficient regularity that an ordinary person would understand that the prevalent vegetation is indicative of a normally aquatic environment" (emphasis added) (quoted in Ortman, Wetlands Or Uplands -- Northwest Courts Make the Call, Nat'l Wetlands Newsletter (May/June 1986), at 13-14).

126. NWF v. Hanson, 623 F. Supp. 1539 (E.D.N.C. 1985) (visual observation not adequate); see also District Court Sets Aside Corps' Wetland Determination, Nat'l Wetlands Newsletter (May/June 1986), at 14-15.

However, the Corps is not required to give permit applicants an adjudicatory hearing. Buttrey v. U.S., 690 F.2d 1170, 1175 (5th Cir. 1982) ("Congress did not intend that the 'public hearings' called for in section 404 be trial-type hearings on the record"); NWF v. Marsh, 568 F. Supp. 985, 993 (D.N.C. 1982) ("[S]ection 404 requires only ... a speech-making hearing at which proponents and opponents of [a] project are allowed to be heard," quoting Buttrey, 690 F.2d at 1176). See also Comment, Section 404 Permit Program Survives Legal Challenges, Faces Congressional and Administrative Review, 11 E.R.L. 10,233, 10,237 (1981). Nor is the Corps required to provide an informal hearing unless one is requested during the comment period. AJA Associates v. Army Corps of Engineers, 817 F.2d 1070 (3d Cir. 1987).

127. U.S. v. Tilton, 705 F.2d 429 (11th Cir. 1983) (district court's injunction based on the Corps' conclusion that the swamp at issue was a wetland was "not clearly erroneous"); U.S. v. Lambert, 589 F. Supp. 366, 370 (M.D. Fla. 1984) (in a hearing for injunctive relief where no administrative record exists, "the court must give substantial deference to the well reasoned conclusions of those Government witnesses who are officials charged by law with administering the provisions of the Clean Water Act"); U.S. v. Lee Wood Contracting, 529 F. Supp. 119, 120 (E.D. Mich. 1981) (government provided "ample evidence" that the parcel at issue was a wetland within the Corps' jurisdiction requiring a permit).

128. Tripp, Judicial Review of § 404 Wetlands Protection Actions: A Reaction, 14 Envtl. L. Rep. 10,096 (1984).

129. See Jackson, above note 116 (arguing that since wetland fills as a class have a substantial affect on interstate commerce, all wetlands satisfying the soil, hydrology, and vegetation factors in the regulatory definition should be subject to 404 regulation).

130. See generally Environmentalists Sue Corps and EPA Over Isolated Wetlands Jurisdiction, Nat'l Wetlands Newsletter (Mar./Apr. 1986) at 13-14.

131. Id. at 14.

132. See Jackson, above note 116.

could not be dismissed as a matter of discretionary nonenforcement.[133] Nevertheless, the court denied the Wildlife Federation's request on the ground that the group lacked standing to secure nationwide injunctive relief.[134] The court also refused to order restoration of the wetland or impose fines because neither the Corps nor EPA undertook enforcement against the discharger.[135]

If the Pond 12 result gains widespread judicial acceptance, it essentially will leave to the discretion of the Corps, subject to EPA oversight, the ability to exempt from the regulatory program nonadjacent wetlands on a case-by-case basis. Eliminating its jurisdiction over nonadjacent wetlands has been a Corps goal since 1972, pursued originally by a narrow construction of its jurisdiction, then by issuance of a nationwide permit, and now through selective determinations of no interstate commerce effects and a strategy of nonenforcement.[136] Pond 12 illustrates the failure of the 404 program to supply comprehensive wetlands protection. The Corps has long claimed that the 404 program is not a wetlands protection mechanism.[137] Through its case-by-case constitutional test for nonadjacent wetlands, the Corps seems committed to ensuring the truth of that contention.

B. Activities Exempt from Individual Federal Permits

Rather than restrict the geographic reach of section 404, in the 1977 Amendments, Congress created a number of mechanisms to reduce the regulatory burden of the program. Exempted from permit requirements were activities with minor effects and certain federal projects.[138] In addition, the Amendments ratified the Corps' practice of issuing general permits and authorized the states to displace the federal permit program in certain waters.[139] This section considers regulatory and judicial developments concerning these categorical exemptions.

1. Exempted Minor Activities

Section 404(f) exempts from permit requirements a number of minor discharges thought by Congress to involve "routine activities, small actors, temporary effects, and avoidance of duplicate regulation,"[140] as well as five other categories of minor discharges. The key exemptions are those for (1) "normal" farming, ranching, and forestry activities, such as plowing, minor draining, and harvesting; (2) constructing or maintaining stock ponds or irrigation ditches or from maintaining drainage ditches; and (3) constructing or maintaining farm, forest, or mining roads.[141] No exemption is available, however, for an activity that would violate a toxic effluent standard[142] or constitute a new use impairing the flow, circulation or reach of waters.[143] Primary responsibility for interpreting these exemptions rests with EPA,[144]

133. 662 F. Supp. 548, 549-50 (S.D. Tex. 1987) the court did determine that Pond 12 was "a water of the United States." Id.

134. Id. at 549.

135. Id. at 550. Cf. Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987) (Corps' decision of whether to compel compliance with permit conditions is an enforcement issue immune from judicial review); Missouri Coalition for the Environment v. Corps of Engineers, 678 F. Supp. 790 (E.D. Mo. 1988) (same).

136. See Jackson, above note 116, at 8-9 (recounting the history of Corps resistance, noting that the latest strategy was devised as a response to the NWF settlement, above note 87, in which the Corps committed to individual permits for nonadjacent wetlands larger than 10 acres, and describing as a Corps' "top priority" the issuance of a new nationwide permit to eliminate the 10-acre cutoff).

137. See, e.g., Testimony of Robert K. Dawson, Acting Ass't Secretary of the Army for Civil Works Before the Senate Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 11 (May 11, 1985), reported in Senate Subcommittee Holds Clean Water Act § 404 Oversight Hearings, Nat'l Wetlands Newsletter (July/Aug. 1985) at 8-9.

138. 33 U.S.C. §§ 1344(f), (r).

139. Id. §§ 1344(e), (g-i).

140. W. Rodgers, above note 1, § 4.12, at 188. Section 404(f) was chiefly the product of intense lobbying by groups, such as the National Association of Home Builders and the National Forest Products Association, opposed to the court-ordered expansion of regulatory jurisdiction and who often invoked the spector of federal regulatory requirements overwheiming the family farm. See, e.g., id. at 187 (citing Sen. Muskie during the Senate debate).

141. 33 U.S.C. § 1344(f)(1) (also exempting maintenance or emergency reconstruction of currently serviceable structures, construction of temporary sedimentation basins on uplands, and activities regulated by an approved statewide "best management practices" programs authorized by § 208(b)(4) of the Act).

142. Id. § 1344(f)(1) (1982). Because toxic effluent standards and prohibitions established under § 307(a)(2) of the Clean Water Act, 33 U.S.C. § 1317(a)(2), supersede any other less stringent requirements in a discharger's NPDES permit, Inland Steel Co. v. EPA, 574 F.2d 367 (7th Cir. 1978), this caveat to the 404(f)(1) exemptions not only brings the activities back within the 404 permit process, but would seem to require permit denial. See 404 Program Perspective, above note 27, at 420 n.44.

143. Id. § 1344(f)(2).

144. According to the Civiletti Attorney General Opinion, above note 72. EPA promulgated revised definitions of the exemptions on June 6, 1988, 58 Fed. Reg. 20,764, 20,774-76 (to be codified at 40 C.F.R. § 232.3). These regulations also resolve a longstanding disagreement between the Corps and EPA over whether the 404 program or the National Pollution Discharge Elimination System (NPDES) authorized by § 402 of the Clean Water Act (33 U.S.C. § 1342) should regulate discharges of solid waste into waters. See 404 Program Perspective, above note 27, at

although the Corps has issued essentially identical interpretations.[145]

The exemptions have been construed narrowly, influenced no doubt by the knowledge that conversions of wetlands to agricultural use accounted for roughly 80% of the wetland losses in the 20 years preceding the enactment of the "normal farming" exemption.[146] "Normal" activities are those that are part of an "established (i.e., on-going)" operation; they are not those that establish a new agricultural use or even return an area farmed in the past to agriculture if hydrological modification is required.[147] The exemption for minor drainage activities is inapplicable to drainage that converts wetlands to non-wetlands or significantly modifies wetlands or other aquatic areas.[148] The regulations specify those activities qualifying for the exemption for irrigation facilities.[149]

The courts have strongly affirmed the narrow construction of the regulations, relying frequently on legislative history indicating that the exemptions apply only to narrowly defined activities causing little or no adverse effect, individually or cumulatively.[150] Thus, they have ruled ineligible for the exemption conversion of a bottomland hardwood forest to a soybean field;[151] road widening, plowing, draining, and bulldozing wetlands for cranberry, corn, and barley planting;[152] construction of various dikes, ditches, channels, and roads to farm in wetlands;[153] and construction of fish farming ponds.[154] However, tree-cutting activities in connection with construction of an electric power line qualified for a permit exemption because no wetlands conversion took place.[155] Nevertheless, the burden of proof is on the applicant when an exemption is claimed.[156] While the case law has rejected attempts by dischargers to qualify for an exemption by placing artificial labels on their activities,[157] fulfillment of the congressional intent to exempt only slight modifications to areas currently used as farmlands having little or no affect on wetlands, rests uneasily on the shoulders of thousands of private actors making case-by-case decisions about whether their activities merit an exemption.[158]

2. Exempted Federal Projects

Fearing that the Executive Branch might employ section 404 to veto water projects specifically authorized by Congress,[159] the 1977 Amendments to the Clean Water Act also exempted from section 404 permit requirements federal construction projects specifically authorized by Congress.[160] Section 404(r) has received little

446-49. Under EPA's new definition of "fill material," such discharges will require a 404 permit. See 58 Fed. Reg. 20,764, 20,774 (to be codified at 40 C.F.R. § 232.2(i)); see also 51 Fed. Reg. 8871 (1986) (Memorandum of Agreement between EPA and the Corps on solid waste).

145. See 33 C.F.R. § 323.4 (Corps regulations).

146. Office of Technology Assessment, Wetlands: Their Use and Regulation 87 (1984).

147. 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 233.35(a)(1)(ii).

148. 33 C.F.R. § 323.4(a)(1)(iii)(C)(2); 40 C.F.R. § 233.35(A)(1)(iii)(C)(2).

149. The Corps' 1982 regulations granted § 404(f) exemption to discharges associated with irrigation facilities. See 47 Fed. Reg. 31,794, 31,795, 31,812 (1982). Pursuant to the National Wildlife Federation settlement, the Corps has clarified that only "discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches" fall within the exemption. 49 Fed. Reg. 39,478, 39,482 (1984) (codified at 33 C.F.R. § 323.4(a)(3) (1987); 40 C.F.R. § 233.35(a)(3) (1986)).

150. U.S. v. Akers, 785 F.2d 814, 819 (9th Cir.), cert. denied, 107 S. Ct. 107 (1986) (Senator Muskie's remarks entitled to substantial weight); U.S. v. Huebner, 752 F.2d 1235, 1241 (7th Cir. 1985); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 926 (5th Cir. 1983). See generally Liebsman, The Farming Exemption Under § 404(f) of the Clean Water Act -- Congressional Intent and Judicial Construction, Nat'l Wetlands Newsletter (July/Aug. 1985) at 14-17.

151. Avoyelles, 715 F.2d at 926; see also U.S. v. Larkins, 657 F. Supp. 76, 85-86 (W.D. Ky. 1987).

152. Huebner, 752 F.2d at 1241-43.

153. Akers, 785 F.2d at 820-22; U.S. v. Cumberland Farms of Connecticut, 647 F. Supp. 1166, 1175-76 (D. Mass. 1986).

154. Conant v. U.S., 786 F.2d 1008, 1010 (11th Cir. 1986).

155. Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 647 (5th Cir. 1983) (sanctioning clearing of wooded swamplands with marsh buggies and helicopters).

156. U.S. v. Larkins, 657 F. Supp. at 76 n.22 (burden of proving an exemption to a regulatory scheme on applicant, especially given the remedial nature of the Clean Water Act).

157. Liebsman, above note 150, at 17.

158. See W. Rodgers, above note 1, § 4.12 at 189 (noting that only a "random element," the risk of federal enforcement, "can rise up to repudiate these institutionalized private judgments").

159. See Thompson, above note 53, at 284-86.

160. Section 404(r) provides:

> The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress ... is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section ... (except for effluent standards or prohibitions under § 307 [33 U.S.C. § 1317 (1982)]), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in

attention. Few projects have been exempted, and none have been judicially challenged.[161] However, the legislative history of § 404(r) indicates that like the 404(f) exemptions Congress intended only a narrow category of activities to qualify for the exemption. First, the exemption applies only to projects entirely planned, financed, and constructed by a federal agency.[162] Second, the sponsoring agency must submit an EIS to Congress analyzing the project's ability to comply with the 404(b)(1) guidelines.[163] Finally, absent an EIS adequately addressing the 404(b)(1) guidelines, federal projects remain subject to § 404 permit requirements.[164]

> an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

33 U.S.C. § 1344(r).

161. Passing reference is made to § 404(r) in Monongahela Power Co. v. Marsh, 809 F.2d 41, 51, n.92 (D.C. Cir. 1987) (exemption applies only to discharges integral to designated federal projects); and South Carolina Wildlife Federation v. Alexander, 457 F. Supp. 118, 128 (D.S.C. 1978) (§ 404(r) does not exempt federal projects from § 402 permit requirements).

162. Senator Stafford remarked in floor debate the following:

> Projects, even though fully financed by the Federal Government, which are authorized under continuing authorities or lump sum appropriation shall be subject to 404 permits not withstanding the issuance by the responsible Federal agency of a programmatic or individual NEPA review document.... For the purposes of this act, Federal projects are those which are entirely planned, financed, and constructed by a Federal agency in every respect.

123 Cong. Rec. 39,193 (Dec. 15, 1977). Accord 123 Cong. Rec. 38,995 (Dec. 15, 1977) (statement of Rep. Stark); 123 Cong. Rec. 38,997 (Dec. 15, 1977) (statement of Rep. Harsha); 123 Cong. Rec. 39,209 (Dec. 15, 1977) (statement of Sen. Baker).

163. Senator Muskie, in describing the conference report, stated the following in floor debate:

> The Congress must have adequate siting, engineering, and environmental information and analysis on each proposed Federal project, as well as on modifications recommended by reviewing agencies, in order to review the available alternatives to and potential adverse impacts of the proposed discharges. The Administrator [of EPA] will be expected to see that the section 404(b)(1) guidelines are sufficiently explicit to focus attention on those aspects of Federal project dredge and fill material discharges [in the construction of the new projects] that could result in environmental degradation. And the Administrator must assist other agencies by carefully reviewing draft [EISs] to assure that the guidelines are being interpreted and implemented properly.

123 Cong. Rec. 39,188 (Dec. 15, 1977).

164. As Senator Muskie explained:

> The depth and quality of discussion of the effects of discharges, including consideration of the (b)(1) guidelines, are crucial to the operation of new subsection (r). The filing of an impact statement adequately exploring these issues is a condition precedent to the operation of subsection (r). Until and unless adequate impact statements, or amendments to statements, are circulated and filed in accordance with [NEPA] and the (b)(1) guidelines, the permit requirements of section 404 ... will remain in full force and effect as to any given project in question. The process of review of environmental impact statements by other agencies should provide the same degree of coordination now provided in the interagency review of permit applications.

123 Cong. Rec. 39,188 (Dec. 15, 1977) (emphasis added). Speaking in support of the conference committee report, Representative Roberts noted: "Congress is to have the benefit of all the necessary information when it makes a decision. It is emphasized that the failure of a project to meet these requirements will result in the project having to obtain a section 404 permit." 123 Cong. Rec. 38,970 (Dec. 15, 1977). The courts have split on whether private parties having standing to challenge the adequacy of EISs for legislative proposals. See Chamber of Commerce of U.S. v. Dep't of the Interior, 439 F. Supp. 762 (D.D.C. 1977); Wingfield v. OMB, 7 E.L.R. 20,362 (D.D.C. 1977) (no standing); Atcheson, Topeka & Santa Fe Ry. Co. v. Callaway, 431 F. Supp. 722 (D.D.C. 1977) (standing); see also D. Mandelker, NEPA Law & Litigation § 4:21 (1984). In Andrus v. Sierra Club, 442 U.S. 347 (1979), the Supreme Court ruled that agencies need not complete an EIS on appropriation requests. However, Congress has specifically mandated that an agency seeking a § 404(r) exemption must either accompany authorization or appropriation requests with an EIS applying the 404(b)(1) guidelines. See quoted text, above note 160. While an agency would be free under Andrus to not file an EIS with an appropriation request for a project within U.S. waters, it would lose any right to a § 404(r) exemption and

Unless a Corps project meets the criteria for exemption under the § 404(r), § 313 of the Clean Water Act subjects the Corps, along with other federal agencies, to the requirements of § 404.[165] The Corps acknowledges this requirement in its regulations.[166] However, while the Corps must go through the same notice and comment process as other permit applicants, it need not issue itself a permit; instead, it issues a "statement of findings" supporting the proposed discharge.[167]

C. General Permits

A key part of the 1977 Amendments' attempt to reduce the perceived burdens of 404 regulation was section 404(e), authorizing the Corps to issue "general permits" on a state, regional, or nationwide basis, thereby exempting certain categories of activities from the individual permit requirement.[168] Only activities "similar in nature" and having minimal individual or cumulative adverse effects may be authorized by general permits.[169] General permits must comply with the 404(b)(1) guidelines and contain management standards.[170] They are limited to five years duration and may be modified or revoked at any time.[171]

The Corps has issued 26 nationwide permits,[172] covering discharges associated with such activities as fish harvesting, bank stabilization, minor road crossing fills, and bridge building.[173] Nationwide permittees must satisfy a number of conditions that make a variety of activities ineligble for authorization under nationwide permits, including discharges in the proximity of public water supply intakes, in areas of concentrated shellfish production, jeopardizing endangered or threatened species or modifying their habitat, significantly disrupting the movement of indigenous aquatic species, with toxic pollutants, in designated or proposed national Wild and Scenic Rivers, or impairing reserved tribal rights.[174] In addition, in some states individual water quality certification and coastal zone management consistency must be secured.[175]

Also authorized by nationwide permit are discharges occurring in wetlands smaller than 10 acres located above the "headwaters" of nontidal waters (where streamflow is less than 5 cubic feet per second) or in "isolated waters" not part of a surface tributary system.[176] These permits exempt from individual permit coverage some 17 million acres of wetlands in the contiguous states, thereby authorizing around 40,000 discharges annually.[177] Not surprisingly, they have proved to be quite controversial. When first proposed, EPA declared that "nationwide permits for classes of waters, in addition to categories of activities, has no basis and is inconsistent with congressional intent."[178] Section 404(e)(1) limits the issuance of general permits, nationwide or otherwise, to activities "similar in nature."[179] The National Wildlife Federation settlement did reduce the scope of these authorizations by reinstituting the 10-acre limit and also requiring pre-discharge notification for discharges causing the "loss of or substantial adverse modification" to wetlands between 1 and 10 acres.[180] Nevertheless, the statute nowhere authorizes exempting entire classes of waters from the requirement of obtaining individual permits.

There is also question whether the entire general permit program meets the statutory requirement that activities permitted under the program produce only "minimal cumulative adverse effects,"[181] especially in view of the alarming

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would have to seek a permit.

165. Section 313 provides that:

> [e]ach ... instrumentality ... of the Federal government ... engaged in any activity ... which may result in the discharge or runoff of pollutants ... shall be subject to and comply with, all Federal, State, interstate, and local requirements ... respecting the control and abatement of water pollution in the same manner, and to the same extent as any non-governmental entity.

33 U.S.C. § 1323 (1982).

166. 33 C.F.R. § 209.145(b)(1) (1987). These regulations were prompted by Save Our Sound Fisheries Ass'n v. Callaway, 387 F. Supp. 292, 306 (D.R.I. 1974) ("Congressional intent that the permit issuance procedures apply to Corps projects is ... clear from Section 301(a) of the FWPCA").

167. Id. at § 209.145(f)(1)(vii). See Minnesota v. Hoffman, 543 F.2d 1198, 1204, n.20 (8th Cir. 1976) (the Corps' regulations provide "a procedure functionally equivalent to permit issuance for its own dredging projects").

168. 33 U.S.C. § 1344(e)(1).

169. Id.

170. Id.

171. 33 U.S.C. § 1344(e)(2).

172. See 33 C.F.R. § 330.5.

173. Id. at §§ 330.5(a)(4) (13-15).

174. Id. at §§ 330.5(b) (1-5, 7, 10).

175. Id. at §§ 330.7(a)(10, (2), (5).

176. Id. at § 330.5(a)(26) (authorizing discharges into waters above the "headwaters" and "isolated" waters except those causing "the loss or substantial adverse modification" of 10 acres or more). See also id. § 330.2(b) (definition of "headwaters").

177. See Nagle, above note 85, at 237; Tomasello, Section 404 of the Clean Water Act: Risks of Regulatory Reform, 58 Fla. Bar. J. No. 4, at 232 (1984).

178. Letter from William N. Hedeman, Jr. to Major General E.R. Heiberg III (Dec. 31, 1980), quoted in Nagle, above note 177, at 247.

179. 33 U.S.C. § 1344(e)(1); see Blumm, above note 82, at 483-84. The Corps appears to have amended the statute by authorizing general permits for activities "substantially similar" in nature. 33 C.F.R. § 322.2(f)(1).

180. See above note 83 and text accompanying note 89.

rate of wetland loss -- up to 450,000 acres annually, according to the U.S. Fish and Wildlife Service.[182] Implied in the 5-year limit that Congress attached to its authorization of general permits is the notion that the Corps would periodically review the program to ensure that the permits actually satisfied the congressional mandates of complying with the 404(b)(1) guidelines and producing "minimal cumulative effect."[183] However, when the permits expired in 1987, the Corps simply reissued them, with no discussion of why its experience with the permits showed they satisfied the statutory standards.[184] If the Corps' assertions of regulatory jurisdiction must be based on thorough study,[185] its regulatory abdications warrant no less.[186] Because only some permittees are required to notify the Corps of their proposed discharge activities,[187] the Corps is poorly equipped to gather information on numerous activities authorized by nationwide permits, let alone those authorized by regional and "programmatic" permits[188] and "letters of permission."[189] There is simply no way to know whether the general permit program is functioning as Congress intended.

Corps District Engineers have the authority to modify, condition, and override general permits to ensure greater environmental protection.[190] The conditions limiting the applicability of nationwide permits have eliminated some particularly damaging activities from that program.[191] And the courts have generally interpreted narrowly the scope of the nationwide permits, at least where the government is pursuing an enforcement action.[192] Still, as in the case of the 404(f) exemptions,[193] the general permit program reduces section 404 to a position of having to react to the decisions of a myriad of private decision makers, usually after they have undertaken an alteration to the aquatic environment. In effect, the general permit program reverses the burden of taking action that otherwise is imposed on a permit applicant. It is a peculiar regulatory scheme that saddles itself with such a burden, explainable in large measure by the Corps' long history of ambivalence toward the 404 program.[194] Given the costs of the current general permit program in annual wetland losses, it seems badly in need of overhaul.

D. State Programs

In addition to the statutory exemptions and the Corps general permits, state permit programs were part of the 1977 congressional compromise that maintained broad geographic jurisdiction but sought to limit the accompanying regulatory burden. In waters other than traditionally navigable waters, states may displace Corps permitting if EPA ascertains that the state program satisfies a detailed set of statutory criteria.[195] EPA promulgated state program approval

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181. 33 U.S.C. § 1344(e)(1).

182. See Barton II, above note 84, at 374.

183. 33 U.S.C. §§ 1344(e)(1) (compliance with 404(b) guidelines, minimum cumulative effect), (e)(2) (5-year limit).

184. 51 Fed. Reg. at 41,217 (1986) ("We are reissuing the 26 nationwide permits ... as modified and conditioned").

185. See NWF v. Hanson, above note 126 and accompanying text.

186. See W. Rodgers, above note 1, § 412, at 191 (nationwide permits are exemptions by rule in everything but name, transferring individualized permitting into an administrative rule based on a one-time only guess that effects will be minimal).

187. See 33 C.F.R. §§ 330.5(7) (outfall structures), (17) (small hydropower projects), (21) (surface coal mining activities), (26) (activities above the "headwaters" and in "isolated" waters between 1 and 10 acres). See also id. § 330.7 (notification procedures for activities above the "headwaters" and in "isolated" waters, requiring 20 days advanced written notice to the Corps prior to discharge).

188. Only nationwide permits are issued through notice and comment rulemaking and published in the Corps regulations. 33 C.F.R. §§ 325.2, 330. Regional permits are issued by Division or District Engineers, after public notice. Id. §§ 325.2(e)(2), .5(c)(1), .3(b). "Programmatic" permits are a type of general permit "founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program," id. § 325.5(c)(2). While the Corps' regulations restrict activities authorized by general permits to those causing minimal individual and cumulative environmental impacts, they seem to have eliminated the requirement that activities be "similar" in nature (or "substantially similar," see above note 179) when the general permit is one designed to avoid "unnecessary duplication of regulatory control." See 33 C.F.R. §§ 322.2(f), 323.3(h).

189. Letters of permission are "a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation but without the publishing of an individual public notice." 33 C.F.R. § 325.2(e)(1). See also id. § 325.5(b)(2).

190. Id. § 325.7.

191. See above notes 174-75 and accompanying text. See also Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985) (dam not eligible for nationwide permit because of distant downstream effects on endangered whooping crane habitat).

192. See U.S. v. Wickard, 718 F.2d 1094 (4th Cir. 1983); U.S. v. Lambert, 589 F. Supp. 366, 371 (M.D. Fla. 1984); U.S. v. Winters, No. EC 82-155-LS (W.D. Miss. June 4, 1984) (all ruling discharges ineligible for authorization under the "headwaters" nationwide permit).

193. See above note 158 and accompanying text.

194. See above § I.

195. 33 U.S.C. §§ 1344(g)-(h). For an overview of the statutory and regulatory requirements of state 404 programs, see 404 Program

regulations in 1979 which only one state, Michigan, has managed to satisfy.[196] The principal reasons for the lack of state interest are a lack of federal grant money to administer the program and the fact that the Corps' general permit program exempts numerous activities from individual permits. Thus, there is less interest among the regulated to eliminate the federal presence than there was in the case of the National Pollutant Discharge Elimination System, authorized by section 402 of the Clean Water Act, where over 30 state programs have received EPA approval. Nevertheless, the Task Force on Regulatory Relief thought the lack of state programs was due to the stringency of the EPA approval regulations and directed EPA to revise them to make it easier for states to obtain approval.[197] Whether the new rules induce a state rush to implement section 404 remains uncertain.[198]

Although not authorized to approve state 404 programs, the Corps has attempted to employ its general permit program to effectively substitute state regulatory programs for 404 regulation, an effort which seems to have subsidized somewhat in the wake of the National Wildlife Federation Settlement.[199] Statewide programmatic permits could effectively undermine EPA's role in approving state 404 programs, as well as the statutory standards Congress established for program approval in section 404(g) and (h).[200] Nevertheless, Corps regulations still authorize such permits and do not appear to reflect the statutory requirement that the authorized activities be similar in nature.[201]

III. Permit Criteria

This section reviews the process by which 404 permits are issued and the standard governing their issuance. Because the decision whether to issue a 404 permit is often the result of the opinion of an agency other than the Corps, the substance of the regulatory program is tied closely to the procedures by which permits are reviewed. Thus, the consultation and review procedures required by the Fish and Wildlife Coordination Act warrant special attention. The section also examines substantive permit criteria, such as the duty to consider alternatives and the findings required by the 404(b) guidelines. Also considered is the recent administrative controversy over the force and effect of the guidelines, as well as recent judicial interpretations. Finally, some 404 program peculiarities, such as "after the fact" permits and interagency agreements are assessed.

A. Permit Procedures In General

1. Individual Permits

Individual 404 permits are issued both in advance of and after a discharge occurs.[202] General permits are issued on a regional basis by Corps Districts under procedures similar to individual permits.[203] Nationwide permits, of course, employ a different path, notice and comment rulemaking.[204] Permit applicants must submit their proposals to the local Corps' District Engineer[205] who notifies interested parties and the general public,[206] decides whether to hold a hearing,[207] and analyzes the environmental effects of the proposal in an environmental assessment (EA).[208] If the action may have a significant effect on the quality of the human environment, an environmental impact statement (EIS) is prepared.[209] Based on the analysis of the EA and/or EIS, the District Engineer decides whether and under what conditions to grant the permit.[210] Where either EPA, the Fish and Wild-

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Perspective, above note 27, at 454-60.

196. 44 Fed. Reg. 32,918 (1979) (now codified at 40 C.F.R. § 233) (consolidated regulations for state programs under §§ 402 and 404 of the Act). On Michigan's program, see id. § 233.42; see also Harrington, Michigan 404 Program Assumption, 7 Nat'l Wetlands Newsletter No. 1, at 10-11 (1985).

197. See Barton I, above note 15, at 245.

198. Revised state program approval rules were promulgated on June 6, 1988, 53 Fed. Reg. 20,764. Their principal inducement for states is a relaxed federal oversight policy whereby EPA will waive federal oversight of categories of discharges. See 53 Fed. Reg. 20,784 (to be codified at 40 C.F.R. § 233.51). EPA explained that it intends to employ this waiver to focus only on proposed discharges with potentially serious adverse environmental effects, noting that in Michigan (the only state with an approved 404 program) only 1% of permit applications received federal review in 1985 and only about 1.5% in 1986. 58 Fed. Reg. 20,772.

199. See Barton I, above note 15, at 245 (reporting that the count in the National Wildlife Federation suit concerning statewide general permits was dismissed because the Corps had made "little headway in issuing such permits, and that the Corps claims most" of those apply only to certain actions and only in certain waters).

200. 33 U.S.C. §§ 1344(g), (h). In particular, such permits may not ensure that authorized activities comply with the 404(b) guidelines.

201. 33 C.F.R. §§ 322.2(f), 323.3(h), 325.5(c)(3). See above notes 179, 188.

202. 33 C.F.R. §§ 325.8, 326.3(e).

203. Id. §§ 325.2(e)(2), .5(c)(1).

204. Id. §§ 325.5(c)(2), 330.

205. Id. § 325.1.

206. Id. § 325.3(d).

207. Id. §§ 325.2(a)(5), 327.4.

208. Id. §§ 230.7(e), .9, 230 App. B.

209. Id. §§ 230.6, 230 App. A. See National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4332(2)(C) (§ 102(2)(C) of the National Environmental Policy Act). However, Corps decisions to prepare EISs on permit applications are relatively rare. For example, in 1986 the Corps prepared only 20 EISs on some 10,000 proposals. See Baldwin, CEQ Supports the Corps on NEPA, Nat'l Wetlands Newsletter (July/Aug. 1987), at 2.

210. 33 C.F.R. § 325.4 (permit conditions must be "directly related to the impacts of the proposal, appropriate to the scope and degree of

life Service, or the National Marine Fisheries Service objects to the proposal, additional administrative procedures take place.[211]

2. "After-the-Fact" Permits

Applicants may also apply for "after the fact," retroactive permits to cure discharges made illegally without a permit. Upon discovering an illegal discharge, the District Engineer must conduct an investigation[212] and, if the activity is still in progress, issue a cease and desist order.[213] After consulting with other federal agencies, the District Engineer may either recommend legal action against the discharger or request that the discharger apply for an "after the fact" permit.[214]

After-the-fact permits pose a number of troublesome issues. These post-hoc ratifications of illegal discharges conflict with the concept of a regulatory program grounded on assessing the impacts of activities before they take place. Their widespread use is perhaps attributable to the Corps' regulations which actually seem to instruct District Engineers to presume after-the-fact permits are the appropriate response to unauthorized discharges, not formal enforcement procedures.[215] Questions persist about whether such authorizations, termed a "policy of mass amnesty" by one commentator,[216] could possibly satisfy the permit criteria contained in the 404(b)(1) guidelines,[217] and whether they serve to insulate the discharge from citizen suit enforcement.[218]

These questions have received little judicial attention.[219] The leading case is a First Circuit opinion briefly addressing when the Corps may refuse to accept an after-the-fact permit application, sustaining a Corps refusal to consider such an application until the discharger complied with a cease and desist order requiring restoration of the area to its wetland condition.[220] The court ruled that the Corps regulations "clearly require that remedial work be completed before the Corps will accept an after-the-fact permit application."[221]

While perhaps after-the-fact permits are simply a reflection of hard realities of administering a permit program regulating numerous diverse activities, by failing to supply specific

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those impacts, and reasonably enforceable"). See also id. § 325.4(a)(3) (authorizing both on-site and off-site mitigation conditions for "significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment"). See also id. § 320.4(r) (Corps general mitigation policy).

211. See below notes 245-52 and accompanying text.

212. 33 C.F.R. § 326.3(b).

213. Id. § 326.3(c)(1).

214. Id. § 326.3(e).

215. See 33 C.F.R. § 326.3(e).

> [f]ollowing the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines ... (i) ... restoration ... has been completed, ... (ii) ... legal action is appropriate ..., (iii) a Federal, state, or local authorization ... has already been denied, [and/or] (iv) enforcement litigation ... has been initiated ....

(Emphasis added.) The regulations note that civil penalties are appropriate in the case of violations which are "willful, repeated, flagrant, or of substantial impact." Id. at § 326.5(a).

216. W. Rodgers, above note 1, § 4.13, at 217.

217. 33 C.F.R. § 326.3 (1987) (requiring after-the-fact permits to comply with the 404(b)(1) guidelines).

218. While a permit puts a discharger in compliance with the Clean Water Act from the date of its issuance, see § 404(p), 33 U.S.C. § 1344(p), the Supreme Court recently ruled that citizen suits had to be based on good faith allegations of intermittent or ongoing violations. Gwaltney v. Chesapeake Bay Foundation, 108 S. Ct. 376 (1987). Since the good faith allegation is measured from the time of the notice of intent to file a suit, a subsequently issued after-the-fact permit would not defeat the suit, although it might heavily influence the penalty imposed.

219. See, e.g., Quinones Lopez v. Coco Lagoon Development Corp., 562 F. Supp. 188 (D.P.R. 1983) (sustaining the issuance of an after-the-fact permit issued without public hearings or a state coastal zone certificate); U.S. v. Alleyne, 454 F. Supp. 1164 (S.D.N.Y. 1978) (holding that an illegal discharge was entitled to an evidentiary hearing on the issues of whether he should be issued an after-the-fact permit, despite the fact he never applied for such a permit and whether the Corps had improperly selected defendant for enforcement based on race).

220. U.S. v. Cumberland Farms of Connecticut, 826 F.2d 1151 (1st Cir. 1987).

221. Id. at 1163: "When [the defendant] refused to comply with the Crops remedial order, and instead continued further destruction of the wetland, the Corps was within its rights, and indeed was left with no other recourse, but to seek judicial enforcement of the remedial restoration order, rather than to process administratively an after-the-fact permit." The court's "no other recourse" language is an overstatement, as whether to require remedial measures before considering an after-the-fact permit is discretionary with the Corps. See id. § 326.3(d)(1) ("If the district engineer determines ... that initial corrective measures are required, he should issue an appropriate order"). Cumberland Farms stands for the proposition that the Corps has discretion to refuse to consider an after-the-fact permit until corrective measures have been taken, but not that it must do so.

criteria governing their issuance,[222] the Corps has encouraged dischargers to pursue a form of "self help for the impatient"[223] that undermines the integrity of the permit program.

B. The Public Interest Review

Since the late 1960s, all Corps of Engineers regulatory programs have governed by the Corps' public interest review.[224] This broad-based balancing of a host of economic and environmental factors has been described as a "parody of standardless administrative choice."[225] Yet while it authorizes Corps District Engineers to weigh a panoply of values on a case-by-case basis, the public interest review is not entirely without standards that curb administrative discretion. Some of these limits are imposed by the Corps regulations, others by interagency consultation requirements. This section examines each in turn.

1. The Corps' Balancing Act

The heart of the public interest review is the Corps' commitment to perform a "careful weighing" of the "benefits which may reasonably be expected to accrue" from a proposed discharge against its "reasonably foreseeable detriments."[226] Assuming that District Engineers possess the wisdom of Solomon, the Corps regulations promise that this balancing will consider public and private need for the project, alternative locations and means of accomplishing the objective where there exist unresolved resource use conflicts, effects on public and private uses, cumulative impacts, and some 20 other factors ranging from environmental concerns to energy needs to "considerations of property ownership."[227] All of these factors are evaluated reflecting "the national concern for both protection and utilization of important resources," and results, reportedly, are permit decisions that serve "the needs and general welfare of the people,"[228] an archetypical New Deal decision-making litmus that seems humorously anachronistic in an era that long ago rejected the New Deal paradigm of dispassionate agency expertise.[229]

Yet while review of decision making under this apparently open-ended charter is predictably of the "soft glance" variety,[230] courts have found some limits to public interest balancing.[231] Others are evident in the Corps' regulations, which require permit denial for discharges into "important" wetlands unless the benefits to the discharge outweigh the damage to the wetlands resource, applying 404(b) guidelines.[232] Overcoming this presumption of no discharge requires a reasoned administrative record[233] and probably absence of dissent from other resource agencies.[234] The limits that the

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222. Some years ago, a recommendation was made that the Corps regulations take into account the size of the fill, the value of the wetlands, and the good faith of the applicant. See Blumm, above note 82, at 487 n.97.

223. W. Rodgers, above note 1, § 4.13, at 217.

224. See above notes 17-19 and accompanying text. In addition to issuing 404 permits, the Corps issues permits for dams and dikes in navigable waters under section 9 of the 1899 Rivers and Harbors Act (33 U.S.C. § 401), see 33 C.F.R. § 321; for structures or work in or affecting navigable waters under § 10 of the 1899 Act (33 U.S.C. § 403), see 33 C.F.R. § 322; and for the transportation of dredged material for the purpose of ocean disposal under section 103 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. § 1413), see 33 C.F.R. § 324.

225. W. Rodgers, above note 1, § 4.12, at 205. Accord, Mall Properties v. Marsh, 672 F. Supp. 561, 566 (D. Mass. 1987).

226. 33 C.F.R. § 320.4(a).

227. Id.

> ... All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.

228. Id.

229. See, e.g., Gifford, The New Deal Regulatory Model: A History of Criticisms and Refinements, 68 Minn. L. Rev. 299 (1983).

230. E.g., Environmental Coalition of Brorward County v. Myers, 831 F.2d 984, 986 (11th Cir. 1987) (deferential judicial review especially appropriate given the complexity of the Clean Water Act and Corps decision making involving balancing under the public interest review). On "soft glance" review, see generally W. Rodgers, above note 1, at § 3.2.

231. Mall Properties v. Marsh, 672 F. Supp. 561 (D. Mass. 1987) (Corps cannot reject a permit for mall exclusively on economic competition grounds where the economic concerns were unrelated to the project's environmental impacts, relying on Metropolitan Edison v. PANE, 460 U.S. 766 (1983)).

232. 33 C.F.R. § 320.4(b)(4). Wetlands "performing functions important to the public interest" include those serving significant biological functions such as habitat, nesting, spawning, rearing and resting sites for wildlife; those set aside for study; those performing drainage, flood control, recharge and water purification functions; and those unique in nature or scarce in the local area. Id. § 320.4(b)(2).

233. Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 1031 (2d Cir. 1983) (enjoining the Corps initial decision on the Westway Highway).

Corps' presumption against wetland fills imposes on public interest balancing are not yet clear, but denial of other required federal, state, and local authorizations clearly requires 404 permit denial.[235] On the other hand, other permit approvals tilt the public interest balancing toward permit issuance.[236] And, although public interest balancing requires a consideration of alternatives,[237] the Corps will, with the blessing of the Council on Environmental Quality (but over EPA's objection) apparently limit its consideration to alternatives to granting the permit, not alternative projects.[238] This will surely result in fewer Corps EISs, as it constricts the "small federal handle" rule by which a federal permit requirement effectively federalized the entire project for NEPA purposes.[239] Limiting the scope of alternatives may also skew the public interest balancing toward applicant visions of the purpose and need for projects.[240]

2. Interagency Consultation

Consultation requirements have been a hallmark of Corps regulation since 1967[241] but proved to be quite controversial in the 1980s.[242] They are a critical aspect of the 404 program's ability to protect wetlands, since the agencies with the most wetlands expertise -- the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and state fish and wildlife agencies -- are not authorized permit agencies. Moreover, the public interest review frequently involves the Corps in socioeconomic decisions far beyond its traditional navigation expertise.[243] Thus, the Corps must often rely on the participation of state and federal fish and wildlife agencies and EPA for assistance in assessing the costs and benefits of proposed activities. The Corps regulations acknowledge this dependence by guaranteeing "full consideration" to the views of the federal and state fish and wildlife agencies.[244] However,

234. See below notes 253-56 and accompanying text.

235. 33 C.F.R. § 320.4(j). However, it is Corps policy to attempt to eliminate "duplicative" permit processing by issuing general "programmatic" permits, or, where not practice, to develop joint permit processing procedures. Id. § 320.4(b)(5). Denial of state water quality or coastal zone management consistency certification produces 404 permit denial unless EPA or the Secretary of Commerce, respectively, overrides the state denial. Id. §§ 320.4(d), (h).

236. Id. §§ 320.4(j)(2), (4) (absent "overriding national factors of public interest" 404 permits generally issued after state and local approval; federal authorizations entitled to "substantial consideration").

237. The requirement to consider alternatives whenever there are unresolved resource conflicts springs from § 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(E).

238. Current Corps regulations, 33 C.F.R. § 230 App. B ¶ 8.a, require the Corps to consider "whether or not the entire project subject top the permit requirement could have significant effects on the environment." However, in 1984 the Corps proposed changes narrowing its environmental analysis to those effects produced by granting the permit, limiting its consideration of the need for the permit, not need for the project, and similarly curbing its evaluation of alternatives. 49 Fed. Reg. 1387-99 (1984). This proposal was prompted by two circuit court decisions, Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980), cert. denied, 449 U.S. 900 (1980) (Corps need only assess the impacts of a 1.25-mile transmission line crossing a navigable river and not the impacts of the entire 67-mile line); and Save the Bay, Inc. v. Corps of Engineers, 610 F.2d 322 (5th Cir. 1980), cert. denied, 449 U.S. 900 (1980) (Corps issuance to a chemical manufacturing plant of a pipeline construction permit was not a "major federal action," in part because EPA had already issued an NPDES permit). However, EPA objected to the proposed changes, citing its need for information on project impacts and reasonable alternatives to fulfill its duties under § 404 and § 309 of the Clean Air Act, 42 U.S.C. § 7609 (giving EPA authority to review and comment on all federal unsatisfactory actions to the Council on Environmental Quality), and referred the matter to CEQ (see 40 C.F.R. § 1504) which sided with the Corps, although it did rule that they must analyze alternatives to non-water dependent uses, as required by the 404(b) guidelines, below notes 257-59 and accompanying text. See generally Baldwin, EPA Refers Proposed Corps NEPA Procedures to CEQ, Nat'l Wetlands Newsletter (May/June 1985) at 3-5; Baldwin, CEQ Supports Corps on NEPA, Nat'l Wetlands Newsletter (July/Aug. 1987) at 2-3.

239. See D. Mandelker, NEPA Law & Litigation § 8.16 (1984).

240. An applicant's economic objectives may limit the scope of alternatives. South Louisiana Environmental Council v. Sand, 629 F.2d 1005, 1017 (5th Cir. 1980); National Wildlife Federation v. Marsh, 586 F. Supp. 985, 1000 (D.D.C. 1983).

241. See above notes 15-16 and accompanying text.

242. See above notes 80-84 and accompanying text.

243. See, e.g., Mall Properties v. Marsh, above note 231.

244. 33 C.F.R. § 320.4(c). Between 1973 and 1984, the Corps attached "great weight" to these views, see 33 C.F.R. § 209.120(g)(4) (1974) and 33 C.F.R. § 320.4(c) (1977). "Great weight" was transformed into "full consideration" in the 1984 regulations implementing the National Wildlife Federation Settlement, 49 Fed. Reg. 39,478, 39,482 (1984). The Corps explained the change was necessary to more accurately reflect the language of the Fish and Wildlife Coordination Act and NEPA. 49 Fed. Reg. at 39,478 (1984). While stating in the preamble to its 1986 regulations that "[i]t is not our intention to reduce or discount the value or expertise of fish and wildlife agency comments or those of any other experts in any field," 51 Fed. Reg. at 41,207, the Corps declared in its 1986 regula-

in the early 1980s the perceived need to expedite permit processing undermined this guarantee and prompted a number of interagency battles between the Corps and the reviewing agencies.

Expediting permit processing was a concern of the 1977 Amendments, which responded to allegations that interagency consultation produced lengthy permit delays by requiring section 404(q) interagency agreements to speed permit processing.[245] Memoranda of Agreement were signed between the Corps and reviewing agencies in 1980,[246] but these were revised in 1982 in the wake of the President's Task Force on Regulatory Reform to substantially reduce the reviewing agencies opportunities to invoke administrative appeals.[247] Reviewing agency dissatisfaction with these limits, along with congressional pressure, forced revisions in 1985.[248] However, while the new agreements make administrative appeals more possible,[249] discretion to grant or deny an appeal remains with the Assistant Secretary of the Army, and only one level of appeal is possible.[250] Thus, if EPA and the Corps disagree over how to apply the 404(b) guidelines to a particular discharge, and the Assistant Army Secretary denies EPA's request for review, EPA's only recourse is to invoke permit veto procedures under section 404(c).[251] And the only recourse of a federal or state fish and wildlife agency is to convince EPA to institute 404(c) proceedings.[252]

It is true that, while the Corps must give "full consideration" to the views of federal and state fish and wildlife agencies, ultimately the Corps need not agree with their conclusions.[253] Nevertheless, the written records produced as a result of the consultation process are critical not only to assist EPA in ascertaining whether a project complies with the 404(b) guidelines or merits a 404(c) veto, but also in facilitating judicial review. Courts increasingly employ these records to determine whether the Corps has complied with section 404 as well as other statutory requirements.[254] For example, there is a welter of cases finding violations of the National Environmental Policy Act where administrative records reflect reviewing agency opposition.[255] Thus, through artful use of the con-

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tions that whether to accord any permit issuance factor "great weight" will be discretionary. 33 C.F.R. § 320.4(a)(3) (1987). Acknowledging the expertise of the fish and wildlife agencies may not be the same as according their comments "great weight" in determining all permit decisions. Notice that federal permit approvals are accorded "substantial consideration," above note 236.

245. 33 U.S.C. § 1344(q); see above note 66 and accompanying text.

246. For a review of some of the difficulties the agencies encountered in reaching the 1980 agreements, see 404 Program Perspective, above note 27, at 443-45.

247. See above notes 78-80, 84 and accompanying text.

248. See, e.g., letter from G. Ray Arnett, Ass't Sec. of Interior for Fish and Wildlife to Robert K. Dawson, Acting Ass't Sec. of the Army for Civil Works (Nov. 7, 1984), discussed in Barton I, above note 15, at 242. On the congressional pressure, see above note 90.

249. See text accompanying above note 91.

250. See EPA and FWS Sign New § 404(q) MOAs With Army, Nat'l Wetlands Newsletter (Jan./Feb. 1986) at 2-4.

251. Memorandum of Agreement Between the Environmental Protection Agency and the Dep't of the Army (Nov. 12, 1985). To enable EPA to invoke its veto authority under section 404(c) (see below § IV.A), the agreement requires the Corps to supply EPA with a written record at least 10 days prior to the discharge. Id. at 5 ¶ 8.

252. The agreement between the Fish and Wildlife Service and the Corps does require the Corps to require permit applications for compliance with the Council on Environmental Quality's mitigation regulation (40 C.F.R. § 1508.20), see Nat'l Wetlands Newsletter, above note 250, at 4, but it does not clarify whether the regulation implies a "sequencing" of mitigation techniques (e.g., to prefer avoiding impacts altogether over minimizing impacts by limiting the action, and to prefer minimizing impacts over restoration efforts, operating conditions, and supplying substitute resources).

253. Sierra Club v. U.S. Army Corps of Engineers (Westway II), 772 F.2d 1043, 1054 (2d Cir. 1985) (only "serious consideration" warranted); River Road Alliance v. Corps of Engineers, 764 F.2d 445, 452 (7th Cir. 1985); Texas Committee on Natural Resources v. Marsh, 736 F.2d 262 (5th Cir. 1984).

254. See, e.g., Sierra Club v. U.S. Army Corps of Engineers (Westway I), 701 F.2d 1011, 1021-24 (resource agency opposition), 1030-31 (NEPA violation), 1032-33 (404 violation) (2d Cir. 1983); Westway II, 772 F.2d at 1053 (NEPA and 404 violations, despite fulfilling consultation requirements); National Wildlife Federation v. FERC, 801 F.2d 1505 (9th Cir. 1986) (violations of Federal Power Act and Northwest Power Act); Washington Dep't of Fisheries v. FERC, 801 F.2d 1516 (9th Cir. 1986) (violations of the Federal Power Act and Fish and Wildlife Coordination Act; Coordination Act imposes a duty to consider and respond); Confederated Tribes v. FERC, 746 F.2d 466 (9th Cir. 1984), cert. denied, 105 S. Ct. 2358 (1985) (violations of Federal Power Act, NEPA, the Northwest Power Act, and the Coordination Act; Coordination Act imposes an affirmative duty on action agency to consult with fish and wildlife agencies -- mere notice insufficient). For an analysis of the latter case, see Blumm, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 Harv. Envtl. L. 1, 34-46 (1986).

255. Oregon Natural Resources Council v. Marsh, 820 F.2d 1051 (9th Cir. 1987), cert. granted, ___ S. Ct. ___ (1988) (EIS inadequate); Northwest Indian Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986) (EIS inadequate; violations of state water quality standards); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) (Environmental Assessment inadequate); The Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985) (Environmental Assessment inadequate);

sultation process, fish and wildlife agencies can help achieve NEPA's neglected goal of elevating the position of agencies with environmental expertise.[256]

D. The 404(b) Guidelines

First published in the wake of the Calaway decision in 1975,[257] and then subjected to vigorous collateral attack by the Corps under the guise of regulatory reform,[258] the 404(b) guidelines are now the chief environmental criteria governing the 404 program.[259] The Corps acquiesced to their binding nature as part of the National Wildlife Federation settlement and promulgated regulations to that effect.[260] 404 permits may not be issued for discharges that do not comply with the guidelines, although the Corps may also deny permits to activities that comply with the guidelines based on its public interest review.[261] The guidelines and the public interest review are therefore independent grounds for permit denial.

1. Basic Requirements

Unlike the Corps' public interest review, which emphasizes utilitarian balancing, the premise of the 404(b) guidelines is that discharges will not be authorized unless shown not to have an unacceptable adverse impact on the aquatic ecosystem.[262] To implement this precept, the guidelines establish a revolutionary presumption against discharges where there exist practicable alternatives having a less damaging impact on the aquatic ecosystem, so long as the alternative does not have other significant environmental consequences.[263] "Practicable alternatives" are a function of cost, technical and logistic factors; although they must be capable of achieving the basic purpose of the proposed activity, the lack of property ownership does not necessarily determine what is practicable.[264] Discharges into "special aquatic sites," like wetlands, for non-water dependent uses are presumed to have practicable alternatives.[265] The guidelines declare that "the guiding principle should be that degradation or destruction of special aquatic sites may represent an irretrievable loss of valuable aquatic resources.[266] In addition, they expressly prohibit certain types of discharges[267] and forbid any discharge causing or contributing to "significant degradation of the waters of the United States."[268] Also proscribed are all discharges unless "appropriate and practicable" mitigation measures have been taken.[269]

To effectuate these presumptions and limitations, the guidelines require documented factual determinations of the potential short- and long-term effects of proposed discharges on the aquatic environment,[270] including cumulative

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Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1984) (EIS required); Foundation for North American Wild Sheep v. U.S. Dep't of Agriculture, 681 F.2d 1172 (9th Cir. 1982) (EIS required).

256. 42 U.S.C. § 4332(2)(C).

257. See above notes 46-48 and accompanying text.

258. See above notes 74-77 and accompanying text.

259. 40 C.F.R. § 230.

260. See 33 C.F.R. §§ 320.4(a)(1), .4(b)(4), 323.6(a), 325.2(a)(6), .3(c)(2), fulfilling National Wildlife Federation v. Marsh, 14 Envtl. L. Rep. 20,262, 20,264 ¶ 18 (D.D.C. Feb. 11, 1984).

261. 33 C.F.R. § 320.4(b)(4); see also 40 C.F.R. § 230.10 (note). The guidelines are promulgated "in conjunction with" the Corps, 33 U.S.C. § 1344(b)(1), a directive unique in U.S. environmental law.

262. 40 C.F.R. § 230.1(c) (unacceptable adverse impacts include both individual and cumulative impacts).

263. Id. § 230.10(a) (areas not presently owned by the applicant must be "reasonably" obtainable).

264. Id. §§ 230.10(a)(1), (2).

265. Id. § 230.10(a)(3) ("Where the activity associated with a discharge which is proposed for a special aquatic site ... does not require access or proximity within the special aquatic site to fulfill its basic purpose (i.e., is not 'water dependent') practicable alternatives that do not involve special aquatic sites are presumed to exist unless clearly demonstrated otherwise.") Special aquatic sites are areas "possessing special ecological characteristic of productivity, habitat, wildlife protection or other important and easily disrupted ecological values ... significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region." Id. §§ 230.3(g-1). In addition to wetlands, they include sanctuaries and refuges, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. Id. §§ 230.40-.45.

266. Id. § 230.10(b) (discharges causing or contributing to violations of state water quality standards, violating toxic effluent standards of prohibitions, jeopardizing the continued existence of endangered or threatened species or resulting in the likely destruction or adverse modification of their critical habitat, or violating a requirement imposed to protect a marine sanctuary).

267. Id. § 230.1(d).

268. Id. § 230.10(c) (including significant adverse effects on (1) human health and welfare, (2) life stages of aquatic life and other wildlife dependent on aquatic ecosystems, (3) aquatic ecosystem diversity, productivity and stability, and (4) recreational, aesthetic, and economic values).

269. Id. § 230.10(d). Mitigating conditions include both alternative locations and operating conditions, including water releases from dams for fish and wildlife needs and water quality controls in dredging operations. Id. §§ 230.70-71.

270. Id. § 230.11. See id. §§ 230.20-.25 (potential physical and chemical effects), 230.30-.32 (potential biological effects), 230.40-.45 (potential effects on special aquatic

effects.[271] Before any 404 permit may be issued, specific findings of compliance with the guidelines must be made,[272] a requirement the Corps formerly found particularly objectionable.[273] While ultimately acceding their binding nature,[274] the Corps has succeeded in exacting from EPA an acknowledgment that the Corps may interpret the guidelines.[275] Thus, EPA may not use its interpretation of the guidelines to override a Corps permit decision outside the context of a formal permit veto under section 404(c).

The 404(b) guidelines, it should be noted, do not simply govern the issuance of individual Corps permits, they also apply to general permits,[276] permits issued under approved state 404 programs,[277] and federal projects exempted from 404 permit requirements by section 404(r).[278] In short, they constitute, as one court noted, the yardstick by which all significant discharges are scrutinized.[279]

2. Judicial Interpretation

The 404(b) guidelines have fared rather well in court. They have been interpreted to proscribe discharges "likely to result in significant loss of or damage to fisheries,"[280] to require 404 permits of dams licensed by the Federal Energy Regulatory Commission,[281] and to bind the Corps.[282] The presumption against discharges for nonwater dependent uses has received favorable judicial treatment, sanctioning Corps permit denials[283] and even leading to a reversal of a Corps decision permitting a fill for a residential development.[284]

The chief controversy has been over whether there in fact are practicable, less damaging alternatives available. In general, the courts have given the Corps wide berth to interpret this requirement, although there is an anomalous decision overturning a Corps permit denial for an industrial park.[285] The guidelines have hardly proved to be a bar to all development, as some applicants have succeeded in defining their project purposes so as to eliminate the availability of practicable alternatives. Consequently, the courts have upheld as consistent with the guidelines wetland losses of considerable magnitude, a 127-acre fill for a New Jersey commercial development,[286] the conversion of 5,200 acres of Louisiana bottomland hardwoods for soybean production,[287] and a 17-acre fill

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sites), 230.50-.54 (potential effects on water supplies, fisheries, recreation, aesthetics, and preserves); see also id. § 230.60-.61 (evaluation and testing procedures).

271. Id. § 230.11(g).

272. Id. § 230.12.

273. See generally Liebsman, above note 74, at 10,274-76 (detailing the Corps' objections to the binding nature and detailed provisions of the guidelines and its efforts to have them revised during 1983).

274. See above note 260 and accompanying text.

275. See EPA/Corps Memorandum of Agreement, above note 251, at 2 (§ 5(d)).

276. 33 U.S.C. § 1344(e)(1), 40 C.F.R. § 230.7 (expressly limiting activities authorized under general permits to those that are similar in nature and similar in their affect on the aquatic environment; also requiring a prediction of the number of discharges likely to take place in order to assess cumulative effects).

277. 33 U.S.C. § 1344(h)(1)(A); see above notes 195-201 and accompanying text.

278. Id. § 1344(r); see above notes 159-67 and accompanying text.

279. Monongahela Power Co. v. Marsh, 809 F.2d 41, 50-51 (N.C. Cir. 1987) ("Section 404 transmits a crisp and unwavering message: all significant discharges, whether or not exempt from the permit requirement must be subjected to Section 404(b)(1) scrutiny or its equivalent").

280. Sierra Club v. U.S. Army Corps of Engineers (Westway II), 772 F.2d 1043, 1050 (2d Cir. 1985) (interpreting 40 C.F.R. §§ 230.1(c), 231.2(e)).

281. Monongahela Power Co. v. Marsh, 809 F.2d 41 (D.C. Cir. 1987), rev'g Monongahela Power Co. v. Alexander, 507 F. Supp. 392 (D.D.C. 1980).

282. Id. at 50; Westway II, 772 F.2d at 1050; Shoreland Assoc. v. Marsh, 555 F. Supp. 169, 179 (D. Md. 1983), aff'd, 725 F.2d 677 (4th Cir. 1984).

283. Buttery v. U.S., 690 F.2d 1170, 1180 (5th Cir. 1982) (affirming permit denial for a stream channelization project and stating, "the Clean Water Act and the applicable regulations do not contemplate that wetlands will be destroyed simply because it is more convenient than not to do so"); Shoreline Assoc., 555 F. Supp. at 169 (nonaquatic site a practicable alternative).

284. Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982) (Corps permit for a quarter-acre fill for two houses and a tennis court remanded because a letter from a realtor claiming that the site was the only one suitable for the project was not a sufficient basis to conclude there were no available alternatives).

285. 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983), which reversed Corps permit denial on the ground that the Corps overemphasized environmental concerns and failed to consider the benefits of increased jobs and tax revenue in its general balancing. The case is explainable by the fact that it predated the Corps' acknowledgment of the binding nature of the 404(b) guidelines (see above note 260 and accompanying text).

286. Nat'l Audubon Society v. Hartz Mountain Development Co., 14 E.L.R. 20,724 (D.N.J. 1983) (feasible alternatives not available because other sites would offer a less attractive marketing package to purchasers; project incorporated mitigating measures but those were deemed insufficient by EPA and federal fish and wildlife agencies).

287. Louisiana Wildlife Federation v. York, 761 F.2d 1044 (5th Cir. 1985) (affirming 6 Corps general permits against charges that the Corps limited its consideration to alternatives that would fulfill the applicant's avowed purpose of

for a log storage and export facility in Washington.[288] These losses have been sustained despite the fact that the guidelines require permit denial for activities producing "significant degradation to the aquatic ecosystem," irrespective of whether there exist practicable alternatives.[289] The problem seems to be in the Corps' interpretation of this directive, which could be cured either by amending the guidelines[290] or through increased use of permit vetoes by EPA.

IV. EPA's Section 404(c) Powers

Permit vetoes, authorized by section 404(c), are a sort of court of last resort. When interagency consultation breaks down, when the Corps denies administrative appeals, and when it interprets the 404(b) guidelines to sanction discharges damaging to the aquatic ecosystem, EPA has the authority to veto permit issuance. Section 404(c) has been a relatively unused provision, but it is now receiving a good deal of attention, and reliance on it will surely increase in the future. In addition to authorizing permit vetoes, section 404(c) also authorizes EPA to identify areas unsuitable for discharge in advance of any permit application, a kind of proactive zoning power not typically assigned to a federal agency. This section considers both the reactive and proactive sides to section 404(c), along with the most notorious 404(c) action to date, the Sweeden's Swamp fill.

A. Permit Veto Authority

Section 404(c) was enacted in 1972 as part of the compromise that allowed the Corps to retain its permit authority. Uneasy with authorizing the nation's largest dredger to regulate discharges of dredged or fill material, Congress established EPA's oversight role in sections 404(b) and (c).[291] Under section 404(c), EPA may prohibit discharges within specified areas when it determines, after public notice and an opportunity for a public hearing, as well as consultation with the Corps, there would be an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas."[292] This broad charter confirms EPA's role as the chief 404 agency[293] and equips it with unprecedented, if largely overlooked, federal authority to protect aquatic wildlife habitat.

The regulations implementing section 404(c) direct EPA to consider relevant portions of the 404(b) guidelines when considering a 404(c) action,[294] since a basic function of section 404(c) is to police application of the guidelines.[295] Consequently, avoidability of resource loss is a relevant 404(c) inquiry.[296]

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increasing soybean production and failed to consider alternative economic uses not envisioned by the applicant, reasoning that the guidelines imposed a duty to take into account the objectives of the applicant; not all requested fills were permitted, some mitigating measures were included; and EPA did not object). See Fifth Circuit Upholds Corps Permits to Clear Bottomland Hardwoods, Nat'l Wetlands Newsletter (Sept./Oct. 1985) at 19.

288. Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986) (affirming a Corps after-the-fact permit where alternative sites were rejected as either too costly or logistically infeasible; EPA and fish and wildlife agencies did not oppose the permit because it was conditioned on a mitigation agreement committing the applicant to acquire substitute wetlands). See Ortman, Ninth Circuit Upholds Corps Issuance of After-the-Fact Permit, Nat'l Wetlands Newsletter (Nov./Dec. 1986) at 11.

289. 40 C.F.R. § 230.12(a)(3)(ii); see also id. §§ 230.10(b), (c); Westway II, above note 280 and accompanying text.

290. One potential approach was suggested by the plaintiffs in the York litigation, above note 287: to prohibit wetland fills for non-water dependent uses unless the applicant demonstrates no economically viable uses, irrespective of the proposed project. Alternatively, the guidelines could reinstate a version of the requirement contained in § 230.5(b)(8) of the 1975 guidelines that sanctioned wetland fills "only when it can be demonstrated that the site is the least environmentally damaging alternative." See Monongahela Power v. Marsh, 809 F.2d at 52 n.100.

291. See Senate Comm. on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 117 (Comm. Print 1973) (joint conference report):

> The Conferees were uniquely aware of the process by which dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the committee did not believe that there could be any justification for permitting the Secretary of the Army to make the determination as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site. Thus, the Conferees agreed that the Administrator of the [EPA] should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.

292. 33 U.S.C. § 1344(c).

293. See above note 72 and accompanying text (describing the Civiletti opinion).

294. 40 C.F.R. § 231.2(e).

295. 44 Fed. Reg. 58,078 (1979) (preamble).

296. 50 Fed. Reg. 33,835, 33,836 (1980) (Proposed Determination to Prohibit or Restrict the Specification of an Area for Use as a Disposal Site; Notice of Public Hearing -- "It is appropriate under section 404(c) to take into

However, EPA has used section 404(c) to veto only 5 permits in 15 years,[297] in part because uncertainty over the force and effect of the 404(b) guidelines,[298] and in part because of the relatively low priority accorded the 404 program within EPA, at least until recently. As the Sweeden's Swamp controversy illustrates, EPA is prepared to be a much more aggressive implementer of 404(c) in the future.

B. The Sweeden's Swamp Veto

The controversy over the Sweeden's Swamp fill illustrates the tension between EPA and the Corps, and their divergent interpretations of when practicable alternatives are available and the circumstances under which mitigation in the form of substitute resources can justify a discharge. The controversy arose when a developer, Pyramid Companies, decided to construct a shopping mall in the Attleboro, Massachusetts area.[299] Pyramid surveyed available sites, including one in North Attleboro containing only one acre of wetlands, but decided to purchase Sweeden's Swamp, a 49-acre red maple swamp which EPA, the Fish and Wildlife Service, and the New England Division of the Corps determined furnished excellent wildlife habitat. In July 1984, Pyramid applied to the Corps for a permit to fill 32 cares of the swamp, proposing to mitigate the loss by attempting to convert 9 acres of uplands into a marsh and to create another 36 acres off-site at a gravel pit some 2 miles away.

EPA objected to issuance of the permit, and the Corps' New England Division initially indicated it would deny the permit based on the availability of the North Attleboro site. However, because that site was subsequently purchased by a competing developer, the Corps' Deputy Director for Civil Works directed that the permit be issued. He further determined that because of Pyramid's proposed mitigation measures, no other site could be environmentally preferable.[300] EPA's Regional Administrator recommended a veto on grounds of adverse wildlife effects and the availability of alternative sites.[301] EPA headquarters agreed, reasoning that (1) even if Pyramid's wetland creation plan was entirely successful, the new wetlands would adversely effect wildlife; (2) this loss was "unacceptable" within the meaning of section 404(c) because it was avoidable through use of an available alternative; and (3) the North Attleboro site was available to Pyramid, even though it was subsequently purchased by another developer, because the determination of availability is not limited to the time of permit application but includes the developer's entire site selection process.[302] According to

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account whether the loss of the resource is avoidable." Id. at 33,836).

297. The first veto was the North Miami landfill in 1981. In 1984, EPA vetoed another permit at the M.A. Norden site in Mobile, Alabama, see EPA Final 404(c) Determination on Mobile Bay Disposal Site Issued, Nat'l Wetlands Newsletter (July/Aug. 1984) at 6. In 1985, 3 more vetoes took place: the Jack May bank site of Jehosse Island, South Carolina, the Bayou Aux Carpes site in Jefferson Parish, Louisiana, and Sweeden's Swamp. See Pending EPA Proposals Under Section 404(c) of the Clean Water Act, Nat'l Wetlands Newsletter (Mar./Apr. 1984) at 7; 52 Fed. Reg. 29,431, 38,519 (1987) (notices of proposed § 404(c) vetoes in Hackensack Meadowlands, N.J. and Taylor Slough, near Miami, FL).

298. See above notes 47-48, 86 and accompanying text.

299. See generally EPA Issues Final § 404(c) Determination Prohibiting Filling of Sweeden's Swamp, Nat'l Wetlands Newsletter (July/Aug. 1986) at 10-12; Liebsman, The "Sweedens Swamp" Controversy -- Focusing on EPA's Role in the Clean Water Act § 404 Program, Nat'l Wetlands Newsletter (Nov.-Dec. 1987) at 15; see also 51 Fed. Reg. 22,977 (1986) (Final Determination of the Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site); 50 Fed. Reg. 33,835-33,836 (1985).

300. See 50 Fed. Reg. 33,836 (1985) (see above note 296). The reasoning went as follows:

> If mitigation measures can fully compensate for all adverse impacts of a proposed discharge on the aquatic environment, then the adverse effects of [that] ... discharge ... [are] zero. Since no alternative could have [a] less adverse environmental effect than zero, 100 [percent] mitigation would allow the satisfaction of the ... guidelines requirement, even if a practicable upland alternative site might be available.

Eggert, Out With the Old, In With the New: The Corps' Controversial Interpretation of the § 404(b)(1) Guidelines, Nat'l Wetlands Newsletter (Sept./Oct. 1985), at 3; see also 33 C.F.R. § 320.4(r) (1987) (Corps' mitigation policy). The Corps regulations state that this mitigation policy is not a substitute for the mitigation requirements in the 404(b)(1) guidelines, and note that an interagency working group is developing guidance to implement the guidelines' mitigation requirements. 33 C.F.R. § 320.4(r) n.1.

301. See EPA Issues Final § 404(c) Determination, above note 299, at 11. Pyramid sought unsuccessfully to overturn the Regional Administrator's decision, arguing that he had taken too long to make his decision. See Bersani v. Deland, 640 F. Supp. 716 (D. Mass. 1986) (neither the Clean Water Act nor applicable regulations place a time limit on the Regional Administrator). Earlier, Pyramid unsuccessfully sought to persuade a different district court to enjoin the initiation of 404(c) proceedings. Newport Galleria Group v. Deland, 618 F. Supp. 1179 (D.D.C. 1985).

302. 51 Fed. Reg. 22,977 (1986); see EPA Issues Final § 404(c) Determination, above note 299, at 11-12:

> Whether the North Attleboro site is or is not the best site within the trade

EPA, given the primitive state of wetland creation science, mitigation measures based on man-made wetlands cannot substitute for analysis of available alternative sites, since such a policy would encourage developers to turn first to the uncertain technology of wetland creation, replacing established, naturally functioning wetlands with man-made creations of questionable value.[303] These determinations were upheld as reasonable by a district court in late 1987 and affirmed by the Second Circuit in mid-1988.[304]

The Sweeden's Swamp result shows a decided judicial deference to EPA. Three district courts in three different circuits all declined to interfere with EPA's 404(c) determinations.[305] Thus, EPA may employ 404(c) to conduct an independent evaluation to override aberrant interpretations of the 404(b) guidelines by the Corps, such as its conclusion that wetlands loss accompanied by compensation of man-made mitigation could be the environmentally preferred alternative.[306] Moreover, judicial ratification of EPA's "market entry" test to judge the availability of alternative sites and sanction of EPA's hard look at the feasibility of alternatives make 404(c) a potent vehicle for wetlands protection.[307] Whether EPA will invoke 404(c) on a regular basis, and whether the Corps will recognize the precedents established in 404(c) proceedings in its interpretation of the 404(b) guidelines remain key, unanswered questions.[308]

C. 404(c) Prospective Prohibitions

Section 404(c) also enables EPA to identify areas unsuitable for dischargers before a discharge is proposed.[309] These prohibitions, referred to as "advanced identifications" by EPA, could supply an important means to protect critical aquatic areas prior to the development of site specific controversies and would also help to increase predictability of 404 regulation.[310] Prospective use of 404(c) in this manner could be encouraged by areawide studies conducted under the National Wetlands Inventory[311] or state coastal zone management programs.[312] The 404(c) regulations ought to enable federal and state agencies and members of the public to submit petitions for prospective

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area from a specific applicant's perspective is not the issue. The practicable alternatives test requires only that other sites be feasible, not that they be equal or better. Neither the Act nor the Guidelines require an applicant to probe the availability of a site that the applicant believes is unsuitable for its project. That is a judgment for the applicant to make. But in making that judgment, the applicant runs the risk that the marketplace will call into question the determination of unsuitability, and that the applicant will then be left without proof that the alternative site was also unavailable. That is the case here.

303. EPA's reasoning went as follows:

> To accept [mitigation] under these conditions would ... encourage developers to seek novel mitigation measures, not alternatives, and would undermine the predictability of the permit process. We would find ourselves drawn, as in this case, into assessments of mitigation approaches for which we will be able to make, at best, only qualitative judgments based on uncertain knowledge. As the technology develops, there might well be a case in which even offsite, out of kind wetland creation would be so beneficial and so reliable as to justify an exception. This plainly is not the case here.

Id. at 12. For a review of the state of the art in wetland mitigation, see Focus on Mitigation Nat'l Wetlands Newsletter (Sept./Oct. 1986); see also Kunz, Rylko & Somers, An Assessment of Wetland Mitigation Practices in Washington State, Nat'l Wetlands Newsletter (May-June 1988) at 2 (finding, among other things, that 35 planned mitigation projects between 1980 and 1986 still resulted in a substantial loss of wetland acreage and diversity, that mitigation designs were not effectively incorporated into 404 permits, and that monitoring was sparse).

304. Bersani v. U.S. E.P.A., 674 F. Supp. 405 (N.D.N.Y. 1987), aff'd sub nom., Bersani v. Robicand, ____ F.2d ____, 56 U.S.L.W. 2724 (2d Cir. 1988).

305. According to the Corps/EPA Memorandum of Agreement, the Corps retains the authority to interpret the 404(b) guidelines, see above note 260 and accompanying language.

306. See above note 300.

307. See Liebsman, above note 299, at 16-17 (noting also, however, that the case leaves unanswered how far back in time an applicant must search under the "market entry" test).

308. EPA is in the process of revising its 404(c) regulations to make 404(c) vetoes procedurally less cumbersome.

309. 33 U.S.C. § 1344(c) ("the Administrator is authorized to prohibit the specification ... of any defined area as a disposal site ..."); see 40 C.F.R. § 231.1; see also id. § 230.80 (tentative identification of sites).

310. See Cooper, Wetlands or Wastelands?, Nat'l Wetlands Newsletter (July/Aug. 1985) at 4-5; Nagle, above note 85, at 49-50.

311. See Barton II, above note 84, at 381-82; 404 Regulation: A Response, above note 82, at 479-80 (advocating use of wetland maps for regulatory purposes).

312. On the relationship between state coastal planning and 404 regulation, see Blumm, Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency, 5 Colum. J. Envtl. L. 69 (1978) (state coastal zone plans cannot eliminate application of 404(b) guidelines).

prohibitions and establish a process for evaluating the merits of the petitions. However, to date EPA has yet to devote the resources necessary to make 404(c) an effective vehicle to designate high value wetlands and special aquatic sites unsuitable for discharges, although a recent effort undertaken in York County, Maine offers hope for the future.[313]

V. Enforcement

Enforcement cases increasingly occupy center stage in 404 regulation, not surprising for a program with around 400 cases pending in mid-1987.[314] Section 404 divides enforcement responsibilities between EPA and the Corps, restricting the latter to permit violations.[315] Only EPA possesses authority to enforce against unauthorized discharges[316] which constitute by far the largest bulk of enforcement cases.[317] The 1987 amendments to section 404 expanded the enforcement powers of both the Corps and EPA to include imposition of administrative penalties,[318] but the amendments left the general division of enforcement authority intact. Remedies for violations include injunctive relief, including restoration orders, and civil and criminal penalties. In addition to government-initiated enforcement, citizens may institute enforcement actions. This section surveys the chief 404 enforcement issues.

A. Detecting Violations

The intergovernmental nature of the 404 program is nowhere better illustrated than in enforcement. In addition to the division of enforcement powers between EPA and the Corps, federal and state fish and wildlife agencies are frequently the motivating forces behind enforcement actions, since they often first detect alleged violations.[319] Corps regulations encourage reporting of violations by other agencies and the public; also encouraged are joint surveillance procedures.[320] Aerial surveillance is not uncommon,[321] and search warrants to confirm suspected discharges not unprecedented.[322]

Once a violation is detected, both EPA and the Corps may issue cease and desist orders prohibiting further discharges and perhaps ordering initial corrective measures.[323] The Corps' regulations instruct District Engineers to consult EPA, federal fish and wildlife agencies, and other interested agencies for advice on the appropriate nature of these corrective measures.[324] The Corps may nevertheless ratify an illegal discharge by issuing an after-the-fact permit, but not without applying the 404(b) guidelines, and not if EPA or any other federal, state or local agency is pursuing enforcement action, unless "clearly appropriate."[325]

B. Restoration Orders

Injunctions to restrain discharges are the usual remedy sought by government enforcement actions,[326] but because of cease and desist authority possessed by both EPA and the Corps, there is less urgency to obtain temporary equitable relief. Instead, the focus is on permanent relief, often including restoration orders. Restoration orders, by which the courts direct unauthorized dischargers to remove their fills or replace the aquatic resources destroyed by their activities, were first authorized in section 12 of the 1899 Rivers and Harbors Act.[327] They supply an important means to carry out the Clean Water Act's policy of preserving and restoring the physical and biological integrity of the nations waters,[328] which the legislative history makes clear includes protection and restoration of wetlands.[329]

Since injunctive relief is not automatic for violation of Clean Water Act permit requirements,[330] neither is an order to restore the environment. Nevertheless, courts have issued

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313. See Shields, Wetlands Advance Identification Program in Southern Maine, Nat'l Wetlands Newsletter (Jan.-Feb. 1988) at 2.

314. Oral remarks of Peggy Strand at Conference on the Clean Water Act's Section 404 Program (May 29, 1987, Washington, D.C.).

315. 33 U.S.C. § 1344(s).

316. Authorized discharges, as well as permit violations, are violations of section 301(a) of the Act, 33 U.S.C. § 1311(a), subject to EPA's enforcement authority under § 313, 33 U.S.C. § 1319.

317. Remarks of Ms. Strand, above note 314.

318. See § 314 of the Water Quality Act of 1987 (Pub. L. No. 100-4).

319. See, e.g., Matter of Alameda County Assessor's Parcels, 672 F. Supp. 1278, 1279 (N.D. Cal. 1987); U.S. v. Larkins, 687 F. Supp. 76, 83 (W.D. Ky. 1987); U.S. v. Edwards, 667 F. Supp. 1204, 1207 (W.D. Tenn. 1987).

320. 33 C.F.R. § 326.3(a).

321. See, e.g., U.S. v. Larkins, 657 F. Supp. 76, 82-83 (W.D. Ky. 1987); U.S. v. Rivera Torres, 656 F. Supp. 251, 251 (D.P.R. 1987); U.S. v. Edwards, 667 F. Supp. 1204, 1207 (W.D. Tenn. 1987).

322. See, e.g., Matter of Alameda County Assessor's Parcels, 672 F. Supp. 1278, 1286-87 (N.D. Cal. 1987) (sanctioning a search warrant for EPA under § 308 of the Act, 33 U.S.C. § 1318).

323. See 33 U.S.C. §§ 1319(a)(3) (EPA authority), 1344(s)(1) (Corps authority).

324. 33 C.F.R. § 326.3(d).

325. Id. §§ 326.3(e)(2), (e)(1)(iv).

326. See, e.g., U.S. v. Rivera Torres, 656 F. Supp. 251 (D.P.R. 1987); U.S. v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984). Section 309(b) of the Clean Water Act authorizes both temporary and permanent injunctions. 33 U.S.C. § 1319(b).

327. 33 U.S.C. § 406.

328. Id. § 1251(a).

329. Sen. Comm. on the Environment, Legislative History of the Clean Water Act Amendments of 1977, 95th Cong., 2d Sess. 532 (committee explanation), at 869-70 (Comm. Print) (statement of Sen. Muskie).

330. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (§ 402 permit violation does not automatically warrant injunction).

restoration orders with some frequency.[331] The usual prerequisite is a government restoration plan that confers maximum environmental benefits, is feasible, and is equitably related to the aquatic damage inflicted.[332] the equities often demand only partial restoration;[333] and sometimes restoration has been denied when the advance of federal jurisdiction confused both the discharger and the Corps,[334] when the court determined discharge to be de minimus,[335] or where there was no specific restoration plan submitted.[336] However, plans meeting the criteria above are regularly imposed upon illegal dischargers.[337]

C. Civil Penalties

The remedial nature of restoration orders is complemented by the authority to seek civil penalties which clearly include a punitive element.[338] A number of courts have imposed penalties in excess of $50,000, largely for deterrent effect.[339] However, often a civil penalty is a means to ensure that restoration work is completed: by reducing or eliminating the penalty under completion of the work, courts command the discharger's attention to remedial measures.[340]

Judicial imposition of civil penalties will become more complex in the wake of the Supreme Court's decision in Tull v. U.S., where the Court ruled that the Seventh Amendment guarantee -- that all common law suits involving more than $20 be tried before a jury -- requires a jury trial on the issue of whether civil penalties should be imposed.[341] According to the Court, civil penalties are intended, at least in part, to punish;[342] they therefore are analogous to common law actions in debt which necessitated jury trials.[343] But while the issue of whether to impose civil penalties, the Court made plain that the amount of the penalty remains in the discretion of the trial judge.[344] Tull means that imposition of civil penalties will require more litigation resources, but dischargers are unlikely to benefit significantly. First, the result should not affect the imposition of administrative penalties which the 1977 amendments authorized.[345] Second, it clearly makes no change regarding injunctive relief such as restoration orders.[346] It is possible, however, that Tull might make less likely the imposition of alternative relief, whereby substantial civil penalties are forgiven upon completion of remedial work.[347]

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331. See generally W. Rodgers, above note 1, § 4.13 at 212-16; Want, above note 12, at 46-51 (1984) (provides thorough discussion of pre-1984 § 10 and § 404 cases).

332. The most well-known restoration cases are the Fifth Circuit's trilogy, U.S. v. Sexton Cove Estates, 526 F.2d 1293, 1301 (5th Cir. 1976); Weiszmann v. District Engineer, 526 F.2d 1302 (5th Cir. 1976), later decision, 489 F. Supp. 1331 (M.D. Fla. 1980); U.S. v. Moretti, 526 F.2d 1306 (5th Cir. 1976).

333. U.S. v. Context-Marks Corp., 729 F.2d 1294 (11th Cir. 1984) (restoration orders should be based on examination of environmental factors and practicalities); U.S. v. Sunset Cove, Inc., 514 F.2d 1089 (9th Cir. 1975); U.S. v. Sexton Coves, 526 F.2d (5th Cir. 1976); U.S. v. Lambert, 589 F. Supp. 366 (M.D. Fla. 1984).

334. Buccaneer Point Estates v. U.S., 729 F.2d 1297 (11th Cir. 1984).

335. U.S. v. Lambert, 589 F. Supp. at 373.

336. U.S. v. MCC of Florida, 772 F.2d 1501 (11th Cir. 1985).

337. U.S. v. Edwards, 667 F. Supp. 1204 (W.D. Tenn. 1984); U.S. v. Larkins, 657 F. Supp. 76 (W.D. Ky. 1987): U.S. v. Tull, 615 F. Supp. 610 (E.D. Va. 1983), rev'd on other grounds, 107 S. Ct. 1831 (1987); U.S. v. Cumberland Farms, 647 F. Supp. 1166 (D. Mass. 1986).

338. See Tull v. U.S., 107 S.Ct. 1831, 1838 (1987) (relying on the 1977 legislative history and EPA's penalty to conclude that Congress intended civil penalties to serve retributive and deterrent functions as well as compensatory; retribution to be based on seriousness of violation and lack of good faith).

339. See, e.g., U.S. v. Conrad, 745 F.2d 30 (11th Cir. 1984) (affirming a penalty of $100,000); U.S. v. Tull, 769 F.2d 182 (4th Cir. 1985 (affirming a penalty of $325,000), rev'd, 107 S. Ct. 1831 (1987); U.S. v. Cumberland Farms of Connecticut, 647 F. Supp. 1166 (D. Mass. 1986) ($150,000); U.S. v. Ciampitti, 669 F. Supp. 684 (D.N.J. 1987) ($235,000).

340. See, e.g., U.S. v. Larkins, 657 F. Supp. 76 (W.D. Ky. 1987) ($40,000 penalty, to be forgiven if restoration complete within 6 months); U.S. v. Lambert, 589 F. Supp. 366 (M.D. Fla. 1984) ($50,000 penalty reduced to $25,000 upon completion of restoration work by date certain).

341. 107 S. Ct. 1831 (1987). See U.S. Const. amend. VII. ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....")

342. See above note 338.

343. 107 S. Ct. at 1838-39 (also distinguishing civil penalties from public nuisance where the remedy is usually injunctive relief).

344. Id. at 1839-40.

345. See above note 318 and accompanying text. In Atlas Roofing v. OSHA, 430 U.S. 442 (1977), the Court determined that imposition of administrative penalties did not require a jury trial, as by authorizing such penalties Congress so did not intend "to choke the already crowded federal courts." Id. at 455. See Openchowski, Changing the Nature of Federal Enforcement of Environmental Laws, 17 Envtl. L. Rep. 10,304, 10,307-10 (1987) (also suggesting that Tull might produce greater reliance on negotiated settlements).

346. One court did employ Tull to conclude that, because they are retributive in nature, civil penalties do not survive the death of the discharger. However, his estate was nevertheless liable for restoration measures. U.S. v. Edwards, 667 F. Supp. 1204, 1214-15 (W.D. Tenn. 1987). Note that because the Seventh Amendment does not apply to the states, Minneapolis & St. L. R.R. v. Bondbolis, 241 U.S. 211 (1916), Tull should have no effect on state enforcement.

D. Citizen Suits

While citizen suits have proved critical to compelling the Corps to recognize and maintain the scope of the 404 program,[348] the citizen role in enforcement has not been as prominent as elsewhere in the Clean Water Act.[349] This may be explainable by the fact that 404 enforcement often turns on whether in fact a discharge occurred in a "water of the United States," while most enforcement actions claiming violations of section 402 involve no such arguable terms.[350]

The Supreme Court's recent decision in Gwaltney v. Chesapeake Bay Foundation, where the Court ruled that citizens could not bring suits based wholly on past violations,[351] is unlikely to affect 404 citizen enforcement.[352] Illegal discharges of dredged or fill material remain statutory violations until they are permitted; they therefore are not past, but present violations of the statute.[353] However, two other recent decisions, one ruling that the Corps cannot be compelled to enforce its permit conditions,[354] and the other denying judicial relief in the absence of government enforcement efforts,[355] are potentially severe limitations to effective citizen enforcement.

VI. The Takings Issue

The Fifth Amendment prohibition against the taking of private property for public use has always lurked in the background of 404 regulation.[356] Once it became clear that jurisdiction extended beyond the traditional navigability confines, permit denials could no longer be insulated from scrutiny under the takings clause by the obscure navigation servitude doctrine.[357] Since the theory behind the takings clause is that justice and fairness limit the burdens society can impose on individual property owners,[358] the issue in 404 regulation is: when has a permit denial transgressed those ideals so that compensation is due? To date, judicial declarations of takings due to 404 permit denial have been virtually nonexistent.[359] Nevertheless, recent Supreme Court rulings are sure to encourage increased allegations of regulatory takings.[360] This section examines the taking issue and 404 regulation in the context of these developments.

A. 404 Takings Jurisprudence

404 takings claims seeking monetary compensation in excess of $10,000 are heard initially in the Claims Court, not federal district courts.[361] Until 1986, the leading 404 takings

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347. See above note 340 and accompanying text. At least one jury has found a landowner-developer had unlawfully discharged fill into wetlands in western Pennsylvania, see Miller, Jury Finds Defendant in Violation of Clean Water Act § 404, Nat'l Wetlands Newsletter (Jan.-Feb. 1988) at 8.

348. See above §§ I.C and F (discussing NRDC v. Callaway and NWF v. Marsh).

349. See Meir, 'Citizen Suits' Become a Popular Weapon In the Fight Against Industrial Polluters, Wall St. J., Apr. 17, 1987 at 17 (discussing the "citizen suit campaign" under § 402 of the Clean Water Act); Thomas, Citizen Suits and the NPDES Program: A Review of Clean Water Act Decisions, 17 Envtl. L. Rep. 10,050 (1987); see generally J. Miller, Citizen Suits: Private Enforcement of Federal Pollution Control Laws (1987); Comment, The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 Northwestern U.L. Rev. 220 (1987).

350. See Thomas, above note 349 (discussing suits where permit noncompliance is based on the permittee's own periodic discharge monitoring reports).

351. 108 S. Ct. 376 (1987) (good faith allegations of intermittent or ongoing violations necessary).

352. See above note 218 and accompanying text.

353. In order to transform a present violation into a past violation, the discharger should have to demonstrate "remedial steps that had clearly achieved the effect of curing all past violations by the time the [citizen] suit was brought." 108 S. Ct. at 388 (concurring opinion of Justice Scalia).

354. Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987).

355. National Wildlife Federation v. Laubscher, 662 F. Supp. 548, 550 (S.D. Tex. 1987) (declining to order restoration or impose a fine for an illegal fill where the Corps and EPA took no enforcement action).

356. U.S. Const., amend. V. See generally D. Callies, F. Bosselman & J. Banta, The Takings Issue (1973); 40 C.F.R. § 233.23 (state 404 program approval requirement that state Attorney General analyze state law of regulatory takings).

357. See W. Rodgers, above note 1, § 4.14 (examining the navigation servitude); see also Kaiser Aetna v. U.S., 444 U.S. 164, 174 (1979) (navigation servitude part of the federal government's commerce power).

358. Agins v. Tiburon, 447 U.S. 255, 263 (1980); Andrus v. Allard, 444 U.S. 51, 65 (1979); see L. Tribe, American Constitutional Law § 9-6 (2d ed. 1988).

359. The only reported case not subsequently overturned to declare the denial of a 404 permit to be a taking was 1902 Atlantic v. Hudson, 543 F. Supp. 1381 (E.D. Va. 1983), discussed in Want, The Takings Defense To Wetlands Regulation, 14 Envtl. L. Rep. 10,169, 10,173-75 (1984) (distinguishing the case on the court's willingness to overrule the Corps on the value of the wetlands at issue, and its faulty rulings on Rivers and Harbors Act jurisdiction and the water dependency test).

360. See below notes 380-86 and accompanying text.

361. The Tucker Act, 28 U.S.C. § 1491, gives the Claims Court (formerly the Court of Claims) exclusive jurisdiction over suits for money damages in excess of $10,000 against the federal

case concerned Deltona Corporation's plans to convert thousands of acres of mangrove wetlands on Marco Island in coastal Florida to "finger-fill" residential development. Deltona was caught in the expansion of 404 jurisdiction, having purchased the property in 1964 and received section 10 permits to develop two of its five tracts prior to enactment of section 404.[362] However, in 1976 the Corps denied 404 permits for two of the three remaining tracts, and Deltona claimed a regulatory taking.[363] The Court of Claims rejected Deltona's assertion, even though conceding that the Corps "substantially frustrated" the developer's "reasonable investment-backed expectations."[364] The court ruled that Deltona failed to show the denial left it with "no economically viable use of its land,"[365] citing the fact that development was foreclosed only on one-third of its total planned lots; even on those tracts denied permits there was sufficient uplands not requiring permits to double Deltona's initial investment.[366] Specifically rejected was Deltona's argument that its property was taken because it was denied its most profitable use.[367] Also rejected was the allegation that the earlier permit approvals created a reasonable expectation of subsequent approvals; the only expectation that was reasonable, according to the Deltona court, was an economical use, looking at the property as a whole.[368]

The Deltona test is one that few frustrated developers can satisfy.[369] Its broad view of the property to be considered in determining whether there is an economically viable use -- accounting for both permitted activities and activities beyond the reach of regulation -- should insulate most 404 decisions from takings clause violations because most permits are not denied outright,[370] and most developers own adjacent uplands. A successful takings claim apparently would require a tract of property almost entirely wetlands, the economic viability of which was wholly dependent on transforming those wetlands.

Such an unusual situation in fact materialized, again in Florida, where a limestone miner wished to transform its suburban Miami wetlands into a lake in the process of its mining operations. Denied a 404 permit, in large measure due to objections by EPA, the Fish and Wildlife Service, and other federal, state, and local agencies,[371] Florida Rock Industries claimed a taking and was awarded over $1 million dollars by a Claims Court judge.[372] This result was overturned by the Federal Circuit in 1986 because, while the 404 permit denial foreclosed mining, it did not inhibit other economically viable uses such as sale of the property. According to the appellate court, the government could successfully defend against a taking if it could show that the burdened property had a fair market value, even if that value was due to speculators willing to purchase the property in the hope that regulatory policies might change in the future.[373]

Although the peculiar value of the limestone wetlands in suburban Miami may foreclose a taking in that situation, and the Federal Circuit's fair market value test is effectively another expansion in how broadly the property at issue is to be characterized, dicta in the Florida Rock decision is sure to encourage other takings claims. In describing the nature of 404 regulation, the court lapsed into the wooden dichotomy of distinguishing between regulation that secures a public benefit from that which prevents a public harm.[374] Worse, the court class-

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government. Claims Court decisions are appealed to the Federal Circuit, 28 U.S.C. § 1295(a)(3).

362. Deltona received one § 10 permit for the Marco River area in 1964, when the Corps' permit criteria was limited to considering likely effects on navigation, and another for the Roberts Bay area in 1969 under the Corps' public interest review. See Deltona Corp. v. U.S., 657 F.2d 1184, 1188 (Ct. Cl. 1981).

363. The Corps denied permits for Barfield Bay and Big Key, while granting permits for development of the Collier Bay tract. Id. at 1188-89.

364. Id. at 1191-92 (relying on Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

365. Id. at 1192 (relying on Agins v. Tiburon, 447 U.S. 255, 260 (1980) and other Supreme Court authority).

366. Id. (noting the existence of 111 acres of uplands with the Barfield Bay and Big Key tracts with a total market value of $2.5 million, while Deltona paid only $1.24 million for all of those tracts).

367. Id. at 1193 (dimunition of value alone insufficient for a taking).

368. Id. at 1192-93 (relying on Penn Central Transp. Co. v. New York City, 438 U.S. at 130-31).

369. In a companion case to Deltona, Jentgen v. U.S., 657 F.2d 1210 (Ct. Cl. 1981), the Court of Claims rejected a similar taking claim based on denial of permits to fill Florida mangroves. The court found no taking because the upper range of the estimated value of the property's uplands (20 acres) and those wetlands that the Corps offered to permit (20 of the 80 acres applied for) was equal to the amount Jentgen originally paid for the property.

370. See, e.g., the Deltona and Jentgen examples, above notes 362 and 369; see also Barton II, above note 84, at 388-89 (in fiscal year 1985 the Corps denied only 365 of 8,500 applications for 404 permits, roughly 4.3%). In effect, when it restricts and conditions permit approvals, the Corps is engaging in a form of "transferable development right" authorization, a concept the Supreme Court approved in Penn Central Transp. v. New York City, 438 U.S. at 137.

371. See Florida Rock Industries v. U.S., 791 F.2d 893, 895 (Fed. Cir. 1986).

372. See id. at 897.

373. Id. at 902-03 (rejecting exclusive reliance on an "immediate use" value); see Meyers, Murky Waters: Florida Rock Revisited, Nat'l Wetlands Newsletter (July-Aug. 1986) at 17.

ified preserving the wetland at issue as falling into the former category, convincing itself that destruction of the wetland would produce no serious water pollution, thus doing "no harm."[375] Reliance on such an artificial dichotomy has led some state courts to conclude that wetland development prohibitions were regulatory takings.[376] The Florida Rock court seemed prepared to countenance a federal extension of this misguided interpretation,[377] despite widespread recognition that wetland fills produce a variety of public harms, including increased flood risks, shoreline destabilization, diminished groundwater recharge, increased sedimentation of surface waters, and damage to commercial and sport fisheries as a result of habitat destruction and food chain alteration.[378] Nevertheless, especially in view of the Supreme Court's recent pronouncements, Florida Rock's legacy is likely to be increased challenges to 404 permit denials as unconstitutional takings. This is especially likely in situations where EPA has exercised its veto authority under section 404(c).[379]

B. Recent Supreme Court Cases

The Supreme Court seems to have ensured a spate of cases alleging takings due to 404 permit denials. First, in Riverside Bayview it instructed courts not to interpret 404 jurisdiction so as to avoid takings claims.[380] Second, in First English Evangelical Lutheran Church v. County of Los Angeles the Court finally approved awarding money damages for temporary regulatory takings.[381] This result will not only encourage takings cases but will focus the litigation in the Claims Court and the Federal Circuit where indications are that some claimants may succeed.[382] Third, the Court has in fact found some regulations to have worked takings.[383] Most of these cases have concerned situations where the regulation seemed to be seizing an easement,[384] disrupting a bargain,[385] or eliminating a "fundamental attribute of property ownership."[386]

In defending 404 regulation in the anticipated welter of takings cases, the government will want to emphasize the distinctions between these cases and the 404 program. First, denials of 404 permits do not represent seizures of property interests, or attempts to secure public benefits without payment. Instead, they are driven by a broad-based set of comprehensive environmental guidelines designed to prevent public harms associated with wetlands losses.[387] In essence, permit denials restrain property uses that are tantamount public nuisances; such regulation, the Court recently affirmed, rarely requires compensation.[388] Second, 404 permit denials hardly involve broken bargains; the geographic scope of the program is now well settled, and the only constitutional guarantee landowners may assert against regulatory programs is denial of economic viability, taking

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374. Id. at 904. For criticism of the public benefit vs. public harm dichotomy, see Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1196-97 (1967) (illustrating the difficulty of classifying regulations as compensable or not according to whether they prevent harms or extract benefits); see also Penn Central, above note 368, at n.43, where the Supreme Court suggested that the "prevention of harm" cases actually "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy ... expected to produce widespread public benefit and applicable to all similarly situated property."

375. 791 F.2d at 904.

376. See, e.g., State v. Johnson, 265 A.2d 711 (Me. 1970).

377. See 791 F.2d at 904. ("Denial of the permit requires [Florida Rock] to maintain at its own expense a facility, the wetlands, which by presently received wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaining such a facility. This appears to be a situation where the balancing of public and private interest is much more deserving of compensation for any loss actually incurred.")

378. See, e.g., Barton II, above note 84, at 373.

379. See above § IV.A. In 404(c) situations, the applicant will have already invested substantial time and expense in the administrative process. Moreover, the record for judicial review will be one in which two government agencies ultimately disagreed in their views of the public interest.

380. See above note 103 and accompanying text.

381. 107 S. Ct. 2378 (1987) confirming the strong signal sent in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), where a four-Justice dissent and a concurrence opinioned that monetary damages should be awarded for regulatory takings.

382. See above note 377 and accompanying text.

383. On the takings cases from the Court's 1986 term, see Large, The Supreme Court and the Takings Clause: The Search For A Better Rule, 18 Envtl. L. 3 (1987).

384. Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987); Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982); Kaiser Aetna v. U.S., 444 U.S. 164 (1979).

385. Kaiser Aetna v. U.S., 444 U.S. at 167 (Corps earlier indicated it had no § 10 permit jurisdiction).

386. Hodel v. Irving, 107 S. Ct. 2076 (1987) (right to transfer); Kaiser Aetna v. U.S., 444 U.S. 164 (right to exclude).

387. In Penn Central Transp. v. New York City, 438 U.S. at 453-55, the Court indicated that broad-based comprehensive planning was less likely to run afoul of the takings clause because it tends to secure an "average reciprocity of advantage."

388. Keystone Bituminous Coal Ass'n v. DeBenedictus, 55 U.S.L.W. 4327, 4332 (1987).

into account all the property at issue.[389] Deltona and Florida Rock indicate that a very broad view of the property will be taken, including upland uses and permitted uses, in ascertaining economic viability.[390] Moreover, EPA's interpretation of the 404(b) guidelines, which requires applicants to focus first on means of accomplishing their project purposes without filling wetlands,[391] should help eliminate some potential takings claims and help answer others. Finally, unlike the right to exclude and transfer, the right to develop has never been held to be a fundamental attribute of property ownership. Given the high social costs associated with ongoing wetlands losses,[392] it ought to be too late in the day to recognize a fundamental right to a wetland fill over government objection.[393]

VII. Conclusion

404 regulation is characterized by a healthy, pluralistic review process, a good deal of regulatory ambivalence, and a considerable amount of intergovernmental tension. Pluralistic review is a consequence of the program's expansive scope, both in terms of geographic jurisdiction and in the great variety of activities it regulates. With such a broad canvass, making permit decisions only after an opportunity for affected individuals and agencies to become involved is an essential to the program's legitimacy.[394] Moreover, pluralistic review improves prospects for identifying practicable, less damaging alternatives, the heart of the permit criteria.[395] While the Corps of Engineers has made some attempts to reduce the influence of comment agencies in permit decisions,[396] the courts have been sensitive to adverse comments by agencies with environmental expertise.[397] This is a healthy development for a program heavily dependent on value judgments about the availability of alternatives, the efficacy of mitigation measures, and the existence or significance of adverse effects on the aquatic environment. The emphasis on 404's pluralistic review process has helped the program overcome some of the problems associated with the regulatory ambivalence that also has been a hallmark of the program.

Nevertheless, 404 regulation has experienced an extremely rocky first fifteen years. In fact, without the aid of the courts, especially the Callaway decision[398] and the National Wildlife Federation settlement,[399] it is unlikely that the program could have survived the hostile reception given it by the Corps. Predictions in the middle 1970s that section 404 would produce a Corps "renaissance"[400] were surely premature, as the "regulatory reform" years soon showed.[401] The Corps has consistently resisted asserting regulatory control over inland wetlands, first claiming a lack of jurisdiction,[402] then attempting a categorical exemption through the general permit program,[403] and most recently, claiming the right to decline to exercise jurisdiction on a case-by-case basis.[404] If the courts ultimately sanction selective assertion of jurisdiction, the program cannot hope to materially reduce the annual rate of wetlands loss.

Just as disturbing as the failure to assert jurisdiction is the approval of large-scale commercial and agricultural developments by allowing applicants to define the project so as to eliminate practicable alternatives.[405] The Sweedens Swamp case does make clear that EPA need not take an applicant's analysis of alternatives at face value.[406] But if the 404 program is to effectively contain wetlands loss, the 404(b) guidelines must be interpreted to forbid significant wetland losses irrespective of whether there are practicable alternatives to particular projects,[407] so long as the applicant retains an economically viable use of its property as a whole.[408] Because the Corps maintains it may interpret the guidelines independent from EPA,[409] such a change will require an amendment to the guidelines.

The guidelines also ought to exercise closer supervision over the Corps' general permits and

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389. See above notes 365, 368, 373 and accompanying text.
390. See above notes 368-69, 373 and accompanying text.
391. See above § III.D.
392. See text accompanying note 378; Barton I, above note 15, at 214 (annual wetland losses of 300,000 to 450,000 acres).
393. See Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) (takings necessarily involve a weighing of public and private interests).
394. See, e.g., above notes 243-44 and accompanying text.
395. See above notes 262-65 and accompanying text.
396. See above note 244 (elimination of "great weight" accorded to the views of federal and state fish and wildlife agencies); above notes 80, 245-50 and accompanying text (limitations on administrative appeals); note 275 and accompanying text (Corps' ability to interpret 404(b) guidelines independent of EPA).
397. See above notes 254-56 and accompanying text.
398. See above § I.C.
399. See above note 89 and accompanying text.
400. See Ablard & O'Neill, above note 13.
401. See above § I.F.
402. See above notes 39-43 and accompanying text.
403. See above notes 81-83 and accompanying text.
404. See above notes 129-37 and accompanying text.
405. See above notes 286-88 and accompanying text.
406. See above note 307 and accompanying text.
407. See above notes 280, 289 and accompanying text.
408. See above notes 290, 365, 373 and accompanying text.
409. See above note 275 and accompanying text.

after-the-fact permits. Since they effectively reverse the burden of proof against discharges,[410] EPA should demand much greater documentation of the anticipated effects of general permits. The guidelines should proscribe reissuance of any general permit unaccompanied by findings, supported by documentation, that previously authorized activities were in fact similar in nature and produced only minimal cumulative impacts.[411] State program general permits warrant special scrutiny on the issue of whether they authorize only similar activities.[412] The guidelines also need to address issuance of after-the-fact permits and clarify that they are not the preferred alternative to undertaking enforcement against unauthorized discharges.[413]

As presently constituted, the ability of the program to reduce wetlands loss is heavily dependent on EPa's ability and willingness to exercise its 404(c) veto authority.[414] Although EPA has indicated it is prepared to veto more permits than it has in the past,[415] an effective regulatory program cannot finally depend upon vetos or threats of vetoes. Veto decisions may also be more vulnerable to takings claims than permit denials.[416] Use of 404(c) in a prospective fashion to protect especially important aquatic areas could avoid some vetoes,[417] especially if a public petitioning process was established,[418] but these designations are likely to be controversial, time consuming and limited to relatively few sites.

The 404 program needs more than use of 404(c) in a prospective manner to adequately preserve the nation's wetland resources, however. The program badly needs congressionally established goals against which to measure the adequacy of administrative implementation. Congress could supply the necessary direction by enacting the following 3 measures: (1) establish a national goal to preserve, protect, and where possible, enhance the nation's wetland acreage; (2) require EPA to annually report on the cumulative losses of wetlands on a nationwide, regional, and statewide basis; and (3) specifically proscribe any discharge or general permit producing a significant loss of wetlands (quantitively and qualitatively).

Ultimately, it is hard to avoid the conclusion that most of the 404 program's problems have to do with the permit issuing agency.[419] While not exactly "a fox in the chicken coup,"[420] the Corps' ambivalence is longstanding and still evident. As recently as 1985, the head of the Corps informed Congress that 404 was not designed to be a wetlands protection program,[421] despite legislative history[422] and Supreme Court authority[423] to the contrary. While "shared custody" of the program has its merits,[424] after fifteen years it seems clear that Congress could have chosen better custodians. Perhaps it is time for Congress to reduce intergovernmental tensions and eliminate regulatory ambivalence by removing the Corps' permit authority, as the Senate nearly did in 1976.[425] This could be accomplished by (1) elevating the role of federal and state fish and wildlife agencies in the permit process, especially in the determination of whether an area is a water of the United States,[426] (2) transferring Corps personnel to EPA and federal fish and wildlife agencies, and (3) increasing grant money to induce states to assume permit responsibilities.[427] These changes need not necessarily increase the cost of administering the program; by reducing intergovernmental tensions, they should reduce the transaction costs of considering most proposed discharges.

In the final analysis, it is not the cost of administering the 404 program that should concern Congress, but the social costs associated with wetland losses on the order of a million acres every three years. Those costs make the current 404 program too expensive to maintain.

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410. See above text between notes 193-94.
411. See above notes 178-89 and accompanying text.
412. See above note 188.
413. See above note 215 and accompanying text.
414. See above § IV.A.
415. See above note 297 (no vetoes until 1981, one each in 1981 and 1984, 3 in 1985).
416. See above note 379.
417. See above § IV.C.
418. See above text following note 312.
419. See Jackson, above note 116, at 9 (arguing that Congress should relieve the Corps of its permit responsibilities).
420. See Power, above note 2.
421. See above note 137 and accompanying text.
422. See above note 329 and accompanying text.
423. See Nagle, above note 85.
424. See notes 108-110 and accompanying text.
425. See above note 51 and accompanying text.
426. Under the National Wetlands Inventory, 33 U.S.C. § 1288(i)(2), Congress has subsidized wetland mapping for over a decade. See Barton II, above note 84, at 381. If these maps are used to make jurisdictional determinations, they could substantially reduce administrative costs.
427. See above text between notes 194-95. There seems to be no compelling reason not to authorize state permit program jurisdiction over all waters, thus entirely displacing Corps 404 permits. In this event, Congress might want to confine Corps § 10 permits (see above note 11 and accompanying text) to navigation concerns, assuming state 404 programs provide opportunity for public and interagency review and comment, apply the 404(b) guidelines, and are subject to EPA veto. See 33 U.S.C. §§ 404(g)-(h).

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