WETLAND PROTECTION AND SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972: A CORPS OF ENGINEERS RENAISSANCE

Charles D. Ablard*
Brian Boru O'Neill**

INTRODUCTION

This article is, in essence, about ecological systems commonly known as wetlands.[1] While it discusses federal and, more specifically, Corps of Engineers jurisdiction over various types of water bodies, its predominant focus is upon wetland protection.

Wetland areas are an endangered natural resource. Approximately one-half of the nation's estuarine salt marshes have been destroyed in the last two centuries.[2] To the uninitiated, a swamp is a swamp. That ignorance has resulted in the wholesale destruction of areas that are vital to food chain production for wetlands inhabitants and for commercially valuable fish and shellfish, and which provide:

1. habitat for various mammals and marsh birds;
2. food sources for migratory birds;
3. study and sanctuary areas;
4. shields from wave action, erosion, and storm damage;
5. storage areas for storm and flood waters;

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* General Counsel, Department of the Army, B.A., University of Oklahoma, 1952, LL.B., 1954, LL.M., George Washington University, 1959. The views expressed herein are those of the authors. We would like to thank Richard Kearney, Esq., for help in developing many of the ideas that follow and Robert Gregg, Esq., William Hedeman, Esq., Vance Hughes, Esq., Jake Lankhorst, Esq., and Ron Stauffer, Esq., for their comments on this article. Readers may assume, however, that our colleagues disagreed with any and all shortcomings that may still exist.

** Assistant to the General Counsel, Department of the Army, B.S., United States Military Academy, 1969, J.D., University of Michigan, 1974.

1. Wetlands include fresh and saline marshes, swamps, bogs, and other low-lying flats and floodplains containing moist soil conditions.

2. THE REPORT OF THE SECRETARY OF THE INTERIOR TO THE CONGRESS, THE NATIONAL ESTUARINE POLLUTION STUDY (1970); San Francisco Bay Conservation and Development Commission, 1970 ANNUAL REPORT; N.Y. Times, July 13, 1970, at 22, col. 7. In 1956, even before the recent coastal building boom, the Department of Interior estimated that 46% of all wetlands had been lost. FISH AND WILDLIFE WETLANDS CIRCULAR 35.

6. recharge areas for ground water;
7. spawning grounds; and
8. large, efficient natural water filtration plants.[3]

Happily, however, a strong national policy has recently emerged that recognizes the importance of saving what wetlands, and other water bodies, still remain. The policy has been expressed by, among others, a President of the United States,[4] an Attorney General of the United States,[5] the House Government Operations Committee of

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3. Scientists and economists are moving closer to the day when dollar amounts can be placed on the value to society of wetlands, N.Y. Times, Jan. 8, 1976, at 24, col. 1. One figure which can now be approximated for some wetland areas is their value as water filtration plants. *E.g.*, Delorme and Wood, *Savannah River Improvement and Environmental Preservation*, L. LAND ECONOMICS 284 (1974) (10,000 acres of wetland near Savannah worth 46.5 million dollars as waste treatment facility for river water and for aquifer).

While the inability to place dollar values on wetlands has resulted in difficulties with cost and benefit analysis, attempts to place dollar values on these resources may, unless placed in proper perspective, create new problems. Mistakes in valuation result in permanent destruction. In addition, the existence of the world as we still have it, of a varied ecosystem that man can live with, not live on, is itself beyond dollar valuation. The concern is that initial attempts at valuation may result initially in unwise use of water resources, which brings to mind Richard Brautigan's fantasy of purchasing a stream in TROUT FISHING IN AMERICA 104 (1964):

> "I'm curious about the trout stream you have for sale. Can you tell me something about it?"
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> . . .
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> "We're selling the waterfalls separately of course, and the trees and birds, flowers, grass and ferns we're also selling extra. The insects we're giving away free with a minimum purchase of ten feet of stream."
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> "How much are you selling the stream for?" I asked. "Six dollars and fifty cents a foot," he said. "That's for the first hundred feet. After that it's five dollars a foot."

A good collection of the numerous wetland studies was presented by the Natural Resources Defense Council in *Hearings on the Development of New Regulations by the Corps of Engineers Before the Subcommittee on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess., No. 94-18, 189 (1975). Also recommended as general works are P. JOHNSON, WETLANDS PRESERVATION (1969); S. SHAW & C. FREIDINE, WETLANDS OF THE UNITED STATES (1956); J. CLARK, FISH AND MAN: CONFLICT IN THE ATLANTIC ESTUARIES (1967); ENVIRONMENT REPORTER MONOGRAPH NO. 20 (1974).

4. PRESIDENTIAL ENVIRONMENTAL PROTECTION MESSAGE, H.R. Doc. No. 247, 92d Cong., 2d Sess. 9 (1972).

5. Speech by William Saxbe, Attorney General, to the Conference on the Protection of Coastal Wetlands, July 18, 1974, Tarpon Springs, Florida:

> [I]f we fail to save the wetlands, we will be losing more than an economic and esthetic asset that can never be re-created. The loss may also signal an impending and crushing defeat in the larger effort to maintain an environment that civilized man can inhabit.

the Congress of the United States,[6] the Congress in the Coastal Zone Management Act,[7] The Estuarine Act,[8] and in the Federal Water Pollution Control Act Amendments of 1972,[9] the National Water Commission,[10] the Environmental Protection Agency[11] and the Corps of Engineers of the Department of the Army.[12] Implementation of this policy will require resolution of many difficult legal and practical issues. The question, however, is no longer whether we protect wetlands, but rather how we do so.

As the result of recent legislation, wetland regulation from a national perspective is now largely the responsibility of the Army Corps of Engineers. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA) were enacted with the purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.[13] A part of the complex and comprehensive scheme created by the FWPCA is Section 404, which authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the disposal of dredged or fill material into navigable waters. In March of 1975 the federal district court for the District of Columbia, in *Natural Resources Defense Council v. Callaway*, interpreted Section 404's mandate to extend to "all waters of the United States,"[14] and, hence, thrust the Army and the

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> [C]oastal wetlands and estuaries are essential for the survival of perhaps three-fourths of our commercial fish and shellfish. The bulk of coastal game fish are also dependent on wetlands. . . .

6. *E.g.*, HOUSE COMM. ON GOV'T OPERATIONS, OUR THREATENED ENVIRONMENT: FLORIDA AND THE GULF OF MEXICO, H.R. REP. NO. 93-1396, 93d Cong., 2d Sess. (1974); INCREASING PROTECTION FOR OUR WATERS, WETLANDS AND SHORELINES, THE CORPS OF ENGINEERS, HOUSE COMM. ON GOV'T OPERATIONS, H. No. 92-1323, 92d Cong. 2d Sess. (1972); HOUSE COMM. ON GOV'T OPERATIONS, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. REP. NO. 91-917, 91st Cong., 2d Sess. (1970).

7. 16 U.S.C. § 1452 (Supp. IV, 1972).

8. 16 U.S.C. § 1221 (1970).

9. Section 101 (a), 33 U.S.C. § 1251 (a) (Supp. IV, 1974) (a goal of the FWPCA is to eliminate the discharge of all pollutants by 1985).

10. NAT'L WATER COMM'N, NEW DIRECTIONS IN U.S. WATER POLICY 73 (1973).

11. 40 Fed. Reg. 41296 (1975).

12. 33 C.F.R. §§ 209.120(f), (g) (1975), particularly (g)(3); *see* 1972 ANNUAL REP. OF THE CHIEF OF ENGINEERS ON CIVIL WORKS ACTIVITIES, VOL. I, at 59.

13. 33 U.S.C. § 1251 (Supp. IV, 1974).

14. 392 F. Supp. 685 (D.D.C. 1975).

Corps into regulation of lakes, rivers, and wetland areas throughout the United States. This decision is important because it enables the federal government, through the Corps, to exert a positive impact upon wetland preservation and upon water quality throughout the nation. At the same time, however, it raises legal questions as to the scope of the term "navigable waters" under the FWPCA and the scope of the federal commerce power with regard to water resource regulation, and also raises the overriding issue of the proper role of the federal and state governments in water resource regulation and land use control. In addition, of course, the decision presents the always present legal and administrative problems associated with the creation of a feasible and effective regulatory program.

I. The History of the Corps of Engineers' Efforts in Water Resource Regulation

Ever since the early days of the Republic the Army Corps of Engineers has been charged with the responsibility of developing and protecting the nation's navigable waterways. While there is no mention in the Constitution of navigable waters or a duty to protect navigable waters, the federal government's "power to regulate commerce with foreign nations and among the several states" was early on interpreted to encompass the power to regulate navigation.[15] The formal regulatory program for navigable waterways dates from 1887, when the Supreme Court in *Willamette Iron Bridge Co. v. Hatch*,[16] held that there was no common law of the United States that prohibited obstructions to navigable waterways. This decision prompted Congress to enact Section 10 of the Rivers and Harbors Act of 1890,[17] which prohibited the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any water of the United States.

Problems with the 1890 Act, and with other federal laws concerning navigation,[18] led to the compilation of all navigation laws in

15. U.S. Const. art. 1, § 8, cl. 3; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

16. 125 U.S. 1, 8 (1888).

17. Ch. 907, § 10, 26 Stat. 454.

18. *See* Section 2 of the Act of June 3, 1896, ch. 314, § 2, 29 Stat. 234; Lecture given by Judge G. W. Koonce, O.C.E. before the Company Officer Class of the Engineer School, Fort Humphreys, Virginia, *reprinted in Water Pollution Control Legislation-1971 (Oversight of*

Sections 9 through 20 of the Rivers and Harbors Appropriations Act of 1899.[19] This statute served for the next 70 years as the primary basis for regulation of the nation's waterways. The legislative history of the 1899 Act is scant and makes only one thing clear: The act was passed to protect navigation.[20] As the 1899 Act dealt with navigation, jurisdiction extended, at its extreme in 1974, to waters that had been,[21] were now,[22] or could be used with reasonable improvements[23] to transport interstate or foreign commerce.[24] Along coastal areas jurisdiction extended to those areas subject to the ebb and flow of the tide.[25]

Certain sections of the 1899 Act are directed toward specific types of activities that could impair navigation. Section 9[26] requires a permit from the Secretary of the Army and the Chief of Engineers for any bridge, causeway, dike, or dam that spans a navigable water of the United States. As this type of structure completely obstructs such waters, Congressional approval, or approval from the appropriate state legislature, is also required.[27] Section 13,[28] commonly referred to as the "Refuse Act," makes it unlawful to throw, discharge, or deposit refuse matter of any kind, except liquid sewage, into any navigable water of the United States or tributary thereof without first obtaining a permit from the Secretary of the Army, upon the

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Existing Program), Hearings Before the Committee on Public Works of the House of Representatives, 92d Cong., 1st Sess. 284-291 (1971).

19. 33 U.S.C. § 401 *et seq.* (1970).

20. 32 Cong. Rec. 2297 (1899); *see* United States v. Republic Steel Corp., 362 U.S. 482 (1960); Lecture given by Judge Koonce, note 18, *supra*; H. R. Rep. No. 794, 68th Cong., 1st Sess. 4 (1924); S. Rep. No. 66, 68th Cong., 1st Sess. 2, 3 (1924).

21. Economy Light and Power Co. v. United States, 256 U.S. 113, 123 (1921).

22. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

23. United States v. Appalachian Electric Power Co., 311 U.S. 377, 407-09 (1940).

24. A good discussion of the nuances of the Corps' jurisdiction under the 1899 Act is in Corps of Engineers, Attorney's Supplement, Definition of Navigable Waters of the United States (Sept. 1972).

25. United States v. Stoeco Homes, Inc., 498 F.2d 597, 610 (3rd Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

26. 33 U.S.C. §401 (1970).

27. Approval authority for bridges and causeways constructed over navigable waters of the United States, originally vested in the Secretary of the Army by this section, was transferred to the Secretary of Transportation on October 15, 1966, by the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931.

28. 33 U.S.C. §407 (1970).

recommendation of the Chief of Engineers.[29] Section 10[30] requires a permit from the Department of the Army for any structure or work that is either performed in a navigable water of the United States or that affects the course, condition, or capacity of navigable waters of the United States. Activities that fall within the purview of Section 10 include structures such as piers, wharves, and bulkheads, and work such as dredging and filling operations.

While the legislative history and the various sections of the 1899 Act demonstrate that Congress intended to limit the scope of coverage to navigable waters of the United States, it is apparent that regulatory jurisdiction also extended to activities outside of such waters that could have an injurious effect on the navigable capacity of navigable waters of the United States. Section 13, for example, prohibits discharges into tributaries of navigable waters of the United States without permits, and also makes it unlawful to place refuse matter on the banks of any of these waters where it is likely to be washed into the water by ordinary or high tides, storms, floods, or otherwise.[31] Section 10 refers to activities that "alter or modify the course, location, condition or capacity" of any navigable water of the United States, as well as activities that occur directly in such waters. The Department of the Army has taken the position through its regulations that even as to those activities that are not performed in navigable waters of the United States, a permit under Section 10 is required if the connection of such activities with navigable waters may affect the course, location, condition, and navigable capacity of the navigable water of the United States.[32]

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29. The Secretary's permit authority was terminated by Section 402 of the Federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. §1342, which transferred the permitting authority for point source discharges to the Administrator, Environmental Protection Agency and eventually to the states. The Refuse Act, however, still remains available as a possible enforcement tool against environmentally damaging non-point source discharges. In addition, Section 402(b)(6), 33 U.S.C. §1342(b)(6), provides that no 402 permit shall issue if, in the judgment of the Secretary of the Army, anchorage and navigation would be impaired.

30. 33 U.S.C. §403 (1970).

31. United States v. Valley Camp Coal Co., 480 F.2d 616 (4th Cir. 1973); United States v. White Fuel Co., 498 F.2d 619 (1st Cir. 1974).

32. 33 C.F.R. §§209.120(e)(1)(i), (g)(11) (1975). This position is supported by long standing judicial precedent. *E.g.*, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 708 (1899). For a recent affirmation, see the "Section 10 Trilogy": United States v. Moretti, 526 F.2d 1306 (5th Cir. 1976); United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976); Weiszmann v. Dist. Eng'r, 526 F.2d 1302 (5th Cir. 1976).

As the touchstone of the 1899 Act was protection of navigation, the Secretary of the Army and the Chief of Engineers initially, and quite properly,[33] limited their review of proposed activities to effects upon navigation. The increasing awareness of environmental concerns in the latter part of the 1960's, however, prompted the Department of the Army to enlarge the scope of review of permit applications, and on December 18, 1968, the following regulation was published:

> The decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish, and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest. . . .[34]

This public interest review soon became a requirement of law for any Corps permit program, as Congress, the courts, and the Executive all stamped broad and compelling imprimaturs upon it.[35]

The National Environmental Policy Act of 1969 (NEPA),[36] turned the public interest review from a legally recognized policy to a statutory requirement. The act of "permitting" is a federal action and, hence, brings the requirements of NEPA into play whenever a permit is issued by a federal agency.[37] NEPA requires the agency to

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33. United States v. Standard Oil Co., 384 U.S. 224 (1966); 27 Op. Att'y Gen. 285, 288 (1909); 34 Op. Att'y Gen. 410, 412, 415-16 (1926).

34. 33 C.F.R. § 209.120(d) (1968).

35. The Congress has in various reports expressed approval of the public interest review, *e.g.*, H.R. Rep. No. 91-917, 91st Cong. 2d Sess. 5, 6 (1970), and has indicated it was to apply to Section 404: "The [Joint House and Senate] Conferees were uniquely aware of the process by which dredge and fill permits are presently handled." Senate Comm. on Public Works, 93d Cong., 1st Sess. (prepared by Congressional Research Service, Lib. of Cong.), A Legislative History of the Water Pollution Control Act Amendments of 1972; (Comm. Print 1973) (joint conference report) [hereinafter cited as Legislative History].

Courts have also approved it, and indeed, have referred to it as a requirement of law. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); United States v. Moretti, 478 F.2d 418 (5th Cir. 1973); *see also* United States v. Sexton Cove Estates, Inc., 389 F.Supp. 602 (S.D.Fla. 1975), 7 E.R.C. 1502 (Feb. 6, 1975); Weiszmann v. Corps of Eng'rs, ___ F.Supp. ___, 7 ERC 1523 (Feb. 12, 1975); United States v. Whichard, Civil No. 797 (E.D.N.C. Feb. 1974). *See* note 32, *supra*.

Last, different pronouncements from the Executive Branch add to its force. Exec. Orders No. 11752, Dec. 17, 1973, 3 C.F.R. 380 (1974); 11514, Mar. 5, 1970, 3 C.F.R. 271 (1974).

36. 42 U.S.C. §§ 4321 *et seq.* (1970).

37. Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

prepare a detailed environmental impact statement for permit actions that significantly affect the quality of the human environment. It also may require that whenever the agency acts, it utilize an interdisciplinary approach and consider not only ecological, but also many of the social and economic impacts of its action.[38] A variety of requirements are also imposed upon any permit action by The Fish and Wildlife Coordination Act of 1956,[39] The Marine Protection, Research and Sanctuaries Act of 1972,[40] The Endangered Species Act of 1973,[41] The Coastal Zone Management Act of 1972,[42] The National Historic Preservation Act of 1966,[43] and The Water Quality Improvement Act of 1970,[44] among others.[45]

Thus, as of 1972 the Corps had developed a regulatory program that utilized a general public interest review for each permit application, and that had as its purpose the protection of past, present, or potential commercial waterways, or waterways that affected the navigable waters of the United States. With the enactment of the Federal Water Pollution Control Act Amendments of 1972, however, the Corps story became much more complex.

II. The Federal Water Pollution Control Act Amendments of 1972

Congress enacted the Federal Water Pollution Control Act

38. *See, e.g.*, Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), *cert. denied* 409 U.S. 990 (1972); Chelsea Neighborhood Ass'n v. Postal Serv., 516 F.2d 378 (2d Cir. 1975). It also may require consideration of alternative courses of action. Trinity Episcopal School v. Romney, 523 F.2d 88, 8 ERC 1033 (2d Cir., July 24, 1975). For a case that seems to find that NEPA requires public participation in all federal decisions, even those that do not significantly affect the quality of the environment, and that apparently expands NEPA's ambit to the short-term and minimal community unemployment impacts, see Breckinridge v. Schlesinger, No. 75-100 (E.D. Ky., Oct. 31, 1975), *notice of appeal filed* Nov. 13, 1975, *sub nom* Breckinridge v. Rumsfeld, No. 75-2505.

39. 16 U.S.C. §§661 *et seq.* (1970).

40. 33 U.S.C. §§1401 *et seq.* (Supp. IV, 1974).

41. Pub. L. No. 93-205, 87 Stat. 884 (codified in scattered sections of 7, 16 U.S.C.).

42. 16 U.S.C. §§1451 *et seq.* (Supp. IV, 1974).

43. 16 U.S.C. §§470 *et seq.* (1970).

44. 33 U.S.C. §§ 1151 *et seq.* (1970), *as amended*, 33 U.S.C. §§ 1251 *et seq.* (Supp. IV. 1974).

45. The Environmental Quality Improvement Act of 1970, 16 U.S.C. §§4371 *et seq.* (1970); the Marine Mammal Protection Act of 1973, 16 U.S.C. §§1401 *et seq.* (Supp. IV, 1974). *Cf.* Section 122 of the Rivers and Harbors and Flood Control Act of 1970, Pub. L. No. 91-611, 84 Stat. 1818 (codified in scattered sections of 5, 10, 16, 33, 42 U.S.C.).

Amendments of 1972 (FWPCA)[46] "to restore and maintain the chemical, physical and biological integrity of the Nation's Waters." Section 101(a)(1)[47] establishes as a national goal elimination of the discharge of pollutants into waters by 1985. The principal mechanism for achieving this goal is the National Pollutant Discharge Elimination System (NPDES), established by Sections 301[48] and 402.[49] The goal of the NPDES is to stop pollution at its source, and to effect this result a schedule for water quality standards, effluent limitations, and toxic standards was formulated. Authority was granted to the Administrator of the Environmental Protection Agency (EPA) to administer the NPDES program, and to control the discharge of any pollutant from any and all point sources into waters of the United States including the territorial seas.

The statutory framework of the FWPCA revolves around Section 301(a)[50] which makes unlawful the water discharge of any pollutant from a point source unless a permit is obtained.[51] Section 402(a)(1)[52] grants to the Administrator of EPA authority to issue a

46. 33 U.S.C. §1251 *et seq.* (Supp. IV, 1974).

47. 33 U.S.C. §1251(a) (Supp. IV, 1974). This goal has recently been challenged by the National Commission on Water Quality: "The Commission recommends that. . .[t]he Congress redefine the goal of the elimination of discharge of pollutants by 1985 to stress conservation and reuse of resources. . . ." H.R. Doc. No. 94-418, 94th Cong., 2d Sess. 10 (1976).

48. 33 U.S.C. §1311 (Supp. IV, 1974).

49. 33 U.S.C. §1342 (Supp. IV, 1974).

50. 33 U.S.C. §1311(a)(Supp. IV, 1974).

51. Section 301(a) provides that: "Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." Applications for permits are made to the local Corps district engineer. He has authority to grant unopposed permits. 33 C.F.R. §209.120(p)(1)(i), (iii) (1974). Where there are objections, or where the district engineer recommends denial, the permit winds its way to Washington up the Corps chain. In cases where the Department of Interior objects to issuance and the objections cannot be resolved at the Corps of Engineers level, the Secretary of the Army makes the decision on issuance. Memorandum of Understanding Between the Secretaries of Army and Interior, *reprinted in* Appendix B to 33 C.F.R. 209.120 (1975). The Division Engineer can deny a permit where there is no state approval or where the proposed structure affects navigation.

In assessing the permit application, an Environmental Impact Statement may be required and public hearings may be held. The proposed Corps hearing regulations, which are presently being used on an interim basis, are in 40 Fed. Reg. 2816 (1975). The Environmental Impact Statement regulations are in 33 C.F.R. §209.410 (1975). For the procedures to be followed when other state and federal agencies object to permit issuance, see 33 C.F.R. §209.120(p)(2)(i).

52. 33 U.S.C. §1342(a)(1) (Supp. IV, 1974). Section 402(a)(1) reads as follows:

permit for the discharge of any pollutant provided that certain criteria and conditions are met.[53] The FWPCA also envisions eventual state administered programs, and thus allows the Administrator to delegate permitting responsibility to the states.[54] The far-reaching scope of the Act is reflected in the definitions of "pollutant" and "point source":

> The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discharged equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.[55]
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> The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.[56]

Another important exception to the mandate of Section 301,[57] specifically that there will be no discharges into navigable waters, is contained in Section 404:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for pub-

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"Except as provided in Sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

53. Section 402, 33 U.S.C. § 1342 (Supp. IV, 1974).

54. Section 502(6), 33 U.S.C. § 1362(6) (Supp. IV, 1974). There is some controversy with regard to whether the Administrator delegates or transfers permit authority, the distinction being that if he delegates he can recall the authority to the federal government. If he transfers then the authority is permanently vested in the state.

55. Section 502(14), 35 U.S.C. § 1362(14) (Supp. IV, 1974).

56. 33 U.S.C. § 1311 (Supp. IV, 1974).

57. 33 U.S.C. § 1344(a) (Supp. IV, 1974).

> lic hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.[58]

Section 404 permits are to be issued pursuant to guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army.

III. *Natural Resources Defense Council v. Callaway* AND THE SCOPE OF JURISDICTION UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The FWPCA, while a comprehensive act, provides but a single, and extremely broad definition of navigable waters as "the waters of the United States, including the territorial seas."[59] In regulations published on April 3, 1974 by the Corps of Engineers to implement its Section 404 responsibilities, navigable waters was defined as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[60] This definition tracked the jurisdiction ex-

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58. The Administrator is empowered to overrule a decision to issue a permit in certain circumstances:

> (c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C. § 1344(c) (Supp. IV, 1974).

However, if such a decision by the Administrator would impair navigation, then Section 511 (a) seems to apply:

> This Act shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 (30 Stat. 1112); except that any permit issued under section 404 of this Act shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 10 of the Act of March 3, 1899. . . .

33 U.S.C. § 1371(a) (Supp. IV, 1974).

59. Section 502(7), 33 U.S.C. § 1362(7) (Supp. IV, 1974).

60. 33 C.F.R. § 209.102(d)(1) (1975).

ercised under the 1899 Act, a jurisdiction referred to alternatively as "navigable waters *of the United States*" and the navigation servitude. It did, however, encompass four recent jurisdictional expansions by the Corps: the inclusion of historical navigable waters of the United States; the inclusion of waters susceptible to navigation after improvement; the inclusion of coastal waters subject to the ebb and flow of the tide; and the expansion of the definition of the limit of the ebb and flow of the tide from the mean high-water mark to the mean higher high-water mark on the West Coast.

The EPA, however, for the purposes of its permit system in regulating the discharge of pollutants under the FWPCA defined the term navigable waters as:

> a. All navigable waters of the United States;
> b. Tributaries of navigable waters of the United States;
> c. Interstate waters;
> d. Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
> e. Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.[61]

The issues began to crystalize with the Corps restricting its jurisdiction to areas within the traditional navigation servitude, and the EPA extending its jurisdiction to its perception of the extent of the federal commerce power.

The courts prior to *Natural Resources Defense Council v. Callaway* dealt gingerly with the FWPCA definition of navigable waters as "waters of the United States." The leading case was *United States v. Holland*,[62] in which the government brought an action to enjoin the filling of nonnavigable mosquito canals and mangrove wetlands that were above the mean high-water line. While the court indicated that the limit of federal jurisdiction was not the mean high-water line, but indeed extended beyond because of the extent of the commerce power,[63] it nevertheless felt constrained to find also that the filling of the nonnavigable waters in question would impact on navigable waters as that term was tradi-

61. 40 C.F.R. § 125.1(P) (1974).
62. 373 F.Supp. 665 (M.D. Fla. 1974).
63. *Id.* at 676.

tionally understood. Thus, the decision applied the rationale of many prior cases as an alternative holding: federal dominion extends to areas that affect nearby navigable waters of the United States.[64] All of the other cases prior to *Natural Resources Defense Council v. Callaway* fit within the same mold.[65]

The *Holland* case subsequently became the subject of correspondence between EPA, the Department of Justice, and the Corps, with both Justice and EPA urging the Corps to commence processing permits for fills in wetlands above the mean high-water mark.[66] In addition, the Committee on Government Operations of the House of Representatives published a report on October 1, 1974[67] that, among other things, urged the Corps and EPA to develop a uniform regulation that complied with the congressional mandate that the term navigable waters "be given the broadest possible constitutional interpretation" rather than "old, narrow definitions of navigability."

In *Natural Resources Defense Council v. Callaway* plaintiff filed suit asking for a declaratory judgment that the Corps exercised its jurisdiction under the FWPCA in too narrow a fashion and for an order requiring the Corps to publish new regulations.[68] District

64. *E.g.*, United States v. Perma Paving Co., 332 F.2d 754, 756-57 (2d Cir. 1964); Tatum v. Blackstock, 319 F.2d 397, 399 (5th Cir. 1963); United States v. Underwood, 344 F.Supp. 486, 491 (M.D. Fla. 1972).

65. *Sexton Coves Estates, Inc.*, 389 F. Supp. 602, 607 (S.D. Fla. 1975) (artificial canals in fact navigable and in any case affect navigable waters) (*see* note 32, *supra*); United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1320, 1325-27 (6th Cir. 1974) (discharge into tributary may affect navigable capacity of river), *aff'g*, 364 F.Supp. 379 (W.D. Ky. 1973); *see also* United States v. Freethy, No. C-73-1470 SC (N.D. Calif., Feb. 3, 1975); Weiszmann v. Corps of Eng'rs, No. 74-469 CIV-WM (S.D. Fla., Feb. 12, 1975); Leslie Salt Co. v. Froehlke, ___ F. Supp. ___, 7 ERC 1311 (N.D. Cal., Dec. 9, 1974), United States v. American Beef Packers, Inc., Crim. No. 74-0-30 (D. Neb. Apr. 25, 1974).

66. *E.g.*, Letter from Russell E. Train, Administrator, EPA, to LTG W.C. Gribble, Jr. Chief of Engineers, June 19, 1974; Letter from Wallace H. Johnson, Assistant Attorney General, to Manning Seltzer, General Counsel Corps of Engineers, Aug. 16, 1974. What happens when the Justice Department disagrees with its client? 28 U.S.C. §§ 516, 519 (1970) designate the officers of the Department of Justice to represent agencies in the courts. The issue becomes whether the Attorney General can impose his views upon the agency. In this case the issue was resolved by letting the Army present its views to the Court. *See also* Cartier v. Secretary of State, 506 F.2d 191, 195, n. 2 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975).

67. H.R. REP. No. 93-1396, 93d Cong., 2d Sess. (1974).

68. 392 F.Supp. 685 (D.D.C. 1975). The concern of the plaintiffs in this case was primarily wetlands protection. Complaint at 3, 10, 11. *See also* the Resolution of Plaintiff-Intervenor

Judge Aubrey Robinson, in a terse opinion, held that the Congress in enacting the FWPCA intended to exercise "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution,"[69] and ordered the Corps to publish regulations recognizing the full regulatory mandate of the Act. In doing so, he addressed two issues: the scope of jurisdiction under the Act and the relative responsibilities of regulatory agencies within that jurisdiction.

A. *The Definition of Navigable Waters*

A review of the legislative history of the FWPCA indicates that the Congress desired to expand significantly the federal role in combating water pollution and that it desired to accomplish this through expansion of jurisdiction. This history also reveals, however, substantial confusion or uncertainty as to how far that expansion would in fact occur. Congress does of course have the power to enact an expansive definition under its commerce power; Congress may regulate those spheres of life that have a substantial effect on interstate commerce.[70] In enacting the FWPCA, however, Congress did not, apparently, give adequate attention to the task of defining the scope of the expanded jurisdiction it desired.

The definition of "navigable waters" in Section 502(7) as "waters of the United States" resulted from an attempt by the joint conference committee to resolve a conflict between the language contained in the Senate and House versions of the bill. S. 2770 referred to "navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes," whereas H.R. 11896 referred to "The Navigable Waters of the United States, including the territorial seas." The Joint Conference Report in reconciling the differences provides but

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Florida: "Whereas, the State of Florida Trustees of the Internal Improvement Trust Fund are desirous of resolving this conflict in favor of the broadest protection for Florida's wetlands. . . ." Resolution of the State of Florida, Jan. 21, 1975.

69. 392 F.Supp. at 686.

70. Perez v. United States, 402 U.S. 146, 150-51 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964). With regard to water resource regulation, see *Zabel v. Tabb*, 430 F.2d at 203-04; *Ashland Oil and Transp. Co.*, 504 F.2d at 1325-26. *See generally* 89 to 90 *infra*.

a terse explanation of the resulting provision:

> The conferees fully intend that the term "navigable waters" be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes.[71]

Some of the proponents of the definition, however, appeared to be unaware of the expansive scope of the commerce power. Thus, Senator Muskie stated:

> Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.[72]

Representative Dingell made the statement that "[n]o longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to cover matters covered in this bill."[73] He perceived the expanded definition as including waterways that were susceptible for use for navigation after improvement,[74] citing a series of navigation cases that had, only a month before, caused the Corps to amend its regulations to include such waterways.[75] Hence, his

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71. LEGISLATIVE HISTORY, *supra* note 35, at 327; *see also* Senate Consideration of the Joint Conference Report, *id.* at 178; House Consideration, *id.*, at 250-51; House Report, *id.* at 131; Senate Report, *id.* at 1495; Statement of Representative Clausen, *id.* at 591.

72. *Id.* at 178.

73. *Id.* at 250-51. Both *Holland*, 373 F.Supp. at 672, and *Ashland Oil and Transp. Co.*, 504 F.2d at 1823, refer to Dingell as a member of the Conference Committee. He was not. Cong. Rec. E-8400-4 (Oct. 6, 1972).

74. LEGISLATIVE HISTORY, *supra* note 35, at 250-51.

75. The regulations were published on September 9, 1972, and Mr. Dingell's statement was made on October 4, 1972. They are presently in 33 C.F.R. § 209.260 (1975).

statement as to jurisdiction could evidence a lack of awareness of the recently revised Corps regulations. In fairness, the Dingell statement could also be interpreted as recognizing recent increases in scope of jurisdiction and evidencing an intent to continue expansion. In any case, his and Senator Muskie's statements indicate that they at least may have believed the exercise of the commerce power to depend upon some nexus to navigation.[76]

In direct contrast to the perceptions evidenced in these statements is the statutory definition which itself indicates a desire to break with traditional notions of navigability. The geographical definition of "navigable waters" as "waters of the United States, including the territorial seas," when considered in the context of an attempt to expand jurisdiction to the extent of the commerce power, seems dispositive of the issue;[77] and the extent of the commerce power certainly goes far beyond solely the regulation of those water bodies that are susceptible for use in navigation.

In light of the extensive legislative history indicating a desire to expand jurisdiction to the extent of the commerce power, the definition in the Act of "waters of the United States," and the overall purpose of the Act to stop the discharge of pollutants at their source,[78] and despite the congressional confusion, it seems clear that FWPCA jurisdiction is expansive. Judge Robinson's opinion was certainly correct in that navigation is no longer the touchstone—water quality, the chemical, physical, and biological integrity of water, is.[79]

B. *The Scope of Corps Jurisdiction Under Section 404*

Holding that the scope of jurisdiction under the FWPCA ex-

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76. *See* note 70, *supra*.

77. The definition, like the legislative history, can also be read to indicate confusion on the part of the legislators. "Navigable waters of the United States" is a term of art used to designate those waters subject to the navigation servitude. *E.g., Appalachian Elec. Power Co.*, 311 U.S. at 398. The FWPCA uses "navigable waters" and defines the term as "waters of the United States." The confusion may result from the fact that Section 10 of the 1899 Rivers and Harbors Act uses the term "waters of the United States" apparently interchangeably with "navigable waters of the United States." *See* Sierra Club v. Leslie Salt Co., Nos. 72561WTS, 732294WTS (N.D. Cal., Mar. 11, 1976).

78. *See* Senate Report, in LEGISLATIVE HISTORY, *supra* note 35, at 1495.

79. *See* P.F.Z. Properties Inc. v. Train, 393 F.Supp. 1370, 1379-82 (D.D.C. 1975).

tends to all waters subject to the commerce power did not, however, dispose of another issue presented. The Army argued that even if the FWPCA's mandate extended to all such waters, Section 404's scope and hence the Corps' jurisdiction, was limited to waters within the navigation servitude with responsibility for regulation outside the servitude belonging to the EPA and the states. In essence, the argument was that the intent of Section 404 was merely to continue the Corps of Engineers in its traditional stewardship of those waterways subject to navigation, and that argument, in light of the legislative history and the structure of the Act as a whole, was not without force.

1. *The Legislative History of Section 404*

a. *S. 2770*

S. 2770, when introduced in the 91st Congress, drew no distinction between dredged or fill material and other pollutants. Thus, the bill treated disposal of dredged material as any other discharge of a pollutant to be controlled through the NPDES program by EPA and ultimately by the states. During consideration of the bill by the Senate Public Works Committee, Senator Randolph offered an amendment that would have retained in the Secretary of the Army authority to regulate the disposal of dredged spoil in navigable waterways, rather than transferring such regulatory authority to the EPA. This attempt failed, however, on October 19, 1971 by committee vote.[80]

b. *The Ellender Amendment*

During the Senate floor debates on November 2, 1971, a second attempt was made to take out of the NPDES program authority to regulate the discharge of dredged material into the nation's waterways. Senator Ellender, the proponent of the amendment, argued that it was essential that the Secretary of the Army retain his authority to permit the disposal of dredged material in waters used for transportation:

> Mr. ELLENDER. Mr. President, this is a very simple

80. LEGISLATIVE HISTORY, *supra* note 35, at 1509.

> amendment, and should not take long to explain.
> It simply retains the authority of the Secretary of the Army to issue permits for the disposal of dredged materials. This is essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States.
> One of the main deficiencies of this bill is that it treats dredged materials the same as industrial waste, sewage, sludge or refuse introduced into a river system, lake, estuary or ocean. The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another. If polluted discharges from municipal and industrial sources are controlled as required by this bill, the disposal of dredged material in open water presents no significant problem.[81]

Senator Ellender's specific concern was navigation:

> The bill, as reported, would in effect give the Environmental Protection Agency a veto power over the spoil disposal areas required for construction and maintenance of all navigation projects. The Secretary of the Army will not be obligated to require strict compliance with the effluent requirements established by the Environmental Protection Agency in issuing permits. The strict adherence to the published standards would result in 90 percent of the ports and harbors of the United States being closed, until such time as land disposal areas are provided. This would create a catastrophical situation with respect to our foreign and domestic commerce.[82]

Senator Stennis was also concerned with navigation. In answer to Senator Muskie's question of why the Corps of Engineers' dredging should be exempt from the Section 402 regulatory program, Senator Stennis replied:

> In order to get their job done. This project has got to stand by and wait and wait and wait for the application. The new agency [EPA] has not been in operation very long. I do not charge them with wrongdoing but they need time to develop. This is a real problem as to how far we are going in stopping all the many hundreds of projects that are in progress already

81. *Id.* at 1386.
82. *Id.* at 1387.

> or beginning to make progress, if we stop progress on the ports and harbors all over this country for a while, stop working on improving them, the economy will stagnate.[83]

c. *The Muskie Amendment*

Instead of supporting the Ellender Amendment, however, Senator Muskie offered one of his own which would have added a subsection to Section 402:

> (Section 402) (m) Any application for a permit under this section for the discharge of dredged spoil into the navigable waters (other than in confined disposal sites) shall be accompanied by a certificate from the Secretary of the Army that the area chosen for disposal is the only reasonable available alternative and, unless the Administrator finds that the matter to be disposed of will adversely affect municipal water supplies, shellfish beds, wildlife, fisheries (including spawning and breeding areas) or recreation areas, such permit shall issue.[84]

d. *The House Public Works Committee Amendment*

The bill that emerged from the House Public Works Committee contained a provision giving back to the Secretary of the Army the responsibility for the regulation of discharges of dredged or fill material.[85] As formulated by the Committee, Section 404 authorized the Secretary of the Army to permit such discharges where they would not "unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities."[86] EPA would play a role under this program through the formulation of guidelines establishing criteria for the discharge of pollutants similar to those applied to discharges in ocean waters by Section 403. The Secretary of the Army would be required to apply these criteria, consult with, and give due consideration to the views of EPA in processing permit applications and in designating disposal sites in the open waters. The Secretary would also be required to consider effects on navigation, economic and

83. *Id.* at 1390.
84. *Id.* at 1392.
85. *Id.* at 816.
86. *Id.* at 1063.

industrial development, and foreign and domestic commerce of the United States. Furthermore, although EPA could prohibit the discharge of dredged or fill material in EPA designated critical areas, the Secretary would not be required to follow EPA's designation if he certified that there was no economically feasible alternative reasonably available:

> The language of the section makes it clear that this action to create in effect, "prohibited areas" for discharging certain materials, is to be used with circumspection. Prior to designating "prohibited areas," it is intended that the Administrator consult with the Secretary of the Army if the banned materials concern the Secretary's permit program. In establishing criteria for dumping, the Administrator is required to consider economic factors and these in turn would be taken into account in the designation of recommended sites for discharging or prohibited sites or times for discharging.
> However, the Secretary upon certification that there is no economically feasible alternative reasonably available, will not be bound by the determination of the Administrator.[87]

The Committee highlighted the reason for creating an exception to EPA's permit granting authority:

> The Committee expects that until such time as economic and feasible alternative methods for disposal of dredged material are available, no arbitrary or unreasonable restrictions shall be imposed on dredging activities essential for the maintenance of interstate and foreign commerce, and that, consistent with the intent of this Act, the Committee expects the disposal activities of private dredgers and the Corps of Engineers will be treated in a similar manner. It is expected that the Secretary shall act promptly on dredging permits essential for the maintenance of interstate commerce because of the seasonal nature of dredging and the need to preschedule scarce dredging equipment. The Committee expects that the Secretary will act on the permit applications usually within 30 days after notice and opportunity for public hearings.[88]

Section 404, as formulated by the Committee, was adopted by

87. *Id.* at 816.
88. *Id.* at 817.

the House. The version of this section that ultimately became law, however, was developed during the House-Senate Conference on S. 2770.

e. *The House-Senate Conference on S. 2770*

The Conference essentially adopted the House bill, giving the Secretary of the Army a regulatory responsibility over the discharge of dredged or fill material.[89] It also reinforced the authority of EPA to prohibit the disposal of such materials at specific sites, and in certain manners. The Administrator of the EPA, in conjunction with the Secretary of the Army, were to develop guidelines for discharge comparable to those to be developed for Section 403 of the FWPCA. The House and Conference approaches differ, however, in at least two basic respects: First, the Conference's scheme requires that the permit be for a discharge at "a specified disposal site." Second, the permit criteria specifically are to be found in the guidelines, rather than in the statute, as was described above for the House version.

f. *Debate on the Conference Report*

The debate on the Conference report emphasized the need to ensure continued utilization of the nation's inland waterways for commercial navigation, and to this limited, but economically important, extent it was willing to maintain the necessary authority vested in the Secretary of the Army for assuring continued operation and maintenance of the nation's waterways:

> The Conferees were uniquely aware of the process by which the 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 there could be any justification for permitting the Secretary of the Army to make 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 Environmental Protection Agency should have the veto over the selec-

89. *Id.* at 324-25.

> tion of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.[90]

At the same time the importance of ensuring that EPA retain primary responsibility for the elimination of water pollution was reemphasized.[91] However, in this narrow area—that is, discharges of dredged or fill material into those inland waterways subject to the federal navigation servitude and utilized for interstate and foreign commerce—EPA was required to exercise its responsibility and authority with circumspection:

> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate Section 301(a).
> Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.
> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.
> [I]t is the position of the House conferees that any restriction or prohibition of any defined area as a disposal site must be made with circumspection in view of the importance of navigation and waterborne commerce to the economic well-being of the United States. Thus, it is expected that disposal site restrictions or prohibitions shall be limited to narrowly defined areas where it can be clearly demonstrated that the discharge of dredged material at such specified location will have an unacceptable adverse effect on critical areas intended to be protected.[92]

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90. *Id.* at 117.
91. *Id.*
92. *Id.* at 236.

And in stressing the limited and temporary nature of the program it gave to the Secretary of the Army, Congress foresaw the time when advancing technology would overcome the need for open water disposal of dredged or fill material, and when open land disposal or diked disposal areas would become more economically feasible:

> At the same time, the Committee expects the Administrator and the Secretary to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States including the Great Lakes—to identify land-based sites for the disposal of dredged spoil and, where land-based disposal is not feasible, to establish diked areas for such disposal.
>
> All of these alternatives are available. The only justification for continuing to utilize open water disposal is the cost of alternatives. The Conferees believe that the economic argument alone is not sufficient to override the environmental requirements of fresh water lakes and streams. Therefore, early action should be taken by the Administrator to develop alternative sites and alternative methods of spoil disposal.[93]

There are two brief passages, mentioned above, that can be read to indicate Corps jurisdictional expansion. The first is the statement that the Congress was aware of the present program and "did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." Combined with the desire to regulate "freshwater lakes and streams," the passages may indicate a desire to utilize the old structure and expertise in a new area.

In any case, this legislative history of Section 404, which evidences a primary interest in continuing the Corps in its traditional regulatory role, is especially noteworthy in its lack of any extended discussion of the substantial environmental, social, and economic impacts that would flow from an expansion of Corps jurisdiction.[94] The absence of such a discussion, of course, lent strong support to

93. *Id.* at 177-78.

94. It is troublesome that throughout the Congressional colloquy there was no discussion whatsoever as to the meaning of the term "fill material" as it appears in Section 404.

the Corps' argument in *Natural Resources Defense Council v. Callaway* that the intent of Section 404 was merely to continue the Corps in its traditional stewardship of those waterways subject to navigation.

2. *The Structure of the FWPCA*

The structure of the FWPCA, like its legislative history, can be construed as evidencing either a desire to continue the Corps in its traditional jurisdiction, or simply a lack of foresight on the part of its drafters as to the potential scope of dredged and fill disposal regulation.

Section 404's presence in the statute as an exception to the NPDES program indicates the navigational basis for its creation. In addition, Section 404 allows the Secretary of the Army to consider the economic impact of a proposed disposal site on *navigation* and *anchorage*, and thus to issue a permit even in those cases where the Administrator's guidelines alone would preclude designation of the proposed disposal site. Finally, and in furtherance of its desire to ensure that the goals of the FWPCA do not interfere with the continuance and maintenance of required navigation projects, the Congress reaffirmed its intent in Section 511(a) of the Act:[95]

> This chapter shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation . . .

It also appears that because the concern addressed by Section 404 was a federal one—navigation—the Secretary of the Army cannot delegate his responsibilities under this section[96] to any state government. But Section 101(b)[97] of the FWPCA states that a purpose of the FWPCA is:

> To recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

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95. 33 U.S.C. § 1371(a) (Supp. IV, 1974).
96. 33 U.S.C. § 1344 (Supp. IV, 1974).
97. 33 U.S.C. § 1251(b) (Supp. IV, 1974).

This policy is clearly recognized in Section 402,[98] which allows the Administrator of EPA to delegate his permit granting responsibilities to states having acceptable permit programs.[99] While it makes good sense to reserve a non-delegable and exclusive responsibility in the Secretary of the Army with respect to commercial waterways in light of the national importance of such bodies and the ensuing importance of nationwide uniformity of regulation, it makes less sense to allow delegation in Section 402 and not allow it in Section 404 for the many waterbodies beyond the navigation servitude.

The problem with such a program becomes more acute when one considers that water regulation is looked upon by the Congress as primarily a state concern.[100] And the argument for extending the Corps non-delegable permit program to areas beyond the servitude becomes less persuasive when the pervasive nature of the Corps' public interest review is considered.[101] While this form of review may be a necessary and proper function of a federal agency with regard to areas subject to a federal servitude, outside the servitude land use control would appear more properly to be a state function. In contrast, the Section 402 program does not impose a pervasive public interest review. Rather, it focuses on water quality standards, effluent limitations, and toxic standards.

Thus, the structure of the FWPCA indicates either an intent to continue Corps jurisdiction only within the navigation servitude or a lack of Congressional foresight with regard to the role of the states in a pervasive regulatory program. In any case, the legislative history and the structure of the Act indicate the uniqueness of the Section 404 program. In this light, the Army argued in *Natural Resources Defense Council v. Callaway* that statutory responsibility

98. 33 U.S.C. § 1342 (Supp. IV, 1974).

99. EPA promulgated guidelines for participation by the states in the NPDES permit program on December 22, 1972. 37 Fed. Reg. 28391 (1972) (codified in 40 C.F.R. pt. 124, 1974). As of June 30, 1974, fifteen states had assumed responsibility for permit issuance. *The Fifth Annual Report of the Council on Environmental Quality*, at 143. There are now 27 such states. Forty-eight states have now enacted legislation or are seriously studying proposals to expand their roles in land use regulation, including coastal zone, floodplain, and wetlands regulation. *Id.* at 49. A federal program duplicates these programs.

100. *See* 108 to 114 *infra*.

101. *See* 57 to 58 *supra*; 108 to 111 *infra*.

for areas outside the servitude was, at a minimum, a joint EPA-Army responsibility.

3. *The Administrative Solution—An EPA Dredged or Fill Disposal Program*

EPA's NPDES program was well under way when in 1974 the Secretary of the Army promulgated his Section 404 regulation. NPDES was being administered by available manpower and funds within EPA, some of which had been transferred to EPA by the Corps of Engineers from its now defunct Refuse Act Permit Program.[102] The Corps of Engineers, however, continued to administer its regulatory program over activities in or affecting navigable waters of the United States through Section 10 of the Rivers and Harbors Act of 1899.[103] It was argued that any extension of jurisdiction through the Section 404 program to areas beyond the federal servitude would have necessitated the creation of a large bureaucracy within the Department of the Army. In contrast, it was argued the narrower scope of review and the possibility of delegation under Section 402 would not have engendered such problems within EPA. A counter argument would have been that as the Corps already had a dredged spoil disposal program, its experience and existing overhead structure, rather than encourage, would have prevented bureaucratic creep.

House Report No. 92-911 on H. R. 11896, the House version of the FWPCA, states that the permit program which had been administered by the Corps of Engineers under the authority of the Refuse Act of 1899 would be consolidated with the Federal Water Pollution Control Act and responsibility for administration transferred to the Environmental Protection Agency because "the basic decision had been made by the President and the Congress at the time that the Environmental Protection Agency came into existence that it would be the single agency responsible for leading the battle against pollution." The report continues, "although other agencies such as the Corps have a tremendous role to play in this battle, it must be a

102. Section 402(a), 33 U.S.C. § 1342 (Supp. IV, 1974), transferred the responsibility for administering the Refuse Act Permit Program under 33 U.S.C. § 407 (1970) from the Secretary of the Army to the Administrator, EPA.

103. 33 U.S.C. § 403 (1970).

supportive role."[104] EPA was thus looked upon as the lead agency, not only with respect to Section 402, but as to all pollution abatement mechanisms established by the FWPCA. Furthermore, the FWPCA itself provides a ready mechanism for assigning permitting responsibilities outside the navigation servitude to EPA. Section 301(a) of the Act[105] makes unlawful the discharge of any pollutant by any person. It also provides a mechanism to purge a discharge of illegality by "compliance with this Section and Sections 302, 306, 307, 318, 402 and 404 of this Act." Pollutants, as broadly defined in Section 502(6),[106] include "dredged spoil" as well as solid particles such as solid waste, incinerator residue, sewage, garbage, sewage sludge, wrecked or discarded equipment, rock, sand, and cellar dirt, all of which comprise "fill material" as that term has been defined by the Secretary of the Army.[107] Since Section 301 treats a discharge permitted under either Section 402 or Section 404 as purged of illegality, permitting authority for discharge of dredge or fill material in areas outside the navigation servitude would, consistent with the statutory scheme, be assigned to EPA under its Section 402 program. The open issue would be—does the use of 402 serve the purposes of the FWPCA in a more effective manner than 404.[108] This view is also consistent with recent court decisions. The cases that have thus far found a violation of Section 301 have not held that the defendant must get a Section 404 permit, in lieu of a Section 402

104. LEGISLATIVE HISTORY, *supra* note 35, at 812.

105. 33 U.S.C. § 1311(a) (Supp. IV, 1974).

106. 33 U.S.C. § 1362(6).

107. *See* 33 C.F.R. § 209.120(d)(4) (1975).

108. It may be that Section 404 is needed, in and of itself, to perform a function with which Section 402 does not adequately deal. Section 404, because of its public interest review, and because of long standing Corps expertise, may deal with the following problem:

> The significance and the need for Section 404 regulation can be appreciated by a look at the situation as it existed before its institution. Protection of the surface water resources of the nation includes, first, the management of water quality. This problem is addressed by the 1972 Federal Water Pollution Control Act Amendments primarily through the institution of the new National Pollutant Discharge Elimination System permit program and the regulation of non-point sources through Section 208 planning. There is also a second aspect, however: management of the contour and shape of water bodies and the integrity of the land-water margin.

Schoenbaum, *Federal Regulation of Disposal of Dredged and Fill Materials under Section 404 of the 1972 Federal Water Pollution Control Act Amendments*, 4 ENVIRONMENTAL CONTROL NEWSLETTER 17 (1976).

permit, to be in compliance with Section 301. Instead, they have only indicated that where the particular area in which the unpermitted discharge occurred fell within "waters of the United States," Section 301 was violated.[109]

In sum, the argument that the opportunity to regulate the discharge of dredged or fill material outside of the navigation servitude rests with EPA derives from an examination of the overall structure of the FWPCA; a recognition of EPA's lead role in the NPDES program; the legislative history of Section 404 with its primary focus upon navigation concerns; and the unique characteristics of Section 404, including the absence of any authority to delegate Section 404 responsibilities and the broad public interest review of Section 404 as contrasted with the water quality review of Section 402.[110]

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109. Two cases have specifically addressed the applicability of Section 404 to a particular waterbody and have held that Section 301 was (or would be) applicable to the unauthorized discharge of "sand, rock, biological and dredged material (dredged or fill material)." Each case has held that the individual involved would be required to obtain a Section 404 permit from the Corps of Engineers to legalize this discharge. However, both cases dealt with discharges into waterbodies that are regarded as navigable waters of the United States under the Corps definition of this term, 33 C.F.R. § 209.260 (1975), and occurred below the ordinary or mean high-water mark within the area of the federal navigation servitude. *P.F.Z. Properties, Inc.*, 393 F.Supp. 1370 and Leslie Salt v. Froehlke, ___ F.Supp. ___, 7 ERC 1311 (N.D. Cal. 1974). Other cases involving the unauthorized discharge of pollutants which could conceivably be classified as "fill material" under a broad definition of that term include: *Weiszmann*, No. 74-469-CIV WM Memorandum Opinion, *reversed in part*, 526 F.2d 1302 (5th Cir. 1976); *Holland*, 373 F.Supp. 665; and United States v. Smith, No. 74-34-NM (E.D. Va., Apr. 21, 1975). Each of these cases held that the unauthorized discharge was a violation of Section 301 and subject to the penal provisions of Section 309 of the Act but did not hold that the defendant was required to obtain a Section 404 permit. However, in these cases an element of proof may have been the lack of a 404 permit.

110. It is conceivable that because of the possibility of overlapping jurisdiction outside the servitude a claim could be made that both a Section 402 and a Section 404 permit are required for specific discharge. Section 101(f) of the FWPCA states:

> It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

In light of this common sense statutory statement, the contention is without merit. In addition, any such contention with regard to permits for work within the servitude ignores the mandate of legislative history and structure of the FWPCA, which is the creation of an exclusive dredged and fill disposal program in that area. *See also* People of St. of California v. Environmental Protection Agency, 511 F.2d 963, 972 (9th Cir. 1975), *cert. granted* 422 U.S. 1041 (1975). Most importantly, Section 402 begins: "Except as provided in sections 318 and 404 of this Act. . ."

These arguments were presented in a letter from the Army General Counsel to the Assistant Attorney General for Lands and Natural Resources that was submitted by the Justice Department for consideration by the court in *Natural Resources Defense Council v. Callaway*. Judge Robinson's opinion, however, did not explicitly address this issue, and thus seemed to leave open the possibility of the Environmental Protection Agency assuming some of the permitting responsibility for dredged and fill material. In a hearing subsequent to the issuance of his opinion, Judge Robinson stated:

> There was an area that was covered by neither EPA nor the Corps of Engineers.
>
> * * *
>
> But the regulatory power is a joint regulatory power, is it not? * * *
>
> My order did not intend and does not state that the Corps of Engineers is to take over the entire program. That is not the intent of the order. That is not what the order says.[111]

Judge Robinson's primary concern was that there was an area beyond the servitude that no one was regulating, and for which permits could not be obtained. Under the FWPCA a discharge is not allowed without a permit, even if there is no federal permit program in existence. Hence, to discharge into a no-agency's land was illegal.[112] This placed a potential discharger in an untenable position. In addition, no agency was assuming the responsibility for a comprehensive enforcement program. This situation obviously required immediate correction.

Recognizing finally the confusion it had created with respect to scope of jurisdiction and division of responsibility under the FWPCA, and possibly evidencing the wisdom that comes only from hindsight, Congress subsequently came to grips with the issue and made clear its desire that jurisdiction under Section 404 be broadly

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111. Hearing Before the Honorable Aubrey Robinson on a Motion for an Extension of Time in Which to Comply with the Court Order, on April 14, 1975, at 9; *see also* Hearing Before the Honorable Aubrey Robinson on the Plaintiffs' Motion for Partial Summary Judgment, on Mar. 26, 1975, at 28.

112. United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973). EPA was issuing cease-and-desist orders, despite the fact neither agency was issuing permits for dredged or fill disposal outside the servitude. *E.g.*, EPA, Region III v. Caine, Administrative Order No. 74-184 (EPA Aug. 23, 1974).

interpreted, and that the Corps is to administer the program.[113] In accordance with this long overdue clarification of congressional intent, the Corps decided that it would implement under its own Section 404 authority a dredged material and fill material disposal program expanded in jurisdiction to the full extent of the commerce power. As will be seen, the Corps has fashioned a reasonable and manageable program focusing on concerns of water quality. Out of the confusion surrounding the passage of Section 404, emerged a serendipitous result.

IV. The Corps' New Regulations

The Corps' regulations implementing its expanded jurisdiction[114] became effective July 25, 1975. Their regulations, which are extensive and somewhat complicated, are unique in that behind them lies a distinct "legislative history" generated by hearings held

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113. House Comm. on Gov't. Operations, Our Threatened Environment: Florida and the Gulf of Mexico, H. R. Rep. No. 93-1396, 93rd Cong. 2d Sess. 23-7 (1974); *see generally Hearings on the Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material Before the Subcomm. on Water Resources of the Senate Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. No. 94-9 (1975) [hereinafter cited as *1st 404 Hearings*]; *Hearings on the Implementation of the Federal Water Pollution Control Act Before the Subcomm. on Investigations and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. No. 94-18 (1975) [hereinafter cited as *2d 404 Hearings*]. There are members of Congress, however, who are distressed about the Corps jurisdictional expansion and have proposed legislation that would limit Corps jurisdiction. *E.g.*, S.1878, 94th Cong., 1st Sess. (1975); S.1843, 94th Cong., 1st Sess. (1975); H.R. 7690, 94th Cong., 1st Sess. (1975); H.R. 7441, 94th Cong., 1st Sess. (1975). There are now over 30 such bills.

114. 40 Fed. Reg. 31320 (1975). The rulemaking undertaken by the Corps was unusual in two respects. First, the proposed regulation set out four widely different alternatives for the public to comment upon. 40 Fed. Reg. 19767-68 (1975). The Corps and the EPA in the published proposals engaged in debate over the alternatives, in essence helping to frame the issues for the public. There were in excess of 4,500 comments on the four alternatives. Second, the July 25 regulations were published as "interim final" regulations, and the Corps again solicited public comment for an additional 90 days. There were in excess of 1500 additional comments during this period. During this 90 day period the Corps held public hearings throughout the nation. Revisions to the interim final regulations are now being studied. This approach to rulemaking, in the opinion of the authors, resulted in an extensive and meaningful public dialogue and should be considered by other agencies when formulating regulations that will impact significantly on the general public. The reader interested in rulemaking should note a recent additional requirement for publication of regulations—the inflation impact statement required by Executive Order No. 11,821 (Nov. 29, 1974) *as implemented by* Office of Management and Budget Circular A-107 (Jan. 28, 1975).

before the House Committee on Public Works to oversee the development of the regulations.[115] At these hearings, which were held during development of the interim final regulations, testimony was presented by both Assistant Secretary of the Army Victor V. Veysey and Assistant EPA Administrator Alvin Alm. This testimony often explains the background for the content of the regulations. What follows is an overview of the program fashioned by the Corps' regulations.

A preliminary note is in order: The purpose of the regulations is to protect and enhance water quality,[116] as that term is used in a broad sense. The FWPCA, as stated in Section 101, " is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Water bodies must be looked at as parts of complex biological communities and must be preserved for that reason.[117] In addition, with regard to dredged spoil and fill disposal nothing is more destructive to water quality than the obliteration of water bodies themselves.

A. *The Scope of Jurisdiction*

Corps jurisdiction is circumscribed, generally, through a series of subsections defining the term, "navigable waters." The first of these provides:

> The term, "navigable waters," as used herein for purposes of Section 404 of the Federal Water Pollution Control Act, is administratively defined to mean waters of the United States including the territorial seas with respect to the disposal of fill material and excluding the territorial seas with respect to the disposal of dredged material . . . .[118]

The first noteworthy aspect of this section is the exclusion of dredged material in the territorial seas, since this activity is already regulated by the Marine Protection, Research and Sanctuaries Act of 1972 (the Ocean Dumping Act).[119] Another important aspect is

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115. *1st and 2d 404 Hearings.*

116. *2d 404 Hearings* at 1, 3, 4, 15 (Veysey); *id.* at 18, 22 (Alm).

117. For judicial support for this proposition see *P.F.Z. Properties, Inc.*, 393 F.Supp. at 1379-82.

118. 33 C.F.R. § 209.120(d)(2)(i), *as amended*, 40 Fed. Reg. 31324 (1975).

119. 16 U.S.C. § 1361 *et seq.* (Supp. IV, 1974).

the characterization of the definition not as statutory interpretation but as an "administrative" definition.[120] As such, it avoids the pitfalls of attempting to divine the statutory definitions, and instead reflects the exercise of a discretionary grant of power by the Congress. As will be discussed, the Congress vested the Army with considerable leeway to define the terms in the statute and to structure a program, with the major bound on that discretion being the purpose of the Act—protection and enhancement of the physical, chemical, and biological integrity of the nation's waters.

The regulations proceed to state that navigable waters include:

> Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high-water mark (mean higher high-water mark on the Pacific coast). . . .[121]

This, of course, is merely a restatement of existing jurisdiction under the 1899 Act. The parenthetical is required because on the west coast the two daily tides are disparate;[122] thus, the higher of the two is the boundary.

The next section of the definition, which is one of the more complicated provisions in the regulation, provides that navigable waters include:

> All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically[123] inundated by saline or brackish waters and

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120. *See* K. Davis, Administrative Law Treatise, § 5.03 (1958, Supp. 1970).

121. 33 C.F.R. § 209.120(d)(2)(i)(*a*), *as amended*, 40 Fed. Reg. 31324 (1975).

122. The mapping or survey is done as follows:

> " 'Mean high water mark' with respect to ocean and coastal waters means the line on the shore established by the average of all high tides (all higher high tides on the Pacific Coast). It is established by survey based on available tidal date (preferably averaged over a period of 18.6 years because of the variations in tide). In the absence of such data, less precise methods to determine the mean high water mark may be used, such as physical markings or comparison of the area in question with an area having similar physical characteristics for which tidal data are already available. . . ."

33 C.F.R. § 209.120(d)(ii) (*b*), *as amended*, 40 Fed. Reg. 31325 (1975). *See Sierra Club*, Nos. 72561 WTS, 732294 WTS.

123. United States v. Tull, Civ., No. 75-319-N (E.D. Va., Nov. 13, 1975) *notice of appeal filed*, represents one judge's discomfort with the concept of periodic inundation. The court

> that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction. . . .[124]

This provision expands jurisdiction by including wetlands that fall outside the mean high-water mark—those contiguous or adjacent to other navigable waters. This expansion is the single most important aspect of the regulations,[125] as it includes those coastal wetlands not regulated by the 1899 Act. The drafters felt that the vegetation line was a clear cut, simple, and certain indicator of the reach of water bodies that could be polluted or destroyed by dredged material or fill disposal. In order to make this provision totally effective, however, field manuals must be prepared detailing those types of vegetation that are deemed capable of growth or reproduction. The Corps intends to prepare such manuals.[126] The Corps approach, when combined with field manuals, is believed to represent the best effort possible given the state of the art.[127] The effort is viewed, however, as an evolving one, which will necessitate consideration of geographical peculiarities, and thus require periodic updating of regional manuals. Also of note is that "mudflats, swamps, and similar areas" are not limited by the second sentence, so as to ensure that areas such as mudflats that do not sustain vegetation but that sustain important insect, aquatic, and other life are regulated.

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in *Tull* complained about the concept, but felt bound by both *Natural Resources Defense Council v. Callaway*, and the regulation, *id.* at 5, and went on to find that the area in question was dry land, *id.* at 3, 5, and, hence, not subject to Corps jurisdiction. For a case in which that same court found Corps jurisdiction over a similar area, see United States v. Smith, No. 74-34-NM (E.D. Va., Apr. 21, 1975).

124. 33 C.F.R. § 209.120(d)(2)(i)(*b*), *as amended*, 40 Fed. Reg. 31324 (1975).

125. *See* 51 to 53 *supra*. In addition to the FWPCA, there are other congressional mandates, or "ancillary statements of intent," to protect wetlands outside the traditional servitude. *E.g.*, 16 U.S.C. §1453 (Supp. IV, 1974) (Coastal Zone Management Act defines the zone so as to include "transitional and intertidal areas, salt marshes, wetlands, and beaches.") The expansion of jurisdiction is the second major step taken by the Corps whose explicit purpose was to protect this resource, the first being the publication in the Federal Register of its wetlands policy on April 3, 1974.

126. 40 Fed. Reg. 31320 (1975). Similar lists have been published by the Fish and Wildlife Service of the Department of Interior, Circular Number 35, and the State of Virginia, Code of Virginia, 62.1-13 3(f); *see* VA. INST. OF MARINE SCIENCE, COASTAL WETLANDS OF VIRGINIA (Interim Report No. 3) (June, 1974).

127. Eventually, and in conjunction with the Corps approach, new mapping and enforcement techniques can be adopted, such as satellite color and infrared photography. *See* Anderson, *Wetlands Mapping in New Jersey*, 1973 PHOTOGRAMMETRIC ENGINEERING 353.

The boundary of coastal wetland jurisdiction has been the subject of an interesting controversy on the west coast, where, under Section 404, jurisdiction extends to the mean higher high-water mark.[128] The issue as to the extent of Army regulatory jurisdiction is compounded in the San Francisco Bay region by the presence of dikes that have been constructed to prevent the Bay waters from inundating unfilled area located below the plane of the mean higher high-water mark. But for the dikes, these areas would continue to be inundated by Bay water. Does the Corps have jurisdiction behind these dikes? In many of these diked-off areas, the land behind the dikes has been rendered dry and remains dry due to the dike and the ability of the landowner effectively to drain off accumulated rainwater. Other areas behind dikes continue to be inundated by water and remain productive marshlands notwithstanding the presence of the dikes. In some cases Bay waters actually inundate these areas because of the permeable nature of the dike, a high underground water table, or the landowner's act of periodically allowing inundation by the Bay's salt waters in order to produce salt through evaporation in settlement ponds. Other low lying areas, while not inundated by Bay waters, are nevertheless periodically inundated by the accumulation of rain water runoff. Rain water combines with salt in the soil (which is present due to the former inundation of the area by Bay waters) to form brackish waters that sustain many forms of aquatic vegetation. These areas are often referred to as "seasonal wetlands" for they are inundated only during periods when the rainfall is abundant; at other times of the year the areas, though still covered with aquatic vegetation, are visibly dry.

The few court decisions dealing with Army jurisdiction on the west coast have not as yet answered the question of whether unfilled dry areas below the plane of the mean higher high-water mark, but located behind dikes that were permitted, continue to remain navigable waters of the United States and thus subject to the federal navigation servitude notwithstanding the presence of the dikes. This entire issue is the subject of litigation before the District Court for the Northern District of California in the case of *Sierra Club v. Leslie Salt Co.*[129]

128. United States v. Freethy, Civil No. C-73-1470 SC (N.D. Calif., Feb. 24, 1975); *Leslie Salt*, ___ F. Supp. ___, 7 ERC 1311.

129. Nos. 72 561 WTS, 72 2294 WTS (N.D. Calif., Mar. 11, 1976).

An associated problem is the time of creation of the dike. If the dike was illegally constructed, specifically, without a permit and inside asserted jurisdiction, the Corps would exercise jurisdiction behind it, whether or not the lands are dry.[130] However, if the dike was constructed at a time when the Corps reviewed permits solely on the basis of effect on navigation, or at a time when the Corps consented to construction behind harbor lines, the dike could have been legal when put into place, and thus, legal now.

United States v. Stoeco Homes, Inc.,[131] indicates that an area which, as a result of legal fill becomes "fast land," specifically, land above the mean high-water mark[132] is no longer subject to Corps jurisdiction. *Stoeco*, therefore, can be read as implying jurisdiction in those areas that are dry but are below the mean high-water mark. Such a reading can be supported by the theory that land subject to the federal servitude is placed in a unique trust and cannot be ceded by the Executive Branch;[133] cession requires an act of Congress.[134] *Stoeco*, which is a generally confusing case, can also be read as implying that dry land that is not fast land behind dikes is outside Corps jurisdiction; as the facts before the court incidently concerned only fast land, the court had only to apply the general principle that all dry land is not subject to Corps jurisdiction to fast land.

In the *Leslie Salt* case the court found that the areas behind the dikes in question:

(a) Were below the former mean higher high-water line;
(b) Were at one time subject to tidal inundation;
(c) Would return to that condition if the dike were

130. *Moretti*, 478 F.2d at 431. That is the Corps position. *Hearings on San Francisco Bay Before the Subcomm. on Conservation and Natural Resources of the Committee on Government Operations*, 91st Cong., 1st Sess. 134-35, (1969).

131. 498 F.2d 597, 610-11 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

132. United States v. Rands, 389 U.S. 121, 123 (1967); United States v. Virginia Elec. and Power Co., 365 U.S. 624, 628 (1961).

133. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); *see* Sax, *The Public Trust Doctrine in Natural Resource Law, Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). The impact of cession is unclear. It may simply mean compensation will be given. If the approach is taken that the public trust obligation to protect the water resource can never be abdicated, federal jurisdiction may still exist.

134. Economy Light and Power Co. v. United States, 256 U.S. 113, 124 (1921). For a recent example of cession of the navigation servitude over a river, see Pub. L. No. 93-251, tit. I, § 97, (to be codified at 33 U.S.C. § 59K).

> abated by the exercise of public authority; and
>
> (d) "Much" of the areas were still subject to periodic inundation.

The court held that the Corps had jurisdiction under both the Rivers and Harbors Act of 1899 and under the FWPCA. It distinguished *Stoeco* as dealing with improved solid upland. While the case can be read to indicate that all areas still below that datum fall within jurisdiction, applying the trust principle mentioned above, it appears to leave open the questions of jurisdiction over unimproved or improved dry land below mean higher water because of the finding of periodic inundation.

As reflected in the regulation, the Corps exercises jurisdiction over seasonal wetlands and over dry areas behind illegal dikes. The Corps does not, however, exert jurisdiction over dryland behind legal dikes be it fast land or not. The Corps perceives its mission to be the protection of the ecologically valuable wetlands, including those that remain behind dikes, and not to engage in wholesale land use control. The new regulations reflect the above position as they exert jurisdiction over contiguous or adjacent wetlands.

The next section of the regulation defines navigable water as including:

> Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark.[135]

This category of waters is a restatement of the traditional Corps jurisdiction, with one important exception: the term headwaters has been substituted for head of navigation. The latter term denotes that point where there is a marked decrease in the navigable capacity.[136] As the touchstone of the Section 404 program is no longer navigation, but rather water quality, a more expansive longitudinal definition was adopted, with the term headwaters being defined as "the point on the stream above which the flow is normally less than 5 cubic feet per second; *provided, however*, the volume of flow, point

135. 33 C.F.R. § 209.120(d)(2)(i)(c), *as amended*, 40 Fed. Reg. 31324 (1975).
136. *See* Egan v. Hart, 165 U.S. 188, 191, 193-94 (1897).

and nonpoint source discharge characteristics of the watershed, and other factors that may impact on the water quality of waters of the United States will be considered in determining this upstream limit."[137] This line reflects an attempt to exclude waters that may have lesser importance with regard to water quality. In addition, the definition provides notice to the public. In a humorous vein, Assistant Secretary Veysey noted that if you can jump over the creek then a permit is not needed; if you can't, one is.[138] At the same time a certain amount of flexibility is provided since a permit proceeding may be required[139] as to a small water body determined by Corps officials to be important for water quality purposes. The last phrase in this section simply indicates that the lateral extent of jurisdiction goes to the ordinary high-water mark.[140]

This next section, which is one of the more important and controversial sections of the regulation, defines navigable waters to include:

> All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark. . . .[141]

This section is important because it encompasses artificial canals used solely for recreational purposes.[142] The phrasing "recreational

137. 33 C.F.R. § 209.120(d)(2)(ii) (*d*), *as amended*, 40 Fed. Reg. 31325 (1975).

138. *2d 404 Hearings*, at 15 (Veysey); *see id.* at 6.

139. 33 C.F.R. § 209.120(d)(2)(i)(*i*), *as amended*, 40 Fed. Reg. 31325 (1975). *See infra* at 91.

140. " 'Ordinary high watermark' with respect to inland fresh water means the line on the shore established by analysis of all daily high waters. It is established as that point on the shore that is inundated 25% of the time and is derived by a flow-duration curve for the particular water body that is based on available water stage data. It may also be estimated by erosion or easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation or its inability to grow, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area." 33 C.F.R. § 209.120(d)(2)(ii)(*a*), *as amended*, 40 Fed. Reg. 31325 (1975).

141. 33 C.F.R. § 209.120(d)(2)(i)(*d*), *as amended*, 40 Fed. Reg. 31324 (1975). The jurisdiction has recently been interpreted by the Corps to include those artificial canals that are subject to the ebb and flow of the tide. *See Stoeco Homes*, 498 F.2d at 610-12.

142. *See* H. R. REP. No. 93-1396, 93d Cong., 2d Sess. 20-23 (1974). The extension of Section 10 jurisdiction over those navigable canals used solely by recreational craft that are connected to navigable waters even though not subject to the ebb and flow was recently

or other navigational purposes" is intended to allow the Corps to regulate a growing and serious environmental problem, the proliferation of dead-end residential canals.[143] The section, by implication, omits drainage and irrigation ditches unless they are used by pleasure boats.[144] It should be noted, however, that drainage and irrigation ditch systems generally can be regulated as point sources by EPA under Section 402 at the point they discharge into a stream or lake.[145]

Navigable waters is also defined to encompass:

> All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark. . . .[146]

This section extends jurisdiction to all tributaries, not just primary tributaries, up to that point where the flow decreases to five cubic feet per second.

The next subsection of the navigable waters definition is perhaps the most interesting legally:

> Interstate waters landward to their ordinary high water mark and up to their headwaters;

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affirmed by Weiszmann v. District Engineer, 526 F.2d 1302 (5th Cir. 1976). ("[P]ersonal or private use by boats" enough for navigability in fact determination as it "demonstrates the availability of the stream for the simpler types of commercial navigation.") However, landlocked canals are not subject to section 10 jurisdiction. *Id.*; *accord*, United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976).

143. *Id.*

144. *2d 404 Hearings*, at 19 (Alm); *1st 404 Hearings*, at 63 (Agee).

145. Natural Resources Defense Council v. Train, 396 F.Supp. 1393, 1401 (D.D.C. 1975); *2d 404 Hearings*, at 28 (Alm). Those that are not can be treated under Section 208 of the FWPCA, which establishes a system of area-wide waste treatment plans. *Natural Resources Defense Council*, 396 F. Supp. at 1401; *see* Section 208(b)(2)(F). There is some discretion in the Administrator in structuring the joint 402/208 program. *Natural Resources Defense Council*, 396 F.Supp. at 1401. However, due to the more rigorous nature of the 402 requirements, a bound on that discretion seems to be that those discharges that are susceptible to "end of pipe" technology be treated as 402 problems. The EPA proposed approach varies somewhat from this analysis; for silvicultural and agricultural activities, the discharge must not only be discharged from a "discernible, confined, and discrete conveyance," but must also result from the controlled application of water by people. Thus, discharges from culverts where the pollution is caused by natural processes is not to be controlled under Section 402 but is to be controlled under Section 208. 43 ENVIRONMENTAL REPORTER 1793, 1810 (1976).

146. 33 C.F.R. § 209.120(d)(2)(i)(*e*), *as amended*, 40 Fed. Reg. 31324 (1975).

> Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:
>
> (1) By interstate travelers for water-related recreational purposes;
>
> (2) For the removal of fish that are sold in interstate commerce;
>
> (3) For industrial purposes by industries in interstate commerce; or
>
> (4) In the production of agricultural commodities, sold or transported in interstate commerce. . . .[147]

This section covers those lakes, rivers, and streams that are not navigable in a traditional sense. Much in this definition is included in those water bodies encompassed within the "all tributaries" section above. Moreover, this section is unique in that it is phrased to provide a nexus to the commerce power. While its categories certainly seem to pull these waters within the ambit of the commerce clause, that type of categorization is unnecessary. As the Sixth Circuit stated in *United States v. Ashland Oil and Transportation Co.*,

> We believe that the language of the Federal Water Pollution Control Act and its legislative history show that the United States Congress was convinced that uncontrolled pollution of the nation's waterways is a threat to the health and welfare of the country as well as a threat to interstate commerce.
>
> Obviously water pollution is a health threat to the water supply of the nation. It endangers our agriculture by rendering water unfit for irrigation. It can end the public use and enjoyment of our magnificent rivers and lakes for fishing for boating and for swimming. These health and welfare concerns are, of course, proper subjects for Congressional attention because of their many impacts upon interstate commerce generally.[148]

The test is "simply whether the activity sought to be regulated is Commerce which concerns more States than one[149] and has a real and substantial relation to the national interest." As, "in the real world everything in the environment is connected to everything

147. 33 C.F.R. § 209.120(d)(2)(i)(*f*) and (*g*), *as amended*, 40 Fed. Reg. 31324 (1975).
148. 504 F.2d 1317, 1325 (6th Cir. 1974).
149. *Heart of Atlanta Motel*, 379 U.S. at 255.

else,"[150] the scope of the commerce power with regard to environmental and water resource regulation is indeed broad. This, combined with the complex interrelationships between all the different kinds of water bodies, certainly brings the lakes, streams, and rivers listed above within the commerce clause.

There are, of course, certain exclusions from these categories. For example, the regulation defines lakes as "natural bodies of water greater than five acres in surface area and all bodies of standing water created by the impounding of navigable waters identified in paragraphs (a)-(h), above. Stock watering ponds and settling basins that are not created by such impoundments are not included."[151] Thus, in an attempt to create a manageable program and to focus on significant environmental problems, the regulation excludes natural lakes less than five acres in size and those impoundments that result from damming unregulated waters or from accumulating rainwater, such as many stock watering ponds.[152] An impoundment of a stream that is regulated, however, will also be regulated. To do otherwise would open a serious loophole in the regulations: a person wanting to discharge into a stream whose flow was greater than five cubic feet per second could obviate the requirements of the regulation by creating an impoundment.

The last category of navigable waters provided for in the regulations is also important:

> Freshwater wetlands including marshes, shallows, swamps and, similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction. . . .[153]

It includes not only those areas that are contiguous but those that are adjacent. This provision extends the area of protection to those wetlands that lie beyond the ordinary high water mark. Fresh-

150. B. Commoner, The Closing Circle 23 (1971).
151. 33 C.F.R. § 209.120(d)(2)(ii)(c), *as amended*, 40 Fed. Reg. 31325 (1975).
152. *2d 404 Hearings* at 6, 7 (Veysey); *see 1st 404 Hearings* at 65 (Ginn, Outen).
153. 33 C.F.R. § 209.120(d)(2)(i)(*h*), *as amended*, 40 Fed. Reg. 31324 (1975).

water wetlands are important for the same reasons as salt water wetlands.[154]

Finally, the regulations contain a provision to ensure that any demonstrable harmful practice can be stopped:

> Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 340). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer.[155]

Thus, for example, swamps that are fed solely by ground water and are not adjacent to navigable waters would be regulated under this provision but only when necessary to protect water quality.[156] This provision should be utilized as an emergency measure rather than as an inclusive catchall.

B. *The Second Set of Exclusions and Inclusions: The Definitions of Dredged Material and Fill Material*

The terms dredged material and fill material, since they are not defined in the Act, provide great leeway to the Corps in developing a workable program. The term "fill material," which is not addressed at all in the legislative history, is especially perplexing. Section 404 was added to the FWPCA because of concern over the disposal of dredged spoil.[157] The regulation of fill material gives rise to some concern as to the intent of Congress, particularly in light of the Corps public interest review and the absence of authority to delegate this function to the States. Nonetheless, the statute says "dredged *or* fill" material, evidencing an intent to cover two generically different types of materials,[158] perhaps because the environ-

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154. *E.g.*, P. JOHNSON, WETLANDS PRESERVATION (1969); U.S. BUREAU OF SPORT FISHERIES AND WILDLIFE, THE WATERFOWL PRODUCTION AREA PROGRAM (1964); *2d 404 Hearings* at 189.

The commerce nexus for adjacent areas is the support they give to, among others, migratory game birds.

155. 33 C.F.R. § 209.120 (d)(2)(i)(i), *as amended*, 40 Fed. Reg. 31325 (1975).

156. *2d 404 Hearings*, at 274 (Alm).

157. *See* 67 to 76, *supra*.

158. We wonder if the drafters intent had been only to include dredged material, and,

mental effects of disposal may be similar.

The Corps defines dredged material as

> material that is excavated or dredged from navigable waters. The term does not include material resulting from normal farming, silvaculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting for production of food, fiber, and forest products.[159]

Of note is the exclusion of plowed material, even where the plowing occurs in a wetland area.[160] While the prospect of allowing individuals to despoil wetland areas gives rise to environmental concern, the language of the statute would not appear to encompass regulation of plowing.

The regulations define "the discharge of dredged material" as

> any addition of dredged material, in excess of one cubic yard when used in a single or incidental operation, into navigable waters. The term includes, without limitation, the addition of dredged material to a specified disposal site located in navigable waters and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into navigable waters resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction of such material may require a

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hence, whether the statute was meant to read "dredged *and* fill material"; only that material that was dredged and then used as fill. Senator Muskie, during the development of the interim final regulations, wrote to Secretary of the Army Callaway, urging that jurisdiction be extended to the full extent of the commerce power, but the program be limited to dredged disposal.

159. 33 C.F.R. § 205.120(d)(4), *as amended*, 40 Fed. Reg. 31325 (1975).

160. Question of Congressman Breaux to Assistant Army Secretary Veysey:

> Question. Do you agree that farming practices such as plowing under aquatic vegetation in wetlands and periodically inundated areas could conceivably be regulated under Section 404 if the requestion is again revised in the future? Response. Attempt has been made to implement reasonably statutory requirements although the regulation may be changed at a later date. We do not believe that activities such as plowing are dredged spoil or fill disposal under Section 404.

2d 404 Hearings at 36.

> permit from the Corps of Engineers under Section 10 of the River and Harbor Act of 1899.[161]

The term was expanded upon in Committee hearings by Assistant Secretary Veysey:

> When material is excavated or dredged from navigable waters by mechanical means such as hopper, pipeline, or bucket dredge or excavated by a bulldozer or other rolling stock and that material is placed in navigable waters the placement constitutes a discharge of dredged material.[162]

This passage makes clear that excavation by backhoe or by bulldozer is dredging. This makes good sense since the operation and the effects—turbidity, extraction, and replacement of large amounts of bottom material—are functionally identical.

As the provision addresses only "the addition" of dredged material, it does not cover slop over from dredging operations. This stems from a recognition of the two separate statutory frameworks.[163] Section 10 of the 1899 Act[164] covers the act of dredging, while Section 404 covers the disposal of the dredged material. The distinction is important as, thus, the EPA veto procedures in Section 404(c) are not applicable to permits for the act of dredging.

The above definitions clearly evidence an intent that activities such as diking or draining in wetlands be covered. While the definition of *dredged material* excludes material produced by normal farming practices, the definition of *disposal* of dredged material does not exclude disposals that are normal farming practices. All who testified before the House Committee on Public Works made clear that construction of levees, where such construction occurs within navigable waters, was intended to be covered by the provisions.[165] However, plowing inundated areas behind dikes, such as rice fields, would not be covered as the operation is a "normal farm-

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161. *Supra*, note 159.

162. *2d 404 Hearings* at 35.

163. *But see Weiszmann*, No. 74-469-CIV WM Memorandum Opinion *reversed in part*, 526 F.2d 1302 (5th Cir. 1976).

164. 33 U.S.C. § 403 (1970).

165. *2d 404 Hearings* at 10, 35 (Veysey); *id.* at 69 (Ford); *1st 404 Hearings*, at 63, 66 (Agee).

ing practice" and thus the material excavated is not dredged material.[166]

The definitions of "fill material" and "discharge of fill material" are self-explanatory and are reproduced in the margin.[167] Of note is that regulation of fill material includes, within navigable waters, construction of highways, dams, roads, causeways, dikes, and some bulkhead and fills.[168] One possible issue which may arise under the definition concerns the discharge of fertilizer into a marshland. It seems from the list of examples given in the definition that fertilization, as opposed to using purposely fertilizer to fill, is not covered, and on this the participants at the hearings seemed to agree.[169] In any event, fertilization is not the kind of activity that would normally be considered a discharge of fill material.

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166. *Id.* Normally, rice dikes are built upland and, thus, are not within the Corps' jurisdiction in the first place.

167. "'*Fill material.*' The term 'fill material' means any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose. 'Fill material' does not include the following:

"(i) Material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products;

"(ii) Material placed for the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.

"(iii) Additions to these categories of activities that are not 'fill' will be considered periodically and these regulations amended accordingly."

"'*Discharge of fill material.*' The term 'discharge of fill material' means the addition of fill material into navigable waters for the purpose of creating fastlands, elevations of land beneath navigable waters, or for impoundments of water. The term generally includes, without limitation, the following activities: placement of fill that is necessary to the construction of any structure in a navigable water; the building of any structure or impoundment requiring rock, sand, dirt, or other pollutants for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwalls, and bulkheads and fills; beach nourishment; levees; sanitary landfills; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants, and subaquaeous utility lines; and artificial reefs."

33 C.F.R. §§ 209.120(d)(6), (7), *as amended*, 40 Fed. Reg. 31325 (1975).

168. Maintenance or emergency reconstruction of existing structures such as dikes, dams, or levees are not regulated. 33 C.F.R. § 209.120(d)(6), *as amended*, 40 Fed. Reg. 31325 (1975).

169. *2d 404 Hearings* at 27.

C. *General or Categorical Permits*

Generally, an applicant is required to come to the Corps and apply for a permit for a specific project. To obviate the need for specific permits for every minor project that has no impact on water quality, the regulations,[170] with the EPA guidelines,[171] set up a system for issuing a general permit for activities that are:

1. Substantially similar in nature;
2. Substantially similar in impact on water quality and on the aquatic system;
3. Individually have minimal impact on water quality and the aquatic system; and
4. Collectively or cumulatively will have minimal impact.

Section 404 also requires that permits be issued only for specified disposal sites. In order to be consistent with the provision, the general permit procedures require either that specific water bodies be designated by the permit, or that dischargers report to the District Engineer forty-five days prior to the commencement of the discharge.

The general permit procedures are vital to the establishment of a workable program. Hopefully, they will be used to minimize the administrative burden on the Corps and the burden on the citizenry by regulating with relative ease activities that have little impact on water quality.

On September 16, 1975, the Corps promulgated guidance on general permits.[172] The guidance listed as possibilities for general permits, small recreational piers, bulkhead and fills for protection of private property, beach restoration, erosion control structures and seventeen other specific kinds of projects. District Engineers were encouraged to undertake at least one general permit procedure in order for the Corps to explore the ramifications of such a procedure.

General permit procedures have a significant advantage over

170. 33 C.F.R. § 209.120(i)(2)(ix), *as amended*, 40 Fed. Reg. 31335 (1975).

171. 40 C.F.R. § 230.6, *as amended*, 40 Fed. Reg. 41297 (1975).

172. Memorandum to Corps district and division offices from Brigadier General Kenneth E. McIntyre, Acting Director of Civil Works.

normal permit procedures in that by addressing the totality of a water body, the procedure allows for a more realistic assessment of cumulative impact.[173] In addition, they tend to ameliorate the sometimes undesirable effects of nation-wide standards by enabling the Corps to consider the peculiar environmental circumstances of diverse areas of the country.[174]

D. *Phased Implementation of the Expanded Section 404 Jurisdiction*

In order to allow experience to be gained, and because of a current lack of personnel and funds needed to implement immediately the entire program, the Corps has decided to phase its jurisdictional expansion.[175] Until July 1, 1976, Corps permits will be required only for discharges into waters subject to the navigation servitude and coastal and inland wetlands contiguous or adjacent thereto. After July 1, 1976, permits will also be required for discharges into primary tributaries, freshwater wetlands adjacent to primary tributaries, and lakes that are not subject to the navigation servitude. And after July 1, 1977, Corps jurisdiction under the regulations will extend to all "waters of the United States."[176]

Discharges that are not subject to the detailed procedures in the regulations are permitted by the regulation subject to a set of general water quality considerations.[177] In addition, if the District Engi-

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173. *See* discussion, *infra*, at 106 to 108.

174. *See* discussion, *infra*, at 112.

175. 33 C.F.R. § 209.120 (e)(2), *as amended*, 40 Fed. Reg. 31325-26 (1975).

176. *Id.*

177. *Id.* at (ii):

> (a) That a water-quality certification under Section 401 of the Federal Water Pollution Control Act (see paragraph (c)(1) of this section) is obtained before the discharge is commenced or the State has waived its right to so certify;
> (b) That a certification of compliance with a State's approved coastal zone management program pursuant to section 307(c)(3) of the Coastal Zone Management Act (see paragraph (c)(2), above), is furnished, if applicable, before the discharge is commenced;
> (c) That the discharge will not be located in the proximity of a public water supply intake;
> (d) That the discharge will not contain unacceptable levels of pathogenic organisms in areas used for sports involving physical contact with the water;
> (e) That the discharge will not occur in areas of concentrated shellfish production; and

neer determines that a water body or discharge should be regulated for water quality reasons, he may decide to apply the full procedures to the discharge or water body.

Some experience is necessary for the Corps to build a solid foundation for what will be a large permit program. By phasing the jurisdictional expansion over a two-year period, the Corps will gain that necessary experience.[178] Second, and most importantly, resources need to be marshalled to solve the most serious environmental problem existing: destruction of wetlands.[179] Thus, the regulations extend the jurisdiction immediately to cover wetlands contiguous or adjacent to navigable waters of the United States.

E. *Permitting by Regulation*

There is a provision in the regulation permitting bulkhead and fills in waters other than those subject to the navigation servitude that are less than 500 feet in length, which incidentally encompasses about two standard lots, are constructed for property protection and involve less than an average of one cubic yard per running foot.[180] The limitation on the reachout into the water of the fill prohibits commitment of a public water resource to private land. Importantly, there is a set of environmental criteria in the regulation with which the discharger still must comply.

F. *The Grandfather Clause*

The regulation also permitted a very small class of projects that were already underway when the regulation was published; those involving less than 500 cubic yards into waters beyond the servitude commenced prior to July 25, 1975, and that are completed by January 25, 1976.[181]

(f) That the discharge will not destroy or endanger the critical habitat of a threatened or endangered species, as identified under the Endangered Species Act.

178. *2d 404 Hearings* at 20 (Alm).

179. *2d 404 Hearings* at 29 (Veysey).

180. 33 C.F.R. § 209.120(e)(2)(iv), *as amended*, 40 Fed. Reg. 31326 (1975).

181. 33 C.F.R. § 209.120(e)(2)(iii), *as amended*, 40 Fed. Reg. 31326 (1975).

G. *The Legal Bases for Geographic and Functional Exclusions*

The Corps regulations are an attempt to develop a workable and manageable program that focuses on water quality. To do so the previously detailed exclusions and unique administrative mechanisms were developed.

As indicated above, the Corps has excluded certain water bodies and certain activities from formal permit requirements. In addition, it has promulgated general or categorical permit procedures for discharges that are similar in nature and occur in one locale. The question immediately arises as to whether these exclusions are legal. Section 301 of the FWPCA can be read to prohibit *any* discharge without a *permit* into *navigable waters*. That statement does not really say a great deal, however, and Section 301, in point of fact, prohibits those discharges not *in compliance* with Section 404. Thus, the question becomes one of interpretation of Section 404. Judicial precedent, the legislative history of Section 404, and common sense, all recognize and, in some cases, dictate that administrative mechanisms be developed in order for there to be any program at all, let alone one that focuses on the purpose of the Act—enhancement of water quality—and one that focuses on the greatest water quality problem—wetland preservation.

The FWPCA leaves undefined the term "dredged or fill material." While it defines "navigable waters," it does so in a confusing fashion—as "waters of the United States."[182] Section 404 provides only a skeleton of the conditions and procedures necessary for the administration of the program—prior notice and opportunity for public hearings, and the application of guidelines in the evaluation of the permit application. The statute, by implication, allows the Secretary of the Army to provide the flesh—definitions of undefined or partially defined terms, detailed procedures, necessary interagency consultation, and guidance on factors to be considered in the permit decision.

Several factors inherent in the nature of the task imposed on the Corps dictate that it be given substantial discretion in formulat-

182. *See* the discussion *supra* note 77.

ing regulations. First, as in any new program, innovation should be encouraged.[183] Second, in view of the substantial impact of the program, clearly defined geographic boundaries are essential to providing public notice as to where permits are required. For example, in a coastal area where marshes are periodically inundated, where does the marsh end: at the high-water mark; at the edge of the salt water vegetation line; at the storm tide or spring tide. If it is at the edge of a vegetation line, what kinds of vegetation are to be looked at? At the same time, these boundaries should enable effective enforcement through aerial surveillance. Similarly, the *types* of activities to be regulated must be delineated in a manner that provides clear notice to the affected public. Farmers should be informed that many normal farming practices such as plowing are not included within the program.

A third set of factors also indicate a need for and a legitimacy in exercising broad discretion in effectuating the program; it is the inherent discretionary power in enforcing any law. A recent Supreme Court case is necessary to set the stage in order to assess the nature of this broad discretion. In *United States v. Pennsylvania Industrial Chemical Corp.*,[184] the Court held, *inter alia*, that the absence of a regulatory program under Section 13 of the Rivers and Harbors Act of 1899 did not in any way affect the prohibition as to discharges without permits. Thus, once the Corps has put the public on notice as to the extent of its jurisdiction, it should have a regulatory mechanism large enough to administer the program.[185] If enforcement is impossible because of an influx of permits and the legal prohibition is still in effect, the following results may ensue: First, the credibility of the FWPCA and the Corps as a regulatory agency is destroyed by unnecessary bureaucratic red tape and delay.[186] Sec-

183. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 52-90, 216-17 (1969).

184. 411 U.S. 655,666 (1973).

185. Where an agency responsible for the administration of a statute misleads or deprives an individual of fair warning as to what constitutes criminal conduct, traditional notions of estoppel may in unique cases prevent the government from prosecution. 411 U.S. at 670.

186. A permit that is not controversial or that does not require an environmental impact statement (EIS) now takes three to four months to process. If an EIS is required, there is preparation time and then the Council on Environmental Guidelines requires a minimum waiting period of 90 days from date of publication of the draft to the date when the agency may take any administrative action with regard to the issuance of the permit. 40 C.F.R. § 1500.11 (1974). If the Fish and Wildlife Service of the Department of Interior objects to a

ond, there is the possibility people may just ignore the Act, undermining the credibility of the entire legal system. Third, the purpose of the Act—to enhance and protect water quality—is undermined as the Corps would spread itself too thin; serious water quality problems should be the focus of the regulatory program and resources should be marshalled accordingly.

A related concept is that, assuming a lack of resources to administer the entire program, exclusion by rulemaking of less harmful discharges divests administrators of a broad-ranging enforcement discretion which is not needed in the development of the program, a discretion which could have resulted in an inconsistently and unfairly applied permit system.[187]

As Congress granted the Secretary of the Army a rulemaking authority, the issue is whether the regulations promulgated were within the statutory grant of authority, were issued in accordance with proper administrative procedure, and were reasonable.[188] Courts traditionally allow agencies great leeway to interpret and implement a new law in a logical and manageable fashion.[189] The limit of discretion is, of course, reasonableness.[190] In focusing upon water quality, the authors believe that the Corps regulations bear a reasonable relationship to the purpose of the Act—the maintenance and enhancement of the chemical, physical, and biological integrity of our nation's waters.[191]

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permit application, there are detailed appeal procedures up to the level of the Secretaries of Army and Interior that add to the time delays. App. B to 33 C.F.R. § 209.120, *as amended*, 40 Fed. Reg. 31341 (1975).

187. DAVIS, *supra* note 183, at 142-62.

188. Nat'l Broadcasting Co. v. United States, 319 U.S. 190 (1943).

189. Weinberger v. Bentex Pharmaceuticals, 412 U.S. 645 (1973); Natural Resources Defense Council v. Train, 510 F.2d 692, 706 (D.C. Cir. 1975).

190. The standard of judicial review, however, is one of "arbitrariness or capriciousness." Dunlop v. Bachowski, 421 U.S. 560 (1975).

191. Thus, in Natural Resources Defense Council v. Train, 396 F. Supp. 1393 (D.D.C. 1975), the court held that the exclusion of certain storm sewers, feed lots, silviculture, and irrigation discharges from the 402 program was illegal. The exemptions were similar to those of the Corps in that applicable water quality standards still applied and the Administrator retained power to exercise control over those that were found to be harmful. The court relied on the plain meaning of Section 301, which indicates that the decision may have some impact insofar as Section 404. However, the court noted that its decision also rested on 402's legislative history. The court harbored considerable doubt as to EPA's claims of administrative necessity and instructed EPA on how to make its program manageable:

In addition, there are specific supports for many of the exclusions built into the program. For example, the Joint Conference Report recognizes the need to streamline procedures and, indeed, gives an imprimatur to the general permit procedures:

> The Secretary [of the Army] is also encouraged to use general dredging permits to maintain such non-Federal facilities where the work is in the same general area and the character of the work is similar.[192]

With regard to the grandfather clause, environmental concerns combining traditional notions of fair play and estoppel may in unique cases prohibit the government from requiring dischargers to restore to pristine character filled areas when they relied on the Corps' earlier regulatory pronouncements on jurisidiction;[193] those unique cases being where restoration itself is environmentally damaging. The clause recognizes this possibility.

It is also interesting to note that all participants to the dialogue concerning the regulations agreed in concept with the Corps' ultimate approach; that of building in different types of exclusions, with a focus on water quality.[194] Judge Robinson also understood the administrative problems that faced the Corps, that the Corps would eventually have to draw lines: "[U]ntil the Army Corps of Engineers can draw a line somewhere it can't function." He understood

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(1) by defining terms that of their nature are vague;
(2) by excluding those activities from one program for which another system of control exists; and
(3) by using area permits.

396 F.Supp. at 1401-02. Most importantly, the case is distinguishable as the EPA basis was administrative convenience; the Corps focus is on needs of water quality and, thus, the attempt is to not overregulate the less harmful discharges.

192. LEGISLATIVE HISTORY, *supra* note 35, at 325; *see also* H. R. REP. No. 93-1396, 93d Cong., 2d Sess. 23 (1974); *2d 404 Hearings* at 74.

193. United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973). A Corps' earlier grandfather clause was upheld by the General Accounting Office. Op. Comp. Gen. B-179721 (July 5, 1974). Estoppel, because of the public interest involved, should rarely come into play and, indeed, the courts generally reject such claims. *E.g.*, *Weiszmann*, 526 F.2d 1302. In cases where there is no estoppel, the Corps can require rejuvenation of the water area. *E.g.*, *Moretti*, 478 F.2d at 431. An evidentiary hearing by the district court on the feasibility and environmental advisability is required. *Sexton Coves Estates, Inc.*, 526 F.2d 1293; *Weiszmann*, 526 F.2d 1302.

194. *2d 404 Hearings* at 18, 22 (Alm) (EPA was a defendant in *NRDC v. Callaway*); *id.* at 1, 3, 5, 14 (Veysey) (the Army and the Corps were defendants in *NRDC v. Callaway*).

the undefined nature of waters of the United States: "What they can't do at the moment is tell me or tell anybody in the Corps, let alone the public, under this concept of waters of the United States, where that line now is."[195]

H. *Permits by and for Federal Agencies*

Both the EPA Guidelines and the Corps regulations apply to federal agencies.[196] This is true even for congressionally authorized projects unless specifically exempted by the Congress.[197] In addition, Section 404 applies to many activities that are permitted by other federal agencies such as the Federal Power Commission,[198] and the Nuclear Regulatory Commission.[199]

I. *The EPA Guildelines*

Section 404(b) of the FWPCA provides that each disposal site "shall be specified . . . through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army. . . ."[200]

Guidelines were promulgated by EPA on September 5, 1975.[201] For the most part they establish the technical criteria for permit issuance. The inquiry with regard to a disposal concerns physical

195. Hearing on a motion for an extension of time in which to comply with the Order in *NRDC v. Callaway* before the Honorable Aubrey Robinson, Apr. 4, 1975, at 15, 16.

196. The Corps does not issue itself a permit. Rather, and in accordance with Section 404 and the EPA Guidelines, it publishes a statement of findings that is substantively the equivalent of a permit. 33 C.F.R. § 209.145 (1975).

197. *See 2d 404 Hearings* at 16-17, 35.

198. Scenic Hudson Preservation Conference v. Callaway, 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974).

199. In an attempt to streamline procedures, the Corps has entered into a Memorandum of Understanding with the Nuclear Regulatory Commission to expedite permit processing for nuclear power plants. Memorandum of Understanding Between the Corps of Engineers and the Nuclear Regulatory Commission, July 2, 1975.

200. It can be argued that the phrase "in conjunction with" may raise the problem of how to break deadlocks between the two agencies on the substance of the Guidelines. Future legislators should use the old reliable, "after consultation with. . . ." The authors, however, would suggest that the conflict between agencies with different constituencies results in guidelines that more accurately reflect the totality of the public interest.

201. 40 Fed. Reg. 41291 (1975). The Corps has underway a $30 million research program to help better understand the impacts of dredging and dredged material disposal.

and chemical-biological impacts. The Guidelines state a strong wetland policy: "From a national perspective, the degradation or destruction of aquatic resources by filling operations is considered the most severe environmental impact covered by these regulations."[202] Other physical impacts to be addressed include effects on the water column, such as reduction in light transmission capability, and the covering of benthic communities, those on the bottom of the water bodies. The Guidelines identify scientific testing procedures for assessing the chemical impact of disposal. Last, they attempt to order or establish a set of criteria upon which to make individual permit determinations.

Of interest is the interaction between the Guidelines and the Corps public-interest review: As both are statutory requirements and as neither specifically is preemptive, they both apply to all permit applications.

The Guidelines raise one serious and current legal issue: They require the application of "such water quality standards as are applicable by law."[203] In *Minnesota v. Callaway*,[204] the court held that the Corps must, with regard to its own dredging activities, comply with state dredged spoil disposal laws. The court's logic was twofold: First, Section 313 of the FWPCA requires the federal government to comply with state water standards "to the same extent that any person is subject to such requirements." Second, the delegation to the state by the EPA Administrator of the Section 402 program was also a delegation of the Section 404 program; the objective of all of the sections of the FWPCA is the creation of state programs.

The opinion is erroneous in at least three respects. First, Section 313 is not dispositive at all unless private dredgers are subject to state dredging standards. Second, it is clear, as was discussed earlier, that the Congress intended to create for federal and private dredgers[205] an exclusive nondelegable federal dredged spoil and fill

202. 40 C.F.R. § 230.4-1(a)(1), *as amended*, 40 Fed. Reg. 41294 (1975).

203. 40 C.F.R. § 230.4-2, *as amended*, 40 Fed. Reg. 41295 (1975).

204. 3-75-Civ.-120 (D. Minn., Oct. 9, 1975). There is a pending case that is similar in Wisconsin. Wisconsin v. Hoffmann, No. 73-C-183 (W.D. Wis.).

205. Private dredgers are treated differently only in that they must, pursuant to Section 401, obtain a state water quality certification. Federal agencies are specifically excluded. Section 401 (a)(6).

disposal program with the possibility of either Corps or EPA jurisdiction outside the servitude; this is made clear both from the structure of the Act itself and from the legislative history.[206] Third, and a related point, Section 402 specifically allows for delegation of its own organic 402 program and makes no mention of any of the other programs in the FWPCA.

The policy reason behind the exclusive federal program, as evidenced by the extensive legislative history, is that maintenance of navigation is still a federal concern and from a national perspective it is unacceptable to allow one state through its application of dredged disposal criteria to shut down an interstate commercial waterway.

The case is on appeal and hopefully this egregious misreading of the FWPCA will be remedied.

V. Three Major Policy Issues That Remain After *Natural Resources Defense Council v. Callaway* and After the Passage of the FWPCA

A. *The Wetland Policy*

When should permits be denied for wetland development? Because of their demonstrated value and the fact that development results in a permanent destruction, denial of a permit should be the normal action. Both the Corps wetland policy and the EPA Guidelines state strong presumptions against wetland development and make one thing clear: Where there are alternative possible sites and the *basic* purpose of the structure is not wetland dependent, then the permit is to be denied.[207] Thus, housing permits should be de-

206. *See* 67 to 76, *supra*.

207. 33 C.F.R. § 209.120(g)(3)(iv)(*a*), *as amended*, 40 Fed. Reg. 31328 (1975) (Corps Regulations):

> In evaluating whether a particular alteration is necessary, the District Engineer shall primarily consider whether the proposed activity is dependent upon the wetland resources and environment and whether feasible alternative sites are available.

40 C.F.R. § 230.5(b)(8)(ii), *as amended*, 40 Fed. Reg. 41296 (1975) (EPA Guidelines):

> Discharge of fill material in wetlands shall not be permitted unless the applicant demonstrates . . . the activity associated with the fill must have access or proximity to the water resource in order to fulfill its basic purpose, or that other site or construction alternatives are not practicable.

nied in most cases as the basic purpose is shelter and as there are almost always alternative sites that a developer can acquire.

The Corps wetland policy, in conjunction with the EPA Guidelines, in essence provides that, except in unusual circumstances, no development in wetlands is to occur. There are conceivable situations, be they unusual, in which a permit should be granted. Almost all such situations, however, raise a difficult philosophical issue. Factories that need access to water because of a demonstrated economic need to use waterways often create new jobs. It should be noted that an absolute need for water access is an unusual situation. In any case, the destruction of the water resource may be, it can be argued, for the benefit of the least advantaged members of society and, hence, its loss to more advantaged members may be socially justified or at least rationalized. There is a third interest, however, and that is that of future generations, which comprises a benefitted class and all others, and which because of its later in time status is *per se* a lesser advantaged class.[208] Fewer primary resources will exist at the time their inheritance vests, so the value to future generations must be weighed against present employment needs in such a situation. A guiding factor is the finality of the wetland destruction, which makes it more difficult for all of society, both advantaged and disadvantaged, to live in the future. The future constituency of the natural wetland will often be larger in scope than that which will be employed by the factory. In addition, the factory may simply be forced to become more ingenious with regard to site selection. In any case, the conflict between present disadvantaged classes and future classes presents a difficult issue with regard to permit issuance; certainly a much more difficult case in that of the unusual factory with a water access need than in that of a home.

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208. *See generally* J. RAWLS, A THEORY OF JUSTICE 282-293 (1971). A related concept is that present generations will preserve in a natural state only those areas that have present commercial value in that natural state. The long term problem follows:

> [A] system of conservation based solely upon economic self-interest is hopelessly lopsided. It tends to ignore, and thus to eliminate, many elements in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning. It assumes . . . that the economic parts of the biotic clock will function without the uneconomic parts.

A. LEOPOLD, A SAND COUNTY ALMANAC 214 (1949).

B. *Taking of Property Without Compensation and Wetland Regulation*

The fifth amendment states: "nor shall property be taken for public use, without just compensation." The taking clause presents a unique problem with regard to wetland regulation. As a wetland may have little commercial value unless filled,[209] denial of a fill permit under 404 may result in some cases in an inability to use the property for any purpose other than pristine purposes. In contrast, permits under Section 402 for factory discharges can, for the most part, be obtained if the factory owners are willing to expend necessary monies. In sum, the nature of the first may require absolute limitations on use and the nature of the second may merely impose costs on use.

Is the prohibition of the opportunity to fill and thus make effective use of the land a taking for public purpose without compensation? We believe it is not.

The easy case first: Where the government prohibits development within the navigation servitude there is clearly no compensation due the landowner.[210] The power to regulate navigation confers upon the federal government a dominant navigation servitude. Regulation of navigable waters does not result in a taking as it results "from the lawful exercise of a power to which the interests of riparian owners have always been subject."[211] Outside the servitude—in the new Corps jurisdiction—the same theory may often apply and in addition new concerns and legal theories come into play.

Insofar as expanded jurisdiction is based upon the protection of the navigation servitude, and the overwhelming majority of the new cases draw such a connection,[212] the exercise of jurisdiction falls

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209. It should be noted that often means less onerous than fill, such as stilts, might be used.

210. United States v. Rands, 389 U.S. 121, 123 (1967).

211. *Id.*

212. *See* cases, *supra* note 62, and accompanying text. *Accord, P.F.Z. Properties, Inc.*, 393 F. Supp. at 1379 (waters of project sites are potential sources of pollution for navigable waters). *Cf.* Conservation Council of North Carolina v. Costanzo, 398 F.Supp. 653 (E.D.N.C. 1975), *aff'd on other grounds*, ___ F.2d ___(4th Cir. 1975). The Supreme Court case of

within the protection of the servitude and no compensation would be due. To the extent that there possibly may be discharges into water bodies that do not affect the servitude, the analysis is more complicated.

The typical taking case is one where a highway cuts off access to land making it worthless. In that case, the impact on use is solely to provide an additional public resource. Wetland fill, in contrast, often results in harm external to the owners due to the interrelated nature of the marsh system to other water bodies and ecological systems, and this regulation is to prevent public harm.

While the federal courts have been adept at avoiding the issue,[213] leading state court decisions indicate that compensation will not normally be due even outside the servitude.[214] Although these recent cases mark a departure from prior case law,[215] their logic is unassailable. Basically, the courts have progressed from viewing wetland regulation as providing a gratis public benefit to recognizing that regulation, in fact, prevents public harm.

An attempt to formulate a doctrine that addresses all old and new cases with regard to the taking decisions of the courts would be foolhardy: "The judicial calculus involved in the balancing process is described in a variety of unilluminating ways."[216] The courts decide these cases on the facts. With regard to wetland regulation, however, there is a set of common facts that indicate that takings will not normally occur.

United States v. Rio Grande Irrigation Co., 174 U.S. 690, 708-09 (1899), is an early and explicit application of this principle. For a recent example, see *Sexton Coves, Inc.*, 526 F.2d 1293.

213. *E.g.*, *Stoeco Homes, Inc.* 498 F.2d 597; *Zabel v. Tabb*, 430 F.2d 199.

214. Potomac Sand and Gravel Co. v. Mandel, 266 Md. 364, 293 A.2d 241 (1972); Just v. Marinette County, 56 Wis.2d 7, 17, 201 N.W. 2d 761, 768 (1972); Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972). While the limitation upon the federal government stems from the taking clause, and the limitation on the state governments is one of a limitation on the police power, the courts treat the two limitations in an identical fashion. Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226 (1897).

215. *E.g.*, MacGibbon v. Bd. of Appeals, 356 Mass. 635, 255 N.E. 2d 347 (1970); Maine v. Johnson, 265 A.2d 711 (Me. 1970).

216. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 39 (1971). F. Bosselman, D. Callies, & J. Banta, The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control (1973) is a good, detailed analysis of taking problems.

The general factors to be looked to are the importance of the purpose of the regulation, the size of the sector of the public benefitted, the rationality of the means used to accomplish the purpose, and the burden imposed by the regulation.[217] While at one time the focus was upon the degree of the burden imposed upon the individual,[218] those decisions were premised upon perceived unlimited resources, unlimited growth, and upon an environment that could withstand the pressures of that growth. In addition, there was a general unawareness of the values of many resources; wetlands were often thought to be useless swamps. Times have changed.

We now know that wetland resources are finite, and that they bestow important benefits upon the general public.[219] To this change in factual premise, an important principle must be added: "[T]he state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . ."[220] Alternatively stated, while the law recognizes a right to use property, it does not recognize a correlative right to use it in a manner that is harmful to others.[221] When a developer fills a wetland he is destroying a natural water filtration plant, he destroys the food source for our fisheries, he destroys nurseries and spawning grounds, he alters both normal and storm patterns of water circulation; in sum, volitional action is being taken that alters the *status quo*, inuring to the benefit of the actor and resulting in a serious and permanent harm to those around him. Prevention of the act is certainly legitimate regulation and not a taking.

C. *Section 404 and the Proper Role of the States and the Federal Government in Land Use Control*

Section 404, as discussed, is a comprehensive and exclusively

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217. Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962); Hudson Water Co. v. McCarter, 209 U.S. 349, 356-57 (1908).

218. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). This was Justice Holmes' famous "diminution in value" test. It has been downplayed by the Supreme Court. *E.g.*, *Goldblatt v. Hempstead*, 369 U.S. at 594.

219. One of those values, protection of fish and wildlife, has for many years been recognized by the Supreme Court as a favored governmental role. *E.g.*, Wells v. Midland Carbon Co., 254 U.S. 300 (1920).

220. E. FREUND, THE POLICE POWER 576 (1905), *see* Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 61-64 (1974). The Supreme Court has recognized this distinction. Miller v. Schoene, 276 U.S. 272 (1928).

221. *Just v. Marinette County*, 56 Wis.2d at 16, 201 N.W. 2d at 767.

federal dredge and fill material regulatory program. It is a comprehensive and pervasive program in two ways. The first is the extent of jurisdiction, which is an obvious extension of federal presence into new jurisdictional areas. The second is a result of what the federal government does in those areas where it has this presence: the permit criteria result in a limited form of federal land use control.[222]

Section 404 itself requires that a broad set of considerations apply to any permit application. Section 404(b) of the FWPCA requires that guidelines for permit issuance be developed that are in consonance with Section 403(c)'s ocean discharge criteria, which are broad ranging. Section 403(c) identifies the following criteria: protection of human health and welfare, fish, shellfish, wildlife, shorelines, beaches, marine life, esthetics, recreation, economic values, alternative locations and methods of disposal, and alternative uses of the water resource. Economic values and alternative uses of the water resource present the most broad ranging factors for consideration. These criteria are reflected in the EPA Guidelines.

In addition, the Corps is required by the National Environmental Policy Act, and other statutory requirements, to

222. Three comments are in order on land use control. The first is that while Section 404 imposes land use controls on states, except in areas that are unusually wet, such as parts of the state of Florida, 404 regulation is not in essence planning. It would rarely result in a *de facto* comprehensive development plan for an area, but does easily result in control by directing development in some areas because of the premise upon which the Corps regulations are based—preservation of our water resources. While federally imposed control may result in a more haphazard approach to resource use than a state or federal planning program, it certainly results in a less pervasive federal involvement.

The second comment is that 404 land use control is not unlike many other federal activities that impact on land use, including federal grant programs, natural gas regulation, and highway development. In premise, those controls that result from many other federal laws are similar. For example: The Clean Air Act, 42 U.S.C. §§ 1857 *et seq.* (Supp. IV, 1974), especially Section 110 (federal requirements for state implementation plans); other sections of the FWPCA, particularly Sections 208 and 303(e) (area wide waste treatment plans); and grant programs administered by various federal agencies such as HUD, *e.g.*, 42 U.S.C. § 4521 (1970) (grants for planning new communities), and the Department of Commerce, 16 U.S.C. §§ 1451 *et seq.* (Supp. IV, 1974) (the Coastal Zone Management Act of 1972). *See also* NEPA. However, except in unusually wet areas, such as parts of Florida, 404 may be less pervasive than these other programs.

Third, the federal government does, in any case, exercise control over the one-third of the nation that it still owns. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 28 (1970). The portion of the country that would be regulated under section 404, 3 1/2% excluding Alaska, is small in comparison.

conduct a public interest review,[223] which is a broad ranging review of all effects of a permit action. A summary follows: The regulation indicates that evaluation of each permit application will be based on a review of the probable impact that the proposed activity will have on the general public interest. The regulation lists the following factors for consideration: conservation, economics, esthetics, general environmental concerns, historical values, fish and wildlife values, flood damage prevention, land-use classifications, navigation, recreation, water supply, water quality, and the needs and welfare of the people. "No permit will be granted unless its issuance is found to be in the public interest."[224] The regulation further establishes the following four general criteria:

> (1) The relative extent of the public and private need for the proposed structure of work;
> (2) The desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;
> (3) The extent and permanence of the beneficial and/or detrimental effects that the proposed structure or work may have on the public and private uses to which the area is suited; and
> (4) The probable impact of each proposal in relation to the cumulative effect created by other structures or work in the general area.

In addition, all of the indirect or secondary effects that have a proximate relationship to the activity must be considered.[225] To assist in the evaluation, the regulation requires any person desiring to undertake any activity requiring a Department of the Army authorization to include in his application a description of the purpose and intended use of the proposed activity. The totality of the public interest is evaluated by looking to the impact of the proposed use of the fill, including the structures to be placed on it, economic and esthetic aspects of the fill and those structures, the benefits to be gained from the fill and the structures, and any secondary impacts that result from the project. A full evaluation of the esthetic and other environmental aspects of the proposed use is essential to en-

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223. *See* 57 to 58, *supra*.
224. 33 C.F.R. § 209.120(f)(1), *as amended*, 40 Fed. Reg. 31327 (1975).
225. 33 C.F.R. § 209.120(1)(3)(e), *as amended*, 40 Fed. Reg. 31327 (1975).

sure the justification required by law for the decision to issue or deny the permit application.

As a result of the public interest review, it is possible to have conditions placed on a permit that are similar to zoning requirements and that have no direct relationship to water quality or navigation. In addition, denial of a permit for other than water quality reasons may be akin to zoning. An example may be helpful in understanding the possible pervasive nature of the public interest review. A developer wishes to fill a wetland area[226] for the development of a shopping center. Present land uses, the needs for a shopping center, and alternative locations, as well as environmental and water quality factors must all be weighed. In addition, as a result of a primary goal of the FWPCA in Section 101(a)—that the discharge of pollutants into navigable waters be eliminated by 1985 (the zero discharge goal)—and numerous pronouncements from the House Committee on Government Operations on wetland preservation, there is a strong presumption in Corps regulations against wetland development. If alternative sites are available, and even if there is no permanent impact on water quality, the permit will probably not be granted. And if the shopping center will result in additional development or changes in traffic patterns, these must also be considered. In addition, if the proposed structure is esthetically, economically, or socially harmful, the permit may not be granted. Last, where there are no alternative sites available but there is a serious impact on water quality, the permit will not be granted. During this evaluation the need for the ultimate structure would weigh heavily in the analysis. This perhaps best illustrates the possibility of land use control.

So two issues present themselves: Should the federal government be involved in all these areas;[227] and if it should or must, how extensive should its review be.

The first factor that dictates for state programs is the relation-

226. Much of the state of Florida is under some amount of water.

227. H.R. 3981, 94th Cong., 1st Sess. (1975) was an attempt to amend the Coastal Zone Management Act 16 U.S.C. §§ 1451 *et seq.* (Supp. IV, 1974) to allow delegation of the Section 404 program, and others, to states with approved coastal zone programs. *See also* S. 1796, 94th Cong., 1st Sess. (1975).

ship between water quality regulation and land use control.[228] Where, whether, and how to dispose of dredge and fill material determines to a large extent possible uses of property, especially in coastal areas. Thus, water quality planning must be coordinated with land use planning,[229] which is a state or local function. While it is not impossible for the Corps to coordinate its 404 program with those state programs such as area-wide waste treatment programs,[230] which comprise the bulk of land use and control programs in the nation, it may be more advisable to consolidate similar functions.

It also seems that jurisdiction should be exercised at the lowest administrative level that can assess accurately relative resource values and that can administer an efficient program. The less levels in the bureaucracy, the more efficient the program, and, hence, with regard to that factor state programs should be favored. With regard to the assessment of relative resource values, the issue is more complex. State boundaries are not drawn on a river basin or coastal zone basis. Hence, the interest of each state entity varies, and it is possible and probable that some states may choose to destroy a class of water resource within their boundaries that are valuable to adjoining states. And it may be that federal detachment results in

228. In the preamble to the Corps interim final regulations, the role of the states in the present Corps program was summarized:

> Thus, where a state denies a permit, the Corps will not issue a section 404 permit. On the other hand, if a state issues a permit, the Corps would not deny its permit unless there are overriding national factors of the public interest which dictate such action. We believe that this type of situation can be kept to a minimum provided the State's permit program has built into it the policies, procedures, goals, requirements, and objectives embodied in the Corps permit program and the national legislation which molded and supports it. This would include, for example, the concerns and requirements of the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, the Coastal Zone Management Act, and the FWPCA. In view of this objective, a section 404 permit will generally be issued following a favorable State determination unless overriding national factors of the public interest are revealed during the final processing of the section 404 permit application and provided the concerns, policies, goals, and requirements expressed in the above cited statutes, the Corps policies, and the guidelines have been addressed.

40 Fed. Reg. 31322 (1975). Thus, the FWPCA, the regulations, and the EPA Guidelines must be looked to despite state approval.

229. NATIONAL WATER COMMISSION, NEW DIRECTIONS IN U.S. WATER POLICY 72 (1973).

230. Section 208, 33 U.S.C. § 1288 (Supp. IV, 1974).

better long-term decisions. At the same time, the federal government is not structured nor located so as to be responsive to local needs. An accommodation needs to be struck and the one we suggest is that the federal government be able to delegate to those states that have an acceptable program permit authority. The statutory provision would set out the provision for meeting rigorous federal environmental standards before the state program is acceptable, would continue the federal role only insofar as navigation goes, and would allow the federal government to withdraw all or part of its delegation for states whose programs are unacceptable for one reason or another, including environmental reasons. It would also require a Corps certificate that either denial or issuance would not substantially impair navigation. This delegation not only makes good sense but is in accordance with what seems to be accepted national policy.[231]

There is one problem with regard to delegation and that is those states that are concerned with dredged and fill disposal problems presently have the best of all worlds: The federal government regulates; the state resources are protected; it costs them no public monies; and the state officials do not have to take the unpopular action of passing tough environmental legislation and then administratively turning down permit applications. In addition, the states do have the opportunity to prevent permit issuance if they so choose. Section 401 requires a water quality certification from a state prior to permit issuance and Section 307(c)(3) of the Coastal Zone Management Act requires compliance with coastal zone management plans.

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231. Sections 101(b); 102(a), 103 of the FWPCA; *Fifth Annual Report of the Council on Environmental Quality*, at 49 *et seq.*; Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.* (Supp. IV, 1974). For recent approaches that have attempted to involve states in land use planning bills, see, *e.g.*, S. 632, 92d Cong., 1st Sess. (1972); S. 268, 93d Cong. 1st Sess. (1973); S. 924, 93d Cong., 1st Sess. (1973); H.R. 634, 94th Cong. 1st Sess. (1975); S. 984, 94th Cong. 1st Sess. (1975). In sum:

> [T]he Federal role in land use planning and regulation is properly limited by very sensitive and long-standing constitutional, political, and institutional constraints. Constitutionally, land use regulatory authority is vested in the States. Traditionally, the States in turn have delegated it to localities.

Statement of Russell Peterson, Chairman of the Council on Environmental Quality, Mar. 24, 1975, *printed in* Council on Environmental Quality, 102 Monitor Vol. 5, No. 3, Apr. 1975, at 11.

There are two solutions to this problem: The first is fiscal support and the second is a federal government that will provide an impetus to states to want to take over the program.[232]

With regard to the scope of federal review, a more troublesome issue is presented. Assuming a federal presence, the Corps is required to do a full public interest review.

Criteria for dredged spoil and fill disposal permits could take basically three different approaches. The criteria could focus on:

> (1) Short term or temporary water quality considerations, (what is actually being placed in the water);
> (2) Long term or permanent water quality considerations as an end, and assess the importance of the water body in question as it relates to the water quality down stream (for example, while the fill itself may be clean, the wetland to be filled may act as an important natural water filtration plant); or
> (3) The totality of the public interest, including temporary and permanent water quality considerations, the relative value of the proposed fill, ensuing development, and other kinds of environmental, social, and economic values.

The public interest review, particularly as a result of NEPA, now requires that the last approach be taken. In defense of that approach, it should be pointed out that:

> (1) Wetlands, as well as other water bodies, because of the many functions they perform, have environmental value above and beyond water quality; and
> (2) Value is a relative concept, and in order to ascertain the importance of a water body for water quality or any other purposes, projected uses and alternatives must be considered.

On the other hand, the issue may still be that while the above are all accurate comments:

> (1) The federal interest should be limited to the dominant federal concern, which is water quality in its larger sense;

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232. Notions of fairness and equity require that a permit program be administered uniformly. The government can react two ways to the uniformity requirement: It can pass requirements that impose standards no more stringent than those needed in the least troubled states or requirements that effectively solve the problems in the most troubled states. The more stringent requirements may encourage states to develop programs.

(2) Such a pervasive review could be accomplished equally as effectively by those traditionally charged with land use planning — the states; and
(3) The states are more aware of local problems, relative resource values, and are more responsive to problems than is the federal government.

We believe that the public interest review should continue to guide the Corps so long as the Corps has the responsibility for permit issuance. The importance of a water body for water quality reasons must, of course, be placed in perspective, especially with regard to alternatives and, in light of scarcity of water resources, the need of the structure for the water resource. The whole issue is one of relative value: the interests of the advantaged and disadvantaged, and of present and future generations provide the analytical framework for decisionmaking embodied in the public interest review. No factors can be realistically separated out in permit decisionmaking.

Conclusion

This article is entitled a Corps of Engineers Renaissance. We believe that the coming months will demonstrate that the Corps has, within the course of a year, accomplished something of which few large bureaucracies are capable: They have changed direction, and have adopted a mission mandated by changing times—the protection of our remaining water resources. And the approach they have taken in their regulations indicates an attempt to do so in a reasonable and manageable fashion.