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Federal Regulation of Wetlands

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I. The Shifting Concepts of Wetland Values

Until the last several decades, wetlands -- bogs and swamps and similar areas -- were generally perceived as impediments to agriculture and development, and most useful when eliminated. Originally, there were an estimated 221 million acres of wetlands in the continental United States; as of 1997 (the latest date for which data is available), approximately 105.5 million acres remained.¹ Annual losses between 1986 and 1997 were approximately 58,500 acres; down dramatically from an estimated 290,000 acres per year between 1970 and 1980, and an estimated 458,000 acres per year between the 1950s and 1970s.²

The historical perspective of wetlands dramatically shifted in the early 1970's. It has become clear that wetlands -- both freshwater and tidal -- are of important societal and ecological value. They perform essential functions in preventing flooding through the retention and slow release of excess water, a role that became particularly evident during the 1993 flooding along the Mississippi River. Wetlands purify storm water by filtering out nutrients, sediments and pollutants, thereby protecting both surface and ground water. Indeed, artificial wetlands are now used in treating wastewater.

Wetlands also provide important wildlife benefits. They provide nesting, wintering, resting and feeding grounds for numerous species of migratory waterfowl. Estuaries provide critical food sources, spawning grounds and nurseries for coastal fish and shellfish on both coasts.³ Many endangered or threatened species are heavily dependant on wetlands for continued survival.⁴

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¹ U.S. Fish and Wildlife Service, Status and Trends of Wetlands in the Conterminous United States - 1986 to 1997 (2000) ("Wetland Trends").

² Id.

³ See M. Holloway, High and Dry: New Wetlands Policy Is A Political Quagmire, Scientific American, Dec. 1991, at 20.

⁴ Id.

As developable areas become scarcer, the battle between wetlands protection and property rights has intensified. This complicated web of competing interests often triggers litigation.

Fifth Amendment "takings" claims have been asserted with greater frequency, and the regulation of wetlands by federal agencies has been subject to increasing Congressional and judicial scrutiny. Federal agencies as well as private interest groups have clashed over wetland-related issues. Recent battles have focused on the extent of Congress' authorization to the Corps to regulate wholly intrastate wetlands under the Commerce Clause, and the agencies' authority to regulate excavation activities that result in the redeposit, or "fallback," of dredged or excavated materials.

II. The Backdrop for Federal Regulation of Wetlands

The regulation of wetlands at the federal level implicates a complex legislative-regulatory scheme involving a number of federal agencies.

A. Rivers and Harbors Act

Until 1972, federal control of wetlands was quite limited, and devolved from Section 10 of the Rivers and Harbors Appropriation Act of 1899.⁵ This legislation regulates "navigable waters of the United States" and prohibits "work" (e.g., dredging and filling) or the placement of structures in such waters except in accordance with a permit issued by the U.S. Army Corps of Engineers. Jurisdiction is limited to waters affected by tidal flow or which have been used, or are susceptible to use, for interstate or foreign commerce.⁶ This statute was intended to protect the government's interest in the navigability of waterways.

B. An Overview of Section 404 of the Clean Water Act

The primary basis for the federal regulation of wetlands derives from Section 404⁷ of the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA").⁸ Enacted in 1972, the CWA reflected a far broader federal interest than just navigation. It sought "to restore and maintain the chemical,

⁵ 33 U.S.C. § 401.

⁶ 33 C.F.R. § 329.4.

⁷ 33 U.S.C. § 1344.

⁸ 33 U.S.C. §§ 1251 et seq.

physical, and biological integrity of the Nation's waters."⁹

Section 301 of the CWA prohibits the discharge from a "point source" of any "pollutant" into the Nation's waters except in accordance with a permit issued under the Act.¹⁰ "Pollutant" is defined in the Act to include "dredged spoil."¹¹ The term "dredged spoil" is not defined in either the Act or the Corps' regulations.

As discussed below, CWA Section 404 grants the Corps the authority to issue permits for discharges of dredged or fill material.¹² "Dredged material" is defined as "material that is excavated or dredged from waters of the United States."¹³

"Fill material" has been defined by the Corps as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody," excluding authorized discharges of certain waste materials.¹⁴ EPA has defined the term as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose."¹⁵ Thus, the Corps' definition focused on the purpose of the fill, whereas EPA's focused on its effect. On May 9, 2002, the two agencies published a final rule replacing the two definitions of "fill material" with a single effects-based definition.¹⁶ Under the rule, both agencies' regulations would

⁹ 33 U.S.C. § 1251.

¹⁰ 33 U.S.C. § 1311. "Point source" is broadly defined as "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." 33 U.S.C. § 1362(14). The classic point source for Section 404 filling activities is the bulldozer.

¹¹ 33 U.S.C. § 1362(6).

¹² 42 U.S.C. § 1344(a). See also 33 C.F.R. § 323.1.

¹³ 33 C.F.R. § 323.2(c).

¹⁴ 33 C.F.R. § 323.2(e).

¹⁵ 40 C.F.R. § 232.2.

¹⁶ 67 Fed. Reg. 31129 (May 9, 2002). In addition to resolving the discrepancy between the Corps and EPA definitions, the new "fill" definition is intended to respond to the Ninth Circuit's holding in Resource Investments, Inc. v. U.S. Army Corps of Engineers, 151 F.3d 1162 (9th Cir. 1998), that the Corps'

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provide that "fill material" is:

material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.¹⁷

The rule also provides examples of "fill material," which "include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." Specifically excluded from the definition is "trash or garbage" in recognition that such materials "are not appropriately used, as a general matter, for fill material in waters of the U.S."¹⁸

Taken together, the new rule specifically differentiates mining overburden from "trash or garbage," and thus provides that the filling of waters of the United States with the former may be permitted, whereas the filling of waters of the United States with the latter may not. The agencies contend that the inclusion of "overburden from mining or other excavation activities" in the new definition of "fill material" represents a codification of existing regulatory practice, and "does not expand the types of discharges that will be covered under section 404."¹⁹

Just one day before the final rule was published, however, a federal district court ruled that the disposal of waste from

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denial of a Section 404 permit in connection with its proposed construction and operation of a landfill was improper because the primary purpose of the applicant's proposed filling was waste disposal, and not raising the bottom elevation of a water body. See also Braqq v. Robertson, 54 F.Supp.2d 253 (S.D. W.Va. 1999) (same). Cf. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 910-11 (5th Cir. 1983) (applying objective, rather than subjective, analysis to primary purpose test in upholding Corps' permit denial).

¹⁷ Id. (to be codified at 33 C.F.R. § 323.2(e)(1); 40 C.F.R. § 232.2).

¹⁸ Id.

¹⁹ Id. at 31133.

mountaintop mining into waters of the United States is not permitted under Section 404, and that "[a]gency rulemaking or permit approval that holds otherwise is ultra vires, beyond agency authority conferred by the [CWA]."²⁰ The suit was initiated in response to the Corps' grant of authorization under an existing nationwide permit to a mining company to dispose of mining waste that would lead to the filling of 6.3 miles of streams.²¹

In granting the plaintiff interest group's motion for summary judgment invalidating the Corps authorization, the court ruled that "[t]his obviously absurd exception would turn the [CWA] on its head and use it to authorize polluting and destroying the nation's waters for no reason but cheap waste disposal."²² The court continued:

The final rule for "discharge of fill material" highlights that the rule change was designed simply for the benefit of the mining industry and its employees. . . .The agencies' attempt to legalize their longstanding illegal regulatory practice must fail. The practice is contrary to law, not because the agencies said so, although their longstanding regulations correctly forbade it. The regulators' practice is illegal because it is contrary to the spirit and the letter of the [CWA].²³

Because the court's decision effectively invalidates the agencies' May 2002 rule, unless reversed on appeal, it leaves the future of a rule harmonizing the two definitions of "fill material" uncertain.²⁴

²⁰ Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 2002 WL 1033853, *1 (S.D. W.Va. 2002).

²¹ Id. In particular, the filling of the streams with overburden from mountaintop mining -- a controversial practice that involves the removal of large amounts of rock and dirt to expose coal seams, followed by the deposit of the "overfill" that cannot be put back in place into nearby valleys often containing streams -- was authorized pursuant to nationwide permit No. 21. (See also discussion of nationwide permits, infra.)

²² Id. at *16.

²³ Id.

²⁴ The decision also calls into question the validity of the Corps' decision, announced April 11, 2002, to issue 10 (...continued)

The Corps of Engineers was accorded the authority to issue permits for the discharge of dredged or fill material into waters under Section 404, in recognition of the expertise the Corps had acquired through its permitting under Section 10 and in an effort to avoid the creation of another new bureaucracy. The Corps was also authorized to issue "general permits" for categories of similar activities that have minimal environmental effect, considered either as individual activities or cumulatively.²⁵ In addition to issuing permits and enacting regulations under Section 404,²⁶ the Corps publishes non-binding Regulatory Guidance Letters ("RGLs").²⁷

The U.S. Environmental Protection Agency ("EPA") was also given responsibilities under the Act. EPA, in conjunction with the Corps, developed Guidelines to be satisfied as a prerequisite of permit issuance (the "Section 404(b)(1) Guidelines").²⁸ The agency was also given authority to prohibit disposal at specific sites if there would be an "unacceptable adverse effect" on environmental resources.²⁹ This authority has been exercised by EPA, albeit sparingly, as a "veto" of Section 404 permits.

In addition, EPA may approve delegation of the Section 404 permitting program to individual states for discharges in intrastate waters.³⁰ In such states EPA retains authority to

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permits to allow mining companies to fill 5,409 acres of wetlands to mine limestone near the Everglades National Park in Florida. See "Army Corps to Allow Filling of 5,400 Acres in Limestone Mining Project Near Everglades," Daily Env't (BNA) at A-5 (Apr. 16, 2002). In exchange for the permits, the companies are required to acquire and restore approximately 7,500 acres of wetlands near the National Park. Id.

²⁵ 33 U.S.C. § 1344(e).

²⁶ See generally 33 C.F.R. §§ 320 et seq.

²⁷ The Corps recently announced that RGLs, which were formerly published in the Federal Register, will now be available only through its website at <http://www.usace.army.mil/inet/functions/cw/cecws/reg/>.

²⁸ 33 U.S.C. § 1344(b). The Guidelines are found in 40 C.F.R. §§ 230 et seq.

²⁹ 33 U.S.C. § 1344(c).

³⁰ 33 U.S.C. § 1344(g)-(1). As of this date, Michigan and New Jersey have assumed that authority for freshwater but not (...continued)

object to the State's proposed permit. If the State fails to satisfy EPA's concerns, EPA may transfer authority to issue the permit to the Corps. Once EPA has transferred issuance authority to the Corps, EPA cannot withdraw its objections and allow the state to issue permits.³¹

Both agencies have enforcement authority. The Corps' authority is limited to administrative or judicial actions related to unauthorized discharges and permits it has issued.³² EPA's jurisdiction includes enforcement relating to unauthorized discharges and extends to violations of state-issued permits.³³

The term "wetlands," though not defined in the CWA, has been defined in regulations by both the Corps and EPA in the same manner.³⁴ EPA, however, possesses the ultimate authority to define the existence and extent of wetlands.³⁵ On the other hand, the Corps has the ultimate authority to determine whether a particular activity necessitates a permit (*i.e.*, whether it constitutes a "discharge of dredged or fill material").³⁶

Other federal agencies play a role in wetlands regulation. Pursuant to the CWA³⁷ and the Fish and Wildlife Coordination Act,³⁸ the Fish and Wildlife Service ("FWS") (of the Department of Interior) and the National Marine Fisheries Service ("NMFS") (of the Department of Commerce) must be afforded the opportunity to comment on applications for individual Section 404 permits and certain general permits. The Natural Resources Conservation Service ("NRCS") of the Department of Agriculture (formerly the

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tidal wetlands.

³¹ Friends of Crystal River v. United States EPA, 794 F.Supp. 674 (W.D. Mich. 1992), aff'd, 35 F.3d 1073 (6th Cir. 1994).

³² 33 U.S.C. §§ 1319(g)(1)(B), 1344(s).

³³ 33 U.S.C. § 1319.

³⁴ 33 C.F.R. § 328.3(b) (Corps); 40 C.F.R. § 230.3(t) (EPA).

³⁵ Opinion of the Attorney General (September 5, 1979).

³⁶ 33 U.S.C. § 1344(a).

³⁷ 33 U.S.C. § 1344(q).

³⁸ 33 U.S.C. § 1344(m); see also 33 C.F.R. § 323.4(c)

Soil Conservation Service) is responsible for the "Swampbuster" program (designed to eliminate the conversion of wetlands for agricultural purposes) and the definition of wetlands for that program.³⁹

Finally, state agencies also have responsibilities under the CWA. A state water quality certification is needed for discharges requiring a Section 404 permit.⁴⁰ A "consistency determination" is required from the agency responsible for the State's coastal zone management program if the proposed discharge is within a coastal zone.⁴¹ Finally, as noted above, states may assume authority for permitting of discharges into intrastate waters.

III. Wetlands and the Federal Jurisdictional Predicate

Although Section 404 uses the same term "navigable waters" as contained in Section 10,⁴² the reach of the former statute is far broader. Rather than being limited to traditional notions tied to navigation, National Resources Defense Council, Inc. v. Callaway⁴³ construed the term to reach to the extent of the Commerce Clause.⁴⁴

For purposes of Section 404, this term has been regulatorily recrafted as "waters of the United States," and includes not only traditional "navigable waters" but also tributaries thereto, interstate waters and wetlands, intrastate waters (including intermittent streams, mudflats, ponds and isolated wetlands) where

³⁹ The Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1504 (1985), 16 U.S.C. §§ 3821-3824, as amended by the Federal Agricultural Improvement and Reform Act of 1996, Pub.L. 104-127, 110 Stat. 888 (1996).

⁴⁰ 33 U.S.C. § 1341.

⁴¹ 16 U.S.C. § 1456.

⁴² The term "navigable waters" is defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

⁴³ 392 F.Supp. 685 (D.D.C. 1975).

⁴⁴ Prior to Callaway, the Corps had disregarded Congressional intent and narrowly construed this language to have the same meaning as under Section 10. Contrary to the traditional conduct of administrative agencies, it took litigation to "convince" the Corps to expand its authority. See also United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979); Slagle v. United States ex. rel. Baldwin, 809 F.Supp. 704, 709 (D. Minn. 1982).

a discharge could affect interstate or foreign commerce,⁴⁵ tributaries of these intrastate waters, and wetlands adjacent to any of these waters.⁴⁶

A. The Definition of Wetlands

"Wetlands" are defined in a broad fashion to mean:

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.⁴⁷

This definition has been upheld by the Supreme Court.⁴⁸ There is no size criterion for federal wetlands. There is no classification by value, except for specific programs in limited geographic areas (such as the New Jersey Meadowlands). Nor is there any regulated "buffer" or "adjacent area," as exists in many state regulations of wetlands.

B. The Delineation Criteria

Three factors have historically been used by federal agencies to delineate wetlands: hydrophytic vegetation; hydric soil; and hydrology.⁴⁹ These factors have been used in the various manuals

⁴⁵ As addressed in detail below, the Supreme Court has recently limited dramatically the scope of wholly intrastate waters that are subject to the Corps' jurisdiction under Section 404. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001).

⁴⁶ 33 C.F.R. § 328.3. The Eleventh Circuit rejected a claim (in a criminal case) that Congress had unconstitutionally delegated to the Corps its duty to define "waters of the United States." Mills v. United States, 36 F.3d 1052 (11th Cir. 1994), cert. denied, 514 U.S. 1112 (1995).

⁴⁷ 33 C.F.R. § 328.3(B) (Corps); 40 C.F.R. § 230.3(t) (EPA).

⁴⁸ United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

⁴⁹ See generally United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 910-11 (5th Cir. 1983); United States v.

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issued by federal agencies (discussed below).

Sufficient hydrology exists when there is inundation of the subject area, by either surface flow or groundwater, for a specified percentage of the growing season (approximately one week is a typical amount of time). The principal criterion for ascertaining the presence of hydrophytic vegetation under normal circumstances is whether more than 50% of the dominant species are obligate wetland plants, facultative wetland plants or facultative plants.⁵⁰ The FWS has compiled a national Wetland Plant List, which characterizes species based on whether their presence is reflective of wetland conditions.⁵¹ The Service has also compiled more specific lists for different sections of the country.

Hydric soils can be identified by field comparison of soil color at pertinent depths to soil color charts. These soil charts reflect the anaerobic conditions typical of water-saturated soils.

Although all three criteria must be satisfied, methods for determining the presence of wetlands where one or more of the criteria are missing, especially for disturbed or difficult areas, have been established.

The "normal circumstances" language of the regulation prevents the avoidance of jurisdiction through action, which eliminates one or more of the defining criteria.⁵² Temporary changes or illegal activity will not preclude finding a wetland if "normal" conditions -- those that would have existed without this activity -- would support a wetland.⁵³ On the other hand, permanent and legal man-made and natural changes can result in

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Fleming Plantations, 9 Env'tl. L. Rep. 20103 (E.D. La. 1978).

⁵⁰ Obligate species are those that are found in wetlands more than 99% of the time. Facultative wetlands are species that occur in wetlands between 67% and 99% of the time; facultative plants are species with a similar likelihood (33% to 67%) of occurring in either wetlands or nonwetlands (i.e., uplands).

⁵¹ The FWS has proposed revisions to the National List. 62 Fed. Reg. 2680 (1997).

⁵² See, e.g., Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989 (9th Cir. 1993) (wetlands formed from a temporary diversion canal not jurisdictional).

⁵³ United States v. Pasquariello, 40 Env't Rep. Cas. (BNA) 1009, 1019 (S.D. Fla. 1994).

conversion of a former wetland to a non-regulated area.⁵⁴

C. The Various Delineation Manuals

There have been various attempts by the interested federal agencies to define wetlands in a more precise fashion and to specify a delineation methodology. These different manuals have generated considerable controversy, as differing definitions tended to include more or less areas as regulated wetlands.

The Corps adopted its first formal Wetland Delineation Manual in 1987. In 1988 EPA adopted its Wetlands Identification and Delineation Manual (Interim). In 1989, the Corps, EPA, FWS and NRCS coordinated to formulate the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands. This 1989 Manual, however, was criticized for extending federal jurisdiction well beyond historical limits. In response, the Corps and EPA developed proposed revisions to that Manual. When those revisions were criticized as too restrictive, Congress acted. It enacted legislation precluding the Corps from relying on the 1989 Manual or any other subsequent manual adopted without rulemaking under the Administrative Procedures Act ("APA").⁵⁵ As a consequence, the Corps began to use the 1987 Manual, and EPA and the other agencies now also rely on this Manual.

The Manual has been viewed as an interpretation of existing regulations, not a law, and thus not subject to the Ex Post Facto clause of the Constitution.⁵⁶ The courts do, however, look to the Corps' consistency with the manual in determining whether a wetland delineation is arbitrary and capricious. In New Hanover Township v. U.S. Army Corps of Engineers,⁵⁷ for example, the

⁵⁴ RGL, No. 86-9, Clarification of "Normal Circumstances" in the Wetland Definition (August 27, 1985). One district court, however, rejected the Corps' effort to clarify the meaning of "normal circumstances." In Golden Gate Audubon Society v. U.S. Army Corps of Engineers, 796 F.Supp. 1306 (N.D. Cal. 1992), the court found that if an area is classified as a wetlands after 1975, even if the characteristics are not natural but aberrational, there is federal jurisdiction. (The 1975 date derives from the Corps' phase-in of jurisdiction over "waters of the United States" as a result of Natural Resources Defense Council v. Callaway.)

⁵⁵ Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510 (1991).

⁵⁶ United States v. Ellen, 961 F.2d 462, 466 (4th Cir. 1992).

⁵⁷ 796 F.Supp. 180 (E.D. Pa 1992), vacated and remanded on
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district court found that the Corps had considered relevant factors identified in the manual in making a wetlands delineation.

In 1992, Congress directed the National Academy of Sciences to conduct a wetlands study in order to assist in the formulation of an updated manual.⁵⁸ This study was released in 1995.⁵⁹ The report concluded that the current regulatory practice for characterizing and delineating wetlands is scientifically sound, although it stressed the need for a uniform and consistent federal approach.⁶⁰

The Corps issued proposed regulations in 1995 establishing a Wetland Delineation Certificator Program, which would be designed to improve the quality and consistency of wetland delineations and streamline the regulatory process.⁶¹ The proposal now appears to be on hold.

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other grounds, 992 F.2d 470 (3d Cir. 1993).

⁵⁸ Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571 (1992). The results of that study are described, supra.

⁵⁹ Wetlands Characteristics and Boundaries, National Research Council (1995).

⁶⁰ In June 1997, the Corps, EPA, NRCS, FWS, and the Federal Highway Administration published a National Action Plan implementing a hydrogeomorphic ("HGM") approach to assessing wetland functions. The HGM approach involves three steps: (1) classifying a wetland based on its ecological characteristics; (2) using references to establish the range of functioning of the wetland; and (3) using a relative index of wetlands, calibrated to reference wetlands, to assess wetland functions. The approach is not intended to replace the permitting process described below, but rather to assist project proponents, the public, and regulators in assessing the environmental impacts of a proposed project, in determining the appropriate level of regulatory review, and in assessing comprehensive mitigation required for offsetting environmental impacts. National and regional guidebooks for assessing wetlands are to be developed under the HGM approach. "National Action Plan to Implement the Hydrogeomorphic Approach to Assessing Wetland Functions," 62 Fed. Reg. 33607 (1997).

⁶¹ 60 Fed. Reg. 13654 (1995) (codified at 33 C.F.R. Part 333).

D. Memorandum of Understanding Regarding Jurisdictional Determinations

As noted earlier, EPA possesses the ultimate authority to determine the existence of a wetland. EPA and the Corps, however, have entered a Memorandum of Agreement ("MOA"), which has limited EPA's role in this regard. Pursuant to a January 1989 MOA,⁶² EPA makes jurisdictional determinations (including exemptions of discharges) only in "special cases" that involve important policy and/or technical issues. Other jurisdictional determinations are made by the Corps. The MOA also provides that written determinations are binding on the Government, thus lessening the chance of conflicting agency decisions on a particular property.

E. The Meaning of "Adjacent" Wetlands

The Corps has construed Section 404 to encompass wetlands that are adjacent to waters of the United States,⁶³ an interpretation upheld by the Supreme Court in Riverside Bayview Homes. The regulation defines "adjacent" to mean "bordering, contiguous, or neighboring," but no distance or further guidance is provided.

In general, the courts have construed the term "adjacent" generously. For example, wetlands have been found to be "contiguous" if they are connected to a river by a slough.⁶⁴ In United States v. Banks,⁶⁵ the necessary connection was established through ground water as well as surface waters during storm events, and buttressed by ecological links. The necessary adjacency may also be shown by an ecological relationship. Thus, wetlands that are separated from other waters of the United States by a man-made barrier are still considered to be "adjacent."⁶⁶ In Conant v. Unites States,⁶⁷ a wetland was found to be "adjacent" to

⁶² Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989).

⁶³ 33 C.F.R. § 328.3(a)(7).

⁶⁴ United States v. Lee Wood Contracting, Inc., 529 F.Supp. 119, 120 (E.D. Mich. 1981).

⁶⁵ 873 F.Supp. 650, 658-59 (S.D. Fla. 1995), aff'd, 115 F.3d 916 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1998).

⁶⁶ Id.

⁶⁷ 786 F.2d 1008 (11th Cir. 1986).

a river because it filtered out sediments and pollutants from runoff flowing into the water body.

By contrast, in United States v. Wilson,⁶⁸ a panel of the Fourth Circuit divided on the proper approach to an "adjacency" determination. Although a majority of the panel concluded that a criminal conviction must be overturned for defective jury instructions on other issues, the court could not assemble a majority on whether the district court had erred in defining adjacent wetlands for the jury.

One member of the panel, Judge Niemeyer, concluded that the district court had erred in instructing the jury that waters of the United States could include adjacent wetlands "without a direct or indirect surface connection to other waters of the United States."⁶⁹ In Judge Niemeyer's opinion, the Supreme Court's approval of Corps jurisdiction over adjacent wetlands in Riverside Bayview Homes was "explicitly in the context of a wetland 'that actually abuts on a navigable waterway.'"⁷⁰ In this case, however, the extension of jurisdiction authorized by the district court's jury instruction was improper "in light of the constitutional difficulties that would arise by extending the [CWA's] coverage to waters that are connected closely neither to interstate nor navigable waters, and which do not otherwise substantially affect interstate commerce."⁷¹

Another member of the panel, Judge Payne, maintained that Judge Niemeyer had improperly focused on the reference in the jury instructions to a "surface connection." Judge Payne argued that the Supreme Court's holding in Riverside Bayview Homes was predicated on the existence of a hydrological relationship between the wetland and a water of the United States, which might exist without a surface connection.⁷² On this basis, Judge Niemeyer was incorrect to "require a surface connection as a condition to adjacency."⁷³

Absent contiguity or an ecological relationship to other waters of the United States, a wetland is considered to be

⁶⁸ 133 F.3d 251 (4th Cir. 1997).

⁶⁹ Id. at 258.

⁷⁰ Id. at 257.

⁷¹ Id. at 258.

⁷² Id. at 267-68.

⁷³ Id. at 267.

"isolated" rather than adjacent, which triggers a separate inquiry.⁷⁴ However, as discussed below, under a recent decision of the Supreme Court that severely limits the Corps' ability to assert jurisdiction over isolated wetlands, the question of the scope of the Court's earlier holding in Riverside Bayview Homes with respect to adjacency has taken on added importance.

F. Isolated Waters

The Corps regulations provide for federal jurisdiction over "other waters" of the United States, including wetlands, the "use, degradation or destruction of which could affect interstate or foreign commerce."⁷⁵ These waters do not have a hydrological or other ecological connection to "waters of the United States." The Supreme Court in Riverside Bayview Homes left open the issue of federal jurisdiction over isolated waters. Instead, the Court held that jurisdictional determinations over such areas were to be made on a case-by-case basis.

Accordingly, the Corps regulations provide for the agency to make determinations of jurisdiction over isolated wetlands based on the specific facts of each case, and give examples of the types of waters over which jurisdiction would typically not be asserted (e.g., waterfill depression on dry land).⁷⁶

The primary issue concerning jurisdiction over isolated wetlands, which is reflected in the Corps' regulations, is whether a sufficient connection exists between the filling activity to be regulated and interstate commerce. Until recently, the Corps and EPA frequently relied upon the presence, or potential presence, of migratory birds to establish the necessary effect on interstate commerce to support jurisdiction.⁷⁷ This asserted jurisdictional predicate derived from a 1985 Opinion of EPA General Counsel. Neither EPA nor the Corps included this provision in regulations, although the Corps did specify this so-called "migratory bird rule" as an interpretative rule in the preamble to its 1986

⁷⁴ In re: The Hoffman Group, Inc., No. CWA 88-A0-24 (Sept. 15, 1989), rev'd on other grounds, DCWA Appeal No. 89-2 (Nov. 19, 1990), rev'd sub nom. Hoffman Homes, Inc. v. Administrator, 961 F.2d 1310 (7th Cir.), vacated, 975 F.2d 1554 (7th Cir. 1992), administrative order for penalties vacated, 999 F.2d 256 (7th Cir. 1993).

⁷⁵ 33 C.F.R. § 328.3(a)(3).

⁷⁶ 51 Fed. Reg. 41206 (1986).

⁷⁷ See, e.g., United States v. Malibu Beach, Inc., 711 F.Supp. 1301 (D.N.J. 1989).

regulations.⁷⁸ In 1989, one district court rejected this effort, finding that the interpretative rule was in fact substantive and had not been enacted in compliance with the APA.⁷⁹

Subsequent litigation over the migratory bird rule resulted in a patchwork of conflicting determinations about the scope of the Corps' authority to regulate intrastate waters, including wetlands. Following the Tabb Lakes decision, in Leslie Salt, the Court of Appeals for the Ninth Circuit upheld the Corps' jurisdiction over isolated ponds due, inter alia, to use by migratory birds.⁸⁰ The Seventh Circuit ultimately found in Hoffman Homes, Inc. v. Administrator, U.S. EPA⁸¹ -- as a result of a series of decisions emanating from a single EPA enforcement action derived from the filling of 0.8 acre of isolated wetland -- that EPA lacked jurisdiction over the intrastate wetland at issue because the agency's finding that the wetland in question was a suitable or potential habitat for migratory birds was not supported by substantial evidence. As a result of this decision, the court found it unnecessary to determine whether the CWA supported jurisdiction over isolated wetlands.

Following Hoffman Homes, another panel of the same circuit construed the case as having concluded that nearly all wetlands are within Section 404 jurisdiction.⁸² One district court, on the other hand, read the decision to exclude isolated wetlands from

⁷⁸ See 51 Fed. Reg. 41206 (1986).

⁷⁹ Tabb Lakes, Ltd. v. United States, 715 F.Supp. 726, 728-29 (E.D. Va. 1988), aff'd n.op., 885 F.2d 866 (4th Cir. 1989).

⁸⁰ 55 F.3d 1388 (9th Cir. 1995), cert. denied sub nom. Cargill, Inc. v. United States, 516 U.S. 955 (1995).

⁸¹ 999 F.2d 256 (7th Cir. 1993).

⁸² Rueth v. United States EPA, 13 F.3d 227 (7th Cir. 1993). See also United States v. Hallmark Construction Co., 998 F.Supp. 946 (N.D. Ill. 1998) (refusing to find that Lopez had abrogated the Seventh Circuit's reasoning in Hoffman Homes, and holding that the regulation of intrastate wetlands based on their actual or potential use by migratory birds does not exceed Congress' powers under the Commerce Clause). But see United States v. Hallmark Construction Co., 30 F.Supp. 2d 1033, 1041-42 (N.D. Ill. 1998) (holding that the Corps lacked jurisdiction over the isolated wetland at issue because the area did not have a well-established use or special attractiveness as a migratory bird habitat, based on a single sighting of geese, sufficient to support a connection to interstate commerce).

CWA jurisdiction.⁸³

At the root of those decisions finding federal jurisdiction over isolated wetlands on the basis of the potential presence of migratory birds is a liberal or expansive interpretation regarding the reach of the Commerce Clause. Beginning with United States v. Lopez,⁸⁴ however, the Supreme Court has within the past decade revived the limitations on federal power pursuant to the Commerce Clause. In Lopez, the Supreme Court held that the regulation of firearms within certain distances of schools exceeded congressional authority under the Commerce Clause. To fall within the scope of the Commerce Clause, the Court concluded that the regulated activity must fall within one or more of three broad categories: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce..., i.e., those activities that substantially affect interstate commerce...."⁸⁵

Next, in United States v. Morrison,⁸⁶ the Supreme Court struck down the Violence Against Women Act on the grounds that, notwithstanding the enormous amount of research and data collected by Congress to demonstrate the impacts of intrastate violence against women on interstate commerce, "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."⁸⁷ In an important elaboration of its holding in Lopez, the Court held that Congress may not regulate wholly intrastate conduct "based solely on that conduct's aggregate effect on interstate commerce."⁸⁸

Not surprisingly, the Supreme Court's decision in Lopez limiting the previously expansive view of the Commerce Clause spawned further litigation challenging jurisdiction over "other"

⁸³ United States v. Suarez, 846 F.Supp. 892, 893 n.4 (D. Guam 1994). Cf. Friends of Santa Fe County v. Lee Minerals, Inc. 892 F.Supp. 1333, 1356 (D.N.M. 1995) (arroyo not a water of the United States because no showing of effect on interstate commerce or tributary to an interstate waterway).

⁸⁴ 514 U.S. 549 (1995).

⁸⁵ Id. at 558.

⁸⁶ 529 U.S. 598 (2000).

⁸⁷ Id. at 618.

⁸⁸ Id. at 617.

or "isolated" waters. Indeed, when the Supreme Court denied certiorari from the Ninth Circuit's affirmance of the district court's finding in the Leslie Salt litigation that isolated ponds were within the Corps' jurisdiction because of the presence of migratory waterfowl, Lopez was the predicate for Justice Thomas' dissent.⁸⁹ He argued that the "other waters" provision of the Corps' regulations defining "waters of the United States" does not require that an activity "substantially affect" interstate commerce -- the Lopez standard -- but only that the activity "could affect" interstate or foreign commerce. Justice Thomas found this nexus too attenuated under Lopez, particularly in the absence of human activity. Even the "occasional presence" of migratory birds was insufficient, as there was no linkage with commerce (such as the interstate transportation of such birds for commercial purpose).⁹⁰

Following the Supreme Court's decision in Lopez, a divided panel of the Fourth Circuit in Wilson echoed Justice Thomas' reasoning in invalidating the Corps' regulation defining "waters of the United States" to include intrastate waters that need not be related to navigable or interstate waters. Because the regulation purports to extend coverage to "a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce," the Court found that it exceeded the Corps' congressional authorization and was therefore unconstitutional on its face.⁹¹ The Court held that an interpretation of the CWA extending jurisdiction over waters not required to "have any sort of nexus with navigable, or even interstate, waters...would appear to exceed congressional authority under the Commerce Clause."⁹² The Court refused to "presume...Congress authorized the [Corps] to assert its jurisdiction in such a sweeping and constitutionally troubling manner."⁹³

⁸⁹ Cargill, Inc. v. United States, 516 U.S. 955, 116 S.Ct. 407, 408-09 (1995) (Thomas, J. dissenting from denial of certiorari).

⁹⁰ The Fourth Circuit's holding in Wilson that the Corps had exceeded its statutory authority in defining "waters of the United States" to assert jurisdiction over adjacent wetlands that "could affect" interstate commerce was based, in part, on the Supreme Court's "recent federalism jurisprudence." 133 F.3d at 256 (citing Lopez).

⁹¹ 133 F.3d at 257 (emphasis in original).

⁹² Id.

⁹³ Id. Following the Wilson decision, the Corps and EPA (...continued)

In contrast to the Fourth Circuit's holding in Wilson, in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ["SWANCC"],⁹⁴ the Seventh Circuit resolved the issue it had left unanswered in Hoffman Homes, and held that the migratory bird rule may provide a basis for the federal government to exercise jurisdiction over discharges to wholly intrastate waters. In rejecting the Wilson court's conclusion that Lopez places the regulation of intrastate migratory bird habitats beyond the reach of federal Commerce Clause jurisdiction, the court upheld the Corps' exercise of regulatory jurisdiction (and permit denial) over isolated ponds on which four species of migratory birds had been observed.

The court first concluded that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce."⁹⁵ Echoing the argument subsequently rejected in Morrison, supra, the court also relied on the aggregate effects of the destruction of individual migratory bird habitats on interstate commerce.⁹⁶ Finally, the court distinguished the Fourth Circuit's decision in Wilson, concluding that "the question whether Congress may regulate waters based on their potential to affect interstate commerce is not presented, because the unchallenged facts show that the filling...would have an immediate effect on migratory birds that actually use the area as habitat."⁹⁷

(...continued)

issued a joint memorandum stating that, because the agencies believed the case to have been decided wrongly, the ruling would be considered by the government to be binding only in the Fourth Circuit. The agencies further instructed Corps districts and EPA Regional Offices within the Fourth Circuit to continue to assert jurisdiction where they were able to establish either an actual link with or a substantial effect on interstate commerce. The guidance, titled "Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson" (June 2, 1998), was subsequently withdrawn by the agencies in light of the Supreme Court's ruling in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001), discussed at length below.

⁹⁴ 191 F.3d 845 (7th Cir. 1999).

⁹⁵ Id. at 850.

⁹⁶ Id.

⁹⁷ Id. at 852.

(...continued)

In January 2001, the Supreme Court finally stepped in to address the issue, reversing by a 5-4 majority the Seventh Circuit's holding in SWANCC.⁹⁸ In so doing, the Court declined to address the broad constitutional question of whether Congress has the authority under the Commerce Clause to regulate wholly intrastate, isolated bodies of water (including wetlands) based on the presence of migratory birds. Instead, the Court limited its decision to the narrower issue of the Corps' interpretation of its own authority to regulation such waters under the CWA.

The Court first found that its earlier decision in Riverside Bayview Homes, *supra*, did not support jurisdiction over isolated intrastate water bodies. Although in Riverside Bayview Homes the Court had stated that the term "navigable" in the CWA is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under [that term's] classical understanding,"⁹⁹ in SWANCC the Court held that its earlier ruling was based largely on "Congress' unequivocal acquiescence to, and approval of, the Corps' regulations covering wetlands adjacent to navigable waters."¹⁰⁰ The Court continued, "[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."¹⁰¹ The Court also rejected the Corps's argument that Congress had clearly "acquiesced to" its broader interpretation of its jurisdiction under Section 404 by failing to pass legislation overturning the migratory bird rule.¹⁰²

Second, the Court found that, even if the question of whether Congress intended Section 404 to extend to non-navigable, isolated, intrastate waters was unclear -- which it did not believe it was -- the Corps' interpretation of its own jurisdiction was not entitled to deference. In what may be a portent of the Court's view of the scope of congressional authority to regulate isolated waters, including wetlands, pursuant to the Commerce Clause, the Court declined to accord

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⁹⁸ 531 U.S. 159 (2001).

⁹⁹ 474 U.S. at 133.

¹⁰⁰ 531 U.S. at 167.

¹⁰¹ Id. (emphasis in original).

¹⁰² Id. at 168-71.

deference to the Corps' interpretation because it found that the migratory bird rule raised serious constitutional problems.¹⁰³ The rule both "invokes the outer limits of Congress' power" under the Commerce Clause, and "would result in a significant impingement on the States' traditional and primary power over land and water use."¹⁰⁴ Opting to interpret the statute so as to avoid these "constitutional and federalism questions," the Court struck down the Corps's exercise of jurisdiction over the SWANCC site under the migratory bird rule.¹⁰⁵

While clearly setting down the law with respect to isolated, non-navigable, wholly intrastate wetlands, the Court's ruling in SWANCC leaves open the question of whether the Corps may continue to exercise jurisdiction over wetlands that are adjacent to other bodies of water that are not traditionally navigable. For example, it is unclear whether a wetland that is adjacent to a non-navigable, as opposed to a navigable, tributary may be subject to Corps regulation if that tributary eventually leads to a navigable river. The Supreme Court's decision in Riverside Bayview Homes would seem to suggest that such wetlands are subject to Corps jurisdiction. Indeed, the Court framed the question in that case as being "whether the [CWA]...authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries*."¹⁰⁶ Later in the opinion, however, the Court characterized its approval of the

¹⁰³ Id. at 172-74.

¹⁰⁴ Id.

¹⁰⁵ Interestingly, in late 2000, the Supreme Court denied certiorari in another case in which a developer sought to have the Court overturn a \$1.2 million penalty assessed against him on the ground that EPA exceeded its authority in asserting jurisdiction over isolated intrastate wetlands based solely on the actual or potential use of those waters as habitat for migratory birds. Krilich v. United States, 209 F.3d 968 (7th Cir.), cert. denied, 531 U.S. 992 (2000). Following the Supreme Court's denial of certiorari, the defendant moved the district court to bar enforcement of the penalty in light of SWANCC. The court denied the motion because, inter alia, at the time the defendant entered into the relevant portions of the consent decree with EPA, the Seventh Circuit case law held that isolated wetlands were not subject to CWA regulation, and therefore the decree was drafted in light of controlling precedent that was no less favorable to defendants than SWANCC. United States v. Krilich, 152 F.Supp.2d 983 (N.D. Ill. 2001).

¹⁰⁶ 474 U.S. at 123 (emphasis added).

Corps' jurisdiction over adjacent wetlands as being applicable to those wetlands adjacent to "other bodies of water over which the Corps has jurisdiction."¹⁰⁷ Because the wetland at issue in Riverside Bayview Homes was adjacent to a navigable waterway, whether such "other bodies" also include non-navigable tributaries to navigable bodies of water is arguably an open question.

The dissenting justices, led by Justice Stevens, would apparently argue that the answer to this question is yes. In discussing Riverside Bayview Homes, Justice Stevens wrote: "[t]he Court has previously held that the Corps' broadened jurisdiction under the [Clean Water Act] properly included an 80-acre parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek."¹⁰⁸ Whether a majority of the Supreme Court agrees with this reading of the holding in Riverside Bayview Homes remains to be seen.

The Corps and EPA have, not surprisingly, adopted a narrow view of the Supreme Court's holding in SWANCC. In a memorandum issued jointly to field personnel by the General Counsel of EPA and the Chief Counsel of the Corps,¹⁰⁹ the agencies expressed their view that "the Court's holding was strictly limited to waters that are 'nonnavigable, isolated, [and] intrastate [sic].' With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions."¹¹⁰

The agencies further pointed out that the Court did not in SWANCC overrule "the holding or rationale" of Riverside Bayview Homes. Thus, they maintained that "traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each" remain subject to federal regulation.¹¹¹ This

¹⁰⁷ Id. at 135.

¹⁰⁸ 531 U.S. at 175-76.

¹⁰⁹ Memorandum from Gary S. Guzy, General Counsel, U.S. EPA, and Roberts Anderson, Chief Counsel, U.S. Army Corps of Engineers, re: Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters (Jan. 19, 2001).

¹¹⁰ Id. at 3.

¹¹¹ Id.

list impliedly, if not expressly, indicates the agencies' belief that wetlands adjacent to non-navigable tributaries that ultimately lead to a navigable water body are subject to federal regulation.

In the agencies' view, the one subsection of the regulatory definition drawn into question by the SWANCC ruling is 33 C.F.R. § 328(a)(3), which applies to "[a]ll other waters" such as intrastate waters "the use, degradation, or destruction of which could affect interstate or foreign commerce...." As to such waters, the agencies provided guidance to their field personnel. Under this guidance, waters that fall under the subsection (a)(3) definition solely because of their use as habitat for migratory birds should no longer be considered "waters of the United States."¹¹² However, other "connections with interstate commerce might support the assertion of CWA jurisdiction over 'nonnavigable, isolated, intrastate waters.'"¹¹³

The memorandum provides two examples of situations in which federal jurisdiction might be asserted over wholly intrastate, non-navigable waters: (1) where the "use, degradation, or destruction" of such waters could affect other "waters of the United States"; or (2) where the "use, degradation, or destruction" of such waters could affect interstate or foreign commerce.¹¹⁴

The Supreme Court's refusal in SWANCC to rule on the precise meaning of the term "navigable waters" under the CWA has left it to the lower courts to determine whether the agencies' reading of the SWANCC decision is correct. Also left for the courts to determine is whether the government may continue to assert jurisdiction over wetlands that have some ecological connection to a navigable water body, but where a surface water connection between the two is lacking.¹¹⁵

¹¹² Id. at 4.

¹¹³ Id.

¹¹⁴ Id. at 4-5.

¹¹⁵ At least one state has opted to step in and fill the regulatory gap left by SWANCC. In May 2001, the governor of Wisconsin signed legislation giving state environmental officials the explicit authority to restrict development of isolated wetlands. See "Governor Signs Law to Protect Wetlands After U.S. High Court Trims Corps Authority," Daily Env't (BNA) at A-6 (May 8, 2001). Many other states already contain comprehensive statutory and regulatory schemes that may apply to isolated wetlands. See, e.g., New York Environmental Conservation Law § 24-0101 et seq.

(...continued)

Already splits are developing in the courts' answers to these questions. In United States v. Buday,¹¹⁶ the district court held that the Corps does have jurisdiction following SWANCC over wetlands that are adjacent to non-navigable tributaries to navigable waters. The court therefore declined to grant the defendant's motion to withdraw his guilty plea, entered "hours before" the Supreme Court issued its decision in SWANCC, for discharging pollutants, including dredge and fill material, into wetlands without a permit. The court found that the Corps retained jurisdiction over the tributary and adjacent wetlands, even though they were not navigable-in-fact and did not connect with a navigable-in-fact waterway for at least 235 miles, because discharges of pollutants into those waters would eventually have an impact on waters affecting interstate commerce.¹¹⁷

In United States v. Lamplight Equestrian Center, Inc.,¹¹⁸ the government brought suit against the defendant for discharging fill onto to wetlands to construct a pathway without obtaining a Section 404 permit. The equestrian center did not dispute that it had discharged fill onto wetlands without a permit. Instead, it argued that, under SWANCC, the Corps lacked jurisdiction over the wetlands at issue because they were isolated.¹¹⁹ The Corps argued that it had jurisdiction based on an allegedly unbroken line of surface water from the wetlands to a non-navigable tributary to the navigable Fox River.¹²⁰ The defendant, while contesting the Corps' position, did concede that, at least at times, there was an unbroken line of water from the wetlands to the tributary.¹²¹ On the basis of that concession, the court held that a "drainage connection" existed that rendered the wetlands adjacent to the tributary, and thus within the Corps' jurisdiction.¹²²

Two cases decided under Section 301 of the CWA (which

(..continued)

¹¹⁶ 138 F.Supp.2d 1282 (D. Mont. 2001).

¹¹⁷ Id. at 1291-92.

¹¹⁸ 2002 U.S. Dist. LEXIS 3694 (N.D. Ill. 2002).

¹¹⁹ Id. at *11-*12.

¹²⁰ Id. at *21.

¹²¹ Id. at *21-*22.

¹²² Id. at *22-*27.

regulates the issuance of permits for discharges of pollutants other than fill materials into waters of the United States) are relevant to evaluating the courts' interpretation of SWANCC, because the same definition of "waters of the United States" applies in that context as under Section 404. In Headwaters, Inc. v. Talent Irrigation District,¹²³ the Ninth Circuit held that a local irrigation district violated the CWA by applying a herbicide to its canals without obtaining a National Pollutant Discharge Elimination System ("NPDES") permit. In so holding, the court found that the canals were not isolated waters excluded from federal jurisdiction under SWANCC, but rather were connected as tributaries to navigable waters, based on their exchange of water with "a number of natural streams and at least one lake, which no one disputes are 'waters of the United States.'"¹²⁴ This court did not have to address, as did the district court in Buday, whether wetlands adjacent to these non-navigable tributaries would constitute waters of the United States subject to the Corps' Section 404 jurisdiction.

In Idaho Rural Council v. Bosma,¹²⁵ a non-profit association sued the owner of a large dairy farm under the citizen suit provision of the CWA for alleged noncompliance with the farm's NPDES permit. The defendant moved for summary judgment on the basis of, inter alia, lack of subject matter jurisdiction, arguing that the springs into which the farm was discharging were not waters of the United States. The court denied the motion, holding first that the farm's discharges into direct surface water connections to the springs met the jurisdictional requirement, because, though not navigable-in-fact, the springs "are sufficiently connected with [the navigable] Clover Creek and the Snake River as to be regarded as waters of the United States."¹²⁶

The court next addressed "[t]he more difficult issue" of whether the farm's "discharge of pollutants into groundwater hydrologically connected to Butler and Walker Springs constitutes a violation of the CWA."¹²⁷ After reviewing the split among the circuits and district courts on this issue, the court concluded that it did. Thus, the court stated "the interpretive history of the CWA only supports the unremarkable proposition with which all

¹²³ 243 F.3d 526 (9th Cir. 2001).

¹²⁴ Id. at 533-34.

¹²⁵ 143 F.Supp.2d 1169 (D. Idaho 2001).

¹²⁶ Id. at 1179.

¹²⁷ Id.

courts agree -- that the CWA does not regulate 'isolated/nontributary groundwater' which has no effect on surface water," but "does not suggest that Congress intended to exclude from regulation discharges into hydrologically connected groundwater which adversely affect surface water."¹²⁸ The court continued, however, "[t]his does not mean...that the plaintiff's burden is light...`It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA."¹²⁹

Other courts have read the SWANCC decision as more broadly limiting federal jurisdiction over isolated wetlands. The Fifth Circuit recently held, for example, that a defendant could not be held liable under the Oil Pollution Act of 1990 ("OPA")¹³⁰ for discharges to "navigable waters" where the only demonstrable discharge was to groundwater.¹³¹ Citing SWANCC, the Court first stated:

recently, the Supreme Court has limited the scope of the CWA...Under [SWANCC], it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable body...Nevertheless, under this standard the term 'navigable waters' is not limited to oceans and other very large bodies of water. If the OPA and CWA have identical regulatory scope, the district court's conclusion that the OPA cannot apply to any inland waters was erroneous.¹³²

The court further found, however, that, although OPA and the CWA both regulate discharges to "navigable waters," and contain "textually identical definitions" of that term, neither law has

¹²⁸ Id. at 1180 (quoting Washington Wilderness Coalition v. Hecla Mining Co., 870 F.Supp. 983, 990 (E.D. Wash. 1994)).

¹²⁹ Id. at 1180-81 (quoting Washington Wilderness Coalition, 870 F.Supp. at 990.)

¹³⁰ 33 U.S.C. §§ 2701-2720.

¹³¹ Rice v. Harken Exploration Co., 250 F.3d 263 (5th Cir. 2001).

¹³² Id. at 268-69 (emphasis in original).

been held to regulate discharges to groundwater.¹³³ The court held that a number of intermittent streams located on the property were not "waters of the United States" because the appellants failed to demonstrate that these streams were "sufficiently linked to an open body of navigable water...."¹³⁴

While acknowledging that the CWA has been applied to discharges to wetlands adjacent to navigable waters, the court refused to conclude that "a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a 'discharge' 'into or upon the navigable waters.'"¹³⁵ Thus, the court held that "a generalized assertion that covered surface waters [in this case, the larger Canadian River] will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA."¹³⁶

In basing its holding on the plaintiffs' "generalized assertions," the court apparently left unresolved whether the discharge would have actionable under Section 404 had the plaintiffs been able to prove that oil actually reached a covered surface water.

In *United States v. Rapanos*,¹³⁷ following remand from the Supreme Court and the Court of Appeals for the Sixth Circuit for reconsideration in light of *SWANCC*, the district court set aside a prior conviction. The defendant in that case, a landowner, had been found guilty of knowingly discharging pollutants into waters of the United States without a permit after filling wetlands on his property with sand.¹³⁸ The government argued on remand that the wetlands were within federal jurisdiction on the basis that they were hydrologically connected and adjacent to navigable waters.¹³⁹ The court rejected that argument, finding first that,

¹³³ Id. at 269-70 (citing Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994); Exxon Corp. v. Train, 554 F.2d 1310, 1322 (5th Cir. 1977)).

¹³⁴ Id. at 270-71.

¹³⁵ Id. at 271.

¹³⁶ Id. at 272.

¹³⁷ 190 F.Supp.2d 1011 (E.D. Mich. 2001).

¹³⁸ Id. at 1012-13.

¹³⁹ Id. at 1013-14.

although there was evidence at trial in support of the position that the wetlands were connected to navigable waters, "[t]hat fact . . . was never explicitly found, either by the jury or by this Court, nor was such a finding necessitated by the jury instructions."¹⁴⁰

In a footnote, the court stated that, "the majority opinion in [SWANCC] repeatedly refers to the wetlands at issue in that case as 'isolated,' despite the fact that, as the dissent points out, even the most seemingly 'isolated' wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters . . . This leads the Court to conclude that even if there is a hydrological connection, Defendant's wetlands may be considered isolated for purposes of the CWA."¹⁴¹

The court went on to conclude that, contrary to the government's assertions of a hydrologic connection with the wetlands, "the nearest body of navigable water to Defendant's property is roughly twenty linear miles away. Upon reviewing these facts, and upon closely reviewing [SWANCC], as well as the Supreme Court's decision in Riverside Bayview Homes, the Court finds, as a matter of law, that the wetlands on Defendant's property were not adjacent to navigable waters."¹⁴²

The court in United States v. Newdunn Associates¹⁴³ not only held that the Corps lacked jurisdiction over the wetlands on the defendant landowner's property on the ground that they were isolated within the meaning of SWANCC, but further that Virginia's new wetlands law, enacted in response to that decision, failed to afford state regulatory jurisdiction over the property. First, the court held that the government had failed to meet its burden of "factually proving a sufficient connection between the [38 acres of] wetlands on the Property and navigable waters or waters of the United States."¹⁴⁴ The court rejected the Corps' argument that there was a "surface water connection" or "hydrological connection" sufficient to establish jurisdiction because, "were the Court to allow this 'surface water connection' to suffice for jurisdiction, any property connected by a drainage pipe or culvert to navigable waters would fall under the Corps'

¹⁴⁰ Id. at 1014.

¹⁴¹ Id. at 1014 n.3.

¹⁴² Id. at 1015.

¹⁴³ 2002 U.S. Dist. LEXIS 6985 (E.D. Va. 2002).

¹⁴⁴ Id. at *33.

jurisdiction. . . ."¹⁴⁵ The court further held, citing Wilson, that "[e]ven if the Corps had proven factually that under [its] regulations the wetlands on the Property would be considered jurisdictional, these rules. . . have far exceeded the grant of authority by Congress in the CWA."¹⁴⁶

Second, the court found that the newly-enacted Virginia wetlands law, because it defined the term "wetlands" identically to the definition in the Corps' regulations, was "coextensive with the CWA."¹⁴⁷ Thus, the state regulatory agency lacked jurisdiction over the wetlands at issue for the same reason as did the Corps.¹⁴⁸

G. Artificial Wetlands

The preamble to the Corps' 1986 permit regulations indicates that, at least conceptually, man-made or artificial wetlands are generally considered exempt from jurisdiction. The preamble indicates, for example, that artificial ponds created for settling basins or for mining activities are generally within this exemption.¹⁴⁹ The preamble also notes, however, that the Corps reserves the right to exercise jurisdiction on a case-by-case basis.¹⁵⁰ The Corps has successfully defended challenges against exercises of this authority.¹⁵¹ Moreover, a potential exemption can be lost through "abandonment."¹⁵² The primary exception has been

¹⁴⁵ Id. at *33-*34.

¹⁴⁶ Id. at *34-*35.

¹⁴⁷ Id. at *44-*45.

¹⁴⁸ Id. at *46. The court declined to find whether the state law was constitutional under the Virginia constitution, holding that that question was "better left to the appropriate state court or agency." Id. at *47.

¹⁴⁹ 51 Fed. Reg. 41206 (1986).

¹⁵⁰ 51 Fed. Reg. 41206 (1986).

¹⁵¹ See, e.g., Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), cert. denied, 486 U.S. 1126 (1991) (salt water excavation pond); Swanson v. United States, 789 F.2d 1368 (9th Cir. 1986); United States v. Ciampitti, 583 F.Supp. 483, 494 (D.N.J. 1984).

¹⁵² United States v. Pasquariello, 40 Env't Rep. Cas. (BNA) 1009, 1018 (S.D. Fla. 1994).

where the Corps itself created the wetland.¹⁵³

H. Jurisdictional Determinations

Jurisdictional determinations are available from the Corps, and are valid for three years (subject to new information).¹⁵⁴ The Corps has consistently contended that the only effect of a finding of jurisdiction is to require a permit, and thus there is no final agency action subject to judicial review until a decision on the permit has been made.¹⁵⁵ Judicial review of Corps jurisdictional determinations is generally limited to the administrative record unless a full administrative record has not been developed, and the arbitrary and capricious standard of review under the Administrative Procedure Act, is applied.¹⁵⁶ In those circumstances, a de novo review is available.

In mid-1995, the Corps issued proposed regulations that would have established an administrative appeal process for two types of decisions: (1) a determination that a particular geographic area, including an area designated as a wetland pursuant to the regulations and the Manual, is subject to Corps regulatory jurisdiction under Section 10 and/or Section 404; and (2) denial with prejudice of a Section 10 and/or Section 404 permit or refusal of a proffered permit by an applicant based on an

¹⁵³ United States v. City of Fort Pierre, 747 F.2d 464 (8th Cir. 1984).

¹⁵⁴ RGL 90-6, Expiration Dates for Wetlands Jurisdictional Delineations (Aug. 14, 1990), reprinted in 58 Fed. Reg. 17210 (1993).

¹⁵⁵ See, e.g., Route 26 Land Development Ass'n v. United States, 753 F.Supp. 532, 541 (D. Del. 1990), aff'd n.op., 961 F.2d 1568 (3d Cir. 1992). In contrast, an agency determination of no jurisdiction is final agency action susceptible to review. See Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers, 717 F.Supp. 1417 (N.D. Cal. 1988).

¹⁵⁶ See, e.g., Tabb Lakes, Ltd. v. United States, 715 F.Supp. 726 (E.D. Va. 1988), aff'd n.op., 885 F.2d 866 (4th Cir. 1989); National Wildlife Federation v. Hanson, 623 F.Supp. 1539 (E.D.N.C. 1985). But see United States v. Sargent County Water Resources District, 876 F.Supp. 1081 (D.N.D. 1992) (trial needed to determine whether activity within exemption); Leslie Salt Co. v. United States, 660 F.Supp. 183 (N.D. Cal. 1987) (plenary trial on jurisdiction issue). Cf. Downer v. United States, 97 F.3d 999, 1001-02 (8th Cir. 1996) (affirming agency delineation of wetlands under Swampbuster provisions of the Food Security Act).

unacceptable condition and a subsequent denial with prejudice.¹⁵⁷

On March 28, 2000, the Corps published its Final Rule Establishing an Administrative Appeals Process for the Regulatory Program.¹⁵⁸ In addition to making minor modification to its May 1999 final rule on administrative appeals of permit denials, which is discussed below, the new rule provides an appeal process for jurisdictional determinations. Prior to this rulemaking, an applicant was required to complete the entire permit process before it could challenge a delineation. Under the new rule, the Corps is required to identify the criteria it uses to make a delineation.¹⁵⁹ A process is provided whereby the applicant may challenge those criteria and their application, and/or the final jurisdictional determination ("JD") based thereon.¹⁶⁰

Under the process, affected parties are notified in writing of a Corps decision on an activity, e.g., a JD, that is eligible for appeal.¹⁶¹ Within 60 days of receiving this notice, the applicant may file a request for appeal ("RFA") with the appropriate Corps division office, and must specifically state the reasons for appeal, such as a procedural error, inaccurate application of law, omission of material fact, etc.¹⁶² Within 60 days of receiving the RFA, the district engineer is to review the approved JD, and either reissue the approved JD or issue a new approved JD.¹⁶³ The reviewing officer may schedule site inspections, informal meetings and conferences on the approved JD prior to making its determination on the appeal.¹⁶⁴ Although the appeal process is designed to take up to 120 days from the date of a completed request for appeal, the regulations provide that it could take as long as one year.¹⁶⁵

Interestingly, although the rule clarifies that judicial

¹⁵⁷ See 60 Fed. Reg. 37280 (1995).

¹⁵⁸ 65 Fed. Reg. 16486.

¹⁵⁹ 33 C.F.R. § 331.5.

¹⁶⁰ 33 C.F.R. §§ 331.6-331.10.

¹⁶¹ 33 C.F.R. § 331.4.

¹⁶² 33 C.F.R. §§ 331.5(a), 331.6(a).

¹⁶³ 33 C.F.R. § 331.6(c).

¹⁶⁴ 33 C.F.R. § 331.7.

¹⁶⁵ 33 C.F.R. § 331.8.

review of a permit denial is available after the applicant has exhausted its administrative remedies under the new appeal process, it does not address whether jurisdictional decisions under the appeal process constitute "final agency action" permitting immediate judicial review.¹⁶⁶ In the preamble to the rule, however, the Corps stated:

In the past, a number of courts have held that jurisdictional determinations are not ripe for review until a landowner who disagrees with a JD has gone through the permitting process.¹⁶⁷

The Federal Government believes this is the correct result, and nothing in today's rule is intended to alter this position.¹⁶⁸

IV. Regulated Activities

Section 404 regulates the discharge of dredged or fill material;¹⁶⁹ thus, activities that do not involve such discharges, even if destructive of wetlands, are not within the purview of the statute.¹⁷⁰ The Corps and EPA, however, have expanded the definition of "discharge" to encompass a wide variety of activities. As addressed below, this expansion has spawned continuing litigation between the regulated community and the agencies.¹⁷¹

¹⁶⁶ 33 C.F.R. § 331.12.

¹⁶⁷ See discussion regarding the ripeness doctrine, infra.

¹⁶⁸ Id. at 16488.

¹⁶⁹ See United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994).

¹⁷⁰ Save Our Community v. United States EPA, 971 F.2d 1155 (5th Cir. 1992). In Resource Investments, Inc. v. U.S. Army Corps of Engineers, 151 F.3d 1162, 1168-69 (9th Cir. 1998), the Ninth Circuit held that the Corps lacks authority to require a developer to obtain a Section 404 permit prior to constructing a municipal solid waste landfill subject to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq. The court found that: (1) the construction of a landfill is not governed by the Corps' regulations concerning "material that is excavated or dredged from the waters of the United States;" and (2) the Corps' exercise of authority over the site would duplicate the environmental review required under RCRA.

¹⁷¹ "Dredged material" is excavated or dredged from waters of the United States. 33 C.F.R. § 323.2(c). As discussed above, although the term "fill material" is presently defined by the (...continued)

(..continued)

Corps applying an "intent-based" test, 33 C.F.R. § 323.2(e), and by EPA applying an "effects-based" test, 40 C.F.R. § 232.2, the agencies have issued a joint proposed rule that would adopt a common "effects-based" test for determining whether a material is regulated fill.

A. Landclearing

In Avoyelles Sportsmen's League, Inc. v. Marsh,¹⁷² the Fifth Circuit supported the Corps' contention that landclearing activities resulting in a substantial redeposit of wetland material constitute a discharge of dredged material. In a 1990 RGL, the Corps went further, and indicated that mechanized landclearing activities, including those that result in only "incidental fallback" of wetland material, are generally subject to Section 404.¹⁷³ This guidance was incorporated into Corps and EPA regulations adopted in August 1993,¹⁷⁴ which, as explained below, have been invalidated. The removal of vegetation without mechanized equipment, or the cutting of vegetation above the ground without disturbance of the root systems, is not subject to regulation under Section 404. In addition, a permit may be avoided by a demonstration to the Corps or EPA that the activity will not destroy or degrade a wetland or other water of the United States.¹⁷⁵

B. Excavation and Draining

Historically, excavation in wetlands was not subject to Section 404 regulation.¹⁷⁶ Similarly, diversion of a stream did not appear to involve a discharge and thus did not trigger Section 404 jurisdiction. However, the Corps' August 1993 regulations dramatically altered this approach. Under the so-called Tulloch Rule, the Corps asserted jurisdiction over excavation (including

¹⁷² 715 F.2d 897 (5th Cir. 1983).

¹⁷³ RGL 90-5, Landclearing Activities Subject to Section 404 Jurisdiction (July 18, 1990). One court found that the Corps' reliance on this RGL as a substantive legislative rule (rather than as guidance) violated the APA. Salt Pond Associates v. United States Army Corps of Engineers, 815 F.Supp. 766, 780-81 (D. Del. 1992).

¹⁷⁴ 33 C.F.R. § 323.2; 58 Fed. Reg. 45008 (1993). This regulation, called the "Tulloch Rule," devolved from the settlement in North Carolina Wildlife Federation v. Tulloch, No. C90-713-CIV-5-BO (E.D.N.C. 1992) (see 57 Fed. Reg. 20894 (1992)), in which environmental groups had sued the Corps and EPA for the failure to require a Section 404 permit for the mechanized landclearing of approximately 700 acres of wetlands.

¹⁷⁵ 33 C.F.R. § 323.2(d); 58 Fed. Reg. 45008 (1993).

¹⁷⁶ See, e.g., Salt Pond Associates v. U.S. Army Corps of Engineers, 815 F.Supp. 766 (D. Del. 1993); Bettis v. Town of Ontario, 800 F.Supp. 1113 (W.D.N.Y. 1992) (drainage of stream).

mechanized landclearing) that results in the redeposit or fallback of dredged or excavated material regardless of quantity.¹⁷⁷ A permit may be avoided by a demonstration of the absence of an impact, as with mechanized landclearing. There is an exemption in this regulation for "normal dredging operations" in navigable waters.

The regulations also govern the excavation of ditches that entails a discharge or redeposit of excavated material into a wetland or other water of the United States, regardless of the extent or temporary nature of the discharge.¹⁷⁸ If there is no discharge, however, there is still no jurisdiction.¹⁷⁹

The Tulloch Rule was successfully challenged by a coalition of trade associations on the ground that it exceeded the authority of the Corps and EPA under the CWA. In American Mining Congress v. U.S. Army Corps of Engineers,¹⁸⁰ the district court invalidated the Corps' regulations to the extent they sought to regulate landclearing, excavation and ditching which result in any discharge or fallback of material to the wetland. The court found that "incidental fallback" is not the "discharge of any pollutant" within the meaning of Section 404.

The Court of Appeals for the D.C. Circuit affirmed the district court's decision, and held that "by asserting jurisdiction over 'any redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps's statutory authority."¹⁸¹ In reaching this conclusion, the court stated:

the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it

¹⁷⁷ 33 C.F.R. § 323.2(d)(1)(iii); 58 Fed. Reg. 45008 (1993).

¹⁷⁸ 33 C.F.R. § 232.2; 58 Fed. Reg. 45008 (1993).

¹⁷⁹ Save Our Community v. United States EPA, 971 F.2d 1155 (5th Cir. 1992).

¹⁸⁰ 951 F.Supp. 267 (D.D.C. 1997) aff'd sub nom., National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998).

¹⁸¹ 145 F.3d at 1405 (emphasis in original).

cannot be a discharge....¹⁸²

The court rejected the government's argument that fallback becomes an "addition" of a pollutant once it is dredged as "ingenious, but unconvincing," noting that under this interpretation, riding a bicycle through a wetland could require a Section 404 permit for the dirt coming off the tires.¹⁸³

In United States v. Deaton,¹⁸⁴ the Court of Appeals for the Fourth Circuit held that sidecasting is a discharge of a pollutant under the CWA. In an action alleging that the defendant had improperly placed fill in a wetland without a permit as a result of sidecasting during construction of a ditch, the district court originally found for the government, "holding that any wetlands on the property were subject to the Clean Water Act and that sidecasting excavated material into those wetlands was a discharge of a pollutant under the Act."¹⁸⁵ Shortly after that opinion was issued, the Fourth Circuit issued its opinion in Wilson, supra. The Wilson panel split three ways on the question of whether sidecasting is a discharge, with one judge concluding it is, one concluding it is not, and the third concurring in the judgment without reaching the sidecasting issue. Based on Wilson, the district court predicted that the Fourth Circuit would adopt the reasoning of the judge who concluded that sidecasting is not a discharge, and thus vacated its opinion and found for the defendant.¹⁸⁶

In its appeal to the Fourth Circuit, the government continued to argue that sidecasting in a wetland is a discharge requiring a permit. This panel of the court agreed, finding that "[i]t is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before."¹⁸⁷ Thus, the court held that "the Clean Water Act's definition of discharge as 'any addition of any pollutant to

¹⁸² Id. at 1404.

¹⁸³ Id.

¹⁸⁴ 209 F.3d 331 (4th Cir. 2000).

¹⁸⁵ 209 F.3d at 334.

¹⁸⁶ Id.

¹⁸⁷ Id. 335-36 (emphasis in original).

navigable waters' encompasses sidecasting in a wetland."¹⁸⁸ It is notable that this reasoning, i.e., that native material becomes a pollutant once it is dredged, stands in stark contrast to the Court of Appeals for the D.C. Circuit's logic in National Mining Association, supra.

In response to the National Mining Association decision, in 1999, the Corps amended its definition of "discharge of dredged material" by deleting the word "any" as a modifier of the term "redeposit," and expressly excluding "incidental fallback" from the definition.¹⁸⁹ The Corps clarified, however, that the court in National Mining Association had specifically recognized its continued jurisdiction over other redeposits of dredged material, including via mechanized landclearing, redeposits at various distances from the point of removal (e.g., sidecasting), and removal of dirt and gravel from a streambed and subsequent redeposit after mineral segregation.¹⁹⁰

In April 2001, the Corps and EPA issued a second joint final rule amending the regulations to establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in the waters of the United States result in more than incidental fallback, and thus involve a regulable discharge of dredged material.¹⁹¹ In addition, the rule establishes a definition of the term "incidental fallback," which the agencies state "is consistent with past preamble discussions of that issue and is drawn from language contained in the relevant court decisions describing that term."¹⁹² The rule defines "incidental fallback" as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal."¹⁹³

¹⁸⁸ Id. at 337. See also United States v. Bay-Houston Towing Co., 33 F.Supp.2d 596 (E.D. Mich. 1999) (Corps' jurisdiction over sidecasting not affected by National Mining Association).

¹⁸⁹ See 64 Fed. Reg. 25120 (1999) (codified as an amendment to 33 C.F.R. § 323.(d)(1) and 40 C.F.R. § 232.2).

¹⁹⁰ Id.

¹⁹¹ 66 Fed. Reg. 4550 (Jan. 17, 2001) (codified at 33 C.F.R. § 323.2(d) and 40 C.F.R. § 232.2).

¹⁹² Id.

¹⁹³ Id. at 4575 (codified at 33 C.F.R. § 323.2(d)(2)(ii) and 40 C.F.R. § 232.2). Although the incoming Bush (...continued)

In August 2001, the Court of Appeals for the Ninth Circuit held that an agricultural process known as "deep ripping," in which prongs up to seven feet long are dragged through soil, constituted an unpermitted discharge when performed in wetlands.¹⁹⁴ The court held that the destruction of wetlands caused by the excavation and redeposition of soils during the process, which the landowner in that case had undertaken to convert portions of his land from cattle grazing area to orchards and vineyards, constituted an illegal discharge of pollutants.¹⁹⁵ The defendant has petitioned the Supreme Court for certiorari, arguing, inter alia, that the circuit court's decision would improperly categorize "incidental fallback" as a discharge that can be regulated under the CWA.¹⁹⁶

C. Piles

The placement of piles, as with excavation, was historically considered by the Corps (but not EPA) to be beyond Section 404 jurisdiction. In the 1980's, however, proposals to use pilings to support platforms for large commercial and residential structures led to reconsideration of this position. The Corps adopted a 1990 RGL which provided that "where piles are used in a manner essentially equivalent to fill material in effect, purpose and

(..continued)

Administration initially pulled the rule, which was issued during the final days of the Clinton Administration, for review, it subsequently announced that it would allow the rule to take effect as originally scheduled. In the interim, two industry groups brought suit challenging the rule as defining "incidental fallback" too narrowly, which is currently pending. National Association of Homebuilders v. U.S. Army Corps of Engineers, No. 1:01CV00274 (D.D.C.).

¹⁹⁴ Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001).

¹⁹⁵ Id. at 814-15.

¹⁹⁶ Borden Ranch Partnership v. U.S. Army Corps of Engineers, docket number unavailable (petition filed Feb. 22, 2002). The circuit court further found that deep ripping does not fall within the CWA's exemption for normal farming activities under the so-called "recapture provision." 261 F.3d at 815-16. (See discussion concerning the normal farming exemption, infra.) The landowner is also seeking Supreme Court review of that portion of the decision. See "Appeals Court Ruling on 'Deep Ripping' in Error, Petition to Supreme Court Says," Daily Env't (BNA) at A-7 (Mar. 4, 2002).

function they should be treated as fill material...."¹⁹⁷ The Corps' August 1993 regulations formally adopted this approach; the decisive factor is the extent to which piles serve to cause sediment to drop out of the water column and become the equivalent of filling.¹⁹⁸

D. Exemptions from Jurisdiction

The CWA exempts certain types of activities from regulation, including normal farming and silvicultural (timbering) activities that are part of established, ongoing operations.¹⁹⁹ The exemptions are self-implementing and are policed through normal enforcement mechanisms. Variations of this exemption have been added as a result of the so-called Swampbuster program described infra. If land has not been farmed for so long that draining or other hydrological modifications to wetlands are necessary to resume operations, the exemption does not apply.²⁰⁰ If areas are "prior converted cropland", as defined by the National Food Security Act Manual ("NFSAM") and as adopted by reference into the EPA and Army Corps regulations and published by the NRCS (i.e., cropping commenced before December 23, 1985 and inundated no more than 14 consecutive days during the growing seasons), they are exempt from regulation.²⁰¹ If these croplands are not farmed for five years and wetland conditions reappear, the area is subject to regulation.²⁰²

Waste treatment systems, such as "treatment ponds or lagoons designed to meet the requirements of [the] CWA," are also exempt.²⁰³

Cooling ponds, however, are not specifically included within this

¹⁹⁷ RGL 90-8, Applicability of Section 404 to Piling (Dec. 14, 1990), reprinted in 58 Fed. Reg. 17210 (1993).

¹⁹⁸ 33 C.F.R. § 323(c); 58 Fed. Reg. 45008 (1993).

¹⁹⁹ 33 U.S.C. § 1344(f).

²⁰⁰ 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B).

²⁰¹ See United States v. Hallmark Construction Co., 30 F.Supp.2d 1033, 1038-40 (N.D. Ill. 1998) (isolated depression in drained agricultural field exempt from federal jurisdiction because it was tilled and annually cropped, and was thus prior converted cropland expressly exempt from Section 404 jurisdiction).

²⁰² 33 C.F.R. § 328.3(a)(8), 58 Fed. Reg. 45008 (1993). See generally Section VII ("Swampbuster"), infra.

²⁰³ 33 C.F.R. § 328.3(a).

definition, and are not exempt.²⁰⁴

Emergency repair of recently damaged but still serviceable structures is exempt, as is the construction of certain types of roads and ditches for mining and agricultural purposes. However, the maintenance of drainage ditches is also exempt, so long as the original physical configuration remains unchanged.²⁰⁵ However, the construction of minor drainage ditches is subject to regulation if it entails discharges and/or the drainage of a water of the United States.²⁰⁶

All potential exemptions are subject to the "recapture" clause of Section 404(f)(2); exemptions are disallowed if the purpose of the proposed activity is to bring waters of the United States into a new use and the flow or circulation of such waters may be impaired or the reach of those waters reduced.²⁰⁷ One district court held that the recapture provision was not triggered by the maintenance of a drainage ditch because the permanent outline of the wetlands reached by flows remained unchanged from the time of the ditch's initial construction in the early 1920's to the maintenance activities in the 1980's.²⁰⁸ On the other hand, in Borden Ranch Partnership v. U.S. Army Corps of Engineers,²⁰⁹ the Court of Appeals for the Ninth Circuit has recently held that "deep ripping" is governed by the recapture provision, because the process, which was used in that case to convert ranch land to orchards and vineyards, "is clearly bringing the land 'into a use to which it was previously not subject.'"²¹⁰

²⁰⁴ United States v. Pasquariello, 40 Env't Rep. Cas. (BNA) 1009, 1019 (S.D. Fla. 1994).

²⁰⁵ See 33 C.F.R. § 323.4; United States v. Zanger, 767 F.Supp. 1030 (N.D. Cal. 1991).

²⁰⁶ 33 C.F.R. § 323.4.

²⁰⁷ 33 U.S.C. § 1344(f)(2). See United States v. Larkins, 852 F.2d 189, 192 (6th Cir. 1988), cert. denied, 489 U.S. 1016 (1989); Leslie Salt Co. v. United States, 820 F.Supp. 478 (N.D. Cal. 1992), aff'd, 55 F.3d 1388 (9th Cir. 1995), cert. denied, sub nom. Cargill, Inc. v. United States, 516 U.S. 955 (1995).

²⁰⁸ United States v. Sargent County Water Resource District, 876 F.Supp. 1090 (D.N.D. 1994). See also Environmental Defense Fund v. Tidwell, 837 F.Supp. 1344 (D.N.C. 1992) (conversion of wetland forest to pine a new use, and thus not exempted silviculture activity).

²⁰⁹ 261 F.3d 810 (9th Cir. 2001).

²¹⁰ Id. at 815-16. The landowner is seeking Supreme Court (...continued)

As a general matter, exemptions to Section 404 are narrowly construed.²¹¹ To be exempt from Section 404's permitting requirements, an activity must satisfy the exemption provision and avoid the recapture provision.²¹² The burden of proof rests with the party claiming the exemption.²¹³

(..continued)
review of this determination. Borden Ranch Partnership v. U.S. Army Corps of Engineers, docket number unavailable (petition filed Feb. 22, 2002). (See also discussion concerning "incidental fallback," supra.)

²¹¹ United States v. Cumberland Farms of Connecticut, Inc., 647 F.Supp. 1166 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1986), cert. denied, 484 U.S. 1061 (1988).

²¹² United States v. Brace, 41 F.3d 117 (3d Cir. 1994).

²¹³ See, e.g., United States v. Huebner, 752 F.2d 1235, 1240 (7th Cir.), cert. denied, 474 U.S. 817 (1985).

V. The Permitting Process

Individual permits are required from the Corps for discharges that are not exempt or authorized by a letter of permission or a nationwide permit (see below).²¹⁴ The permitting process entails a "public interest" review, consideration of the Section 404(b)(1) Guidelines, and the application of other statutory authority. A key element in the permitting process is the sequencing for the evaluation of wetland impacts: avoidance, minimization and compensation. Corps permitting decisions are subject to judicial review under the APA; thus, the agency's decision is upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²¹⁵

As noted above, in March 1999, the Corps promulgated a final rule establishing an administrative appeal process for project proponents who want to contest a Section 404 permit denial.²¹⁶ As also noted, minor modifications were made to the final rule on March 28, 2000.²¹⁷ The process for appealing a permit denial is akin to that for appealing a JD, described above.

In the context of permit denials, the rule clarifies that, unless an administrative appeal is requested, the Corps' final

²¹⁴ One district court dismissed criminal charges against three individuals and a company, after finding that the Corps had engaged in an illegal sub-delegation of authority of Section 404 permit issuance from the Chief of Engineers down to the District Engineers. United States v. Mango, 46 Env't Rep. Cas. (BNA) 1294 (N.D.N.Y. 1998). Because almost all, if not all, current dredge and fill permits have been issued by District Engineers, the court's ruling, if upheld, could have had sweeping implications. See "Federal Trial Court Dismisses Prosecution of Four Iroquois Pipeline Case Defendants," 28 Env't Rep. (BNA) 2432 (Mar. 20, 1998). Subsequently, the Court of Appeals reversed the district court's ruling, finding that the Secretary's delegation of the permit-issuing authority to District Engineers was proper. U.S. v. Mango, 199 F.3d 85 (2d Cir. 1999). Likewise, the court in Johnson v. U.S. Army Corps of Engineers, 6 F.Supp.2d 1105, 1109-10 (D. Minn. 1998), rejected the lower court's reasoning in Mango, and held that the Secretary does have the authority to delegate the task of issuing Section 404 permits.

²¹⁵ 5 U.S.C. § 706(2)(A). See generally Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 1032 (2d Cir. 1983).

²¹⁶ 64 Fed. Reg. 11708 (1999) (codified at 33 C.F.R. Part 331).

²¹⁷ 65 Fed. Reg. 16486.

decision on an application is its decision to issue or deny the permit.²¹⁸ If an appeal is taken, what constitutes the final decision turns on whether the division engineer determines the appeal is with merit.²¹⁹ If not, the initial decision to issue or deny the permit remains the final decision. If so, the final decision is the district engineer's decision to grant or deny the permit on remand of the appealed action.²²⁰ The rules make explicit that, for judicial review purposes, "[t]he appellant is considered to have exhausted all administrative remedies when a final Corps decision is made in accordance with...this Part."²²¹ However, it remains unclear whether an applicant that chooses not to pursue an administrative appeal is considered to have exhausted all administrative remedies, and thus to have a judicially reviewable final decision.

A. The Processing of Applications for Individual Permits

The process for the review of applications for individual permits encompasses both procedures typical of other agency reviews and components that are idiosyncratic to Section 404.

1. The Basic Process

The elemental aspects of the Corps review process are set forth in the agency's regulations.²²² These procedures include time-frames for Corps decisionmaking; while these time periods are generally applicable to routine applications, they are invariably exceeded in more complex or controversial matters.²²³

Pre-application reviews are encouraged. The application must be on specified forms, and must contain certain information. The Corps theoretically determines whether the application is complete

²¹⁸ 33 C.F.R. § 331.10.

²¹⁹ 33 C.F.R. § 331.10(a).

²²⁰ 33 C.F.R. § 331.10(b).

²²¹ 33 C.F.R. § 331.12.

²²² 33 C.F.R. § 325.

²²³ The Corps has often been accused of delaying permit decisions that were the subjects of a threatened EPA veto. The agency has sought to address this problem (or perception, as the case may be) by issuing RGL 92-1 (Federal Agencies Roles and Responsibilities), reprinted in 59 Fed. Reg. 5182 (1994), which clarified the Corps' position as "project manager" for the evaluation and decision on permit applications.

within 15 days of its receipt. Frequently, as in most permit processes, additional information is required. Once an application is determined to be complete, the Corps issues a public notice. The notice advises interested parties of the application and solicits information -- including whether the Corps should hold a public hearing. The notice is not extremely detailed, and must only contain information sufficient to afford an understanding of the proposal and to generate meaningful comment.²²⁴ The notice is sent to parties who have asked to receive Corps notices, as well as EPA, FWS, NMFS, and state historic preservation offices. The notice may be published in newspapers or other media, but that is not required under the regulations.²²⁵

After its receipt of comments, the Corps decides whether substantial factual questions, which warrant a hearing, have been raised.²²⁶ If so, an informal, legislative-type of public hearing is held.²²⁷ The Corps has considerable discretion in determining whether to convene a hearing.²²⁸ On controversial applications, the Corps will sometimes proceed directly to the hearing stage. After the hearing, interested parties have ten days to submit written comments.²²⁹

²²⁴ Environmental Coalition of Broward County, Inc. v. Myers, 831 F.2d 984 (11th Cir. 1987).

²²⁵ The "harmless error" rule has been applied to minor discrepancies in the public notice. See, e.g., Sierra Club v. Pena, 915 F.Supp. 1381, 1397-98 (N.D. Ohio 1996), aff'd sub nom. Sierra Club v. Slater, 120 F.3d 623 (1997).

²²⁶ 33 C.F.R. § 327.4.

²²⁷ There is no obligation to hold an adjudicatory hearing. See, e.g., Buttrey v. United States, 690 F.2d 1170, 1175 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983).

²²⁸ Friends of Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 996 (9th Cir. 1993) (Corps decision not to hold hearing, despite 250 requests, was upheld; Corps found hearing would "be useful only as a forum to enable project proponents and opponents to air their views"). See also Fund for Animals, Inc. v. Rice, 85 F.3d 535, 545 (11th Cir. 1996) (upholding Corps decision not to hold own hearing when there had been two public hearings under the state process); Conservation Law Foundation v. Federal Highway Administration, 827 F.Supp. 871 (D.R.I. 1993), aff'd, 24 F.3d 1465 (1st Cir. 1994) (upholding Corps denial of request for hearing).

²²⁹ 33 C.F.R. § 327.8(g).

The Corps must afford the applicant a reasonable opportunity to respond to comments on the application.²³⁰ Its failure to do so may be grounds to overturn a permit decision. In Mall Properties, Inc. v. Marsh,²³¹ a Corps permit denial was overturned in part because the applicant was not advised of objections to the project voiced by the Governor of Connecticut in a private meeting with the agency.

The Corps expresses the facts supporting its permit decision in a Statement of Findings.²³² If an Environmental Impact Statement ("EIS") has been prepared, the permitting decision is memorialized in a Record of Decision.²³³

After-the-fact permits may be issued by the Corps to authorized illegal filling activities. These permit proceedings generally occur in the enforcement context, where the agency suspends enforcement -- and in particular an order to restore -- pending the results of a permit application.²³⁴ An application for this type of permit is discretionary with the Corps, may be conditioned upon certain corrective measures, and cannot proceed while there is an ongoing federal, state or local enforcement action addressing the same conduct.²³⁵

2. The National Environmental Policy Act and the "Small Handle" Issue

Before it issues a permit the Corps must comply with the National Environmental Policy Act ("NEPA"). Generally, this entails the preparation of an Environmental Assessment to determine whether the proposed discharge and integrated project would cause a significant effect on the quality of the human environment, and thus trigger the need for an EIS.²³⁶ If it determines that an EIS is not necessary, the Corps does not issue the environmental assessment and resultant Finding of No

²³⁰ 33 C.F.R. § 325.2(a)(3).

²³¹ 672 F.Supp. 561, 574-75 (D. Mass. 1987), appeal dismissed, 841 F.2d 440 (1st Cir.), cert. denied sub nom. City of New Haven v. Marsh, 488 U.S. 848 (1988).

²³² 33 C.F.R. 325.2(a)(6).

²³³ 33 C.F.R. § 325.2(a)(6).

²³⁴ 33 C.F.R. § 326.3(e).

²³⁵ 33 C.F.R. § 326.3(e)(1).

²³⁶ 33 C.F.R. § 325, App. B.

Significant Impact (or "FONSI") until it renders its final decision.

In many instances, the discharge that requires a Section 404 permit is part of a larger proposal. For example, a proposal for an apartment complex on uplands may include a marina that requires a Section 404 permit. Several cases in the mid-1980's allowed the Corps to limit the scope of its NEPA assessment to the aspects of the overall project within its Section 404 (or Section 10) jurisdiction.²³⁷

In 1988, the Corps modified its regulations to address the "pipe versus the plant" issue. This regulation allows the Corps to limit its NEPA assessment to the environmental effects of the specific activity being permitted rather than the entire project, depending on the relationship between the two components.²³⁸ The determination of a sufficient relationship is predicated upon a variety of factors, the most important of which is the interdependence of the upland and jurisdictional components -- the "independent utility" test. This approach was ratified in Sylvester v. U.S. Army Corps of Engineers,²³⁹ in which the court upheld the Corps' decision that a golf course which necessitated the filling of eleven acres of wetlands had independent utility from an upland resort complex; thus, the Corps need not have assessed the environmental effects of that upland project in evaluating the impacts of the golf course.²⁴⁰ A similar approach was followed in National Wildlife Federation v. Whistler.²⁴¹ In Whistler, a developer had proposed a residential development with boat access to the Missouri River. The Corps limited its review to the boat access aspect of the project because the residential development was on uplands and "would proceed even without the

²³⁷ Save the Bay, Inc. v. U.S. Army Corps of Engineers, 610 F.2d 322, 327 (5th Cir.), cert. denied, 449 U.S. 900 (1980) (permit applicant for discharge pipe for industrial facility need only assess impacts of pipe, not the entire plant); Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272-73 (8th Cir.), cert. denied, 449 U.S. 836 (1980) (power line project need only assess impacts of stream crossings, and not entire 67 mile transmission line).

²³⁸ 33 C.F.R. § 325, App. B § 7(b).

²³⁹ 871 F.2d 817, rehearing en banc, 884 F.2d 394 (9th Cir. 1989).

²⁴⁰ See also Macht v. Skinner, 916 F.2d 13 (D.C. Cir. 1990) (Section 404 permit for a small part of project did not federalize the entire project).

²⁴¹ 27 F.3d 1341 (8th Cir. 1994).

creation of water access."²⁴² The Eighth Circuit declined to disturb the Corps' decision to treat the two projects as severable.²⁴³ In contrast, the district court in Morgan v. Walter²⁴⁴ found that a fish propagation facility could not exist without the stream diversion requiring a Section 404 permit; thus, the Corps had to assess the aggregate impact of both components.

²⁴² 27 F.3d at 1346.

²⁴³ See also Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105 (9th Cir. 2000) (Corps properly limited scope of review to wetland filling activities where it lacked control over upland residential and commercial development activities), cert. denied, __ U.S. __, 122 S.Ct. 431 (2001); Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242 (11th Cir. 1996) (Corps properly limited scope of review to a roadway connecting existing highways); California Trout v. Schaefer, 58 F.3d 469 (9th Cir. 1995) (Corps properly limited scope of review to impacts on wetlands relating to a limited (4 acre) portion of a 41 mile diversion project, since Corps had no jurisdiction over diversion of water).

²⁴⁴ 728 F.Supp. 1483 (D. Idaho 1989).

3. The Consultation Process

a. The Environmental Agencies

Pursuant to Section 404(q) of the CWA,²⁴⁵ the Corps was required to enter into Memoranda of Agreement with a variety of federal agencies to facilitate a coordinated permit review process. The Corps has entered into such MOAs with EPA, the FWS (through the Department of the Interior) and NMFS (through the National Oceanic and Atmospheric Administration). The most recent versions were all entered in 1992.²⁴⁶ The MOAs provide for procedural mechanisms governing coordination and also for elevation to higher levels of the Corps for certain permitting disputes that involve aquatic resources of national importance.

EPA has the authority to review (and "veto") permits under Section 404(c). In addition, the Fish and Wildlife Coordination Act²⁴⁷ provides that FWS and NMFS must be afforded an opportunity to comment on permit applications. Comments of these agencies are entitled to "full consideration" by the Corps in its permitting decision.²⁴⁸

If an EIS on a proposal is prepared, EPA is required to review and comment on that document and to decide whether the proposal is "environmentally satisfactory."²⁴⁹

²⁴⁵ 33 U.S.C. § 1344(q).

²⁴⁶ Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992); Memorandum of Agreement Between the Department of Commerce and the Department of the Army (Aug. 11, 1992); Memorandum of Agreement Between the Department of the Interior and the Department of the Army (Dec. 21, 1992).

²⁴⁷ 16 U.S.C. §§ 661-666c.

²⁴⁸ 33 C.F.R. § 320.4(c). The Corps' decision should reflect its consideration of any concerns expressed by commenting federal agencies. See, e.g., California Trout v. Schaefer, 58 F.3d 469, 475 (9th Cir. 1995).

²⁴⁹ Clean Air Act, 42 U.S.C. § 7609.

b. The National Historic Preservation Act

The Corps must also comply with the consultation provision of the National Historic Preservation Act ("NHPA").²⁵⁰ This entails consultation with the appropriate State Historic Preservation Officer and, in certain circumstances, with the Advisory Council on Historic Preservation.²⁵¹ The Corps must determine whether the activity in question would have an adverse effect on sites listed or eligible for listing on the National Register of Historic Places and, if so, conduct an assessment which is similar to that for wetlands; that assessment must identify measures to avoid, minimize, or mitigate adverse effects.²⁵²

c. The Endangered Species Act

The Corps is obligated to consider to effects of permit activities on endangered species under the Endangered Species Act.²⁵³ Section 7 of that Act requires the Corps to insure that a permitted activity "is not likely to jeopardize . . . any endangered or threatened species."²⁵⁴ The Corps generally confines the review to the area over which it has jurisdiction (such as wetlands); however, in certain circumstances, where the permitted activity will cause impacts on such species outside of this area, the Corps will expand the scope of its review.

A critical facet of Corps review under this legislation is whether the permitted activities would constitute a "taking" of an endangered species.²⁵⁵ The FWS regulations define the statutory prohibition against a "take" of an endangered species to include significant habitat modification.²⁵⁶ The Supreme Court affirmed this regulation, reversing its invalidation by the Court of Appeals for the District of Columbia in Babbitt v. Sweet Home Chapter of Communities For A Great Oregon.²⁵⁷

²⁵⁰ 16 U.S.C. § 470(f).

²⁵¹ See generally 33 C.F.R. § 325, App. C § 2(a) and 36 C.F.R. §§ 800.5, 800.10. For a discussion of this subject, see Hough v. Marsh, 557 F.Supp. 74, 86-88 (D. Mass. 1982).

²⁵² 36 C.F.R. § 800.10(c).

²⁵³ 16 U.S.C. §§ 1531-1544.

²⁵⁴ 16 U.S.C. § 1536.

²⁵⁵ 16 U.S.C. § 1536; 33 C.F.R. § 325.2(b)(5).

²⁵⁶ 50 C.F.R. § 17.3.

²⁵⁷ 515 U.S. 687 (1995), reversing 17 F.3d 1463 (D.C. Cir. (...continued)

4. Coastal Zone Management Act

If a proposed discharge would occur within a coastal zone under state legislation implementing the Coastal Zone Management Act,²⁵⁸ the applicant must demonstrate that its proposal is consistent with the state's coastal zone management plan.²⁵⁹ In most states, this triggers the need for an approval or a specific finding of consistency with the State plan. If a consistency determination is sought but the agency does not act within six months, consistency is conclusively presumed.²⁶⁰

5. Water Quality Certification

Section 401 of the CWA requires that a proposed discharge into waters of the United States must receive a State water quality certification.²⁶¹ The certification, generally issued by the State environmental agency, certifies that water quality standards would not be contravened by the proposed discharge. The State determination is considered by the Corps to be conclusive, unless EPA interposes an objection.²⁶² A waiver of this requirement may occur in the event of state inaction for at least 60 days, and no more than one year.²⁶³

B. The Public Interest Review

(..continued)
1994).

²⁵⁸ 16 U.S.C. §§ 1451-1464.

²⁵⁹ 33 C.F.R. § 325.2(b)(2)(ii).

²⁶⁰ Id.

²⁶¹ 33 U.S.C. § 1341. See Howard W. Heck and Associates v. United States, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (upholding Corps' requirement that applicants submit a water quality certification from the affected state as a prerequisite for issuing a Section 404 permit).

²⁶² RGL 90-4, Water Quality Considerations (Mar. 13, 1990), reprinted in 57 Fed. Reg. 6591 (1992).

²⁶³ 33 C.F.R. § 325.2(b)(1)(ii). The scope of a state water quality certification can be quite broad, and relates to the activities in question, not just the regulated discharge. See generally, Public Utility District (PUD) No. 1 of Jefferson County and the City of Tacoma v. State of Washington Department of Ecology, 511 U.S. 700 (1994).

The Corps engages in a so-called "public interest" review in determining whether to issue or deny a Section 404 permit. The review is used in all Corps permitting, and is derived from its historical usage in Section 10 permitting. The broad standard for assessing the public interest was initially upheld in the landmark Fifth Circuit decision of Zabel v. Tabb.²⁶⁴ The public interest review entails a weighing and balancing of diverse factors applicable to each application. The factors range from archeology to zoology, and encompass economic as well as environmental considerations. This ad hoc balancing process focuses on the relative extent of the public and private need for the proposed work, the existence of alternative locations and methods to accomplish the project objective, and the extent and permanence of the proposal's benefits and detriments.²⁶⁵ The review encompasses, but is not limited to, an assessment of compliance with the Section 404(b)(1) guidelines (see below). A proposal that does not comply with the Guidelines is considered to be contrary to the public interest.

The Corps regularly considers the economic ramifications of a proposal in its public interest review. In Mall Properties, Inc. v. Marsh,²⁶⁶ however, the only reported decision overturning a Section 404 permit denial, the district court found that the Corps' assessment must be based upon changes in the physical environment, as opposed to socio-economic harm not caused by such physical effects. However, the physical effects that can be properly considered extend beyond the direct effects of the regulated activity to include secondary impacts of the entire project.²⁶⁷

C. The Section 404(b)(1) Guidelines

²⁶⁴ 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). See also B&B Partnership v. United States, 45 Env't Rep. Cas. (BNA) 1922 (4th Cir. 1997) (upholding Corp's permit denial and reiterating that proposed projects in wetlands must be in the public interest).

²⁶⁵ Slagle v. United States By and Through Baldwin, 809 F.Supp. 704, 711 (D. Minn. 1992).

²⁶⁶ 672 F.Supp. 561 (D. Mass. 1987), appeal dismissed, 841 F.2d 40 (1st Cir.), cert. denied sub nom. City of New Haven v. Marsh, 488 U.S. 848 (1988).

²⁶⁷ Fox Bay Partners v. U.S. Corps of Engineers, 831 F.Supp. 605 (N.D. Ill. 1993) (upholding permit denial based on impact of increased boat traffic from a marina project).

These guidelines, developed jointly by the Corps and EPA, establish substantive aquatic criteria for Section 404 permits. They contain three principal elements: the alternatives requirement; the prohibition of significant degradation; and the mitigation provisions.

1. Practicable Alternatives and the Water Dependency Test

The applicant has the burden of demonstrating that there is no practicable alternative to the proposed activity that would have a less adverse impact on the aquatic environment, provided that an alternative does not have other significant adverse environmental consequences (not limited to the aquatic environment).²⁶⁸ For activities that are proposed for special aquatic areas such as wetlands and are not water-dependent (*i.e.*, do not require a location in wetlands), the Guidelines establish a presumption that there are such practicable alternatives.²⁶⁹

In recognition of the differing values of wetlands, the Clinton Administration urged the Corps and EPA to provide flexibility in applying the alternatives requirement, and to have regulatory decisions relate to the environmental severity of a particular proposal.²⁷⁰ The agencies sought to provide this flexibility by lessening the alternatives requirement for projects that would have only minimal wetland impacts.²⁷¹

In determining the existence of a practicable alternative, a variety of factors are considered. These include availability, cost, logistics and technology. Thus, to be "practicable" an alternative must be both feasible and available.²⁷²

²⁶⁸ 40 C.F.R. § 230.10(a).

²⁶⁹ 40 C.F.R. § 230.10(a)(3). On March 6, 1995, the Corps and EPA issued a Policy Statement providing for a presumption of unavailability of alternatives not located on property owned by an applicant seeking a permit for the construction or expansion of a home or farm, or expansion of a small business, that does not affect more than two acres of non-tidal wetlands. R. Perciasipe and J. Zirschky, Memorandum for the Field (March 6, 1995).

²⁷⁰ Protecting America's Wetlands, supra.

²⁷¹ RGL 93-2, Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking 2 (August 23, 1993), reprinted in 59 Fed. Reg. 5182 (1994).

²⁷² See generally Stewart v. Potts, 996 F.Supp. 668, 675-76 (S.D. Tex. 1998) (Corps not required to consider alternatives outside of geographic area that satisfied logistical purposes of (...continued)

In conducting an alternatives analysis, the starting point is the applicant's purpose. A practicable alternative must be capable of achieving the basic project objective.²⁷³ The Corps, however, is not obliged to accept at face value the applicant's stated purpose -- particularly when it appears crafted to preclude the potential for a practicable alternative. For example, the Corps refused to accept the developer's definition of a minimum size project in Hartz Mountain 404(q) Elevation.²⁷⁴ Similarly, the Corps cannot merely accept an applicant's definition of project feasibility. The economic viability of a project is keyed to the economic circumstances of a typical developer, and not to the idiosyncratic circumstances of a particular applicant.²⁷⁵

Where a project entails multiple uses, such as a housing complex and golf course, the Corps must determine whether the uses are independent of an integrated whole. (This is a variant of the "pipe versus the pipeline" issue under NEPA, discussed above.) For example, where marketing studies demonstrated that a resort complex and golf course were integrally related such that they did not have any independent utility, a potentially practicable alternative was compared to the entire proposal, rather than to the individual components.²⁷⁶ In contrast, the Corps subjected the

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project); Conservation Law Foundation v. Federal Highway Administration, 827 F.Supp. 871 (D.R.I. 1993), aff'd, 24 F.3d 1465 (1st Cir. 1994) (the alternative selected was the most "practicable" because it best met project goals; an alternative with lesser wetlands impact not practicable because it would cause traffic congestion and safety concerns). See also Sierra Club v. U.S. Army Corps of Engineers, 935 F.Supp. 1556, 1572-74 (S.D. Ala. 1996) (plaintiffs failed to show that the alternative of a parking deck structure for a stadium, instead of surface parking was practicable).

²⁷³ See generally Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986); Louisiana Wildlife Federation, Inc. v. York, 761 F.2d 1044 (5th Cir. 1985); Stewart v. Potts, 996 F.Supp. 668, 675-76 (S.D. Tex. 1998).

²⁷⁴ HOUSACE Findings (Unpublished) (July 25, 1989). See also Old Cutler Bay 404(q) Elevation, HOUSACE Findings (Unpublished) (Sept. 13, 1990).

²⁷⁵ Old Cutler Bay 404(q) Elevation, HOUSACE Findings (Unpublished) (Sept. 13, 1990).

²⁷⁶ Sylvester v. U.S. Army Corps of Engineers, 882 F.2d 407 (9th Cir. 1989). This decision is difficult to reconcile with the Ninth Circuit's finding that the golf course and development could

(...continued)

project components to an alternatives analysis in National Wildlife Federation v. Whistler,²⁷⁷ and Plantation Landing Resort, Inc.²⁷⁸

The principle that an alternative must be available to the applicant to be "practicable" is primarily relevant to alternative sites. Thus, in National Audubon Society v. Hartz Mountain Development Corp.,²⁷⁹ the district court upheld the Corps' determination that two potential sites owned by other developers were not available because neither owner would sell to the applicant.²⁸⁰ In contrast, a governmental applicant with the power to condemn cannot advance this argument.

As noted in Hartz Mountain, an alternative site may be considered practicable if it is available to the applicant, although not owned by it. The temporal element appears to be the availability of a potential alternative site at the time the applicant entered the market and commenced a search for a site.²⁸¹ Unfortunately, neither EPA nor the courts has defined the point of "market entry."

A typical alternative site assessment under the Guidelines (as under NEPA) screens a variety of relevant factors, such as size, accessibility to a transportation network, land use and

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be separately reviewed for purposes of NEPA. Sylvester v. U.S. Army Corps of Engineers, 871 F.2d 817, rehearing en banc, 884 F.2d 394 (9th Cir. 1989).

²⁷⁷ 27 F.3d 1341 (8th Cir. 1994).

²⁷⁸ Permit Elevation (April 21, 1989).

²⁷⁹ 14 Env'tl. L. Rep. 20724 (D.N.J. Oct. 24, 1983).

²⁸⁰ See also Willow Development Corp. Statement of Findings for Application Number 87-0046-YW by WDC Associates (Apr. 13, 1988).

²⁸¹ See Bersani v. United States EPA, 674 F.Supp. 405 (N.D.N.Y. 1987), aff'd sub nom. Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989). This litigation arose from EPA's veto of a Corps permit in the Sweedens Swamp matter. EPA found that the applicant, a mall developer, could have purchased an alternative site at the time it entered the market. Final Determination of the Assistant EPA Administrator for External Affairs Concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to Section 404(c) of the Clean Water Act (May 13, 1986).

zoning.²⁸² The failure to make a valid comparison between an alternative site and the applicant's proffered location can invalidate the Corps' determination.²⁸³

The Corps generally will not consider mitigation in determining the presence of a less environmentally harmful practicable alternative.²⁸⁴ However, the Corps has some flexibility in the application of this principle. Thus, in Town of Norfolk v. U.S. Army Corps of Engineers,²⁸⁵ the court upheld the Corps' consideration of the quality of the wetland and degree of mitigation in determining that the project was the least environmentally harmful alternative. In Northwest Environmental Defense Center v. Wood,²⁸⁶ the Corps relied, in part, on its prior determination that a proposed site had already been approved under a Section 404(b)(1) practicable alternatives analysis of a wetlands plan.

2. Significant Degradation

The proposed discharge cannot cause or contribute to the "significant degradation" of waters of the United States.²⁸⁷ In determining significant degradation, the Corps must consider impacts from direct as well as secondary effects of the discharge.²⁸⁸ The Guidelines specify a series of biological and chemical calculations to be made in furtherance of this

²⁸² See, e.g., Northwest Environmental Defense Center v. Wood, 947 F.Supp. 1371, 1376-78 (D. Or.), aff'd n.op. 97 F.3d 1460 (9th Cir. 1996); Borough of Ridgefield v. U.S. Army Corps of Engineers, 20 Env'tl. L. Rep. 21387 (D.N.J. 1990). Economics was the dispositive factor in the district court's affirmance of the Corps' alternative site evaluation in Citizens Alliance to Protect Our Wetlands v. Wynn, 908 F.Supp. 825 (W.D. Wash. 1995).

²⁸³ See Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986).

²⁸⁴ Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990) ("Mitigation MOA").

²⁸⁵ 968 F.2d 1438 (1st Cir. 1992).

²⁸⁶ 947 F.Supp. 1371, 1379 (D. Or.), aff'd n.op., 97 F.3d 1460 (9th Cir. 1996).

²⁸⁷ 40 C.F.R. § 230.10(c).

²⁸⁸ Fox Bay Partners v. U.S. Army Corps of Engineers, 831 F.Supp. 605, 610 (N.D. Ill. 1993).

determination.²⁸⁹ In addition, the Guidelines identify other, non-quantifiable factors, such as aesthetics and recreational values.²⁹⁰

In the Westway litigation, the district court found that the depletion of the striped bass population in the Hudson River by 20 to 33 percent constituted a significant degradation of aquatic resources.²⁹¹ In determining significant degradation, the Corps may consider mitigation proffered by the applicant.²⁹²

The Guidelines also prohibit issuance of a permit for a discharge that would cause or contribute to a violation of water quality standards or toxic effluent standards.²⁹³

²⁸⁹ 40 C.F.R. §§ 230.10 - 230.61.

²⁹⁰ 40 C.F.R. §§ 230.50 - 230.54.

²⁹¹ Sierra Club v. U.S. Army Corps of Engineers, 614 F.Supp. 1475, 1495 (S.D.N.Y. 1985).

²⁹² Twisted Oaks Joint Venture 404(q) Elevation, HOUSACE Findings (March 15, 1991) at 16 n.5.

²⁹³ 40 C.F.R. § 230.10(b).

3. Mitigation

Mitigation of wetland impacts is a critical permit prerequisite. The Mitigation MOA between the Corps and EPA endorses a national goal of "no net loss" of wetlands.²⁹⁴ It establishes a sequencing for the evaluation of mitigation that is derived from applicable regulations²⁹⁵ and the Section 404(b)(1) Guidelines:²⁹⁶ (a) avoidance to the maximum extent practicable; (b) minimization of remaining impacts; and (c) compensation (mitigation) for unavoidable wetland losses as a last resort. Deviation from strict sequencing is allowable where Corps and EPA agree that activity is necessary to avoid environmental harm or would cause insignificant environmental loss.²⁹⁷

For mitigation to be considered acceptable, it must generally provide at least a 1:1 value (not geographical) ratio. The values of the wetlands affected and the post-development wetlands are compared by ecological formulas. The Corps and EPA had historically employed (or more accurately, required the applicant to employ) a methodology entitled Wetland Evaluation Technique (known, not surprisingly, as "WET"), or variants thereof, to assess pre- and post-development wetland functions and values. In the 1990s, the Corps announced a new approach -- the hydrogeomorphic ("HGM") approach -- to be used by the Corps and other federal agencies to assess wetland values. This approach "first classifies wetlands based on their differences in functioning, second it defines functions that each class of wetlands performs, and third uses reference [wetlands] to establish the range of functioning of the wetland."²⁹⁸ The goal is to implement the new method after regional guidebooks containing "sufficient [regional] assessment models to address 80 percent of the Section 404 permit workload requiring wetland function assessments have been developed."²⁹⁹ Although draft HGM models have been developed, and some research programs have focused on HGM,

²⁹⁴ Mitigation MOA, supra.

²⁹⁵ 33 C.F.R. § 320.4(r).

²⁹⁶ 40 C.F.R. § 230.10.

²⁹⁷ A challenge to this MOA was found unripe for adjudication because it had no immediate effect. Anchorage v. United States, 32 Env't Rep. Cas. (BNA) 1199 (D. Alaska 1990).

²⁹⁸ The National Action Plan to Implement the Hydrogeomorphic Approach to Assessing Wetland Functions, U.S. Army Corps of Engineers, 62 Fed. Reg. 33607 (1997).

²⁹⁹ Id.

the approach has never been formally adopted and the extent to which it is being utilized is unclear.³⁰⁰

The Mitigation MOA, however, does not specify the use of a particular methodology. The MOA emphasizes wetland values and functions, similar to those articulated in the August 1993 Clinton Administration Task Force on Wetlands.³⁰¹ Thus, where the wetlands to be filled are already degraded, a replacement ratio of less than 1:1 may be permissible.

As a general matter, enhancement of low quality wetlands is favored over the creation of new wetlands, since there is scientific doubt that wetland creation will be successful for the long term. The Corps will generally require an 85 percent success ratio and monitoring over three to five years for a mitigation plan.

The Mitigation MOA expresses the preference for on-site in-kind mitigation, rather than off-site or out-of-kind mitigation. Where off-site mitigation is necessary, the mitigation area should be located in the same watershed as the affected wetland.

Although the Corps frequently requires a fairly detailed mitigation plan as part of the permit application, several courts have held that a "final detailed mitigation implementation plan" is not a prerequisite to permit issuance;³⁰² the permit may be conditioned on future implementation of a conceptual plan. Because a mitigation plan can run the gamut between "conceptual" and "detailed", these decisions tend to be very fact-intensive.³⁰³ At least one court has held that the Corps' decision not to enforce the mitigation requirements of a Section 404 permit is a decision committed to agency discretion regarding enforcement, and

³⁰⁰ See Cole and Kooser, "HGM: Hidden, Gone, Missing?," National Wetlands Newsletter (ELI) (March-April 2002).

³⁰¹ Protecting America's Wetlands, supra.

³⁰² Sierra Club v. Pena, 915 F.Supp. 1381, 1398 (N.D. Ohio 1996), aff'd sub nom. Sierra Club v. Slater, 120 F.3d 623 (6th Cir. 1997).

³⁰³ See Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1528-29 (10th Cir. 1992). See also National Wildlife Federation v. Whistler, 27 F.3d 1341, 1343 (8th Cir. 1994) (extent of mitigation plan unclear). The Holy Cross decision is consistent with the Supreme Court's relaxed requirement for the discussion of mitigation in an EIS prepared under the auspices of NEPA. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989).

is consequently unreviewable.³⁰⁴

Another mitigation approach is known as mitigation banking. Under this system, third parties would create, restore or enhance wetlands that would be credited toward future mitigation needs of permit applicants. Mitigation banking had been endorsed by the Corps and EPA in the 1993 Corps RGL³⁰⁵ and by the Clinton Administration Task Force on Wetlands, but only after compliance with the sequencing and preference for mitigation location described above.

In late 1995, the Corps, EPA and other federal agencies issued Federal Guidance for the "Establishment, Use and Operation of Mitigation Banks."³⁰⁶ The Guidance articulates: (a) policy considerations underlying mitigation banking; (b) key planning considerations, including the prospectus, goal setting, site selection, technical feasibility, role of preservation, inclusion of upland areas and relationship to watershed planning; (c) principal components in the establishment of banks, such as the banking instrument, agency coordination, role of the bank sponsor, the type of mitigation (in-kind vs. out-of-kind), the timing of the credit withdrawal) and the accounting procedures; and (d) long-term management, monitoring and remediation provisions.

The concept is still more theory than fact for private applicants, as banking has primarily been used in regard to projects by state transportation agencies.³⁰⁷ There have, however, been a number of private mitigation banks approved during the last several years. In addition, mitigation banking was used as part of a settlement of the long-standing controversy with Russo Development Corporation, which included an EPA veto of an after-the-fact permit issued by the Corps.³⁰⁸

In late 2000, the Corps, EPA, the FWS, and NOAA, issued a joint guidance on the use of In-Lieu-Fee Arrangements ("ILFA") for

³⁰⁴ Harmon Cove Condo Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987).

³⁰⁵ RGL 93-2, Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking (Aug. 23, 1993), reprinted in 59 Fed. Reg. 5182 (1994).

³⁰⁶ 60 Fed. Reg. 58605 (1995).

³⁰⁷ Some states, including Florida and New Jersey, also employ mitigation banking.

³⁰⁸ Russo Development Corporation Site, NJ; Modification to March 21, 1988, Clean Water Act Section 404(c) Final Determination. 60 Fed. Reg. 47568 (1995).

compensatory mitigation resulting from Section 404 permit actions.³⁰⁹ In-lieu-fee mitigation allows a permittee to direct funds to a third party, generally a natural resource management organization, instead of performing site-specific mitigation. The use of ILFA is thus applicable when on-site mitigation is not practicable or ecologically sound.

In November 2001, the Corps issued a controversial RGL concerning mitigation that was intended to address the recent finding of the National Research Council in its June 2001 report, "Compensating for Wetlands Losses Under the Clean Water Act," that mitigation programs were not meeting the federal government's "no net loss" policy goal for "wetlands function."³¹⁰ The RGL seeks to address this problem by adopting a system of measuring credits and debits regarding wetlands acreage based on different functional components to better account for the comparability of the mitigation project to the lost wetlands.

The controversy surrounding the RGL stemmed primarily from the perception that the Corps had taken it upon itself to unilaterally rewrite the 1990 Mitigation MOA without seeking the input of EPA, other federal agencies or the public. In response to the outcry over this process, the Corps announced in March 2001 that it would meet with EPA and other federal agencies to discuss their comments on the guidance.³¹¹

D. EPA's Veto Power

Section 404(c) of the CWA authorizes EPA to veto the Corps' issuance of a Section 404 permit based upon "unacceptable adverse effect[s]" on certain environmental resources: municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.³¹² This veto power, though exercised sparingly, has been utilized more often in recent years and has become quite controversial.³¹³ Moreover, the implicit (and sometimes express)

³⁰⁹ 65 Fed. Reg. 66914 (Nov. 7, 2000).

³¹⁰ RGL 01-1.

³¹¹ See "Corps of Engineers to Meet with Agencies to Discuss Latest Guidance on Mitigation," Daily Env't (BNA) at A-7 (Mar. 19, 2002). EPA also criticized the RGL on a number of substantive grounds, including that it lacks the established preference for "in-kind" and on-site mitigation, both preferred in the agencies' earlier joint guidance. Id.

³¹² 33 U.S.C. § 1344(c).

³¹³ The agency had exercised its veto power eleven times through 1994.

threat by EPA to exercise its veto gives the agency's comments during the permit application process considerable weight.

EPA's regulations provide for a specific procedure to be followed before the agency can impose a veto, but those regulations are bereft of substantive standards.³¹⁴ EPA uses the Section 404(b)(1) Guidelines as the substantive basis for its veto. Because the veto tends to be used only in controversial matters, litigation has invariably resulted from such EPA action.

The first of EPA's more controversial vetoes involved a proposal by the Pyramid Company to construct a regional shopping mall on an 80-acre site containing 25 acres of wetlands in Attleboro, Massachusetts. The EPA vetoed the permit, finding that there was a practical alternative site and that the proposed location, therefore, did not comply with the practicable alternative provisions of the Section 404(b)(1) Guidelines. (This is known as the "Sweedens Swamp" veto.) The veto was upheld against the developer's challenge, and the Second Circuit in Bersani v. Robichaud³¹⁵ upheld EPA's authority to consider compliance with the Guidelines in its Section 404(c) decisionmaking.

Another controversial EPA veto involves a proposed water project in James City County, Virginia. The Corps had issued a permit to the County, finding that there was no practicable alternative to the flooding of approximately 425 acres of wetlands to create a water supply reservoir. EPA vetoed, suggesting the potential of practicable alternatives -- though it had identified none during the permitting process -- and finding the record on this subject inadequate to support the Corps' decision. This veto was judicially overturned by the district court. The Fourth Circuit affirmed the district court's finding that there was no substantial basis for EPA's finding of a practicable alternative.³¹⁶

The matter was remanded to the district court for further remand to the agency for EPA's consideration of whether environmental grounds alone would justify a veto.

On remand, EPA again vetoed the permit. This decision was based exclusively on unacceptable adverse environmental effects. The County again sued. The district court again ruled in the

³¹⁴ See 40 C.F.R. § 231.

³¹⁵ 850 F.2d 36 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989), aff'g Bersani v. United States EPA, 674 F.Supp. 405 (N.D.N.Y. 1987).

³¹⁶ James City County, Virginia v. United States EPA, 955 F.2d 254 (4th Cir. 1991).

County's favor, finding the veto invalid because EPA had failed to consider the County's need for a water project and the record did not support its environmental conclusions.³¹⁷ However, on this ground the Fourth Circuit reversed, finding that EPA was under no obligation to consider anything other than environmental factors and that its finding of adverse impacts was supported by the record.³¹⁸ The courts have also sustained other EPA vetoes.³¹⁹

³¹⁷ James City County, Virginia v. United States EPA, 23 Env'tl. L. Rep. 20228 (E.D. Va. 1992).

³¹⁸ James City County, Virginia v. United States EPA, 12 F.3d 1330 (4th Cir. 1993), cert. denied, 513 U.S. 823.

³¹⁹ Alameda Water and Sanitation District v. Reilly, 930 F.Supp. 486 (D. Colo. 1996) (water storage project); City of Alma v. United States, 744 F.Supp. 1546 (S.D. Ga. 1990) (dam and impoundment project); Russo Development Corp. v. Reilly, 735 F.Supp. 631 (D.N.J. 1989) and 21 Env'tl. L. Rep. 21345 (D.N.J. 1991) (after-the-fact permit); Creppel v. U.S. Army Corps of Engineers, 19 Env'tl. L. Rep. 20134 (E.D. La. 1988) (land reclamation flood control project).

E. General And Nationwide Permits

In Section 404(e), Congress included authority for the Corps to issue "general permits" on a national, state or local basis.³²⁰ This provision was intended to afford the Corps flexibility in the administration of the permit process, and to avoid the need for individual permits where similar categories of filling activities would have only minimal cumulative environmental impacts.³²¹ In Alaska Center for the Environment v. West,³²² the Ninth Circuit upheld the Corps' use of general permits authorizing construction in wetlands for projects that are similar in nature and generate only minimal individual and cumulative impacts.³²³ The court further held that the Corps' coordination of its general permitting procedures with municipalities that seek to impose additional or consistent protections does not constitute an improper delegation of its Section 404 permitting authority.³²⁴ The national permits of this nature, classified as "nationwide" permits,³²⁵ are the most frequently invoked approvals under Section 404(e).

There are currently 43 nationwide permits that have been enacted by the Corps.³²⁶ The agency retains the discretion to

³²⁰ 33 U.S.C. § 1344(e).

³²¹ 33 U.S.C. § 1344(e)(1).

³²² 157 F.3d 680 (9th Cir. 1998).

³²³ 157 F.3d at 683-85.

³²⁴ Id. at 685-86. See also National Wildlife Federation v. Caldera, 2002 U.S. Dist. LEXIS 7458 (D.D.C. 2002) (dismissing lawsuit challenging nationwide permitting process on the basis that certain activities authorized under nationwide permits were damaging to the habitat of the Florida panther, because the suit sought to require a consultation process between the Corps and the Fish and Wildlife Service, which would result in a program change, and the court found it did not have subject matter jurisdiction to change ongoing agency programs).

³²⁵ The Corps has employed programmatic general permits for certain projects that are also regulated by another federal, state or local authority. The Corps has issued a Regulatory Guidance Letter for the development and implementation of such permits. 62 Fed. Reg. 31492 (1997). One other means of authorizing a discharge is a letter of permission, issued in limited circumstances following an abbreviated application procedure. 33 C.F.R. § 3425.2(e)(1).

³²⁶ 67 Fed. Reg. 2020 (2002).

require an individual permit for any proposed discharge due to environmental impacts or the results of a public interest review, or to modify, suspend or revoke a nationwide permit for a particular activity.³²⁷ Individual permits are required for activities that affect endangered species or their habitat, sites subject to the NHPA or, with certain exceptions, activities that affect designated wild and scenic rivers.³²⁸

All nationwide permits must comport with certain general conditions, relating primarily to navigation, sedimentation and erosion, and aquatic concerns.³²⁹ In addition, there are specific criteria that apply to particular nationwide permits. Most nationwide permits do not require prior notice to the Corps; in these cases, if there is compliance with the general and any specific conditions, the permit is considered to have been already issued.³³⁰ A number of nationwide permits, however, do require "pre-construction notification" and, in some circumstances, there must also be a wetlands delineation.³³¹ For certain nationwide permits, this procedure entails notification of the proposed discharge to EPA, FWS and NMFS to afford these agencies an opportunity to comment on whether the activity should be deemed eligible for a nationwide permit or whether an individual permit should be required.

The Corps' nationwide provisions provide for the inclusion of mitigation as part of a request for confirmation that a proposed activity meets the applicable criteria.³³² It is not unusual, particularly for activities that necessitate preconstruction notification to the Corps and other federal agencies to incorporate mitigation at appropriate ratios to diminish the potential that an individual permit would be required.

³²⁷ See generally 33 C.F.R. Part 330. See, e.g., Donnell v. United States, 834 F.Supp. 19 (D. Me. 1993); O'Connor v. U.S. Army Corps of Engineers, 801 F.Supp. 185 (N.D. Ind. 1992).

³²⁸ 33 C.F.R. § 330.4(f), (g) and App. A, § C.7.

³²⁹ 33 C.F.R. § 330, App. A, §§ C.1, C.3, C.4.

³³⁰ Confirmation can be sought from the Corps that the proposed activities is eligible for a nationwide permit. 33 C.F.R. § 330.6. This is often a prudent step. A written confirmation is valid for up two years. 33 C.F.R. § 330.6(a)(3)(ii).

³³¹ 33 C.F.R. § 330, App. A, § C.13(b)(4).

³³² 65 Fed. Reg. 12818 (2000).

The individual states must issue water quality certifications for a nationwide permit to be valid in that state.³³³ Similarly, there must be a State consistency determination for nationwide permits in coastal zone states.³³⁴ Through the Section 401 certification and/or the coastal zone consistency process, States may also impose conditions upon the issuance of a nationwide permit. If a State denies certification or consistency, an individual certification or consistency determination for the proposed activity is a prerequisite for a valid nationwide permit.³³⁵ For this reason, one court found a challenge to the Corps' issuance of a notice to proceed under a nationwide permit not ripe until the relevant state acted on certification.³³⁶

The Corps may allow different nationwide permits to be used for the same overall project.³³⁷ In certain circumstances, an individual and nationwide permit may be used for components of the same overall project.³³⁸ The application of particular nationwide permits is site and project specific, and subject to considerable agency discretion. If warranted by the impacts of the proposed activity, the Corps may require an individual permit even when the nationwide permit criteria and conditions are satisfied.³³⁹ Most

³³³ 33 C.F.R. § 330.4(c). United States v. Marathon Development Co., 867 F.2d 96 (1st Cir. 1989). The issuance of a nationwide permit conditioned upon receipt of a water quality certification is ripe for judicial review. New Hanover Township v. U.S. Army Corps of Engineers, 796 F.Supp. 180, 185 (E.D. Pa. 1992), reversed and remanded on other grounds, 992 F.2d 470 (3d Cir. 1993).

³³⁴ 33 C.F.R. § 330.4(d).

³³⁵ See RGL 92-4, Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits, reprinted in 58 Fed. Reg. 17210 (1993).

³³⁶ New Hanover Township v. U.S. Army Corps of Engineers, 992 F.2d 470 (3d Cir. 1993).

³³⁷ 33 C.F.R. § 330.6(c).

³³⁸ 33 C.F.R. §§ 330.6(c), (d).

³³⁹ See Reichelt v. U.S. Army Corps of Engineers, 923 F.Supp. 1090, 1094-95 (N.D. Ind. 1996); O'Connor v. Corps of Engineers, 801 F.Supp. 185 (N.D. Ind. 1992). When a nationwide requirement is not satisfied, a nationwide permit cannot be relied upon to justify otherwise illegal filling. United States v. Pozsgai, 999 F.2d 719, 732 n.8 (3d Cir. 1993); Reichelt v. U.S. Army Corps of Engineers, 923 F.Supp. 1090, 1095 (N.D. Ind. 1996).

importantly, the Corps' decision that a nationwide permit is not available for a proposed discharge, and that an individual permit is necessary, is considered a non-final agency decision. As such, it is not subject to judicial review.³⁴⁰

Until major modifications to the nationwide permit program announced in March 2000, discussed further below, probably the most popular and controversial nationwide permit was No. 26. This nationwide permit, which was replaced in the March 2000 revisions, applied only to isolated waters or wetlands above the "headwaters" of a non-tidal, non-navigable waterway ("headwaters" was defined by an annual average flow of less than 5 cfs).³⁴¹ The filling of less than one-third acre was permitted by the nationwide permit, provided that additional waters of the United States were not flooded or drained. The filling of between one-third and one acre triggered preconstruction notification to the Corps only; the filling of between one and three acres triggered preconstruction notification to the Corps and to EPA, FWS and NMFS. The acreage limits could not be reduced by the provision of mitigation, and No. 26 could not be used more than once for the same project. Special provisions for subdivisions were also included.

In 1995, the Corps adopted a new nationwide permit, No. 29, relating to single-family residential development for a personal residence.³⁴² This nationwide permit allows discharges into non-tidal waters, including wetlands, for the construction or expansion of such residences and attendant features, provided that: not more than a half-acre of waters of the United States is lost; there is pre-construction notification; impacts have been minimized; and other standard conditions are satisfied.

On April 30, 1998 the District Court for Alaska suspended the use of nationwide permit No. 29, saying that it did not do enough to ensure that no more than minimal environmental harm would be permitted.³⁴³ In response to this decision, the Corps proposed, on

³⁴⁰ Industrial Highway Corp. v. Danielson, 796 F.Supp. (D.N.J. 1992), aff'd n.op., 995 F.2d 217 (3d Cir. 1993); Avella v. U.S. Army Corps of Engineers, 20 Env'tl. L. Rep. 20920 (S.D. Fla.), aff'd n.op., 21 Env'tl. L. Rep. 20542 (11th Cir. 1990).

³⁴¹ 33 C.F.R. § 330 App. A § B.26 and § 330.2(d). Prior to the Corps' reissuance of the nationwide permits, this permit allowed discharges up to ten acres, and required preconstruction notice only when filling was one acre or more.

³⁴² 60 Fed. Reg. 38650 (1995).

³⁴³ Alaska Center for the Environment v. West, 31 F.Supp.2d 714, 724 (D. Al. 1998).

July 1, 1998, a rule that included an announcement that the agency would prepare a revised environmental assessment for No. 29, which would result in a new FONSI, because the Corps does not consider the nationwide permit program to be a "major Federal action."³⁴⁴ The Corps also proposed reducing the acreage limit for projects under No. 29 to one-fourth acre.

As expected, on August 30, 1999, the Corps issued a final notice, modifying nationwide permit No. 29 to reduce the acreage limit to one-fourth acre, and announcing that a revised environmental assessment had been prepared.³⁴⁵ The Corps stated that because the revised assessment fulfilled the requirements set by the court, it was no longer prohibited from processing applications under No. 29, and would begin receiving preconstruction notifications under the nationwide on September 30, 1999.³⁴⁶

In mid-1996, the Corps reissued the nationwide permits, many with additional conditions, and adopted two additional nationwide permits.³⁴⁷ The two new nationwide permits issued in 1996 relate to the management of wildlife on federal or state lands and the maintenance of existing flood control facilities previously authorized or constructed by the Corps and transferred to a local sponsor. Certain new provisions governing the popular No. 26 were also included. However, the Corps reissued nationwide permit No. 26 for only two years in the 1996 rule, rather than the typical five-year period, and announced its intention to develop and adopt "activity-specific" replacement permits for No. 26 which would then be "regionalized" by the addition of specific regional conditions.³⁴⁸ In March 1997, an industry group challenged several

³⁴⁴ 63 Fed. Reg. 36040 (1999). However, the Corps has announced that it is initiating a Programmatic Environmental Impact Statement ("PEIS") for the entire nationwide permit program. 64 Fed. Reg. 13782 (1999). The stated purpose of the PEIS is "to review and evaluate the nationwide permit program as a whole, to ensure that the nationwide permit program authorizes only those activities with minimal individual and cumulative adverse environmental effects on the aquatic environment." Id. The final PEIS is currently expected to be completed by early 2001. See 65 Fed. Reg. 12818, 12819 (2000).

³⁴⁵ 64 Fed. Reg. 47175 (1999).

³⁴⁶ Id.

³⁴⁷ 61 Fed. Reg. 65874 (1996).

³⁴⁸ Id.

of the changes made to nationwide permit 26.³⁴⁹ The district court for the D.C. Circuit ordered the Corps to withdraw its changes to nationwide No. 26, and required it to return to the drawing board.

On July 1, 1998, the Corps published a new proposal to modify nationwide No. 26 and five other existing nationwide permits, and to issue six new activity-specific nationwide permits to replace the No. 26.³⁵⁰ The proposed rule would also have extended No. 26's expiration date to March 28, 1999. On October 14, 1998, after reviewing over 3,200 public comments received on the July 1, 1998 notice, the Corps announced its decision to withdraw certain of the newly-proposed nationwide permits, and to seek additional comments on additional modifications to the replacement nationwide permits.³⁵¹ Reacting in part to industry groups' concerns that No. 26 would expire before the replacement nationwide permits were in place, or that the Corps would do an inadequate job in crafting the nationwide permits in an effort to issue them in time, the Corps announced its decision to further extend No. 26's expiration date. The revised schedule provided for the new and revised nationwide permits to issue, and for No. 26 to expire, on September 15, 1999.³⁵²

After several more extensions, the Corps finally issued its final rule replacing nationwide permit No. 26 on March 9, 2000.³⁵³ As was expected, the dramatic new rule replaced No. 26 with five new and six modified nationwide permits, directed at regulating specific activities that result in the filling of wetlands, rather than simply hinging on the amount of acreage that is filled. In a drastic change from previous proposals to replace nationwide No. 26, however, the maximum acreage that may be filled under any nationwide permit was reduced from three acres to one-half acre.

The five new nationwide permits authorized: (1) residential,

³⁴⁹ National Association of Homebuilders v. U.S. Army Corps of Engineers, No. 97 CV 00464 (D.D.C. 1997). The Association challenged the three key changes made to nationwide permit No. 26: the two-year phase-out; the preclusion of "stacking" the nationwide with certain other nationwide permits when impacts exceeded three acres; and the proscription on the use of the nationwide for activities involving more than 500 linear feet along a streambed.

³⁵⁰ 63 Fed. Reg. 36040 (1998).

³⁵¹ 63 Fed. Reg. 55095 (1998).

³⁵² Id.

³⁵³ 65 Fed. Reg. 12818 (2000).

commercial and institutional activities that would affect up to one-half acre of non-tidal waters, including wetlands (No. 39); (2) reshaping existing drainage ditches in non-tidal waters, restricted to the minimum area necessary and provided the activity does not change the existing location or size of the ditch (No. 41); (3) construction of passive recreational facilities that would disturb up to one-half acre of non-tidal waters or 300 linear feet of streambed (No. 42); (4) stormwater management facilities that involve construction on up to one-half acre in non-tidal waters (No. 43); and (5) mining activities affecting up to one-half acre of non-tidal waters (including the area affected by certain support activities) (No. 44). The Corps also modified six existing nationwide permits authorizing: (1) maintenance activities (No. 3); (2) outfall structures and maintenance (No. 7); (3) utility line activities (No. 12); (4) linear transportation crossings (No. 14); (5) stream and wetland restoration activities (No. 27); and (6) agricultural activities (No. 40).³⁵⁴

For all of the new nationwide permits, the Corps established preconstruction notification thresholds designed to ensure minimal adverse environmental impacts. Thus, most of the new nationwide permits require notification for any losses greater than one-tenth acre.³⁵⁵

This also represents a major change from past practice, under which preconstruction notification was typically triggered by the proposed filling of one-quarter acre or more.

In addition, the Corps added two new, and modified nine existing, general conditions governing all nationwide permits. The new conditions apply to activities affecting two types of "high value aquatic resources": (1) designated critical resource waters, including certain designated marine sanctuaries, wild and scenic rivers, and critical habitat for threatened and endangered species; and (2) fills within the 100-year floodplain. As under earlier proposals, the general conditions are to be "regionalized" with the addition by Corps districts of region-specific conditions designed to minimize cumulative and individual adverse impacts on the aquatic environment.³⁵⁶

The new and revised nationwide permits and general conditions took effect, and nationwide No. 26 expired, on June 7, 2000.³⁵⁷ Despite the Corps' self-described efforts to strike a balance

³⁵⁴ Id.

³⁵⁵ Id.

³⁵⁶ Id.

³⁵⁷ Id.

between the conflicting positions of the environmental and regulated communities in promulgating its final rule, the very same day the rule was published, one industry group filed a lawsuit challenging the Corps' issuance of the new nationwide permits as "arbitrary and capricious," and beyond its authority under the CWA.³⁵⁸ In May 2000, several other regulated groups joined together in bringing an additional suit challenging the Corps' final rule as violative of NEPA due to its issuance prior to its completion of a programmatic EIS to review and evaluate the nationwide program as a whole in violation of NEPA, as well as on other various other procedural and constitutional grounds.³⁵⁹ Both lawsuits are still pending.

In part in reaction to the immediate controversy generated by the new nationwide permits, in August 2001, the Corps proposed to reissue all of the existing permits, general conditions and definitions with some modifications, and to issue one new general condition.³⁶⁰ The Corps stated that the proposal was intended to simplify and clarify permits having no more than minimal effect on the environment, add some additional requirements to enhance protection of the aquatic environment, and increase Corps flexibility. The "key protections for the aquatic environment, i.e., the one-half acre impact limit and one-tenth acre notification requirement, were not to be affected."³⁶¹

On January 15, 2001, the Corps in fact reissued the nationwide permits, conditions and definitions, with modifications, and issued one new condition.³⁶² In so doing, the Corps announced that it was reinforcing its commitment to "no net loss" of wetlands by, among other things, requiring the Corps districts to meet or exceed the goal of one-for-one replacement for impacted acreage on a programmatic (as opposed to project-specific) level. In addition, in recognition of the growing controversy surrounding the impacts of mountaintop mining (see

³⁵⁸ National Association of Home Builders v. U.S. Army Corps of Engineers, No. 1:00 CV 00379 (D.D.C. March 9, 2000).

³⁵⁹ National Stone Assoc. v. U.S. Army Corps of Engineers, No. CV 00558 (D.D.C. May 4, 2000).

³⁶⁰ 66 Fed. Reg. 42070 (Aug. 9, 2001).

³⁶¹ See 67 Fed. Reg. 2020 (Jan. 15, 2002). The new general condition, No. 27, provides that for activities for which the Corps has received notification and a construction schedule has been reviewed, and verification issued by the Corps, the Corps may establish project completion dates beyond the expiration of the nationwide permits.

³⁶² Id.

the discussion of the new definition of "fill material," supra), the reissued permits call for reevaluating permit No. 21, which permits activity associated with surface coal mining, upon completion of a regional environmental impact statement presently being jointly prepared by the Corps, the State of West Virginia, EPA and other federal agencies. In the interim, certain additional protections from the effects of mining have been imposed, including enhanced mitigation requirements and case-by-case review for the use of the permit.

The reissued permits also provide for a waiver from the 300-linear foot limitation in several nationwide permits, including No. 39, where the affected stream is intermittent rather than more permanent perennial streams. The March 2000 acreage limits were not affected. All issued, reissued and modified nationwide permits became effective on March 18, 2002 and are set to expire on March 19, 2007.

VI. The Wetlands "Takings" Controversy

There has been increasing judicial scrutiny of whether the regulation of property, including the imposition of conditions on its development, constitutes a "regulatory taking" in violation of the Fifth Amendment. This inquiry has reached the regulation of wetlands under Section 404; indeed, several of the more recent "takings" decisions have involved the Corps' denial of Section 404 permits to fill wetlands.

The just compensation clause of the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." When the federal government directly "takes," or condemns private property for a public use, such as a highway, it must provide just compensation to the owner.³⁶³ An "inverse condemnation" occurs when government regulation results in a taking of property without the institution of formal condemnation proceedings.³⁶⁴

There are two basic categories of inverse condemnation. The

³⁶³ United States v. 564.54 Acres of Land, 441 U.S. 506 (1979).

³⁶⁴ See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987). As explained in First Lutheran, the Fifth Amendment prohibition against taking is applicable to the states through incorporation in the Fourteenth Amendment. 482 U.S. at 310. The Fifth Amendment's applicability through the Fourteenth Amendment has been recognized since Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

first is when the government physically occupies or "takes" the property. A classic example of this physical invasion is Loretto v. Teleprompter Manhattan CATV Corp.,³⁶⁵ in which the City of New York physically invaded property to effectuate cable television hookups by stringing a 30-foot cable across an apartment building's roof.³⁶⁶ Another example is a decision that EPA's placement of a monitoring well on private property was a taking.³⁶⁷

The second principal category is the regulatory taking. It is well-settled that the government can regulate private property. However, as described in less than precise terms by the Supreme Court in the landmark case of Pennsylvania Coal Co. v. Mahon, "if [that] regulation goes too far it will be recognized as a taking."³⁶⁸ A body of jurisprudence has evolved from this phrase, directed at ascertaining whether a particular regulation "goes too far."³⁶⁹ While a detailed discussion of this evolving jurisprudence of "regulatory taking" is beyond the scope of this Article, a brief overview of the subject pertinent to the regulation of wetlands is presented.

A. Jurisdiction and Related Issues

Pursuant to the Tucker Act,³⁷⁰ the U.S. Claims Court (formerly the Court of Claims) has sole jurisdiction over claims against the federal government for damages in excess of \$10,000. Thus, a takings claim arising under a Corps denial (or conditioning) of a Section 404 permit must generally be commenced in this Court.

³⁶⁵ 458 U.S. 419 (1982).

³⁶⁶ See also Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946) (physical invasion of air space by low-flying airplanes could constitute a taking).

³⁶⁷ Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991).

³⁶⁸ 260 U.S. 393, 415 (1922).

³⁶⁹ The "regulation" can be state legislation, as in Mahon, a local legislative (e.g., zoning) provision, as in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), a permit denial, as in First Lutheran, or the imposition of a condition for the permission to develop, as in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

³⁷⁰ 28 U.S.C. §§ 1346(a)(1), 1491(a)(1) (1988) (giving the U.S. Claims Court jurisdiction for all claims against the federal government and limiting federal district courts' jurisdiction to claims not exceeding \$10,000).

An applicant denied a permit will frequently seek to challenge the Corps' action as arbitrary and capricious or otherwise in violation of law under the APA. Such challenges are brought in a district court. The Supreme Court, however, held that the Court of Claims could not exercise jurisdiction over a taking claim if the plaintiff had pending in another court (invariably a U.S. district court) a claim based on the same operative facts that sought the same type of relief.³⁷¹ The existence of the district court action could cause the lapse of the six-year statute of limitations for the Court of Claims.³⁷² The problem was addressed by the Court of Appeals in Loveladies Harbor, Inc. v. United States,³⁷³ which held that a property owner may maintain a taking claim in the Court of Claims while simultaneously challenging in district court the validity of a permit denial (or conditioning) because the claims seek different relief.³⁷⁴

A district court decision finding that a Corps permit was a taking did not establish issue preclusion in the court of claims because there was no identity of parties (due to the differing jurisdiction), the claims were unrelated in nature (equitable v. monetary damages), and the government had no opportunity to litigate the takings issue.³⁷⁵

To assert a viable regulatory taking claim, the plaintiff must have possessed a property interest.³⁷⁶ In the wetland context,

³⁷¹ Keene Corp. v. United States, 508 U.S. 200 (1993), affirming sub nom. UNR Industries v. United States, 962 F.2d 1013, 1023-24 (Fed. Cir. 1992).

³⁷² 28 U.S.C. § 2501 (1988).

³⁷³ 27 F.3d 1545 (Fed. Cir. 1994)(en banc) ("Loveladies III").

³⁷⁴ See also Creppel v. United States, 41 F.3d 627, 633 (Fed. Cir. 1994); Marks v. United States, 34 Fed. Cl. 387, 1995 U.S. Claims LEXIS 213, *25-29 (Fed. Cl. Ct. 1995), aff'd n.op., 116 F.3d 1496 (Fed. Cir. 1997), cert. denied, 522 U.S. 1075 (1998). An earlier solution was to seek to toll the taking claim until resolution of the district court litigation. See Creppel v. U.S. Army Corps of Engineers, 30 Fed. Cl. 323, 1994 U.S. Claims LEXIS 11, *21 (Fed. Cl. Ct.), aff'd in part and rev'd in part, 41 F.3d 627 (Fed. Cir. 1994).

³⁷⁵ 1902 Atlantic Ltd. v. United States, 31 Env't Rep. Cas. (BNA) 1225 (Cl. Ct. 1990).

³⁷⁶ Lucas v. South Carolina Coastal Council, 505 U.S. 1003, (...continued)

a claimant was found to lack the requisite ownership of land below the mean high water line because the property was under State ownership.³⁷⁷

B. Ripeness and Exhaustion

No takings claim can be asserted until the Section 404 permit process has been completed.³⁷⁸ A judicial determination of whether a Corps' permit denial is final and on the merits will be based on the overall circumstances, and not the agency's denomination of the denial as "without prejudice."³⁷⁹ For example, where a Corps enforcement order required extensive restoration that was inconsistent with potential development, it would have been futile, and thus unnecessary, for the property owner to apply for

(..continued)
1028-29 (1992).

³⁷⁷ Plantation Landing Resort, Inc., v. United States, 30 Fed. Cl. 63 (Fed. Cl. Ct. 1993), aff'd n.op., 39 F.3d 1197 (Fed. Cir. 1994). Note that "navigable waters" of the United States which are below the mean high water line and thus subject to navigational servitude of the federal government cannot be the subject of a viable takings claim. Marks v. United States, 34 Fed. Cl. 387, 1995 U.S. Claims LEXIS 213, *43-47 (Fed. Cl. Ct. 1995), aff'd n.op., 116 F.3d 1496 (Fed. Cir. 1997), cert. denied, 522 U.S. 1075 (1998).

³⁷⁸ Riverside Bayview Homes, Inc. v. United States, 474 U.S. 121 (1985); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (1983). In Howard W. Heck and Associates, Inc. v. United States, 134 F.3d 1468, 1471-72 (Fed. Cir. 1998), the court upheld dismissal of the applicant's takings claim on ripeness grounds, because neither the state's cancellation of its water quality certification application as incomplete, nor the Corps' resulting removal of the Section 404 permit application from active status, constituted a final or merit-based government decision. See also Lakewood Assoc. v. United States, 45 Fed. Cl. 320 (Fed. Cl. Ct. 1999) (plaintiffs' takings claim not ripe for judicial review because plaintiff did not receive a final agency decision regarding its Section 404 permit application; continuation with permitting process would not be futile because the response from the Corps was that it needed additional information to make a decision, and the possibility that development on some of plaintiff's property could occur in exchange for the creation of wetlands on other properties was not foreclosed).

³⁷⁹ City National Bank of Miami v. United States, 42 Env't Rep. Cas. (BNA) 1153, 1156-59 (Fed. Cl. Ct. 1995).

a permit before bringing a takings claim.³⁸⁰ The government has sometimes argued that a single permit denial is not sufficient exhaustion of remedies.

That contention was rejected in Loveladies Harbor, Inc. v. United States,³⁸¹ because the Corps decision indicated that any development of the wetlands would be unacceptable to the agency, and the agency did not advance any development alternatives. The same determination was reached in Beure-Co. v. United States,³⁸² as the court construed the Corps' permit decision to foreclose any development on the property.³⁸³ As discussed above, the new administrative appeals process makes clear that, where an administrative appeal is taken, the district engineer's decision whether to issue a permit on remand constitutes the Corps' final, judicially reviewable decision. It remains unclear, however, whether an applicant that chooses not to pursue an administrative appeal, though deemed to possess a final permit decision, is also considered to have exhausted its administrative remedies for judicial review purposes.³⁸⁴

There is no requirement to seek a "variance", as may exist with regard to certain land use challenges and state wetland laws, because there is no Corps provision that provides for such relief.³⁸⁵

C. General Takings Formula

³⁸⁰ Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 1996 U.S. Claims LEXIS 46, *7-18 (Fed. Cl. Ct. 1986).

³⁸¹ 15 Cl. Ct. 381, 386 (1988) ("Loveladies I").

³⁸² 16 Cl. Ct. 42 (1988).

³⁸³ But see MacDonald, Sommer & Frates v. County of Yolo, 47 U.S. 340, 351 (1986) (taking claim not ripe because less ambitious development plans could have been approved by the County).

³⁸⁴ See 64 Fed. Reg. 11708 (1999) (to be codified at 33 C.F.R. §§ 331.10, 331.12).

³⁸⁵ Beure Co. v. United States, 16 Cl. Ct. 42, 49 (1988). Compare Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (plaintiff must seek variance, as well as exhaust state remedies, before bringing a taking claim in federal court). In Ciampitti v. United States, 18 Cl. Ct. 548, 552-53 (1989), the state denial of coastal zone consistency did not preclude a federal taking claim. The court found that the Corps decision was independent of the state denial, and would have been the same even if a consistency determination had been issued.

A fundamental test has evolved from a series of Supreme Court cases, which is designed to ascertain whether a particular regulation, as stated in Mahon, "goes too far." The test is two-fold: the regulation of property may effectuate a taking if it fails to substantially advance a legitimate state interest or denies an owner economically viable use of property.³⁸⁶ As discussed below, if the governmental regulation substantially advances a legitimate objective and does not effectuate a categorical taking, the courts then apply an ad hoc balancing test that considers a number of factors, including many of the same factors that are considered in determining whether these two criteria have been satisfied.

1. Substantial Advancement of Legitimate State Interest

The first prong of the standard involves at least two inquiries. As the Supreme Court explained in Nollan v. California Coastal Comm'n,³⁸⁷ the initial inquiry is whether the articulated regulatory goal is legitimate. This inquiry generally yields an affirmative answer, as the Court has found a broad variety of environmental and planning goals to meet this criterion.³⁸⁸ That is certainly the case with wetlands, as protection of wetlands is undeniably a legitimate regulatory objective.³⁸⁹

The second inquiry involves the "substantial advancement" criteria; viz., whether the regulation substantially advances the purported regulatory objective. For conditions that are imposed upon permits, this prong of the standard is characterized as the

³⁸⁶ See generally Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

³⁸⁷ 483 U.S. 825, 834 (1987) (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

³⁸⁸ Dolan v. City of Tigard, 512 U.S. 374 (1994) (flood control and traffic congestion); Agins v. Tiburon, 447 U.S. 255 (1980) (scenic zoning); Berman v. Parker, 348 U.S. 26 (1954). See generally Nollan v. California Coastal Comm'n, 483 U.S. 825, 833-34 (1987).

³⁸⁹ See, e.g., Deltona Corp. v. United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) ("we take as given that the ... Army Corps of Engineers, and the entire body of federal navigational and environmental laws to which they give effect, substantially advance a legitimate and important federal interests.").

"essential nexus" test. The Supreme Court in Nollan, for example, found that the stated goal of the California Coastal Commission to preserving viewsheds of the shoreline was valid and legitimate.³⁹⁰ However, it found that the condition imposed by the Commission -- the granting of a beachfront easement of the Nollan's property to provide access between two public beaches -- bore no relationship to this stated regulatory goal.³⁹¹ Accordingly, the Court invalidated the condition.

In City of Monterey v. Del Monte Dunes at Monterey, Ltd.,³⁹² the Supreme Court upheld a \$1.45 million jury award in a takings case under the substantial advancement inquiry. Five times Del Monte submitted its plan to the City to develop a parcel of seaside property, and each time the City rejected the proposal and imposed more rigorous demands on the developer. The Court upheld the jury's finding that the City's repeated rejections of the landowner's applications did not substantially advance a legitimate public interest, and thus effected an unconstitutional taking of its property.³⁹³ The Court held that there was sufficient evidence to support the jury's determination that, although it was instructed that the various purposes asserted by the City for its denials were legitimate public interests (including providing public beach access and preserving endangered species' habitat), the City's decision to deny Del Monte's final development proposal was not reasonably related to those interests.³⁹⁴

³⁹⁰ 483 U.S. at 834-35.

³⁹¹ 483 U.S. at 836-37.

³⁹² 526 U.S. 687 (1999).

³⁹³ In so holding, the Court refused to negate the substantial advancement of a legitimate state interest test first adopted in Agins v. Tiburon, 447 U.S. 255 (1980). The Court rejected the argument advanced by amici curiae to the City that the test was properly considered a substantive due process test not appropriate in the regulatory takings context.

³⁹⁴ Id. at *30-36. In upholding the jury's findings, the Court held that, in the "highly particularized context" of the case at bar, whether the legitimate state interest was substantially furthered by the challenged government action was a question of fact properly before the jury. Id. at *59-60. Because that question is usually one of mixed fact and law, however, the Court declined to adopt a general rule that it is always properly put to the jury. Id. at *60-62. The question whether the government's asserted basis for its challenged action represented a legitimate state interest, on the other hand, was a question of law properly removed from the jury's cognizance. Id. at 62. The broader question whether the landowner was denied of

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In Dolan v. City of Tigard,³⁹⁵ the Supreme Court amplified the essential nexus test to require that a condition (or exaction) imposed upon a permit as a result of a land use approval process must have a "rough proportionality" to the impacts from the proposed action.³⁹⁶ In Dolan, approval of a store expansion was conditioned on deeding to the City property for a floodway and bicycle path. The Court invalidated these conditions because the record did not demonstrate that they were "roughly proportional" to the impacts caused by the proposed expansion.³⁹⁷

In Del Monte Dunes, the Supreme Court held that the "rough proportionality" test does not apply generally in takings cases, but is restricted to cases involving alleged excessive exactions. Thus, where the issue was whether the government's repeated denials of the landowner's development applications substantially advanced a legitimate public interest, the Ninth Court erred in applying the "rough proportionality" test.³⁹⁸

2. Deprivation of Economically Viable Use of Property

If the regulation in question does substantially advance a legitimate state interest, the inquiry shifts to the economic loss inflicted by the regulation or condition in question. This aspect of regulatory takings frequently involves several tiers of analysis. The principal issue is whether the challenged regulation effectuates so-called "categorical taking," in which the owner is deprived of all economically viable use of the property. This scenario is illustrated by the Supreme Court's decision in Lucas v. South Carolina Coastal Council.³⁹⁹ Lucas involved a regulation, which, by the concurrence of the parties, prevented the owner from building one house on each of two lots, and, consequently, stripped the property of any economic value. The Court found that such a categorical taking required compensation unless it fell within the so-called "nuisance"

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all economically viable use of its property was also a question of fact properly put to the jury. Id. at *59.

³⁹⁵ 512 U.S. 374 (1994).

³⁹⁶ 512 U.S. at 398.

³⁹⁷ Id.

³⁹⁸ 1999 U.S. LEXIS 3631 at *28-30.

³⁹⁹ 505 U.S. 1003 (1992).

exception (discussed below).⁴⁰⁰

a. The "Parcel as a Whole"

It is well-settled that a mere diminution in value does not, without more, constitute a taking.⁴⁰¹ Thus, a factual issue that is often a critical determinant of whether a taking has occurred is the so-called "parcel as a whole" issue: namely, whether the taking inquiry is limited only to the affected property or whether it encompasses contiguous or other arguably related property. This issue is particularly important for wetland cases, because permit denials or conditions are frequently directed only to the wetland portions of properties that invariably contain uplands. If these wetland areas can be isolated and made the sole subject of the taking case, the likelihood of success is substantially greater. Indeed, in many matters the result would be a categorical taking; in others, the economic harm would be materially greater, thus increasing the probability of success in the ad hoc balancing test conducted in the absence of a categorical taking. On the other hand, if upland portions of a parcel (or contiguous areas) are included in the analysis, the potential for proving a taking are dramatically lessened, since there is generally an economically viable use for those upland areas.

In several cases preceding Lucas, the Supreme Court indicated that taking jurisprudence would not divide a single parcel into discrete components in order to ascertain whether rights in one of them had been affected. Rather, the inquiry was into the parcel as a whole. This rule was clearly articulated in Penn Central, where the Court refused to consider the company's right to use of its air rights over Grand Central Station as a separate "strand" of a property interest in determining whether a taking occurred.⁴⁰² The Court reiterated this approach in Keystone Bituminous Coal Ass'n v. DeBenedictis.⁴⁰³ There, a coalition of coal companies had challenged a Pennsylvania law that required that 50 percent of the coal beneath certain structures remain in the ground, to prevent subsidence. This underground coal was considered, under state

⁴⁰⁰ See also Cooley v. United States, 46 Fed. Cl. 538 (Fed. Cl. Ct. 2000) (denial of permit constituted Lucas total taking due to 98.8% reduction in value).

⁴⁰¹ Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

⁴⁰² 438 U.S. at 130-31.

⁴⁰³ 480 U.S. 470 (1987).

law, to constitute a separate support estate.⁴⁰⁴ The Court held, nonetheless, that requiring this coal to be left in the ground, and thus destroying the value of this "support estate," did not effectuate a taking because it constituted less than 2 percent of the coal companies' overall underground reserves. Thus, the Court viewed the support estate as merely one strand of the coal companies' bundle of property rights, similar to Penn Central's air rights.

Justice Rehnquist dissented in both Penn Central and Bituminous Coal, arguing in each that, inter alia, the destruction of the value of an entire estate effected an unconstitutional taking.⁴⁰⁵ These dissents appear to have garnered increased support, as indicated by the questioning of the "parcel as a whole" in Lucas. There, the majority stated that where a regulation

requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in the value of the tract as a whole.⁴⁰⁶

A number of cases involving alleged takings arising from the Corps of Engineers' denial of permits for work in wetlands have addressed this "parcel as a whole" question. In Deltona Corp. v. United States,⁴⁰⁷ the Corps had issued permits for the first two stages of the mixed-use development of approximately 10,000 acres of property purchased in 1964. However, it denied permits for the later three stages, as its regulations became increasingly stringent. The Court of Claims refused to find a taking. It reasoned that the permit denials did not destroy all commercially

⁴⁰⁴ 480 U.S. at 500.

⁴⁰⁵ Penn Central, 438 U.S. at 149 n. 13; Keystone Bituminous Coal, 480 U.S. at 518-20.

⁴⁰⁶ 505 U.S. at 1016 n.7. See also Dolan v. City of Tigard, 512 U.S. 374, 384-85, 399-400. The Supreme Court, however, has not been fully consistent in this, and other aspects, of taking law. Compare Concrete Pipe and Products of California, Inc. v Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 643 (1993) (supporting the "whole property" concept articulated in Penn Central).

⁴⁰⁷ 657 F.2d 1184 (Cl. Ct. 1981).

viable use of the property, as the developer retained valuable upland development rights and had been able to develop large portions of its property before any permit denial. In Jentgen v. United States,⁴⁰⁸ uplands adjacent to the subject wetlands were considered in a finding of no regulatory taking.

In Forest Properties, Inc. v. United States,⁴⁰⁹ the Court of Claims held that the relevant parcel for determining whether a taking had occurred was a 9.4 acre parcel of lake bottom property for which the Corps had denied the owner a dredge and fill permit, plus 53 contiguous acres of upland that together constituted a 62 acre property subject to common ownership and a common plan for residential development.⁴¹⁰ The Court of Claims went further in Ciampitti v. United States,⁴¹¹ and included noncontiguous property owned by the claimant because he had treated them as a single unit in negotiating their purchase and financing. In Formanek v. United States,⁴¹² the court included 12 acres of uplands on a 112-acre tract, but still found a taking because the government had not shown a market for the uplands.

Several cases have refused to consider the entire parcel. In Loveladies I,⁴¹³ the owner had developed and sold most of a 250-acre parcel prior to its application for a Section 404 permit for a remaining 11.5-acre piece. The Court of Claims considered only the loss in economic value of this 11.5 acre parcel. Having narrowed the inquiry, the Court went on to find a 99% loss of value, and thus a taking.⁴¹⁴ The most recent Loveladies Harbor

⁴⁰⁸ 657 F.2d 1210 (Cl. Ct. 1981), cert. denied, 455 U.S. 1017 (1982).

⁴⁰⁹ 27 Env'tl. L. Rep. 21454 (Cl. Ct. 1997).

⁴¹⁰ See also Broadwater Farms Joint Venture v. United States, 46 Env't Rep. Cas. (BNA) 1158, 1160 (Fed. Cir. 1997) (unpublished opinion) (trial court properly considered entire 27-lot parcel in takings action arising from proposed development on 12 out of 27 lots in subdivision).

⁴¹¹ 22 Cl. Ct. 310, 319 (1991).

⁴¹² 26 Cl. Ct. 332, 339 (1992).

⁴¹³ 15 Cl. Ct. 381 (1988).

⁴¹⁴ Loveladies II, 21 Cl. Ct. 153 (1990), aff'd, 28 F.3d 1171 (Fed. Cir. 1994) ("Loveladies IV"). In Loveladies II, the Court of Claims considered an acre of upland in the midst of wetlands but, like the Court in Formanek v. United States, 26 Cl. Ct. 332 (1992), found that a taking had occurred of that one acre. 21 Cl. Ct. at 395. The Court of Claims in Loveladies I

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decision confirmed this result.⁴¹⁵ In Florida Rock Industries, Inc. v. United States,⁴¹⁶ the Court of Claims limited its inquiry to the approximately 98 acres of the entire 1560-acre property that was the subject of the Corps permit application for limestone mining, even though the remainder of the site was eventually to be mined. The apparent basis for this limitation was that the Corps had restricted the claimant from applying for a permit for this acreage, and thus the government should not be allowed to expand the inquiry to the remainder of the property.

Following a series of appeals and remands, in its most recent decision, the trial court in Florida Rock found that the Corps' denial of a permit for the 98 acres was a taking, even though the loss of economically viable use of those 98 acres -- a 73.1% diminution in value -- was "severe, but not total."⁴¹⁷ Proclaiming the unfairness in requiring the plaintiff to now proceed to apply for (and likely be denied) additional permits for the remaining acres, the court asked the parties to propose a fair method of resolving issues relating to the remainder of the property, ranging from a complete negotiated settlement through various means of making the result dependent on the appeal of its judgment.⁴¹⁸ On reconsideration, the court entered final judgment as to the 98 acres to enable immediate appellate review, and certified for immediate appeal the issue of whether the plaintiff's claim as to the remaining acres was ripe.⁴¹⁹

The current judicial approach appears to be ad hoc, focusing on the particular facts and circumstances rather than establishing a "bright-line" test.⁴²⁰ Thus, the courts have assessed the degree

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also excluded from consideration contiguous wetlands because the claimant had been denied a state permit for its development.

⁴¹⁵ Loveladies Harbor v. United States, 28 F.3d 1171 (Fed. Cir. 1994) ("Loveladies IV"), affirming Loveladies II.

⁴¹⁶ 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987) ("Florida Rock I"). See also 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109 (1995) ("Florida Rock III"), rev'g 21 Cl. Ct. 161 (1990) ("Florida Rock II").

⁴¹⁷ Florida Rock Industries, Inc. v. United States, 45 Fed. Cl. 21 (Fed. Cl. Ct. 1999).

⁴¹⁸ Id.

⁴¹⁹ Florida Rock Industries, Inc. v. United States, 2000 U.S. Claims LEXIS 50 (Fed. Cl. Ct. 2000).

⁴²⁰ See Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334 (...continued)

of contiguity, dates of acquisition, the extent to which the parcel has been treated as a single unit (by both the owner and government), and the extent to which the undeveloped or protected lands enhance the value of the remaining lands.⁴²¹

b. The "Nuisance" Exception

If all economic value has been destroyed, a taking will occur unless the proposed undertaking would have constituted a "nuisance" under common law.⁴²² This broad exception was narrowed by the Supreme Court in Lucas, which required that the challenged regulation or condition reflect the limitations on use or development which "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" at the time of purchase.⁴²³ If state property and nuisance law had created an expectation that the activity in question would be prohibited, there would be no taking.⁴²⁴

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(1992), aff'd, 10 F.3d 796 (Fed. Cir. 1993) (refusing to determine as a matter of law a definition of the "whole parcel" and engaging in a fact-based inquiry).

⁴²¹ Forest Properties, Inc. v. United States, 27 Env'tl. L. Rep. 21454 (Fed. Cl. Ct. 1997); Ciampitti v. United States, 22 Cl. Ct. 310, 319 (1991). See also Palm Beach Isles Assoc. v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (50.7 acres of total 331.7 acre parcel for which permit was denied was the relevant "denominator" because plaintiffs never intended to develop parcel as single unit, and because plaintiffs sold remaining 261 acres prior to the enactment of the CWA); K & K Construction, Inc. v. Department of Natural Resources, 456 Mich. 570, 575 N.W.2d 531 (Mich. Sup. Ct. 1998) (holding that the proper "denominator parcel" for determining whether a taking had occurred constituted at least three of four parcels after considering the parcels' contiguity, common ownership, and the owner's comprehensive plan for development).

⁴²² See generally Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 270, 489 (1987). The government has the burden of proving a nuisance. Bowles v. United States, 31 Fed. Cl. 37 (1994).

⁴²³ Lucas, 505 U.S. 1003, 1029 (1992).

⁴²⁴ The Court also noted that certain activities were so offensive that their use would be expected to be barred, regardless of state law. 112 S. Ct. at 2899. Wetland taking decisions have rejected the government's argument that filling which triggered the Section 404 permit requirement necessarily

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In Palm Beach Isles Assoc. v. United States,⁴²⁵ the Court of Appeals for the Federal Circuit found that the Corps' denial of a permit to develop 50.7 acres of shoreline wetlands, including 49.3 acres of submerged wetlands, denied plaintiffs of all economically viable use of their property and thus constituted a categorical taking. However, because the submerged wetlands were subject to a navigational servitude under Article I, Section 8 of the Constitution, the court held that the government had a nuisance defense to the taking. It thus vacated and remanded the case to the trial court for a factual determination as to whether the government had a navigational purpose for denying the permit application.

3. The Ad Hoc Taking Test

If there is no "categorical taking," the court then must determine whether application of a regulation has "gone too far" and constitutes a taking. There is no set formula for making the determination; rather, each alleged taking triggers the need for a particularized, ad hoc factual inquiry. This is the balancing approach exemplified by the Supreme Court in the Penn Central decision.

In making this inquiry, a court generally assesses three types of factors. First, it ascertains the character of the governmental regulation, primarily to determine the importance of the objectives. Second, it assesses the economic impact, generally by comparing the pre-taking value with the post-taking value.⁴²⁶ Third, the court will consider the effect of the regulation on the owner's reasonable investment-backed expectations. These factors, and often others, are then considered to ascertain whether, on balance, the regulation has gone "too far."

a. The Character of the Governmental Regulation

The Supreme Court has held that the mere denial of a Section

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constitutes a nuisance or similar noxious conduct. See, e.g., Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990), aff'd, 28 F.3d 1171 (Fed. Cir. 1994) ("Loveladies II"); Florida Rock II, 21 Cl. Ct. 161 (1990), rev'd on other grounds, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 513 U.S. 1104 (1995).

⁴²⁵ 208 F.3d 1374 (Fed. Cir. 2000).

⁴²⁶ See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

404 permit does not constitute a taking.⁴²⁷ Moreover, denial of a wetland permit does not generally entail the physical invasion of land⁴²⁸ or the denial of the right to exclude others⁴²⁹ that have been the hallmark of recent affirmative Supreme Court findings of a taking.⁴³⁰ Consequently, the character of the government action is not generally a major component of a taking case based on denial of a wetland permit.⁴³¹ Rather, the focal point is on the second and third prongs -- whether a permit denial prevents economically viable use of the land at issue and, if so, whether that result contravenes reasonable investment-backed expectations.

b. The Market and Related Issues

The economic impact criterion frequently entails a determination of whether a partial denial of use of property effects a taking. The Federal Circuit has recognized a dichotomy between compensable "partial takings" and noncompensable "mere diminutions."

'Mere diminution' occurs when the property owner has received the benefits of a challenged regulation, such that an 'average reciprocity of advantage' results from it. A 'partial taking' occurs when a regulation singles out a few property owners to bear burdens, while benefits are spread widely across the community.⁴³²

⁴²⁷ United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 (1985).

⁴²⁸ Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

⁴²⁹ Dolan v. City of Tigard, 512 U.S. 374, 393 (1994).

⁴³⁰ Nor would denial of a wetland permit generally prevent a nuisance; if that were the case, however, no taking would occur under Lucas. See Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994).

⁴³¹ See, e.g., Loveladies Harbor I, 15 Cl. Ct. 381, 391 (1988) (denial of a Section 404 permit not the equivalent of a "physical destruction or intrusion attendant with an act of eminent domain.") But see Florida Rock Industries, Inc. v. United States 21 Cl. Ct. 161, 168 (1990) ("Florida Rock III") (where government forbids conduct previously allowed, there may be a taking).

⁴³² Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. (...continued)

In determining economic impacts, the comparison has generally been of the value of the property before and after the alleged taking.⁴³³ In wetland taking cases, the proper measure of just compensation for a taking is the fair market value at the time of permit denial.⁴³⁴ Thus, an important issue is the market demand for the property in question. In Florida Rock I, the Circuit Court found that the market for wetlands could include buyers who might not have the full knowledge of wetlands regulations.⁴³⁵ This finding will allow claimants to show the existence of a market for speculative buyers of property, who would tend to pay more for wetlands than well-informed buyers. The government's claim in Loveladies II⁴³⁶ that recreational and similar uses for wetlands were available (including use as mitigation for other wetland developments) was found lacking, as it had failed to prove a market. In Formanek v. United States,⁴³⁷ the offer of a conservation group to acquire the property at only a small percentage of its market value was insufficient to preclude the finding of a taking. In contrast, the sale of most of the subject property for "millions of dollars" in another case demonstrated the remaining (*i.e.*, after the alleged taking) economic viability of the property.⁴³⁸

In a "takings" case involving the Corps' denial of a Section 404 permit for limerock mining, the Claims Court addressed elements relevant in determining the pre-takings value.⁴³⁹ The

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1994) (citations omitted) (citing Florida Rock III, 18 F.3d 1560, 1570 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109 (1995)).

⁴³³ See generally Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 479 (1987).

⁴³⁴ Loveladies II, 21 Cl. Ct. 153 (1990), aff'd, 28 F.3d 1171 (Fed. Cir. 1994); Bowles v. United States, 31 Fed. Cl. 37, 1994 U.S. Claims LEXIS 63, *18 (1994).

⁴³⁵ 791 F.2d 893, 903 (Fed. Cir. 1986). See also Florida Rock III, 18 F.3d 1560, 1565 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109.

⁴³⁶ 21 Cl. Ct. at 159.

⁴³⁷ 26 Cl. Ct. 332, 340 (1992).

⁴³⁸ Marks v United States, 34 Fed. Cl. 387, *71-72 (Fed. Cl. Ct. 1995), aff'd n.op., 116 F.3d 1496 (Fed. Cir. 1997), cert. denied, 522 U.S. 1075 (1998).

⁴³⁹ City National Bank of Miami v. United States, 42 Env't (...continued)

Court held that if the plaintiff could demonstrate a "reasonable probability" that he would have obtained the necessary approvals under the County Comprehensive Plan, which was tantamount to a zoning scheme, it would then address plaintiff's effort to prohibit the United States from introducing evidence of state and local governmental denial of a water quality certification and coastal zone management consistency determination.⁴⁴⁰ The result of this motion would be to prevent the United States from showing that any loss in the value of plaintiff's property was due to state rather than federal action.⁴⁴¹

c. Investment-Backed Expectations and Other Issues

There have been fewer decisions on the issue of investment-backed expectations. In Deltona Corp. v. United States,⁴⁴² the Court of Claims acknowledged that enhanced Corps permitting requirements had frustrated the claimant, but refused to find a taking because the property still possessed viable economic use. In Ciampitti v. United States,⁴⁴³ the court found there was no reasonable expectation of developing wetlands, when the claimant knew of the applicable restrictions and made a package deal to acquire the restricted wetlands along with unrestricted uplands.⁴⁴⁴

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Rep. Cas. (BNA) 1153 (Fed. Cl. Ct. 1995).

⁴⁴⁰ Id. at 1159-62.

⁴⁴¹ Plaintiff could not, however, take advantage of this opportunity, and the Claims Court ultimately granted the government's motion for summary judgment. City National Bank of Miami v. United States, 33 Fed. Cl. 759 (1995).

⁴⁴² 657 F.2d 1184 (Ct. Cl. 1981).

⁴⁴³ 22 Cl. Ct. 310, 320-21 (1991).

⁴⁴⁴ See also Good v. United States, 189 F.3d 1355 (Fed. Cir. 2000) (in view of regulatory climate that existed when applicant acquired its property, he could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land; despite constructive and actual knowledge that state and/or federal regulations could prevent development, the applicant took no steps to obtain approval for seven years, and thus could not fairly claim surprise when permit application was denied); Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154 (Fed. Cl. Ct. 1999) (no taking due in part to fact that plaintiff was sophisticated developer with constructive and actual knowledge of CWA wetlands scheme prior to buying property).

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In Robbins v. United States,⁴⁴⁵ the court held that the mere assertion of the Corps' regulatory jurisdiction over wetlands does not constitute a taking, even if the designation of the landowner's property as wetland frustrates expectations under a private sales contract. Rather, the property owner must apply for, and be denied, a Section 404 permit before any claim that governmental action has deprived the landowner of its property can be asserted.

(...continued)

Interestingly, the South Carolina Supreme Court recently held, in a case virtually factually indistinguishable from Lucas, that no taking had occurred. Despite the fact that the state's denial of permits to bulkhead and fill two unimproved lots on manmade canals eliminated all economically viable use of the property, plaintiff's prolonged neglect and failure to seek permits in the face of ever more stringent environmental regulations indicated a lack of investment-backed expectations. McQueen v. South Carolina Coastal Council, 2000 S.C. LEXIS 88 (S.C. Sup. Ct. 2000).

⁴⁴⁵ 40 Cl. Ct. 381 (1998), aff'd, 1998 WL 870142 (Fed. Cir. 1998).

5. The Effect of Pre-Existing Regulations
on the Ability to Assert a Taking

The Supreme Court recently stepped into an unsettled area of takings jurisprudence in Palazzolo v. Rhode Island,⁴⁴⁶ to hold that a property owner who takes title to property that is already subject to development restrictions, in this case wetlands regulations, is not precluded from bringing a takings claim. The Rhode Island Supreme Court had ruled that because the regulations limiting development of the landowner's property (approximately 18 acres of wetlands located in an ocean resort town) existed before the landowner came to own the property, he could not pursue a takings claim.⁴⁴⁷

The Supreme Court disagreed, stating that the lower court's holding that a successor in title is always precluded from bringing a takings claim on the ground that he is deemed to have notice of previously-enacted regulations goes too far. In an opinion by Justice Kennedy, the Court stated that adopting this position "would absolve the state of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."⁴⁴⁸ In addition, such a rule would be unfair and capricious in effect, citing by way of example a situation in which a regulatory takings claim would be barred simply because the steps needed to ripen the claim could not have been taken by a previous landowner.⁴⁴⁹

The Court further rejected the argument that new regulations become a part of the background principles of property law as constraints on land use for which compensation need not be paid. Thus, it stated that a regulation "that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the state's law by mere virtue of the passage of title."⁴⁵⁰ After rejecting the landowner's claim that he was deprived of all economically viable use of his property, the Court remanded the case with instructions for the state court to engage in a Penn Central analysis.⁴⁵¹

⁴⁴⁶ 533 U.S. 606 (2001).

⁴⁴⁷ This principle is sometimes referred to as the "notice rule."

⁴⁴⁸ 533 U.S. at 627.

⁴⁴⁹ Id. at 627-28.

⁴⁵⁰ Id. at 629-30.

⁴⁵¹ Id. at 630. The Court also rejected the state court's determination that the takings claim was not ripe, finding that
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In a concurring opinion, Justice O'Connor stated her belief that the regulations in effect at the time a landowner acquires its property is a factor, but not the only one and not the dispositive one, in assessing the landowner's reasonable investment-backed expectations.⁴⁵²

The next day, the Court vacated and remanded a decision of the South Carolina Supreme Court that found that the owner of coastal property was not entitled to compensation after being denied development permits by the state.⁴⁵³ In a summary order, the Court stated that the state court's decision was vacated and remanded for further consideration in light of its decision in Palazzolo.

The South Carolina Supreme Court had denied the landowner's takings claim in part on the basis that he "purchased beach front property that has been the subject of at least some developmental regulation for over a century...His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations."⁴⁵⁴

4. Temporary Takings

The Supreme Court held in Agins v. Tiburon,⁴⁵⁵ that

(..continued)

the state had made a final determination that the landowner would not be able to develop his property as planned. (See section IV.B, supra.) Although a landowner whose initial proposal is rejected is generally required to make additional proposals for less ambitious development, or to apply for a variance, here the Coastal Council made clear in rejecting the owner's two proposals that it interpreted its regulations to bar any filling or development of the wetlands. Thus, "[f]urther permit applications were not necessary to establish this point." Id. at 621.

⁴⁵² Id. at 633-34. Justice Stevens filed a separate opinion, concurring in part, but dissenting from the majority on the ultimate judgment on the ground that the landowner lacked standing. Justices Ginsburg and Breyer filed separate dissenting opinions.

⁴⁵³ McQueen v. South Carolina Department of Health and Environmental Control, 533 U.S. 943 (2001).

⁴⁵⁴ McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 50 ERC 1987 (S.C. 2000).

⁴⁵⁵ 477 U.S. 255, 286 n.9 (1980).

"extraordinary delay" in the administrative processing of a permit could constitute a taking. In First Lutheran, the Supreme Court held that even a temporary loss of property could constitute a taking for which just compensation was required. This concept has, thus far, proved unavailing in the Section 404 arena. The Court of Claims has consistently found that delays in the Corps' permitting process do not rise to the level of unconstitutional takings.

In 1902 Atlantic Ltd. v. United States,⁴⁵⁶ the claimant suffered an approximately five-year delay in project implementation due to illegal Corps permit denials. Nevertheless, the Court found no taking because (a) the claimant had no property right to the permit during the administrative proceedings, and (b) there was no "extraordinary delay." A four-year delay did not violate due process in Russo Development Corp. v. Thomas.⁴⁵⁷ A 16-month delay in the Corps' processing of a permit application also did not rise to the level of an "extraordinary delay" in Dufau v. Untied States.⁴⁵⁸ Finally, a three-year delay in the permitting process due to the Corps' illegal assertion of jurisdiction was not a taking because the claimant was able to sell upland lots from contiguous uplands during that period.⁴⁵⁹

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,⁴⁶⁰ the Court of Appeals for the Ninth Circuit held that a temporary planning moratorium on development, such as those sometimes used to suspend wetlands development, did not constitute a taking. The Supreme Court affirmed that decision, holding that such moratoria do not constitute categorical takings necessarily

⁴⁵⁶ 26 Cl. Ct. 575 (1992).

⁴⁵⁷ 735 F.Supp. 631, 636 (D.N.J. 1989).

⁴⁵⁸ 22 Cl. Ct. 156, 164 (1990), aff'd, 940 F.2d 677 (Fed. Cir. 1991)(table) (citing First English Evangelical Lutheran Church, 482 U.S. at 321). See also Walcek v. United States, 44 Fed. Cl. 462 (Fed. Cl. Ct. 1999) (no temporary taking based on eight-year delay between filing of initial permit request and Corps' issuance of partial-development permit; plaintiffs' failure to provide requisite information to Corps and decision to pursue litigation rather than administrative options accounted for all but one year of delay and one year does not meet "extraordinary delay standard").

⁴⁵⁹ Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334, 1352 (1992), aff'd sub nom. Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993).

⁴⁶⁰ 216 F.3d 764 (9th Cir. 2000).

requiring compensation under the Fifth Amendment, but rather that the case-by-case analysis set forth in Penn Central is the appropriate method for evaluating whether a temporary taking requires compensation.⁴⁶¹

VII. "Swampbuster"

The Swampbuster Program is an optional federal wetlands conservation program intended to discourage the conversion of wetlands to agricultural use. Enacted as part of the Food Security Act of 1985 ("FSA"),⁴⁶² Swampbuster is administered by the Department of Agriculture through the NRCS and the Agricultural Stabilization and Conservation Service ("ASCS"). The Federal Agricultural Improvement and Reform Act of 1996⁴⁶³ (the "Farm Bill") contains certain modifications to Swampbuster. Under Swampbuster (as now amended), any person who drains or fills converted wetlands in order to produce an "agricultural commodity"⁴⁶⁴ is ineligible for price supports or payments, loans, crop insurance or disaster payments related to such production.⁴⁶⁵

The Corps, NRCS, EPA and FWS entered into a Memorandum of Agreement in January 1994 relating to the delineation of wetlands on agricultural lands under Swampbuster and Section 404.⁴⁶⁶ NRCS, which was designated as lead agency for such delineations, has its own delineation manual.

The Swampbuster usage of the term "wetlands" is not fully consistent with that of the CWA. The FSA and the Swampbuster

⁴⁶¹ ___ U.S. ___, ___ S.Ct. ___, 2002 U.S. LEXIS 3028 (2002).

⁴⁶² Pub. L. No. 99-198, 99 Stat. 1504 (1985). The Swampbuster provisions are codified at 16 U.S.C. §§ 3821-3824, and the basic regulations can be found at 7 C.F.R. Part 12.

⁴⁶³ Pub. L. No. 104-127, 110 Stat. 888 (1996), codified at 16 U.S.C. § 3821, et seq.

⁴⁶⁴ An "agricultural commodity" is "any crop planted, and produced by annual tilling of the soil, including tilling by one-trip planters or sugarcane." 7 C.F.R. § 12.2(a)(1).

⁴⁶⁵ 16 U.S.C. § 3821. Although initially the ineligibility applied only for the crop year in which the conversion took place, the program was strengthened in 1990 and now applies to all subsequent years as well. 16 U.S.C. § 3821(b).

⁴⁶⁶ Memorandum of Agreement Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act ("Delineation MOA").

regulations use a physical definition of wetlands that is consistent with that used by the Corps and EPA under the CWA.⁴⁶⁷ However, under Swampbuster a variety of areas that meet the physical definition of wetlands are excluded from this statutory definition of wetlands by a series of exemptions.⁴⁶⁸ Thus, an actual wetland is not considered a wetland for purposes of Swampbuster if: (a) conversion to agricultural use by "manipulation" (the alteration of hydrology, filling and/or removal of woody vegetation) was commenced prior to 1985;⁴⁶⁹ (b) it is artificially created; (c) it is a "wet area" created by an irrigation system; or (d) if production by normal agricultural practices is made possible by a natural condition such as a drought.⁴⁷⁰ These are known generally as "prior converted croplands."⁴⁷¹ In contrast, wetlands that were manipulated for agricultural use but still meet certain specific hydrology criteria remain subject to regulation under Section 404, as do wetlands that were merely "cropped" under natural conditions but not "manipulated".

There is also a limited exemption available where the conversion was made in good-faith and the person actively restores the area within a reasonable period of the time of notification by the Secretary of Agriculture (but that time cannot exceed one year).⁴⁷² In National Wildlife Federation v. Agricultural Stabilization and Conservation Service,⁴⁷³ the Eighth Circuit held that the 1990 amendments narrowing the "good-faith" exemption apply retroactively.

The Court of Appeals for the Seventh Circuit recently upheld the government's ability to regulate wholly intrastate isolated wetlands under the Swampbuster program.⁴⁷⁴ The case arose when the

⁴⁶⁷ 16 U.S.C. § 3801(a)(16); 7 C.F.R. § 12.2(a)(29). See Downer v. United States, 97 F.3d 999, 1003-04 (8th Cir. 1996).

⁴⁶⁸ 16 U.S.C. § 3822.

⁴⁶⁹ See, e.g., Von Eye v. United States, 92 F.3d 681 (8th Cir. 1996).

⁴⁷⁰ 16 U.S.C. § 3822(b); 7 C.F.R. § 12.5(b).

⁴⁷¹ 33 C.F.R. § 328.3(a)(iii)(8).

⁴⁷² 16 U.S.C. § 3822(h).

⁴⁷³ 955 F.2d 1199 (8th Cir. 1992).

⁴⁷⁴ United States v. Dierckman, 201 F.3d 915 (7th Cir. 2000).

government sued to recover farm benefits paid to the defendant farmer from 1991 to 1993. The farmer's ineligibility for such benefits was based on his violation of Swampbuster by having converted certain wetlands on his property to cropland. In turn, defendant challenged the constitutionality of certain portions of the Swampbuster provisions of the FSA and requested that his eligibility be reinstated. The district court granted the government summary judgment.⁴⁷⁵ On appeal, the farmer contended that because the wetland on his property was isolated and had no connection to interstate commerce, the wetland could not be regulated under the FSA.⁴⁷⁶ The Court of Appeals affirmed the district court's ruling, finding that while Congress may lack the authority to regulate a strictly intrastate wetland, the incentive provided by the FSA was a valid exercise of the spending power.⁴⁷⁷

The NRCS is principally responsible for technical issues such as wetlands determinations, while the ASCS establishes eligibility for subsidies and evaluates the applicability of the exemptions from the program. In contrast to the earlier version of Swampbuster, the ASCS' designation of an agricultural use determination is dispositive and not subject to EPA review.

Swampbuster differs from the CWA wetlands regulatory scheme in both the activities it regulates and the activities that it exempts. Because Swampbuster applies to the draining as well as the filling of wetlands, it encompasses activities beyond the regulatory authority of Section 404. However, the numerous exemptions that narrow the definition of wetlands under Swampbuster also allow activities that are otherwise regulated under Section 404.

The Farm Bill contains certain additional modifications to Swampbuster. For example, the bill expands the circumstances in which mitigation can be employed in support of a Section 404 permit to convert wetlands to agricultural production.⁴⁷⁸ The definition of agriculture lands, as articulated in the MOA Delineation, has been broadened.⁴⁷⁹ The Farm Bill also establishes a pilot program for wetland mitigation banking in order to allow the USDA to assess how well banking works for agriculture.⁴⁸⁰

⁴⁷⁵ Id. at 917-21.

⁴⁷⁶ Id. at 921.

⁴⁷⁷ Id. at 922-23. See also discussion of Corps' authority to regulate isolated wetlands under the Clean Water Act, supra.

⁴⁷⁸ 16 U.S.C. § 3822(f).

⁴⁷⁹ Farm Bill, § 325(a).

Wetland designations for agricultural land will be certified by NRCS and remain in effect until a change of use or reversal by the Secretary of Agriculture.⁴⁸¹

VIII. Enforcement

The Corps and EPA possess independent enforcement authority under the CWA. They also have a variety of administrative and judicial enforcement options from which to pick and choose. In an effort to coordinate and achieve more effective enforcement, the agencies entered an MOA on Enforcement in January 1989, which allocates enforcement responsibilities.⁴⁸² In general, the Corps, because of its greater field resources, conducts initial investigations. If a case involves a permit violation, the Corps generally retains the matter. EPA concentrates on unpermitted discharges, as well as problem and special cases. The declination of one agency to enforce does not preclude the other from moving forward.⁴⁸³ Nor does the enforcement MOA give any rights or defenses to putative defendants.⁴⁸⁴ In a recent draft guidance, EPA's Office of Enforcement and Compliance announced that it was altering the emphasis of its enforcement priorities by shifting enforcement personnel out of certain areas and into others, including wetlands.⁴⁸⁵

A. To Whom Does Potential Liability Run

The CWA, like many other environmental statutes, imposes obligations on "persons."⁴⁸⁶ The Act defines this term broadly, to sweep in, among others, individuals, various business organizations and governmental entities.⁴⁸⁷ In addition, EPA

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⁴⁸⁰ 16 U.S.C. § 3822(k).

⁴⁸¹ 16 U.S.C. § 3822(a)(4).

⁴⁸² Memorandum of Agreement between the Department of the Army and the United States Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989) (the "Enforcement MOA").

⁴⁸³ Enforcement MOA at II.D.

⁴⁸⁴ Enforcement MOA at V.B.

⁴⁸⁵ "Draft Guidance on Enforcement Personnel" (Apr. 20, 2000), reprinted in 21 Inside EPA Weekly Rpt. at 11 (May 5, 2000).

⁴⁸⁶ 33 U.S.C. § 1362(5).

⁴⁸⁷ Id.

regulations include agents or employees of any "person."⁴⁸⁸

Any "person" responsible for the illegal activity may be the subject of an administrative or judicial enforcement action. The key inquiry is whether a particular person was responsible for, or exercised control over, the illegal activities. Using this standard, the courts have held liable landowners,⁴⁸⁹ construction companies,⁴⁹⁰ consulting firms,⁴⁹¹ and engineers.⁴⁹²

As a general matter, an owner of property on which illegal filling took place, but who had no responsibility for this activity, is not liable under the Act. However, Section 404 filling violations are often deemed to be "continuing" in nature.⁴⁹³

Relying on this concept, one court has gone so far as requiring current owners to allow previous owners to remediate the damaged wetlands -- even where the restoration would lower the economic value of the property.⁴⁹⁴

B. Administrative Enforcement

Both EPA and the Corps are authorized to issue orders to violators that direct the cessation of illegal activities and/or undertaking of remedial action. EPA may issue orders relating to non-compliance with the CWA (*i.e.*, filling without a permit) and violations of a state-issued permit (where the Section 404 program

⁴⁸⁸ 40 C.F.R. § 232.2(m).

⁴⁸⁹ United States v. Lambert, 915 F.Supp. 797, 802 (D.W. Va. 1996).

⁴⁹⁰ United States v. Board of Trustees of Florida Keys Community College, 531 F.Supp. 267, 274-75 (S.D. Fla. 1981).

⁴⁹¹ See United States v. Weisman, 489 F.Supp. 1331 (M.D. Fla. 1980).

⁴⁹² See United States v. Van Leuzen, 816 F.Supp. 1171 (S.D. Tex. 1993).

⁴⁹³ See, e.g., United States v. Cumberland Farms of Connecticut, Inc., 647 F.Supp. 1166, 1183 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988); United States v. Tull, 615 F.Supp. 610, 626 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); United States v. Ciampitti, 669 F.Supp. 684 (D.N.J. 1987). But see the discussion of the statute of limitations, infra.

⁴⁹⁴ United States v. Norris, 937 F.2d 286 (6th Cir. 1991).

has been delegated to a state).⁴⁹⁵ The Corps can issue orders with respect to non-compliance with Section 404 and permit violations.⁴⁹⁶

EPA issues "administrative orders" while the Corps issues "cease and desist" orders; the substantive results are the same.

If the violation involves an ongoing project, the violator is generally ordered to halt the illegal activity. The order not only prohibits work in wetlands, but can enjoin work on the entirety of a project, pending final resolution of the matter.⁴⁹⁷ The initial order will frequently direct removal of the offending fill and restoration of the affected area to the prior status. Removal of a limited amount of fill may be allowed where that would bring the activity within the ambit of a nationwide permit.

The Corps sometimes allows the applicant to apply for an after-the-fact permit, while the fill remains in place during the pendency of permit review.⁴⁹⁸ If the after-the-fact permit is denied, restoration of the illegally filled area may be required.⁴⁹⁹

EPA and Corps enforcement orders are not independently enforceable against the violator; enforcement is through a judicial action. Of course, these orders inform the recipients that they are violating federal law. Moreover, these administrative compliance orders are not judicially reviewable. The courts have repeatedly held that pre-enforcement review is unavailable under the CWA.⁵⁰⁰

⁴⁹⁵ 33 U.S.C. § 1319(a)(3).

⁴⁹⁶ 33 U.S.C. § 1344(s)(4).

⁴⁹⁷ 33 C.F.R. § 326.3(c).

⁴⁹⁸ 33 C.F.R. § 326.3(e).

⁴⁹⁹ Reichelte v. United States, No. 2:93 Cv. 332 (N.D. Ind. Feb. 14, 1996).

⁵⁰⁰ Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996); Board of Managers v. Bornhoft, 812 F.Supp. 1012 (D.N.D. 1993), aff'd n. op., 48 F.3d 1223 (8th Cir. 1995); Southern Ohio Coal Co. v. Office of Surface Mining Reclamation and Enforcement, Department of Interior, 20 F.3d 1418 (6th Cir. 1994), cert. denied, 513 U.S. 927 (1994); Rueth v. United States EPA, 13 F.3d 227 (7th Cir. 1993); Southern Pines Associates v. United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990); Spires dba Rivers End Ranch v. United States Army Corps of Engineers, 1995 U.S. Dist. LEXIS 15972 (D. Ore. 1995); McGown v. United States, 747 F.Supp. 539 (E.D. Mo. 1990). See also Route 26 Land Development Ass'n v. U.S. Government, 753 F.Supp. 532 (D. Del. 1990), aff'd n.op., 961 F.2d 1568 (3d Cir. 1992) (no pre-
(...continued)

Administrative penalties under Section 309(g) of the CWA⁵⁰¹ involve a two-tiered scheme. EPA, as noted above, may impose penalties for unpermitted discharges, while the Corps may impose penalties for violations of permit conditions and administrative orders. A penalty may be assessed after issuance of a complaint and proposed penalty and the opportunity for a hearing.

Class I penalties, for less egregious conduct, may not exceed \$10,000 per violation, with a maximum of \$25,000. The defendant has the right to an informal hearing.⁵⁰² Class II penalties, for more serious conduct, may not exceed \$10,000 for each day the violation continues, but the ceiling is \$125,000. The defendant has the right to a formal adjudicatory hearing before an administrative law judge,⁵⁰³ but has no right to a jury trial.⁵⁰⁴ While EPA has both Class I and Class II penalty proceedings, the Corps only has the Class I option.

EPA has adopted an administrative penalty policy, which is designed to achieve uniformity and consistency in enforcement of Section 404 violations.⁵⁰⁵ The Policy provides for the consideration of a variety of factors in determining the penalty. Like Section 404(s)(4), which governs the Corps civil penalty criteria, these factors include the nature and gravity of the violation(s), the economic benefit to the violator, prior history of violations, good faith efforts to comply, degree of

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enforcement review when plaintiff sought after-the-fact permit). But see Leslie Salt Co. v. United States, 660 F.Supp. 183 (N.D. Cal. 1987); Swanson v. United States, 600 F.Supp. 802 (D. Idaho 1985), aff'd, 789 F.2d 1368 (9th Cir. 1986); Bayou Marcus Livestock & Agriculture Co. v. U.S. EPA, 20 Env'tl. L. Rep. 20445 (N. D. Fla. 1989).

⁵⁰¹ 33 U.S.C. § 1319(g).

⁵⁰² 33 U.S.C. § 1319(g)(2)(A); the Corps regulations are in 33 C.F.R. § 326.6.

⁵⁰³ 33 U.S.C. § 1319(g).

⁵⁰⁴ Sasser v. Administrator, United States EPA, 990 F.2d 127, 130 (4th Cir. 1993). See also United States v. Cumberland Farms of Connecticut, Inc., 647 F.Supp. 1166 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987).

⁵⁰⁵ Clean Water Act Section 404 Administrative Penalty Actions, Guidance on Calculating Settlement Amounts (Dec. 14, 1990).

culpability, and ability to pay.⁵⁰⁶ The EPA Policy also includes an elaborate matrix, which indicates a level of penalty based on "gravity-based" factors -- compliance significance and environmental significance. This amount can be adjusted based on other factors, including those noted above.

Unlike an administrative compliance order, penalties imposed under the Section 309 administrative process are subject to judicial review. Class I penalties are subject to judicial review in district court, while Class II penalties are reviewable in the court of appeals.⁵⁰⁷

C. Civil Judicial Enforcement

Judicial enforcement actions referred from either EPA or the Corps may seek preliminary or permanent injunctive relief, including restoration.⁵⁰⁸ The government may also seek penalties, which may run as high as \$25,000 per day per violation.⁵⁰⁹ Under the "continuing violation" concept, each day of the violation is considered a separate penalty.⁵¹⁰

⁵⁰⁶ 33 U.S.C. § 1344(s)(4). The Fourth Circuit has held that reliance on the attorney's opinion that activities came under a nationwide permit does not constitute good faith or evidence a lack of willfulness. Sasser v. Administrator, United States EPA, 990 F.2d 127, 131 (4th Cir. 1993).

⁵⁰⁷ 33 U.S.C. § 1319(g)(8).

⁵⁰⁸ 33 U.S.C. § 1319(b). In United States v. Banks, 873 F.Supp. 650 (S.D. Fla. 1995), aff'd, 115 F.3d 916 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1998), however, the district court refused to find a violation of the CWA or to require restoration for properties the Corps had informed defendant were uplands before the advent of the 1987 Manual, even though the properties were correctly classified as wetlands under the Manual.

⁵⁰⁹ 33 U.S.C. § 1319(d). Indeed, the Court may have to impose some penalty, as Section 309(d) provides that a violator "shall be subject to a civil penalty...." Id. See Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990).

⁵¹⁰ Sasser v. Administrator, United States EPA, 990 F.2d 127, 129 (4th Cir. 1993). See also United States v. Cumberland Farms of Connecticut, Inc., 647 F.Supp. 1166 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987). Note that a \$2,500 per day penalty, argued upon in a consent decree, was not considered excessive in United States v. Krilich, 948 F.Supp. 719, 727-28 (N.D. Ill. 1996), aff'd, 209 F.3d 968 (7th Cir. 2000).

The CWA does not specify a statute of limitations for a civil enforcement action. Consequently, the courts have generally applied the five-year limitation for civil penalty actions.⁵¹¹ Historically, EPA contended, often successfully, that the statute of limitations commences to run only when the government becomes aware of the illegal filling.⁵¹² At least with respect to enforcement actions seeking civil penalties, this position was undercut by the decision in 3M Co. (Minnesota Mining and Mfg.) v. Browner,⁵¹³ which held that the statute of limitations pursuant to 28 U.S.C. § 2462 accrues at the time of violation for purposes of the Toxic Substances Control Act; in other words, there is no general "discovery of violation" rule that triggers the statute of limitations.

In response to the 3M Co. ruling, EPA formulated a policy stating that environmental violations would be considered "ongoing" for statute of limitations purposes until corrected. Because most wetlands violations are not corrected until discovered, under the policy, the statute of limitations would apparently never be triggered. Nonetheless, the district court in United States v. Reaves⁵¹⁴ adhered to the EPA policy approach, holding that the statute of limitations in an illegal fill case was not triggered so long as the violation was "continuing." The district court in United States v. Material Service Corp.,⁵¹⁵ on the other hand, followed the pre-3M Co. rule that the statute of limitations accrues when the government becomes aware of the illegal filling. Both EPA's pre- and post-3M Co. approaches were rejected in United States v. Telluride Co.⁵¹⁶

The district court in that case found, as did the court in 3M Co., that the statute of limitations for a Section 404 violation

⁵¹¹ 28 U.S.C. § 2462. See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F.Supp. 440 (D. Md. 1985).

⁵¹² See, e.g., Public Interest Research Group of New Jersey v. Powell Duffryn, 913 F.2d 64, 75 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991); United States v. Hobbs, 736 F.Supp. 1406, 1409 (E.D. Va. 1990), aff'd n.op., 947 F.2d 941 (4th Cir. 1991), cert. denied, 504 U.S. 940 (1992); United States v. Windward Properties, Inc., 821 F.Supp. 690 (N.D. Ga. 1993).

⁵¹³ 17 F.3d 1453, 1460-62 (D.C. Cir. 1994).

⁵¹⁴ 923 F.Supp. 1530 (M.D. Fla. 1996).

⁵¹⁵ 1996 U.S. Dist. LEXIS 14471 (N.D. Ill. 1996).

⁵¹⁶ 884 F.Supp. 404 (D. Col. 1995).

accrues at the time of the violation.⁵¹⁷ The Court of Appeals subsequently reversed the district court's ruling in Telluride to the extent it dismissed, along with the government's claims for civil penalties, its claims for injunctive relief, finding that governmental claims for equitable relief are not governed by 28 U.S.C. § 2462.⁵¹⁸ Indeed, unlike the division that exists with respect to the triggering of the statute of limitations in actions seeking civil penalties, the majority of courts hold that the five-year statute of limitations contained in 28 U.S.C. § 2462 is inapplicable to governmental actions for injunctive relief.⁵¹⁹

The Government must prove the existence of wetlands by a preponderance of the evidence.⁵²⁰ There is a right to a jury trial on the issue of liability, but not on the issue of relief (either injunctive relief or penalties).⁵²¹

Defenses in a judicial enforcement are quite limited, as the CWA is a "strict liability" statute.⁵²² Thus, intent is not necessary to find a violation of Section 404.⁵²³ The Act itself articulates no defenses and governmental estoppel and similar arguments have met little success.⁵²⁴ As a practical matter, asserted defenses are generally insufficient to defeat an enforcement action but may be helpful in reducing or ameliorating the relief and/or penalty imposed.

⁵¹⁷ Even if some courts treat the application of the "continuing" violation theory as inapplicable with respect to the triggering of the statute of limitations in enforcement actions, as discussed below, it retains its viability in regard to the calculation of penalties.

⁵¹⁸ United States v. Telluride Co., 146 F.3d 1241 (10th Cir. 1998).

⁵¹⁹ See, e.g., United States v. Hallmark Construction Co., 14 F.Supp.2d 1065, 1077 (N.D. Ill. 1998).

⁵²⁰ Stoeco Development, Ltd. v. Department of the Army, 792 F.Supp. 339 (D.N.J. 1992).

⁵²¹ Tull v. United States, 481 U.S. 412 (1987).

⁵²² See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).

⁵²³ United States v. Lambert, 915 F.Supp. 797, 802 (D. W. Va. 1996); United States v. Sinclair Oil Co., 767 F.Supp. 200 (D. Mont. 1990).

⁵²⁴ See, e.g., United States v. Boccanfuso, 882 F.2d 666 (2d Cir. 1989).

The courts have not hesitated to impose temporary restraining orders or preliminary injunctions to halt illegal filling.⁵²⁵ The judiciary has commonly required restoration of the affected wetlands, unless there is some persuasive reason that such relief is infeasible.⁵²⁶ In many cases, additional mitigation, such as dedication of property, has been ordered.⁵²⁷ As a general matter, the restoration must bear a reasonable relationship to the degree and kind of wrong.⁵²⁸

Penalties for violation of Section 404 may be severe. In one

⁵²⁵ See, e.g., United States v. Smith, 149 F.3d 1172 (4th Cir.), cert. denied, 525 U.S. 1008 (1998); United States v. Bayshore Associates, Inc., 934 F.2d 1391 (6th Cir. 1991); United States v. Ciampitti, 583 F.Supp. 483 (D.N.J. 1984). In United States v. Hallmark Construction Co., 14 F.Supp.2d 1065, 1068-69 (N.D. Ill. 1998), the court reversed its holding in an earlier decision, and held that the Corps has authority under Section 404 to bring civil actions to enforce permitless discharges to wetlands.

⁵²⁶ See, e.g., United States v. Gallo Glass Co., No. C01-3350 JL (N.D. Cal. Nov. 8, 2001) (requiring restoration, together with \$95,000 fine and creation of new wetlands, in settlement of civil action for destruction of 12.5 acres of wetlands associated with grading and deep ripping activities at vineyard); United States v. Robinson, 570 F.Supp. 1157 (M.D. Fla. 1983); United States v. Weisman, 489 F.Supp. 1331 (M.D. Fla. 1980). See also "Deal Reached on Major Reclamation Project for Large Areas of California Salt Ponds," Daily Env't (BNA) at A-10 (May 30, 2002) (describing largest wetlands restoration project in California history under agreement between Cargill Inc., state and federal agencies and private groups to restore thousands of acres of salt ponds ringing San Francisco Bay and Napa River; in 1978, Cargill acquired property from Leslie Salt Co., which had created ponds in solar evaporative salt-producing operations (see discussion of Leslie Salt litigation, supra)).

⁵²⁷ See, e.g., United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993); United States v. Key West Towers, Inc., 720 F. Supp 963 (S.D. Fla. 1989). In United States v. Reuth Development Co., No. 2:96CV540-JM (N.D. Ind. Oct. 23, 1998). the court permanently enjoined two defendants from discharging dredged or fill material into U.S. waters, and ordered them to pay \$23,500 in civil penalties, and to perform a full restoration of the three acres of wetlands they had illegally filled.

⁵²⁸ United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976).

case, a national development company was ordered to pay \$170,000 in penalties, donate 11 acres (valued at \$850,000) to a local park and create and enhance 22 acres of wetlands for illegal filling wetlands during construction of a shopping mall.⁵²⁹ In another matter, the illegal filling of wetlands near the Gulf of Mexico resulted in a negotiated settlement including nearly \$2,000,000 in a civil penalty, restoration costs of over \$100,000, and a mitigation program costing approximately \$1,000,000.⁵³⁰

The judicial penalty factors articulated in the Act are quite similar to those for administrative proceedings.⁵³¹ EPA and the courts also utilize the agency's Penalty Policy in judicial enforcement proceedings. The district courts possess broad discretion in imposing penalties,⁵³² and the courts of appeal are loath to "second-guess" the lower courts.⁵³³ The judiciary has not been reluctant to impose substantial penalties where warranted by the circumstances.⁵³⁴

D. Citizen Suits

Section 505 of the CWA authorizes citizen suits against any person alleged to be in violation of the Act or a permit.⁵³⁵ The critical issue for many citizen suits under the CWA is whether the litigation can be maintained once the activity causing the illegal

⁵²⁹ United States v. Bridgeview Joint Venture, No. Civ. 94-C-3184 (N.D. Ill. Feb. 26, 1996).

⁵³⁰ United States v. Westinghouse Bayside Communities, Inc., No. 93-10-Civ. FTM-99 (M.D. Fla. 1993).

⁵³¹ Compare 33 U.S.C. § 1319(d) (judicial) with 33 U.S.C. §§ 1319(g)(3) and 1344(s)(4) (administrative).

⁵³² United States v. Cumberland Farms of Connecticut, Inc., 647 F.Supp. 1166, 1183 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

⁵³³ Weizmann v. District Engineer, 526 F.2d 1302, 1306 (5th Cir. 1976).

⁵³⁴ See, e.g., Tull v. United States, 481 U.S. 412 (1987) (\$75,000 in penalties plus restoration of property or, if that failed, \$250,000); United States v. Cumberland Farms of Connecticut, Inc., 647 F.Supp. 1166, 1183 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988) (\$540,000 penalty, with \$390,000 suspended upon adequate restoration).

⁵³⁵ 33 U.S.C. § 1365(a)(1), (f).

filling has ceased under the Supreme Court's landmark decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.⁵³⁶ The continuing violation theory would arguably satisfy the need for an actual, ongoing violation under Gwaltney. As noted by the district court in North Carolina Wildlife Federation v. Army Department,⁵³⁷ a wetland violation is inherently continuing in nature, as it remains capable of correction until the illegal fill material is removed and the affected area restored. If there is agency-approved mitigation of the violation, however, the violation is no longer "continuing."⁵³⁸

Section 505 of the CWA authorizes a suit against EPA for the failure to enforce the Act. As such suits seek to require EPA to perform the discretionary action of enforcement, rather than a mandatory duty, they have invariably been unsuccessful.⁵³⁹

⁵³⁶ 484 U.S. 49 (1987).

⁵³⁷ 29 Env't Rep. Cas. (BNA) 1241, 1243 (E.D.N.C. 1989).

⁵³⁸ Orange Environment, Inc. v. County of Orange, 923 F.Supp. 529 (S.D.N.Y. 1996). Another crucial threshold issue, as in any citizen suit, is whether the organization can establish standing to bring suit. See, e.g., The Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315 (4th Cir. 2002) (holding that plaintiff citizen group lacked standing to seek judicial review of land purchase by U.S. Fish and Wildlife Service intended to protect sensitive wetlands, because group's alleged injuries were "conjectural and hypothetical.")

⁵³⁹ See, e.g., Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242 (11th Cir. 1996); Harmon Cove Condominium Ass'n, Inc. v. Marsh, 815 F.2d 949 (3d Cir. 1987). Some plaintiffs have sought to bring citizen suits against the Corps, although Section 505 only allows these actions against EPA. These suits have had mixed results. Compare National Wildlife Federation v. Hanson, 859 F.2d 313 (4th Cir. 1988) and Environmental Defense Fund v. Tidwell, 837 F.Supp. 1344 (E.D.N.C. 1992) (citizen suit allowed against Corps and EPA) with Cascade Conservation League v. M.A. Segale, Inc., 921 F.Supp. 692 (W.D. Wash. 1996) and Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers, 700 F.Supp. 1549 (N.D. Cal. 1988) (citizen suit against Corps dismissed).

E. Settlement

Most enforcement proceedings are settled. Although the negotiation of consent orders is beyond the scope of this article, it should be noted that, in certain circumstances, the enforcing agency might not be able to authorize certain conduct in the settlement documents. For example, in Orange Environment, Inc. v. County of Orange,⁵⁴⁰ a violator's settlement with EPA did not relieve that party of its obligation to obtain a Section 404 permit from the Corps.

F. Governmental Policy

The Corps and EPA established a joint wetland enforcement initiative in December 1990.⁵⁴¹ The initiative was intended to emphasize the government's commitment to Section 404 enforcement, to educate the public and regulated community, and to publicize Section 404 enforcement actions. The result has been a governmental selection of certain cases to highlight its intent to enforce Section 404.

G. Criminal Enforcement

The government may also prosecute criminally violations of Section 404, and seek penalties and/or imprisonment.⁵⁴² The Act provides separate provisions for "negligent" versus "knowing" violations.⁵⁴³ The former encompasses fines that range from \$2,500 to \$25,000 per day for each violation and imprisonment of up to one year. Knowing violations entail fines ranging from \$5,000 to \$50,000 per day per violation and imprisonment of up to three years. Both the permissible fines and penalties increase for multiples violators.

Prosecutions for violations of Section 404 have yielded

⁵⁴⁰ 811 F.Supp. 926 (S.D.N.Y. 1993), aff'd sub nom. Orange Environment v. Orange County Legislature, 2 F.3d 1235 (2d Cir. 1993).

⁵⁴¹ 56 Fed. Reg. 2408 (1991); 57 Fed. Reg. 6589 (1992).

⁵⁴² 33 U.S.C. § 1319(c).

⁵⁴³ This dichotomy may allow avoidance of the controversy over the need for the government to prove "intent," or mens rea, to achieve a criminal conviction. Compare United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), cert. denied sub nom. Angel v. United States, 469 U.S. 1208 (1985) with United States v. Greer, 850 F.2d 1447 (11th Cir. 1988).

imposing results. For example, in United States v. Ellen,⁵⁴⁴ the illegal filling of wetlands resulted in a 6-month prison sentence for the project manager.⁵⁴⁵ The filling of approximately 14 acres of wetlands in spite of governmental warnings and cease-and-desist orders yielded a three-year prison term and imposition of a fine of over \$200,000 in United States v. Pozsgai.⁵⁴⁶ The "negligent" filling of over 85 acres of wetlands on the eastern shores of Chesapeake Bay in Maryland, exacerbated by repeated flouting of government orders, was punished by a \$2 million penalty and 18 months probation in United States v. Jones.⁵⁴⁷ Although subsequently reversed, in United States v. Wilson,⁵⁴⁸ a real estate developer was convicted by a jury; he was sentenced to 21 months in jail and fined \$1 million. His company was fined \$2 million. And the Court directed restoration of the illegally filled wetlands.

Fairly recently, the Supreme Court declined to review a ruling by the Sixth Circuit that, under the "open fields" doctrine (a judicially developed exception to the search and seizure requirements of the Fourth Amendment), state inspectors did not need a search warrant to enter the site of a planned community development to search for wetlands subject to CWA jurisdiction.⁵⁴⁹

The construction of a natural gas pipeline from the Canadian border of New York to Long Island in violation of Corps permit conditions resulted in substantial penalties paid by the Iroquois Pipeline Operating Company as part of settlement of felony charges; \$18 million to the federal government and \$4 million to

⁵⁴⁴ 961 F.2d 462 (4th Cir.), cert. denied, 506 U.S. 875 (1992).

⁵⁴⁵ The defendant Ellen was not the property owner but a wetland specialist who was responsible for obtaining all requisite permits and supervised construction.

⁵⁴⁶ 897 F.2d 524 (3d Cir.), cert. denied, 498 U.S. 812 (1990). See also United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989).

⁵⁴⁷ No. 90-216 (D. Md. May 25, 1990).

⁵⁴⁸ No. AW-0390 (D. Md. Feb. 29, 1996), rev'd, 133 F.3d 251 (4th Cir. 1997).

⁵⁴⁹ Rapanos v. United States, 522 U.S. 917 (1997). Subsequently, the district court denied the landowner's motion for a new trial, and on appeal, the Sixth Circuit affirmed both the denial of the motion and the landowner's 1995 conviction. United States v. Rapanos, 235 F.3d 256 (6th Cir. 2000).

the State. As part of the settlement, four company officials pled guilty to misdemeanor violations of the CWA.⁵⁵⁰ The district court dismissed the felony charges against the company responsible for monitoring construction of the pipeline, two officials of that company and one Iroquois officer, based on a procedural error by the Corps.⁵⁵¹ The Court of Appeals subsequently reversed that holding and remanded the case back to the district court.⁵⁵²

IX. Conclusion

The national focus on wetlands is not likely to wane, particularly if the economy continues to improve and developmental pressures increase. These pressures will heighten the tension between environmental protection and private property interests. Moreover, wetland regulation is likely to be a key component in the CWA reauthorization. In short, the federal regulation of wetlands will undoubtedly continue to be a ripe arena for litigation.

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⁵⁵⁰ See United States v. Mango, 1997 U.S. Dist. LEXIS 6145 (N.D.N.Y. 1997).

⁵⁵¹ United States v. Mango, 997 F.Supp. 264 (N.D.N.Y. 1998). See note 143, *supra*.

⁵⁵² 199 F.3d 85 (2d Cir. 1999).