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James K. Jackson

William A. Nitze

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WETLANDS PROTECTION UNDER SECTION 404 OF THE CLEAN WATER ACT - THE *RIVERSIDE BAYVIEW* DECISION, ITS PAST AND FUTURE

James K. Jackson* and William A. Nitze**

I. INTRODUCTION

On December 5, 1985, the United States Supreme Court in *United States v. Riverside Bayview Homes, Inc.*¹ upheld the authority of the Army Corps of Engineers to define the geographic scope of its jurisdiction under Section 404 of the Clean Water Act to include wetlands adjacent to navigable waters whether or not they are periodically inundated by those waters. Section 404 was created by the 1972 amendments to the Federal Water Pollution Control Act. (The FWPCA was renamed the Clean Water Act in 1977.)² The Act prohibits the discharge of pollutants into the waters of the United States by any person subject to certain exceptions. One exception is contained in Section 404, which authorizes the Army Corps of Engineers to issue permits for the disposal of dredged or fill materials into "navigable waters."³ The term "navigable waters" is defined by the Act to mean "waters of the United States."⁴

The Supreme Court's decision brings to a close an important chapter in the long-standing controversy over the geographic scope of the Section 404 Permit Program and its predecessors. Ever since the Court's decision in *Gibbons v. Ogden*,⁵ there has been no doubt about Congress' power under the commerce clause to regulate the use of navigable waters for interstate commerce. The Court's expansive reading of Congress' commerce clause powers in other contexts leaves little doubt that Congress has the power to regulate any activity within the United States having an impact, however tangential, on interstate commerce.⁶ The issue therefore is not whether Congress has the power to regulate dredge and fill activities in wetlands. Rather, it is whether and, if so, to what extent Congress chose to exercise that power when it passed the Clean Water Act and subsequent amendments.

* Managing Attorney, American Petroleum Institute, Washington, D.C.

** Assistant General Counsel, Exploration and Producing, Mobil Oil Corporation. The opinions and conclusions expressed are those of the authors and do not necessarily represent the views of any organization or institution with which the authors are, or have been associated.

1. 106 S. Ct. 455 (1985).

2. 33 U.S.C. §§ 1251-1376 (1982).

3. 33 U.S.C. § 1344.

4. 33 U.S.C. § 1362(7).

5. 22 U.S. (9 Wheat) 1 (1824).

6. See e.g., *Hodel v. Virginia Surface Mining Reclamation Assoc.*, 452 U.S. 264 (1981).

II. THE IMPORTANCE OF WETLANDS: PRESERVATION VS. DEVELOPMENT

Before discussing the historical evolution of congressional regulation of navigable waters leading up to *Riverside Bayview* and how the law may develop from here, it is important to understand why the geographic scope of federal regulation over wetlands has generated so much controversy. Simply put, wetlands have become a public policy issue because of conflicts between those who wish to develop them and those who wish to preserve them. During the nineteenth century, when national priority was given to settling the country, wetlands were regarded as a hindrance to land development, an obstacle to transportation and a source of malaria. Through the Swamp Land Acts of 1849, 1850 and 1860, Congress granted a total of sixty-five million acres of wetlands to fifteen states for reclamation to reduce the destruction caused by flooding and to eliminate mosquito breeding swamps.⁷

Since the turn of the century, however, public attitudes towards wetlands have gradually changed. People have increasingly come to understand and appreciate the scenic, recreational and ecological importance of wetlands. More than fifty years ago a group of men led by political cartoonist "Ding" Darling organized the first national program to preserve waterfowl habitat, particularly wetlands. Their approach was to make hunters purchase a waterfowl stamp to attach to their state hunting licenses and to use the proceeds to buy waterfowl habitat.⁸ Since 1934 proceeds from the "Duck Stamp" have been used to purchase more than three million acres of wetlands and upland waterfowl habitat. In the mid-1950's the United States Fish and Wildlife Service conducted a nationwide wetlands inventory. By creating the lasting impression that wetlands were rapidly disappearing, the inventory stimulated wetlands preservation efforts by environmental and other groups.⁹

Since the 1950's our knowledge of the extent, variety and functions of wetlands, as well as the causes of their ongoing disappearance, has continued to grow. There are approximately ninety million acres of vegetated wetlands remaining in the lower forty-eight states in addition to the over 200 million acres of wetlands (primarily tundra) in Alaska. Of the approximately ninety million acres of vegetated wetlands, ninety-five percent are located in inland areas; the rest are coastal salt water

7. OFFICE OF TECHNOLOGY ASSESSMENT, *WETLANDS: THEIR USE AND REGULATION*, Doc. No. OTA-0-206 (1984) [hereinafter cited as OTA].

8. Breaux, *Steps to Strengthen Wetlands Acquisition*, ENVTL. PROTECTION AGENCY J., Jan./Feb. 12 (1986).

9. OTA at 38.

wetlands.¹⁰ Inland wetlands can be found throughout the United States and include marshes, bogs, tundra, swamps, bottom lands and riparian habitats. Coastal salt marshes exist in all coastal states, but particularly so in the Mid and South Atlantic and Gulf Coast states.

Wetlands preservation has become important to many people not only because of their intrinsic value as natural ecosystems essentially untouched by human hands, but also because of the many ecological functions they perform. In recent years, the case for protecting wetlands has increasingly been based on scientific evidence demonstrating the ecological services provided by wetlands. These services include:¹¹

- *Floodpeak Reduction.* By temporarily storing storm waters and by providing capacity to convey floodwaters, wetlands can reduce floodpeaks and the frequency of flooding in downstream areas.

- *Shoreline Erosion Control.* Shoreline erosion is a natural process caused by river currents during flooding, tidal currents in coastal areas and wind generated waves in larger waterbodies. Vegetated wetlands have four characteristics which reduce shoreline erosion: (1) the low gradient shore which absorbs and dissipates wave energy, (2) the dampening and absorption of wave energy by wetlands vegetation itself, (3) the binding action of root structures and peat development on the shore and (4) increased deposition of suspended sediment resulting from dense growth of wetland plants.

- *Water Quality Control.* It is generally believed that wetlands improve the quality of the water that flows over and through them by temporarily retaining pollutants such as suspended material, excess nutrients (nitrogen and phosphorus), toxic chemicals and disease containing micro-organisms. Certain of these trapped pollutants may be converted by biochemical processes to less harmful forms before they are released; others such as excess nitrogen and phosphorus may be released to adjacent waters in lower concentrations over greater time periods. Wetlands also directly improve water quality by trapping and removing suspended sediment.

- *Fish and Wildlife Habitat.* Perhaps the most important ecological service performed by wetlands is to provide a habitat, breeding ground and source of food for thousands of species of birds, fish, mammals and other wildlife. Wetlands are vital to many species of the duck, geese and swan families of North America for nesting, food and cover; regions of greatest wetlands concentration correspond with the major migratory routes, breeding and nesting areas and over-wintering areas for migratory

10. OTA at 3.

11. OTA at 6.

waterfowl. Many freshwater and saltwater fish and shellfish require wetlands at some phase of their life cycle. A number of mammal species such as muskrat, nutria and mink live in wetlands; many other species such as foxes, raccoons and deer prefer wetlands habitats, particularly during critical times, because of the abundance of food and water.

Wetland areas also provide direct recreational and economic benefits to the human population. Nineteen of the twenty-five most visited National Wildlife Refuges (out of 309 refuge units) contain substantial wetlands.¹² These nineteen refuges attract approximately half of all total visits to United States Wildlife Refuges.¹³ The United States Fish and Wildlife Service estimates that in 1980 5.3 million hunters (fifty percent of the hunters sixteen years or older) hunted migratory birds, spending over \$600 million in the process.¹⁴ The wholesale value of the annual commercial catch of fish and shellfish from United States wetlands is well over \$1 billion.¹⁵

Important benefits from development activities on wetlands must also be considered in making public policy decisions about wetlands use. Wetlands can provide important sites for agriculture, forestry, port and harbor development, housing and urban growth, oil and gas extraction, mining and water resource development. Some of these activities in wetland areas provide employment for thousands of people and irreplaceable resources for industry and commerce. The whole economy of Southern Louisiana, including the city of New Orleans itself, largely depends on development activities conducted in wetlands. Therefore neither an absolute prohibition on development activities in wetland areas nor complete freedom to conduct those activities as developers see fit is the answer. A careful balancing of competing benefits should be conducted for each proposed activity on the wetlands. Factors to be considered in this balancing test include: the benefits of the development activity, the degree of disturbance to the wetlands in question, whether the activity can be conducted elsewhere, to what extent the disturbance can be minimized while the activity is being conducted, and to what extent the disturbance can be reversed after the activity is finished.

The oil and gas industry provides an excellent case in point. There are a limited number of underground reservoirs which contain oil and gas in commercial quantities, some of which underlie wetlands areas in the lower Mississippi delta and on the North Slope of Alaska. Such reservoirs cannot be developed or produced without disturbing the overlying wetlands to

12. OTA at 41-42.

13. *Id.* at 42.

14. *Id.* at 54.

15. *Id.* at 59.

some extent. Earlier oil and gas extraction activities in Louisiana undoubtedly contributed to wetlands loss through coastal dredging and moving heavy equipment over marshes. Today, however, oil and gas companies frequently use directional drilling to minimize the number and length of canals. In addition, alternate filling at the edge of canals, closing off canals after use to minimize saltwater penetration and the development of new "marsh buggies" which minimize surface damage by spreading their weight over a large area have substantially reduced the amount of wetlands disturbance caused by oil and gas operations and have made it easier to restore affected wetlands after those operations are completed.¹⁶

Another major United States oil producing province located in an area with a high concentration of wetlands is the Prudoe Bay oil field in the North Slope of Alaska. After discovery in 1968, Arco and the other major operators retained environmental consultants to help them develop the field in a manner which would minimize any adverse impact on the surrounding environment.¹⁷ By working with the Corps of Engineers, the Environmental Protection Agency (EPA), the Fish & Wildlife Service and state and local agencies, the operators have designed and located drilling points and access roads to avoid wetland and other sensitive environments wherever possible and to keep the amount of fill in wetland areas to a minimum. Adverse environmental impacts have been mitigated by the rehabilitation of abandoned disturbed areas such as gravel pads and roads, by the construction of man-made islands in tundra lakes for bird habitat and by the inclusion of elaborate fish bypasses in floodwater intake systems.¹⁸

On a nationwide basis, it is still uncertain what proportion of the 300-500 thousand acres per year of continuing wetlands loss is due to man-induced factors and what proportion is due to natural factors. Whereas man-induced factors such as clearing, draining and filling for agriculture and real estate development appear to be primarily responsible for the recent loss of inland wetlands,¹⁹ there is evidence that natural factors are primarily responsible for recent loss of coastal wetlands. A recent report on causes of Louisiana wetland losses prepared by the Mid-Continent Oil and Gas Association concludes that natural factors such as sea level rise, subsidence, changes in deltaic sites of deposition and hurricanes have played a larger role in Louisiana coastal wetlands loss than man-induced

16. NATIONAL INSTITUTE FOR URBAN WILDLIFE, ENVIRONMENTAL CONSERVATION AND THE PETROLEUM INDUSTRY 4-5 (1985).

17. Posey, WETLANDS AND OIL: COEXISTENCE ON THE TUNDRA, ENVTL. PROTECTION AGENCY J., Jan./Feb. 19-20 (1986) [hereinafter cited as Posey].

18. *Id.* at 20.

19. OTA at 3-5. *See also* Refalt, *Wetlands in Extermis*, 49 WILDERNESS 28 (Winter 1985).

factors such as dams, levees and canal dredging.²⁰ Similarly, on the North Slope of Alaska, oil and gas extraction, the only significant development activity, has affected less than one percent of the North Slope.²¹

Whatever the specific causes, the continuing loss of both inland and coastal wetlands has been increasingly perceived as a serious national problem by elected officials and the public at large. Since the Section 404 permit program is the only federal program directly regulating development activities in wetland areas, there has been increasing pressure on the Army Corps of Engineers to exercise its authority over as many wetland areas as possible. In *Riverside Bayview*, the Supreme Court upheld the Corps' authority to require permits for dredge and fill activities in "adjacent" wetlands. Following the *Riverside Bayview* decision, the National Wildlife Federation and three other environmental plaintiffs have brought suit in the Southern District Court of Texas seeking to require the Corps and the EPA to assert jurisdiction over all "isolated" wetlands as well. This case, *National Wildlife Federation v. Laubscher*,²² involves a thirty acre pothole wetlands located in Willacy County, Texas. A careful examination of the history of federal regulation over "navigable waters," however, suggests that such an extension of the Corps' jurisdiction cannot be supported under the Clean Water Act.

III. HISTORY OF THE TERM "NAVIGABLE WATERS"

In the second half of the nineteenth century, Congress repeatedly confronted the problem posed by the discharge of refuse and other materials into the waters of the United States.²³ Its efforts culminated in the passage of the Rivers and Harbors Act of 1899. Section 10 of that Act created separate prohibitions against: (1) obstructing "the navigable capacity of any of the waters of the United States"; and (2) building any structure in any port, roadstead, haven, harbor, canal, navigable river, or

20. Coleman, Roberts, and Tye, (Prepared for the Louisiana Mid-Continent Oil and Gas Association) *Causes of Louisiana Land Loss* 1-2 (1985).

21. Posey at 20.

22. *National Wildlife Federation v. Laubscher*, No. G-86-37 (S.D. Tex. filed Jan. 15, 1986).

23. See, e.g., River and Harbor Act of 1886, ch. 828, § 3, 24 Stat. 329 (1886) ("it shall not be lawful to [discharge] . . . any . . . refuse or mill-waste of any kind, into New York Harbor"); New York Harbor Act of 1888, ch. 496, § 1, 25 Stat. 209 (1888) (the [discharge] . . . of refuse . . . or any other matter of any kind . . . in the tidal waters of the harbor of New York, or its adjacent or tributary waters . . . is hereby strictly forbidden); River and Harbor Act of 1890, ch. 907, § 6, 26 Stat. 453 (1890) ("it shall not be lawful to [discharge] . . . refuse, or other waste of any kind, into any . . . navigable river, or navigable waters of the United States . . . or to deposit . . . waste in any place or situation on the bank of any navigable waters . . . whereby navigation shall or may be impeded"); River and Harbor Act of 1894, ch. 299, § 6, 28 Stat. 363 (1894) ("it shall not be lawful to place, discharge or deposit . . . refuse . . . or any other matter of any kind . . . in the waters of any harbor or river of the United States.")

other water of the United States"; and (3) excavating, filling, or modifying the condition or capacity of "any navigable waters of the United States."²⁴ Section 13 (referred to as the Refuse Act) went considerably further and declared it to be unlawful to discharge refuse of any kind or description into any "navigable waters of the United States" or into "any tributary of any navigable waters."²⁵

Between 1899 and 1966, considerable uncertainty existed over whether the Refuse Act's prohibition against discharges was limited to discharges affecting navigation. In 1966, the United States Supreme Court laid this issue to rest by holding that "the serious injury to our watercourses . . . sought to be remedied [by the Refuse Act] was caused in part by obstacles that impeded navigation and in part by pollution," and that refuse "includes all foreign substances and pollutants."²⁶ Despite the Court's clear language, the Corps continued to define Refuse Act discharges as only those discharges which impede navigation.

The original Federal Water Pollution Control Act (FWPCA) was passed in 1948.²⁷ Largely advisory in nature, the Act did include a limited but cumbersome quasi-enforcement scheme for the abatement of pollution in interstate waters. Amendments to the FWPCA in 1961²⁸ simplified the federal enforcement process and expanded the geographic scope of the Act's abatement and enforcement scheme to include all "navigable waters."²⁹

By 1961, Congress considered water to be the leading resource problem confronting the United States.³⁰ Congress concluded that a water pollution enforcement scheme limited to interstate waters was wholly inadequate to address this problem.³¹ Of particular significance is Congress' clear recognition of the type of constitutional power it was exercising to address this problem. For example, the House Report contains an in depth discussion of Congress' constitutional power over "navigable

24. 33 U.S.C. § 403 (1982).

25. 33 U.S.C. § 407 (1982). Although the Refuse Act also prohibits the depositing of any refuse on the banks of a navigable water or a tributary thereof, such is prohibited by the terms of that Act only when deposited materials might later impede or obstruct navigation. No such navigation-based limitation appears or applies to discharges directly into navigable waters or their tributaries. See *United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655, 670 n.23 (1973).

26. *United States v. Standard Oil Co.*, 384 U.S. 224, 228-30 (1966).

27. Act of June 30, 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

28. The Federal Water Pollution Control Act of 1961, Pub. L. No. 87-88, § 7, 75 Stat. 204, 207-10 (1961).

29. *Id.* See also H.R. REP. NO. 306, 87th Cong., 1st Sess. 8-12, 16-18 (1961); S. REP. NO. 353, 87th Cong., 1st Sess. 19 (1961); 107 CONG. REC. 7144-47 (1961) (House debate).

30. H.R. REP. NO. 306, 87th Cong., 1st Sess. 2 (1961).

31. *Id.* Of an estimated 26,000 water bodies in the United States, only 4,000 were of an interstate nature.

waters”:

It is well settled that the jurisdiction of Congress over waters capable of use as highways of interstate or foreign commerce, which is derived from the commerce clause of the Constitution, extends as well to intrastate. The power to regulate commerce necessarily embraces all matters pertaining to navigation on such waters but is not limited to navigation . . . Congress and the courts have long assumed that as “public property of the Nation” the quality of navigable waters of the United States is within the protection of Congress. For over 61 years the pollution of navigable waters by refuse has been prohibited by section 13 of the Rivers and Harbors Act of 1899 without regard to its effects on navigation.³²

It is noteworthy that Congress recognized that its expansion of the Act would encompass the same “navigable waters” as covered under the Refuse Act.³³ The minority views on the House Bill brought the question of federal jurisdiction over “navigable waters” into even sharper focus. In opposing an expansion of federal jurisdiction beyond “interstate waters,” the minority expressed strong concern that this would “*extend federal enforcement jurisdiction to all waters*” and that “*for all practical purposes, the new federal enforcement provisions would apply to all waters in every state.*”³⁴ The dispute continued to the floor. However, the committee bill passed and subsequently became the Federal Water Pollution Control Act of 1961.³⁵ Subsequent amendments to the FWPCA left its scope unchanged and failed to shed any additional light on the congressional intent behind the definition of “navigable waters.”³⁶

By late 1971, the federal government openly acknowledged the ineffectiveness of the Refuse Act as a tool for the prevention of industrial

32. H.R. REP. NO. 306, 87th Cong. 1st Sess. 10 (1961) (citations omitted).

33. See 107 CONG. REC. 7145 (1961) where Rep. Blatnik, Chairman of the House Public Works Committee which reported out the bill and one of the bill's floor managers, stated:

An extension of Federal authority to abate pollution in navigable intrastate streams is consistent with the scope of authority of the Corps of Engineers to protect and improve navigation for the promotion of interstate commerce. In fact, it would complement that authority.

34. H.R. REP. NO. 306, 87th Cong., 1st Sess. 24, 25 (1961) (emphasis in original).

35. 107 CONG. REC. 7144-72, 7195-96 (1961).

36. See The Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); The Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (1966); The Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970). The 1965 Amendments are noteworthy here because they added a broad statement of purpose to the law (i.e., “to enhance the quality and value of our water resources and to establish a national policy for the prevention, control and abatement of water pollution”). § 1, 79 Stat. 903. From the very beginning, the context in which the substantive provisions of the Act were to be considered was “in connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution.”

pollution. By that time, Executive Order No. 11574³⁷ had established a new Refuse Act permit program explicitly aimed at the pollution problem. The geographic scope of the program, however, was not defined. Although neither the Refuse Act itself nor the FWPCA as amended in 1961 contained a definition of "navigable waters," Congress did not perceive this absence to be a deficiency because numerous United States Supreme Court decisions had clearly defined the geographic limits of "navigable waters."

Early in its history, the United States Supreme Court recognized that the power to regulate commerce under the commerce clause³⁸ necessarily included power over navigation.³⁹ After recognizing the constitutional basis for the exercise of such power, the Court proceeded to define the power's spatial limits. In what is sometimes referred to as the classic definition of "navigable waters," the Court stated that the term included those waters that:

form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.⁴⁰

In subsequent cases this definition was broadened to include all waters capable of use for waterborne commerce,⁴¹ all waters with a past history of use by waterborne commerce,⁴² all waterways that could be made navigable "with reasonable improvements,"⁴³ and all waters that serve as a link in the chain of commerce among the states, a chain that include other modes of commerce as well (e.g., highways or railroads).⁴⁴

These spatial concepts, grounded upon recognized commerce clause power over navigation, clearly defined the scope of the FWPCA and the Refuse Act. Although the geographic scope of these laws was defined by

37. 35 Fed. Reg. 19,627 (1970).

38. U.S. CONST. Art. I, § 8, Cl. 3.

39. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

40. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1881).

41. *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874).

42. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921).

43. In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-10 (1940), the United States Supreme Court stated:

A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. . . . There must be a balance between cost and need at a time when the improvement would be useful. . . . Nor is it necessary that the improvement should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. . . . Nor is it necessary for navigability that the use should be continuous. . . . Even absence of use over long periods of years, because of changed condition . . . does not affect the navigability of rivers in the constitutional sense.

44. *Utah v. United States*, 403 U.S. 9, 11-12 (1971).

reference to navigability, the exercise of Federal control was not limited to navigational interests. As expressed in *United States v. Appalachian Electric Power Co.*:

It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation . . . That authority is as broad as the needs of commerce . . . Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.⁴⁵

Thus by late 1971, the United States Supreme Court had developed a doctrine of "navigable waters" which defined an expanded, but clearly limited, area in which Congress had exercised its commerce clause powers.

This doctrine was incorporated into the amendments to the FWPCA passed in 1972.⁴⁶ The Senate took the lead. The bill which emerged from the Committee on Public Works, Senate Bill 2770, defined "navigable waters" as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."⁴⁷ As explained by the accompanying report:

The control strategy of the Act extends to navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.⁴⁸

Although the Committee had found that "the national effort to abate and control water pollution has been inadequate in every vital respect,"⁴⁹ nowhere did it suggest that the scope of the term "navigable waters" as used in the Refuse Act, the 1961 Amendments to the FWPCA and judicial interpretations was in anyway deficient. To the contrary, the Committee unquestionably considered the permit regime under S. 2770 a simple codification and continuation, with certain procedural changes, of the Refuse Act permit program.⁵⁰

45. *United States v. Appalachian Electric Power Co.*, 311 U.S. at 426.

46. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 500 (codified as amended 33 U.S.C. §§ 1251-1376 (1982)).

47. S. REP. NO. 414, 92d Cong., 1st Sess. 77 (1971).

48. *Id.*

49. S. REP. NO. 414, 92d Cong., 1st Sess. 7 (1971).

50. As explained in the accompanying committee report:

The Refuse Act as now restated in the Committee bill establishes that the discharge of pollutants into the navigable waters of the United States is prohibited. The federal

The House Public Works Committee reported a bill⁵¹ which on its face defined "navigable waters" more narrowly than its counterpart in the Senate. The House definition made no reference to tributaries. It simply defined "navigable waters" as being "the navigable waters of the United States."⁵² The report language accompanying House Bill 11896 contained the following language:

One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.⁵³

The Committee's objective was to prevent the Corps from continuing its past practice of administratively adopting a definition of "navigable waters" far less inclusive than permitted under available case law. To prevent this problem from recurring in the future, the Committee stated that the broad judicial interpretations of the "navigable waters" concept should control over administrative interpretations made for convenience or efficiency of application.

The floor debate over amendments which would have expanded the bill's enforcement provisions to encompass all groundwater demonstrates that the Committee did not intend to expand the concept of "navigable waters" to include all waters wherever situated. Participants in that debate agreed that to include groundwater under the FWPCA would require a further revision to the definition of "navigable waters" contained in the House bill.⁵⁴ Every participant argued the substantive merits of whether the bill's controls should extend to groundwater.⁵⁵ In the end, however, the

government as the custodian of the navigable waters has the responsibility to control affirmatively any discharges of pollutants into the navigable waters and, under the Committee bill, seek to achieve elimination of the discharge of pollutants." (emphasis added).

S. Rep. No. 414, 92d Cong., 1st Sess. 71 (1971). This approach was taken in the final bill which was enacted. See 33 U.S.C. § 1342(a)(4).

It is also noteworthy to observe that the committee language equates "navigable waters" with waters subject to the Federal navigational servitude (e.g., "as the *custodian* of the navigable waters").

51. H.R. 11896, 92d Cong., 2d Sess. § 502(8) (1972).

52. H.R. 11896, 92d Cong., 2d Sess. § 502(8) (1972). Since the committee also saw the geographic scope of the bill as being identical to then existing coverage under the Refuse Act and since the Refuse Act prohibition upon the discharge of pollutants applies to navigable waters and tributaries thereof, this omission was of little practical significance.

53. H.R. REP. NO. 911, 92d Cong., 2d Sess. 131 (1972).

54. 118 CONG. REC. 10,666-69 (1972).

55. *Id.*

House decided not to extend the geographic scope of the bill to encompass groundwater.

Due to many differences between S. 2770 and H.R. 11896, they were submitted to conference. The conferees considered the House definition of "navigable waters" to be "basically the same as provided in the Senate bill,"⁵⁶ but adopted language contained in the report accompanying H.R. 11896. The views expressed by the floor managers, Senator Muskie and Representative Dingell, provide the most instructive background on the conference substitute. Senator Muskie presented a carefully prepared, detailed discussion of the Senate conferees' views on the floor. As to the definition of "navigable waters," he offered the following:

One matter of importance throughout the legislation is the meaning of the term 'navigable waters of the United States.'

The Conference agreement does not define the term. The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies, such as lakes, streams and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.⁵⁷

The statement of Representative Dingell as to the definition of "navigable waters" is to the same effect:

The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability — derived from *The Daniel Ball* case (77 U.S. 557, 563) — to include waterways which would be "susceptible of being used *** with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc. *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalach-*

56. S. REP. NO. 1236, 92d Cong., 2d Sess. 143 (1972).

57. 118 CONG. REC. 33,756-57 (1972).

ian Electric Power Co., 331 U.S. 337, 407-10, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA 7, 1945); *cert. den.*, 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA 7, 1954) *cert. den.*, 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA 7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA 5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA 2, 1965); *The Montello*, 87 U.S. (20 Wall.) 430, 441-2 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of 'Power *** To regulate commerce with foreign nations and among the several states ***' (art. I, sec. 8, cl. 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a state boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the states as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, etc. The 'gist of the Federal test' is the waterway's use 'as a highway,' not whether it is 'part of a navigable interstate or international commercial highway.' *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 9, 1972) [sic].

Thus, this new definition clearly encompasses all water bodies, including mainstems and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill."⁵⁸

The above statements and the legislative and judicial history concerning the term "navigable waters" indicate that the term "navigable waters," as used in the 1972 Amendments, was to include all waters covered by the expanded judicial interpretations of that term, but no others. There is no indication in the language or history of the 1972 amendments that Congress was asserting jurisdiction over groundwater or any other waters which were not in some way connected with waterborne commerce. Indeed, each of the cases referred to in that history addresses commerce clause power over waterborne commerce as the touchstone for geographic

58. 118 CONG. REC. 33,756-57 (1972).

inclusion within the Act's proscriptions. Moreover, several of the drafters stated that additional amendments to the statute would be required to cover such other waters. Clearly, a wholesale expansion of federal control over other waters was not then intended by Congress.⁵⁹

IV. SUBSEQUENT REGULATORY DEVELOPMENTS

Following enactment of the 1972 amendments to the FWPCA, the Corps embarked upon a rulemaking effort to develop regulations implementing Section 404 of the Act authorizing the Corps to issue permits for disposal of dredged or fill materials into "navigable waters." When the Corps published final regulations in 1975,⁶⁰ however, they disregarded the Act's legislative history and the Supreme Court precedents referred to therein by excluding tributaries from the geographic scope of the Section 404 permit program. In light of the legislative history and judicial precedents, the Corps' limitation of its jurisdiction to "navigable waters" meeting the traditional tests of navigability could not stand. Not surprisingly, the Corps' limited assertion of jurisdiction was challenged in court. In *Natural Resources Defense Council v. Callaway*,⁶¹ the United States District Court for the District of Columbia held that the definition of "navigable waters" in the 1972 FWPCA served to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the commerce clause" and that "the term [navigable waters] is not limited to the traditional tests of navigability" as asserted by the Corps.⁶² The district court, on cross motions for summary judgment, correctly declared that the Corps had acted unlawfully and in derogation of their responsibilities under Section 404 of the FWPCA. The government chose not to appeal, electing instead to institute rulemaking proceedings pursuant to the court's order.

The Corps proposed new regulations on May 6, 1975⁶³ and promulgated interim final rules on July 25, 1975.⁶⁴ The original proposal

59. Had a different constitutional power been exercised or a more expansive view of its power under the commerce clause been intended, surely at least one relevant citation would have been given. See e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. Darby*, 312 U.S. 100 (1941).

60. See 39 Fed. Reg. 12,119 (1974), 33 C.F.R. § 209.120(d) (1) (1975) for the Corps' 1975 regulatory definition of "navigable waters."

61. 392 F. Supp. 685 (D.D.C. 1975).

62. *Id.* at 686.

63. 40 Fed. Reg. 19,766 (1975).

64. 40 Fed. Reg. 31,320-43 (1975). The development and promulgation of these regulations are unusual in that the controversy spawned by Judge Robinson's decision and the Corps' regulatory response resulted in extensive hearings in the House of Representatives (*Development of New Regulations by the Corp of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings before the*

presented several alternatives, one of which included a broad assertion of federal regulatory jurisdiction over the disposal of dredged or fill materials in virtually every coastal and inland artificial or natural water body. It was his approach that was adopted in the interim final rules.

As originally proposed, the term "navigable waters" would be defined as including seven discrete types of water bodies. The boundaries of each type of water body would extend up to the headwaters and shoreward to the ordinary high water mark or to the aquatic vegetation line, whichever extended further. The Corps' proposed the aquatic vegetation line as "the line beyond which aquatic plants, dependent on periodic inundation for growth, do not thrive."⁶⁵ Although wetlands were not separately defined, adoption of the "aquatic vegetation line" clearly would have resulted in many contiguous wetland areas being covered under this approach.⁶⁶

The interim final regulations simply reorganized the proposed definition described above.⁶⁷ Instead of repeating the phrase "or to the aquatic vegetation line," the interim final regulations established separate definitions for "coastal wetlands" and "freshwater wetlands." Coastal wetlands were defined as "those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction."⁶⁸ Freshwater wetlands were defined as "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."⁶⁹ A comparison of these "wetland" definitions with the earlier "aquatic vegetation line" definition shows that exactly the same areas would be covered under each formulation.

Under the aquatic vegetation approach, the areas to be covered could

Subcommittee on Water Resources of the House Committee on Public Works and Transportation, 94th Cong., 1st Sess. (1975) and in the Senate (Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Committee on Public Works, 94th Cong., 2d Sess. (1976)).

65. 40 Fed. Reg. at 19,770 (1975).

66. In its earlier regulations, the Corps had defined wetlands, for non-jurisdictional purposes, as "those land and water areas subject to regular inundation by tidal, riverine or lacustrine flowage." Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps and similar areas in coastal and inland "navigable waters." 39 Fed. Reg. 12,115, 12,121 (1974) (emphasis added). Clearly, the definitions proposed in 1975 were largely a reiteration of this other definition, but now in a jurisdictional context. *Cf.* Preamble, 40 Fed. Reg. at 19,767 (1975).

67. Compare 33 C.F.R. § 209.120(d)(2) (1976) with Proposed 30 C.F.R. § 209.120(d)(2) (Alternative I), 40 Fed. Reg. 19,770 (1975). To make its expanded permit authority more manageable, the Corps exempted a wide variety of activities from its regulatory control, 33 C.F.R. § 209.120(d)(4), (5) and (6) (1977), and instituted a mechanism for the issuance of general permits for certain non-exempt activities, 33 C.F.R. § 209.120(i)(2)(ix) (1976).

68. 33 C.F.R. § 209.120(d)(2)(i)(b) (1976).

69. 33 C.F.R. § 209.120(d)(2)(i)(h) (1976).

go no further than the limits of periodic inundation because the required vegetation must be "dependent on periodic inundation."⁷⁰ The coastal/freshwater wetlands approach limited its coverage to those areas that are periodically inundated by salt, brackish or fresh water and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions. Thus both approaches required that the area be periodically inundated by "navigable waters" in order to be within the geographic scope of the Corps' regulatory program.⁷¹

In promulgating the 1975 Section 404 regulations, the Corps had merely caught up with the doctrine of "navigable waters" previously developed by Congress and the Supreme Court. The crucial link between the Corps' jurisdiction and the concept of navigability for waterborne commerce had been maintained. In 1977, however, the Carter Administration Corps took a fateful step which set the stage for *Riverside Bayview*.

In its revised 1977 Section 404 regulations,⁷² the Corps greatly expanded the apparent scope of its regulatory jurisdiction by redefining the term "navigable waters" to include "wetlands." "Wetlands" were further defined as: "those areas that are inundated or saturated by surface or groundwater 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."⁷³ By eliminating two critical requirements of the Corps' previous definition of "wetlands" in the 1975 regulations—periodic inundation by "navigable waters" and the presence of vegetation requiring saturated soil conditions—the Corps extended its jurisdiction by administrative fiat to include lands merely saturated by rainwater or groundwater so long as certain types of vegetation are also present, regardless of any connection with other

70. 40 Fed. Reg. at 19,767 (1975).

71. The unique legislative history of these regulations makes clear that the intent of the drafters was that periodic inundation be by way of flooding from adjacent, navigable waters and not be rainfall collecting at the site or by inundation from groundwater sources. See House 404 Regulatory Hearings at 4, 6-7, 10-11, 31, and 74. It is also noteworthy that numerous environmental groups supported the definitions contained in these interim final regulations. See Senate 404 Regulatory Hearings 213 (National Audubon Society), 327 (Natural Resources Defense Council), 391 (National Wildlife Federation), 450 (The Sport Fishing Institute), and 454 (Conservation Foundation). Indeed, as conceded by Mr. Speth (NRDC): "It may well be that the implications of Section 404 are larger than Congress originally envisioned." Senate 404 Regulatory Hearings 327.

72. 42 Fed. Reg. 19,767 (1975).

73. 42 Fed. Reg. 37,122, 37,144 (1977). Whereas the 1975 regulations were thoroughly reviewed and considered by Congress, only a handful of isolated references to the 1977 regulations appear anywhere in the legislative history, and each of these is wholly devoid of anything more than a simple reference to their existence. See, 123 CONG. REC. 25,718-19 (1977) (statement of Sen. Baker); *Id.* at 26,721-22 (statement of Sen. Tower); 123 CONG. REC. 10,427-28 (1977) (statement of Rep. Smith). Thus, it cannot be contended seriously that Congress legislatively ratified these 1977 regulations.

“navigable waters.”

Congress subsequently passed the 1977 amendments to the FWPCA.⁷⁴ After much debate the Congress decided not to alter the existing statutory definition of “navigable waters.” Instead they elected to exempt a number of specific activities from federal controls and expressly authorized continued issuance by the Corps of nationwide and regional general permits. Statements made by numerous key members of Congress throughout this legislative process reflects a remarkable familiarity with the Corps’ 1975 regulations.⁷⁵ Thus it may be that Congress ratified the Corps’ 1975 definition of “navigable waters” in 1977.⁷⁶

During 1976 and 1977, the proponents of legislative change sought to curtail substantially the Corps’ regulatory jurisdiction, as reflected in its 1975 interim final regulations. Although those efforts were twice successful in the House,⁷⁷ they were narrowly defeated in the Senate.⁷⁸ Instead of redefining the term “navigable waters,” the House-Senate conferees were able to reach a compromise which would confirm in law what the Corps had done administratively in its 1975 interim final regulation (e.g., general permitting and the establishment of activity-specific exemptions).⁷⁹ This compromise won quick passage and became the Clean Water Act of 1977.⁸⁰ In short, the proponents and opponents of change were able to agree upon a package of legislative solutions which tacitly, if not expressly, ratified the Corps’ 1975 regulations. It can be fairly inferred from the foregoing history that these regulations, including their definition of coastal and freshwater wetlands, represent the furthest extent of the Corps’ jurisdiction under the Clean Water Act as envisioned by the Congress.

The Supreme Court reviewed much of this legislative history in the

74. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

75. As to phased implementation, a concept only applicable under the Corps’ interim final regulations, *see* S. REP. NO. 370, 95th Cong., 1st Sess. 75 (1977); 123 CONG. REC. 26,720 (1977) (Statement of Sen. Hart); *Id.* at 26,714-16 (statement of Sen. Stafford); H.R. REP. NO. 139 95th Cong., 1st Sess. 22 (1977); 123 CONG. REC. 38,969 (1977) (statement of Rep. Roberts); 123 CONG. REC. 39,208-09 (1977) statement of Sen. Baker). As to general permits, *see* 123 CONG. REC. 26,714-15 (1977) (statement of Sen. Stafford); *Id.* at 26,770-71 (statement of Sen. Nunn); S. REP. NO. 370, 95th Cong., 1st Sess. 80 (1977); 123 CONG. REC. 39,209 (1977) (Statement of Sen. Baker). As to the enumerated exemptions from permitting requirement, *see* S. Rep. No. 370, 95th Cong., 1st Sess. 75-77 (1977); H.R. REP. NO. 830, 95th Cong., 1st Sess. 103 (1977); 123 CONG. REC. 39,209-11, 39,216-17 (1977) (statements of Senators Baker, Wallop and Heinz).

76. As observed by the Supreme Court, the debate and history of Congress’ consideration of this issue “provide additional support for a conclusion that Congress in 1977 acquiesced in the Corps’ definition of waters including adjacent wetlands.” 106 S. Ct. at 465.

77. 122 CONG. REC. 16,562-59, 16,564-65 and 16,572 (1976). 123 CONG. REC. 10,426-34 (1977). *See generally*, Caplin, *Is Congress Protecting our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 U. MIAMI L. REV. 445 (1977).

78. 122 CONG. REC. 28,793-95 (1976); 123 CONG. REC. 26,710-29 (1977).

79. H. REP. NO. 830, 95th Cong., 1st Sess. 97-105 (1977).

80. The Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

Riverside Bayview case when it recognized that "Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands."⁸¹ Instead of considering whether that acquiescence was intended to be a limitation upon the geographic scope of the Corps' program, the Court cryptically concluded that it could serve as a regulatory springboard for further expansions in regulatory authority over adjacent wetlands. In doing so, the Supreme Court appears to have misapplied the 1977 legislative history. A better reading of this history is that Congress intended to ratify the Corps' 1975 regulations and not the 1977 regulations.

V. LEGISLATIVE AND REGULATORY REFORM EFFORTS—1981-1985

The Corps' 1977 regulations and the EPA's new Section 404(b)(1) guidelines issued in 1980⁸² represent the high watermark of the executive branch's administrative efforts to extend the geographic scope of the Corps' regulatory jurisdiction over wetlands. With the advent of the Reagan Administration in 1981, the executive branch's focus shifted from environmental protection *per se* to "regulatory reform" aimed at reducing the economic and administrative burden of regulatory compliance on the private sector. A Vice Presidential Task Force on Regulatory Relief was established in 1981 to spearhead this initiative.⁸³ The Corps' Section 404 regulations were identified by the Task Force as one of the prime candidates for regulatory reform. A joint effort by the Task Force, the other agencies with input into the Section 404 permit process, and the Corps led to the signing in 1982 of three new Memoranda of Agreement (MOAs)⁸⁴ governing the relationships among the Corps and the Department of the Interior, the Department of Commerce and the EPA, respectively. The new MOA's reduced permit processing times and limited the number of higher level reviews of a Corps District Engineer's initial permit decision. Dissatisfaction by the EPA and other environmental agencies with the Corps' refusal to elevate certain controversial permit decisions led to a renegotiation of the MOA's in 1985.⁸⁵ These new MOA's

81. 106 S. Ct. at 465.

82. 40 C.F.R. §§ 230.1 (1981).

83. Exec. Order 12,291, 3 C.F.R. §§ 127-134 (1981), reprinted in 5 U.S.C. § 601 (1982).

84. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army, dated July 7, 1982; Memorandum of Agreement between the Department of the Interior and the Department of the Army, dated July 2, 1982; and the Memorandum of Agreement between the Department of Commerce and the Department of the Army, dated July 2, 1982.

85. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army, dated November 12, 1985; Memorandum of Agreement between the Department of the Interior and the Department of the Army, dated November 8, 1985; and the Memorandum of Agreement between the Department of Commerce and the Department of the Army, dated November 1985.

maintain the limit on the number of reviews of a Corps District Engineer's decision, but extend the periods in which the Department of the Interior (United States Fish and Wildlife Service), the Department of Commerce (National Marine Fisheries Service) and the EPA can comment on Section 404 permit applications.

Another major change in the Corps' administration of the Section 404 permit program resulted from a court challenge to the Corps' reissuance of certain general permits.⁸⁶ This challenge was settled by the Corps' issuance of new general permit regulations which, among other things, provided that the Corps and the environmental agencies involved in the 404 program be notified of dredge and fill activities affecting isolated waters between one and ten acres in size and that an individual permit for such activities affecting isolated lakes larger than ten acres would again be required.⁸⁷ In 1982, the EPA also published an advance notice of proposed rulemaking regarding possible changes to its Section 404(b)(1) guidelines.⁸⁸ A number of comments on the EPA's proposal have been submitted, but the agency has not taken any further action. Finally, the Corps itself has made a number of proposals for additional changes in its Section 404 regulations,⁸⁹ but has not attempted to implement those proposals.

None of the above regulatory initiatives directly address the geographic scope of the Section 404 permit program. It has generally been recognized that an amendment to the Clean Water Act itself would be required to achieve a meaningful expansion or contraction of the Corps' Section 404 jurisdiction. At the urging of farmers, oil and gas producers and other members of the regulated community, Senators Tower and Bentsen introduced a bill⁹⁰ which would have substantially reduced the scope of the Corps' jurisdiction to waters which were, or could be made, navigable in fact. Under that bill, "adjacent" and "isolated" wetlands would have been excluded from regulation under Section 404. Strong public support for wetlands protection at the federal level, however, blocked these initiatives. Senator Chafee's Environmental Pollution Subcommittee has actively criticized the Corps' administration of the Section 404 program and is considering new approaches to increased wetlands protection.

86. *National Wildlife Federation v. Marsh*, Civil No. 82-3632 (D.D.C., filed Dec. 22, 1982).

87. 49 Fed. Reg. 39,478 (Oct. 5, 1984).

88. 47 Fed. Reg. 36,798-99 (Aug. 23, 1982).

89. 48 Fed. Reg. 21,466 (May 12, 1983); 49 Fed. Reg. 1,387-99 (Jan. 11, 1984).

90. S. 777, 97th Cong., 1st Sess. (1981). Companion bills were introduced into the House: H.R. 393, 97th Cong., 1st Sess. (1981), H.R. 3962, 97th Cong., 1st Sess. (1981).

VI. THE RIVERSIDE BAYVIEW DECISION

The challenge to the Corps' 1977 regulations in the *United States v. Riverside Bayview Homes Inc.* represented the first real opportunity to clarify the geographic scope of the Corps' wetlands jurisdiction under Section 404 since the *Callaway*⁹¹ decision in 1975. Riverside Bayview Homes, Inc. owned eighty acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan. In 1976, Riverside Bayview began to place fill materials on its property as part of its preparations for construction of a housing development. The Corps of Engineers, believing that the property was an "adjacent wetland" under the 1975 regulation defining "waters of the United States," filed suit in the United States District Court for the Eastern District of Michigan, seeking to enjoin Riverside Bayview from filling the property without a permit from the Corps.⁹²

The District Court held that the portion of Riverside Bayview's property lying below 575.5 feet above sea level was a covered wetland and enjoined Riverside Bayview from filling it without a permit.⁹³ Riverside Bayview appealed, and the court of appeals remanded for consideration of the effect of the intervening 1977 amendments to the regulation. On remand, the district court again held the property to be a wetland subject to the Corps' permit authority.⁹⁴ Riverside Bayview again appealed, and the Sixth Circuit reversed. The Sixth Circuit Court "construed the Corps' regulations to exclude from the category of adjacent wetlands—and hence from that of 'waters of the United States'—wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation."⁹⁵ The court expressed both its view that a broader definition of wetlands might result in the taking of private property without compensation and its "doubt that Congress, in granting the Corps jurisdiction to regulate the filling of 'navigable waters,' intended to allow regulation of wetlands that were not the result of flooding by navigable waters."⁹⁶ Under the court's reading of the regulations, Riverside Bayview's property was outside the Corps' jurisdiction because its semi-aquatic characteristics were not the result of frequent flooding by the nearby navigable waters.⁹⁷ Riverside Bayview was therefore free to fill the property without obtaining a permit.

91. 392 F. Supp. 685 (D.D.C. 1975). See *supra* note 61.

92. 106 S. Ct. at 458.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

The Supreme Court reversed. In doing so, it upheld the Corps' discretion to make the leap from Congress' intent to allow regulation of waters that would not be deemed "navigable" under the classic understanding of that term to inclusion within its jurisdiction of wetlands whose only connection with navigable waters is physical proximity: "We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States—based as it is on the Corps' and the EPA's technical expertise—is unreasonable."⁹⁸ Thus, the Court concluded that a definition of "'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the [Clean Water] Act."⁹⁹

VII. FUTURE ISSUES

The Supreme Court's decision in *Riverside Bayview* leaves both an unresolved issue of statutory interpretation and an unresolved policy issue. With respect to statutory interpretation, the Court reached as far as it could to uphold the Corps' jurisdiction over "adjacent wetlands" under the 1977 regulations. The Court did not address the question of whether the Corps also had the statutory discretion to assert jurisdiction over "isolated wetlands" which are not adjacent to other waters.¹⁰⁰ If our reading of the judicial precedents and legislative history behind the term "navigable waters" in the Clean Water Act is correct, the Corps' assertion of jurisdiction over "isolated wetlands" in the 1977 regulations will be hard to sustain.

With respect to policy, Congress needs to clarify the geographic scope of the Corps' wetland jurisdiction in the Clean Water Act itself. However it chooses to do so, we would hope that Congress leaves the Section 404 permit program essentially intact. We believe it is possible for the Corps and the other agencies involved in administering the program to strike an appropriate balance between the benefits both of wetlands development and wetlands preservation through methods such as general permits, mitigation banking and special protection for particularly important wetlands.

Again the oil and gas industry provides an excellent case in point. The industry has had considerable experience in working with the Corps of Engineers and other agencies involved in the Section 404 permit program. Oil and gas companies apply for and receive many hundreds of Section 404

98. 106 S. Ct. at 463.

99. *Id.*

100. 106 S. Ct. at 462 n.8.

permits every year. To our knowledge, no important applications have been denied, although in some cases the applicant has accepted permit stipulations which may be unreasonable. Average permit processing times have declined from approximately 130 days in the early 1980s to approximately 70 days in 1985.

We believe the permitting program for the oil and gas industry has also worked well from the standpoint of the Corps, the EPA, and the other agencies involved. Shorter permit processing times do not appear to have reduced environmental safeguards and the industry's operating procedures in wetland areas have continued to improve. Although there have been several cases in which the EPA has felt obliged to exercise its Section 404(c) veto power over permit approvals, none of these cases have involved oil and gas projects. Moreover, there are a number of techniques by which the program's administration could be further improved to the benefit of all parties concerned. The following techniques can serve as examples.

A. *Increased Use of General Permits*

The Corps already has in place a number of general permits used by the oil and gas industry, including the headwaters and isolated waters permits. Greater use could be made of "activity-specific" general permits, particularly on a regional basis. In Louisiana, for example, the Corps, industry and other affected groups could design activity-specific general permits for the construction of drill pads and roads for the transportation of drilling supplies and equipment. These permits would allow operators to conduct the permitted activity without applying for an individual permit, while at the same time establishing uniform conditions for the activity and for the restoration of affected wetlands after that activity is completed.

B. *Mitigation Banking*

The Corps, the EPA and the United States Fish and Wildlife Service have authority under the Fish and Wildlife Coordination Act and the Clean Water Act to require mitigation of any adverse ecological impact of a development project. The United States Fish and Wildlife Service has developed a Habitat Evaluation Procedure (HEP) for determining the adverse or positive impacts of development on a given habitat. HEP permits the agencies involved in reviewing a permit application to calculate how much mitigation is required to offset the adverse effects of the permitted activity in advance of issuing a permit. By offsetting the adverse impacts of its activities on one or more species with the benefit of mitigation in terms of "habitat units" gained or lost, the "bank account" of a developer such as an oil and gas company would show a net credit or debit in its "habitat units" account. Landowners with a credit balance they did

not intend to use could sell credits to another developer who was operating in the same state and habitat type but was not in a position to perform required mitigation on its own.

Certain petroleum companies have used HEP by developing the concept of "mitigation banking." "Mitigation banking" involves implementation by the developer of a wildlife management program designed to develop wildlife habitat similar to the land adversely affected by its development activities. The program would be in place for seventy-seven years, subject to reevaluation after twenty-five years. The Fish and Wildlife Service is currently working with over a dozen other companies in six states, on areas ranging from eleven to 9,500 acres in size to test the "banking" concept. The concept may or may not be widely accepted, but it demonstrates the possibility of creative approaches to reconciling the benefits of development activities with preservation of wildlife habitat.

C. *Special Protection for Important Wetlands*

The EPA is currently attempting to identify particularly important wetlands that require special protection before applications for Section 404 permits are received. Pilot identification projects are under way in the states of Washington, Wisconsin, Indiana, Nebraska and Virginia. Once geographic areas, wetland types and development impacts worthy of special attention have been identified, appropriate restrictions on development activities in those wetlands can be devised. This effort should be combined with the general permit and mitigation banking techniques discussed above to maximize the net benefit derived from nationwide wetlands management.

In conclusion, it should be possible to create a legal and regulatory framework at the federal level which both assures the ongoing preservation of important wetland areas, and allows limited, high priority development activities in wetland areas to proceed. Before such a framework is fashioned, however, the issue of the Corps' jurisdiction over "isolated" wetlands should be resolved. The Texas federal district court case, *National Wildlife Federation v. Laubscher*,¹⁰¹ in which environmental groups challenge the Corps' failure to assert jurisdiction over dredge and fill activities in an "isolated" pothole wetlands in Texas, provides a context for this resolution to take place.

101. No. G-86-37 (S.D. Tex. filed Jan. 15, 1986). See *supra* note 22 and accompanying text.

