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Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands

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COMMERCE TO CONSERVATION: THE CALL FOR A NATIONAL WATER POLICY AND THE EVOLUTION OF FEDERAL JURISDICTION OVER WETLANDS

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I. INTRODUCTION

Upon inauguration, the Clinton Administration inherited an ongoing debate on federal involvement in protecting the future of America's waters. The lack of any coherent national water policy has prompted calls for a national water agenda.[1] These calls seem particularly timely in light of the rising concerns with our national water quality standards, the severe drought that recently ripped through the West during the past several years and the over subscription of water, leaving some western cities, such as Las Vegas, struggling to find water for their residents.[2] One critical and well-publicized aspect of this debate is how we should protect our nation's wetlands.

Wetlands serve a multitude of functions, yet they have been lost at an alarming rate. The nation's wetlands, swamps, bogs, marshes and tidal and mud flats provide critical barriers for controlling floods and tides. They reduce soil erosion in surrounding areas, trap sediment, and act as a filter for our water supplies.[3]

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1. *See* WATER QUALITY 2000 PHASE III REPORT, A NATIONAL WATER AGENDA FOR THE 21ST CENTURY (Nov. 1992); REPORT OF THE LONG'S PEAK WORKING GROUP ON NATIONAL WATER POLICY, AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY (Dec. 1992); ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, NEW POLICY DIRECTIONS TO SUSTAIN THE NATION'S WATER RESOURCES (1993); Charles H.W. Foster & Peter P. Rogers, *Federal Water Policy: Toward an Agenda for Action*, Harvard University Energy and Environmental Policy Center (Aug. 1988); David H. Getches, *From Askhabad, To Wellton—Mohawk, To Los Angeles: The Drought in Water Policy*, 64 U. COLO. L. REV. 523 (1993). Congress also recently responded to some of these concerns when it passed the Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600 (1992) (authorizing certain water transfers and enacting the Western Water Policy Review Act of 1992); *see also Water: The Power, Promise, and Turmoil of North America's Fresh Water*, NAT'L GEOGRAPHIC, Special Edition, Nov. 1993.

2. For a general discussion of the existing strain on our water resources, *see generally* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, §§ 1, 2 (1993); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 21, 286-292 (1992); MARC REISNER, CADILLAC DESSERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986); DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985); D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, The Prospects for Accommodation*, 21 ENVTL. L. 1 (1991). *See also* Bruce Babbitt, *The Public Interest in Western Water*, 23 ENVTL. L. 933 (1993).

3. *See generally* Staff of the Environment and Natural Resources Policy Division of the Congressional Research Service of the Library of Congress for the Senate Comm. on Env't

Wetlands also serve as important enclaves for wildlife, including endangered and threatened species, by providing necessary breeding, nesting and feeding grounds.[4] Unfortunately, the United States Fish & Wildlife Service estimates that over the past two hundred years, the lower forty-eight states have lost an estimated 53% of their original wetlands.[5] Approximately 11 million acres of wetlands reportedly have been lost simply between the mid-1950s and the mid-1970s, with only 2 million acres of new wetlands created in their place.[6] While our understanding of the ecological impact of this vast loss of wetlands is hindered by the lack of a comprehensive and organized national database of information,[7] the importance of preserving wetlands is evident.

It is now axiomatic that the protection of our nation's wetlands is a "responsibility" of the United States Army Corps of Engineers [hereinafter Corps].[8] The Corps exercises its responsibilities under section 404 of the Clean Water Act [hereinafter CWA][9] as well as under the Rivers and Harbors Act [hereinafter RHA].[10] These acts require Corps authorization before obstructing or altering navigable waters or discharging dredged or fill material into "waters of the United States." The Corps decides whether to issue permits for such activities in accordance with guidelines established by the

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& Pub. Works, Report on Wetlands Management, 97th Cong., 2d Sess. (1982) [hereinafter CRS Report]; JON A. KUSLER & MARY E. KENTULA, WETLAND CREATION AND RESTORATION THE STATUS OF THE SCIENCE (1990); WILLIAM J. MITSCH & JAMES G. GOSSELINK, WETLANDS (2d ed. 1993); OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION (1984); PAUL F. SCODARI, WETLANDS PROTECTION: THE ROLE OF ECONOMICS (1990); REBECCA R. SHARITZ & J. WHITFIELD GIBBONS, FRESHWATER WETLANDS & WILDLIFE (1989); U.S. Deprtment of the Interior Fish and Wildlife Service, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 13-25 (1984) [hereinafter RECENT TRENDS]; MICHAEL WILLIAMS, WETLANDS: A THREATENED LANDSCAPE (1993); John G. Mitchell, *Our Disappearing Wetlands*, NAT'L GEOGRAPHIC, Oct. 1992, at 3; U.S. Department of the Interior, Fish and Wildlife Service, PROCEEDINGS OF THE NATIONAL SYMPOSIUM ON PROTECTION OF WETLANDS FROM AGRICULTURAL IMPACTS (1988).

4. *See supra* note 3. *See also* Office of Technology Assessment. NATIONAL WATER QUALITY INVENTORY: 1990 REPORT TO CONGRESS 61-63 (1990); James D. Williams and C. Kenneth Dodd, Jr., *Importance of Wetlands to Endangered and Threatened Species, reprinted in* PHILLIP E. GREESON, JOHN R. CLARK, JUDITH E. CLARK, WETLAND, FUNCTIONS AND VALUES: THE STATE OF OUR UNDERSTANDING (1978).

5. THOMAS E. DAHL, WETLANDS: LOSSES IN THE UNITED STATES, 1780s TO 1980s 1 (1990).

6. RECENT TRENDS, *supra* note 3, at vii.

7. *Cf.* Debra S. Knopman & Richard A. Smith, *20 Years of the Clean Water Act*, ENV'T 17 (Jan./Feb. 1993).

8. Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515 (10th Cir. 1992).

9. 33 U.S.C. § 1344 (1988). Section 301 of the CWA prohibits the discharge of any pollutant by any person except in compliance with the Act. 33 U.S.C. § 1311 (1988). In section 404, the CWA authorizes the secretary to "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters, at specified disposal sites." 33 U.S.C. § 1344(a) (1988) For a discussion of the current scope of the Corps jurisdiction, see *infra* notes 206-07 and accompanying text.

10. 33 U.S.C. §§ 403-407 (1988).

Environmental Protection Agency [hereinafter EPA] and based upon a public interest determination.[11]

The administration of the 404 program has been controversial since its inception approximately 20 years ago. As one member of the environmental community poignantly noted, *"[n]o one* is happy with the existing § 404 program—it frustrates developers and fails to protect many wetlands."[12] Similarly, former Governor Kean of New Jersey, who chaired the National Wetlands Policy Forum,[13] commented that "[e]veryone involved in the wetlands issue agrees that something needs to be done. Yet, everyone has different ideas about what to do."[14] Proponents of expanding wetlands regulation argue that the program should encompass a greater percentage of wetlands, accompanied by increased protection against the destruction of those wetlands.[15] Other advocates of wetlands reform contend that there is too much Federal involvement and uncertainty in the way the program is being administered.[16] Even some courts have become concerned with

11. For an excellent summary of the § 404 program and existing law by a former Department of Justice official, see Margaret N. Strand, Federal Wetlands Law, WETLANDS DESKBOOK (1993). For other summaries of the § 404 program, *see generally* William L. Want, LAW OF WETLANDS Regulation; Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695 (1989); Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 SW. L. J. 1473 (1991); Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773 (1989); Ellen K. Lawson, *The Corps of Engineers' Public Interest Review Under Section 404 of the Clean Water Act: Broad Discretion Leaves Wetlands Vulnerable to Unnecessary Destruction*, 34 WASH. U. J. URB. & CONTEMP. L. 203 (1988); Lawrence R. Liebesman & Philip T. Hundemann, *Regulatory Standards for Permits Under Section 404*, 7 NAT. RESOURCES & ENV'T 12 (Summer 1992); Mark A. Rouvalis, *Restoration of Wetlands Under Section 404 of the Clean Water Act: An Analytical Synthesis of Statutory and Case Law Principles*, 15 B. C. ENVTL. AFF. L. REV. 295 (1988); Robert E. Steinberg & Michael G. Dowd, *Economic Considerations in the Section 404 Wetland Permit Process*, 7 VA. J. NAT. RESOURCES L. 277 (1988); E. Manning Seltzer & Robert E. Steinberg, *Wetlands and Private Development*, 12 COLUM. J. ENVTL. L. 159 (1987). *See also A Research Guide to Selected Wetland Law and Policy Literature*, 7 VA. J. NAT. RESOURCES L. 435 (1988). The Corps also exercises broad permitting authority under the RHA. *See* United States v. Alaska, 112 S.Ct. 1606 (1992) (discussing authority under RHA to condition permits on factors other than navigability).

12. Jan Goldman-Carter, *New Legislation, Not "Business as Usual"*, Envtl. F. 20, 22 (Jan./Feb. 1989). Professor Getches similarly notes that the 404 program's "inadequacies and its applications are assailed by nearly everyone. . . . And almost everyone agrees that the statute is clumsy and anomalous in practice." David H. Getches, *Foreward*, 60 U. COLO. L. REV. 685, 687 (1989). *See also* Dickerson, *supra* note 11, at 1496-97.

13. *See infra* note 193 and accompanying text.

14. Thomas H. Kean, *Protecting Wetlands—An Action Agenda*, THE ENVTL. F 20 (January/February 1989).

15. *E.g.*, Robert W. Adler, *Statement of the Nat. Resources Defense Council, Inc. Before the Interagency Task Force on Wetlands* (June 22, 1993) (on file with author); *Statement of the Nat'l Wildlife Federation Before the Interagency Working Group on Wetlands*, Presented by Doug Inkley (June 22, 1993).

16. *E.g.*, Jon Kusler, *Wetlands Wish List*, NAT'L WETLANDS NEWSLETTER 11 (Mar./Apr. 1993) (Mr. Kusler is the Executive Director of the Association of the Wetlands Managers). *See generally Implementation of the Section 404 of the Clean Water Act:*

understanding the proper scope of 404 jurisdiction.[17] Still others argue that expansive wetlands regulation intrudes upon private property rights.[18]

The time is surely ripe for all sides in the wetlands debate to study the evolution of the 404 program or what has been called federal "wetlands regulation." This history establishes the scope as well as the institutional character of the existing program. As Congress and the public debate the need to reform section 404 of the CWA,[19] everyone will undoubtedly recognize that there is no easy solution; regulatory agencies and their administration of programs almost inherently evoke disputes.[20] But understanding what path to take requires an appreciation for what road has been traveled.[21] This is particularly true in this instance. Federal treatment governing wetlands has been continually in flux, with the Congress,

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Hearings Before the Subcomm. on Envtl. Protection of the Senate Comm. on Env't and Public Works, 102d Cong., 1st Sess. (1991) (Various witnesses testified to asserted problems with program).

17. *See infra* note 170.

18. *See* James S. Burling, *Property Rights, Endangered Species, Wetlands, and other Critters—Is It Against Nature to Pay for A Taking?*, 27 LAND & WATER L. REV. 309, 316 (1992); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); Warren Brookes, *The Strange Case of the Glancing Geese*, FORBES 104 (Sept. 2, 1991); L. Gordon Crovitz, *Judging Whose Beach Fronts, Wetlands and Junk Bonds*, WALL ST. J. A13 (March 4, 1992); Daniel J. Popeo & Paul D. Kamenar, *Taking Stock of Takings Law After Lucas: For Regulators, Court's Ruling Spells Trouble*, LEGAL TIMES 17 (July 13, 1992). *See also Brief Amici Curiae of Mountain States Legal Foundation and the National Cattlemen's Association in Support of Petitioner* at iii, 17-18, Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (No. 91-453) (filed Jan. 2, 1992) (noting potential takings implication of wetlands regulation). *See generally* Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectation in the Wake of Lucas v. South Carolina Coastal Council*, 28 LAND & WATER L. REV. 425 (1993); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENV'T L. 171 (1987); Jan G. Laitos, *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901 (1989); Flint B. Ogle, *The Ongoing Struggle Between Private Property Rights and Wetlands Protection: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573 (1993); Simeon D. Rapoport, *The Taking of Wetlands Under Section 404 of the Clean Water Act*, 17 ENVTL. L. 111 (1986); William L. Want, *The Taking Defense to Wetlands Regulation*, 14 ENVTL. L. REP. 10169 (1984). *See also* Steve France, *Does the Fifth Amendment Require the Government to Buy All the Wetlands It Wishes to Save?*, WASHINGTON LAWYER 25 (Sept./Oct. 1991).

19. The CWA, although originally slated for reauthorization in 1992, is presently scheduled for reauthorization by the current Congress. *Cf.* 139 CONG. REC. S7243 (daily ed. June 15, 1993) (a proposed reauthorization of the Clean Water Act: "Water Pollution Prevention and Control Act of 1993").

20. *See generally* GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES (1987); WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES (1967); LOUIS M. KOHLMEIER, JR., THE REGULATORS: AGENCIES AND THE PUBLIC INTEREST (1969).

21. In the words of Alfred E. Kahn, "the lesson I take from recent history is that the evolution of regulatory policy will never come to an end. The path it takes—and we should make every effort to see that it takes—however, is the path not of a full circle or pendulum, which would take us back to where we started, but of a spiral, which has a direction." Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 353-54 (1990).

the executive branch, the federal agencies and the courts continually reacting to one another and attempting to define the parameters of the program, including the breadth of its application to wetlands. Consequently, "[a] fundamental defect of the current wetlands programs is that they lack a clear, coherent goal."[22]

II. EARLY HISTORY

This article traces the progress of the nation's regulatory treatment of wetlands. The history of wetlands protection is best characterized as one of constant change or struggle in an evolving effort to develop a coherent policy direction. At first, wetlands were not perceived as a beneficial resource and the early national program governing activities in inland waterways was designed simply to promote water transportation and commerce. This national program ultimately became used in the battle against water pollution, although congressionally prescribed limitations necessitated further congressional action and the passage of the Federal Water Pollution Control Act of 1972.[23] In 1972, Congress adopted the 404 permitting program, but since then the reach of the program has remained vague even after subsequent amendments to the Act in 1977.[24]

The nation's early land policies promoted the destruction of such areas as marshes, mudflats, and wetlands. Congressional policy encouraged the draining and filling of wetlands, reflected in the various Swamp Land Acts of 1849, 1850 and 1860.[25] By around the mid-twentieth century, however, the future of our natural resources became a matter of growing public concern.[26] Between the late 1950s and the mid 1970s, Congress enacted a variety of broad federal land and resource management statutes.[27]

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22. THE FINAL REPORT OF THE NATIONAL WETLANDS POLICY FORUM, PROTECTING AMERICA'S WETLANDS; AN ACTION AGENDA 3 (1988) [hereinafter Forum].

23. Pub. L. No. 92-500, 86 Stat. 816 (1972).

24. *See infra* notes 134-67 and accompanying text.

25. *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 321-330 (1968); BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 269-288 (U. Wisc. Press. ed. 1965).

26. "In retrospect, it is apparent that a time of unparalleled change and ferment in federal land and resources law began about 1964." GEORGE C. COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 9 (3rd ed. 1993). For an interesting history of water management planning in the first half of the twentieth century, see Martin Reuss, *Coping With Uncertainty: Social Scientists, Engineers, and Federal Water Resources Planning*, 32 NAT. RESOURCES J. 101 (1992). *See generally* RODERICK NASH, THE AMERICAN ENVIRONMENT: READINGS IN THE HISTORY OF CONSERVATION (ed., 1968); RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (3d ed. 1982).

27. Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742a-754a (1988) (enacted Aug. 8, 1956); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c (1988) (enacted Mar. 10, 1934,

Congress intended that many of these acts would encourage conservation and efficient use of our land and natural resources, including our water resources. In addition, Congress commissioned various studies for reporting on the proper management of the nation's resources.[28] Water quality and water planning were among those issues considered.[29] And it was during this period

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amended July 9, 1965); Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1988) (enacted Oct. 22, 1976); National Trails System Act, 16 U.S.C. §§ 1241-1251 (1988) (enacted Oct. 2, 1968); National Park System Concessions Policy Act, 16 U.S.C. §§ 20-20g (1988) (enacted Oct. 9, 1965); Refuge Recreation Act, 16 U.S.C. §§ 460k-460k-4 (1988) (enacted Sept. 28, 1962); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470w-6 (1988) (enacted Oct. 15, 1966); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1988) (enacted Oct. 2, 1968); Water Resources Planning Act, 42 U.S.C. §§ 1962-1962d-20 (1988) (enacted July 22, 1965); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988) (enacted Oct. 21, 1972); Wild Free Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1988) (enacted Dec. 15, 1971); Wilderness Act, 16 U.S.C. §§ 1131-1136 (1988) (enacted Sept. 3, 1964); Endangered Species Conservation Act of 1969, 16 U.S.C. §§ 668aa-668cc-6 (1988) (enacted Dec. 5, 1969); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988) (enacted Dec. 28, 1973); Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460l-4-460l-11 (1988) (enacted Sept. 3, 1964); Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1601-1614 (1988) (enacted Aug. 17, 1974); Mining and Minerals Policy Act of 1970, 30 U.S.C. §§ 21a (1988) (enacted Dec. 31, 1970); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 (1988) (enacted July 1, 1944, as amended Dec. 16, 1974); Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988) (enacted Oct. 27, 1972).

28. In 1968, Congress created the National Water Commission. National Water Commission Act, Pub. L. No. 90-515, 82 Stat. 868 (1968). This is also when Congress authorized the preparation of what became widely recognized studies in the development of our nation's water resource policies. Pub. L. No. 90-537, 82 Stat. 885, 886 (1968). *See* FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE (1973).

29. *See* FINAL REPORT TO THE PRESIDENT AND TO THE CONGRES OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE (1973); WESTWIDE STUDY, CRITICAL WATER PROBLEMS FACING THE ELEVEN WESTERN STATES (Dep't. of Interior) (April 1975). The focus on national water issues occurred concomitantly with Congress' increasing interest in national land use legislation. *E.g.*, Staff of the Comm'n on Interior Affairs, NATIONAL LAND USE POLICY: BACKGROUND PAPERS ON PAST AND PENDING LEGISLATION AND THE ROLE OF THE EXECUTIVE BRANCH, CONGRESS, AND THE STATES IN LAND USE POLICY AND PLANNING (Comm. Print 1972). And the United States Fish & Wildlife Service only became actively interested in wetlands issues around 1950, conducting its first nationwide inventory of wetlands in 1954.

Although Congress had earlier passed the Public Health Service Act of 1912 and the Oil Pollution Act of 1924, its interest in *affirmatively* addressing water pollution began in 1948 after the Committee on Public Works was established. Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948). Next, in 1956, Congress authorized state grants for pollution control. Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498 (1956). And nine years later Congress modified its pollution control program in three pertinent areas: (1) it assigned new responsibility to the states; (2) it continued the 1948 enforcement program; and (3) it established a new federal agency. Water Resources Planning Act, Pub. L. No. 89-80, 79 Stat. 244 (1965). Congress expressly provided that the Water Pollution Control Act Amendments of 1956and the amendments provided for by the Water Quality Act of 1965 [hereinafter FWQA]did not supersede or impair the Refuse Act, *id*; *see* United States v. Interlake Steel Corp., 297 F. Supp. 912, 916 (N.D. Ill. 1969) (explaining that FWQA did not affect prosecutions under the Refuse Act). The FWQA nevertheless adversely affected the diligence of prosecutions under the Refuse Act. *See generally* Alexander Polikoff, *The Interlake Affair*, 3 WASH. MONTHLY 7, 10-13 (1971). *See also infra* note 61. For other congressional efforts, *see* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (1966); Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (1961); *infra* note 59. ENV'T AND NAT. RESOURCES

that the RHA underwent its transformation from promoting commerce to protecting U.S. waterways against pollution, a process that ultimately led to the adoption of the 404 program.[30]

III. RIVERS AND HARBORS ACT

By the second half of the nineteenth century, federal rivers and harbors legislation was necessary before either the states or the federal government could prevent obstructions to the nation's navigable waters. Supreme Court decisions interpreting the commerce clause of the United States Constitution imposed an awkward framework that confined a state's ability to regulate activities in navigable waters.[31] On the one hand, the Constitution prohibited states from regulating interstate commerce, while on the other hand the Court had held that there was no federal common law prohibiting the obstruction of navigable waters.[32] Congress responded by enacting various Rivers and Harbors Acts, passing the principal Act in 1899.[33] These acts, adopted within several years of the creation of such entities as the National Rivers and Harbors Congress and the Inland Waterways Commission, reflected the national focus on the use and development of

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POL'Y DIVISION, CONG. RES. SERVICE, LIBR. OF CONGRESS, 94TH CONG., 2D SESS., THE WATER RESOURCES RESEARCH ACT OF 1964: AN ASSESSMENT (Comm. Print 1976); *The Water Resources Planning Act: An Assessment, Report of the Subcomm. on Energy Res. and Water Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess (1975); *Water Quality Act of 1965: Hearing before a Special Subcomm. on Air and Water Pollution of the Senate Comm. on Pub. Works*, 89th Cong., 1st Sess. (1965); WATER QUALITY ACT OF 1965, H.R. REP. NO. 215, 90th Cong., 1st Sess. (1966); STAFF OF SENATE COMM. ON PUB. WORKS, 88TH CONG., 1ST SESS., A STUDY OF POLLUTION—WATER (Comm. Print 1963).

30. The American public also became more galvinized during this period, leading up to the first Earth Day in 1970. *See generally* RACHEL CARSON, SILENT SPRING (1962) (an inspirational monograph on DOT and the need for pollution control); BARRY COMMONER, THE CLOSING CIRCLE: NATURE, MAN & TECHNOLOGY (1971); FRANK GRAHAM, JR., SINCE SILENT SPRING (1970).

31. *See generally* Sam Kalen, *Reawakening the Dormant Commerce Clause in its First Century*, 13 U. DAYTON L. REV. 417 (1988).

32. Williamette Iron Bridge Co. v. Hutch, 125 U.S. 1 (1888).

33. Rivers and Harbors Act of 1899, Ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401-418 (1988)). *See also* Rivers and Harbors Appropriations Act of 1886, Ch. 929, 24 Stat. 310, 329 (1886) (New York Harbor); New York Harbor Act of 1888, Ch. 496, 25 Stat. 209 (1888) (New York Harbor); Rivers and Harbors Appropriations Act of 1890, Ch. 907, 26 Stat. 426 (1890); River and Harbor Act of 1894, Ch. 299, 28 Stat. 338, 363 (1894); River and Harbor Appropriations Act of 1896, Ch. 314, 29 Stat. 202, 234 (Congress directed compilation of various laws and sought recommendations). In United States v. Republic Steel Corp., 362 U.S. 482, *reh'g denied*, 363 U.S. 858 (1960), the Supreme Court noted that Congress enacted the RHA to fill the jurisdictional void left by the Court's decision in Williamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), which had held that federal common law did not prohibit obstructing navigable waters. *See also* United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 663-64 (1973). The RHA purportedly did not change existing law. Wyandotte Transportation Co. v. United States, 389 U.S. 191, 203 n.21 (1967); United States v. Republic Steel, 362 U.S. at 486.

national waterways.[34]

A. REFUSE ACT

Three principal provisions in the RHA affected activities associated with the nation's waters. Section 9 of the Act requires congressional approval before constructing "any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water[,]" except state legislatures can authorize the building of a bridge across rivers and other waterways if the plans for the bridge are submitted to and approved by the Chief of Engineers and the Secretary of the Army.[35] Section 10 of the Act (1) requires congressional approval before obstructing "the navigable capacity of any of the waters of the United States[,]" (2) prohibits building "structures in any port, roadstead, haven, harbor, canal, navigable river, or other water". . ."except on plans recommended by the Chief of Engineers and authorized by the Secretary of the [Army]," and (3) prohibits the exacting, filling, altering or modifying "the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water[,]" unless recommended by the Chief of Engineers and approved by the Secretary of the Army.[36] Lastly, Section 13 of the Act, commonly referred to as the Refuse Act,[37] prohibits the discharge of refuse into any navigable water or tributary thereof, as well as the deposit of material on the bank of a navigable waterway, "whereby navigation shall or may be impeded or obstructed . . . ." However, the Secretary of the Army may permit any such deposit of material "whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured . . . ."[38]

Although ostensibly enacted to regulate against obstructions to the navigability of the nation's waters, Section 13 of the Act subsequently became viewed as statutory authority for controlling

34. *See generally* SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 91-121 (1959); SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM: 1885-1914 (1957); Worster, *supra* note 2, at 129-188. *See also* HAROLD T. PINKETT, GIFFORD PINCHOT: PRIVATE AND PUBLIC FORESTER 102-110 (1970) (discussing the development of the Commission).

35. 33 U.S.C. § 401 (1988).

36. 33 U.S.C. § 403 (1988).

37. "Section 13 is sometimes referred to as the 'Refuse Act of 1899,' but that term is a post-1970 label not used by Congress, past or present." United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 658 n.5 (1973).

38. 33 U.S.C. § 407 (1988).

pollution.[39] As awareness heightened over the need for an effective pollution control program, the Refuse Act became the tool of choice. Two Supreme Court decisions in the 1960s began the Act's transformation from focusing on promoting commerce to controlling pollution. In the first of these decisions, Republic Steel Corporation argued that the United States could not use the Act to prohibit the company from dumping industrial solid waste into the Calumet River, a tributary of the Mississippi.[40] The company claimed that the Act only prohibited structures obstructing navigation. The Court disagreed. A broad construction of the Act encompassed obstructions to navigable capacity in addition to interferences with navigation.[41] The Court observed that industrial solid waste, upon settling, affects the navigable capacity of a waterway and therefore can constitute an obstruction prohibited by Section 10 of the RHA.[42] Such industrial solid waste also constitutes refuse—the discharge of which is banned by the Refuse Act. Thus, the Court held that the United States could use the Act against Republic Steel and seek injunctive relief against further discharges.

The opinion in *Republic Steel* served as a necessary prelude to the Court's later decision in *United States v. Standard Oil Company*.[43] In *Standard Oil*, the issue was simple: did the Refuse Act authorize a criminal prosecution for accidentally discharging "commercially valuable aviation gasoline" into the St. Johns River, a navigable waterway?[44] The company argued that commercially valuable substances could not be treated as "refuse" matter.[45] Relying on language in *Republic Steel* that the Act must be construed broadly, the Court interpreted the term "refuse" to include substances harmful to waterways, i.e. pollutants.[46] Oil, the Court observed, "is both a menace to navigation and a pollutant" and has a "deleterious effect on waterways."[47] And, according to the

39. *See generally* Robert L. Potter, Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483, 484-85 (1972).

40. United States v. Republic Steel Corp., 362 U.S. 482, 483 (1960).

41. *Id.* at 487-89.

42. *Id.* at 485, 488-90.

43. 384 U.S. 224 (1966). *See also* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (relying on *Republic Steel*, by analogy, to authorize United States' efforts to seek affirmative remedial order); United States v. Perma Paving Co., 332 F.2d 754 (2nd Cir. 1964) (Friendly, J., following the *Republic Steel* decision).

44. United States v. Standard Oil Co., 384 U.S. 224-25 (1966).

45. *Id.* at 225.

46. *Id.* at 229-30.

47. *Standard Oil Co.*, 384 U.S. at 226. The Court noted that the Solicitor General indicated that the Refuse Act was "the basis" of prosecution in approximately one-third of

Court, Congress sought to remedy serious injury to watercourses "caused in part by obstacles that impeded navigation and in part by pollution."[48] While this holding sanctioned further prosecutions against polluters, the Court never expressly authorized applying the Act to pollution apart from its navigation or navigable capacity antecedents.[49]

The invitation left open by the Court to further clarify the relationship between pollution control and navigable capacity was accepted a few years later by a lower court. In 1970, a court of appeals for the first time clearly upheld a Corps decision prohibiting an activity not adversely affecting navigation. In *Zabel v. Tabb*,[50] a group of landowners sought to compel the Corps to issue a permit to fill eleven acres of tidelands in the Boca Ciega Bay in St. Petersburg-Tampa, Florida.[51] They argued that the Corps could deny a permit only if the activity interfered with navigation. The district court ordered the issuance of the permit, although it noted that the parties had acknowledged that ecological damage would result from the activity.[52] The court of appeals reversed, holding that the Corps "was entitled, if not required, to consider ecological factors."[53] The court observed that there had "been no absolute answer to this question,"[54] and emphasized that prior

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the oil pollution cases brought by the Government. *Id. E.g.*, United States v. Humbold Oil, 3 ERC 1226 (S.D. Tex. 1971) (holding "that the Federal Water Quality Control Act of 1965, as amended by the Federal Water Quality Improvement Act of 1970," did not alter the Government's authority under the Refuse Act to prosecute against oil pollution).

48. *Standard Oil Co.*, 384 U.S. at 228-29. Other federal remedies were available to abate oil pollution. *See, e.g.*, State, Dep't of Fish & Game v. S.S. Bournemouth, 307 F. Supp. 922, 929 (C.D. Cal. 1969) (discussing the growing problem of oil pollution and various statutory as well as common law remedies).

49. The posture of the case explains this failure. The district court had dismissed the action under the erroneous judgment that commercially valuable oil was not "refuse" matter under the Act. It was in rejecting such a limited definition that the Court stated that such a substance was refuse matter, *because* it constituted pollution *and* was a menace to navigation. The Court declined to say anymore. *Standard Oil*, 384 U.S. at 230, n.6. Arguably pollution may or may not impact on navigable capacity. However, the Court simply stated that "[t]his case comes to us at a time in the Nation's history when there is greater concern than ever over pollution"one of the main threats to our free-flowing rivers and to our lakes as well." *Id.* at 225. Writing for the dissent, Justice Harlan opined that there was no support for using the Act to prohibit pollution independently of *obstruction*. *Id.* at 233 n.4. *But cf. infra* note 54.

50. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

51. Zabel v. Tabb, 430 F.2d 199, 201 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

52. *Id.* at 201.

53. *Id.*

54. *Id.* at 207. The court, however, discussed two cases in which factors other than navigation were considered. *Id.* at 208. United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933); Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970). *See also* United States v. Esso Standard Oil Co. of Puerto Rico, 375 F.2d 621 (3rd Cir. 1967) (holding Refuse Act applicable to indirect discharges into navigable waters, when no navigation was obstructed or impeded); United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952) (holding discharge of oil actionable and impedance to navigation not necessary); The President Coolidge, 101 F.2d 638 (9th Cir. 1939) (stating that garbage

decisions did not address "the changes wrought by the Fish and Wildlife Coordination Act [hereinafter "FWCA"]"[55] and the National Environmental Policy Act [hereinafter "NEPA"].[56] Both the FWCA and NEPA, according to the court, indicated Congress' intent that the Corps consider ecological and conservation factors before issuing a permit.[57] This conclusion quickly became accepted by other courts.[58]

B. THE NEW FEDERAL PERMITTING PROGRAM

The *Zabel* opinion reflected the growing consensus in Congress and the Executive branch that there should be a uniform permitting program.[59] By 1970, the Corps apparently had become committed to a pollution control permitting program,[60]

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thrown off a boat is a discharge of refuse); La Merced, 84 F.2d 444 (9th Cir. 1936) (finding oil to be refuse matter, and also discussing Oil Pollution Act of 1924); United States v. Vulcan Materials Co., 320 F. Supp. 1378, 1380 (D.N.J. 1970) (finding that discharge of waste acid, alkaline, and oil into the waters of New York Harbor Violates the New York Harbor Act, 33 U.S.C. § 441, and noting deleterious effect of pollution on usefulness of harbor); United States v. Florida Power & Light Co., 311 F. Supp. 1391 (S.D. Fla. 1970) (finding thermal discharge violates Refuse Act); United States v. U.S. Steel, 328 F. Supp. 354 (N.D. Ind. 1970) (stating that pollution actionable and obstruction to navigation not essential element), *aff'd*, 482 F.2d 439 (7th Cir. 1973).

55. *Zabel*, 430 F.2d at 207 n.14.

56. *Id.* at 209.

57. *Id.* at 211. The court further noted that a 1970 Report of the House Committee on Government Operations commended the Corps for recognizing ecological considerations. *Id.* at 213-14 (citing to OUR WATERS OUR WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. Rep. No. 917, 91st Cong., 2d Sess. (1970)).

58. *E.g.*, United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1310 (5th Cir. 1976) (discussing *Zabel*); Bankers Life & Cas. Co. v. Village of North Palm Beach, 469 F.2d 994, 998-99 (5th Cir. 1972) (relying on *Zabel*); United States v. Underwood, 344 F. Supp. 486, 493-94 (M.D.Fla. 1972); Akers v. Resor, 339 F. Supp. 1375, 1379-80 (W.D. Tenn. 1972) (noting effect of NEPA and the FWCA of 1958); United States v. Pa. Industrial Chemical, 329 F. Supp. 118 (W.D.Pa. 1971) (discharge of industrial waste prohibited), *rev'd*, 461 F.2d 468 (3d Cir. 1972); United States v. Maplewood Poultry Co., 327 F. Supp. 686, 687-88 (N.D. Me. 1971) (stating that pollution actionable regardless of effect on navigation); United States v. Baker, 2 ERC 1849, 1850-51 (S.D. N.Y. 1971).

59. *Zabel*, 430 F.2d at 213-14 (citing OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN PREVENT THEIR DESTRUCTION AND POLLUTION, H. R. REP. NO. 917, 91st Cong., 2d Sess. (1970)). Congressional actions in 1970 illustrated the growing interest in Federal involvement in water quality issues. Not coincidentally, Congress had just enacted NEPA the previous year, and in 1970 it passed the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), establishing the Office of Environmental Quality, declaring the United States' policy against discharging oil and other hazardous substances into navigable waters of the United States, and adding a state water quality certification program for applicants for a federal license or permit, while the Executive Branch meanwhile created the Environmental Protection Agency, Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (1970).

60. The Corps explained that "[u]ntil 1966, the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's waters." Final Rule, 42 Fed. Reg. 37,122 (1977). Permits were only required for waters presently used for interstate or foreign commerce. *Id.* In 1967, the Corps entered into a Memorandum of Agreement with the Department of the Interior, with the Corps agreeing to solicit the advice of the Department and to consider conservation issues when issuing or denying a permit under the RHA. MEMORANDUM OF AGREEMENT BETWEEN THE

although the Department of Justice seemingly preferred *ad hoc* litigation for ensuring compliance with the expanding purpose of the Refuse Act.[61] Citizen and conservation groups also sought, unsuccessfully, judicial intervention to force the establishment of a broad permitting program that would include an evaluation of environmental factors.[62] When the matter came to the attention of the newly created Council on Environmental Quality [hereinaf-

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SECRETARY OF THE ARMY STANLEY RESOR AND THE SECRETARY OF THE INTERIOR STUART UDALL (July 13, 1967), *reprinted in* 33 Fed. Reg. 18,672 (1968). *See also* 39 Fed. Reg. 12133-34 (1974). The next year, therefore, the Corps published new regulations expanding the scope of its public interest review. *See* 42 Fed. Reg. 37122 (1977) (explaining regulations). Thus, a court in 1971 correctly noted that "[u]ntil recently, no permits were ever issued under the Act." Kalur v. Resor, 335 F. Supp. 1, 11 (D.D.C. 1971). Congress also had anticipated the use of the Refuse Act when it triggered federal permitting authority for water quality issues in section 21(b) of the Water Quality Improvement Act of 1970. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 71 (1971), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, prepared by ENVIRONMENTAL POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, at 1489 [hereinafter LEGISLATIVE HISTORY]; Final Rule, 36 Fed. Reg. 6565, 6567 (1971) (Congress' policy pursuant to § 21(b) of the 1970 act).

61. *See* Polikoff, *supra* note 29, at 7, 10-13 (explaining that the Department of Justice informed Congressman Reuss that the Department's policy after the FWQA was not to vigorously enforce the Refuse Act, but rather to defer to the FWQA and to the states). *Cf.* Mattson v. Northwest Paper, 327 F. Supp. 87, 94 (D.Minn. 1971) (quoting from Department of Justice guidelines). The Department of Justice's policy seemingly ignored Congress' intent that the FWQA not affect the Refuse Act. *See* Polikoff, *supra* note 29, at 12 (stating the Department of Justice's response to Congress' intent).

62. *See* Gerbing v. I.T.T. Rayonier, Inc., 332 F. Supp. 309 (M.D.Fla. 1971); United States v. Florida-Vanderbilt Dev. Corp., 326 F. Supp. 289 (S.D.Fla. 1971); Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323 (D.Colo. 1971); Durning v. I.T.T. Rayonier, Inc., 325 F. Supp. 446 (W.D.Wash. 1970); Bass Anglers v. U.S. Steel, 2 ERC 1204 (S.D.Ala. 1971); Bass Anglers Sportsman's Soc'y of Am. v. U.S. Plywood, 324 F. Supp. 302 (S.D.Tex. 1971); Reuss v. Moss-American, Inc., 323 F. Supp. 848 (E.D. Wisc. 1971) (the plaintiff, Rep. Henry Reuss, was the Chairman of the Subcomm. on Conservation and Natural Resources at that time).

Most courts rejected allowing a *qui tam* action (now often termed a public attorney general action) by private citizens seeking injunctive relief and criminal penalties for alleged violations of the Refuse Act. One court explained that Congress raised the notion of *qui tam* suits in its pamphlet published in 1970, entitled *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*. United States v. Florida-Vanderbilt Dev. Corp., 326 F. Supp. at 290. *See also* United States v. Northwest Paper, 327 F. Supp. 87, 89 (D.Minn. 1971) (citing to "Congressional Committee Print of 'Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways,' House Committee on Government Operations, Subcommittee on Conservation and Natural Resources," 91st Cong., 2d Sess. (1970)). *But cf.* United States v. St. Regis Paper, 328 F. Supp. 660, 665 (W.D. Wisc. 1971) (awarding Rep. Henry Reuss, Chairman of the Subcommittee on Conservation and Natural Resources, "informer's fees"). Courts did allow private actions under the Refuse Act to remedy an injury to a right of navigation or anchorage. *See generally* Gutherie v. Alabama-By-Products Co., 328 F. Supp. 1140, 1146-47 (N.D.Ala. 1971) (discussing cases), *aff'd*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946, *reh'g denied*, 411 U.S. 910 (1973). *See, e.g.*, Tatum v. Blackstock, 319 F.2d 397 (5th Cir. 1963) (property owners seeking injunction against activities on tidal flat).

Of course, the need to attempt a *qui tam* action dissipated as environmental groups were successful in their efforts to secure standing under NEPA and challenge activities in the nation's waters. *E.g.*, Izaak Walton League v. Macchia, 329 F. Supp. 504 (D.N.J. 1971) (attempting to halt dredge and fill activities in New Jersey tidal marshes). *Refuse Act Permit Program, Hearings Before the Senate Subcomm. on the Env't of the Committee on Commerce*, 92d Cong., 1st Sess. (1971).

ter CEQ],[63] the decision was made to establish a uniform policy. On December 23, 1970, therefore, President Nixon issued Executive Order No. 11574.[64] Section 1 of this Order directed the implementation of "a permit program under the aforesaid Section 13 of the Act of March 3, 1899 . . . to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks."[65] The order further required that the EPA Administrator provide advice on water quality standards and her findings, determinations and interpretations would be binding; a permit contrary to such could not be issued.[66]

The Corps reacted to this order a week later by issuing a notice of proposed rulemaking.[67] The final regulations, issued on April 7, 1971, established a permitting program for direct and indirect discharges or deposits into a navigable waterway, a tributary of such a waterway or into a waste treatment system.[68] The regulations provided that, when considering whether or under what conditions to issue a permit, the Corps would evaluate the impact of the activity on, among other factors, water quality conditions and fish and wildlife values.[69] The Corps and the EPA also entered into various memoranda of agreement for implementing the Refuse Act permitting program.[70]

Judicial intervention prevented this new regulatory program from ever becoming fully operational. After the Corps issued its regulations, users of the Grand River in Northeastern Ohio challenged the authority of the Corps to grant a permit for depositing refuse into tributaries connected to navigable waters.[71] They argued that the Refuse Act did not authorize the issuance of per-

63. The National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852, 854 (as codified at 42 U.S.C. §§ 4331-4347).

64. Executive Order No. 11574, *reprinted in* 35 Fed. Reg. 19,627 (1970).

65. *Id.*

66. *Id.* It was the coalescence of the Water Quality Program established earlier, *see supra* note 29, and the Refuse Act that highlighted the aspects of the congressional hearings in 1971. *See Water Pollution Control Legislation: Refuse Act Permit Program; Part 9: Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works United States Senate*, 92nd Cong., 1st Sess. (1971). For a discussion of the program and the Corps.' efforts before the program, *see id.* and *Refuse Act Permit Program, Hearings Before the Subcomm. on the Env't of the Senate Committee on Commerce*, 92nd Cong., 1st Sess. (1971).

67. Notice of Proposed Rulemaking, 35 Fed. Reg. 20005 (1970).

68. Final Rule, 36 Fed. Reg. 6564-65 (1971) (to have been codified at 33 C.F.R. pt. 209).

69. 36 Fed. Reg. 6566 (1971). *Id.* In accordance with the Executive Order, the regulations further provided that the Administrator's findings, determinations and interpretations on water quality standards would be binding.

70. *See* 1 LEGISLATIVE HISTORY, *supra* note 60, at 266, 269, 438.

71. Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971).

mits for depositing refuse matter into non-navigable waterways that merely serve as tributaries to navigable waters.[72] In its decision in *Kalur v. Resor*, the district court parsed the statutory language and noted that, while the language of the Refuse Act authorized the issuance of a permit for the disposal of refuse into navigable waters, Congress did not include similar language for non-navigable tributaries that flow into navigable waters.[73] This prompted the court to hold that the regulations were "*ultra vires* and of no effect."[74] The court further held that the regulations failed to satisfy the requirement under NEPA for the preparation of detailed environmental statements.[75] The court's decision, therefore, led to the temporary suspension of the Refuse Act program[76] until the following year when the Corps and Congress both acted.

The Corps responded by revising its regulatory definition of jurisdictional waters. In 1972, the Corps published an administrative definition of "navigable waters of the United States" governing the administration of Sections 9 and 10 of the RHA. The Corps defined such waters to include waters presently or in the past used for transportation in interstate or foreign commerce, all waters reasonably susceptible to such use or with reasonable improvement could be susceptible to such use, and all waters subject to the ebb and flow of the tide (up to the mean high, mean higher or ordinary high water mark, depending upon the nature of the waters).[77] This narrow administrative construction is what Congress intended to remedy when shortly thereafter it proceeded to strengthen federal pollution control requirements. The new programs established by Congress relegated the *Kalur* decision to a historical relic.

IV. FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The same year the Corps issued its newly tailored regulations

72. *Id.* at 9-10.
73. *Id.* at 10-11. *See also* United States v. Cannon, 363 F. Supp. 1045 (D.Del. 1973) (suggesting Corps' jurisdiction under the RHA does not extend to non-navigable water above mean high water line); United States v. Pot-Nets, 363 F. Supp. 812 (D.Del. 1973) (discussing jurisdiction under RHA). *But cf.* Tatum v. Blackstock, 319 F.2d 397, 399 (5th Cir. 1963) (suggesting that a permit is required for activities that would affect nearby navigable waters).
74. 335 F. Supp. at 10.
75. *Id.* at 15.
76. *See* 42 Fed. Reg. 37123 (1977).
77. 37 Fed. Reg. 18,289, 18,290 (1972).

in accordance with the *Kalur* decision, Congress established an entirely new regulatory program.[78] Overriding President Nixon's veto, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 [hereinafter FWPCA], which were intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[79] Through this Act, Congress created, *inter alia*, the National Pollution Discharge Elimination System [hereinafter "NPDES"] and a program for issuing dredge or fill permits.[80] Section 402 governed the discharge of pollutants under the NPDES; this section also directed that all permits for discharges into navigable waters under the Refuse Act would be deemed a permit under this Title—and *vice versa*, and that no further permits for discharges into navigable waters should be issued pursuant to Section 13 of the RHA.[81] More importantly, Congress added the Section 404 regulatory program for the issuance of dredge or fill permits.

As enacted, Section 404 consisted of three subparagraphs. In Section 404(a), Congress authorized the Corps to issue permits, after notice and opportunity for hearing, "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[82] "[N]avigable waters" were defined as "the waters of

78. *See generally* Charles W. Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459 (1973). Even before the *Kalur* decision, the relationship of the Refuse Act and the FWPCA sparked congressional interest during the debates on amending the FWPCA, with the Chairman of the Council on Environmental Quality advocating delegation of the permit authority to EPA. *Water Pollution Control Legislation-1971 (Proposed Amendments to Existing Legislation): Hearings Before the House of Representatives Comm. on Public Works*, 92d Cong., 1st Sess. 1546, 1551 (1971) (statement of Russell E. Train). *See also Water Pollution Control Legislation*, *supra* notes 62, 66.

79. Federal Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376 (1988), Pub. L. No. 92-500, § 101, 86 Stat. 816 (1972) (quoting § 1251 (a)) [hereinafter "FWPCA"]. The veto message focused on the alleged costs associated with the program. 1 LEGISLATIVE HISTORY, *supra* note 60, at 137-9.

80. *See* FWPCA, *supra* note 79, §§ 402, 404, 86 Stat. 816, 880-884. The NPDES program governs the discharge of any pollutant, or combination of pollutants, from a "point source" into navigable waters. 33 U.S.C. §§ 1342 (a), 1362 (12), (14) (1988). Congress also created a State water quality certification program in Section 401 of the Act. *See also* Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 21(b), 84 Stat. 91 (1970) (§ 401 predecessor). Briefly, Section 401 requires an applicant for a federal license or permit to obtain a certification—or waiver—from a state for an activity which may result in a discharge into navigable waters in any such state. 33 U.S.C. § 1341 (a) (1) (1988). *See generally* Katherine Ransel & Erik Meyers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, 7 VA. J. NAT. RESOURCES 339 (1988).

81. 86 Stat. at 880. Congress vested EPA with the authority to authorize a State "to issue permits for discharges into the navigable waters within the jurisdiction of such State," subject to various qualifications—including that any such State permitting program would have to be in accordance with the water quality criteria guidelines established by the EPA pursuant to section 304 of the Act. *Id.*

82. 33 U.S.C. § 1344(a) (1988).

the United States, including the territorial seas."[83] In Section 404(b), the Secretary of the Army was to specify each disposal site for each permit through the application of guidelines developed by the EPA pursuant to Section 403 of the Act.[84] When the application of the guidelines would prohibit the specification of the site, the Secretary was further directed to consider "the economic impact of the site on navigation and anchorage."[85] Congress also vested EPA, in Section 404(c), with veto authority over the specification of an area as a disposal site, upon certain findings.[86]

This 404 program evolved as a compromise for resolving differences between the House and Senate over the future role of the Corps in regulating discharges into navigable waters. The House, for instance, preferred giving the Corps the primary role in regulating discharges into navigable waters and oceans. Members of the House expressed their concern with the relationship between the Corps' permitting authority under the Refuse Act and any new similar permitting regime administered by another agency such as the EPA.[87] Thus, the proposed House bill H.R. 11896 would have authorized the Corps to issue permits "for the discharge of dredged or fill material into navigable waters, when the Secretary determines that such discharge will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities."[88] The EPA essentially would have served an advisory function, issuing guidelines and designating certain areas as "critical areas," with the Corps capable of authorizing activities in such areas where there is "no economically feasible alternative reasonably available."[89] Furthermore, the House would have defined navigable waters simply as those "navigable waters of the United States," without any reference to wetlands or even tributaries.[90] Yet, in

83. 33 U.S.C. § 1362(7) (1988).
84. 86 Stat. at 884.
85. *Id.*
86. *Id.*
87. H.R. REP. NO. 911, 92d Cong., 1st Sess. 124-26 (1971), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 811-813 (discussing proposed section 402).
88. H.R. 11896, 92nd Cong., 2d Sess. § 404 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 1063.
89. H.R. 11896, 92nd Cong., 2d Sess. § 404 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 1064. The House intended that "critical areas" encompass "shellfish beds, breeding or spawning areas, highly susceptible resort beaches, and similar areas." H.R. REP. NO. 911, 92d Cong., 2d Sess. 129 (1971), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 816. The Corps would have been authorized to consult with the Administrator of the EPA when applying the guidelines, but the guidelines were not necessarily binding. *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 129-30 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 816-17.
90. H.R. 11896, 92d Cong., 2d Sess. § 502(8) (1972), *reprinted in* 1 LEGISLATIVE

oft-quoted report language accompanying the Bill, the House intended that " 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations . . . made for administrative purposes."[91] This apparently reflects the House's efforts to ensure that the Corps would not limit the scope of jurisdictional waters beyond those waters judicially defined as "navigable."[92]

The Senate, on the other hand, would have entrusted The EPA with the primary responsibility for regulating all discharges of pollutants. The original Senate Bill S. 2770, introduced by Senator Edmund S. Muskie, sought to treat all discharges of pollutants equally, with the discharge of dredged or fill material effectively regulated by the EPA under the NPDES system.[93] When debating an amendment by Senator Ellender which would have added a Section 404 program authorizing the Corps to regulate "discharge of dredged materials into the navigable waters at specified disposal sites[,]"[94] Senator Muskie explained that the selection of EPA as the regulator reflected a recognition that the Corps' expertise was in assessing the impact of dredging activities on navigation not on the impact of "disposing of dredged spoil in particular locations . . ."[95] In lieu of Senator Ellender's proposed Section 404 amendment, Senator Muskie offered a compromise proposal (which was adopted by the Senate) that would have required that any application for a permit for the discharge of dredged spoil into navigable waters would have to be accompanied by a Corps' certification "that the area chosen for disposal is the only reasonably available alternative," in which instance a permit would have to be issued" unless the Administrator [of the EPA] finds that the matter to be disposed of will adversely affect municipal water supplies, shellfish beds, wildlife, fisheries (including spawning and breeding areas) or

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HISTORY, *supra* note 60, at 373. As originally introduced, H.R. 11896 would have defined "navigable waters" as those "navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." H.R. 11896, 92d Cong., 1st Sess. § 502(8) (1971), *reprinted in Water Pollution Control Legislation-1971 (H.R. 11896, H.R. 11895): Hearings Before the House Comm. on Pub. Works*, 92d Cong., 1st Sess. 158 (1971).

91. H.R. REP. NO. 911, 92d Cong., 2d Sess. 131 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 818.

92. *See* James K. Jackson & William A. Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, Its Past and Future*, 7 PUB. LAND L. REV. 21, 31 (1986).

93. S. 2770, 92nd Cong., 1st Sess. §§ 402, 502(8) (1971), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 60, at 1386-89, 1489, 1534, 1685-94.

94. 2 LEGISLATIVE HISTORY, *supra* note 60, at 1386.

95. 2 LEGISLATIVE HISTORY, *supra* note 60, at 1388.

recreation areas . . . ."[96] Additionally, the Committee Report accompanying S. 2770 demonstrates the Senate's understanding that the term "navigable waters" had been administratively defined too narrowly, and that the term should not be so limited.[97]

When the competing proposals reached the Conference Committee, the Committee resolved the differences between the amendments proposed by the two houses by combining aspects of both the House and Senate versions. The Conference Committee adopted the structure of the 404 program envisioned by the House, but it significantly altered the role that the EPA would play. Although the Committee acceded to the House's proposal for a Corps administered permitting program, it resolved the Senate's concerns by giving the EPA two critical functions. First, the EPA would establish guidelines based on criteria comparable to those applicable to the territorial seas and contiguous zone of the oceans, which guidelines would govern the Corps' administration of the program.[98] Second, the EPA would have the authority to prohibit a discharge whenever the discharge would have an unacceptable adverse effect on those functions or values defined in the House proposal as "critical areas" and embodied in Senator Muskie's compromise amendment to the Senate proposal.[99] The Committee also adopted the Senate's version for defining "navigable waters," suggesting that the definitional provisions in the two bills were "basically the same."[100]

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96. 2 LEGISLATIVE HISTORY, *supra* note 60, at 1392.

97. S. REP. NO. 414, 92d Cong., 1st Sess. 77 (1971), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 60, at 1495 ("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."). The Senate's definition of navigable waters included waters of the United States and their "tributaries." S. 2770, 92d Cong., 1st Sess. § 502(h) (1971), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 60, at 1698.

98. S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 141-142 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 324-25.

99. *Id.*

100. S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 143 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 326. During the debates in the House on approving the Conference Report, Congressman John D. Dingell of Michigan explained that the definition of "navigable waters" was intended to reflect waters in a "geographical sense" rather than "in the technical sense we sometimes see in some laws." 118 CONG. REC. 33,756-57 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 250. After reviewing the broad definition of navigable waters established through judicial decree (waterways susceptible of being used in commerce, as well as areas obstructed by falls, rapids, sand bars, currents, floating debris, etc.), he further indicated that "this new definition clearly encompasses all water bodies, including mainstreams 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." *Id.* Senator Muskie's prepared remarks for urging passage of the Conference Report repeated the critical language from the House Report to H.R. 11896, as well as the following observation:

Soon after Congress passed the 404 program created by the Conference Committee, courts invoked aspects of the CWA legislative debate, particularly the discussion concerning the definition of "navigable waters," to support an expansive interpretation of the Corps' jurisdiction. In *United States v. Holland*,[101] for instance, the United States sought to enjoin the discharge of materials into non-navigable manmade canals and mangrove wetlands which were periodically inundated by tides above the mean high water line—otherwise referred to as inter-tidal wetlands.[102] Defendants argued that such inter-tidal wetlands were non-jurisdictional, even though the waters were hydrologically linked to the Papy Bayou. The court held that the FWPCA was not limited to traditional tests of navigability.[103] The court began by noting that jurisdiction extended to "navigable waters," but navigable waters were defined as "waters of the United States, including the territorial seas[,]" with no limiting language.[104] The court reasoned that Congress' intent to abandon any historic navigability limitation was evident both from the statutory definition as well as from the legislative history.[105] Polluting non-navigable canals that empty into a bayou arm of the Tampa Bay, therefore, "is clearly an activity Congress sought to regulate."[106] Although the court considered jurisdiction over non-navigable mangrove wetlands above

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> 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.

118 CONG. REC. 33,756-57 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 178.

101. 373 F. Supp. 665 (M.D. Fla. 1974).

102. United States v. Holland, 373 F. Supp. 665, 668, 676 (M.D. Fla. 1974) The United States charged the Defendants with violating Sections 10 and 13 of the RHA, as well as section 301 of the FWPCA. *Id.*

103. *Id.* at 671.

104. *Id.*

105. *Id.* The court reviewed the legislative history surrounding S. 2770 and H.R. 11896. *Id.* at 671-72. It noted that the restrictive definition of navigable waters in H.R. 11896 was deleted in conference, with a joint explanatory statement that the committee of conference intended that the term be given the broadest possible constitutional interpretation. *Id.*

106. *Holland*, 373 F. Supp. at 673. The Corps' regulations after *Holland* provided that manmade canals would be regulated where the canals were either navigable or connected to navigable waters "in a manner which affects their course, condition, or capacity." 39 Fed. Reg. 12,123 (1974). Such affects included fish and wildlife values. *Id.*

the mean high water line to pose a more difficult issue, it nevertheless held that the need to control pollution at the source necessitated jurisdiction.[107]

A year after the *Holland* decision, another court held that the Corps was not exercising its authority broadly enough. In *Natural Resources Defense Council, Inc. v. Callaway*,[108] conservation groups challenged the Corps' implementation of the 404 program.[109] The Corps had adopted an administrative definition of navigable waters that it believed was based on judicial precedent and constitutional limitations. This definition limited jurisdictional wetlands to waters subject to the ebb and flow of the tide, waters presently or in the past used for interstate commerce, and waters susceptible in the future for use for the purposes of interstate commerce.[110] The court determined that the term "navigable waters" is not limited to the traditional tests of navigability and that Con-

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107. *Holland*, 373 F. Supp. at 675-76. "Pollutants have been introduced into the waters of the United States without a permit and the mean high water mark cannot be used to create a barrier behind which such activities can be excused. The environment cannot afford such safety zones." *Id.* The court added that its decision under the FWPCA rendered unnecessary the need to resolve the issue under sections 10 and 13 of the RHA. *Id.* at 676.

The Corps later observed that other courts had upheld the broad exercise of jurisdiction. 42 Fed. Reg. 37,124 (1977). *See* Leslie Salt Co. v. Froehlke, 403 F. Supp. 1292 (N.D.Cal. 1974) (jurisdiction not limited to traditional "navigable" waters), *modified in part and rev'd in part*, 578 F.2d 742 (9th Cir. 1978); Sun Enterprises, Ltd. v. Train, 394 F. Supp. 211, 223-24 (S.D.N.Y. 1975) (broad scope of Corps' jurisdiction), *aff'd*, 532 F.2d 280 (2d Cir. 1976); United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349 (W.D.Ky. 1973), *aff'd*, 504 F.2d 1317 (6th Cir. 1974); United States v. Lewis, 355 F. Supp. 1132 (S.D. Ga. 1973) (discussing history of program and *Zabel* decision, holding that Corps jurisdiction extends to marshlands adjacent to tidal creek). *But cf.* United States v. Cannon, 363 F. Supp. 1045, 1051 (D.Del. 1973) (suggesting that, under RHA, no jurisdiction over activities in uplands that might have indirect impact on navigable waters).

108. 392 F. Supp. 685 (D.D.C. 1975).

109. Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D. D.C. 1975).

110. *Proposed Policy, Practice and Procedure: Permits for Activities in Navigable Waters or Ocean Waters*, 38 Fed. Reg. 12,217 (1973). *Cf.* 37 Fed. Reg. 18,289 (1972) (previous revised definitions). On May 10, 1973, the Corps had proposed new 404 regulations. The Corps published its final regulations on April 3rd of the next year, adopting, *inter alia*, a wetlands policy and defining navigable waters as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 39 Fed. Reg. 12,115, 12,119 (1974). The regulations further provided that the Corps would undertake a public interest balancing process when determining whether to issue a permit, a process which included consideration of such factors as the effect on wetlands. *Id.* at 12,121. Wetlands were "those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage." *Id.*

These regulations effectively limited the 404 program to waters regulated under the RHA: waters presently used, used in the past or susceptible to being used, for transportation in interstate or foreign commerce, as well as waters subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher water mark on the West Coast), and their adjacent wetlands. Conservation groups expressed concern that the 404 program excluded a considerable portion of coastal and isolated wetlands and tributary streams feeding into navigable waters and lakes, as well as other waters. *See* 42 Fed. Reg. 37,123-24 (1977) (discussing 1974 regulatory revisions).

gress intended that jurisdiction be extended "over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."[111] Consequently, the court held that the Corps' proposed definition in 39 Federal Register 12119 (and 33 C.F.R. § 209.260) contravened the FWPCA and ordered that revised proposed regulations be published within fifteen days and final regulations 30 days thereafter.[112]

On July 25, 1975, the Corps complied by issuing a revised statement of its jurisdiction under the FWPCA.[113] The regulations established a lengthy classification of jurisdictional waters. In the regulations, navigable waters of the United States were defined as those waters that either have been used in the past or are now used or susceptible of being used for interstate commerce landward to the head of navigation and the ordinary high water

111. *Callaway*, 392 F. Supp. at 686.

112. *Id. See also* PFZ Properties, Inc. v. Train, 393 F. Supp. 1370 (D.D.C. 1975) (relying on *Zabel*, *Holland* and *Callaway* to conclude that jurisdiction appropriate to prevent destruction of mangrove forest which would impair the biological integrity of nearby navigable waters of the U.S.). Both the Senate and House held hearings on the 404 program after the court's decision. *See Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Sen. Comm. on Pub. Works*, 94th Cong., 2d Sess. (1976); *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 Subcomm. on Water Resources of the House Comm. on Pub. Works and Transp.*, 94th Cong., 1st Sess. (1975). *See generally* Lee E. 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) (discussing reaction to *Callaway*); William F. Schneider, *Federal Control Over Wetland Areas: The Corps of Engineers Expands Its Jurisdiction*, 28 U. FLA. L. REV. 787 (1976) (briefly describing development of Corps program).

113. 40 Fed. Reg. 31,320 (1975). Although the EPA and the Corps disagreed over whether 404(b) guidelines were binding, the EPA finally published its interim final 404(b) guidelines on September 5, 1975. 40 Fed. Reg. 41,292 (1975). The proposed regulations issued by the Corps on May 6, 1975, had presented four alternatives for public comment: Alternative 1 would have extended the Corps' jurisdiction to practically all coastal and inland artificial or natural waterbodies, including navigable waters and their tributaries as well as intrastate waters used in interstate commerce—this definition generally followed the Corps' definition issued on May 6, 1975; Alternative 2 would have included navigable waters and primary tributaries, as well as coastal waters generally shoreward to their mean high water mark; Alternatives 3 and 4 focused more heavily on state certification. 40 Fed. Reg. 19,766 (1975).

The Corps purportedly preferred a limited definition of waters of the United States coupled with a state certification and authorization program incorporating the Section 401 process. *Id.* at 19,767-68. The Corps, in effect, warned that Alternative 1 would "regulate all disposal of dredged or fill material in virtually every wetland contiguous to coastal waters, rivers, estuaries, lakes, streams, and artificial waters regardless of whether those wetlands are regularly or only periodically inundated . . ." *Id.* at 19,767.

By contrast, when the EPA issued proposed guidelines, it indicated a preference for alternative 1, which it stated would minimize the damage to wetlands. 40 Fed. Reg. 19,794 (1975). The EPA's regulations, for instance, defined navigable waters to include all navigable waters and their tributaries, interstate waters, intrastate lakes, rivers, and streams utilized by interstate travelers for recreational or other purposes, intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce or which are utilized by industries (industrial and agricultural) in interstate commerce. 40 Fed. Reg. 41,292, 41,297 (1975).

mark,[114] as well as waters subject to the ebb and flow of the tide shoreward generally to their mean high water mark.[115] Navigable waters further included:

> 1) coastal waters subject to the ebb and flow of the tide shoreward generally to their mean high water mark;
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> 2) coastal wetlands, mudflats, swamps, and other similar areas that are contiguous or adjacent to other navigable waters; and "coastal wetlands" includes marshes and shallows and means 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;
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> 3) rivers, lakes, streams and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;
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> 4) all artificially created channels and canals used for recreation or other navigational purposes that are connected to other navigable waters and landward to their ordinary high water mark;
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> 5) all tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;
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> 6) interstate waters landward to their ordinary high water mark and up to their headwaters;
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> 7) intrastate lakes, rivers, and streams landward to

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114. Ordinary high water mark, when used in connection with inland fresh water, was defined as:

> the line on the shore established by analysis of all daily high waters. It is established as that point on the shore that is inundated 25% of the time and is derived by a flow-duration curve for the particular water body that is based on available water stage data. It may also be estimated by erosion or easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation or its inability to grow, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area . . . .

40 Fed. Reg. at 31,325 (1975).

115. Mean high water mark, when used in connection with ocean and coastal waters, was defined as:

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

Id.

> their ordinary high water mark and up to their headwaters that are utilized by interstate travels for water related recreational purposes, for the removal of fish sold in interstate commerce, for industrial purposes by industries in interstate commerce or in the production of agricultural commodities sold or transported in interstate commerce;
>
> 8) freshwater wetlands, marshes, swamps, shallows and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation, where these areas are periodically inundated and are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction; and
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> 9) other waters the Corps determines necessitate regulation for the protection of water quality as expressed in the guidelines—such as intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to previously identified navigable waters.[116]

The Corps proposed to phase in this expanded permitting program over a two year period.[117] Under Phase I, the regulations became immediately effective for coastal waters and their adjacent wetlands, along with already regulated inland rivers, lakes and streams and their contiguous or adjacent wetlands.[118] Phase II became effective on September 1, 1976 (originally scheduled for July 1, 1976),[119] and extended the program to "primary tributaries (the main stems of tributaries directly connecting to navigable waters of the United States), their contiguous or adjacent wetlands, and all lakes."[120] Finally, Phase III, which included all navigable waters, was to become operative the following year.[121]

These regulations and accompanying court decisions generated considerable attention, resulting in further review of the

116. 40 Fed. Reg. at 31,324-25 (1975).
117. *Id.* at 31,321 (1975).
118. *Id.*
119. *Id.* In United States v. Byrd, 9 ERC 1275 (N.D. Ind. 1976), defendants conducted activities in wetlands prior to the Phase II date, as extended by Executive directive, and argued that the Corps could not assert jurisdiction until the effective date of the Presidential proclamation. *Id.* at 1276. The court rejected this argument and issued an injunction. *Id.* at 1280.
120. 40 Fed. Reg. at 31,321 (1975). Lakes were defined as those "natural bodies of water greater than five acres in surface area and all bodies of standing water created by the impounding of navigable waters. . ."—excluding stock watering ponds and settling basins not created by such impoundments. *Id.* at 31,325.
121. *Id.* at 31,321.

national policy toward protecting wetlands. In 1975, 1976, and 1977, Congress explored the appropriate scope of the Corps' jurisdiction.[122] On May 24, 1977, President Carter also entered the fray by issuing Executive Order No. 11990, governing the protection of wetlands on federal property.[123] That Order sought to limit destructive activity in federally owned wetlands whenever there was a practicable alternative.[124] And the Corps, meanwhile, promulgated revised regulations in 1977.[125]

The agency's regulatory revisions memorialized the Corps' effort to reorganize and clarify those areas that would be regulated under the 404 program. In this reorganization, the Corps incorporated the phrase "waters of the United States" for implementing the 404 program (to distinguish it from Sections 9 and 10 of the RHA), and it consolidated into four categories the list of jurisdictional waters previously identified in the 1975 regulations.[126] Category 1 included coastal and inland waters, lakes, rivers, and streams that are navigable, including adjacent wetlands; Category 2 included tributaries to navigable waters, including adjacent wetlands—excluding nontidal drainage and irrigation ditches feeding into navigable waters; Category 3 included interstate waters and their tributaries, including adjacent wetlands; and Category 4 included all other waters of the United States, "such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[127]

These revised regulations also included a specific discussion of

122. The regulations, for instance, prompted an immediate congressional inquiry. H.R. REP. NO. 139, 95th Cong., 1st Sess. (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1217. Efforts to limit the Corps' jurisdiction were successful twice in the House but narrowly defeated in the Senate. Senator Robert Dole of Kansas, for example, explained that he introduced S.1343 in 1974 to redefine navigable waters after the *Holland* decision. 123 CONG. REC. S13,567 (daily ed. Aug. 4, 1977). The Senator, along with a number of other members, also urged that the President issue a temporary moratorium on the implementation of Phase III, in order to allow time for congressional action. The President denied the request. *Id.* at S13,566.

Congress meanwhile also evinced its interest in protecting wetlands, when it passed the Wetlands Loan Act, 16 U.S.C. §§ 715k-3, 715k-5 (1988) (Pub. L. 94-215). *See* Senate Comm. on Commerce, Wetlands Loan Extension Act of 1976, Report Accompanying H.R. 5608, S. REP. NO. 594, 94th Cong., 2d Sess. (1976).

123. Executive Order No. 11990, Protection of Wetlands, *reprinted in* 42 Fed. Reg. 26,961 (1977).

124. *Id. See also* Executive Order No. 11988, *reprinted in* 42 Fed. Reg. 26,951 (1977) (Floodplain Management). In response to these orders, some agencies developed guidelines for protecting wetlands. *E.g.*, 45 Fed. Reg. 7,889 (1980) (Bureau of Land Management).

125. 42 Fed. Reg. 37,122 (1977).

126. 42 Fed. Reg. at 37,127 (1977).

127. *Id.*

the Corps' jurisdiction over wetlands. The Corps rejected employing traditional tests, such as the mean tide line or ordinary high water mark.[128] The Corps noted that the hydrologic interconnection of wetlands and other waters is not dependent upon such artificial lines.[129] "For this reason," the Corps concluded, "the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."[130] The Corps further refined its definition of wetlands, in part, by excluding the requirement for periodic inundation:[131]

> Those acres 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.[132]

In response to concerns of uncertainty surrounding the need for a permit when performing certain activities—primarily in Category 4 areas, the Corps also attempted to simplify the program by establishing a general permitting process and by allowing, on a nationwide basis, discharges into i) nontidal rivers and streams above the headwaters, and ii) lakes less than 10 acres in surface area in accordance with certain management practices.[133] Other activities, such as certain farming practices, were exempted.

V. THE CLEAN WATER ACT

Shortly after the Corps issued these regulations and still in 1977,[134] Congress amended the FWPCA and once again rendered

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128. 42 Fed. Reg. 37, 128-29 (1977).

129. *Id.*

130. 42 Fed. Reg. at 37,128.

131. *Id.* The Corps further explained that wetlands included isolated wetlands. *Id.* at 37,129.

132. *Id.* at 37,128.

133. *See.*

134. It has been suggested that members in Congress were not fully aware of these regulations or of the changes made to the 1975 regulations when it debated the 1977 amendments. *See, e.g.*, Jackson & Nitze, *supra* note 92, at 36, n.73. Although the House sponsor of the legislation, Congressman Roberts, expressly referred to these regulations when discussing the Conference Report, his remarks suggest that he perceived little difference between these regulations and the preceding ones. 123 CONG. REC. H12,935 (daily ed. Dec. 15, 1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 348. Admittedly, most of the debate focused on the 1975 regulations and the three-phased program. *Id.* passim.

the Corps' regulations obsolete.[135] These amendments generally altered the 404 program in three ways. First, Congress authorized the issuance of "general permits" on a national, regional or statewide basis.[136] Second, Congress provided certain exemptions from the program: for normal farming, silviculture, ranching, the maintenance of currently serviceable structures, the construction or maintenance of farm or stock ponds or irrigation ditches, the maintenance of drainage ditches, the construction of temporary sedimentation basins, and for the construction or maintenance of farm or forest roads.[137] Activities subject to an approved state program under section 208 of the Act were also exempted.[138] And third, Congress added section 404(g), which authorizes a state to administer its own individual and general permit program for the discharge of dredge and fill material.[139] Yet, in so providing, Congress expressly excluded the states from adopting a program that would apply to waters navigable in fact "shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast," including adjacent wetlands.[140]

While the legislative debate over these amendments portrays Congress' commitment toward protecting "wetlands"—however the members understood the term, the debate more importantly illustrates Congress' objective of building on the Corps' regulatory program. In so doing, Congress clearly rejected limiting the program to traditionally navigable waters, which might have excluded tributaries that flow into navigable waterways as well as adjacent wetlands, marshes, swamps and bogs lying above the ordinary high water mark. But equally evident from these debates is that Congress acknowledged the Corps' three categories of "waters of the United States" and envisioned that states would, at the very least, regulate those more jurisdictionally attenuated areas.

The original House bill as introduced by Congressman Roberts, H.R. 3199, would have narrowly circumscribed those waters regulated under the 404 program. In particular, Section 16 of the

135. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).
136. *Id.* at 1600.
137. *Id.* at 1600-1601.
138. *Id.* at 1601.
139. *Id.*
140. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1601 (1977). 33 U.S.C. § 1344(g) (1988).

bill would have modified Section 404 by including only dredging and filling activities in carefully defined navigable waters and adjacent wetlands.[141] Navigable waters were defined as either waters navigable in fact or reasonably susceptible to being navigable in interstate or foreign commerce.[142] Adjacent wetlands were defined as wetlands contiguous or adjacent to navigable waters, periodically inundated, and normally characterized by the prevalence of appropriate vegetation, depending upon whether the waters are freshwater or salt/brackish water.[143] Discharges of dredge or fill material into waters other than navigable waters and their adjacent wetlands would not have been prohibited unless otherwise subject to regulation under the CWA or the RHA. The bill also would have authorized the Secretary of the Army to delegate to a state any or part of the Corps' regulatory functions over adjacent wetlands[144] and wholly intrastate freshwater lakes, except for federal government projects.[145] Moreover, Section 16 would have authorized the Corps to issue general permits, as well as to provide exemptions for normal farming, silviculture, the maintenance of dikes, dams and levees, the construction and maintenance of farm or stock ponds and irrigation ditches and certain federal and federally assisted projects.[146] The limited scope of

141. If a State entered into a joint agreement with the Corps, the Corps would have been authorized to regulate the discharge of dredged or fill material "in waters other than navigable waters and in wetlands other than adjacent wetlands. . . ." H.R. 3199, 95th Cong. 1st Sess. 17 § 16(f) (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1158.

142. H.R. 3199, 95th Cong., 1st Sess. 39 (1977) (as reported), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1183; H.R. 3199, 95th Cong., 1st Sess. 15 (1977) (as introduced), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1157. Such waters extended shoreward to their ordinary high water mark including water subject to the ebb and flow of the tide "shoreward to their mean high water mark [and] mean higher high water mark on the west coast." H.R. 3199, 95th Cong., 1st Sess 39 (1977) (as reported).

143. These definitions reflected dissatisfaction with the full implementation of the Corps' three-phased regulatory program adopted in 1975, and they would have limited the effect of the decision in Natural Resources Defense Council, Inc. v. Calloway, 392 F. Supp 685 (1975). In the report accompanying H.R. 3199, the Committee explained that its definition of "navigable waters" retained the definition of the term as it has evolved, with the exception that historically navigable waters would be excluded. H.R. REP. NO. 139, 95th Cong., 1st Sess. (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1215-19.

144. H.R. 3199, 95th Cong., 1st Sess. 18 § 16(j) (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1160. *See also* H.R. REP. NO. 139, 95th Cong., 1st Sess. (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1215 (permiting "authority over wetlands adjacent to navigable waters may be delegated to a State if the State has the authority, responsibility and capability to exercise the authority of the delegation . . .").

145. The Committee added a subsection (k) that included authorizing a delegation of authority over freshwater lakes. H.R. 3199, 95th Cong., 1st Sess. § 16(k) (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1186.

146. Section 16 resembled the Wright Amendment to H.R. 9560 of the prior year. H.R. REP. NO. 139, 95th Cong., 1st Sess. (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1220. *See also* 123 CONG. REC. H3,029 (daily ed. April 5, 1977) (statement of Cong. Roberts), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1276. In the Committee Report accompanying H.R. 3199, the Committee explained that the existing

Section 16 aroused proponents of regulating activities in inland and coastal wetlands.[147] Congressman McKinney, for instance, supported virtually all of H.R. 3199, except the amendments to the 404 program that he feared would leave unregulated a considerable percentage of the nation's swamps and marshlands.[148]

By contrast, Section 49 of Senate Bill S. 1952, introduced by Senator Edmond Muskie and as reported out of committee, proposed to amend Sections 402 and 404 of the FWPCA by including certain provisions affecting the 404 program. Generally, the Senate Bill proposed to retain the then existing broad definition of navigable waters,[149] and it sought a greater degree of state regulatory oversight than that proposed by the House bill. Under the proposed Senate amendments to Section 402, the 404 program would have been suspended for activities in a state that received approval from EPA for a dredge and fill permit program. Any such program would include:

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404 program posed a substantial threat to the agriculture and forest industries. The Corps had even hinted as much in a press release that it later retracted. The Committee Report noted that the Corps was attempting to address the concerns of these industries by issuing general permits, but there was "no assurance that such permits upon challenge will not be declared invalid." H.R. REP. No. 139, 95th Cong., 1st Sess. (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1218. Section 16, therefore, proposed to add a general permitting program as well as exemptions for normal farming, silviculture and ranching, etc. Congressman Don H. Clausen, of California, for instance, indicated that he would leave to the Conference Committee the appropriate scope of Corps' jurisdiction, but emphasized the need for these exemptions and for a moratorium on implementation of Phase III of the Corps' regulations. 123 CONG. REC. H3,033 (daily ed. April 5, 1977). *See also* Statement of Cong. Mineta, *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 1305 (concerning the limited protection of wetlands and hoping issue would be addressed in conference).

147. *See, e.g.*, 123 CONG. REC. H3,031 (daily ed. April 5, 1977) (statement of Cong. William H. Harsha of Ohio), 123 CONG. REC. H3,031 (daily ed. April 5, 1977) (statement of Cong. Edgar), 123 CONG. REC. H3,047 (daily ed. April 5, 1977) (statement of Cong. Bonoir); 123 CONG. REC. H3,046 (daily ed. April 5, 1977) (statement of Cong. Lehman).

148. 123 CONG. REC. H3,034-35 (daily ed. April 5, 1977). McKinney preferred state regulation, albeit recognizing that most state programs were too weak to accomplish the result. *Id.* He opposed limiting the program to navigable waterways, as proposed in the bill. Instead, he supported the Cleveland-Harsha amendment "to restore the broader definition of waters or wetlands now in the law." *Id.* at H335. The amendment purportedly was drafted to avoid needless regulation by exempting routine agriculture and ranching activities, as well as authorizing the issuance of general permits for "practices having minimal environmental impacts, such as construction of logging roads and homebuilding."

149. The Committee Report provided:

> The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.

S. REP. NO. 370, 95th Cong., 1st Sess. 75 (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 708.

> all navigable waters within the State except any coastal waters of the United States, subject to the ebb and flow of the tide, including any adjacent marshes, shallows, swamps, and mudflats, any inland waters of the United States that are used, have been used or are susceptible to use for transport of interstate or foreign commerce, including any adjacent marshes, shallows, swamps and mudflats.[150]

The bill also proposed to amend 404 by authorizing a state to assume control over navigable waters other than as specified in the amendment to Section 402.[151] Permits would not have been required for, *inter alia*, certain farming and forestry activities, as well as for activities identified in section 208 under an approved state best management practice plan for placement and nonpoint source activities.[152] Depending upon whether there was an approved state program, either the Corps or a state would have been authorized to issue general permits for activities with only minimal adverse environmental effects.[153]

The Committee Report accompanying S. 1952 indicates that the proposed amendments were intended to address the destruction of the nation's wetlands, bays, estuaries and deltas, "(a) by providing general delegation authority to the States; (b) by specifying exempt activities; and (c) by bringing the program under the general procedures of Section 402."[154] The report proposed Section 208, as it would be amended, as "undoubtedly the logical element for dealing" with such problems. States would assume primary responsibility for protecting uplands, while the federal govern-

150. S. 1952, 95th Cong., 1st Sess. § 49(a) (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 622.

151. S. 1952, 95th Cong., 1st Sess. § 49(b) (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 622-23.

152. Under the proposed language, a State approved program under Section 208 would have obviated the need for a permit under Sections 402 or 404. S. 1952, 95th Cong., 1st Sess. § 49(e)(1), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 623. (The bill further proposed to amend section 208 by requiring that a statewide regulatory program under section 303 had to include a process to identify and control the placement of dredged and fill material and other pollutants adversely affecting wetlands and other critical aquatic resources. *Id.* § 49(g)(1) at 626-28.)

153. S. 1952, 95th Cong., 1st Sess. § 49(b) (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 625.

154. S. REP. NO. 370, 95th Cong., 1st Sess. 10-11 (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 644-45. The report explained that such areas provide important food supply, and spawning grounds for fish as well as habitat for wildlife. *Id.* When commenting on the committee bill, Senator Stafford of Vermont noted that "[t]he section 404 program as outlined in the committee bill will be a successful and reasonable process for protecting inland and coastal waters, including wetlands, from adverse environmental effects resulting from the discharge of dredged or fill material." 123 CONG. REC. S13,545 (daily ed. August 4, 1977).

ment retained principal responsibility for regulating *activities* that harmed the nation's waters. The report acknowledged that states might be reluctant to develop the necessary measures for protecting upland wetlands and navigable waters, but an overriding federal presence would be unwarranted until such time as state regulation proved ineffective.[155] When debating the bill as reported out of committee, Senator Lloyd Bentsen of Texas proposed amending S. 1952 to limit the Corps' jurisdiction to navigable waters and adjacent wetlands, while permitting states to designate additional waters that should be covered in the Corps' administration of its program.[156] This amendment, ultimately rejected, was criticized because it would have removed jurisdiction over wetlands in Phase II and III waters.[157]

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155. S. REP. NO. 370, 95th Cong., 1st Sess. 10-11 (1977), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 60, at 644-45.

156. *See* 123 CONG. REC. S13,555-56 (daily ed. Aug. 4, 1977). Senator Bentsen's proposal responded to his concern that the proposed amendments would be a shadow federal program unnecessarily taxing states with the administrative burden of implementation. *Id.* at S13,555.

157. Senator Gary Hart of Colorado warned:

> The fact of the matter is that if this amendment is adopted it will remove 98 percent of all the rivers, streams, and lakes from the protection program which the Congress has adopted. It will remove 85 percent of the wetland areas of this country from this kind of necessary national and Federal protection. It will also allow coverage of the above waters and wetlands only if a State decides to take action.

123 CONG. REC. S13,557 (daily ed. Aug. 4, 1977). Senator Stafford responded that:

> [a]fter extensive deliberation, the committee amendment rejects the redefinition of navigable waters. Instead, the committee amendment insures continued protection of the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and similar areas that lie outside the corps program in the so-called Phase I waters'.

123 CONG. REC. S13,558 (daily ed. Aug. 4, 1977). Similarly, Senator John Chafee of Rhode Island added:

> The part of this amendment that particularly concerns me is the part that deals with our wetlands. It is hard to believe that at least 75 percent of our wetlands are covered by the so-called phase II and phase III waters, which, under this amendment, would be very drastically removed from Federal jurisdiction. The amendment presented by the Senator from Texas would leave many of our Nation's ecologically important wetlands with no protection and many with uncertain protection from discharges of dredged or fill materials. Such discharges are potentially destructive to the integrity of wetlands, streams, and rivers, and must be regulated if we are to reach the national goal of restoring the quality of our waters.

123 CONG. REC. S13,560 (daily ed. Aug. 4, 1977). *See also* 123 CONG. REC. S13,564 (daily ed. Aug. 4, 1977) (statement of Senator Muskie); 123 CONG. REC. S13,561-2 (daily ed. Aug. 4, 1977) (statement of Senator Howard Baker of Tennessee). *But cf.* 123 CONG. REC. S13,563 (Aug. 4, 1977) (statement of Senator Pete Domenici of New Mexico) (supporting Senator Bentsen's amendment); 123 CONG. REC. S13,565 (daily ed. Aug. 4, 1977) (statement of Senator John Tower of Texas) (urging a more limited definition of protected waters and wetlands); 123 CONG. REC. S13,566-68 (daily ed. Aug. 4, 1977) (statement of Senator Dole) (discussing the history and scope of the 404 program, and supporting Senator Bentsen's amendment, arguing that it was essential to the farm industry). Senator Bentsen's amendment was rejected by a close 51 to 45 vote. 123 CONG. REC. S13,571 (daily ed. Aug. 4, 1977).

The House and Senate went into conference to mediate their differences, with the conferees opting to retain the broad scope federal jurisdiction,[158] along with certain exemptions and an opportunity for state administered programs. The Conference substitute essentially incorporated the three phases of jurisdictional waters identified in the Corps' 1975 regulations. The Corps would exercise jurisdiction over waters in all three categories, but a state could supersede the federal permitting program for Phase II and III waters with an approved state program.[159] In sections (g) through (l) of the proposed amendments to section 404, the substitute established "a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into Phase II and Phase III waters after the approval of a program by the Administrator."[160] States also could administer their own permitting program for "dredged or fill material into navigable waters other than traditionally navigable waters and adjacent wetlands" upon the approval of the EPA, which would suspend the federal program over those waters.[161] The Conference substitute adopted language authorizing the issuance of general permits for activities causing only minimal adverse effects. The exemptions from the

158. When presenting the conference report to the Senate, Senator Muskie explained that the conference substitute "follow[ed] the Senate bill by maintaining the full scope of Federal regulatory authority over all discharges of dredged or fill material into any of the Nation's waters." 123 CONG. REC. S19,653 (daily ed. Dec. 15, 1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 470.

159. *See* 123 CONG. REC. 19,658 (daily ed. Dec. 15, 1977) (statement of Senator Stafford), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 484-85; *id.* at 19,675 (statement of Senator Baker); *id.* at H12,936 (statement of Cong. Roberts). States, however, were not precluded from regulating Phase I waters considered navigable solely because of their historical use. *Id.*

160. H. CONF. REP. NO. 830, 95th Cong., 1st Sess. 101 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 285.

> These latter waters are considered more appropriate for State regulation rather than Federal since they do not support interstate commerce either in their present state or with reasonable improvement. (A State can, however, regulate the discharge of dredge or fill materials into these so-called phase I waters where it takes over the administration of a general permit issued by the corps or under an EPA approved section 208 program. . . .)

123 CONG. REC. H12,936 (daily ed. Dec. 15, 1977) (statement of Cong. D'Amours), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 358.

161. H. CONF. REP. NO. 830, 95th Cong., 1st Sess. 104 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 288. Congressman Dingell impliedly warned that transferring such authority to the states might result in the loss of invaluable wetlands. *But cf.* 123 CONG. REC. S19,676 (daily ed. Dec. 15, 1977) (statement of Senator Malcolm Wallop of Wyoming) ("I do not believe that the amendments reduce the effectiveness of the wetlands protection effort. They provide for the delegation of the permit program to the States"). Other members, such as Congressman Harsha, expressed concern that exemptions for federal projects would substantially impact wetlands. 3 LEGISLATIVE HISTORY, *supra* note 60, at 420. *See generally* Friends of the Crystal River v. U.S.E.P.A., 794 F. Supp. 674, 681-83 (W.D. Mich. 1992) (discussing state-administered program).

404 program were maintained for the farming and forest industries, along with the exemption for certain Federal and federally funded projects.

Various members of Congress viewed the substitute as providing sufficient wetlands protection through either a Corps or state administered permitting program.[162] Congressman Harsha stated that the legislation "resolves the controversy over wetlands protection," indicating that he believed the Conference version provided a workable state permitting program.[163] And, during a colloquy on the Conference Report, for example, Congressman Bauman asked how far "adjacent wetlands" would go.[164] The original sponsor of H.R. 3199, Congressman Roberts, responded that "[w]etlands adjacent to traditionally navigable waters remain under Federal jurisdiction. Other wetlands may be regulated by a State under its own program if approved by [the] EPA."[165] Congressman Clausen similarly observed:[166]

> wetlands adjacent to traditionally navigable waters will remain under the jurisdiction of the Federal Government with one exception—jurisdiction over historically navigable waters can be assumed by a State if that State so chooses. I would interpret the word "adjacent" to mean immediately contiguous to the waterway.

Some congressman, while supporting the Conference Report, nevertheless voiced reservations about allowing state control over wetlands.[167] Amid such reservations from both sides, those favor-

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162. *E.g.*, 3 LEGISLATIVE HISTORY, supra note 60, at 413 (statement of Senator Lehman) ("The conference report fortunately recognizes the importance of protecting the wetlands"); 123 CONG. REC. S19,662 (daily ed. Dec. 15, 1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 494 (statement of Senator Randolph) (the conference report "recognizes that there must be no basic gaps in the program for protection of wetlands and waterways . . .).

163. 3 LEGISLATIVE HISTORY, *supra* note 60, at 383.

164. 3 LEGISLATIVE HISTORY, *supra* note 60, at 367 (statement of Cong. Bauman) ("I understand the Federal Government will retain through the Corps of Engineers jurisdiction over navigable waters, but what does 'adjacent wetlands' mean? How far will that go?").

165. *Id.*

166. *Id.*

167. Congressman Ambro, from New York, cautioned:

> The most injurious section of the conference report is the so-called 404 wetlands provision. . . . Initially, the concern of people interested in protecting the wetlands was that the definition for "navigable waters" might be tightened. The definition remains fundamentally unchanged, but the language of the conference report will almost surely serve to destroy many of our most valuable, ecologically productive systems. [The Corps] will now be able to issue "general" permits on a State, regional, or nationwide basis, essentially giving a State control over the wetlands. Without close supervision from either the corps or the [EPA], we will almost certainly see economically expedient activities, such as

ing a stronger federal program as well as those concerned with invasive federal regulation, the Conference Report language was adopted and signed into law on December 27, 1977.

VI. IMPLEMENTATION OF THE CLEAN WATER ACT

The latest chapter in the evolution of the 404 regulatory program since the 1977 amendments has been marked by tension between the Corps and the EPA, as well as by continued overtures into the appropriate scope of this federal permitting program. The two agencies, for instance, have struggled to define their appropriate roles. In 1979, the Corps requested that the United States Attorney General opine on whether the 1977 amendments delegated administrative authority to determine the reach of "navigable waters," and it further requested clarification on whether the EPA or the Corps had that ultimate authority. In an opinion issued on September 5, 1979, the Attorney General concluded that there could only be one definition of "navigable waters" under the Act and that "the Congress intended to confer upon the administrator of the [EPA] the final administrative authority to make those determinations."[168] The Attorney General examined the legislative history and structure of the 1972 Act, reasoning that the comprise adopted by the Conference Committee left the EPA with considerable responsibility over the administration and the enforcement of Section 404.[169] The 1977 Amendments, furthermore, did not alter that structure.[170] Not until after this opinion did EPA finally issue its guidelines under 404(b) of the Act.[171] Of course the dispute over the binding nature

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construction, development, and even some dumping, take precedent over the preservation of the ecological sensitive and valuable wetlands.

Reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 413. *See also* 123 CONG. REC. H12,962 (daily ed. Dec. 15, 1977) (statement of Cong. Dingell), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 417 (expressing concern with transferring such authority to the states, and indicating that the conference report would not provide sufficient protection for wetlands).

168. *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Atty. Gen. Op. No. 15 (Sept. 5, 1979), *summarized in* 10 BNA ENV'T REP. 1278 (1979) (sometimes referred to as the "Civiletti Opinion").

169. *Id.*

170. *See* Golden Gate Audubon Society v. United States Army Corps of Engineers, 700 F. Supp. 1549, 1552 (N.D. Cal. 1988) (affirming jurisdictional issue in Civiletti Opinion). Prompted by the Attorney General opinion, the Corps and the EPA entered into a Memorandum of Agreement [hereinafter MOA] on the Geographical Jurisdiction of the Section 404 Program in April of 1980. 45 Fed. Reg. 45,018 (1980). Pursuant to this MOA, the Corps nevertheless rendered jurisdictional determinations. The agencies updated that MOA in 1989. *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Section 404 Program* (Jan. 19, 1989) (stating that the Corps is to make jurisdictional determinations except in "special cases").

171. 45 Fed. Reg. 33,290 (1980); 45 Fed. Reg. 85,336 (1980).

of the guidelines was not resolved until several years later when the Corps agreed to accept the binding nature of the guidelines as part of a settlement to a lawsuit.[172]

As might also be expected from this continued activity, the 1977 amendments did not end further congressional scrutiny. Members of Congress continued to review the 404 program, particularly wetlands regulation and protection. Various bills were introduced to narrow or clarify the scope of jurisdictional waters.[173] The Senate Subcommittee on Environmental Pollution continued to hold oversight hearings on the program.[174] And Congress confirmed its commitment toward aspects of wetlands protection through other legislation, including amending the Water Bank Act in 1980 to broaden the definition of wetlands under that Act and to authorize increased payments to property owners for conservation of wetlands.[175] This continued congres-

172. During the first term of the Reagan Presidency, the Corps attempted to establish a broad nationwide permit program as well as restrict the authority and function of EPA. 47 Fed. Reg. 31,794 (1982). These regulatory changes were a product of the President's Task Force on Regulatory Reform, whose mission was to reduce regulatory burdens. *See Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works,*, 99th Cong., 1st Sess. 198 (1985). The Corps abandoned these efforts following congressional pressure and the settlement of the litigation in National Wildlife Federation v. Marsh, 14 ENV'T L. REP. 20261 (D.D.C. 1984). New regulations were issued at 51 Fed. Reg. 41,206 (1986), *updated* 56 Fed. Reg. 59,110 (1991). *See generally* Eric W. Nagle, *Wetlands Protection and the Neglected Child of the Clean Water Act: A Proposal for Shared Custody of Section 404*, 5 VA. J. NAT. RESOURCES L. 227 (1985).

173. CRS Report, *supra* note 3, at 132-33, 136-37. *See, e.g.*, S. 777, 97th Cong., 2d Sess. (1982) ("A Bill to Amend the Federal Water Pollution Control Act to Restrict the Jurisdiction of the United States Over the Discharge of Dredge or Fill Material to Those Discharges Which are Into Navigable Waters, and for Other Purposes"); *Clean Water Act Amendments of 1982: Hearings Before the Senate Subcomm. on Envtl. Pollution & Pub. Works on S. 777 and S. 2652*, 97th Cong., 2d Sess. (1982).

174. *E.g., Implementation of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 97th Cong., 2d Sess., Serial No. H38 (1982); *see also infra* notes 176-77 and accompanying text. For more recent hearings, see also *Implementation of the Clean Water Act, Hearings Before the Subcomm. on Envtl. Protection of the Senate Comm. on Env't and Pub. Works*, 102d Cong., 1st Sess. 450 (1991); *Wetlands Conservation: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Envi't of the House Comm. on Merchant Marine and Fisheries on H.R. 1330*, 101st Cong., 1st Sess. (1991) ("A Bill to Amend the Federal Water Pollution Control Act to Establish a Comprehensive Program for Conserving and Managing Wetlands in the United States, and for Other Purposes"); *Wetlands Conservation: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the House Comm. on Merchant Marine and Fisheries on Discussion of Steps That Our Nation Should Take to Halt the Continuing Loss of Wetlands*, 101st Cong., 1st Sess. (1989).

175. Water Bank Act of 1980, Pub. L. No. 96-182, 93 Stat. 1317. As part of the Food Security Act of 1985 (later amended in the 1990 Farm Bill), Congress also adopted provisions for wetlands conservation (the "Swampbuster" program) governing the agricultural community. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1507. These provisions removed incentives for persons to grow agricultural commodities on converted wetlands, by withholding certain federal benefits from agricultural producers who convert wetlands to production of agricultural commodities after December 23, 1985. For background on Swampbuster, see Stewart L. Hofer, Comment, *Federal Regulation of Agricultural Drainage Activity in Prairie Potholes: The Effect of Section 404 of the Clean*

sional interest and monitoring of the program even prompted EPA to clarify the breadth of 404 jurisdiction over isolated wetlands susceptible of being used by migratory waterfowl.[176] Senator Chafee openly acknowledged, therefore, that "it would appear as though we have made some progress through this oversight process."[177]

While Congress was busy overseeing the implementation of the 404 program, parties were challenging in court the Corps' exercise of jurisdiction over adjacent wetlands. In what became the seminal decision, a development company attempted to construct a housing development on 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Michigan.[178] Acting under the 1972 Act and the Corps' 1975 implementing regulations, the United States obtained an injunction halting part of the development on the basis that the property included jurisdictional wetlands under the Corps' permit authority.[179] On appeal, the

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Water Act and the Swampbuster Provisions of the 1985 Farm Bill, 33 S.D. L. REV. 511 (1987-88); Anthony N. Turrini, Comment, *Swampbuster: A Report From the Front*, 24 IND. L. REV. 1507 (1991). Congress also later amended the CWA to correct an administrative imbalance in 404 enforcement authority between the Corps and EPA. Pub. L. No. 100-4, § 313(d) (codified at 33 U.S.C. § 1344 (1988)).

176. During oversight hearings in 1985, some Senators expressed concern about the treatment of wetlands habitat for migratory birds and endangered species. *See generally Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 99th Cong., 1st Sess. (1985) [hereinafter 1985 Oversight Hearings]. EPA acting Assistant Administrator Richard Sanderson testified that isolated wetlands used by migratory birds or endangered species fell under the umbrella of regulated waters that could affect interstate or foreign commerce. *Id.* at 189-90. However, he also indicated that he would have to consult with the agency's counsel before answering whether waters that merely could be used by waterfowl were regulated under 404. Agency counsel subsequently concluded that such areas were jurisdictional. Memorandum from EPA General Counsel Francis S. Blake to Richard E. Sanderson regarding "Clean Water Act Jurisdiction over Isolated Waters" (Sept. 12, 1985) (on file with author). After this EPA memorandum, the Corps expressed its agreement with the conclusion. *1985 Oversight Hearings* at 208, 212. The Corps also prepared memorandum on this issue. EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters from Brigadier General Patrick J. Kelly (Nov. 8, 1985). Thereafter the preamble to the Corps' regulations indicated that "waters of the United States" included isolated wetlands that could be used by migratory birds and as habitat for endangered species. 51 Fed. Reg. 41,217 (Nov. 13, 1986).

177. *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, S. Hrg. No. 278, Part 2, 99th Cong., 2d Sess. 1 (1986). Senator Chafee offered some examples of how the oversight process prompted agency responses, such as the negotiation of a new memorandum of agreement governing review of permit decisions, an agreement to clarify regulations on accidental and waste disposal into wetlands, and the clarification of jurisdiction over isolated wetlands. *Id.* Another issue raised during this oversight hearing was how the Corps was implementing the requirement that it examine practicable alternatives to a proposed project impacting wetlands. *Id.* at *passim*.

178. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985).

179. Before attempting to fill the alleged wetlands, a stockholder of Riverside approached the Corps about the need for a permit; the company then submitted an incomplete application which apparently was denied after the injunction. United States v. Riverside Bayview Homes, Inc. 729 F. 2d 391, 393 (6th cir. 1984).

court of appeals remitted the case to the district court for consideration of the regulatory changes since the 1975 rulemaking. On remand, the district court reaffirmed the exercise of jurisdiction and once again the case was appealed.[180] The court of appeals examined the regulatory definition of wetlands, holding that the definition required both periodic inundation and adequate vegetation. The court concluded that since the company's property was not inundated it was not a wetlands.[181] The court's judgment apparently was motivated by its expressed concern that the exercise of jurisdiction to such inland properties might raise a "serious taking problem" under the Fifth Amendment.[182] The court emphasized on rehearing that exercising jurisdiction without regard to the proximity of the property to navigable waters or degree of inundation from such waters would leave the definition of wetlands without any adequate limiting principle.[183]

The Supreme Court rejected such a limiting interpretation of jurisdictional wetlands.[184] Initially, the Court cast aside what it termed a "spurious" attempt to construe the definition of wetlands narrowly in order to avoid a potential taking of private property.[185] The Court next observed that the plain language of the regulation refuted any suggestion that "frequent flooding" was a prerequisite for exercising jurisdiction over adjacent waters under the Corps' then existing regulations. Lastly, the Court held that the regulatory definition of wetlands adopted by the Corps was both a reasonable construction of the Act and consistent with its legislative history.[186] According to the Court, although not providing "unambiguous guidance," the legislative history supported the Corps' assertion of jurisdiction over adjacent wetlands that are not necessarily frequently flooded.[187] In its review of this legislative history, the Court noted that Congress was aware of the Corps' previously expansive interpretation of jurisdictional waters and "rejected measures designed to curb the Corps' jurisdiction in large part because of its concerns" for protecting wetlands.[188] The Court also noted that even those congressional members who wanted a restrictive definition of "waters of the United States"

180. *Id.* 392.
181. *Id.* at 397.
182. *Id.* at 398.
183. *Id.* at 401.
184. *Riverside*, 474 U.S. at 126-27.
185. *Id.* at 129.
186. *Id.* at 131-39.
187. *Id.* at 132, 139.
188. *Id.* at 137.

nonetheless favored including adjacent wetlands for whatever definition of "waters of the United States" Congress adopted.[189]

Since the Court's *Riverside* decision, the national wetlands policy debate has simply intensified. The public's awareness of and interest in wetlands protection and wetlands regulation has now reached new levels of understanding and concern, with proponents of wetlands protection often clashing with property owners affected by wetlands regulation.[190] Two fundamental issues may explain the growing frustration among differently situated groups. First, there is no comprehensive national wetlands policy or program, but rather a patchwork of various regulatory and market incentive programs, of which the 404 program is simply one—albeit significant—component of the quilt woven by several non-integrated statutes.[191] Second, even after two decades, considerable uncertainty still surrounds the program. At least until recently, this uncertainty was magnified as a result of the differences between how the Corps and the EPA each expected to implement the program.[192]

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189. *Riverside*, 474 U.S. at 131. Additionally, two aspects of the 1977 amendments further supported the Court's conclusion. First, the state permitting program was not authorized for wetlands adjacent to waters actually navigable. Second, the Act authorized appropriations for completing the National Wetlands Inventory Program. Riverside, *Id.* at 138-39. *See generally* Jackson & Nitze, *supra* note 88, at 21; Kenneth L. Rosenbaum, *The Supreme Court Endorses a Broad Reading of Corps Wetland Jurisdiction Under FWPCA Section 404*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10008 (1986); Laura Rush, *The Supreme Court Upholds the Corps' "Wetlands Jurisdiction"*, 2 J. LAND USE & ENV'T L. 65 (1986). It should be noted that the Court expressly declined to address the separate issue, not presented by the case, of whether the Corps could assert jurisdiction over isolated wetlands. *Riverside*, 474 U.S. at 131 n.8.

190. *See* United States General Accounting Office, Clean Water Act: Private Property Takings Claims As a Result of the Section 404 Program (1993). *See also supra* note 18.

191. *E.g.*, Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-142, 105 Stat. 878 (1991); Coastal Barrier Resources Act, 16 U.S.C. § 3501 (1988); Coastal Wetlands Planning, Protection and Restoration Act, Pub. L. No. 101-646, Title III, 104 Stat. 4778 (1990); Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582 (1986); Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990); Food Security Act of 1985, 16 U.S.C. § 3821 (1988 & Supp. 1990) (commonly referred to as the "Swampbuster" Act provision); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1007, 105 Stat. 1914, 1927-31 (1991); North American Wetlands Conservation Act, Pub. L. No. 101-233, 103 Stat. 1968 (1989) (codified at 16 U.S.C. §§ 4401-4413 (Supp. 1990)); Water Resources Development Act of 1990, Pub. L. No. 101-640, 104 Stat. 4604 (1990); Wild Bird Conservation Act of 1992, Pub. L. No. 102-440, Title I, 106 Stat. 2224; The Great Lakes Fish and Wildlife Tissue Bank Act, Pub. L. No. 102-440, Title III, 106 Stat. 2224 (1992). *See also* Robert E. Holden & David J. McBride, *The Duplicative Regulation of Wetlands*, 7 NAT. RESOURCES & ENV'T 27 (Winter 1992) (discussing overlapping regulation between 404 program and the Coastal Zone Management Act); Ransel & Meyers, *supra* note 80, at 340 (indicating that Section 401 of the CWA also could be used to protect wetlands at state level).

192. *Cf.* James T. B. Tripp & Michael Herz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. NAT. RESOURCES L. 221, 228-29 (1988) ("This uneasy dual authority has been especially problematic because the two agencies have never agreed on the objectives or the details of the section 404 program.").

Not surprisingly, a fairly recent attempt to establish and implement a national wetlands policy sparked considerable controversy. Through the auspices of The Conservation Foundation[193] and its President William Reilly, later the Administrator of the EPA under President George Bush, a National Wetlands Policy Forum [hereinafter "Forum"] was convened at the EPA's request in the summer of 1987. Led by its Chairman Governor Kean of New Jersey, the Forum consisted of representatives from government and the private sector. The Forum's final report observed that the nation's wetlands programs have been "adopted haphazardly and incoherently," with attendant gaps in wetlands protection and often unfairness to people forced to negotiate through the maze of the Federal regulatory program.[194] The Forum's goal, therefore, was "to develop sound, broadly supported recommendations on how federal, state, and local wetlands policy could be improved."[195] It recommended that the national wetlands policy proceed from one simple premise: no overall net loss of the nation's remaining wetlands—"that the nation's overall wetlands base reach equilibrium between losses and gains in the short run and increase in the long term."[196] On January 18, 1989, EPA reciprocated by announcing a new wetlands policy that adopted the Forum's stated goal.[197]

One byproduct of this recent activity has been to prompt the EPA and the Corps to review how they each administer the program. Only in the last few years have the two agencies even begun to address important issues effectively, publishing a variety of new MOAs[198] and Regulatory Guidance Letters [hereinafter

193. The Conservation is a non-profit research and communications organization founded in 1948 and affiliated with the World Wildlife Fund. It is dedicated to encouraging human conduct to "sustain and enrich life on earth" through wise management of the earth's resources. FORUM, *supra* note 22, at title page.

194. *Id.* at 1.

195. *Id.* at vii.

196. *Id.* at 3. The Forum generated a series of specific recommendations for reducing wetlands losses and increasing wetlands restoration efforts, including providing better incentives for protection, expanding and improving acquisition initiatives, reducing losses associated with Federal projects, strengthening mitigation requirements, and instituting better regulatory programs. *Id.* at 3-4. The Forum recommended improving the regulatory program by delegating primary responsibility to states with adequate State Wetlands Conservation Plans and ensuring the efficacy of those programs with financial and technical assistance. *Id.* at 5. The Forum further recommended working toward a single definition of "wetlands"; considering the regulation of less valuable wetlands through regional general permits; allocating more state and Federal funding to wetlands protection; expanding and monitoring enforcement activities; and ensuring against inappropriate use of "wetlands" maps. *Id.* at 5-6.

197. Wetlands Action Plan, EPA's Short-Term Agenda in Response to Recommendations of the National Wetlands Policy Forum (Jan. 1989).

198. Section 404(q) expressly contemplates these agreements. 33 U.S.C. § 1344(q) (1988). The two agencies have entered into MOAs governing the appropriate method for

"RGLs"]. RGLs, for instance, provide guidance to interested persons on how the Corps implements various aspects of the 404 program, governing such issues as the expiration of wetlands delineation determinations, the effect of a state water quality certification, the issuance of permits for structures and fills which affect the territorial seas, the application of the nationwide permit program, and activities subject to 404 jurisdiction. Yet, not until January of 1991 were these RGLs even published in the Federal Register.[199] Similarly, not until August of 1992, through the use of MOAs governing interagency cooperation and coordination, did the two agencies formally agree on an effective allocation of responsibility of 404 permit decisions, including when the EPA would exercise its authority to request review of permit decisions prior to the EPA's consideration of whether it will exercise its veto power pursuant to 404(c).[200] But many critical issues remain unresolved, such as the use of sequencing in evaluating 404 permit

addressing mitigation requirements for activities impacting wetlands. Memorandum of Agreement Between the EPA and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (1990). This MOA, in particular, initially prompted concerns when it was first introduced in 1989. 54 Fed. Reg. 51319 (1989). *See generally* Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10212 (1990); William L. Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10209 (1990); Margot Zallen, *The Mitigation Agreement—A Major Development in Wetland Regulation*, 7 NAT. RESOURCES & ENV'T 19 (1992). *See also* Anchorage v. United States, 980 F.2d 1320 (9th Cir. 1992) (rejecting procedural challenges to 1989 MOA). On December 17, 1990, the EPA and the Corps also agreed to a wetlands enforcement initiative, providing guidance on criminal and civil enforcement priorities under the 404 program. RGL 90-9, *reprinted in* 58 Fed. Reg. 17212 (1993). After the 1987 amendments to the CWA, providing new administrative penalty authority, the agencies had entered into a MOA "Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act" on January 19, 1989.

199. 56 Fed. Reg. 2408 (Jan. 22, 1991) (publishing past RGLs and establishing practice of publishing future RGLs in the Federal Register.). *See, e.g.*, 58 Fed. Reg. 17,209 (Apr. 1, 1993) (publishing RGL 90-6 through RGL 92-5).

200. Memorandum of Agreement Between EPA and Dep't of the Army on Responsibility for Permit Decisions Under Wetlands Provisions of Clean Water Act and other Statutes Dated Aug. 11, 1992, with Conveying Memorandum to EPA Regional Offices Dated Aug. 18, 1992. *See* 57 Fed. Reg. 23574 (June 4, 1992). *See also* RGL 92-1, reprinted in 58 Fed. Reg. 17,216 (Apr. 1, 1993). The August MOA modified an earlier agreement (in 1985) and ostensibly resolves a controversy surrounding EPA's procedures for disagreeing with Corps permit decisions. Part of this controversy is that the EPA had vetoed twelve permits since 1981, allegedly, according to one observer, in an effort to wrest ultimate authority over permit decisions from the Corps. *See* William B. Ellis, *Section 404(c): Where is the Balance?*, 7 NAT. RESOURCES & ENV'T 25 (1992). *Cf.* James City County v. EPA, 955 F.2d 254 (4th Cir. 1992), *appeal after remand* 1992 U.S. Dist. LEXIS 17675 (E.D. Va. 1992); Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987) (veto of "Sweden Swamp" project upheld), *aff'd*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989). *See generally* Sharon J. Kilgore, *EPA's Evolving Role in Wetlands Protection: Elaboration in Bersani v. U.S. EPA*, 18 E.L.R. 10479 (1988) (discussing *Bersani* and EPA's veto authority); Christine A. Klein, *Bersani v. EPA: The EPA's Authority under the Clean Water Act to Veto Section 404 Wetland — Filling Permits*, 19 ENVTL. L. 389 (1988) (discussing *Bersani* and EPA's veto authority).

applications,[201] the use of mitigation banking,[202] the appropriateness of the EPA's functions in the 404 program, the apparent problem facing landowners who have received a cease-and-desist order under the 404 program,[203] and whether all wetlands areas should be treated and regulated equally.[204] Perhaps even more importantly, the EPA and the Corps have struggled over the appropriate scientific method for delineating jurisdictional wetlands, a process that has resulted, to say the least, in considerable strife and ultimately congressional intervention.[205] And, quite characteristic of the program, the appropriate jurisdictional reach of 404 is still

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201. *See supra* note 198.

202. Mitigation banking "provides for the advanced compensation of unavoidable wetland losses due to development activities" and it "can be achieved through the creation, restoration, enhancement or preservation of other wetland areas of equivalent value generally located outside the immediate area of Wetlands loss or alteration." RICHARD REPPERT, UNITED STATES ARMY CORPS OF ENGINEERS, WETLANDS MITIGATION BANKING CONCEPTS (1993). *See also* Robert D. Sokolovo & Pamela D. Huang, *Privatization of Wetland Mitigation Banking*, 7 NAT. RESOURCES & ENV'T 36 (Summer 1992).

203. When the Corps issues a cease-and-desist order, a landowner must stop all activity regardless of whether or not he or she believes the property or activity is regulated under the 404 program. *Cf.* United States v. Marinus Van Leuzen, 816 F. Supp. 1171 (S.D. Tex. 1993) (noting that landowner disregarded Corps' orders). During the last three years, the courts have been holding that a landowner cannot challenge in court such cease-and-desist orders, but rather must await the Corps' final decision. *See, e.g.*, Southern Pines Assoc. v. United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990); Board of Managers v. Bornhoft, 812 F. Supp. 1012 (D. N.D. 1993); Howell v. United States, 794 F. Supp. 1072 (D. N.M. 1992); McGown v. United States, 747 F. Supp. 539 (E.D. Mo. 1990). Waiting for the Corps' final decision may take awhile and be so costly as to financially cripple activities on lands later determined not to be wetlands. *See generally* Virginia S. Albrecht & David Isaacs, *Wetlands Jurisdiction and Judicial Review*, 7 NAT. RESOURCES & ENV'T 29 (Summer 1992).

204. *See* William E. Taylor & Dennis Magee, *Should All Wetlands Be Subject to the Same Regulation?*, 7 NAT. RESOURCES & ENV'T 32 (Summer 1992). *See also* Michael R. Deland, *No Net Loss of Wetlands: A Comprehensive Approach*, 7 NAT. RESOURCES & ENV'T 3 (Summer 1992).

205. The Corps released its own wetlands delineation manual in 1987. U.S. ARMY ENGINEER WATERWAYS EXPERIMENT STATION, ENVIRONMENTAL LABORATORY, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL, REPORT Y-87-1 (1987). The other federal agencies used their own manuals, however. *See* Strand, *supra* note 11, at 14 n.60 and accompanying text. After the Forum's report in 1989, the Corps, the EPA, the Soil Conservation Service and the United States Fish & Wildlife Service issued a Federal Manual for Identifying and Delineating Jurisdictional Wetlands. This manual proposed to expand the scope of jurisdictional wetlands. However, opposition from the regulated community against this manual mounted and, in August 1991, the EPA and the Corps proposed a revised wetlands delineation manual, narrowing wetlands regulated under 404. 56 Fed. Reg. 40446 (1991); *see* Environmental Defense Fund & World Wildlife Fund, *How Wet is A Wetland? The Impacts of the Proposed Revisions to the Federal Wetlands Delineation Manual* (1992); William S. Sipple, *Time to Move On*, National Wetlands Newsletter 4 (March/April 1992) (discussing history of manuals). *See generally* United States v. Ellen, 961 F.2d 462, 466 (4th Cir. 1992) (discussing manuals), *cert. denied*, 113 S.Ct. 217 (1992). Shortly thereafter, however, Congress prohibited the agencies from using the proposed 1991 manual and commissioned the National Academy of Sciences to prepare a report on wetlands delineation. Energy and Water Development Appropriations Act of 1992, Title 1, Pub. L. 102-104, 105 Stat. 518 (1991), continued in Pub. L. No. 102-377, 106 Stat. 1315 (1992); Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993, Pub. L. No. 102-389, 106 Stat. 1571 (1992). Both the Corps and the EPA have agreed to use the 1987 manual. 58 Fed. Reg. 4,995 (1993).

being argued and debated in the courts,[206] while the Corps also continues its efforts to resolve its jurisdiction over various activities such as pond excavation, draining of wetlands and de minimus discharges.[207] In a valiant effort to resolve some of these issues, on August 24, 1993, the White House Office on Environmental Policy issued what has been called the "President's Plan" for "Protecting America's Wetlands: A Fair, Flexibile, and Effective Approach."[208] Although this plan has been both praised and criticized, it portends how these tough issues might get settled by future congressional action.

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206. *See* Hoffman Homes, Inc. v. EPA , 961 F.2d 1310 (7th Cir. 1992) (stating that certain isolated wetlands are not jurisdictional), *vacated* 999 F.2d 256 (7th Cir. 1993); United States v. Pozsgai, 999 F.2d 179, 726, (3d Cir. 1993) (rejecting, *inter alia*, argument that the CWA does not apply to discharges of pollutants into wetlands); Save Our Community v. EPA, 971 F.2d 1155, 1167 (5th Cir. 1992) ("[w]etlands draining activity per se does not require a 404 permit. . . ."); United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (expressing concern with increasing breadth of 404 program); Salt Pond Associates v. Army Corps of Engineers, 815 F. Supp. 766, 772-77 (D. Del. 1993) (finding that the Corps cannot exercise jurisdiction under RGL 90-5 over pond excavation activity, where there has been no validly adopted regulation establishing jurisdiction over activity). *See also* United States v. Sargent County Water Resource District, No. A3-88-175 (D.N.D. 1992). For a discussion of *Sargent*, *see* Skip Barron, *North Dakota Cuts Protection*, Nat'l Wetlands Newsletter 15 (July/August 1993). For the argument favoring jurisdiction over isolated wetlands, *see generally* Jerry Jackson, *Wetlands and the Commerce Clause: The Constitutionality of Current Wetland Regulation under Section 404 of the Clean Water Act*, 7 VA. J. NAT. RESOURCES L. 307 (1988); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1 (1993).

A corollary issue is the scope of the Corps' jurisdiction where the link to waters of the United States is dependent upon groundwater resources. *Compare* Norfolk v. Army Corps of Engineers, 968 F.2d 1438, 1451 (1st Cir. 1992) (indicating that an ecological judgment in the first instance should be left to the EPA's discretion) *with* Inland Steel Co. v. EPA, 901 F.2d 1419, 1422 (7th Cir. 1990) (questioning whether groundwater is jurisdictional), *reh'g denied, en banc*, 1990 U.S. App. LEXIS 9693, *and* McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1193-94 (E.D.Cal. 1988) (same).

207. On June 16, 1992, the Corps proposed new regulations which would expand the scope of 404 activities to include mechanized landclearing, ditching, channelization or other excavation if it destroys or degrades wetlands and which would clarify when the placement of pilings constitutes fill material. 57 Fed. Reg. 26894 (proposed June 16, 1992). This proposal was prompted by a lawsuit filed by the North Carolina Wildlife Federation and the National Wildlife Federation. North Carolina v. Tulloch, Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992). The Corps and the parties signed a settlement agreement on February 28, 1992, requiring the Corps and the EPA to submit proposed regulations revising the relevant portion of the definition of "discharge of dredged material" and amending RGL 90-8 on pilings. *Id.* Until this proposed regulation was finalized, one district court held that the Corps could not exercise jurisdiction over activities newly defined in this proposed rulemaking. *See* Salt Pond Associates, 815 F. Supp. 766 at 772-77. This regulation was finalized in August of 1993 as part of President Clinton's plan for protecting and regulating wetlands. 58 Fed. Reg. 45008 (proposed Aug. 25, 1993). Immediately upon notice of this finalized rule, various parties filed a lawsuit challenging the government's authority under the CWA to regulate activities embraced by this new rulemaking. American Mining Congress, et al. v. Corps of Engineers, Civ. Action No. 93-1754 (U.S.D.D.C. filed Aug. 24, 1993).

208. WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY, PROTECTING AMERICA'S WETLANDS: A FAIR, FLEXIBLE, AND EFFECTIVE APPROACH 1 (Aug. 24, 1993). As a part of this plan, the White House finalized the *Tulloch* rule, issued a regulatory guidance letter on both the flexibility of the 404(b)(1) guidelines, *id.* at 13, and on mitigation banking (RGL No. 93-2), *id.* at 17, as well as issued a signed Interagency Statement of Principles Concerning Federal Wetlands Programs on Agricultural Lands. *Id.* at 3-4.

VII. CONCLUSION

Wherever the debate eventually takes us, any attempt to define a national wetlands policy must recognize that until recently, and perhaps still, implementation of the 404 program has been sporadic, often driven by judicial decree and conflict between the agencies rather than by active and thoughtful consideration. This has caused frustration on the part of both proponents and opponents of the existing 404 program.

Amid this growing frustration and with the imminence of the reauthorization of the Clean Water Act, it now seems likely that Congress will once again step in and amend the 404 program. The level of interest is now so high that the United States Senate has established a wetlands caucus to consider this matter, while the Administration's Wetlands Task Force already has issued its recommendations. Yet, before Congress acts precipitously and loses this critical opportunity to break the labyrinth that has so marred the 404 program since its creation, it should recognize that the program never successfully reflected a clear, coherent congressional policy toward federal regulation of activities in our nation's wetlands. Rather, it has been a program driven more by conflict than consensus, more by *ad hoc* reactions than by articulated goals, and more by unrealistic assumptions than by an assessment of how best to balance society's need to protect our environment and water resources with society's need to promote economic progress. If, as Ralph Waldo Emerson once said, "[n]ature always wears the colors of the spirit,"[209] we must define a program that harmonizes society's differing needs, where that spirit is not broken and the colors of nature are bright.

209. RALPH WALDO EMERSON, NATURE, ADDRESSES, AND LECTURES 17 (Riverside Press Ed. 1883).