

Economic Development Versus Environmental Protection: Executive Oversight and Judicial Review of Wetland Policy

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I. INTRODUCTION

Landowners and developers typically assume that they can legally proceed with grading and fill activities (for example, levelling property in preparation for subsequent construction or other use) once the necessary state and local permits are obtained. If a project will affect wetlands,¹ however, section 404 of the Clean Water Act (CWA)² may require the landowner or developer to obtain further permission from the U.S. Department of the Army's Corp of Engineers (Corps). Persons who violate section 404 can face penalties of up to \$25,000 per day of violation and one year of imprisonment; the Corps may also order violators to remove all unpermitted fill and any structures built on the fill, and require restoration of the area to its preproject condition at the violator's own expense.³ Even those persons experienced in dealing with wetland regulations are caught by surprise with a Corps enforcement order and subsequent penalties.⁴ All landowners, developers, and

¹ The term "wetlands" is defined by the U.S. Army Corps of Engineers to include:

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

33 C.F.R. § 328.3(b) (1992). For a discussion of the rationale for regulating development in wetland areas, see *infra* notes 57-59 and accompanying text.

² 33 U.S.C. §§ 1251-1387 (1991) (amending the Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816). For a description of § 404, see *infra* part III. Authority to regulate wetlands is also provided by: the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. § 403 and § 407 (1991); the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1413 (1991); and the Fish and Wildlife Coordination Act, 16 U.S.C. § 662 (1991).

³ 33 U.S.C. § 1344(s) (1991).

⁴ Consider Bill Ellen, nonprofit wildlife rescue center operator and former environmental engineer, who worked carefully with the Soil Conservation Service and the Corps to secure thirty-eight permits for a project to convert a Maryland estate into a 103-acre wildlife sanctuary. After a new, expansive interpretation of the "wetlands" definition was issued in 1989 (see *infra*, part III.B.2.a), however, the same Corps

their legal representatives should therefore monitor the evolving federal regulatory scheme and take steps to ensure accountability for any significant changes. Environmental and community activists committed to the preservation of wetland resources should be equally vigilant.

Existing statutory ambiguity under the CWA⁵ reflects an enduring conflict between economic development and environmental protection.⁶ The struggle between these two forces has affected many development projects in Hawai'i,⁷ and in the nation as a whole. Sometimes landowners become subject to enforcement action because they are unaware that their property contains wetland areas.⁸ Previously exempt prop-

official that Mr. Ellen had been working with ordered all work on the project stopped. The pressure of deadlines under previously-signed subcontracts led to "mistakes" and, ultimately, a jail sentence for Mr. Ellen. *EPA's Most Wanted*, WALL STREET JOURNAL, Nov. 18, 1992, at A16. See also *The MacNeil/Lehrer News Hour* (PBS television broadcast, Jan. 1, 1993) (featuring Bill Ellen's plight).

⁵ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (noting that Congress did not provide clear guidance under the CWA).

⁶ Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 ENVTL. L. REP. 10,212, 10,212 (June 1990). For the direct quote from Mr. Houck on this point, see *infra* text accompanying note 61.

⁷ See, e.g., Christopher Neil, *Kailua hills are alive with the sound of discord*, SUNDAY STAR-BULLETIN & ADVERTISER, Jan. 17, 1993, at A27. Neil mentioned the withdrawal of a development proposal by Kaneohe Ranch for the Hamakua Marsh after encountering stiff opposition from Kailua Neighborhood Board members and nearby residents in June 1992, and discussed more recent opposition to a subsequent proposal to build a retirement community and community center on the same site. *Id.*

A battle over development of the Ka'elepulu wetlands in windward O'ahu, which began in 1978 with a prior landowner, was only recently resolved at substantial cost to the current developer. See Letter from attorney Ronald Y. Amemiya to Honolulu City Councilman John Henry Felix (Jan. 13, 1992) (on file with Ronald L. Walker, Wildlife Program Manager for the State of Hawaii Department of Land and Natural Resources). Residents' objections to an application for an after-the-fact Corps permit for the wetland fill resulted in a leveraged settlement wherein the developer must spend \$700,000 to mitigate for lost wetland acreage (\$500,000 for habitat creation, and \$200,000 for permanent maintenance). *Id.* See also Thomas Kaser, *Disputed Enchanted Lake project gets the go-ahead*, HONOLULU ADVERTISER, Dec. 13, 1991, at A14.

⁸ In 1986, after the community objected to the start of construction for a house in the vicinity of Kawainui Marsh, the landowner abandoned his plans (which were proceeding in accordance with a valid building permit up to that point) when told that a section 404 permit was also required. Telephone Interview with Donna Kokubun, President, Hawaii Chapter of the National Audubon Society (Nov. 20, 1992).

erties can also fall under the Corps' jurisdiction when a landowner's own activities, or those of third parties (including federal, state, and local government entities as well as private parties), create artificial wetlands on a particular site.⁹ Even where the presence of wetlands is recognized, however, the regulated community often remains uncertain how to proceed. Unless regulators provide both large and small developers with greater predictability, the current guidelines and standards will continue to deter vital investments.

From the perspective of environmentalists and other activists, on the other hand, wetland regulations can represent a useful tool for thwarting or temporarily stalling controversial projects.¹⁰ Delays and the added costs of penalties and project modifications have been sufficient, in some cases, to derail otherwise profitable ventures in the past.¹¹ A

⁹ See *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) (upholding Corps regulation of unintended wetland environments resulting from artificial or even accidental property alterations).

¹⁰ Several individuals and groups, including Ho'okahe Wai Ho'oulu 'Aina (HWA) as caretakers of a *kalo lo'i* (taro farm) supported by an *auwai* (irrigation ditch) from Manoa Stream, objected to plans for the development of a Hawaiian Studies Building on the site because of adverse effects on these associated wetland areas (including pooled water emanating from the nearby Wa'ahila culvert). Letter from Michael T. Lee, Chief of the Corps Operations Division, to Gordon Matsuoka, State Public Works Engineer for the Department of Accounting and General Services (Aug. 17, 1992) (on file with author). Initial statements by the Corps indicated that the filling of all wetlands, including man-made wetlands such as the *kalo lo'i*, *auwai* and Wa'ahila ditch, is subject to the Clean Water Act. *Id.* The Corps issued a cease and desist order two months later, when it discovered that boulders, rocks, soil and grubbed vegetation fell into Manoa Stream as a result of construction activities. Letter from Michael T. Lee to Gordon Matsuoka (Oct. 16, 1992) (on file with author). The Corps ultimately reversed its initial claim of jurisdiction with respect to the *lo'i* (as insignificant and "relatively recent manmade water features," which are not normally located in fastlands), *auwai* (also relatively small and constructed on normally fastland areas), and Wa'ahila tributary (because it is "not designated on the Geological Survey map as an intermittent stream" and is already culverted for 200 feet upstream from the project). Letter from Lt. Col. James T. Muratsuchi, U.S. Army District Engineer, to Gordon Matsuoka (Dec. 9, 1992) (on file with author). As of late January, 1993, the project awaits approval of a \$ 404 permit for a proposed revetment to prevent further accidental fill of the Manoa Stream. *Id.*

¹¹ For example, environmentalists have staved off a variety of development proposals for Kailua's Kawainui Marsh, the state's largest wetland, including a 400-unit housing project and a massive park built on filled land. *Kawainui Marsh's future to be discussed*. HONOLULU STAR-BULLETIN, Sep. 23, 1992, at A5.

particularly revealing example involves the development of a wetland area west of Kapa'akea Homesteads on the island of Moloka'i, which is the subject of ongoing litigation between the Corps and the site's developer.¹²

Conflict, however, is not inevitable under the current regulatory regime. State and federal governments have worked out mitigation plans and set-asides for protected wetland areas in some cases, effectively balancing economic concerns with the conservation of wetland functions and values.¹³ Creative conflict resolution is clearly possible under the current regulatory system; nonetheless, controversies over wetlands regulation persist because of uncertainty regarding the relative value ascribed to the economy versus the environment.

The friction between economic development and environmental protection received significant attention during the 1992 campaign for President of the United States. The incumbents, President George Bush and Vice President J. Danforth Quayle, sought to characterize their Democratic opponents, Arkansas Governor Bill Clinton and U.S. Senator Al Gore, as radicals planning to protect the environment at the

¹² See File No. 89-015, with the Corps' Pacific Operations Division at Fort Shafter, in Hone'ulu, Hawai'i. In an area zoned for housing, the developer apparently exercised due diligence in obtaining necessary county and state permits, for which the appropriate federal agencies were also notified. *Id.* Although a December 1976 Final Environmental Impact Statement prepared for a flood control project at Kapa'akea indicated the absence of any endangered species, the sighting of a Hawaiian stilt by a Corps field officer led to an enforcement action in 1989 halting the nearly completed project. *Id.* Subsequent offers by the developer to provide mitigation, involving the creation of larger wetland areas and payment of substantial monetary amounts, have been summarily rejected by the United States Fish & Wildlife Service (USFWS). *Id.* See also File No. 92-006 (concerning litigation over illegal fill activity in the Maunawili wetlands on the island of O'ahu).

¹³ Plans for the expansion of Azeka's Supermarket in Kihei, Maui (Kanaha Pond) ran into trouble when the USFWS determined that the property, located near Kahana Pond, served as a habitat for stilts when wet. Letter from Ernest Kosaka, USFWS Field Supervisor, Pacific Islands Office, to Lt. Col. Donald T. Wynn, U.S. Army Corps (Apr. 27, 1990) (on file with Ronald L. Walker, Wildlife Program Manager, State of Hawai'i Department of Land and Natural Resources). Subsequent negotiations led to a suitable compromise permitting construction while adequately protecting valuable wildlife habitat, at a cost of approximately \$470,000. Letter from Lt. Col. Donald T. Wynn to Ernest Kosaka (Nov. 20, 1990) (on file with Ronald L. Walker, DLNR). See also *supra* note 7 (discussing adoption of a mitigation plan for development of the Ka'elepulu wetlands) and *infra* text accompanying note 58 (listing important wetland functions and values).

expense of humans.¹⁴ The incumbents themselves were often accused in the media of gutting vital environmental statutes in order to appease big business.¹⁵ In 1991 and 1992, the Bush-Quayle Administration's regulatory review body, the Council on Competitiveness, gained increasing power and prominence as it battled to weaken federal environmental regulations concerning wetlands, hazardous waste, and clean air.¹⁶

After the 1992 election, the Clinton Administration eliminated the Council on Competitiveness.¹⁷ Regulatory review under the Clinton-Gore Administration might have shifted the balance of interests toward environmental protection,¹⁸ but the administration's fundamental message remained that economic and environmental policies need not be mutually exclusive.¹⁹ The polarized reactions to the former Competitiveness Council suggest, however, that the conflict between environmental and economic interests will likely persist.²⁰ Public willingness

¹⁴ See Michael Kranish and Scot Lehigh, *Insults Fly as Clinton, Bush Travel to Key States*, BOSTON GLOBE, Oct. 30, 1992, at 1. President Bush referred to Vice Presidential candidate Al Gore as "Ozone Man," stating that "[t]his guy is so far off in the environmental extreme, we'll be up to our neck in owls and out of work for every American. This guy is crazy. He is way out, far out, man." *Id.*

¹⁵ See, e.g., Dianne Dumanoski, *Environment Not Gaining Ground During Campaign*, BOSTON GLOBE, Oct. 4, 1992, at 1

¹⁶ *Id.*

¹⁷ *Gore lauds abolishment of rule-reviewing body*, HONOLULU ADVERTISER, Jan. 23, 1993, at D1 (citing Vice President Al Gore as stating that "an existing review process under the Office of Management and Budget will make sure businesses are not burdened by federal regulations"); see also Eric Pianin and David S. Hilzenrath, *Clinton to Press Major Deficit Cut; Short Term Stimulus, Tax Reduction Fade*, WASHINGTON POST, Jan. 12, 1993, at A1 (quoting Leon Panetta's assertion, during hearings on his own confirmation as Director of the Office of Management and Budget, that Vice President Gore plans to organize a new regulatory review panel).

¹⁸ Vice President Gore believes that the United States should utilize "every means . . . to preserve and nurture our ecological system." Albert Gore, *EARTH IN THE BALANCE* (1992) (cited in Bruce S. Klafter, *Businesses Should Head Gore's Manifesto*, SAN FRANCISCO CHRONICLE, Nov. 30, 1992, at B3).

¹⁹ Dumanoski, *supra* note 15. Bill Clinton acknowledged that he had put jobs ahead of the environment as Governor of Arkansas, but also stated that in the process he learned that this is a "false choice." *Id.*

²⁰ The Bush Administration's efforts to balance the conservation ethic with the competing interests of the regulated community were reminiscent of the effort to vindicate private property rights under the Regulatory Reform Task Force led by then Vice President Bush. Houck, *supra* note 6, at n. 10 (citing Exec. Order No. 12291, 48 Fed. Reg. 21,466 (1983)).

to accept executive influence over regulatory policy-making (also known as executive oversight) has its limits, whether economic development or environmental protection is the motivating factor.²¹ Both the proper role of the executive branch in this evolving process and the appropriate standard for judicial review of such issues require careful analysis.

This comment begins by considering the propriety of executive influence on regulatory policy governing wetlands.²² Part II critically examines the mandatory deference model provided by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,²³ and considers the potential application of this model through judicial review of evolving wetlands regulations under section 404 of the Clean Water Act (CWA). This comment argues that despite section 404's recognized ambiguities, overly-deferential judicial review is inappropriate, especially where proposed regulatory changes are apparently inconsistent with existing interpretations of the CWA.²⁴ Any

²¹ Consider the growth in size and influence of the "Wise Use Coalition," established to oppose environmental regulations adversely affecting human social conditions—especially as related to jobs and American competitiveness. As a legislative staff member to U.S. Sen. John Breaux, during the first session of the 102nd Congress, the author observed a concerted lobbying effort called the "Fly-in for Freedom." Fishing, logging, homebuilding, and other industries lobbied against environmental protection bills and for a greater accommodation of economic concerns. Some of the environmental statutes scheduled for reauthorization in 1993, and therefore possibly subject to similar lobbying pressure, include the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1991), the Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1991), and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1991). *See also* New York v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992) (rejecting plaintiffs' challenge of EPA-issued Clean Air Act regulations allegedly altered in response to the wishes of the Competitiveness Council)

²² Under President George Bush and Vice President J. Danforth Quayle, the Council on Competitiveness and the White House Domestic Policy Council significantly impacted proposals to reformulate wetlands policy under section 404 of the Clean Water Act. Richard S. Stenger, *ALL WET. ENVIRONMENTAL ACTION*, Nov.-Dec. 1991, at 12-14.

²³ 467 U.S. 837 (1984).

²⁴ Existing interpretations of the CWA suggest that the balance of interests under this statute favors environmental protection over economic development. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (recognizing the breadth of congressional concern for protection of water quality and aquatic ecosystems, especially wetlands, and noting their central value in the hydrologic cycle); *Smithwick v. Alexander*, 12 ENVTL. L. REP. 20,432 (4th Cir. 1981) (finding the balance tilting decisively in favor of wetlands protection); *see also* Jeffrey M. Lovely, Comment, *Protecting Wetlands: Consideration of Secondary and Social and Economic Effects by the United*

agency decision-making process that merely reacts to the views of the executive branch lacks independence and effectively violates democratic principles of accountability. Part III reviews the historical evolution of section 404 in order to support Part II's conclusions regarding statutory ambiguity, accountability, and independence. Subparts A and B of Part III cover the periods before and after introduction of the "no net loss" policy for wetlands. The no net loss policy appeared, initially, to unify competing wetland perspectives.²⁵ Later, the phrase simply highlighted a fundamental conflict between developers and conservationists that is enshrined in the statute.²⁶

After laying these foundations, this comment turns to the task of offering recommendations to ensure accountability for future agency decisions. Part IV echoes the suggestion of Northwestern University School of Law Professor Thomas Merrill that courts should review regulatory changes through precedent-based judicial deference to the executive branch.²⁷ Professor Merrill's "executive precedent" model

States Army Corps of Engineers in its Wetlands Permitting Process, 17 B.C. ENVTL. AFF. L. REV. 647, 677-78 (1990) (stating that the CWA was "enacted to protect the natural environment," not to decide between the economic interests of alternative sites as a matter of public policy) (citing *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 573 (D.Mass. 1987)). *Contra Hoffman Homes, Inc. v. Environmental Protection Agency*, 961 F.2d 1310 (7th Cir.), *vacated to facilitate settlement negotiations*, 975 F.2d 1774 (7th Cir. 1992), cited *infra* notes 54-55 and accompanying text; see also *infra* note 49 for an interpretation of the CWA suggesting that the phrase "unacceptable adverse impacts" at 33 U.S.C. § 1344(c) arguably indicates Congress' willingness to accept some adverse wetland impacts, for example, when the balance of interests favors economic development.

Other statutes demonstrate that Congress knows how to give economic interests higher priority than environmental protection, or at least an equally balanced consideration. See *infra* notes 45 (highlighting a statutory provision designed to prevent economic disruption or unemployment), 46 (cataloging environmental statutes that pay greater attention to economic interests by calling for cost-benefit analyses), 91 (noting that some environmental protection statutes simply establish long term goals), and 92 (listing environmental protection statutes that require a balanced consideration of economic interests).

²⁵ See *infra* note 84 (citing the National Wetlands Policy Forum as the genesis for a consensus strategy on the regulation of wetlands).

²⁶ See *infra* part III.B 1

²⁷ See generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969 (1992). Professor Merrill's expertise in this area comes from his 1987 to 1990 service as Deputy Solicitor General, Department of Justice, when he argued or helped brief a large number of U.S. Supreme Court cases involving the "Chevron doctrine." *Id.* at 969.

achieves many of *Chevron's* regulatory-efficiency goals, but refuses to sanction executive influence unchecked by meaningful judicial review. Part V provides two more immediate remedies. First, subpart A recommends legislation requiring the disclosure of an agency's rationale for succumbing to executive oversight. Then, subpart B draws upon analogous criticisms of Clean Air Act (CAA)²⁸ developments in order to encourage explicit clarification of Congress's intent. Congressional reauthorization or amendment could provide a viable opportunity to replace the ever-shifting political rhetoric between economic and environmental concerns with a more stable, harmonious regime.

II. JUDICIAL DEFERENCE UNDER *CHEVRON*

In enacting the CWA, Congress sought to provide uniform water quality protection to a broad scope of areas with inherently different functions and values.²⁹ Unfortunately, the original legislative drafters lacked the scientific knowledge necessary to determine appropriate standards. The resulting delegation of authority was necessarily ambiguous.³⁰ Before the United States Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,³¹ courts generally applied "discretionary deference" (based on an arbitrary and capricious standard of review) to agency interpretations of ambiguous laws.³² After

²⁸ Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7671q (1991).

²⁹ Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. 1251-1387 (1991)).

³⁰ Merrill, *supra* note 27, at 997 (noting that similarly ambiguous delegations are found in many other statutes establishing jurisdictional or boundary limitations). See also *Solid State Circuits v. U.S. Environmental Protection Agency*, 812 F.2d 383 (8th Cir. 1987) (discussing alleged violations of constitutional due process presented by the inability to weigh, in advance, the probable validity or applicability of a CERCLA clean-up order, given that the statute imposes treble liability for failing to comply with a valid order). In *Solid State Circuits*, the Court of Appeals for the Eighth Circuit characterized the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), 42 U.S.C. §§ 9601-9675 (1988), as "in some circumstances . . . silent or ambiguous." *Id.* at 392.

³¹ 467 U.S. 837 (1984) (holding that the EPA's interpretation of the term "stationary source," as permitting polluting-facility owners to treat all emitting devices as if they were under a single "bubble," represented a valid construction of the Clean Air Act).

³² *Cf. Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (applying a "hard look" standard to hold that a decision by the Secretary of Transportation, rescinding a passive automobile restraint requirement, was arbitrary and capricious because it was not supported by a reasoned analysis).

Chevron, however, the courts can apply "pure deference" to these interpretations when Congressional direction is imprecise. The pure deference standard effectively precludes full judicial consideration of the substantive issues associated with policy disputes.³³ For example, the ambiguity inherent in section 404 could theoretically prevent the judiciary from determining whether expansive executive oversight unduly influences agency decisions.³⁴

In *Chevron*, the United States Supreme Court acknowledged that agencies "may within the limits of [congressional] delegation, properly rely upon an incumbent administration's views of wise policy" to inform its judgments.³⁵ Where Congress has "directly spoken to the precise question at issue," the Court will adopt and enforce that answer; if the statute is ambiguous, however, judicial review shifts into a pure deference mode, which permits agencies to "fill the gap" with any reasonable construction of the statute.³⁶ In effect, "administrative actors become the primary interpreters of federal statutes and [courts are] relegate[d] to the largely inert role of enforcing unambiguous statutory terms."³⁷

Professor Merrill criticizes the Court's expressed rationale for adopting a restrictive, deferential framework in *Chevron*. The Court justifies deference to the executive branch by invoking democratic principles of accountability.³⁸ Merrill suggests, on the other hand, that this expli-

³³ Merrill, *supra* note 27, at 1002 (arguing that contextual factors, such as the degree of the agency's expertise and the existence of reliance interests implicated by the agency's interpretation, are ignored by the courts)

³⁴ See generally *id.* (noting that *Chevron* can be read to require mandatory deference to agency interpretations where Congress provided ambiguous statutory guidance). *see also infra* notes 35-37 and accompanying text.

³⁵ 467 U.S. at 865-66. The disputed issue in *Chevron* could be seen as part of the deregulatory thrust of the early Reagan Administration. Merrill, *supra* note 26, at 975. *see also Chevron*, 467 U.S. at 857-59. In response to the wishes of the Reagan Administration, the EPA "interpreted the term 'stationary source' in the Clean Air Act to permit owners of polluting facilities to treat all emitting devices as if they were under a single 'bubble,' thereby minimizing the costs of complying with the emissions standards" established by the Act. *Id.* at 975-76 (citing 467 U.S. at 840). The Court of Appeals for the District of Columbia Circuit invalidated the EPA's interpretation, in a prior stage of the litigation, largely because it was contrary to prior precedent. Merrill, *supra* note 26, at 989.

³⁶ *Id.* at 842-45.

³⁷ Merrill, *supra* note 27, at 969-70.

³⁸ See *id.* at 978-79 (suggesting that the Court viewed "agency decisionmaking [as] always more democratic than judicial decisionmaking because all agencies are accountable . . . to the President [who is elected by the people]".)

cation is based upon a "fictitious delegation" of legislative power from Congress to executive agencies.⁴⁰ According to Merrill, this "dubious fiction . . . threatens to undermine [the functional theory of separation of powers,] the principal constitutional constraint on agency misbehavior."⁴⁰ *Chevron* effectively permits agencies not only to make policy within the limits of their organic statutes, but also to define these limits.⁴¹

Despite *Chevron's* apparent holding that an implementing agency may change regulations simply by articulating a rational basis for its decision, courts should assume (unless Congress expressly provides to the contrary) that Congress expects agencies to apply their experience and expertise when reformulating regulatory policy. The secrecy inherent in the executive oversight process, however, often produces incomplete administrative records and furthers hidden agendas. The courts should not, therefore, use *Chevron* to validate rulemaking that is no more than a response to political choices.⁴²

Admittedly, the challenged regulatory about-face by the Environmental Protection Agency (EPA) in *Chevron* took place pursuant to a new philosophy introduced by President Ronald Reagan.⁴³ The Court expressly determined, however, that the EPA's decision was a "reasonable accommodation of manifestly competing interests."⁴⁴ The Court noted, in addition, that Congress "sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality."⁴⁵ Correspondingly, the courts could logically extend this reasoning to

⁴⁰ *Id.* at 1014.

⁴¹ *Id.* at 998; *see also id.* at 994.

⁴² *Id.* at 997.

⁴³ *See* Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 *IND. L. REV.* 299, 303 (1991). Consider *New York v. Reilly*, 969 F.2d 1147 (D.C. Cir. 1992), in which the Court of Appeals for the District of Columbia Circuit rejected the allegation that the EPA improperly relied upon the views of the Competitiveness Council when it abandoned proposed rules under the Clean Air Act. The court held that the EPA's decision to omit materials separation requirements (designed to control industrial emissions) was adequately supported by the administrative record *Reilly*, 969 F.2d at 1149-51. The agency based its decision on uncertainty over associated costs, as identified through testimony by the U.S. Conference of Mayors' National Resource Recovery Association. *Id.*

⁴⁴ *Chevron*, 467 U.S. at 857-59.

⁴⁵ *Id.* at 865.

⁴⁶ *Id.* at 851. The Clean Air Act contains a provision entitled "Measures to prevent economic disruption or unemployment." 42 U.S.C. § 7425 (1991) (emphasis added).

support increased consideration of economic factors in the regulation of wetlands. A careful consideration of the language, policies, and history of the CWA, however, suggests that Congress intended broader protection of water quality than air quality. Whereas other environmental protection statutes pay significant attention to cost-benefit analyses,⁴⁶ reflecting Congress' intent to accept certain risks to human safety and environmental degradation, an equivalent commitment to balancing economic and ecological concerns is not readily apparent in the CWA.⁴⁷

Potential judicial analysis of section 404 policy decisions is complicated, however, by the ambiguity generally associated with wetlands regulation. Proponents of President Bush's Wetland Protection Plan⁴⁸ could argue that Congress did not intend the CWA as a full wetland protection measure; in other words, the Act was designed only to protect those ecosystems that serve important water quality functions.⁴⁹

⁴⁶ See, e.g., the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1991) (accepting, implicitly, that environmental and other harms associated with pesticides are outweighed by their beneficial uses); Coastal Zone Management Act, 16 U.S.C. § 1454(b)(7) (1991) (balancing ecological, cultural, historic and esthetic values as well as needs for economic development); National Environmental Policy Act, 42 U.S.C. § 4331(b)(5) (1991) (recognizing the government's responsibility to achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities); *id.* § 4332 (1991) (recognizing, indirectly, the need to consider economic and technical factors when analyzing impacts on the human environment); Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act), 42 U.S.C. § 6901(a)(2) (1991) (recognizing that economic and population growth needs require increased industrial production).

⁴⁷ Compare *supra* note 24 and *infra* part III.A.1 (discussing the congressional compromise between economic and environmental concerns under the Clean Water Act, in other words, bifurcating administrative authority under both the Corps and EPA) with *supra* notes 45-46 and *infra* notes 91-92 (noting that statutory guidance concerning the appropriate balance between these competing interests under the CWA is not as specific as other statutory references, including cost-benefit analyses and other balancing tests). A possible explanation for this difference is that Congress acted upon a perceived need for broader protection against human impacts on water resources, as opposed to impacts on the air.

⁴⁸ Fact Sheet from the White House Office of the Press Secretary, *Protecting America's Wetlands* (Aug. 9, 1991) (on file with the author) [hereinafter President Bush's Wetlands Plan].

⁴⁹ See Clean Water Act, 33 U.S.C. § 1344(c) (1991). The Administrator of the EPA is authorized to veto any permit issued by the Corps for the discharge of dredged or fill material:

whenever he determines, after notice and opportunity for public hearings, that

Advocates for this proposition might draw support from the United States Supreme Court's decision in *United States v. Riverside Bayview Homes*,⁵⁰ which noted that section 404 provides ambiguous guidance.⁵¹ Given a hypothetical decision by the EPA to increase the scope of allowable adverse impacts on wetlands,⁵² therefore, the *Riverside* decision could serve as precedent for judicial deference, à la *Chevron*, to this new interpretation of the CWA's statutory mandate. Under *Chevron*, a restrictive EPA interpretation of the CWA would apparently be entitled to deference.⁵³ The decision by the Court of Appeals for the Seventh Circuit in *Hoffman Homes, Inc. v. Environmental Protection Agency*⁵⁴ lends additional support to claims for limited section 404 application. The Seventh Circuit interpreted *Riverside* restrictively to support its holding that the CWA does not either explicitly, or through delegation of Congress' constitutional power to regulate interstate commerce (under Article I, Section 8 of the Constitution), authorize regulation of all wetland resources.⁵⁵

the discharge of such materials into such area will have an *unacceptable adverse effect* on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Id. (emphasis added). The phrase "unacceptable adverse effect" could be interpreted as an indication of Congress' willingness to accept some adverse wetlands impacts, notwithstanding the CWA's general commitment to environmental protection. *See also* 40 C.F.R. § 231.2(e) (1991) (codifying the EPA's veto authority through regulations covering any adverse impact resulting in the significant loss of, or damage to, wildlife habitat).

⁵⁰ 474 U.S. 121 (1985).

⁵¹ *Id.* at 132.

⁵² President Bush arguably sought to implement this decision in his Wetlands Protection Plan, *supra* note 48. *See also infra* subpart III.B.4 (discussing the growing tide of economic conservatism in the United States, and the corresponding desire for an interpretation of section 404 that provides greater consideration of economic interests).

⁵³ *See, e.g., New York v. Reilly*, 969 F.2d 1147 (D.C. Cir. 1992) (rejecting plaintiffs' allegation that the EPA improperly relied upon the views of the Competitiveness Council when it abandoned proposed rules under the Clean Air Act).

⁵⁴ 961 F.2d 1310 (7th Cir. 1992) (invalidating EPA's regulation defining waters of the United States to include isolated wetlands). On Sept. 4, 1992, this decision was vacated upon grant of rehearing, to facilitate settlement negotiations. *Hoffman Homes Inc. v. Environmental Protection Agency (Hoffman Homes II)*, 975 F.2d 1774 (7th Cir. 1992).

⁵⁵ *Hoffman Homes*, 961 F.2d at 1311, 1320 (finding that isolated intrastate wetlands are excluded from federal regulation, and potential use of such wetlands by migratory birds is insufficient to invoke federal regulatory authority); *cf. Leslie Salt Co. v. United*

Overly-deferential analysis under *Chevron*, however, constitutes little more than a rubber stamp for otherwise questionable administrative procedures. Agencies adopting any regulatory changes pursuant to executive oversight should support these changes with detailed explanations of their rationale for succumbing to outside views. Regardless of the merits associated with the Bush Administration's attempt to inject greater balance in section 404, the process that generated President Bush's Wetlands Plan remains disconcerting for two reasons: (1) influence was applied behind closed doors, not in public hearings; and (2) increased attention to economic concerns is apparently inconsistent with existing statutory interpretations of section 404.⁵⁶ Given the high stakes of the wetlands debate, and the potential for continued polarization of the environmental and economic constituencies, administrative efforts to modify existing wetland regulations should avoid the appearance of impropriety that surrounded the Competitiveness Council. Attempts to harmonize environmental and economic interests under the Clean Water Act must adhere to democratic principles of accountability and be immune from undue influence.

III. THE EVOLUTION OF SECTION 404 WETLAND POLICY

Part II, above, argued that broad judicial deference with respect to changes in wetland regulations is inappropriate, despite statutory ambiguity, because of deeply-ingrained democratic values related to independence and accountability under our system of government. A review of section 404's historical development provides a better understanding of the underlying inconsistencies associated with wetlands regulation. This part also illustrates the fact that executive oversight can change regulatory policy without sufficient public accountability.

In the past, most people viewed wetlands as wastelands, a home to mosquitos, ooze, and pestilence, that were to be "diked, drained, and filled in for housing developments and industrial complexes, converted

States, 896 F.2d 354 (9th Cir. 1990) (upholding the U.S. Army Corps of Engineers' regulatory jurisdiction over man-made wetlands and wetland areas having the potential to serve as migratory bird habitat).

⁵⁶ Compare *supra* notes 24 and 46 (indicating (i) a broad concern by Congress for water quality protection, especially with respect to wetlands, (ii) a rejection of cost-benefit balancing under the CWA, as compared to other environmental statutes which require such analysis, and (iii) that the balance of interests will, in any event, tilt decisively in favor of wetland protection.) with *supra* note 45 and *infra* notes 91-92 (listing statutes that employ cost-benefit analyses and other flexible approaches to the conservation and management of resources in an effort to balance economic and environmental impacts equitably).

to farmland, [or] used as receptacles for household and hazardous waste."⁵⁷ Eventually, heightened awareness revealed wetlands as sensitive transitional areas with subtle intrinsic values, serving vital environmental functions such as ground water recharge; flood and sediment control; prevention of shoreline erosion and saltwater intrusion; wildlife habitat formation; water quality maintenance; enhancement of biological productivity; and provision of recreational opportunities.⁵⁸

Despite numerous benefits furnished by wetlands and continuing losses of such areas, however, federal wetland initiatives do not provide comprehensive protection for this vital natural resource. For example, high value wetlands are lost every year because activities such as draining, excavating and channelizing are not regulated.⁵⁹ Section 404, which requires permits for the placement of dredge and fill material in the waters of the United States, is the most important federal regulatory program for wetland protection. The ambiguous Congressional guidance provided in this legislation, however, allows a divisive conflict to persist.

A. *Before the No Net Loss Policy*

Despite progressive regulatory revisions, and almost twenty years of litigation, section 404's competing constituencies, i.e. developers and conservationists, remain polarized as the nation's wetland resources continue to dissipate. A bifurcated administrative structure under section 404, divided between the U.S. Army Corps of Engineers (Corps) and the EPA,⁶⁰ provides:

a recipe for *endless conflict* between those who would protect what is the United States' most productive and endangered ecosystem—its wetlands—and those who would exercise their most fundamental economic right—to develop the land they own.⁶¹

1. *Institutionalized conflict and uncertainty*

Congress awarded administration of the section 404 permit program to the Corps, based on that agency's previous experience with permit

⁵⁷ Barbara Sleeper, *Wetlands, Wonderlands*, ANIMALS, Jan.-Feb. 1991, at 12. See also Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 Sw. L. J. 1473, 1474 (1991).

⁵⁸ Sleeper, *supra* note 57, at 12-13; Dickerson, *supra* note 57, at 1474-75.

⁵⁹ Dickerson, *supra* note 57, at 1496.

⁶⁰ See *infra* part III.A.1.

⁶¹ Houck, *supra* note 6, at 10,212 (emphasis added).

programs in navigable waters.⁶² In addition, the EPA can veto any Corps permit that would "adversely affect municipal water supplies, shellfish beds, and fishery areas . . . , wildlife, or recreational areas."⁶³ This bifurcated structure reflects Congress' compromise between the values of economic well-being (the Corps' primary mission) and environmental protection (the EPA's mission).⁶⁴

The resulting procedural uncertainty is accompanied by substantive ambiguity; section 404 does not clearly define its jurisdictional limits. The statute merely authorizes Corps permits for placement of dredge and fill material in the "waters of the United States."⁶⁵ Wetlands are neither defined nor specifically addressed in the CWA; the Act's goal is simply "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁶⁶

2. Judicial expansion of section 404 jurisdiction

Initially, the Corps limited its scope of authority under section 404 to traditional navigable waters.⁶⁷ Public interest environmental groups, however, sought greater ecosystem protection. In the landmark decision *National Resources Defense Council v. Callaway*,⁶⁸ fulfilled the environmental community's hopes. As a result, the term "navigable waters" under the CWA now encompasses all waters of the United States within the reach of the Commerce Clause.

⁶² See, e.g., Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. §§ 403, 407 (1991); Fish and Wildlife Coordination Act, as amended 1965, 16 U.S.C. § 662 (1991); and Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1413 (1991).

⁶³ Shannon J. Kilgore, Comment, *EPA's Role in Wetlands Protection, Elaboration in Bersani v. U.S. EPA*, 18 ENVTL. L. REP. 10,479, 10,481 n. 16 and accompanying text (Nov. 1988) (citing S. Rep. No. 1236, 92nd Cong., 2d Sess. 141-42 (1972)).

⁶⁴ *Id.* at 10,480. But see Benjamin H. Grumbles & Kenneth J. Kopocis, *Water Resources Acts: Developing an Environmental Corps*, 21 ENVTL. L. REP. 10,308 (June 1991). The Water Resources Development Act of 1990, Pub. L. No. 101-640, 104 Stat. 4604, established environmental protection as a primary mission for the Corps. *Id.* at 10,309, 10,314-21. The Wetlands Research Program established by the Corps also indicates increased environmental sensitivity in this agency. See U.S. ARMY ENGINEER WATERWAYS EXPERIMENT STATION, *THE WETLANDS RESEARCH PROGRAM* (1991) (brochure on file with author).

⁶⁵ 33 U.S.C. § 1362(7) (1991).

⁶⁶ 33 U.S.C. § 1251(a) (1991).

⁶⁷ 33 C.F.R. §§ 209-210(d)(1) (1974).

⁶⁸ 392 F. Supp. 685 (D.D.C. 1975).

The Corps' regulatory jurisdiction applies to interstate waters (including wetlands), waters affecting interstate or foreign commerce, tributaries thereof, and wetlands adjacent thereto.⁶⁹ The crucial element in defining Corps jurisdiction is whether or not a particular saturated area (wetland) is hydrologically connected to a navigable water of the United States. After promulgation of the *Callaway* decision, supporters of the Corps' prior, more limited application of section 404 sought to reinstate the old interpretation through congressional amendment.

3. Congressional reaction

In 1977, Congress rejected efforts to limit the jurisdictional scope of section 404 to traditionally navigable waterways and their adjacent wetlands.⁷⁰ Although the House of Representatives passed such a limiting measure,⁷¹ the Senate defeated a parallel amendment.⁷² The debate centered on wetland preservation issues.⁷³

Proponents of limited jurisdiction argued that the inclusion of non-navigable waters far exceeded congressional intent; opponents asserted that a narrower definition would exclude vast stretches of crucial wetlands to the detriment of wetland ecosystems, water quality, and the aquatic environment generally.⁷⁴ The statute, however, exempted certain agricultural, forestry, ranching and other operations.⁷⁵ In spite of these clarifications, section 404 still causes uncertainty and confusion.

4. Judicial perpetuation of institutional conflict

The judiciary finally reviewed the bifurcated decisionmaking authority created under section 404 in *Bersani v. Robichaud*.⁷⁶ The holding by

⁶⁹ See *supra* note 1 for the Corps' current definition of wetlands.

⁷⁰ See generally H.R. CONF. REP. No. 95-830, 95th Cong., 1st Sess. 10-11 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4424, 4475-80.

⁷¹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985) (citing H.R. 3199, 95th Cong., 1st Sess., § 16 (1977)).

⁷² *Riverside Bayview*, 474 U.S. at 136 (citing S. 1952, 95th Cong., 1st Sess., § 49(b) (1977)).

⁷³ 123 CONG. REC. H10,426-36, S26,710-29 (1977), cited in *Riverside Bayview*, 474 U.S. at 136.

⁷⁴ *Id.*

⁷⁵ *Dickerson*, *supra* note 57, at 1478 (citing 33 U.S.C. § 1344(f)(1)(A) (1988)). But see § 1344(f)(2) (prohibiting recapture, or new uses, that affect the reach or circulation of wetlands).

⁷⁶ 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

the Court of Appeals for the Second Circuit failed, however, to clarify the law. Although *Bersani* implicitly approved EPA's "practicable alternatives" test⁷⁷ over the Corps' "public interest review" test,⁷⁸ the Court of Appeals for the Second Circuit found only that EPA's interpretation was reasonable.⁷⁹ The court expressly declined to rule that EPA's position was entitled to deference.⁸⁰

According to one commentator,

{t}his system of permit review is duplicative, cumbersome and inconsistent. The Corps is given the task of serving two masters, while it lacks the tools to fully satisfy either one. Consequently, the Corps' permitting process often times produces unsatisfactory and inconsistent results.⁸¹

This conclusion is reinforced by observations that the judiciary has yet to provide reliable guidance for the Corps, remanding section 404 permit decisions both for considering and for failing to consider economic factors.⁸²

5. *Inconsistent agency determinations of wetland jurisdiction*

A final example of the uncertainty which existed prior to the "no net loss" standard is revealed by the divergent agency perspectives on how to identify wetlands for jurisdictional purposes. The identification of wetlands is also referred to as delineation, or defining the scope of authority under section 404. The original Corps and EPA delineation manuals were both based on a multiparameter approach.⁸³ The manuals

⁷⁷ *Bersani*, 850 F.2d at 39. The court determined that the Corps must, during its permit review process, avoid the development of wetland areas if possible, by first considering the economic feasibility of alternative sites regardless of ownership. *Id.*

⁷⁸ *Id.* at 39-40. The court balanced the benefits of a proposed development—including economic considerations and the right to reasonable private use—against potential damage to wetland resources, in order to secure both adequate protection and reasonable utilization of environmental resources. *Id.*

⁷⁹ *Id.* at 46.

⁸⁰ *Id.* at 45 (noting that the court was "not thoroughly persuaded that EPA's interpretation was entitled to deference"); see also *Kilgore*, *supra* note 63, at 10,487-88.

⁸¹ *Dickerson*, *supra* note 57, at 1486.

⁸² See, e.g., *Lovely*, *supra* note 24, at 668, 673-78 (citing *Mall Properties, Inc. v. Marsh*, 672 F.Supp. 561 (D.Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 488 U.S. 848 (1988); *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985); *Hough v. Marsh*, 557 F.Supp. 74 (D.Mass. 1982)).

⁸³ Thomas A. Sands, Comparison of 1987 Corps Wetland Delineation Manual and the 1989 Federal Manual for Identifying and Delineating Wetlands (1991) (unpublished manuscript on file with the author). According to this paper, Mr. Sands was principal author of the original U.S. Army Corps of Engineers' Wetland Delineation Manual, *RECOGNIZING WETLANDS* (1987). *Id.* at 1.

emphasized that all three of the following technical criteria must be met for an area to qualify as a wetland: wetland vegetation, hydric soils and hydrology.⁸⁴ Again, the crucial element justifying jurisdiction was the hydrologic link to, and potential adverse effect upon, navigable waters of the United States.

Evaluation of the wetland indicators mentioned above involves highly complex processes. Different interpretations led to inconsistent applications by field personnel for the respective federal agencies with wetland responsibilities: the Corps, EPA, Fish & Wildlife Service, and the Department of Agriculture's Soil Conservation Service. The Fish & Wildlife Service applied a significantly different basis for wetland jurisdiction than the other agencies; its 1979 manual required only one of the three wetland criteria.⁸⁵ This inconsistency severely impeded efforts to regulate wetlands uniformly⁸⁶ and, predictably, heightened tensions between competing interest groups. After fifteen years of continuing conflict and uncertainty, the regulated community marshalled its resources in an effort to revitalize wetland regulation. As Section B explains below, the resulting proposal for resolving regulatory conflicts merely highlighted a fundamental difference of perspective concerning the proper scope of wetland regulation.

B. Going Beyond the No Net Loss Policy

Current elements of the ongoing regulatory controversy are traceable to the aftermath of a compromise that, ironically, appeared to unify previously irreconcilable wetland perspectives. In 1987, a prestigious group of state governors, business and environmental leaders, academicians and developers came together at the National Wetlands Policy

⁸⁴ *Id.* at 1. The term "hydric soil" refers to soil that is "flooded, ponded, and/or saturated long enough during the growing season to produce anaerobic conditions in the upper part" of the soil profile. *Id.* at 5. The term "hydrology" refers to "[a]reas that are inundated or have saturated soils for at least a week during the growing season more often than every other year on the average." *Id.* at 7. See also Dickerson, *supra* note 57, at 1482-83.

⁸⁵ Sands, *supra* note 83, at 1. See also Dickerson, *supra* note 55, at 1482-83 (citing FISH AND WILDLIFE SERVICE, U.S. DEPT. OF THE INTERIOR, FWS/OBS-79/31, CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES (1979)). The Fish & Wildlife Service's 1979 Delineation Manual simply requires one of the three criteria—periodic wetland vegetation, predominantly hydric soil, or saturation—at some time during the growing season. Sands, *supra* note 83, at 3.

⁸⁶ Dickerson, *supra* note 55, at 1483.

Forum to recommend a consensus strategy for protecting the nation's wetlands.⁸⁷

In 1988, President George Bush elevated the importance of wetlands protection by adopting the Forum's fundamental goal, no net loss of wetlands. The optimism surrounding the no net loss policy soon dissipated, however. The fragile consensus was torn apart by the following developments: promulgation of a revised wetland delineation manual,⁸⁸ EPA's veto of a permit for the popular Two Forks Dam public works project,⁸⁹ and mounting controversy over the proper role of mitigation within the permit process.⁹⁰ This part of the article demonstrates how the underlying conflict enshrined in section 404 led to a deterioration of the no net loss consensus. Finally, subpart B closes with the observation that unaccountable agency action concerning regulatory policy, whether due to executive influence or overzealous implementation by the Corps or the EPA, is an abuse of basic democratic principles.

1. *Conflicting interpretations of "no net loss"*

The conflict between economic and ecological interests under section 404 flared once again shortly after the 1987 National Wetland Forum's vague no net loss compromise. Rather than interpreting no net loss as a flexible long term goal,⁹¹ environmentalists pushed for pure protection of wetlands. They urged literal, immediate, and comprehensive application of the CWA to prevent the loss of any wetlands. Landowners

⁸⁷ THE CONSERVATION FOUNDATION, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA, THE FINAL REPORT OF THE NATIONAL WETLANDS POLICY FORUM [hereinafter FORUM REPORT]; Lovely, *supra* note 24, at 648 n.7.

⁸⁸ See discussion *infra* at subpart III.B.2.a.

⁸⁹ *Section 404 Program Critics Call for Reform*, LAND LETTER (W.J. Chandler & Assoc.) [hereinafter Chandler], Mar. 1, 1991, at 1.

⁹⁰ See discussion *infra* at subpart III.B.2.b.

⁹¹ Long-term goals in certain statutes indicate Congress' desire for a flexible approach to pressing environmental problems where carefully-tailored solutions are currently unavailable, or unwise. The MMPA expresses a long term goal of "insignificant dolphin mortality rates approaching zero" for fishing activities involving the setting of purse-seine nets to catch yellowfin tuna (the nets are intentionally set on dolphins, which are often found swimming above schools of yellow-fin tuna). Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1372 (1991). Similarly, the CWA establishes an unachievable, industry-forcing "goal" of eliminating pollutant discharge by 1985. Clean Water Act, 33 U.S.C. § 1251(a)(1) (1991).

and developers, on the other hand, sought balanced consideration of both economic and ecological factors in section 404 permit decisions.⁹²

2. *Agency cooperation fails to resolve the conflict*

The four principal federal agencies with wetlands responsibilities (the Corps, the EPA, the Fish & Wildlife Service, and the Department of Agriculture's Soil Conservation Service) appeared to reach a consensus on these issues in 1989. Conflicts along the way, however, soon revealed that the debate over wetland regulation was far from settled. The environmental community complained that the agencies' efforts were falling short, and the business community countered that the agencies' agreement represented "a drastic change from the past."⁹³

(a) *The 1989 federal delineation manual.*

Complaints about inconsistent application of wetland identification techniques⁹⁴ prompted cooperative agency efforts to produce a joint delineation manual. In January 1989, the four agencies agreed to use the same mandatory definition for identifying wetlands.⁹⁵ The agencies implemented this new manual without providing for public review and comment, claiming that "the agreement does not change the way wetlands are defined."⁹⁶

⁹² The Endangered Species Act calls for consideration of both the economic impact caused by proposed critical habitat designation, 16 U.S.C. § 1533(b)(2), and the benefits provided by alternatives consistent with the statutory goals, *Id.* § 1536(h)(1)(A) (1991). The Fishery Conservation and Management Act promotes fisheries utilization that provides the greatest overall benefit to the nation, while taking into account and allowing for regional variations in the resource. 16 U.S.C. §§ 1801-1882 (1991).

⁹³ Marianne Lavelle, *Wetlands: the new battle cry in Washington*, NAT'L L. J., July 23, 1990, at 24.

⁹⁴ Dickerson, *supra* note 57, at 1483-84.

⁹⁵ See generally U.S. ARMY CORPS OF ENGINEERS, U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. FISH AND WILDLIFE SERVICE, U.S.D.A. SOIL CONSERVATION SERVICE, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1988) [hereinafter FEDERAL DELINEATION MANUAL]. The FEDERAL DELINEATION MANUAL was not formally adopted until 1989. The predecessors of the FEDERAL DELINEATION MANUAL are discussed *supra* in subpart III.A.5. See also MEMORANDUM OF AGREEMENT BETWEEN THE ARMY AND EPA CONCERNING THE DETERMINATION OF THE GEOGRAPHIC JURISDICTION OF THE SECTION 404 PROGRAM (Jan. 19, 1989).

⁹⁶ Chandler, *supra* note 89, at 1.

Journalists reported that "[i]n 1988 the U.S. Fish and Wildlife Service (USFWS) estimated 100 million acres of wetlands in the continental United States; in 1990, after adoption of the manual, it produced virtually the same estimate."⁹⁷ Although technically correct, these reports failed to point out that the USFWS's interpretation did not concur with generally recognized assessments of wetland acreage under the Corps/EPA 1987 Delineation Manual. Misleading and inflammatory statements like this failed to consider the dramatic changes made by the new manual. For example,

the approximately 7,000 vegetation species used as wetlands indicators also occur with some frequency in *non-wetland* areas, . . . [the 1989 manual] creates thirteen special conditions under which land may be deemed wetland by satisfying *only one or two* of the three required technical criteria, . . . [and the 1989 manual] is replete with *technical flaws* including the failure to recognize significant *regional differences in vegetation and soil* across the country.⁹⁸

(b) *The Corps-EPA memorandum of agreement on wetlands mitigation.*

Another document illustrating the agencies' efforts to cooperate is the Memorandum of Agreement (MOA) on Wetlands Mitigation between the Corps and the EPA. Prior to this arrangement, the Corps and the EPA disagreed about the validity of mitigation as a consideration during section 404 permitting decisions. In *Bersani v. Robichaud*,⁹⁹ the Court of Appeals for the Second Circuit did not address or even acknowledge EPA's general policy that mitigation is not an appropriate means of satisfying the section 404(b)(1) guidelines. The court's holding, however, appeared to favor the EPA's interpretation.¹⁰⁰

Subsequent consultations between the two agencies led to a revised MOA on Wetlands Mitigation incorporating the EPA's sequencing

⁹⁷ Tim Searchinger and Douglas Rader, *The Condominium Crowd Makes its Move on Wetlands*, L.A. DAILY J., Aug. 21, 1991, at 6. The 1989 Manual apparently incorporated FWS's perspective of wetland indicators. See *supra* subpart III.A.5.

⁹⁸ Dickerson, *supra* note 57, at 1484 (emphasis added).

⁹⁹ 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

¹⁰⁰ *Id.* at 46; see also Houck, *supra* note 6, at 10,212 (noting that with time, *Bersani* "might have caused the Corps to cease mitigation-based permitting," however, developments in the Wetlands Forum "subsumed the issue").

approach.¹⁰¹ The agencies also committed themselves to no net loss by requiring that “[wetlands] mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values).”¹⁰² Although the MOA was originally issued on November 15, 1989, the White House delayed actual implementation of the agreement several times in order to respond to criticisms submitted by the Departments of Energy and Transportation, the oil and gas industry, and Alaskan development interests.¹⁰³ As a result, the revised MOA on Wetlands Mitigation allows the Corps to deviate from the otherwise required sequencing approach whenever EPA agrees that a proposed discharge into wetlands is “necessary to avoid environmental harm,” will produce “environmental gain or insignificant environmental losses,” or whenever the “mitigation measures necessary to meet this goal are not feasible, not practicable” or inconsequential.¹⁰⁴ Reactions to these MOA amendments epitomize the divergence of views concerning section 404

¹⁰¹ MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT SECTION 404(B)(1) GUIDELINES (Feb. 6, 1990) [hereinafter MOA ON WETLANDS MITIGATION], at 2, 3. The EPA considers whether a proposed discharge should be permitted by applying a sequential procedure (avoidance, mitigation, and compensation), granting a permit only where the agency determines: first, that potential wetland impacts have been avoided to the maximum extent practicable; second, that remaining unavoidable impacts will be mitigated to the extent appropriate and practicable; and finally, that the permit applicant will compensate for aquatic resource values lost or damaged. *Id.* at 3; see also 40 C.F.R. § 230.10 (1992) (codifying the EPA's sequencing approach).

“It is important to recognize that there are circumstances where the impacts of a project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed.” MOA ON WETLANDS MITIGATION, *supra*, at 3 n.5 (citing 40 C.F.R. § 230.10(c)).

¹⁰² *Id.* at 5. In other words, the MOA defines “no net loss” as meaning that any loss of wetlands must be replaced, either through creation, restoration or modification, with wetlands of at least functionally equivalent value. See also William L. Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 ENVTL. L. REP. 10,209, 10,210 (June 1990).

¹⁰³ Want, *supra* note 102, at 10,210-11; Royal C. Gardner, *The Army-EPA Mitigation Agreement: No Retreat From Wetlands Protection*, 20 ENVTL. L. REP. 10,337, 10,337 nn. 1-5 (Aug. 1990).

¹⁰⁴ MOA ON WETLANDS MITIGATION, *supra* note 101, at 2, 3; Want, *supra* note 102, at 10,210 (noting also that the MOA recognizes that no net loss of wetlands functions and values “may not be achieved in each and every permit action”); Gardner, *supra* note 103, at 10,341.

that continues to polarize conservationists and developers.¹⁰⁵ Although the revised MOA may solve some of the problems associated with section 404, it "does not represent the FUNDAMENTAL RESTRUCTURING [of wetlands regulation] that is necessary."¹⁰⁶

3. *The continuing ambiguity of congressional guidance*

Congress is fully aware of the public uncertainty concerning the relationship between economic and environmental factors under section 404. It is also clear that section 404 does not provide comprehensive protection of the nation's wetlands. Our elected representatives continue, however, to address wetlands loss in a piecemeal, inconsistent fashion.¹⁰⁷

During the 102nd Congress, staff members of the Senate Environment & Public Works Committee suggested that the Committee would not include any significant changes to the section 404 program in its 1992 reauthorization bill.¹⁰⁸ The National Wetlands Coalition and other

¹⁰⁵ See *id.* at 10,211; Ronald A. Zumbun, *Wetland Preservation Rule Adopted Without Public Comment*, L.A. DAILY J., May 1, 1991, at 6; Houck, *supra* note 6, at 10,214.

¹⁰⁶ Dickerson, *supra* note 57, at 1488 (emphasis added). A uniform wetland evaluation technique would represent a significant step toward improved regulation of wetland areas.

¹⁰⁷ See, e.g., the Conservation Easements on Wetlands in FmHA Inventory Property Act of 1990, 7 U.S.C. § 1985(g) (1991); the Farms for the Future Act of 1990, 7 U.S.C. § 4201 (note) (1991); the Fish and Wildlife Coordination Act, as amended 1965, 16 U.S.C. § 662 (1991); the Migratory Bird Conservation Fund, as amended 1966, 16 U.S.C. § 715k (1991); the Wetlands Loan Act, as amended 1988, 16 U.S.C. § 715k-3 (1991); the Watershed Protection and Flood Prevention Act, as amended 1990, 16 U.S.C. §§ 1001-09 (1991); the Water Bank Program (WBP), as amended 1980, 16 U.S.C. §§ 1301-11 (1991); the Erodible Lands and Wetland Conservation and Reserve Program, 16 U.S.C. §§ 3801-39d (1991); the Emergency Wetland Resources Act, as amended 1989, 16 U.S.C. §§ 3901-32 (1991); the Coastal Wetlands Planning, Protection and Restoration Act of 1990, 16 U.S.C. §§ 3951-56 (1991); the North American Wetlands Conservation Act of 1989, 16 U.S.C. §§ 4401-13 (1991); (the Land and Water Conservation Fund), 16 U.S.C. §§ 4601 through 4601-22 (1991); and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1413 (1991).

¹⁰⁸ Chandler, *supra* note 89, at 6. See also *The Status of Wetlands Science: hearing before the Subcommittee on Environmental Protection of the Committee on Environment & Public Works*, S. Hrg. No. 102-69, 102nd Cong., 1st Sess. 1-2 (statement by Senator Max Baucus of Montana), 24 (statement by Senator John Chafee of Rhode Island) (April 9, 1991); *Implementation of Section 404 of the Clean Water Act: hearing before the Subcommittee on Environmental Protection of the Committee on Environment & Public Works*, S. Hrg. No. 102-

interested parties then lobbied members of Congress who were not on the committee. Their vigorous efforts resulted in the introduction of several bills aiming to reform wetlands regulation.¹⁰⁹

4. *Displacing agency decisionmaking responsibility*

A growing tide of economic conservatism¹¹⁰ appeared to convince President George Bush to take preemptive action despite the introduction of these bills. On August 9, 1991, the Bush Administration unveiled a new plan for protecting the nation's wetlands.¹¹¹ The effort suggested a return to the vindication of private property rights, previously initiated in 1981 through a Regulatory Reform Task Force led by then-Vice President George Bush.¹¹² President Bush's Wetlands Protection Plan apparently sought to rein in section 404 by injecting more balance into the permitting process.¹¹³ The potential impact of this plan recognizably diminished with the departure of President Bush and the election of Bill Clinton. Without more explicit congressional guidance, however, section 404's fundamental inconsistencies, conflicts between environmentalists and developers, and further wetland losses,

450, 102nd Cong., 1st Sess. 172 (letter from the National Governor's Association urging no changes to section 404 until amendments to the 1989 delineation manual have been given an opportunity to improve the program) (June 20, July 10, and Nov. 22, 1991).

¹⁰⁹ H.R. 1330, 102nd Cong., 1st Sess. (sponsored by Rep. Jimmy Hayes, D-La.); S. 1463, 102nd Cong., 1st Sess. (sponsored by Sen. John Breaux, D-La.). Other bills introduced that same session also sought to revise § 404, including: H.R. 251, 102nd Cong., 1st Sess. (sponsored by Rep. Charles Bennett, D-Fla.); H.R. 404, 102nd Cong., 1st Sess. (sponsored by Rep. John Hammerschmidt, R-Ark.); and H.R. 2400, 102nd Cong., 1st Sess. (sponsored by Rep. Lindsay Thomas, D-Ga.). No substantive action was taken on any of these bills.

¹¹⁰ See, e.g., Michael Satchell, *Any Color But Green*, U.S. NEWS & WORLD REPORT, Oct. 21, 1991, at 74 (reporting that the "wise use" coalition blames poor economic conditions on environmental statutes, which do not sufficiently balance nonenvironmental interests).

¹¹¹ See generally President Bush's Wetlands Plan, *supra* note 48.

¹¹² See Exec. Order No. 12,291, 48 Fed. Reg. 21,466 (1983) (implementing a policy based on the belief that American businesses are too heavily regulated by the federal government).

¹¹³ The President's Plan was apparently prepared to resolve a controversy between regulatory amendments proposed by the Competitiveness Council. See generally *supra* part I, and note 15. See also *infra* subpart III.B.4.b (discussing the scientific recommendations of the Federal Interagency Committee for Wetland Delineation).

are likely to persist.¹¹⁴ A quick evaluation of President Bush's Wetlands Plan provides a sense of the business community's interests concerning wetland regulation and reveals several problems associated with unchecked executive oversight.

(a) *Streamlining & flexibility.*

President Bush's plan attempted to streamline section 404 procedures and introduce greater flexibility in analyzing proposed developments. The President sought to replace consulting agency appeals of individual permits granted by the Corps with appeals based on resources or issues of national significance.¹¹⁵ The President's interpretation of section 404 under the plan placed increased emphasis on balancing economic and ecological interests.¹¹⁶ In addition, the plan provided incentives for private restoration or creation of wetlands, including a system of granting mitigation-banking credits where the effects of proposed developments in wetlands areas are mitigated through off-site enhancement projects.¹¹⁷

(b) *The 1991 federal delineation manual.*

The President's plan also sought to revise the Federal Delineation Manual. Pursuant to the Bush Administration's wishes, the EPA promulgated proposed revisions to the Federal Delineation Manual for public comment on August 14, 1991.¹¹⁸ One of the criteria for delineation, wetlands hydrology, requires inundation for fifteen or more consecutive days, or saturation for twenty-one or more consecutive days.¹¹⁹ As a result, some areas designated as wetlands under the 1989 delineation manual were not wetlands under the revised manual.¹²⁰ The

¹¹⁴ Houck, *supra* note 6, at 10,212 nn. 8-13. Houck commented that "[t]he actors and alliances may change . . . but the basic positions remain the same—intractable—and proceeding from entirely different assumptions." *Id.* at 10,212.

¹¹⁵ See President Bush's Wetlands Plan, *supra* note 48, at 4.

¹¹⁶ *Id.* at 4-5. The President's plan resurrected the Corps' balancing test, which was implicitly rejected by *Bersani* in favor of the EPA's sequencing approach. See *supra* part III.A 5 (discussing the respective tests).

¹¹⁷ See, e.g., Robert W. Hahn and Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 *ECOLOGY L. Q.* 1 (1991).

¹¹⁸ 56 Fed. Reg. 40,446-40,480 (August 14, 1991).

¹¹⁹ *Id.*

¹²⁰ Robert T. Stewart and Chris M. Amantea, *President's New Policy Shifts Focus*, NAT'L L. J., Feb. 10, 1992, at 27. Only areas experiencing seven days of saturation within eighteen inches of the ground surface are designated as wetlands. *Id.*

agencies continued to assert, however, that they did not change their wetland definitions.¹²¹

Executive attention can, and sometimes does, contribute to the development of sound national policy. Where this oversight displaces agency decisionmaking authority, however, executive influence risks conflict with the president's constitutional responsibility to ensure that the laws are faithfully executed.¹²² A collision between conservation and business interests apparently led to political tradeoffs and subsequent changes in wetland delineation rules.¹²³ Soon after this collision, several scientists quit the Federal Interagency Committee for Wetland Delineation in a dramatic protest of undue administrative influence.¹²⁴ The "infusion of *politics* into what was initially designed as a *technical* exercise"¹²⁵ prompted the following individuals to make statements critical of the Bush Administration: William Sipple, Chief Ecologist EPA Office of Wetlands, stated that he would have engaged in "unethical behavior" by agreeing to the proposed changes without first getting public comment; EPA ecologist Charles Rhodes, Jr., complained of "external pressures" and the redrafting of technical provisions by "others with limited wetlands experience"; and finally, Acting FWS Director Bruce Blanchard sent a letter to EPA refusing to accept its fourteen-day inundation threshold because it was "confusing and technically indefensible."¹²⁶

Whether or not the compromises implemented by the Competitiveness Council would have actually improved the status quo, democratic principles require adherence to the statutory mandate provided under section 404 of the CWA. Typically, Congress intends agencies to apply

¹²¹ *Id.* at 36 (citing 56 Fed. Reg. 65,963 (Dec. 19, 1991), which seeks to portray the proposed addition of a new wetlands regulatory section as a simple description of new identifying characteristics for wetlands).

¹²² See Gilhooley, *supra* note 42, at 311.

¹²³ Michael Weisskopf, *Rewriting the Book on Wetlands: Scientists Wash Hands of White House's Definition of Protected Areas*, WASHINGTON POST, May 3, 1991, at A23. Keith Schneider, *3 U.S. Agencies Want to Loosen Wetland Curbs: Draft Proposal Reveals Rift in Government*, NEW YORK TIMES, May 15, 1991, at A18. See also Gilhooley, *supra* note 42, at 311-13 nn. 76-90 (discussing Gilhooley's view that the executive oversight process permits manipulation of agency analysis to fit a predetermined outcome).

¹²⁴ Weisskopf, *supra* note 123 (indicating that these scientists quit after political considerations reflecting the interests of the business and development community overrode their scientific recommendations).

¹²⁵ *Id.* (emphasis added).

¹²⁶ *Id.*

their expertise rather than simply respond to political choices. When the President's advisors became deadlocked over the "extent of protection to be conferred on the nation's dwindling wetlands," however, they chose to pull the President into the politically sticky issue rather than rely on technical expertise.¹²⁷ Even if a plan like President Bush's were viable, that fact would not justify immunity from effective judicial review.

IV. A NEW JUDICIAL FRAMEWORK FOR DEFERENCE

With a firm grasp of the regulatory evolution of wetlands protection under section 404 well in hand, it is now appropriate to return to this article's primary concern: the influence of executive oversight on the rulemaking process. Professor Thomas Merrill theorizes that *Chevron U.S.A., Inc. v. Natural Resources Defense Council*¹²⁸ has not had the revolutionary impact on judicial review that many commentators assume.¹²⁹ Cases applying *Chevron* "have on the whole produced fewer affirmances" than those that do not follow *Chevron*.¹³⁰ Furthermore, the United States Supreme Court itself often ignores *Chevron* in cases involving deference questions.¹³¹ The Court's apparent reluctance to

¹²⁷ Michael Weisskopf, *Bush: Arbitrator on Wetlands Dispute?*, WASHINGTON POST, July 30, 1991, at A13. Weisskopf reported unidentified sources as stating that President Bush was to receive an options paper "asking him to sort out technical matters normally left to his advisers, such as the number of days a parcel of land must be inundated to qualify as a wetland." *Id.* According to Weisskopf, "EPA Administrator Reilly was outnumbered [at a meeting of the Council on Competitiveness] by officials seeking to weaken wetlands safeguards beyond what he ha[d] proposed." *Id.*

¹²⁸ 467 U.S. 837 (1984).

¹²⁹ Merrill, *supra* note 27, at 970. *Contra* Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

¹³⁰ Merrill, *supra* note 27, at 984.

¹³¹ See, e.g., *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) (holding that a NLRB rule is entitled to considerable deference so long as it is rational and consistent with the organic statute, even where the rule represents a departure from the Board's prior policy); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (holding that a decision by the Corps to issue a Supplemental Information Report, rather than a second supplemental EIS, in order to review new information affecting a dam project, is entitled to deference provided the agency has made a reasoned decision based on its analysis of those documents); *Equal Employment Opportunity Commission v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988) (holding that EEOC's interpretation of the Civil Rights Act, as permitting immediate EEOC jurisdiction over Civil Rights Act violations prior to

apply *Chevron* is probably linked to that case's apparent all-or-nothing approach. If congressional limits are discernible, the Court exercises purely independent judgment with no consideration of the executive viewpoint; otherwise, the Court gives maximum deference to the executive branch.¹³²

Indiscriminate application of *Chevron* can be said to reflect the continuing rivalry between mandatory and discretionary deference models in the judicial branch.¹³³ As with many aspects of public policy, truth, justice, and equity probably lie somewhere in the middle of these two extremes. Professor Merrill suggests a potentially viable solution that assimilates the judicial deference doctrine into the general juridical practice of following precedent.¹³⁴ Under Merrill's executive precedent model, the courts are asked to follow precedent generated by a different branch of government.¹³⁵ The courts' decision to defer would "entail a three-part inquiry: (1) Is there an executive precedent? (2) How strong is that precedent? (3) Given the strength of the precedent, does an independent judicial examination of statutory interpretation compel a different result?"¹³⁶ Under this model, the courts would affirm agency decisions that present a combination of strong precedent and congruence with congressional intent, and reject those that present a combination of weak precedent and tension with congressional intent.¹³⁷

Professor Merrill's model makes sense because executive interpretations of law are analogous to decisions by courts of coordinate jurisdiction.¹³⁸ Executive interpretations "share much in common with judicial precedent."¹³⁹ For example, strengths and weaknesses exist on

expiration of the statutorily required 60 days after termination of State agency proceedings, is entitled to deference where reasonable). There are numerous other cases involving deference questions where the Court has apparently ignored *Chevron*. See Merrill, *supra* note 27, at 982 and Appendix.

¹³² Merrill, *supra* note 27, at 977.

¹³³ *Id.* at 1032.

¹³⁴ *Id.* at 1003-31.

¹³⁵ *Id.* at 1003-12.

¹³⁶ *Id.* at 1010.

¹³⁷ *Id.* at 1014. Application of this model to recent wetland proposals or to the earlier stages of § 404 implementation is a useful exercise, but is beyond the scope of this comment.

¹³⁸ *Id.* at 1004.

¹³⁹ *Id.*

both sides of the ledger when comparing courts and agencies. The characteristics of technical expertise, familiarity, and accountability, for example, favor the agencies. The courts, on the other hand, benefit from legal expertise, freedom from time constraints, and insulation from political pressure. Professor Merrill's executive precedent model encourages deference to the judgments of more accountable political actors, but avoids the practical and theoretical failings caused by *Chevron's* all-or-nothing approach.¹⁴⁰ Whereas the Court's current practice of tempering *Chevron* with ad hoc exceptions lacks internal coherence,¹⁴¹ the executive precedent model "strikes a more enduring balance between executive, legislative, and judicial perspectives, and between the forces of change and stability."¹⁴²

Many features of the discretionary deference doctrine, which were apparently banished under *Chevron*, "suddenly become explicable once we view the practice of deference as a form of following precedent."¹⁴³ Under the executive precedent model, the discretionary deference doctrine's traditional contextual factors— express delegations, agency expertise, longstanding interpretations, well-reasoned decisions, the existence or lack of interagency agreement, contemporaneous interpretations, congressionally-ratified interpretations, the level of statutory ambiguity and independent judicial judgment—are all weighed against each other on a sliding scale.¹⁴⁴ Although Professor Merrill's suggested model "may be complex . . . , it is not unprincipled."¹⁴⁵ The model encourages the courts to provide more revealing, candid reasons for either deferring to or invalidating agency decisions.¹⁴⁶ According to Professor Merrill,

there are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula.¹⁴⁷

¹⁴⁰ See *id.* at 1013-15. See also *supra* notes 129-34 and accompanying text.

¹⁴¹ Merrill, *supra* note 27, at 1027.

¹⁴² *Id.* at 1028.

¹⁴³ *Id.* at 1016-22.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1026.

¹⁴⁶ *Id.* at 1027.

¹⁴⁷ *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1989) (criticizing mandatory judicial deference as an improper standard of review)).

V. LEGISLATIVE RESPONSES TO THE WETLANDS PROTECTION CHALLENGE

Legislative action may be more effective than the judicial reform proposed by Professor Merrill, *supra* part IV, especially given the continuing threat to wetlands posed by concern over American competitiveness and economic growth. The length of time and cost involved in mounting effective legal challenges, not to mention the politically charged atmosphere, also support congressional action in favor of judicial reform. If development interests ultimately persuade Congress to incorporate more balance into section 404, the legislative branch could adopt or acquiesce in modifications such as those included in former President Bush's Wetlands Plan.¹⁴⁸ Until that time, however, any effort to limit the protection of wetlands under section 404 will necessarily conflict with long-standing interpretations of the CWA.¹⁴⁹

A. Disclosure of Regulatory Review Impacts

The infusion of politics into the regulatory review process through executive oversight arguably displaces an agency's obligation to make independent regulatory decisions based on its experience and expertise. The veil protecting the processes of executive oversight could, however, deflect even a "hard look"¹⁵⁰ by the courts into the legitimacy of such action. This problem can be addressed by requiring the disclosure of

¹⁴⁸ Senators John Chafee (R-RI) and Max Baucus (D-MT) cautioned FWS Director John Turner that "revisions to the manual should not be used to effect policy changes" in § 404, and that if "you believe that changes are needed, we ask that you submit such recommendations to the Congress for its consideration." Letter from Chafee and Baucus to Turner, cited in Johnson, *Administration attempts to bend wetlands science*, THE LEADER, June 1991, at 1.

¹⁴⁹ See *supra* notes 24 and 46 for a discussion of greater congressional concern for environmental protection under the Clean Water Act, as compared to other environmental statutes. But see *supra* notes 49, 54-55 and accompanying text for an argument to the contrary. Suggesting, respectively, that Congress implicitly acknowledged some wetland resources are not subject to regulation, or that the legislative branch cannot rely on its constitutional power under the commerce clause to extend regulatory jurisdiction over all wetland resources. *Id.*

¹⁵⁰ In *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983), the United States Supreme Court applied a "hard look" standard to reject, as arbitrary and capricious, a decision by the Secretary of Transportation rescinding passive automobile restraint regulations because the decision was not supported by a reasoned analysis.

administrative policy as it affects agency decisionmaking.¹⁵¹ This proposal will not reveal the give-and-take of executive and agency communications in reaching a decision. Instead,

agencies would designate, as both an administration and agency position, any policy adopted to reflect specific oral or written comments of OMB [the Office of Management and Budget] or the White House made during the regulatory review process . . . the agency would also *identify its initial position as a policy alternative it considered and provide reasons for adopting a different position.*¹⁵²

For example, under this proposal the regulatory record for the 1991 Federal Delineation Manual would have to include EPA's earlier proposal for broader wetland protection as a rejected alternative.¹⁵³ The agency would also have to explain why a more limited definition was adopted instead of its earlier proposal. According to Environmental Defense Fund biologist Douglas Rader, the fifteen and twenty-one day definitions proposed in former President Bush's now-abandoned Plan "were pulled out of the air," and have "no bearing on ecological reality."¹⁵⁴

Disclosure is not aimed at insulating agencies from politically responsive influence. It is meant, rather, to reinforce the agencies' ultimate responsibility to ensure that adoption of an administration position is consistent with the agency's statutory mission.¹⁵⁵ Disclosure

¹⁵¹ See generally Gilhooly, *supra* note 42, at 320-21. See also *id.* at 307 nn. 48-55, 335 nn. 189-92 (criticizing the lack of documentation in the public record concerning the Competitiveness Council's role in the alteration of a proposed EPA rule). Legislation to require disclosure of extra-agency influence was introduced during the 2nd Session of the 102nd Congress. See S. 1942, 137 CONG. REC. S16,250 (Nov. 7, 1991) (the Regulatory Review Sunshine Act). For earlier examples, see 128 CONG. REC. 5285-305 (1982) (S. 1080, the Regulatory Reform Act of 1982) and 132 CONG. REC. 572, 574 (1986) (S. 2023 proposing establishment of a public file disclosing any intervention by the Office of Management and Budget into the rule-making process). The latter example is also discussed at 128 CONG. REC. 25,662-63 (1982) and in *Oversight of OMB Regulatory Review and Planning Process: Hearings before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Affairs*, 99th Cong., 2d Sess. 56, 98 (1986).

¹⁵² Gilhooly, *supra* note 42, at 301-02 (emphasis added).

¹⁵³ See *supra* part III.B.4 for discussion of the executive oversight process, and the intervention of President Bush, as displacing the EPA's statutorily-mandated decision-making authority.

¹⁵⁴ Stenger, *supra* note 22, at 12-14.

¹⁵⁵ Gilhooly, *supra* note 42, at 303.

will provide greater accountability in the regulatory process, and give courts the information they need to accurately assess compliance with congressional mandates.¹⁵⁶ Professor Margaret Gilhooley, of Seton Hall Law School, confidently dismisses concern that this disclosure requirement may represent an inappropriate intrusion into the deliberative process.¹⁵⁷ Although "[t]he administration has a recognized role in influencing agency decisions," its influence "cannot exceed the statutorily delegated responsibility of the agency."¹⁵⁸

B. *Explicit Section 404 Policy Guidance from Congress*

When first enacted, the CWA provided a "new shape for administrative process—one that would avoid the use of expertise as an excuse to inaction and would protect agencies from capture by special interests."¹⁵⁹ The initial evolution of section 404 under CWA's broader policies¹⁶⁰ generally conformed to this procedural design, but developments in recent years suggest that additional legislative guidance is now required.

In his examination of comparable Clean Air Act (CAA)¹⁶¹ developments, Bruce Ackerman, Professor of Law at Yale University, notes that EPA's failure to make sensible regulatory policy was a symptom of organizational breakdown under the Act.¹⁶² This failure was caused in part by vague formulas for environmental protection that too readily delegated basic value choices to agency experts. Although Congress

¹⁵⁶ *Id.* at nn. 19-20 and accompanying text (citing Verkuil, *Welcome to the Constantly Evolving Field of Administrative Law*, 42 ADMIN. L. REV. 1, 2 (1990)).

¹⁵⁷ Gilhooley, *supra* note 42, at 350. See also *id.* at 335-48 nn. 193-244 (noting that such intrusions are otherwise prohibited by executive privilege).

¹⁵⁸ *Id.* at 350. See also *Chevron*, 467 U.S. at 865. "[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments" provided that accountability to the people is preserved. *Id.* (emphasis added).

¹⁵⁹ BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981), at 1 (discussing general characteristics of the evolving administrative process in the context of the Clean Air Act).

¹⁶⁰ See *supra* subparts III.A.1 through 5.

¹⁶¹ 42 U.S.C. §§ 7401-7671q (1992).

¹⁶² ACKERMAN, *supra* note 159, at 2, 124.

accorded high priority to scrubbing technology,¹⁶³ the agencies could have selected other more ecologically sensible and less costly mechanisms for combatting air pollution instead.¹⁶⁴ In effect, an extraneous interest in applying uniform standards rather than accounting for regional differences subverted the CAA's goal of reducing total air pollution.¹⁶⁵ If Congress had given more explicit guidance on economic and environmental values, this result might have been avoided.

Professor Ackerman advises that "it is imperative . . . that [Congress'] early efforts in agency-forcing be *replaced* by statutory schemes that promise a more fruitful dialogue between politicians and technocrats in the decade[s] ahead."¹⁶⁶ Admittedly, the political compromises that weakened the CAA are different from the proposals for limiting federal wetlands jurisdiction: "[u]nlike many other environmental laws that require a facility or project to attain a certain level of pollution control, wetlands regulation simply determines whether the project will be built in the first place."¹⁶⁷ Persons interested in convincing Congress to reform section 404 of the CWA can rely upon the lessons provided by Professor Ackerman. Although the CWA represents an initially successful utilization of agency-forcing provisions, breakdowns in communication between politicians and agency scientists threaten to exacerbate the statutory conflict between economic and environmental concerns.

Congressional statements of purpose and explicit statutory goals will not necessarily provide precise solutions, but could help the experts resolve internal conflicts.¹⁶⁸ The pursuit of congressionally-formulated

¹⁶³ A technique called "flue gas desulfurization" that reduces the amount of sulfur dioxide particles released into the air as a by-product of industrial production; the process involves a device attached to smokestacks which evokes a chemical reaction attracting sulfur dioxide into a lime solution that is sprayed in the path of exhaust gases—which is later removed, dewatered and extruded in the form of sludge. Ackerman, *supra* note 159, at 15-16.

¹⁶⁴ See generally Dale W. Jorgensen & Peter J. Wilcoxon, *Environmental Regulation and Economic Growth*, 21 RAND J. ECON., 314 (1990).

¹⁶⁵ ACKERMAN, *supra* note 159, at 45-47; see also Bruce A. Ackerman and William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L. J. 1466, 1492-96 (1980) [hereinafter *Beyond the New Deal*].

¹⁶⁶ Ackerman, *supra* note 159, at 4 (emphasis added); see also *Beyond the New Deal*, *supra* note 164, at 1470.

¹⁶⁷ William L. Want, *Expanding Wetlands Jurisdiction Affects Property Transactions*, NAT'L L. J., Nov. 13, 1989, at 19. See also *supra* note 149.

¹⁶⁸ See, e.g., Grumbles & Kopocis, *supra* note 64; John Webster Kilborn, *Purchaser*

wetland protection policy takes the lessons of the CAA to heart and applies them to the CWA. To paraphrase Professor Ackerman, Congress must be careful not to mix clean water symbols with the economic self-interest of landowners in a way that invites cynicism about self government.¹⁶⁹ Acquiescence to wetlands regulatory changes like those proposed by former President Bush, a plan that might resurface in subsequent political debates, is tantamount to acting against Professor Ackerman's advice. Whether Congress wishes to clarify its original intention by (a) requiring balanced consideration of economic and environmental interests under the Clean Water Act or (b) expressly prohibiting the agencies from making such comparisons, our elected representatives should take affirmative action. The policy implications inherent in such a choice should be debated and resolved on the floors of the U.S. House of Representatives and the U.S. Senate, not behind the closed doors of an executive oversight committee meeting, especially if dramatic changes of policy will receive a mere rubber-stamp of approval from the judiciary.

VI. CONCLUSION

Divergent interpretations of the phrase "no net loss" (a long term goal in the minds of developers; a more immediate mandate for conservationists) reflect the basic policy conflict inherent in section 404 of the Clean Water Act. Advocates for the retrenchment of existing wetland protection policies have legitimate concerns; their focus on the impacts of environmental statutes on local and national economies understandably promotes grass-roots and institutional support for regulatory reform. Environmental regulations have had an undeniable impact on local economic development efforts.¹⁷⁰ Whether or not the current regulatory regime adequately balances economic development with environmental protection is, therefore, a worthwhile topic for debate. The concerns motivating passage of the Clean Water Act in the first place, however, have not dissipated. In fact, improved under-

Liability for the Restoration of Illegally Filled Wetlands under Section 404 of the Clean Water Act, 18 ENVTL AFF. 319 (1991); William K. McGreevey, Note, *A Public Availability Approach to Section 404(b)(1) Alternatives Analysis: A Practical Definition for Practicable Alternatives*, 59 GEO. WASH. L. REV. 379 (1991).

¹⁶⁹ See ACKERMAN, *supra* note 159, at 116 (referring to clean air symbols); see also *Beyond the New Deal*, *supra* note 164, at 1566.

¹⁷⁰ See *supra* notes 7-13 and accompanying text.

standing of the impacts of human activity on the environment, and continuing losses of vital resources, counsel against retrenchment of existing statutory environmental protections. In either case, we must resolve the apparent tension between these interests in order to ensure the rational conservation and management of national and local wetlands. Any changes to the process should, however, take place in a way that respects democratic principles of accountability.

Expanded executive oversight and broadened judicial deference enabled President Bush's administration to attack longstanding statutory interpretations of the CWA regarding environmental protection.¹⁷¹ Although President Clinton eliminated the Competitiveness Council,¹⁷² these twin forces of change could resurface. Agency supervision is one of the president's constitutionally-approved executive functions, but agencies also have a legal responsibility to exercise independent judgment. Broad, deferential judicial review of executive influence, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,¹⁷³ deprives the public of an essential tool for checking alleged excesses in the executive branch.¹⁷⁴ As discussed in Section IV above, the courts should be ready to undertake meaningful judicial review of executive influence, especially where regulatory changes merely reflect responses to political pressure. The public interest is best served when democratic principles of accountability are upheld.

Professor Merrill's executive precedent model encourages judicial deference based on traditional contextual factors.¹⁷⁵ Agency expertise, longstanding statutory interpretations, well-reasoned decisions, the ex-

¹⁷¹ Compare *supra* notes 24 (discussing present judicial interpretations of the CWA as favoring environmental protection) and 46 (regarding the distinction between Congress' ambiguous, compromise bifurcation of § 404 administrative authority under the EPA and the Corps, and other environmental statutes) with *supra* notes 45 (cataloging statutorily authorized cost-benefit analysis policies under the Federal Insecticide, Fungicide and Rodenticide Act, the National Environmental Policy Act, and the Resource Conservation and Recovery Act), 91 (noting flexible long term approaches to the resolution of environment-development problems under the Marine Mammal Protection Act and the National Pollutant Discharge Elimination System) and 92 (listing statutorily authorized balancing of environmental and economic factors under the Endangered Species Act and the Fisheries Conservation and Management Act).

¹⁷² See *supra* note 17.

¹⁷³ 467 U.S. 837 (1984); see *supra* part II for discussion on the potential application of this case in a challenge to changes in the wetland regulatory scheme.

¹⁷⁴ The Council on Competitiveness also influenced the development of clean air, recycling and hazardous waste policy. Stenger, *supra* note 22, at 13.

¹⁷⁵ See *supra* text accompanying note 144.

istence or lack of interagency agreement, and many other elements can be weighed against each other on a sliding scale. If applied, this model will result in judicial judgments supported by more revealing reasons for deferring to agency decisions. Professor Merrill's model preserves the checks and balances necessary for a smoothly-functioning democratic government.

Required disclosure of changes in agency positions that result from executive oversight can enhance both agency and administrative accountability for regulatory decision-making. Such disclosure can be accomplished through legislative action.¹⁷⁶ Finally, explicit policy guidance from Congress would also help clarify existing ambiguities in the Clean Water Act. Without a response of some kind, it is likely that current tension between economic and ecological interests under section 404 will continue unabated. The necessary result of inaction is continued wetlands loss and heightened dissatisfaction in the regulated community.

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¹⁷⁶ See *supra* note 151, for a list of bills submitted to the second session of the 102nd Congress to accomplish this goal.

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