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Federal Control Over Wetland Areas: The Corps of Engineers Expands its Jurisdiction

William F. Schneider

COMMENTARIES

FEDERAL CONTROL OVER WETLAND AREAS: THE CORPS OF ENGINEERS EXPANDS ITS JURISDICTION*

INTRODUCTION

In 1972 the increasing awareness of and concern for the effects of water pollution on the quality of the environment and the recognition of the inadequacies of past and existing legislation resulted in the congressional enactment of amendments to the Federal Water Pollution Control Act (FWPCA).[1] The goal of the 1972 amendments is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters"[2] by eliminating "the discharge of pollutants into the navigable waters . . . by 1985."[3] An interim goal is to achieve a standard of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and is safe for human recreation by 1983.[4] Under the FWPCA it is illegal to discharge any pollutant into the waters of the United States without a permit;[5] responsibility for overseeing the permit system is delegated to the Environmental Protection Agency (EPA).[6] Recognizing that the actual destruction or removal of a waterway could be as environmentally disruptive as the polluting of an extant waterway,[7] Congress integrated control over dredging

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1. Act of Oct. 18, 1972, Pub. L. No. 92-500 §§101 *et seq.*, 86 Stat. 816, *amending* 33 U.S.C. §§1151 *et seq.* (1970) (codified at 33 U.S.C. §§1251 *et seq.* (Supp. II, 1972)) [hereinafter cited as FWPCA]. For a general history of the events leading up to the passage of the 1972 amendments, *see* Ipsen & Raisch, *Enforcement Under the Federal Water Pollution Control Act Amendments of 1972*, 9 LAND & WATER L. REV. 369, 370-74 (1974); Note, *Clearing Muddy Waters: The Evolving Federalization of Water Pollution Control*, 60 GEO. L.J. 742, 744-61 (1972); Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 1973 WIS. L. REV. 893, 893-95.

2. FWPCA §101(a), 33 U.S.C. §1251(a) (Supp. II, 1972).

3. *Id.* §1251(a)(1).

4. *Id.* §1251(a)(2).

5. FWPCA §§301(a), 402, 33 U.S.C. §§1311(a), 1342 (Supp. II, 1972). In some instances an actual permit may not be required, but approval of the EPA is required. *See, e.g.*, 33 U.S.C. §1328 (Supp. II, 1972).

6. FWPCA §§301(a), 402, 33 U.S.C. §§1311(a), 1342 (Supp. II, 1972). Generally, permits are issued only for discharges that comply with technology based effluent limits and water quality standards. Specifically, permits are issued for discharges from point sources. A point source is "any discernible . . . conveyance . . . from which pollutants are or may be discharged." FWPCA §502(14), 33 U.S.C. §1362(14) (Supp. II, 1972). An effluent limitation is a restriction applying to a particular point source that limits the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged." *Id.* §1362(11). The effluent limitations are set by the EPA based on the availability and practicality of current technological equipment for removing the pollutants from waste water. 33 U.S.C. §1314(b) (Supp. II, 1972).

7. FWPCA §404(c), 33 U.S.C. §1344(c) (Supp. II, 1972).

and filling activities into the scope and purpose of the act.[8] Authority to administer the permit system controlling these activities was given to the United States Army Corps of Engineers.[9]

Congress clearly intended that the scope of the new act should be national and that federal regulation should reach areas previously untouched by federal control.[10] Although the FWPCA contains a provision that the act is to apply only to navigable waters, the latter term is broadly defined as the "waters of the United States."[11] During the House debate on this bill, Representative Dingell stated that the term navigable waters was to be defined as "the waters of the United States" in a geographical sense, and was not to be limited to "navigable waters of the United States" in the technical sense as it had appeared in some prior laws.[12] He further elaborated by stating that the "conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[13] The exact scope of the jurisdictional definition was not detailed in the act,[14] which leaves the limits of the statute to evolve in the courts. Although the EPA has not yet been sued for failure to recognize the geographical jurisdiction that some commentators say was conferred by the act, a federal court has ordered the Corps of Engineers to implement its full jurisdictional mandate.[15]

In *Natural Resources Defense Council v. Callaway*,[16] the federal district

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8. *Id.* §1344.

9. *Id.* §1344(a).

10. The Federal Water Pollution Control Act was first passed in 1948. It was subsequently amended five times previous to the 1972 amendments because of its failure to adequately stem the growing problem of water pollution. The original act proceeded on the assumption that control of water pollution was the primary responsibility of the states. Although the later amendments increased federal grants, introduced water quality standards, and instituted more adequate enforcement provisions, these provisions achieved few results. The 1972 amendments were, in effect, a complete rewriting of the past law. Ipsen & Raisch, *supra* note 1, at 370-74. After the 1972 amendments were passed, the EPA was burdened with large administrative responsibilities. The EPA missed a number of procedural deadlines, failed to quickly establish certain quality standards, and created a number of exclusions to its permit program. Recently, it has been sued in order to force it to correct these failings. Hall, *Litigation Under the Federal Water Pollution Control Act Amendments of 1972*, 4 ENVIRONMENTAL L. RPTR. 50,109, 50,115-16 (1974). One commentator has attributed these failures in part to the fact that the funding of the EPA has been inadequate for it to function optimally. Speth, *Environmental Critique (The 1972 Federal Water Pollution Control Act: Problems and Prospects After One Year)*, 7 NATURAL RESOURCES LAW. 249, 253-54 (1954).

11. FWPCA §502(7), 33 U.S.C. §1362(7) (Supp. II, 1972).

12. 118 CONG. REC. 33,756 (1972).

13. *Id.* at 33,757.

14. *See, e.g.*, Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459, 461 (1973) (recognizing that it was the intention of Congress to greatly expand the jurisdiction of the EPA but questioning the propriety of this action); Robie, *State Viewpoint: (The Federal Water Pollution Control Act and the States: Love in Bloom or Marriage on the Rocks)*, 7 NATURAL RESOURCES LAW. 231, 232-33 (1974).

15. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

16. *Id.*

court for the District of Columbia held that the Corps had ignored the statutory definition of navigable waters in section 502(7) of the FWPCA.[17] Noting that the act defines navigable waters as "the waters of the United States, including the territorial seas," the court held that this language demonstrated congressional intent to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the commerce clause of the Constitution.[18] The court found that the Corps had acted unlawfully and in derogation of its responsibilities under section 404 of the FWPCA by adopting a more limited definition of navigability, and the court ordered the Corps to publish new regulations clearly recognizing the full regulatory mandate of the FWPCA.[19] Although the decision was written in language suggesting that the Corps had failed to accept a clearly delineated responsibility, the court ordered the Corps, in effect, to traverse previously uncharted ground. In fact, the full extent of the jurisdiction granted to Congress under the commerce clause has not been determined.[20] Since the use of the Corps of Engineers as a watchdog and protector of the environment is of recent origin, its ability in this role is largely untested.

NAVIGABILITY AND THE HISTORY OF THE CORPS' PERMIT GRANTING AUTHORITY

Prior to the passage of the FWPCA, the Corps of Engineers had administered a permit issuing system regulating certain dredge and fill activities by the authority of section 10 of the Rivers and Harbors Act of 1899.[21] This act prohibits the building of any structure (dams, dikes, bridges) in or over any navigable water of the United States and the excavation, filling, or modifying of any lake or channel of any navigable waters without a permit issued by the Corps of Engineers.[22] The jurisdiction of this act was essentially based on the necessity of maintaining the navigability of the nation's waterways.[23] Historically the Corps' jurisdiction was limited to those waterways that were navigable in fact — capable of being used for any sort of commercial activity.[24] Once a determination of navigability was made it could not be extinguished by a subsequent finding that the waterway was no longer actually

17. FWPCA §502(7), 33 U.S.C. §1362(7) (Supp. II, 1972).

18. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

19. *Id.*

20. See text accompanying notes 87-97 *infra.*

21. 33 U.S.C. §403 (1970) (originally enacted as Act of March 3, 1899, ch. 425, §10, 30 Stat. 1151).

22. *Id.*

23. *See* Eames, *The Refuse Act of 1889: Its Scope and Role in Control of Water Pollution*, 58 CAL. L. REV. 1444 (1970).

24. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). "[Waters are] navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* In some cases the fact that hunters and trappers used a stream as part of their commercial activity was "sufficient to establish it as navigable water." Donley, Moss, Outen, & Speth, *Land Use Controls Under the Federal Water Pollution Control Act: A Citizen's Guide*, 5 ENVIRONMENTAL L. RPTR. 50,092, 50,099 (1975) [hereinafter cited as Donley].

navigable.[25] Later court decisions enlarged the scope of navigability for federal jurisdictional purposes to include waters that, though not commercially used, had the capability of such use[26] and waters that, by means of "reasonable" improvements, could be so used.[27] Federal jurisdiction based on navigability also extends to regulating obstructions in nonnavigable tributaries of navigable waters if the obstructions could affect the navigability of the downstream water.[28] Even though these findings seem to broaden the definition of navigability, the Corps of Engineers has traditionally limited its jurisdiction to those waterways navigable in fact, which has excluded, in most instances, tributaries and feeder streams of navigable waters and tidal areas above the mean high tide line.[29]

As long as the Corps' concern was to protect and enhance the navigability of the nation's waterways, the historical definition of navigability created no difficulties. Increasing federal concern with environmental protection in the late 1960's led to an expansion of the Corps' permit granting authority under section 13 of the Rivers and Harbors Act of 1899 (commonly called the Refuse Act).[30] Pursuant to an executive order issued in December 1970, the Corps was required to implement a permit program to regulate the discharge of pollutants into the navigable waters of the United States or their tributaries.[31] The change in the focus of the act from control of navigational impediments to restriction of pollutant discharge necessitated an expansion of the definition of navigable waters to include waterways that were being polluted but were not necessarily navigable in fact.[32] The Corps of Engineers and the EPA began initial steps toward the institution of a permit system for the industrial discharge of pollutants, but a federal district court's ruling halted this program. In *Kalur v. Resor*,[33] the court held that the 1899 act gave authority for a permit system to cover discharges only into navigable waters and that the Corps had no authority to issue or deny permits authorizing discharge into the tributaries of navigable waters.[34] The court also ruled that the Corps could issue no permit in cases involving navigable

25. *See* Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).

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

27. *See* United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

28. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

29. Donley, *supra* note 24, at 50,099. Traditionally the area above the mean high water (tide) line (mean higher high water line on the Pacific coast) was considered to be land and below this mark was considered to be water. Both coasts of the United States experience two high tides daily, one of which rises higher on the shore than the other. "The mean high water line (MHW) is the average of both high tides over a period of 19 years; the mean higher high water line (MHHW) is the average of only the higher of the two high tides for same period of time." Leslie Salt Co. v. Froehlke, 5 ENVIRONMENTAL L. RPTR. 20,039, 20,041 (N.D. Cal. 1974).

30. 33 U.S.C. §407 (1970). Section 13 of the Rivers and Harbors Act is usually called the Refuse Act, but at times the name has been applied to the entire 1899 Act.

31. Exec. Order No. 11,574, 3 C.F.R. 188 (1970).

32. *See* Comment, *Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483 (1972).

33. 335 F. Supp. 1 (D.D.C. 1971).

34. *Id.* at 11-12.

waters unless it submitted an environmental impact statement for each proposal.[35] This ruling effectively suspended the entire permit granting system then being developed.[36] Because the Corps' role as watchdog of the environment through revitalization of the 1899 act was halted so soon after its inception, no expansion of the term "navigability" developed, and the Corps' performance as a protector of the environment could not be evaluated.[37]

While retaining and expanding the permit issuing regulatory scheme of the Refuse Act,[38] the FWPCA has almost completely superseded this statute as a means of pollution control, although the Refuse Act remains in effect. Primary responsibility is given to the EPA; however, the act continues the Corps' of Engineers jurisdiction over dredge and fill activities.[39] Implementing its authority under the FWPCA, the Corps retained the definition of navigability developed under the Rivers and Harbors Act of 1899.[40] The EPA, however, adopted a broader definition of navigability that was challenged in *United States v. Ashland Oil & Transportation Co.*[41] This court, interpreting the words "navigable waters" as used in the FWPCA, found that Congress intended the broadest possible constitutional meaning. Because the act defines this term as "waters of the United States," the court reasoned that one simply substitutes "waters of the United States" for "navigable waters" wherever the latter term appears in the act.[42] Thus, *Ashland* held that a nonnavigable tributary of a navigable waterway is within the definition of "waters of the United States."[43]

Considering the same issue, a federal district court in *United States v. Holland*[44] concluded that Congress intended to go beyond the "navigability"

35. *Id.* at 13. The National Environmental Policy Act requires that all agencies of the federal government file a detailed impact statement with every recommendation, report, or proposal for legislation and with any other major action that significantly affects the quality of the human environment. These statements must outline the environmental impact of the proposed policy, detail any adverse environmental effects that cannot be avoided, and describe the alternatives to the proposed action. 42 U.S.C. §4321 *et seq.* (1970). Congress in passing the FWPCA exempted most of the proposed activities under the act from the necessity of complying with the provisions of the NEPA. FWPCA §511(c)(1), 33 U.S.C. §1371(c)(1) (Supp. II, 1972).

36. *See* Wenner, *Federal Water Pollution Control Statutes in Theory and Practice*, 4 ENVIRONMENTAL LAW 251, 258-61 (1974).

37. *But see* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). The Fifth Circuit upheld the Corps' power under the 1899 Act to deny a dredge and fill permit application based solely on ecological reasons.

38. FWPCA §402, 33 U.S.C. §1342 (Supp. II, 1972).

39. *Id.* §1344(a).

40. 33 C.F.R. 209, 260 (1975).

41. 364 F. Supp. 349 (W.D. Ky. 1973), *aff'd*, 504 F.2d 1317 (6th Cir. 1974).

42. United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349, 350 (W.D. Ky. 1973).

43. *Id.* at 351.

44. 373 F. Supp. 665 (M.D. Fla. 1974). For extensive analysis of this case and a history of the prior judicial definitions of navigability, see Comment, *Federal Jurisdiction: Water Pollution Control Act Amendments of 1972 Reach Polluting Activities Occurring Above Mean High-Water Line*, 2 FLA. ST. U. L. REV. 799 (1974); Comment, *The 1972 Amendments to the Federal Water Pollution Control Act Extends Dredge and Fill Jurisdiction Above the Mean High Water Mark*, 6 RUTGERS-CAMDEN L.J. 823 (1975); Comment,

limitation to control water pollution. The defendant in *Holland* had filled man-made nonnavigable mosquito canals and mangrove wetlands above the mean high water line. The court easily concluded that the canals were within the scope of the FWPCA, seemingly because they emptied into a navigable body of water,[45] but congressional intent to control fill activities in the mangrove wetlands was less apparent. Reasoning that the FWPCA embraced the belief that pollution of wetlands areas could prove ecologically fatal, the court "necessarily" felt the act was intended to avoid such catastrophes. The court seemed to conclude that the mangrove wetland area was land instead of water but that "fill activities on land periodically inundated by tidal waters constituted discharges entering 'waters of the United States.' "[46] In passing the FWPCA, Congress intended to reach the source of pollution, even if this necessitated breaching the barrier of the mean high water mark, the traditional boundary of navigable waters.[47] The *Holland* court did not define "waters of the United States"; instead, it reasoned that the commerce clause was the only limitation on the Corps' jurisdictional power.

The third recent decision to examine this issue was *Leslie Salt Co. v. Froehlke*.[48] The single question presented was whether the Corps' jurisdiction extended above the mean high water mark. Relying on the reasoning of the *Ashland* and *Holland* cases, the court concluded that to permit the Corps to extend its regulation above the mean high water mark was a reasonable interpretation of its jurisdiction under the FWPCA.[49]

The only other guideline available to the Corps in drafting its new regulations was a legal memorandum by the EPA defining its jurisdiction for purposes of implementing the National Pollution Discharge Elimination System (NPDES) permit program.[50] The memorandum states that the EPA will have jurisdiction not only over all navigable waters and their tributaries but also over waters that affect interstate commerce.[51]

THE EXPANDED JURISDICTION AND NEW PROCEDURES

In compliance with the *Callaway* court order, the Corps of Engineers issued a new statement of jurisdiction on July 25, 1975.[52] The definition of

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Waters of the United States: Does Federal Control Inundate the Wetland, 26 U. FLA. L. REV. 893 (1974).

45. 373 F. Supp. at 673.

46. *Id.* at 676.

47. See text accompanying notes 12-13 *supra*.

48. 5 ENVIRONMENTAL L. RPTR. 20,039 (N.D. Cal. 1974).

49. *Id.* at 20,040. The court was, in effect, holding that it was permissible to use the mean higher high water mark as the boundary for navigable water on the Pacific coast. The propriety of extending jurisdiction above this line was not explored. See note 29 *supra*.

50. *See Current Development*, 3 ENVIRONMENTAL RPTR. 1240 (Feb. 9, 1973).

51. *Id.* Specifically, jurisdiction was stated to include interstate and intrastate lakes, rivers, and streams that are utilized by interstate travelers for recreational purposes, or from which fish or shellfish are taken and sold in interstate commerce, or which are utilized for industrial purposes by industries in interstate commerce.

52. 40 Fed. Reg. 31,320 (1975).

navigability adopted[53] is broad, at least superficially. The Corps' regulation[54] delineates its jurisdiction under both the Rivers and Harbors Act of 1899 and section 404 of the FWPCA. For the 1899 act the regulations retain the traditional definition of navigability — navigable in fact.[55]

In contrast to this, as directed by the *Callaway* court, jurisdiction under section 404 of the FWPCA parallels the policy guidelines published by the EPA. The Corps, however, retains the distinction between navigable and nonnavigable waterways in this definition. Navigable waters include waterways traditionally considered navigable in fact, both coastal and interior, and artificially created channels and canals used for recreational or navigational purposes that are connected to other navigable waters.[56] Jurisdiction for both coastal and inland navigable waters extends shoreward to the mean high water mark for tidal waters and to the head waters of rivers, lakes, streams, and artificial waterbodies. Nonnavigable waters include tributaries of navigable waters, interstate waters, and intrastate waters used in some method that broadly affects interstate commerce.[57] Jurisdiction of nonnavigable waters extends landward to the ordinary high water mark and up to their head waters.

This distinction between navigable and nonnavigable waterways is important in deciding which wetland areas[58] will be regulated by the Corps. Only those wetlands adjacent or contiguous to navigable waters are included as "waters of the United States" and thus fall within the scope of the regulations.[59] If by navigable waters, in the definition of wetlands, the Corps means those waters that are navigable in fact, it would exclude from regulation a large number of the wetland areas in the United States. On the other hand, these wetland areas may not be excluded if the term navigable waters under the wetland definition is given the broader meaning outlined in the rest of the regulations.[60] By extending its jurisdiction to encompass wetlands, the Corps avoids the problem of deciding where the water stops and the land begins.[61] To ascertain that an area is a wetland, the Corps must find that the area is periodically inundated and that specific vegetation requiring a wetland environment grows and reproduces in the area.[62]

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53. The regulation discussed in this commentary is the "interim final regulation." As of this date, no final regulation has been issued.

54. Corps of Engineers Reg. §209.120, 40 Fed. Reg. 31,322 (1975).

55. Corps of Engineers Reg. §209.120-(d)(1), 40 Fed. Reg. 31,324 (1975).

56. *Id.* §§209.120-(d)(2)(i)(a), (c), (d).

57. *Id.* §§209.120-(d)(2)(i)(e), (f), (g).

58. Wetlands can be defined generally as the zone of land that lies between dry land and land that is permanently inundated. A wetland is land that contains much soil moisture such as a marsh, estuary, swamp, or bog.

59. *Id.* §§209.120-(d)(2)(i)(b), (h).

60. *Id.* §209.120-(d)(2)(i).

61. Previously, the Corps would accept jurisdiction only over that portion of a wetland that was inundated by the tide a specified number of times per year, that portion being considered, in effect, part of the water. The new method simply attaches jurisdiction to the wetland, without dividing it into land and water.

62. Corps of Engineers Reg. §§209.120-(d)(2)(i)(b), (h), 40 Fed. Reg. 31,324 (1975).

The new definition of "waters of the United States" contained in the FWPCA enables the Corps of Engineers to protect water quality to the full extent of the commerce clause. It extends federal regulation over the discharge of dredge and fill materials to many areas that have never been subject to federal control for water quality protection purposes.[63]

Three exceptions that the Corps has made to its broad statement of jurisdiction should be noted. First, although section 404 prohibits the discharge of dredge and fill material into the waters of the United States without a permit, the regulations specificially exempt discharge of dredge material into the territorial seas.[64] Perhaps this exception can be explained by the fact that the Corps is one of the primary contractors for such operations and hopes to exempt itself from the necessity of obtaining a permit.[65]

Second, man-made canals used for drainage or sewage disposal are omitted from the definition of navigable waters. No permit would seem necessary for dredge and fill activities affecting them;[66] however, regulation of such canals was clearly within the purview of the FWPCA by the *Holland* decision.[67]

The third exclusion allows, without a permit application, the construction of small bulkheads that result in minimal discharges.[68] Recently, a federal court held that the EPA could not exempt from the regulation of the NPDES permit program any point source sites of pollution discharges.[69] The EPA had allowed small discharges of a certain type to continue without a permit. The Corps' attempt to utilize a similar distinction in its new regulations may be invalid.

The new regulations provide that the Corps may make a case by case determination of its possible jurisdiction over any waterway that does not fall clearly within the regulations' definitions.[70] The permit requirement gives the Corps an opportunity to evaluate the possible harmful effects of the proposed activity on the environment; however, if the case by case determination takes place after the activity has been completed, the Corps will be unable to prevent environmental damage. The purpose of defining the Corps' jurisdiction was to give the affected parties notice of the necessity

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63. The new regulations would extend federal jurisdiction to include, for example, a lake located entirely within a single state and used only for recreational purposes.

64. Corps of Engineers Reg. §120-(d)(2)(i), 40 Fed. Reg. 31,324 (1975). Territorial sea is defined as "that belt of the sea adjacent to the coast of a state, beyond its land territory and its internal waters, over which the sovereignty of the state extends." S. SCHWARTZTRAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS 3 (1972). The Corps will therefore exempt from regulation bodies of water that have always been subject to its jurisdiction for dredge and fill purposes.

65. See Wenner, *supra* note 36, at 253 n.6.

66. 40 Fed. Reg. 31,321 (1975).

67. See text accompanying note 45 *supra*.

68. Corps of Engineers Reg. §209.120-(e)(2)(iv), 40 Fed. Reg. 31,320, 31,326 (1975).

69. Natural Resources Defense Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975). See text accompanying notes 38, 50 *supra*.

70. Corps of Engineers Reg. §209.120-(d)(2)(i)(i), 40 Fed. Reg. 31,325 (1975). The regulation specifically refers to intermittent rivers, streams, tributaries, and perched wetlands as falling within this category.

for obtaining a permit. This attempt to fill the gaps in the Corps' definition of its jurisdiction seems to be an open invitation to litigation.[71]

The new definition of the jurisdiction of the Corps of Engineers extends federal control into areas that were previously within the sole power of the states. Despite this extension, the FWPCA does not purport to exclude the states from participation in the important job of water pollution control. Thus, the Corps in its explanatory remarks accompanying the new regulations stated that "there is considerable merit in having the states become directly involved in the decisionmaking process to the maximum extent possible under the law."[72] The states may become involved in the section 404 permit granting system at two stages. First, before a permit can be granted, a state water quality certification is required; no permit may be granted if the proposed discharge would lower the quality of the receiving water below the standards set by the state.[73] If the state denies a water quality certification, the Corps may not issue a permit. If the state does not have a certification program or delays the processing of its certification, the Corps will proceed to process the permit. Since the EPA must approve any state's proposed water quality certification program before it begins operation,[74] no danger exists that the state standard will conflict with the objectives of the FWPCA. In the absence of a state program, the EPA has developed its own standards.

A second type of state permit might be required. The Corps recognizes that many states have existing permit programs that regulate the same types of activities that are regulated by section 404.[75] In those states the Corps may not issue a permit if the state denies an applicant a permit. If, however, the state issues a permit, the Corps will not withhold its permit "unless there are overriding national factors of the public interest which dictate such action."[76] The Corps does not explain what these overriding factors would be. Since there is no requirement that the state's permit program meet any national environmental standards, it is possible that a state's approval of a permit will not effectuate the purposes of the FWPCA. By according such great weight to the state's determination of whether to grant a permit, the Corps may be failing to comply with its statutory responsibility.

The new regulations bring the protection of wetland areas under federal control for the first time. Wetlands protection involves unique factors not present in attempts to control water pollution in other "navigable waters."[77]

71. *See, e.g.*, United States v. Phelps Dodge Corp., 391 F. Supp. 1811 (D. Ariz. 1975). (The FWPCA was attacked as being void for vagueness, specifically because the general definition of navigable waters contained in the act was said to be so vague that it failed to give fair warning of the conduct that it made criminal. The court rejected this argument as applied to the broad definition given in the act.) The Corps' failure, however, to explicitly define every aspect of its jurisdiction may raise more serious problems of adequate notice to affected parties.

72. 40 Fed. Reg. 31,322 (1975).

73. FWPCA §303, 33 U.S.C. §1313 (Supp. II, 1972).

74. *Id.* §1313(a). *See also* Corps of Engineers Reg. §209.120-(f)(3), 40 Fed. Reg. 31,327 (1975).

75. 40 Fed. Reg. 31,322 (1975).

76. Corps of Engineers Reg. §209.120-(f)(e)(iii), 40 Fed. Reg. 31,327 (1975).

77. *See, e.g.*, Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER

The quality of the wetlands area is not a prime consideration; the real issue is the continued existence of the wetlands area. Water pollution control under the FWPCA has been predicated on setting standards either to maintain or improve the existing quality of the polluted water. The enforcement provisions of the FWPCA do not focus on the nondegradation of presently pure water.[78] As one commentator has noted: "While the importance of nondegradation has been recognized on a policy level, it has not been effectively implemented."[79] Nondegradation of presently pure water is analogous to wetlands protection since the Corps will be trying to maintain the "purity" of many wetland areas as well as trying to improve those already damaged.

In dealing with wetlands, the Corps, contemplating a balancing process, has delineated in its regulations some of the factors to be considered. Its decisions will weigh the benefits and probable impact of the proposed fill activity against the need to preserve the wetland in its present state.[80] The Corps recognizes that wetlands serve important natural and biological functions such as aiding fish and wildlife reproduction, protection against erosion, providing storage areas for storm and flood waters, and affording recharge areas for surface and ground water.[81] While a particular alteration of a wetland may cause only minor damage, the cumulative effect of many small changes often results in a major impairment of wetland resources.[82] Against these important environmental concerns the Corps plans to balance such factors as the dredge and fill project's effect on the local economy, on employment, and on navigation.[83] Since the Corps' jurisdiction over the wetlands is predicated on the environmental concerns of the FWPCA, it is questionable whether the proposed balancing process is compatible with the Corps' responsibility. Furthermore, given the EPA's inactivity in implementing its own nondegradation responsibility,[84] it seems unlikely that the Corps will assume a leading role in this area.

As a whole, this regulatory expansion of jurisdiction over dredge and fill activities may catalyze the EPA's involvement in previously neglected areas and may serve as the definitive statement of the EPA's jurisdiction over waterways.

The New Regulations and the Commerce Clause

The only obstacle to full implementation of the expanded jurisdiction of the Corps and the EPA would be a judicial finding that such jurisdiction

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L. Rev. 351, 351-62 (1970); Comment, *The 1972 Amendments to Federal Water Pollution Control Act Extend Dredge and Fill Jurisdiction Above the Mean High Water Line,* 6 Rutgers-Camden L.J. 823 (1975).

78. See Note, *Nondegradation of Water Quality: The Need for Effective Action,* 50 Notre Dame Law. 890, 896-900 (1975).

79. *Id.* at 890-91.

80. Corps of Engineers Reg. §§209.120-(f)(1), (2), 40 Fed. Reg. 31,327 (1975).

81. Corps of Engineers Reg. §209.120-(g)(3), 40 Fed. Reg. 31,328 (1975).

82. *Id.* §209.120-(g)(3)(iii).

83. 33 C.F.R. §209.120-(g)(3)(iii).

84. See Note, *supra* note 78, at 896-97.

has no constitutional basis. The legislative history of the FWPCA appears to support a broad jurisdictional interpretation.[85] Congress intended to establish federal pre-eminence in the field of water pollution control because of the widespread dissatisfaction with individual state efforts toward solving the problem.[86] Congress, in expanding its control over the "waters of the United States," relied on its constitutional power under the commerce clause.[87] Although there appear to be some limits on the commerce power, most recent Supreme Court decisions have interpreted this power broadly.[88]

The extent of congressional power over the nation's waterways has seldom been reviewed because all previous federal acts extended regulation only to those waters characterized as interstate or navigable.[89] Thus, past federal acts respected the general principle of a state's sovereignty over its own internal waters. In considering the precursors of the FWPCA, courts seemed to assume that congressional power under the commerce clause was limited to navigable waters.[90] As the EPA and the Corps began to implement the new power given them under the FWPCA, several courts[91] were faced squarely with this new assertion of congressional commerce power. The Sixth Circuit in *Ashland*[92] noted that Congress found uncontrolled pollution of the nation's waterways a "threat to its interstate commerce."[93] The court concluded that congressional passage of the FWPCA based on this finding was indeed constitutional.

Another lower federal court in *United States v. Holland*[94] agreed with the *Ashland* court's finding of constitutionality. The *Holland* court justified this finding by stating that: "It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution."[95] Stressing the lethal effects of pollutants on all organisms and the

85. See text accompanying notes 12-13 *supra.*

86. See 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW 3-58 to 3-59, 3-80-1 to 3-81 (1973).

87. U.S. CONST. art. I, §8.

88. *See generally* Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Fillburn, 317 U.S. 111 (1942). *But see* National League of Cities v. Usery, 96 S. Ct. 2465 (1976).

89. See note 10 *supra* and accompanying text. *See also* Comment, *Federal Water Pollution Control Act Amendments of 1972*, 14 B.C. INDUS. & COM. L. REV. 672, 674-77.

90. *Cf.* United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp, 362 U.S. 482 (1960); United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970).

91. United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974); P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370 (D.D.C. 1975); United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975); United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602 (S.D. Fla. 1975); United States v. Smith, 7 E.R.C. 1937 (E.D. Va. 1975); Weiszmann v. Corps of Engineers, 7 E.R.C. 1523 (S.D. Fla. 1975); Leslie Salt Co. v. Froehlke, 5 ENVIRONMENTAL L. RPTR. 20,039 (N.D. Cal. 1974); United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).

92. United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

93. *Id.* at 1325.

94. 373 F. Supp. 665 (M.D. Fla. 1974).

95. *Id.* at 673.

interrelatedness of ecological systems, the court felt that it would be contrary to reason to hold that water pollution does not affect interstate commerce unless committed in navigable waters.[96] The cases since *Ashland* and *Holland* have concurred in finding that the FWPCA's grant of jurisdiction is a valid exercise of congressional power under the commerce clause.[97] Federal pre-eminence in the regulation of the nation's waterways seems to be firmly established.

Although there may be constitutional authority for the FWPCA's broad jurisdiction, regulation of the waterways under this act, particularly in dredge and fill operations, may amount to a taking of property.[98] If this regulation is found to be a taking, the fifth amendment[99] would require compensation.[100] The experience of states that have passed wetlands protection acts indicates that litigation over the taking issue is likely to be frequent.[101]

Implementing the New Regulations

The effect of the Corps' of Engineers geographical and subject matter jurisdiction is to make it an overseer of a federal wetlands act.[102] The FWPCA and the Corps' new regulations for implementing its jurisdiction should enable these valuable natural resources to be adequately protected; however, the history of the Corps' activity in ecological areas raises serious doubts about its ability to function in this new capacity. Traditionally, the Corps has been an agressive builder and constructor,[103] allegedly ignoring environmental interests unless there has been exhaustive proof of environmental damage.[104] The Corps' former dredge and fill regulations have been criticized as inadequate in that they interpreted the Corps' jurisdiction narrowly, permitted

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96. *Id.*

97. P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370 (D.D.C. 1975); United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975); United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602 (S.D. Fla. 1975); United States v. Smith, 7 E.R.C. 1937 (E.D. Va. 1975); Weiszmann v. Corp of Engineers, 7 E.R.C. 1523 (S.D. Fla. 1975); Leslie Salt Co. v. Froehlke, 5 Environmental L. Rptr. 20,039 (N.D. Cal. 1974).

98. *See, e.g.*, Comment, *Environmental Land-Use Control: Common Law and Statutory Approaches*, 28 U. Miami L. Rev. 135, 153-155 (1973).

99. U.S. Const. amend. V.

100. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); United States v. Jones, 109 U.S. 513 (1883).

101. For a history of Connecticut's experience with wetlands protection act, which includes summaries of the experience of other states, see Comment, *The Wetland Statutes: Regulation or Taking*, 5 Conn. L. Rev. 64 (1972); Hall, *The Inland Wetlands Act: Reconciling a Collision of Interests*, 48 Conn. B.J. 3 (1974).

102. *Cf.* Comment, *The 1972 Amendments to the Federal Water Pollution Control Act Extend Dredge and Fill Jurisdiction Above the Mean High Water Mark*, 6 Rutgers-Camden L.J. 823, 840 (1975).

103. *See generally* Note, *Corps of Engineers — New Guardians of Ecology*, 31 La. L. Rev. 666 (1971); Comment, *Protection of the Environment and the Army Corps of Engineers: The Extent of Responsibility*, 1971 Law & Soc. Order 778.

104. See Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. Fla. L. Rev. 19, 29-30 (1973).

exceptions, "grandfathered in existing violations," and lacked tough enforcement procedures.[105]

The problem of the Corps' narrow definition of its jurisdiction has been remedied by a court order.[106] While the newly promulgated definition is broad, there are reasons to believe that the Corps may be less than wholehearted in utilizing its new power. This reluctance was indicated when the Corps published four alternative definitions for public comment prior to adopting the new regulations.[107] The Corps stated its preference for the alternative that only slightly changed its old jurisdictional definition.[108] This public statement of its bias casts suspicion on the Corps' willingness to aggressively implement its new power. Hopefully, since this alternative was not accepted, the thinking that led to its proposal will not affect decisions reached under the new regulations.

The Corps' new regulations provide for a step by step assertion of its authority over areas not previously regulated.[109] Complete compliance with the *Callaway* court order will not take place until July 1, 1977, two years after the adoption of the new regulation. Since the court gave the Corps only 90 days to begin implementing its jurisdictional mandate,[110] the delayed implementation is of questionable legality. The new regulations also exempt all previous discharges (of dredge and fill material) completed by the date of the issuance of the new regulations;[111] moreover, continued discharges below a certain volume are excepted if started before the date of issuance of the new regulation.[112] The Corps justifies these exceptions as being necessitated by manpower and budgetary constraints.[113] While such considerations may not be overlooked, the weight accorded them characterizes the maneuvering that has followed the Corps' regulatory operation throughout its history.[114]

One of the positive improvements of the new regulations is the enforcement procedure. Under these provisions, when the Corps becomes aware of any unauthorized activity still in progress, it must immediately issue a cease and desist order.[115] Prior to the new regulations, remedial proceedings

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105. *Id.* at 31.

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

107. 40 Fed. Reg. 19,767-68 (1975).

108. *Id.* at 19,768.

109. Corps of Engineers Reg. §§209.120-(e) (2)(i)(a), (b), (c), 40 Fed. Reg. 31,325-26 (1975). The new regulation immediately applied to all waterways previously considered navigable and to contiguous wetlands; it applied to all tributaries of navigable waters and lakes effective July 1, 1976; and on July 1, 1977, it will apply to all remaining waters within the Corps' jurisdiction.

110. The *Callaway* court originally gave the Corps 15 days within which to publish proposed regulations and 30 days to publish the final regulations implementing its full jurisdictional mandate. Later these periods were amended to 40 days for the proposed regulations and 40 days after that for the final version. Obviously, the court had meant for action to be taken immediately. 392 F. Supp. 685, 686 (D.D.C. 1975).

111. Corps of Engineers Reg. §209.120-(e)(2)(iii), 40 Fed. Reg. 31,326 (1975).

112. *Id.*

113. 40 Fed. Reg. 31,321 (1975).

114. Hoyer, *supra* note 104, at 29-35.

115. Corps of Engineers Reg. §209.120-(g)(12)(i), 40 Fed. Reg. 31,330 (1975).