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Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States

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FEDERALISM IN WETLANDS REGULATION: A CONSIDERATION OF DELEGATION OF CLEAN WATER ACT SECTION 404 AND RELATED PROGRAMS TO THE STATES

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Wetlands regulation may be the most controversial issue in environmental law. It pits America's most biologically-productive and most rapidly-diminishing ecosystems against rights of private ownership and property development in more than 10,000 individual permit decisions a year,[1] decisions not over-described by one regulator as a "'tough, nasty business.'"[2] The centerpiece of federal wetlands regulation is section 404 of the Clean Water Act (CWA),[3] whose scope and implementation have been in running dispute since 1972.[4] A predicate of the Act, however, has been that clean water and related wetland values inhere to the entire nation and that a federal program is necessary to protect, restore and maintain them.[5] If states wish to engage in this tough and nasty business well and good, but the ultimate responsibility remains a national one.

This predicate has not gone unquestioned. The Act has been amended to allow states to operate delegated section 404 programs,[6] and to allow states to regulate certain activities, in the alternative, under broad federal permits.[7] Neither of these opportunities has been widely exercised to date, for reasons that bear examination. In the meantime, enthusiasm for a reduced federal government has swept the political landscape and has brought with it proposals for the outright delegation of welfare, Superfund and other programs to the

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1. U.S. ARMY CORPS OF ENGINEERS, REGULATORY QUARTERLY REPORT, OFFICE OF THE CHIEF OF ENGINEERS FOR FISCAL YEAR 1994, FIFTH QUARTER (on file with author). The Corps processed 10,920 individual permit applications in FY '94. *Id.* This number does not include 55,120 additional activities in wetlands evaluated under general and nationwide permits, and an unknown number of activities under these same permits for which no notification or explanation is required. *Id.* Of the 10,000-plus individual permit decisions referenced here, only 98 permit applications were denied, a rejection rate of less than one percent. *Id.* From these data, it is apparent that § 404 operates largely through negotiating environmentally-protective permitting conditions that minimize wetland loss, not through up-or-down decisions. *See* Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,212 (June 1990). It is these negotiations that generate the continuing controversy surrounding § 404.

2. *Efforts to Combat Marine Pollution Not Keeping Pace with Growth, State Group Told*, 18 Env't Rep. (BNA) 1934, 1934-35 (Dec. 18, 1987) (quoting Jim Ross, Director of Oregon Department of Land Conservation and Development).

3. Federal Water Pollution Control Act (CWA) § 404, 33 U.S.C. § 1344 (1988 & Supp. V 1993).

4. The literature on § 404 controversies is abundant. For a sampling and overview, see Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695 (1989).

5. *See* 33 U.S.C. § 1251 ("The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters.").

6. *Id.* § 1344(g), (h).

7. *Id.* § 1344(e).

states with a minimum of federal oversight. At the time of this writing, bills were under active consideration in the Congress calling for an equally extensive delegation of section 404.[8]

This enthusiasm for delegation once again begs the question of the authority under which—or more realistically the configuration of authority under which—wetlands protection should reside. To attempt an answer, this Article begins by reviewing the rationale for federal wetland regulation and the current matrix of federal and state regulatory authorities. It then turns to the law and practice of delegation under section 404 of the Clean Water Act, and under related federal programs for point-source pollution control[9] and for coastal zone management.[10] It last examines pending initiatives to accelerate delegation and proposes initiatives of its own. At the risk of prejudging this proposal, it seems as obvious today as it did in 1972 when the CWA was enacted, and in 1977 when section 404 was rewritten and the question of delegation exhaustively debated, that the national interest in clean water and related wetlands functions merits a strong federal presence.[11] It seems equally clear that wetlands regulation will work better with an active state partnership. The right question is not "either-or." It is "how."

I. REVIEWING THE PREDICATE: THE CASE FOR A FEDERAL ROLE

Section 404 does not appear in the Clean Water Act by accident. The swamps, bogs, sloughs, marshes, bottomlands, wet meadows,

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8. This Article uses the term delegation in its common and generic sense to describe the transfer of federal regulatory authority to state agencies. In a technical sense, states may assume certain § 404 regulatory functions under § 404(g), (h), 33 U.S.C. § 1344(g), (h), a process termed state "assumption." *See infra* notes 160-181 and accompanying text. States also may exercise sole regulatory authority under general permits, § 404(e), through which the federal government does not "delegate" but rather, relinquishes its jurisdiction to duplicate state programs. *See infra* notes 284-316 and accompanying text. Congress and the courts have been careful to distinguish approvals of state authority under the Clean Water Act from actual "delegation," apparently in order to avoid claims that subsequent state actions are subject to federal judicial review. *See* 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.26, at 380 (1986). As a practical matter, however, both processes involve the deliberate, prescribed and negotiated transfer of § 404 functions from the Environmental Protection Agency and the U.S. Army Corps of Engineers to state authorities and are very much delegations.

9. 33 U.S.C. § 1342.

10. Coastal Zone Management Act (CZMA) of 1972, 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993).

11. Public opinion seems to share this conclusion. *See What Rebellion?*, LAND LETTER, Feb. 1, 1995, at 6 (citing a January 19, 1995, *Wall Street Journal*/NBC News poll which indicated that 50% of those polled favored federal responsibility for protecting the environment, while only 38% preferred state responsibility).

prairies, ponds, seeps, potholes, dune grasses and seabeds of the American landscape are the primary pollution control systems of the nation's waters, and the primary determinants of their water quality.[12] They remove heavy metals at efficiencies ranging from twenty to one hundred percent.[13] They remove up to ninety-five percent of phosphorous, nutrients and conventional pollutants, the equivalent of multi-million dollar treatment systems.[14] A recent report concludes that a loss of fifty percent of America's remaining wetlands would result in increased sewage treatment plant expenditures of up to $75 billion for the removal of a single pollutant, nitrogen, alone.[15] These

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12. Wetlands play a well-documented role in pollution control. *See, e.g.*, NATIONAL WILDLIFE FEDERATION, STATUS REPORT ON OUR NATION'S WETLANDS 11 (1987) [hereinafter STATUS REPORT]; OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, WETLANDS: THEIR USE AND REGULATION 48-52 (1984); WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 2.01[3] (1989). "A study of Tinicum Marsh in Pennsylvania revealed significant reductions in BOD (biochemical oxygen demand), phosphorous, and nitrogen within three to five hours in samples taken from heavily polluted waters flowing through a 512-acre marsh." JON A. KUSLER, OUR NATIONAL WETLAND HERITAGE 1 (1983). "A study on the effects of a wetland adjacent to Lake Wingra in Wisconsin indicated that 200-300 kg/yr of phosphorous now entering the lake would have been trapped, had not 300 wetland acres been destroyed by development." *Id.*; *see also infra* note 14.

13. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 12, at 49.

14. Many communities rely on wetlands for tertiary waste treatment facilities.

> For example, in the community of Wildwood, Florida (pop. 2500), a 506-acre gum-cypress swamp was used to treat sewage for 19 years. The swamp removed 98% of the phosphorous, 90% of the nitrogen, and reduced fecal coliform bacteria from 16 million to 3 thousand per liter within two miles of the discharge. The community saved an estimated $80,000 (1974 dollars) . . . .

NATIONAL WILDLIFE FEDERATION, WETLANDS: A VALUABLE RESOURCE 75 (undated) [hereinafter WETLANDS: A VALUABLE RESOURCE]. In another study conducted at the University of Michigan, researchers found that a 1700-acre peat bog was capable of treating 100,000 gallons of secondarily treated wastewater per day. "The wetland removed roughly 70% of ammonia nitrogen, 99% of nitrite and nitrate nitrogen and 95% of total dissolved phosphorous from the wastewater, much of it in less than 24 hours." STEVE MOYER & J. SCOTT FEIERABEND, NATIONAL WILDLIFE FEDERATION, STATEMENT OF NATIONAL WILDLIFE FEDERATION BEFORE THE SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION OF THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE ON WETLANDS PROTECTION AND FEDERAL WETLANDS LEGISLATION 13 (1991). The water quality of the Alcovy River in Georgia, polluted with chicken excrement and human waste, was significantly improved after flowing through a three-mile stretch of swamp. *Id.* The pollution control value alone for that piece of wetland was estimated to exceed $1 million dollars annually. *Id.*; *see also* Luke Danielson & Mary Lou Nordell, *Wetlands Litigation: Current Issues and New Directions*, C855 A.L.I.-A.B.A. 341, 343 (1993). The cost of removing sediments and pollutants caused by the loss of wetlands is impressive. The cost of modifying sewage treatment plants in either Maryland or Virginia has been estimated at more than $1 billion. On Long Island, estimates for installing nutrient removal systems at sewage treatment plants was estimated at approximately $6 billion. WORLD WILDLIFE FUND, STATEWIDE WETLANDS STRATEGIES: A GUIDE TO PROTECTING AND MANAGING THE RESOURCE 5 (1992) [hereinafter STRATEGIES].

15. NATIONAL WILDLIFE FEDERATION, WETLANDS ARE VITAL TO PROTECTING OUR NATION'S WATER QUALITY (May 1993) (wetlands factsheet). This report comes at a time when

same wetlands purify and recharge groundwater, providing municipal drinking water supplies for towns and cities across the country.[16] The loss of these wetland functions is, moreover, a phenomenon felt by states and federal off-shore waters hundreds of miles downstream. Nutrient loadings to the Mississippi River from the farm states of the American midwest have created a summer "dead zone" of anaerobic water across 6800 square miles of the Louisiana coast.[17] Similar pollution from a half-dozen states seriously threatens the life and the economy of the Chesapeake Bay.[18] In the 1972 CWA and in its subsequent amendments, Congress recognized that virtually all Americans live downstream and that wetlands protection was critical to achieve national goals of high water quality.[19] While Congress debated seriously

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a congressional committee has concluded that the nation faces a $62 billion shortfall in wastewater infrastructure improvements and that "43 percent of the nation's drinking water systems supplying 43 million people" violate drinking water standards. *House Public Works and Transportation Committee Transportation and Environmental Infrastructure Needs*, Jan. 19, 1995, *cited in* WATER QUALITY REPORT, Feb. 1, 1995 at 24.

16. Studies done at Lawrence Swamp in Massachusetts found that the 2700-acre wetland "recharges the shallow aquifer at a rate of eight million gallons per day," providing much of the water supply for the town of Amherst. MOYER & FEIERABEND, *supra* note 14, at 14. "[I]n North Dakota, prairie potholes store approximately 72 percent of the total stormwater runoff. Residents of the state depend on groundwater for up to one-third of their drinking water." Skip Barron, *North Dakota Guts Protection*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), July-Aug. 1993, at 10. Similarly, in Wisconsin, Cedarburg Bog is the sole source of recharge for a quickly developing suburban area near Milwaukee. WETLANDS: A VALUABLE RESOURCE, *supra* note 14, at 75. However, "[e]xperts warn that new development within or adjacent to the 5 square mile bog which causes increased withdrawal of groundwater but decreases the area available for recharge, will eventually result in a decline in groundwater levels affecting a 165 square mile area." *Id.*

17. Sandra Barbier, *Gulf's Dead Zone Still Big: Scientists Surprised*, TIMES-PICAYUNE, Aug. 22, 1994, at B1 ("The 1993 dead zone measured 6,800 square miles . . . . This year, the zone measured 6,414 square miles . . . .").

18. *See Chester River: EPA Challenges Channelization*, EPI PERSP., Aug. 1984, at 5 ("[E]xcessive nutrient and sediment loadings have resulted in an 84% decline in the Bay's submerged aquatic vegetation since 1971 and a 15-fold increase in areas experiencing low or no dissolved oxygen since 1950."); *see also* BETH MILLEMAN, AND TWO IF BY SEA: FIGHTING THE ATTACK ON AMERICA'S COASTS (1986).

19. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 77 (1971) ("Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."); 1 COMM. ON PUB. WORKS, 93D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF 1972 250 (1972) (statement of Rep. Dingell) ("[T]his new definition [of navigable waters] clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes."). These statements have been cited in support of broad federal jurisdiction over wetlands. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); United States v. Holland, 373 F. Supp. 665, 672 (M.D. Fla. 1974). Congress reiterated its emphasis on upstream, wetland protection in amendments to the Act enacted in 1977: "There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage." S. REP. NO. 370, 95th Cong., 1st Sess. 10 (1977). For a discussion of these amendments, see *infra* notes 135-159 and accompanying text.

which federal authority should be entrusted with providing this protection,[20] there was no question that wetlands protection was a necessary part of a national pollution control program.

Congress also recognized that wetlands perform related functions of equal importance and of a similar, transboundary nature.[21] Their biomass is the building block for the world's fisheries.[22] More than seventy percent of America's commercial seafood harvest, with an estimated annual value of $3.6 billion and total economic output of $31 billion,[23] originates in the shallow seagrasses and the salt, intermediate and brackish marshes of coastal estuaries.[24] Up to 100 million migratory waterfowl breed in the prairie potholes, lakeshores and wet tundra of North America and winter along the coastal marshes of California, Louisiana and the Chesapeake Bay.[25] The hydrology and nutrients of these systems are, in turn, regulated and protected by freshwater systems upstream, as is the abundance of their wildlife. Clearcutting along salmon spawning streams in Idaho degrades the

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20. For a discussion of the controversy over whether § 404 authority should be conferred on the Environmental Protection Agency or the U.S. Army Corps of Engineers, see Blumm & Zaleha, *supra* note 4, at 708-13.

21. A Senate report noted,

> The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

S. REP. NO. 370, 95th Cong., 1st Sess. 10 (1977); *see also* S. REP. NO. 326, 103d Cong., 2d Sess. 2 (1994) ("The North American Wetlands Conservation Act was enacted to assist efforts to stem the serious decline in waterfowl and other migratory birds due to the loss and degradation of wetlands across North America."); S. REP. NO. 375, 101st Cong., 2d Sess. 2-4 (1990) (discussing the importance of coastal wetlands, the human causes of their destruction, and the implications of their loss).

22. This biological truism has been captured in a bumpersticker that proclaims, "No Wetlands, No Seafood," spotted on the North Carolina coast. MOYER & FEIERABEND, *supra* note 14, at 16.

23. Letter from W.F. Grader, Jr., Executive Director, Pacific Coast Federation of Fishermen's Associations to the Honorable Ronald H. Brown, Secretary of Commerce (Sept. 9, 1994) [hereinafter Letter from W.F. Grader, Jr.] (on file with author).

24. MOYER & FEIERABEND, *supra* note 14, at 17 ("75 percent of U.S. Commercial Fish and Shellfish landings consist of species dependent on coastal wetlands and estuaries"). "Roughly two-thirds of the commercial important fish and shellfish species harvested along the Atlantic and Gulf coasts and half of the Pacific Coast are dependent upon estuarine wetlands for food spawning and/or nursery areas." LOUISIANA STATE UNIVERSITY AGRICULTURAL CENTER, WETLANDS FUNCTIONS AND VALUES IN LOUISIANA 6 (1993) [hereinafter WETLANDS FUNCTIONS AND VALUES IN LOUISIANA].

25. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 12, at 52. "Millions of Waterfowl . . . use the [Rainwater] Basin [in Nebraska] every year. These include approximately 90 percent of the entire population of white-fronted geese, 50 percent of the breeding mallards, and 30 percent of the breeding northern pintail that use the mid-continental United States." STRATEGIES, *supra* note 14, at 5.

commercial fisheries of Washington and Oregon.[26] Prairie pothole drainage in North Dakota has threatened to eliminate Canvasback, Redhead and other wintering waterfowl of Virginia, Maryland and Delaware.[27] More than seventeen million Americans own fishing licenses and generate an estimated fifteen billion dollars annually in related revenue;[28] in 1980 another 5.3 million Americans hunted migratory birds, spending $638 million in the process.[29] Fifty-five million Americans spent almost $10 billion in 1980 simply to watch and photograph wetland-dependent species of birds.[30] This commerce,[31] use and enjoyment begins, and will end, with wetlands. As parts of the American landscape, wetlands are not properly viewed as static parks or monuments, the objects of our occasional visitation. In the natural world—and in an ever increasingly unnatural one—they are aptly seen as biological factories, producing interstate goods.

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26. *See* Daniel J. Chasan, *Goodbye Wild Salmon?*, DEFENDERS, Sept.-Oct. 1991, at 24 ("In the Columbia River System an estimated 5,000 miles of spawning streams, one third of the total, have been lost to salmon. Throughout the Northwest, spawning streams have been vulnerable to such traditional economic activities as logging and cattle ranching."); *see also* National Wildlife Fed'n v. United States Forest Serv., 592 F. Supp. 931, 934 (D. Ore. 1984) ("[R]oad building and timber harvesting have dramatically increased the rate of landslide erosion. . . . Unless all such practices are eliminated, the accelerated landslide erosion will cause major long term damage to soil, water, and fishery resources.").

27. 1 U.S. SECRETARY OF THE INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS: THE LOWER MISSISSIPPI ALLUVIAL PLAIN AND THE PRAIRIE POTHOLE REGION 20 (1988) [hereinafter IMPACT] ("Prairie potholes are among the most important and also most threatened ecosystems in the United States. They are prime nesting grounds for many species of North American waterfowl. Up to 50 percent of the United States production of migratory waterfowl is raised in the United States portion of the Prairies in some years.").

28. Letter from W.F. Grader, Jr., *supra* note 23, at 1.

29. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 12, at 54. "Waterfowl hunters are estimated to spend more than [$]600 million per year in hunting-related expenditures . . . ." WETLANDS FUNCTION AND VALUES IN LOUISIANA, *supra* note 24, at 7; *see also* U.S. FISH AND WILDLIFE SERVICE, NATIONAL WETLANDS PRIORITY CONSERVATION PLAN 22 (1989) [hereinafter CONSERVATION PLAN] ("17.4 million hunters spent about [$]5.6 billion on supplies, lodging, transportation and other related expenses in 1980 . . . . In total, fish and wildlife-related recreation in 1980 was a $41 billion industry, based largely on wetland resources.").

30. STATUS REPORT, *supra* note 12, at 7; *see also* CONSERVATION PLAN, *supra* note 29, at 22 ("Participation in water- and wetland-related outdoor recreation by Americans twelve years and older was estimated in 1982-83 at 53 million for boating, 64 million for fishing and 22 million for birdwatching . . . . [I]n 1980 alone, 28.8 million people . . . took special trips simply to observe or photograph wildlife." (citations omitted)); WETLANDS FUNCTIONS AND VALUES IN LOUISIANA, *supra* note 24, at 8 ("In 1991, Louisiana estimated more than 1.4 million nonconsumptive fish and wildlife resource participants. Total expenditures for nonconsumptive users that year exceeded $220 million.").

31. "According to a recent report, the annual economic value of estuarine habitats is about $14 billion." MOYER & FEIERABEND, *supra* note 14, at 16 (citation omitted).

Perhaps the most dramatic of these goods is flood control.[32] The year 1973 saw record floods along the lower Mississippi River and the first-ever test of its Atchafalaya Floodway system.[33] A post-flood analysis concluded that the rainfall fueling this extraordinary event had not been, itself, extraordinary; flood stages had been raised by riverside development and the loss of the retention capacity of adjacent wetlands. The report concluded: "[T]he '73 flood was man made."[34] Twenty years later, new record floods along the upper Mississippi River led to remedial proposals based on restoring the natural floodplain.[35] Similar findings emerge from nearly every watershed and river basin in the country.[36] They have been the basis—although at

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32. Once again, the literature on this function is abundant. To select a sampling, in two studies of the Charles and Neponset River watersheds in Massachusetts, the Corps of Engineers "estimated that loss of 8,423 acres of wetlands within the basin would result in annual flood damages of over $17,000,000," CONSERVATION PLAN, *supra* note 29, at 21, and "predicted that a 40 percent reduction in wetland area along the [Charles] river would result in a 2- to 4-foot increase in floodpeaks and would increase flood damages by at least $3 million annually." OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 12, at 45; *see also* STATUS REPORT, *supra* note 12, at 10 ("A study conducted in Wisconsin showed flood flows to be reduced by 80% in basins with wetlands as opposed to basins without wetlands."). It has been documented that floodpeaks are up to 80% lower in watersheds with large lake and wetlands areas than in similar areas with little or no wetlands areas. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 12, at 45.

33. For a description of the Atchafalaya floodway system, see generally Kermit L. Hebert, *The Flood Control Capabilities of the Atchafalaya Basin Floodway*, GT-1 LOUISIANA WATER RESOURCES RES. INST. BULL. (Baton Rouge, La.), Apr. 1967; Raphael G. Kazmann & David B. Johnson, *If the Old River Control Structure Fails? (The Physical and Economic Consequences)*, 12 LOUISIANA WATER RESOURCES RES. INST. BULL. (Baton Rouge, La.), Sept. 1980; *see also Forecasters Hedge Bets on Mississippi Flooding*, TIMES-PICAYUNE, Jan. 18, 1993, at B2 ("The 1973 flood is believed to be second only to the Great Flood of 1927 in destruction in the Mississippi Delta."); *Flood Project Could Avert Catastrophe*, TIMES-PICAYUNE, Apr. 10, 1991, at B8 ("The state last experienced 100-year floods in [1973] . . . . A 100-year flood today could result in more than $1 billion in damages.").

34. C.S. Belt, *The 1973 Flood and Man's Constriction of the Mississippi River*, 189 SCIENCE 681 (1975). For the role of the loss of wetlands in this event, see Kazmann & Johnson, *supra* note 33, at 7; *see also* Johanna Neuman, *Flood Control Changes Denied by Politicians*, CLARION LEDGER, Apr. 25, 1979, at 1. "Blackwelder, who claimed that floods are man-made disasters, cited statistics from the 1973 Mississippi River floods showing that rainfall was 21 percent above normal but runoff was 43 percent higher. 'That's one of the significant adverse effects of channelization,' he said." *Id.*

35. *See* Scott E. Faber, *Letting Down the Levee*, NATIONAL WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.) Nov.-Dec. 1993, at 5.

36. WETLANDS FUNCTIONS AND VALUES IN LOUISIANA, *supra* note 24, at 11 ("The presence of only 15% of a watershed in wetlands can reduce flooding peaks by as much as 60%."); *see also* STRATEGIES, *supra* note 14, at 5 ("Salt Creek watershed [in DuPage County, Illinois] . . . has less than one percent of its wetlands remaining. This area now experiences frequent flood damage . . . . These damages are directly traceable to the loss of the shallow basin wetlands."). In 1987, a flood caused approximately $120 million in damages to only a few thousand residents. *Id.* The county is now developing engineering projects to "replace" the lost wetlands at a cost of $100 million to the taxpayers. *Id.*

times honored more in the breach than in the observance—of the U.S. Department of Agriculture's small watershed program, whose original mission was to "hold the raindrop on the land."[37] Wetlands along the coast perform a more direct flood-proofing function, buffering storm surges and protecting interior properties.[38] A mile of vegetated wetlands can reduce storm wave heights by one foot.[39] There are fifty miles of marshes between New Orleans and the sea.

These values are in jeopardy. The coastal wetlands of Louisiana are disappearing at the rate of forty square miles each year.[40] Waterfowl breeding grounds that once spread from Minnesota to Montana have been reduced to a thin wedge in North Dakota.[41] It seems no coincidence that of the 595 plant and animal species listed in the United States as threatened or endangered, nearly sixty percent rely on wetlands during some part of their life cycle.[42] An estimated twelve million acres of bottomland hardwood wetlands along the

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37. The congressional declaration of policy of the Watershed Protection and Flood Prevention Act of 1956 stated,

> Erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the United States, causing loss of life and damage to property, constitute a menace to the national welfare: and it is the sense of Congress that the Federal Government should cooperate with states and their political subdivisions, soil or water conservation districts, flood prevention or control districts, in furthering the conservation, development, utilization and disposal of water, and the conservation and utilization of land and thereby of preserving, protecting and improving the Nation's land and water resources and the quality of the environment.

16 U.S.C. § 1001 (1988). This retooling of watersheds by the Department did not always conform to the Act's policy. *See* Montgomery v. Ellis, 364 F. Supp. 517 (N.D. Ala. 1973); Natural Resources Defense Council v. Grant, 355 F. Supp. 280 (E.D.N.C. 1973).

38. "The coastal wetland development infrastructure being protected is valued in the billions of dollars." WETLAND FUNCTIONS AND VALUES IN LOUISIANA, *supra* note 24, at 11.

39. *Id.*

40. STATUS REPORT, *supra* note 12, at 24, Fig. 7b.

> According to the U.S. Fish and Wildlife Service, between the 1970's and 1980's, the U.S. lost over 2,600,000 acres of wetlands—about 300,000 acres per year. Forested wetlands (which provide critical wintering duck habitats), such as Mississippi River floodplain forests, were hit especially hard. More than 2,100,000 acres of these wetlands were destroyed, and seven states lost over 100,000 acres each. Coastal wetlands, also extremely important over-wintering habitat for waterfowl, were reduced by 70,000 acres between the 1970's and 1980's. This eradication of over-wintering wetland habitat is especially alarming in light of the massive destruction of prairie wetlands, the "duck factory" of North America. Half of all North American ducks depend on these seasonal wetlands for breeding but, since Colonial times, at least 10,000,000 acres (about 65%) of prairie potholes have been destroyed in the U.S., and they continue to disappear.

NATIONAL WILDLIFE FEDERATION, WILDLIFE FACT SHEET (1994).

41. "North Dakota's prairie potholes are being drained at an estimated rate of 20,000 acres per year." IMPACT, *supra* note 27, at 80.

42. *See* NATIONAL WILDLIFE FEDERATION, *supra* note 40.

Lower Mississippi River dropped to five million in a half-century.[43] Only ten percent of California's wetlands remain.[44]

These losses are mirrored in every state.[45] Of an estimated 215 million acres of wetlands found in America at the time of European discovery, fewer than half remain.[46] They continue to disappear at a rate approaching 300,000 acres per year.[47] The federal role in their protection arises not only from the fact that they produce critical national values. It also arises from the fact that, in the absence of federal protections, their losses have been catastrophic.

On the other side of the scales, however, whatever their value to the nation, the wetlands of the United States—even those located in tidal and navigable waters—are privately owned. And the regulation of private land ownership historically has been viewed as the prerogative of state and local governments. The root question of delegation is whether state and local governments can, on their own, stand up to the formidable economic and political pressure to develop the wetland ecosystems of the United States.[48] Certain kinds of economic development depend on wetland and coastal locations; they are where oil and gas deposits are found and where ports and navigation systems

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43. "In 1937 there were an estimated 11.8 million acres of bottomland hardwood forests in the Mississippi Alluvial Plain. About 5.2 million acres . . . were left in 1978." 1 ECOLOGICAL SERVICES, U.S. DEP'T OF THE INTERIOR, DOCUMENTATION, CHRONOLOGY, AND FUTURE PROJECTIONS OF BOTTOMLAND HARDWOOD HABITAT LOSS IN THE LOWER MISSISSIPPI ALLUVIAL PLAIN, BASIC REPORT iv (1979).

44. STATUS REPORT, *supra* note 12, at 24, Fig. 7A.

45. MOYER & FEIERABEND, *supra* note 14, at 22 ("California and Ohio have lost more than 90% of their original wetlands . . . . Iowa, Indiana and Illinois have lost 89%, 87%, and 85%, respectively.").

46. More than half the wetland acreage which existed in the 48 states as little as 200 years ago is now gone. During the 1780's up to the 1980's this "translates to a loss in excess of 60 acres per hour—one acre per minute." *Id.*

47. *See* WANT, *supra* note 12, § 2.01[4] ("Wetlands losses have been estimated at between 300,000 acres and 458,000 acres per year.").

48. One application alone for a condominium development in coastal Louisiana was supported by a letter to the Corps of Engineers signed by every member of the Louisiana congressional delegation. Letter from Louisiana Congressional Delegation (Sen. J. Bennett Johnston, Sen. John Breaux, Rep. Buddy Roemer, Rep. Jimmy Hayes, Rep. Billy Tauzin, Rep. Jerry Huckaby, Rep. Bob Livingston, Rep. Lindy Boggs, Rep. Clyde C. Holloway) to Colonel Lloyd K. Brown, District Engineer, New Orleans District (Feb. 6, 1987) (on file with author). The state granted all necessary permits as did, originally, the U.S. Army Corps of Engineers, New Orleans District; after EPA objections and the threat of a § 404(c) veto, the Corps denied the permit at higher levels. *See* Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 795-98 (1989) (discussing the impact of the Corps's about-face).

will lie, each impacting on the surrounding environment.[49] The major development pressure, however, is the relentless rush of human habitation. The first section 404 case before the United States Supreme Court was captioned "Riverside Bayview Homes,"[50] a title that also captures the essence of an American dream: a riverside, bayview home. This dream is realized by dragline and bulldozer on a daily basis along the coasts of Florida and California, in the dunes of Cape Cod, along the shores of the Great Lakes, in the very floodplains of Arkansas and Mississippi and on every piece of real estate in the country that borders water. It is the most desirable real estate on the market.[51] In 1960, fifty percent of Americans lived within an hour's drive of the coast; by 1990, seventy percent of the country had moved there and the rush continues. The money to be made on coastal, lakeside, riverside and wetland development is all but irresistible. State and local governments stand to gain considerable employment and tax revenue as well.[52] The countervailing impacts of any one permit proposal on overall wetlands functions are extremely difficult for any regulator to identify,[53] and even less persuasive to a permit applicant. The harm from wetland development is cumulative, not individual, and few Americans will accept the denial of their dream because of what others in the future might also do, particularly when it is obvious that yet others have already received permits and are enjoying their riverview, bayside homes.

It is inequality of these pressures that makes the case for the federal role in section 404. Indeed, that makes the case for multiple roles. It intends no injury to state agencies to observe that, in whatever good faith they approach wetlands protection, the financial, scientific, political and legal resources they have available to offset development interests may not be up to the job. Nor should it be injurious to observe that a state's perspective on what that job is might differ from that of other states, or the national interest. The Alaskan tundra breeds millions of migratory waterfowl, most of which are en-

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49. *See* Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3 (1983) (documenting the impact of oil, gas and navigation development on the coastal wetlands of Louisiana).

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

51. "Lands adjacent to scenic salt marshes bring prices of $40,000-$60,000 an acre in Cape Cod, Massachusetts, and even higher prices in some urban areas." KUSLER, *supra* note 12, at 5.

52. *See, e.g.*, National Audubon Soc'y v. Hartz Mountain Dev. Corp., [1984] 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,724 (D.N.J. Oct. 24, 1983) (discussing a New Jersey Master Plan to create 100,000 new residents and 200,000 new jobs).

53. *See* Houck, *supra* note 48, at 775-76 (describing the difficulties inherent in determining the countervailing impacts).

joyed in the lower forty-eight states;[54] not surprisingly Alaska has strenuously opposed the application of section 404 to tundra development.[55] North Dakota has opposed its application to the prairie potholes (*e.g.*, "isolated wetlands") with equal vigor.[56] Louisiana's coastal marshes produce one-quarter of the nation's seafood and anchor the winter flight of the Mississippi Flyway;[57] these same wetlands overlay significant oil and gas deposits, however, and the current, leading initiatives to weaken the section 404 program are authored by Louisiana representatives.[58] The neighboring state of Mississippi has enacted legislation *requiring* the location of gambling casinos—a burgeoning new industry—in state coastal waters.[59] As a general rule, the larger a state's wetland inventory, the more important it is to the nation, but the less important saving it may appear to be to the state itself—indeed, the more onerous the burden of protecting it will appear. Nearly every contested federal wetlands permit decision—and they are numerous—is one that, by federal regulation, already received all necessary state approvals.[60] If the interests of receiving states—of downstream and downflight Americans—are going to be represented, those interests will have to be protected by more than an agency of a state that stands to benefit directly from the wetland development it regulates. Hence the emergence of a mix of federal and state programs in their defense.

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54. Alaskan wetlands support 70,000 swans (50% of the continental population), 1 million geese (all or most of 8 continental species or subspecies), and 12 million ducks (30% northern pintails, 24% american widgeons, 19% scaup, 18% canvas backs, 13% greenling teal, 12% shovelers and 4% mallards). L.J. Lensink & D.V. Derkson, *Evaluation of Alaskan Wetlands for Waterfowl 1986, in* ALASKAN REGIONAL WETLAND FUNCTIONS (A. VanderValk & J. Hall eds., 1986).

55. *See* Houck, *supra* note 1, at 10,214; *see also Alaskans Push Wetland Development*, LAND LETTER, Feb. 1, 1995, at 4-5 ("A new bill introduced by the powerful Alaska Republican delegation would exempt states with significant acreage of wetlands from Clean Water Act mitigation requirements.").

56. Barron, *supra* note 16, at 10.

57. *See* LOUISIANA COASTAL WETLANDS CONSERVATION AND RESTORATION TASK FORCE, LOUISIANA COASTAL WETLANDS RESTORATION PLAN: MAIN REPORT AND ENVIRONMENTAL IMPACT STATEMENT 25-27 (1993).

58. *See infra* Part V.C.

59. "To limit the geographic distribution of legalized gambling, the legislature directed that casinos may operate only on vessels in waters 'south of the three coastal counties.'" OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, U.S. DEP'T OF COMMERCE, FINAL EVALUATION FINDINGS FOR THE STATE OF MISSISSIPPI'S COASTAL PROGRAM 36 (1993). NOAA found that casinos were replacing "sites reserved in the MCP [Mississippi Coastal Plan] for water dependent industry and to support commercial and sport fishing." *Id.*

60. State Requirements, 33 C.F.R. § 337.2 (1994).

II. SETTING THE STAGE FOR DELEGATION: SECTION 404 AND RELATED REGULATORY AUTHORITIES

Federal regulation of development in navigable waters began more than a century ago with the Rivers and Harbors Act of 1890, which required the Secretary of the Army, acting through the Army Corps of Engineers, to review construction and the disposal of waste into the nation's waterways.[61] This jurisdiction was expanded by the Rivers and Harbors Act of 1899[62] and was exercised primarily to safeguard navigation until the 1960s brought a heightened awareness of aquatic and other environmental values.[63] Although its jurisdiction is limited to traditionally navigable waters and its potential for environmental protection has been largely supplanted by the Clean Water Act,[64] the Rivers and Harbors Act establishes a primary and exclusive federal authority in the regulation of harbors, marinas, levees and other major water development.[65]

In 1972 Congress faced what it perceived as the wholesale degradation of the nation's waters and the continuing failure of federally-assisted state pollution control programs to remedy the problem.[66] The Clean Water Act established as a national objective the protection, restoration and maintenance of the waters of the United States, elimination of pollution discharges by a date certain, and the achievement of these goals through a vigorous permit system administered, in the first instance, by the Environmental Protection Agency (EPA).[67] Section 404 of this legislation, however, concerning the regulation of discharges associated with navigation, ports and aquatic development generally, provoked an impasse.[68] EPA was perceived as too environmentally-oriented by development interests and the Corps, and by environmental interests as too insensitive to aquatic values. The result was a jurisdictional split within section 404 itself; in effect, a partial

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61. Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426, 453-54 (1890) (superseded 1899).

62. River and Harbors Act of 1899, ch. 425, 30 Stat. 1121 (current version at 33 U.S.C. §§ 401-467n (1988 & Supp. V 1993)).

63. *Compare* United States v. Republic Steel Corp., 362 U.S. 482 (1960) (applying the Rivers and Harbors Act of 1899 to obstruction of the navigable capacity of a river) *with* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (authorizing Secretary of Army to deny permission for a dredge and fill project even though the project would have no effect on navigation).

64. Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

65. 33 U.S.C. §§ 401-467n.

66. S. REP. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668.

67. 33 U.S.C. § 1251.

68. *Id.* § 1344.

delegation to the Corps.[69] The Corps of Engineers would issue the permits but, under EPA guidelines, subject in each case to an EPA veto.[70] The consequences of this two-headed system have been debated often since that time,[71] and the Corps has obviously chafed, particularly in the early years, under both the guidelines and the specter of EPA review. But in recent years two conclusions have emerged plain that are relevant to the inquiry at hand. The first is that, after a series of conflicts, the Corps and EPA have arrived at common understandings on jurisdiction, standards and process that, day-to-day, work.[72] The second is that EPA oversight over Corps permitting, although quite selectively exercised, provides a demonstrable layer of environmental protection for more difficult permit decisions.[73] With no attribution of good faith or bad faith to either agency, it would appear that independent review by a second agency helps keep the system focused on its statutory goals.[74]

Perhaps the most important safeguard in the section 404 program is the CWA's 404(b)(1) guidelines,[75] whose primary thrust is to steer wetland development away from wetlands in the first place by the examination of alternatives.[76] The guidelines flatly prohibit the discharge of dredge or fill material in wetlands if there is a practicable alternative that would have less impact on aquatic ecosystems, such as

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69. 1 COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 250 (1973).

70. 33 U.S.C. § 1344(b), (c).

71. *See* Blumm & Zaleha, *supra* note 4, at 699 (recommending that "Congress relieve the Corps of Engineers of its permit issuing responsibilities"); Houck, *supra* note 48, at 775 (discussing the "differences in outlook between the Corps and EPA . . . [which] remain stubborn and unresolved").

72. *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*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 35,223 (Feb. 6, 1990) [hereinafter *Mitigation MOA*].

73. *See infra* notes 82-85 and accompanying text.

74. *See infra* note 117 (discussing the USFWS's participation in marsh management). It is also not unusual for a permit applicant to be told that, while the issuing agency is quite sympathetic, another environmental agency may prove difficult unless modifications are made. In a world of difficult regulatory decisions, this type of blame-sharing is an essential part of the process.

75. 33 U.S.C. § 1344(b)(1). These guidelines have been given the force of regulations governing both applicants and the Corps of Engineers. *See* Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987), *aff'd*, 850 F.2d 36, 43-44 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989) (discussing the use of § 404(b)(1) guidelines); *see also* Blumm & Zaleha, *supra* note 4, at 736 n.274 (citing National Wildlife Fund v. Marsh, [1984] 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,262, 20,264 (D.D.C. Feb. 11, 1984)) (discussing the Corps's acquiescence in the § 404(b) guidelines).

76. 40 C.F.R. § 230.10(a) (1994).

elevating the highway or building on higher ground.[77] An alternative is "practicable" under the guidelines if it reasonably could be obtained and used to fulfill the basic purpose of the proposed activity.[78] For "special aquatic sites," which includes wetlands, these regulations go further to *presume* the availability of alternative locations for activities that do not depend on proximity to water.[79] This second presumption is to hold unless "clearly demonstrated otherwise," shifting the burden of proof to the applicant.[80] The interpretation and application of these requirements transcend the scope of this discussion.[81] What is important to grasp is the power of the required inquiry. Under these guidelines, it is not enough to claim that a waterfront development is highly desirable or that it will not be very harmful to wetlands; if it can go on dry land, it must.

A strong second in the panoply of safeguards under the section 404 program is the prospect of an EPA veto under section 404(c).[82] These vetoes come only rarely, but their rarity in no way bespeaks their impact on the program. In the first place, they are highly controversial, adversarial and visible decisions;[83] as with a ruling decision from the Supreme Court, everyone listens. Further, they set precedent for strong interpretations of section 404 that have been upheld uniformly by appellate courts,[84] and have reinforced the program's emphasis on the examination of alternatives and the redirection of development away from aquatic sites.[85] Like a lone state trooper on a busy interstate highway, the mere presence of EPA's authority tends to keep the level of speeding down.

EPA's guidelines and authority have been bolstered by its February 1990 Memorandum of Agreement with the Department of the Army concerning "Mitigation Under the Clean Water Act Section

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77. *Id.*

78. *Id.* § 230.10(a)(2).

79. *Id.* § 230.10(a)(3).

80. *Id.*

81. For one discussion, among many, of the § 404(b)(1) guidelines, see Margaret N. Strand, *Federal Wetlands Law: Part II*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,284, 10,289-91 (1993); Robert Uram, *The Evolution of the Practicable Alternatives Test*, NAT. RESOURCES & ENV'T, Summer 1992, at 15.

82. 33 U.S.C. § 1344(c).

83. Houck, *supra* note 48, at 790-95.

84. As of the date of this writing, no EPA § 404(c) decision had, ultimately, been overruled by subsequent litigation. *Id.* at 790-93. Granted, at least one legal challenge to a § 404(c) veto has led to a rollercoaster of decisions invalidating the veto at trial level and reinstating it on appeal. James City County v. EPA, 12 F.3d 1330 (4th Cir. 1993), *rev'g* [1993] 23 Envtl. L. Rep. (Envtl. L. Inst.) 20,228 (E.D. Va. 1992), *cert. denied*, 115 S. Ct. 87 (1994).

85. Bersani v. EPA, 850 F.2d 36, 43-44 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

404(b)(1) Guidelines."[86] Much more than an understanding on mitigation, and more too than a handshake between long-standing federal adversaries, the agreement announced a national policy of "no overall net loss to wetlands."[87] This no-net-loss policy is to be achieved by a process of "sequencing" which requires, first, that wetlands losses be avoided, a ratification of the central feature of the section 404(b)(1) guidelines.[88] Only if losses are unavoidable would consideration then be given to mitigation and compensation, which would require the functional replacement of wetlands values and an adequate margin of safety to accommodate the uncertainty of replacement plans.[89] The Memorandum of Agreement produced a firestorm at the time it was announced[90] and, while not codified or even judicially enforceable,[91] it has had a marked influence on federal wetland decision-making. It is the closest the federal government has come to a national wetlands goal.

The EPA guidelines, veto authority and no net loss policy are bolstered by other laws and agencies that serve to represent environmental values against development pressures in the federal section 404 program. Chief among these laws is the Fish and Wildlife Coordination Act (FWCA) which prescribes a formal consultation process with the U.S. Fish and Wildlife Service and, in marine waters with the National Marine Fisheries Service, for water resources development.[92] These agencies are not only required to comment on but also to rec-

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86. *Mitigation MOA*, *supra* note 72.

87. *Id.*, Part II.B.

> The Department of the Army and the Environmental Protection Agency (EPA) recently ended a protracted dispute over the use of wetlands mitigation in the Federal Water Pollution Control Act (FWPCA) § 404 permitting process. On November 15, 1989, they signed a Memorandum of Agreement providing that mitigation alone cannot serve as the basis for issuing a § 404 permit. The MOA established various mitigation criteria and created an outburst of opposition from segments of the regulated community. The White House intervened twice to delay its effective date, and after negotiations among federal agencies and representatives of the regulated community, a revised MOA took effect on February 7, 1990.

William L. Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 Envtl. L. Rep. (Envtl. L. Inst) 10,209, 10,209 (1990) (citations omitted).

88. *Mitigation MOA*, *supra* note 72, Part II.C.

89. *Id.*, Part III.B.

90. Houck, *supra* note 1, at 10,212.

91. Coeur D'Alene Lake v. Kiebert, 790 F. Supp. 998, 1009 (D. Idaho 1992).

92. 16 U.S.C. §§ 661-668ee (1988 & Supp. V 1993). For marine resources, NMFS participates in the consultation process although this role is not conferred by statute. *See* Reorganization Plan No. 4 of 1980, 35 Fed. Reg. 15,627, *reprinted in* 5 U.S.C. app. at 1349 (1988) (creating the National Oceanic and Atmospheric Administration with an Assistant Administrator for Fisheries).

ommend specific mitigation measures for federal permits;[93] should disputes arise they are authorized to elevate the issue to their Washington, D.C. headquarters.[94] This FWCA authority, although far short of a veto, leads to strong bargaining positions by the fish and wildlife agencies and to a track record in mitigation for wetland losses. Corps records in the late 1980s reflect that (often, over the objections of EPA, the USFWS and NMFS), all but a few section 404 permits were granted but that more than one-third contained mitigating conditions that saved a reported 50,000 acres of wetlands.[95] Criticized by the development community as "green mail" and by the environmental community as "inadequate palliatives,"[96] for the vast majority of section 404 permits mitigation measures under the FWCA are the basic, environmental output of the section 404 review process.

The National Environmental Policy Act (NEPA)[97] serves a similar function in section 404, at an even broader scale. On one level, the Act serves to notify, beyond the fish and wildlife agencies, other government departments, academics, consultants, media, local neighborhoods and the environmental community of significant permit applications, and to solicit their review and comment.[98] The very specter of this involvement, coupled with the burden of complying with NEPA's undeniably cumbersome requirements for environmental impact statements, itself encourages private development away from federally-protected aquatic areas.[99] This same specter further encourages developers to "buy down" the adverse impacts of their proposals to fall below the "major federal action" level, avoiding full

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93. 16 U.S.C. § 662(b).

94. 33 U.S.C. § 1344(j).

95. Houck, *supra* note 1, at 10,213.

96. For a developer's perspective, see Mike Wilmar, *Mitigation: The Applicant's Perspective*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), Sept.-Oct. 1986, at 16, 17 (arguing that mitigation unfairly pressures applicants to make environmental concessions in order to expedite project approval). For an agency perspective, see David B. Barrows, *Mitigation in the Army Corps of Engineers Regulatory Program*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), Sept.-Oct. 1986, at 11, *noted in* Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 362 n.18 (1988). For an environmentalist's perspective, see David E. Ortman, *Let's Call Them Watermeadows*, ENVTL. FORUM, Jan.-Feb. 1989, at 21, 25, *noted in* Houck, *supra* note 48, at 837 n.470.

97. 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).

98. *Id.* § 4332.

99. The prospect of protracted and contested NEPA review in connection with its § 404 application was a major factor in a decision by Merrill Lynch to sell wetland property held for development to the U.S. Fish and Wildlife Service for a national wildlife refuge. Interview with Alice Dutton, Merrill Lynch (1990).

NEPA review.[100] While it is true, therefore, that NEPA imposes no substantive requirements on these or any other federal permits, the statute works the same rough justice on section 404 that it has on other federal activities: the more severe the potential impact, the more difficult the gauntlet to run. Large section 404 permit activities launch a searching, public inquiry under NEPA: Is there a better way? This inquiry has decided more than a few, celebrated wetland development proposals.[101] In those instances, there was a better way.

The Endangered Species Act (ESA)[102] plays a more substantive role in section 404 permitting than any authority previously discussed, although limited to the actual habitat of listed species. Section 7 of the ESA prohibits federal actions, including permit approvals, that would jeopardize listed species or adversely modify habitats critical to their survival.[103] This prohibition has been accorded wide respect by the courts.[104] Several ESA cases have arisen out of section 404 permits,[105] and ESA review of these permit applications has led to the scaleback of private, waterside development affecting the Florida Manatee, the Piping Plover, the Brown Pelican and other water-dependent species.[106] A private developer contemplating wetland development is asking for trouble under the 404(b)(1) guidelines and extra mitigation costs from the FWCA; if the site supports endangered species, however, project modifications are certain.[107] Section 7 of the ESA is the most powerful safeguard in environmental law, and in the section 404 program.

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100. *See* Louisiana v. Lee, 758 F.2d 1081 (5th Cir. 1985) (scope of dredging project reduced by permit restrictions, requiring determination of whether project, as modified, constituted a "major federal action").

101. For a discussion of NEPA's effect on § 404 permits, see Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?*, 20 ENVTL. L. 747, 750-51 (1990); *see also* National Wildlife Fed'n v. Marsh, 568 F. Supp. 985 (D.D.C. 1983) (requiring extensive consideration of alternatives for a proposed, large refinery).

102. 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

103. *Id.* § 1536.

104. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 185 (1978) ("[T]he legislative history undergirding § 7 reveals an explicit Congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species."). For a discussion of subsequent § 7 litigation, see James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499 (1991).

105. *See, e.g.*, Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985) (requiring the Corps to stop a § 404 permit project to protect an endangered species and its habitat as required by the ESA).

106. Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 317-21 (1993).

107. For examples of reasonable and prudent alternatives identified in ESA consultations as a means of avoiding jeopardy, see *id.* at 359-70.

The exclusively federal safeguards just described are strengthened by liberal CWA citizen suit provisions allowing access to federal courts and recovery of attorney fees.[108] They are also strengthened by federally-authorized state leverage as well. The FWCA enables state fish and wildlife departments to propose mitigation for federal water resources development and permitting.[109] Section 401 of the CWA requires states to certify that proposed federal activities, including permits, will comply with state water quality standards.[110] The Coastal Zone Management Act (CZMA)[111] authorizes coastal states to certify that federal activities, including permits, are consistent with state coastal management plans.[112] More broadly, the CZMA facilitates state coastal regulatory programs that review, and permit, activities in coastal wetlands.[113] Each of these levers, from time to time, creaks forward to modify, or even lead to the denial of, a section 404 permit.[114]

Beyond these federal programs, of course, are the individual wetlands programs of the fifty states.[115] While no summary of these programs is remotely possible in this Article, most include regulatory functions and, in the aggregate, they are at the receiving end of whatever section 404 authority they would assume by way of delegation. These state wetlands programs interact with section 404, coastal management programs, and other federal programs, providing disincentives for wetlands alteration and for wetlands acquisition.[116]

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108. 33 U.S.C. § 1365.

109. 16 U.S.C. § 662(a).

110. 33 U.S.C. § 1341.

111. 16 U.S.C. §§ 1451-1464.

112. *Id.* § 1456(c)(2).

113. *See infra* Part IV.

114. For a discussion of the FWCA's effectiveness, see Ted Griswold, Comment, *Wetland Protection Under Section 404 of the Clean Water Act: An Enforcement Paradox*, 27 SAN DIEGO L. REV. 139, 179 (1990). For a discussion of the § 401 certification process and its potential to affect wetland development, see Katherine Ransel & Erik Meyers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, 7 VA. J. NAT. RESOURCES L. 339 (1988). The (occasional) effectiveness of CZMA permitting is discussed *infra* notes 399-407 and accompanying text.

115. For discussions of state wetland programs, see WANT, *supra* note 12, and KUSLER, *supra* note 12. *See generally* JON A. KUSLER, CENTER FOR GOVERNMENTAL RESPONSIBILITY, WETLANDS PROTECTION: STRENGTHENING THE ROLE OF THE STATES (1985).

116. Federal and state wetland regulatory programs are accompanied by other federal programs for wetland acquisition. *See, e.g.*, Land and Water Conservation Fund Act, 16 U.S.C. §§ 460l-4 to -11 (1988 & Supp. V 1993); Conservation Program Improvements Act, 16 U.S.C. §§ 3821-3824 (1988 & Supp. V 1993); Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3901-3932 (1988 & Supp. V 1993); Coastal Wetlands Planning, Protection and Restoration Act, 16 U.S.C. §§ 3951-3956 (Supp. V 1993).

Stepping back to review the authorities that take part in wetlands regulation, a first and lasting impression is that this is a crowded stage. Jurisdictional lines blur. The Corps of Engineers itself often issues both section 10 and section 404 permits for the same activity under the potential eye of EPA. The USFWS and NMFS often comment on the biological impacts of the same permit applications, at times with contradictory advice.[117] State wetlands and coastal zone regulators find proposals acceptable that are second-guessed, albeit rarely, during federal review. Whatever else may be said about the multiple authorities involved in wetlands regulation, they certainly are not efficient. Then again, neither are the multiple authorities of American democracy. It may well be impossible to achieve goals as politically and economically difficult as wetlands protection through the kind of efficiency represented by one-stop permit shopping. Section 404's power derives as much from the layers of protection surrounding it as from the statutory authority or good instincts of any one agency. It was not, furthermore, the fact of duplicative state and federal programs that triggered the impulse to delegate section 404 functions to state agencies. Rather, it was the extension of federal protections from coastal and traditionally navigable waters, long considered "federal," upstream to tributaries, adjacent wetlands, prairie potholes and the American heartland.

III. SECTION 404 DELEGATION IN LAW AND PRACTICE

The original Federal Water Pollution Control Act Amendments of 1972 made no provision for transferring section 404 permit responsibilities to the states.[118] Five years later, after these federal responsi-

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117. The USFWS, for example, tends to support "marsh management" proposals in the coastal wetlands of Louisiana that increase production of migratory waterfowl. The USFWS currently uses marsh management practices in Louisiana National Wildlife Refuges in Baritaria Bay, Jefferson Parish and Bayou LaLoutre, Terrebone Parish. More recently, the USFWS has applied to the Corps for a permit to begin marsh management in the Bayou Sauvage National Wildlife Refuge, also in Louisiana. *See* U.S. ARMY CORPS OF ENGINEERS, JOINT PUBLIC NOTICE FOR PROPOSED PUMPS AT BAYOU SAUVAGE NATIONAL WILDLIFE REFUGE (1995). The NMFS has opposed marsh management projects because of impairment of the fisheries. *See* Interview with Jeff Waters, Staff Scientist, Tulane Environmental Law Clinic, New Orleans, Louisiana (Mar. 8, 1995). Mr. Waters is researching marsh management in coastal Louisiana under a grant from the National Fish and Wildlife Foundation. *See also* Letter from Andrew J. Kemmerer, Regional Director, National Marine Fisheries Service, to Brigadier General Eugene Witherspoon, Division Engineer, Army Corps of Engineers 1 (Oct. 7, 1993) (on file with author); Letter from Andrew J. Kemmerer, Regional Director, National Marine Fisheries Service, to Colonel Michael Diffley, District Engineer, Army Corps of Engineers 1 (June 16, 1993) (on file with author).

118. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404(a), 86 Stat. 816, 884. This provision remains the same today except that a time

bilities had been extended by courts and federal agencies to the full reach of the Commerce Clause, Congress amended the Act to provide limited exemptions and two forms of delegation. The first delegation program, under sections 404(g) and (h),[119] provided for state assumption of a full permitting program, but with restricted geographic scope and continuing federal oversight. The second means of delegation, under section 404(e), was by way of a general permit, also restricted, most importantly, in the nature of the activities included.[120] These restrictions were neither incidental nor accidental to the law; they reflected conscious legislative choices in balancing national, state and private interests.

A. A Legislative History

Section 404(a) originally provided that the Secretary of the Army would "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[121] Section 404(b) called for EPA/Corps guidelines for permitting decisions.[122] Section 404(c) allowed for EPA veto of a Corps permitting decision.[123]

The Corps's jurisdiction was not well defined in the 1972 Act. The Corps was to permit activities in the navigable waters of the United States, defined as "the waters of the United States, including territorial seas."[124] Whatever Congress and the Corps may have assumed the limits of the waters of the United States to be,[125] this jurisdiction was interpreted broadly by federal district courts in *United States v. Holland*[126] and *Natural Resources Defense Council v. Calloway*.[127] In *Calloway*, the court noted the importance of wetlands in achieving congressional water quality goals, and held that Congress asserted federal jurisdiction to the maximum extent possible under the Com-

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frame for publication of notice of a permit application was added in 1977. *See* 33 U.S.C. § 1344(a).

119. *Id.* § 1344(g)-(h).

120. *Id.* § 1344(e).

121. § 404(a), 86 Stat. at 884. This provision has remained the same today except that a time frame for publication of notice of a permit application was added in 1977.

122. § 404(b)(1), 86 Stat. at 884.

123. § 404(c), 86 Stat. at 884.

124. § 502(7), 86 Stat. 886.

125. The Corps's original approach to its § 404 jurisdiction was to place the same limits on § 404 as existed under the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401, 403 (1988 & Supp. V 1993)).

126. 373 F. Supp. 665 (M.D. Fla. 1974).

127. 392 F. Supp. 685 (D.D.C. 1975).

merce Clause of the Constitution.[128] For purposes of the CWA, navigable waters were not tied to "traditional tests of navigability."[129] The *Calloway* court ordered the Corps to "publish within forty (40) days of the date of this order proposed regulations clearly recognizing the full regulatory mandate of the Water Act."[130]

On July 25, 1975, the Corps published final regulations that brought all the waters of the United States under the Corps's jurisdiction in three different phases.[131] U.S. Representative Roberts of Texas summarized these regulations on the House floor:

> Phase I, effective with the notice in the Federal Register, extended permit procedures to traditional navigable waters of the United States and to the adjacent wetlands.
>
> Phase II, which became effective September 1, 1976, initiated regulation of discharges of dredged or fill material into primary tributaries of navigable waters of the United States, natural lakes greater than five acres in surface area and their adjacent wetlands.
>
> Phase III, after July 1, 1977, extended the Corps of Engineers' authority to regulate discharges of dredge fill material into waters generally up to the headwaters, where streams flow less than 5 cubic feet per second.[132]

At the same time, the Corps—still smarting from its recent losses in court—issued a press release threatening regulation of normal farming, ranching and other innocuous activities,[133] raising considerable opposition in Congress.[134] The exercise of federal authority over

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128. *Id.* at 686.

129. *Id.*

130. *Id.*

131. 40 Fed. Reg. 31,319, 31,326 (1975).

132. 123 CONG. REC. 38,968 (1977).

133. *Id.* at 10,427-38. The press release stated, "Under some of the proposed regulations, Federal permits may be required by the rancher who wants to enlarge his stockpond or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion." *Id.* at 10,428.

134. *See id.* at 26,711 (memorializing the congressional backlash). Senator Muskie began the debate stating: "I think it ought to be clear that no Member of the Senate as far as I know, defends Section 404. The Senator knows that I vigorously opposed the interpretation of Section 404 which the Corps of Engineers undertook to implement." *Id.*; *see also id.* at 10,415 (statement of Rep. Kemp).

> The 1972 act contained a very controversial section 404, which reemphasized the Corps of Engineers' traditional authority to issue permits for any dredge and fill operations in the country's navigable waters. Since then, however, the corps has defined 'navigable waters' to include virtually every body of water in the United States that has ever been traveled on, and ranchers, farmers and foresters have become concerned that this broad definition would necessitate a very complicated permit process for ordinary agriculture and forestry activities.

Phase III waters had not yet taken effect before Congress began debating changes to the jurisdiction and the implementation of the section 404 program. The House and Senate offered two solutions to address the problem.

In 1976, the House addressed this problem by proposing an amendment to the 1972 Act that died at the end of the session.[135] The same provision was introduced in 1977 and passed by the House of Representatives as H.R. 3199,[136] addressing the amendment of the section 404 program in its section 16.[137] This section restricted the exclusive jurisdiction of the Corps to traditionally navigable waters.[138] The Secretary could delegate authority over adjacent waters, with a finding that the state had the authority and capability to carry out regulatory functions and that the delegation was "in the public interest."[139] Section 16 further authorized the Secretary of the Army, through the Chief of Engineers to "issue those general permits which he determines to be in the public interest."[140] The Corps could assume regulation of Phase II and III waters only if the governor of a state requested that the Corps take over jurisdiction of "ecological[ly] and environmental[ly]" important waters.[141] Otherwise, the Phase II and III waters would be regulated solely by the state. The Corps would retain jurisdiction over only navigable-in-fact waters themselves.[142]

Opponents of the House measure cited EPA and Corps estimates that section 16 would leave "98 percent of stream miles and 80 percent of wetlands unprotected by uniform nationwide controls."[143] Two attempts were drafted to amend section 16 of H.R. 3199 to leave the jurisdiction of the Corps as defined by *Calloway*; they were defeated,[144] and H.R. 3199 passed and moved to the Senate for consideration.

Id.

135. *See id.* at 10,429.

136. *Id.* at 10,434.

137. H.R. 3199, 95th Cong., 1st Sess. (1977). For the text of § 16, see 123 CONG. REC. 10,420-21 (1977).

138. H.R. 3199, § 16(e).

139. *Id.* § 16(k).

140. *Id.* § 16(g). Section 16 also exempted from the CWA all discharges of dredge or fill material from normal farming, ranching or silviculture activities; maintenance of currently serviceable structures; and the construction of farm or stock ponds and irrigation ditches. *Id.* § 16(h).

141. *Id.* § 16(f).

142. *See id.* § 16(j)-(k).

143. 123 CONG. REC. 10,416 (1977) (statement of Rep. Lehman).

144. *See id.* at 10,426 (amendment of Rep. Edgar); *id.* at 10,428 (statement of Rep. Cleveland).

The Senate Committee on Environment and Public Works took a completely different approach to the problems caused by the expansion of the Corps's jurisdiction. The Senate Bill retained Corps authority over all wetlands, navigable or not, but excepted those activities that were causing the firestorm of controversy over the 404 program: "upland farming, forestry and normal development activit[ies] carried out primarily by individuals and as a part of family business or family farming activity."[145] The bill also provided for assumption by the states of "substantial portions of the permit program,"[146] limited, however, to Phase II and Phase III waters. The EPA Administrator, not the Secretary of the Army, would be the delegating authority after consultation with the Secretary of the Army and the Director of the Fish and Wildlife Service.[147] The exclusive responsibility of the Corps over Phase I waters and for the administration of the Rivers and Harbors Act of 1899 remained.[148] The Senate amendments also authorized the Corps to issue general permits on a regional or national basis, but only for "classes or categories of activities which cause, individually or cumulatively, only minimal environmental impact."[149]

Senator Bentsen moved on the Senate floor to amend the committee bill to conform to House Bill H.R. 3199, section 16.[150] The amendment called for the rollback of the Corps's jurisdiction to Phase I waters, and the further delegation to the states, upon a showing of "public interest," of both section 404 and Rivers and Harbor Act jurisdiction in Phase I waters.[151] The motion was defeated and the Committee amendments were passed by the Senate.[152] The two bills went to Conference Committee whose bill, which became law, rejected the House Bill and adopted the Senate amendments to the section 404 program with little revision.[153]

The Committee approved delegation to the states, but restricted its jurisdiction to Phase II and III waters[154] and spelled out require-

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145. *Id.* at 26,697 (statement of Sen. Muskie).

146. *Id.* at 26,707.

147. S. REP. NO. 370, 95th Cong., 1st Sess. 78 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4403.

148. *Id.* at 75, 1977 U.S.C.C.A.N. at 4400.

149. *Id.* at 80, 1977 U.S.C.C.A.N. at 4405.

150. 123 CONG. REC. 26,710-11 (1977).

151. *See supra* notes 135-142 and accompanying text.

152. 123 CONG. REC. 26,728, 26,775 (1977).

153. H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 97-105 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4472-80.

154. The Committee report stated that § 404(g)-(h)

ments for this delegation in greater detail.[155] It did not allow the delegation of Phase I waters, under either section 404 or the Rivers and Harbors Act.[156] The Committee also approved, with tightening amendments, authority for the Corps (or a delegated state) to issue general permits.[157] The general permit would be limited to five years, and have a continuing oversight provision allowing the party issuing the general permit to decide that an activity subject to the permit should obtain an individual permit.[158] The Committee further rejected the "in the public interest" standard for general permits of the House Bill and adopted the Senate version, requiring an inquiry into the extent of similar activities and required a finding of minimal individual and cumulative environmental impact.[159] From this history it is clear that Congress considered delegation in several forms, and in the end adopted two mechanisms that were consciously and strictly limited in scope.

B. State Assumption Under Section 404(g), (h)

State assumption of section 404 authority under subsections (g) and (h) reflects the caution of Congress and the priority it placed on wetlands protection. The jurisdiction of section 404(g) and (h) is limited to Phase II and III waters.[160] Under current EPA regulations, no partial jurisdiction is allowed within these waters; this form of delega-

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allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of navigable waters outside the Corps program in the so-called Phase I waters. Under the committee amendment, the Corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until approval of a State Program for Phase II and III waters.

S. REP. NO. 370, 95th Cong., 1st Sess. 75 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4400.

155. *Id.* at 77-80, 1977 U.S.C.C.A.N. at 4402-05.

156. *Id.*

157. H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 100 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4475.

158. *Id.*

159. *Id.*

160. 33 U.S.C. § 1344(g)(1) (1988). This section allows states to administer their own permit programs governing discharges into

navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto).

Id.

tion is all or nothing.[161] The approval process receives searching scrutiny, and baseline federal standards remain, as does the same sort of continuing EPA oversight that the Agency exercises in the Corps permitting process.

To achieve delegation, a state wishing to assume section 404 permit authority must submit a proposed program to EPA.[162] The proposal must identify state authority—for which state enabling legislation is generally required—to, *inter alia*, fund and operate an assured program,[163] delineate and distinguish its Phase II and III waters from those regulated by the Corps,[164] assure record-keeping,[165] inspection,[166] monitoring[167] and enforcement,[168] provide public notice[169] and notice to other states affected by proposed dischargers,[170] and avoid interference with Corps functions.[171] Significantly, the first requirement in a long list is that the state apply and assure compliance

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161. 40 C.F.R. § 233.1(b) (1994). Although the CWA is silent on the question, EPA interprets the statute as prohibiting partial delegation. The preamble to the current EPA § 404 regulations states:

> Several comments were received on partial State programs, ranging from the view that partial programs should not be allowed to the view that it is desirable to approve partial programs. The commentators identified partial programs in terms of geographic extent or scope of activities regulated. EPA interprets the Act as requiring State programs to have full geographic and activities jurisdiction (subject to the limitation in section 404(g) [concerning Phase I waters]). While specific authorization for partial programs under section 402 was enacted in the Water Quality Act of 1987, no similar provision was added for section 404. Accordingly, partial 404 programs are not approvable.

53 Fed. Reg. 20,764 (1988).

EPA's conclusion is open to question. The 1987 amendments to the CWA specifically allowed partial § 402 programs, 33 U.S.C. § 1342(n), but were silent on partial § 404 approval. These amendments responded to a 1982 opinion of EPA counsel that approval of partial § 402 programs posed "a serious legal risk." Memorandum from Robert M. Perry, General Counsel, to Bruce R. Barrett, Acting Assistant Administrator for Water (Jan. 15, 1982). The opinion also noted, however, that § 404 approvals were a different matter because § 404 was to be delegated only in part (*i.e.*, not in Phase I waters) to begin with, so the case for partial § 404 delegation was "more plausible." *Id.* Nonetheless, EPA concluded, "some risk remains" for approval of a partial program under § 404 as well. *Id.* The presence of "some risk" has apparently kept EPA from approving a measure that would greatly facilitate state approvals. *See infra* Part III.D. On the other hand, EPA apparently has not sought to remove this risk through legislation, as it did for § 402.

162. 40 C.F.R. § 233.10 (1994).
163. *Id.* § 233.11-.12.
164. *Id.* § 233.14.
165. *Id.* § 233.23(7).
166. *Id.* § 233.23(8).
167. *Id.* § 233.23(7).
168. *Id.* § 233.41.
169. *Id.* § 233.32.
170. *Id.* § 233.31(a).
171. *Id.* § 233.31(b).

with the section 404(b)(1) guidelines.[172] Individual permits are limited to a period of five years.[173]

Detailed provision is also made for EPA oversight and for the reversion to federal decision-makers of permits with potential major impacts.[174] States transmit copies of proposed individual permits to EPA for review,[175] and may not issue a permit if EPA objects on the basis of its application of the section 404(b)(1) guidelines or the objection of another state.[176] Within limits, EPA may waive its oversight authority;[177] these limits, however, preclude waiver of general permits, permits with a "reasonable potential" to harm endangered species or waters of another state, as well as permits containing toxins or hazardous materials, near drinking water supplies and within protected "critical areas" (*e.g.*, parks and refuges).[178] EPA in turn, is required to consult the Corps, USFWS and NMFS on both state applications for delegated programs and on individual permit applications from delegated states.[179] As a bottom line, EPA may revoke state authority to operate a section 404(g), (h) delegated program for noncompliance with these conditions.[180]

To date, only two states, Michigan and New Jersey, have received EPA authority to operate assumed programs.[181] Twice Maryland has tried and fallen short in its implementing legislation. North Dakota completed all steps necessary to meet federal requirements, but has since had second thoughts. These programs offer some experience in the difficulties of program assumption and implementation.

1. An Assumed Program in Practice: Michigan.—Michigan has been the testing ground for state-assumed programs. There were, perhaps, advantages to Michigan in being both first and early. In a 1992 review of state assumption, EPA noted that as its requirements have evolved, states perceive that the Agency "picks the state law apart with a fine tooth comb. In the view of a Michigan official interviewed for

172. *Id.* § 233.23(a).
173. *Id.* § 233.23(b).
174. *Id.* §§ 233.50-.53.
175. *Id.* § 233.50(a).
176. *Id.* § 233.50(e).
177. *Id.* § 233.51(a).
178. *Id.* § 233.51(b).
179. *Id.* § 233.50(b).
180. *Id.* § 233.53(b).
181. Michigan's § 404 program assumption took effect October 16, 1984. 49 Fed. Reg. 38,947 (1984). New Jersey's § 404 program assumption took effect on March 2, 1994. 59 Fed. Reg. 9933 (1994).

[an EPA] study, Michigan's program today would likely not be approved, given EPA's requirements."[182]

The Michigan program is administered by the state Department of Natural Resources (DNR),[183] and funded by permit fees and general appropriations.[184] The 1989 budget was $1.3 million.[185] The program is not based on one state wetlands statute but a combination of several statutory schemes, including: the Great Lakes Submerged Lands Act;[186] the Goemaere-Anderson Wetland Protection Act;[187] the Water Resources Commission Act;[188] the Inland Lakes and Streams Act of 1972;[189] and the Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970.[190] Pursuant to the limitations of section 404(g), the program embraces only Phase II and III waters and does not assume primary jurisdiction over the Great Lakes coastal areas, which connect waters and major tributaries of the Great Lakes upstream to the limit of federal navigability.[191] For these areas, the Corps continues to issue section 404 permits. Michigan's state program asserts concurrent jurisdiction, however, and also issues state permits for all Phase I waters.[192] The Corps and state implement a consolidated permitting process that provides a single application for all state and federal permits.[193] The application must be decided upon within strict time frames. The permit must issue in ninety days

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182. U.S. ENVTL. PROTECTION AGENCY, STUDY OF STATE ASSUMPTION OF THE SECTION 404 PROGRAM 10 (1992) [hereinafter EPA ASSUMPTION REPORT].

183. State of Michigan, Michigan 404 Program 4.2 (undated) [hereinafter Michigan Documents] (documents submitted to the EPA upon request for assumption). These documents, as well as the documents on the New Jersey § 404 program, were obtained from the Louisiana State University Seagrant Legal Foundation Library and are on file with the authors.

184. *Id.* at 4.D.66.

185. Peg Bostwick, *Michigan Section 404 Program Update*, NATIONAL WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), July-Aug. 1989, at 7.

186. MICH. COMP. LAWS ANN. § 322.701-.715 (West 1984 & Supp. 1994).

187. *Id.* § 281.701-.722 (West Supp. 1994).

188. *Id.* § 323.1-.13a (West 1992 & Supp. 1994).

189. *Id.* § 281.951-.966 (West 1979 & Supp. 1994).

190. *Id.* § 691.1201-.1207 (West 1987 & Supp. 1994).

191. Bostwick, *supra* note 185, at 5; Michigan Documents, *supra* note 183, at K.143.

192. Michigan state law does not regulate wetlands that are not contiguous to a "lake or pond, or a river or stream." MICH. COMP. LAWS ANN. § 281.702(g) (West 1984 & Supp. 1994). Areas that are not regulated include isolated basin wetlands with no surface outflow, unless they are more than five acres in size. *Id.* Although in all likelihood these wetlands would not be adequately protected by the Corps because of Nationwide Permit 26, *see* 33 C.F.R § 330.1, at App. A (1994), at a minimum they would be under the jurisdiction of the federal program. In Michigan, unless they are treated as wetlands "essential to the preservation of the natural resources of the state," they are not regulated at all. *Id.*

193. The consolidated permitting process encompasses nine state statutes requiring permits and four federal programs, including § 404. Bostwick, *supra* note 185, at 6.

from the date of application,[194] unless the state and applicant agree to an extension.[195] If a permit decision is not made, the permit is granted by operation of law.[196]

Under its MOA with the state, EPA retains a circumscribed oversight authority. The Agency, in consultation with the Corps and the U.S. Fish and Wildlife Service, reviews and comments on all permits that may involve contaminated materials, are located in critical environmental or historical areas, or involve "major discharges."[197]

Michigan's Administrative Procedures Act[198] allows a contested case hearing before an Administrative Law Judge (ALJ) for DNR permit actions.[199] The ALJ's decision is reviewed before the Natural Resource Commission,[200] the members of which are appointed by the Governor.[201] In reviewing an ALJ decision, the Commission considers nine factors, including "the relative extent of public and private need for a proposed activity," "the availability of feasible and prudent alternative locations and methods," and "the economic value, both public and private, of the proposed land changes to the general area."[202] What strikes the eye about the factors is their highly discretionary character,[203] more like the Corps of Engineers' "public interest review" than the EPA 404(b)(1) guidelines.[204] This degree of discretion may serve to explain both the flexibility of the Michigan program in practice, and the rare occasions on which EPA has intervened.

In practice, relatively few Michigan permit applications fall into those categories (*e.g.*, "contaminated," "critical areas" or "major") subject to individual permit review by EPA and other federal agencies. Of the 3000 to 3500 permit applications received by Michigan DNR per year, only 42 were referred to EPA in 1993, 49 in 1992 and 52 in

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194. MICH. COMP. LAWS ANN. § 281.708 (West 1984 & Supp. 1994).

195. If a public hearing is held, the state must decide on the application within 150 days of the completion of the application or 90 days after the public hearing, whichever comes first. *Id.*

196. *Id.*

197. Michigan Documents, *supra* note 183, at 5.1. Major discharges are defined as fills greater than 10,000 cubic feet or the relocation of waters greater than 500 feet. *Id.*

198. MICH. COMP. LAWS ANN. § 24.201-.328 (West Supp. 1994).

199. *Id.* § 24.271.

200. *Id.* § 281.701.

201. *Id.* § 299.307(e).

202. *Id.* § 281.709(2)(a), (b), (i) (Supp. 1994); *see In re* Goemaere-Anderson Wetland Protection Act, 1994 Mich. ENV. LEXIS 15 (July 12, 1994) (assessing the Commission's application of the nine factors in requiring wetland mitigation as a condition of permit approval).

203. *See* MICH. COMP. LAWS ANN. § 281.709(2)(a)-(i) (West 1979 & Supp. 1994).

204. 33 C.F.R. § 320.4 (1994). For a discussion of the contrast between the Corps review and the EPA guidelines, see generally Houck, *supra* note 48.

1991.[205] Of these, EPA commented on only 11 applications in 1993, 11 in 1992 and 34 in 1991.[206] In 1988, of those individual permits subject to actual federal agency review, however, 48% of the permits were denied, 13% issued, 13% modified significantly prior to issuance, 6% closed and 21% were still pending by mid-1989.[207] These data point to the conclusion that federal oversight is highly selective, indeed rare; when it is exercised, however, it has tended to be stringent.

As the record further shows, actual conflicts between federal and state decision-makers have been exceedingly rare. Of the approximately 20,000 permits granted[208] during the existence of the Michigan program, and the hundreds that have been individually reviewed by EPA and the other federal agencies in their oversight capacity, in only two instances has there been significant disagreement over whether permits should issue.[209] The most celebrated involved a proposal for a golf course at the Homestead Resort, also known as the *Crystal River* case from the suit filed in federal court by the Friends of Crystal River.[210]

In *Crystal River*,[211] Michigan's DNR denied the permit application based on its determination that the applicant had not met its burden of proof that there were no reasonable and prudent alternatives to developing wetlands for a golf course next to its existing resort.[212] On

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205. Telephone Interview with Peg Bostwick, Michigan Dep't of Natural Resources (Jan. 31, 1995).

206. *Id.* As a result of Friends of Crystal River v. EPA, 794 F. Supp. 674 (W.D. Mich. 1992), *aff'd*, 35 F.3d 1073 (6th Cir. 1994) (discussed *infra* notes 210-226 and accompanying text), EPA decided to revoke the Region's oversight authority. Thereafter, all comments came out of Washington, D.C., leading to a decrease in EPA comment in 1992 and 1993. Michigan is attempting to have EPA delegate the review and oversight authority back to Region VI.

207. Bostwick, *supra* note 185, at 6.

208. Telephone Interview with Peg Bostwick, Michigan Dep't of Land and Water Quality (Apr. 3, 1993). Ms. Bostwick stated at that time that the Michigan program had received approximately 23,000 permits and had issued approximately 72% of them. *Id.* At that rate, it is estimated that Michigan will have issued over 20,000 permits by the time this Article is published. *Id.*

209. Telephone Interview with Rick Moore, Michigan United Conservation Club (Jan. 27, 1995). The Michigan United Conservation Club is a conservation organization with over 120,000 members. *Id.* The Club's staff of five policy analysts monitors wetlands permitting throughout Michigan. *Id.*

210. The second dispute concerned a landfill outside of Detroit. EPA objected, negotiations ensued and the permit ultimately was issued after modifications, and without litigation. *Id.*

211. *Crystal River*, 794 F. Supp. at 674.

212. *Id.* at 679. The § 404(b)(1) guidelines create a rebuttable presumption that non-wet alternatives exist for non-water dependent activities. 33 C.F.R. § 325, at app. B(9)(b)(5) (1994). The Michigan program requires the applicant show that no "feasible

appeal, the Natural Resources Commission reversed,[213] holding that the resort needed a golf course to be competitive in its market,[214] and that golfers would be less likely to visit a resort that required traveling to an offsite course,[215] leading to an unspecified reduction in profits.[216] Having accepted the permittee's project definition as a contiguous "on-site golf course for the resort," eight alternative noncontiguous sites offered by the environmental community were eliminated as being inconsistent with the project's purpose.

The subsequent history of this case demonstrates the influence of politics over the permitting process at both the state and federal levels. After the state commission issued the permit, EPA's Regional Office objected on the grounds that "pursuant to 40 C.F.R. § 230.10(a)(3) of the 404(b)(1) guidelines, the applicant had not adequately evaluated alternative sites."[217] When Michigan did not resolve these objections, EPA then transferred the permit decision to the Corps.[218] Homestead Resort did not then seek a 404 permit from the Corps, however. In the words of a reviewing court, "Rather than any action taken with the COE, the evidence demonstrates that the MDNR and other state officials from the Governor's office pursued negotiations with the EPA. In early 1991, the Michigan Governor requested that the EPA Administrator, William Reilly, 'review the Homestead Resort permit application decision-making process.'"[219]

Thereafter, EPA set up an advisory panel to review the dispute regarding the permit application.[220] The advisory panel issued a report "generally supporting" the EPA objections.[221] The Region V Administrator concluded that the permit should not be granted on April 11, 1992, and on April 16, 1992, William Reilly "decided to exercise his discretion to withdraw his delegation of authority from the Regional Administrator and to transfer it to the Assistant Administrator for Water."[222] The Assistant Administrator for Water concluded that

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and prudent" non-wetland alternatives exist for the activity. MICH. COMP. LAWS ANN. § 281.709(4)(b) (West 1979 & Supp. 1994).

213. *In re* Wetlands Act Appeal of Kuras Properties, Inc., 1990 Mich. ENV. LEXIS 70, *12, *18 (Nov. 14, 1990).

214. *Id.* at *14.

215. *Id.* at *17.

216. *Id.*

217. *Crystal River*, 794 F. Supp. at 678.

218. *Id.* at 679. EPA is authorized to make such a transfer under 33 U.S.C. § 1344(j) and 40 C.F.R. § 233.50(j) (1994).

219. *Crystal River*, 794 F. Supp. at 680 (citation omitted).

220. *Id.*

221. *Id.*

222. *Id.*

the development would have no adverse effect and restored the permit decision back to Michigan.[223] The Friends of Crystal River and other environmental groups sued and obtained judgment that the EPA had no authority to return the decision to Michigan once it had been transferred to the Corps.[224]

In retrospect, the Crystal River controversy illustrated not so much a divergence of opinion among state and federal regulators, both of whom would have denied the permit, as a discrepancy between the opinions of regulators and of bureaucrats up the line. It is apparently not unusual in Michigan for the politically-appointed Natural Resources Commission to overrule protective permit decisions by the state DNR.[225] The same phenomenon has occurred in Washington, D.C. One lesson that emerges from this rather common phenomenon is that, for decisions as subject to political influence as high-stakes wetlands development, two decision points—be they Corps of Engineers and EPA or EPA and the state—are superior to one.[226]

A related problem with the Michigan program is enforcement, and the loss of federal enforcement muscle. As one Michigan commentator has put it:

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223. *Id.* at 681.

224. *Id.* at 694. EPA only retained the authority provided by Congress under the federal program, *i.e.*, veto power under 404(c) or power to persuade the Corps through the comment and consultation process. *Id.* at 693. The district court's conclusions were affirmed on appeal. 35 F.3d 1073 (6th Cir. 1994). It was only then that the developer of the Homestead resort contacted the Detroit District Office of the Corps. A meeting was held between the Corps and the developer in November 1994 and the developer applied for the permit during the first week of March 1995. Telephone Interview with David Gesl, Permit Branch, Detroit District Corps (Mar. 7, 1995). As of the writing of this Article the Corps had just begun processing the permit. *Id.*

225. A review of the Michigan Natural Resource Commission opinions contained in LEXIS "ENVIRN" Library, "MIENV" File, revealed that there were 85 reported contested permit cases. Thirty-three cases were dismissed without prejudice for lack of activity. Of the 52 remaining cases, 3 were cases involving the issuance of a permit by MDNR; the Commission upheld the permit issuance in two cases and modified and issued the permit in the third. Forty-nine cases were contested because MDNR denied a permit. Of these, the Commission at least partially granted 24 of the permits and upheld MDNR's permit denial in 25 of the cases.

226. In Michigan, the environmental community considers it a strength of the delegated program that influence and political pressure can be brought to bear on the local permitting authority. Telephone Interview with Rick Moore, *supra* note 209. The ability of the permitting authority to be influenced politically is not usually a situation environmentalists would embrace, and reflects the relative strength of the environmental community in Michigan. One only has to look at relative political strengths of the development and environmental communities in states with large wetland inventories, such as Alaska, Louisiana, or North Dakota, to appreciate that susceptibility of a program to local political pressure is not, per se, an argument in favor of delegation.

> Some of the greatest difficulties of wetland protection under the state program stem from a political climate which inhibits strong enforcement. The wetlands program is extremely controversial, and state legislators often hear loud complaints from landowners whom it has affected. . . . In many cases, the county prosecutors responsible for enforcing state law are aggressively opposed to the § 404 program, thereby making enforcement all but impossible.[227]

The most chronic of Michigan's problems, however, is funding. Even though the state had financed a statewide wetlands regulatory program prior to delegation, operating the assumed federal program is more expensive because of, *inter alia*, the time required for reporting, documenting section 404(b)(1) compliance and federal coordination.[228] Federal operating funds are not available. State permit fees have not proven sufficient to carry the load,[229] and general appropriations from the legislature are subject to local and state political forces, including those inimical to wetland protection.[230]

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227. Stephen Brown, *Michigan: An Experiment in Section 404 Assumption*, NATIONAL WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), July-Aug. 1989, at 8. This reluctance of state enforcement authorities has been compounded by the inactivity of EPA. When Michigan assumed the program, federal enforcement on Phase II and III wetlands simply shut down. Bostwick, *supra* note 185, at 7. Sections 404(h)(3), (4), and (5) require the Corps to suspend the issuance of permits, to transfer all applications to the state and, for general permits, to suspend the administration and enforcement of such general permits. 33 U.S.C. § 1344(h)(3)-(4). Although under § 404(h)(5), 33 U.S.C. § 1344(h)(5), enforcement is suspended only for general permits, apparently the Corps suspends enforcement in Phase II and III waters in favor of state enforcement mechanisms. EPA's enforcement power is specifically reserved by § 404(n), 33 U.S.C. § 1344(n), but it appears from Michigan's experience that EPA's enforcement presence was either not strong before assumption or suspended after assumption.

228. Bostwick, *supra* note 185, at 5.

229. For wetland activities that require merely a Wetlands Protection Act permit, only a small fee is required. Telephone Interview with Rick Moore, *supra* note 209. Of the approximately 3000 permits granted annually, only about 1000 applications require more than one type of permit. *Id.* The fee schedule for the consolidated permits is $50 for minor permits, $500 for medium permits, and $2,000 for permits defined by the program as major. MICH. COMP. LAWS ANN. § 281.955 (West 1979 & Supp. 1994). Only about 5-6% of permits are considered major. Telephone Interview with Rick Moore, *supra* note 209.

The program is far from self-sustaining. Recently EPA provided Louisiana with a grant to study its own assumption. *See* Naomi T. Krogman & Robert Gramling, Preparation of a Plan for State of Louisiana Assumption Clean Water Act Section 404 Wetlands Permitting Authority (1994) [hereinafter Louisiana Assumption Study] (on file with author). During the study MDNR stated it was attempting to raise its permit fees to offset the $4,000,000 cost of operating the program in 1993. *Id.* at 268.

230. A commentator notes:

> Moreover Michigan's § 404 program is severely limited by the legislative appropriations process. For example, the wetlands inventory that is required by the state's wetland protection act languished for eight years waiting for adequate funding

On the plus side, the Michigan experience illustrates several advantages of its assumed program over a federal system.[231] The first of these is localized service. The state has placed thirteen field offices throughout the state to deal with localized permitting actions, four in the Upper Peninsula.[232] The Detroit District Corps of Engineers has only four office locations servicing all of Michigan, and parts of Ohio and Indiana. Because of Michigan's geography, federal permit decisions are made in the Detroit Corps District Office, which is as much as an 800 mile drive from some areas under its jurisdiction.[233] Local Michigan DNR has a much better concept of the local watersheds, problems and potential impacts, both individual and cumulative, of the permitted activity.

A second advantage is in the quality of the decision-making itself. Michigan DNR staff inspect all section 404 permit sites in the state.[234] Under the former Corps-operated section 404 program, seventy percent of applicants were treated under the nationwide permits and another twenty-two percent of the permits were handled under general permits.[235] Michigan inspects many sites of which the Corps did not even receive notification under the nationwide and general permit programs.[236] Given the cumulative, death-from-1000-blows impact of small wetland decisions on overall wetland health, individual permit review is a decided plus. At the same time, the Michigan program is able to consolidate several different wetlands statutes, reducing the burden on the regulated community and encouraging the project to be evaluated in light of multiple impacts, including many not specifically regulated by the section 404 program.[237] The upshot is more small-scale permit review, and cumulative review as well.

The conclusion that emerges from the Michigan experience with delegation is that section 404(g), (h) assumption can work. EPA will approve a program, funding can be provided through, among other

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from the state. Without the inventory, the program has been restricted by a widespread misunderstanding about the location and extent of wetlands.

Brown, *supra* note 227, at 8.

231. Bostwick, *supra* note 185, at 6.

232. *Id.*

233. *Id.*

234. *Id.* at 7.

235. These numbers are mirrored in nationwide data which show that of 90,000 activities subjected to § 404 jurisdiction each year, 80,000 are exempted under nationwide and general permits. To the extent that state programs provide additional attention to these activities, wetland protection can only improve. *See supra* note 1.

236. Bostwick, *supra* note 185, at 7.

237. *Id.* The Michigan consolidated permit process encompasses nine separate state statutes and four federal programs, including § 404. *Id.* at 6.

means, permit fees, the program can operate with moderate rigor, and EPA will keep federal oversight to a minimum and for the most part in harmony with state regulators. On the other hand, there is no doubt that the potential for federal oversight, combined with continuous monitoring by state-based citizen watchdog organizations, has helped make Michigan's permit decisions conform to national water quality goals.

2. State Assumption Post-Michigan: New Jersey, Maryland and North Dakota.—The New Jersey program was approved for assumption on December 22, 1993, the end of a journey the state had initiated as early as 1989, and became effective in March 1994.[238] Unlike Michigan, which used many existing laws to demonstrate state compatibility with section 404, New Jersey passed the Freshwater Wetlands Protection Act[239] specifically to gain delegation of the section 404 program from EPA.[240] The state worked closely with EPA after the adoption of its statute to develop state regulations that would meet federal requirements for state assumption of the federal program, including the section 404(b)(1) guidelines.[241]

New Jersey relies on permit fees as a source of funding for the program. To finance the New Jersey program prior to section 404 delegation, the state legislature appropriated funding of $2 million in 1988, $1 million in 1989 and 1990, and $450,000 in 1991 and 1992. During this time, the Freshwater Wetlands Protection program collected permit application fees from a high in 1990 of $2.4 million to

238. The program was officially delegated on March 2, 1994. 59 Fed. Reg. 9933 (Mar. 2, 1994).

239. N.J. STAT. ANN. § 13:9B-1 to -30 (West 1991 & Supp. 1994). Although the Freshwater Wetlands Protection Act was passed specifically to gain § 404 assumption, other state statutes administered by the New Jersey Department of Environmental Protection and Energy affect the regulation of wetlands. These are the Wetlands Act of 1970, N.J. STAT. ANN. § 13:9A-1 to -10 (West 1991 & Supp. 1994); the Flood Hazard Area Control Act, N.J. STAT. ANN. § 58:16A-50 to -101 (West 1991 & Supp. 1994); the Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:19-1 to -21 (West 1992 and Supp. 1994); and the Waterfront Development Law, N.J. STAT. ANN. § 12:5-1 to -11 (West 1978 & Supp. 1994).

240. New Jersey Governor Jim Florio stated in New Jersey's assumption submission that "the New Jersey Freshwater Wetlands Protection Act contains provisions that are specifically intended to require and facilitate the assumption of the federal 404 wetlands program by our State." Letter from Governor Jim Florio to William J. Muszynski, Acting Regional Administrator, EPA 1 (May 17, 1994) (on file with authors).

241. Memorandum from William J. Muszynski, Acting Regional Administrator, Region II, New Jersey, to Carol Browner, EPA Administrator 2-11 (Dec. 22, 1993) [hereinafter New Jersey Application Memo] (on file with authors).

lows of $1.2 million in 1989 and again in 1992.[242] The fees charged by the state are based on the types of permits called for under five state laws; the Wetlands Act of 1970;[243] the Flood Hazard Area Control Act;[244] the Coastal Area Facility Review Act;[245] the Waterfront Development Act;[246] and the Freshwater Wetlands Protection Act.[247] The fees range considerably with the nature of the state review. An applicant pays a base fee of $100 to determine if wetlands are present or absent on its land;[248] these fees may rise to $50,000 to delineate the wetland boundary line for a parcel 1420 acres or over.[249] Suffice it to say that fees of this nature can carry a state program a long way.

The most difficult issue in state assumption for New Jersey was the extent and nature of federal oversight. Under its Memorandum of Agreement with EPA, the EPA reviews all draft general permits[250] and individual discharges affecting endangered or threatened species;[251] permits involving toxic pollutants,[252] permits near public water supplies,[253] and in environmentally critical areas such as refuges and parks;[254] fills of 5 acres or more[255] or channelization of more than 500 feet of a river or stream.[256] Underlying this memorandum were the comments and outright objections of other federal agencies. In March 1993 the U.S. Fish and Wildlife Service initiated a Section 7 Endangered Species Act[257] informal consultation over its concerns that the New Jersey program could weaken endangered species protection.[258] The consultation was elevated to Washington after the Service rejected a proposed resolution offered by the EPA Region. After three extensions were granted EPA by the state under section

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242. State of New Jersey Application for Approval of 404 State Program [hereinafter New Jersey Documents] (documents submitted to the EPA upon request for assumption pursuant to 40 C.F.R. § 233.11(d) (1994)).

243. N.J. STAT. ANN. § 13:9A-1 to -10 (West 1991 & Supp. 1994).

244. *Id.* § 58:16A-50 to -101 (West 1992 & Supp. 1994).

245. *Id.* § 13:19-1 to -21 (West 1991 & Supp. 1994).

246. *Id.* § 12:5-1 to -11 (West 1979 & Supp. 1994).

247. *Id.* § 13:9B-1 to -30 (West 1991 & Supp. 1994).

248. *See* New Jersey Documents, *supra* note 242, at 80 (depicting Regulatory Fee Schedule).

249. *Id.*

250. *Id.* § (B)(1)(a).

251. *Id.* § (B)(1)(b).

252. *Id.* § (B)(1)(d).

253. *Id.* § (B)(1)(e).

254. *Id.* § (B)(1)(f).

255. *Id.* § (B)(1)(g).

256. *Id.* § (B)(1)(i).

257. 16 U.S.C. § 1536 (1988 & Supp. V 1993).

258. *See New Jersey Becomes Second State with Wetlands Jurisdiction*, WATER POL'Y REP. (Inside Washington Pub., Washington, D.C.) Jan. 5, 1994, at 22.

404(h)(3), the two agencies came to a consensus under which the Service was granted authority to review permit applications in areas with "documented occurrences of federally listed species or designated habitat."[259]

The Corps of Engineers was concerned about the influence of local politics. As summarized by EPA:

> The NYD maintains that a state program "is far more politically accessible to project sponsors than the federal program is under the auspices of the Corps." Further, the NYD "has noted in the past a number of instances where state intervention in the process appeared to be far more oriented to political expediencies than to resource protection or public interest." The NYD dismisses the contention that federal oversight of an assumed program can counter this concern by pointing out that this "oversight can sometimes be used in a highly political manner, as is evident in the Crystal River case in Michigan." The NYD asserts that "the highly charged political atmosphere in New Jersey" lends itself to undue political influence in the State program.[260]

For its part, New Jersey was apprehensive about the process of federal oversight, particularly at the EPA headquarters level.[261]

Environmentalists noted that, on the basis of EPA's track record of oversight of the state's section 402 NPDES program, the issue was largely moot: little oversight in fact would be exercised on any level.[262]

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259. *Id.*

260. New Jersey Application Memo, *supra* note 241, at 3-3. EPA's failure to address the Corps's NYD comments suggests the political nature of the remarks. *See id.* § 4 (Responsiveness Summary). The comments were not directly submitted by the Corps but by the Morris County Planning Commission.

261. *Agency to Revise Permit Decision Operation: State Says EPA Oversight Impedes Delegated Wetlands Program*, WATER POL'Y REP. (Inside Washington Pub., Washington, D.C.), Nov. 9, 1994, at 18 [hereinafter *Oversight Impedes Delegation*]. New Jersey's Department of Environmental Protection and Energy stated in its October 27, 1994, report that

> [i]t would appear that the review required at headquarters level . . . must surely be redundant with that done at the regional level . . . . The need for all official EPA comments to go to headquarters for the signature of the Assistant Administrator of Water inevitably results in all comments taking the entire 90 days allocated in the Federal Transfer Regulations. While EPA Region II appears willing to expedite comments to the extent permissible by the transfer regulations, it has no control over the amount of time that may be required to obtain a signature at the headquarters level.

Id. at 18-19.

262. *See Comments of the New Jersey Audubon Society About New Jersey "Tract Record,"* New Jersey Application Memo, *supra* note 241, at 3-12.

The New Jersey experience confirms that EPA is still feeling its way with the process of delegation, including the application of such federal laws as the Endangered Species Act. The very length and complexity of the process has served to deter applications for assumption from other states. In 1992, while the process was still ongoing, EPA noted that states familiar with New Jersey's experience were concerned by the inflexibility it demonstrated.[263] The experience also shows, however, that approval can be obtained and that a state program can be funded, in even more major part than that in Michigan, through permit application fees.

Maryland also recently pursued delegation. Newly-elected Governor Glendening made assumption of the section 404 program a top legislative priority, and the state planned to submit its assumption application to EPA in April 1995.[264] Maryland presently protects freshwater wetlands under the Maryland Nontidal Wetlands Protection Act,[265] administered by its Department of Natural Resources. In 1991 the Corps issued a Statewide Programmatic General Permit delegating the section 404 process over nontidal wetlands projects of less than five acres,[266] but the regulated community complained that the permit did not do enough to facilitate development while environmentalists saw too many permit authorizations through this abbreviated process.[267]

A range of issues arose during the development of the Maryland assumption packet. One issue was adherence to the EPA 404(b)(1) guidelines, which required conforming legislation.[268] Another was the availability of citizen suits to review state permit decisions.[269] The state also needed to expand its jurisdiction over some Phase II and

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263. EPA ASSUMPTION REPORT, *supra* note 182, at 12 n.16.

264. Interview with Thomas Grasso, Acting Director and Attorney for the Chesapeake Bay Foundation (Feb. 1, 1995).

265. MD. CODE ANN., NAT. RES. §§ 8-1201 to -1211 (1990 & Supp. 1994).

266. Maryland Programmatic General Permit, MDGP-1, part II(c), issued by the Baltimore District (Jan. 31, 1994) [hereinafter MDGP-1].

267. Thomas V. Grasso & Grady S. McCallie, *Make No Assumptions*, NATIONAL WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), July-Aug. 1994, at 3.

268. Grasso Interview, *supra* note 264. Also at issue is a paradoxical state incentive for filling wetlands. If a permittee can reduce the impact of the project on wetlands to 5000 square feet or less, the state will perform the necessary mitigation for the permittee. On the one hand, this incentive reduces a project's impact on wetlands; on the other, it subsidizes the incremental loss of small wetlands parcels. *Id.*

269. Grasso & McCallie, *supra* note 267, at 4. Current Maryland law allows standing only to the permittee and landowners in the immediate area or a party with a direct economic interest; citizen standing to represent wetland preservation interests is not provided. *Id.*

Phase III waters, and to agree on a delineation of Phase I waters.[270] The program apparently was to be funded through general legislative appropriations;[271] the state charges no fees and has rejected this avenue for revenue.[272]

During the 1995 session of the General Assembly, however, state authorizing legislation in support of assumption was defeated.[273] Approval of Maryland assumption had seemed assured. EPA was once again wrestling not only with the substance of the program but also with the process for its approval, including the application of the National Environmental Policy Act of 1969.[274] The defeat of the Maryland assumption plan leaves untested the viability of a state program dependent entirely upon annual appropriations from its legislature.

North Dakota also has engaged in protracted overtures towards an assumed program. Apparently, the pressure for state assumption came from the North Dakota Water Users, an association with members ranging from private citizens to the public Water Resource Districts and the State Water Commission.[275] The group complained of poor service on wetland permits by the Corps of Engineers, which had divided its jurisdiction in the state along its two major drainage basins, requiring applicants to apply to two different Corps Districts, in two different Divisions.[276] While the Corps had since consolidated section 404 regulatory functions for the entire state into its Omaha District, the momentum continued for the state to apply for an assumed program, giving rise to the suspicion that the water users preferred state jurisdiction for other reasons as well.[277]

The state had to thoroughly revise its wetland program to conform to CWA requirements.[278] After passage of state enabling laws,[279]

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270. Grasso Interview, *supra* note 264. Under a draft MOA with the Corps, the state will receive delegation of all freshwater wetlands and non-navigable streams and will manage the 1000 foot buffer zone around the Chesapeake Bay by a delegation through a SPGP. The Maryland Nontidal Wetlands Protection Act covers the state's nontidal wetlands but not the non-navigable rivers and streams in the state. *See* MD. CODE ANN., NAT. RES. § 8-1201(h) (1990 & Supp. 1994). The state currently does not have the statutory power to regulate dredging and filling of these waters. *Id.*

271. Grasso Interview, *supra* note 264.

272. *Id.*

273. Interview with Thomas Grasso, Acting Director and Attorney for the Chesapeake Bay Foundation (Aug. 1, 1995).

274. 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).

275. Telephone Interview with Cary Backstrand, Chief, Regulatory Section, North Dakota State Water Commission (Jan. 20, 1994) [hereinafter Backstrand Interview].

276. *Id.*

277. *Id.*

278. North Dakota's existing wetland regulatory program was designed to prevent the draining of a wetland in any watershed area over 80 acres; partial fills of the basins, how-

the State Engineer formed a committee that met for over eighteen months to develop a new wetland program.[280] The committee modeled its work on the Corps's regulatory program, developed detailed rules, held public meetings, received public comments, and by August 1994 the third draft of its rules and regulations were published and the state was ready for delegation.[281]

The state has not submitted the program to EPA for approval. One reason given is that the Corps has not staffed its offices to handle North Dakota's section 404 permits adequately to meet permit demand.[282] Once this pressure subsided, state funding became the reason for pause. In addition to operating costs, the state considered its potential liability for takings claims by landowners denied permits, as well as potential litigation by citizen groups over permit issuance.[283] It now appears that assumption in North Dakota has been overtaken by events. Perhaps inadvertently, the effort may have at least brought about one intended result of delegation itself—better service by the permitting authority.

C. Section 404(e) State Programmatic General Permits

Section 404(e), providing for general permits, was added by the Clean Water Act of 1977 in part to relieve pressure created by expanded federal jurisdiction and, in part, as an acknowledgement of a practice that the Corps already was performing.[284] By the time Con-

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ever, such as for a parking lot, are not covered by the regulatory scheme. *See* N.D. CENT. CODE § 61-32-03 (Supp. 1993).

279. H.B. 1142, ch. 594 (1993). The enabling legislation is effective on the date the State Engineer certifies to the Governor and the secretary of state that the EPA has approved the North Dakota program and adequate funding to run the program have been made available from the federal government or other sources. *Id.* § 12.

280. Backstrand Interview, *supra* note 275. The committee included representatives of the Farm Bureau, National Wildlife Federation, the North Dakota Wildlife Society, the Corps, the U.S. Fish and Wildlife Service, the State Wildlife Service, and the Soil Conservation Service from the U.S. Department of Agriculture. *Id.*

281. *See* North Dakota State Water Commission, Proposed Rules to the North Dakota Administrative Code (1994) (Third Draft).

282. *Id.* Actually the branch 404 office in Bismarck was opened around the same time the regulatory function was transferred from St. Paul to Omaha, but the office was poorly staffed and the delays did not subside.

283. *Id.*

284. *See* 123 CONG. REC. 26,718 (1977) (statement of Sen. Baker).

> [T]he Corps has used nationwide and general permits to the maximum extent possible to authorize categories of discharge that cause only minimal harm to water quality . . . . General permits to authorize erosion control bulkhead and fill and for fills associated with highways and long roads have already been issued and the committee amendment allows this practice to continue.

Id.

gress debated the amendment of section 404 in 1977, the Corps had already issued general permits for erosion control bulkheads and fill for existing highways.[285] Both the Senate version of the section 404 amendments and the House-Bentsen version of the amendments ratified the Corps's authority to issue general permits. The House version would have authorized the Corps to issue general permits with only the minimal restriction that the Corps find it "in the public interest";[286] the Senate version allowed the Corps to issue general permits only if the permits were "similar in nature"; would cause only "minimal adverse environmental effects" when performed separately; and would have only "minimal cumulative adverse effect" on the environment.[287] Under the Conference Committee amendments a general permit must meet the "similar" and "minimal" requirements just noted, conform to the 404(b)(1) guidelines, set forth specific requirements and standards for the authorized activities[288] and terminate within five years.[289]

Corps regulations provide for a category of general permit entitled a programmatic permit.[290] The purpose of a programmatic permit is explained as follows: "The Corps believes that state and federal regulatory programs should complement rather than duplicate one another. The Corps uses general permits, joint processing procedures, interagency review, coordination, and authority transfers (where authorized by law) to reduce duplication."[291] A programmatic permit is further defined as "a type of general permit founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program."[292] The Corps has combined

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285. *Id.*

286. *See* 123 CONG. REC. 10,421 (1977).

287. H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 100 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4475.

288. *Id.*

289. *Id.* Federal regulations further require that before any general permit is issued, "the permitting authority shall set forth in writing an evaluation of the potential individual and cumulative impacts," 40 C.F.R. § 230.7(b) (1994), based on consideration of the criteria listed in the § 404(b)(1) guidelines. *Id.* § 230.7(b)(1). The Corps conducts this evaluation in consultation with the USFWS, NMFS, and EPA. The evaluation must "include a precise description of the activities to be permitted under the General permit," *id.* § 230.7(b)(2), and include a projection of the individual discharges likely to occur in order to predict cumulative impacts. *Id.* § 230.7(b)(3). The permit must be modifiable or revokable if "the activities authorized by such general permit have an adverse impact on the environment or . . . are more appropriately authorized by individual permits." 33 U.S.C. § 1344(e)(2) (1988 & Supp. V 1993).

290. 33 C.F.R. § 325.5(c)(3) (1994).

291. *Id.* § 320.1(a)(5).

292. *Id.* § 325.5(c)(3).

the concepts of a general permit (for "similar" and "minimal" activities), with a programmatic permit (for "duplicative" state programs), and created yet a new entity, the Statewide Programmatic General Permit (SPGP).[293]

1. Delegation to States by SPGP.—While only two states have gone through the formal section 404(g), (h) assumption process, as of November 1992 fifteen states operated under SPGPs[294] and four states operated under permits based on municipal or regional authority programs.[295] These permits follow two models in practice, those limited by fixed criteria and those limited by a process of consultation and review.

The New England model[296] calls for all potential section 404 permit applications to be placed by the state in one of three categories: Non-reporting, Screening, and Individual permits.[297] This classification sometimes is referred to as the "green, yellow, and red light system."[298] If the application is within the green category, the applicant may proceed with its project upon obtaining a state permit, state water quality certification, and, if the project is in the coastal zone, a consistency concurrence.[299] The permittee need not even notify the Corps.

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293. The term "Statewide Programmatic General Permit" is sometimes used but is misleading. Any general permit based on another program to assure the protection of wetlands is a programmatic permit and if it is based on a state program it is referred to by the Corps as an SPGP, even if it does not cover the whole state. For example, the Chinese Tallow Landclearing Programmatic General Permit issued by the Galveston District of the Corps is based on a U.S. Soil Conversation Service Program. General Permit No. 19415, issued Aug. 17, 1992. The Louisiana Coastal Management Zone Programmatic General Permit (referred to by its permit number, NOD-22) does not even cover the whole Louisiana Coastal Zone, much less the state, but is considered a SPGP because it is based on a state program.

294. These being Louisiana, Mississippi, Maine, Connecticut, New Hampshire, Massachusetts, Maryland, New Jersey (prior to state assumption by that state), Virginia, Delaware, Minnesota, Wisconsin, South Carolina, North Carolina, and Utah. John F. Studt, U.S. Army Corps of Engineers, The Corps of Engineers General Permit Program (Nov. 23, 1992) [hereinafter General Permits].

295. Alaska has a number of programmatic permits based on municipal programs; Oregon has the city of Tualatin; Nevada, the Lake Tahoe Regional Planning Agency; and California, the San Francisco Bay and Conservation and Development Commission. *See* General Permits, *supra* note 294.

296. The New England Division has issued SPGPs in the states of Maine, Vermont, Massachusetts, Rhode Island, Connecticut, and New Hampshire. All SPGPs are generally the same.

297. Amendment to Department of the Army Programmatic General Permit, Commonwealth of Massachusetts, Permit No. 199301040, at 2-4 (May 31, 1994) [hereinafter Massachusetts Permit Amendment] (on file with authors).

298. Telephone Interview with Jim Stoutamire, Florida Department of Environmental Protection, Water Management Division (Sept. 21, 1994).

299. *See* Massachusetts Permit Amendment, *supra* note 297, at 1-2.

In order to determine if the application is in the green category, the state applies two objective criteria: size and effect of the activity. In the Massachusetts SPGP, for example, green activities are those which fill less than 5000 square feet of wetlands[300] and do not affect certain resources such as endangered species and historic properties.[301] The "red" permits go directly to the Corps for an individual section 404 permit. The state and the Corps meet periodically to determine if the "yellow" permit applications will be treated as green or red.

Under the second model, upon receipt of an application for a state permit, the state environmental agency does a site visit and an Environmental Consultant's Field Report.[302] The site visit and report in effect replace the "fixed criteria" for "green" activities in the New England model. The state publishes public notices of permit applications and transmits the packet to the Corps and other federal resources agencies.[303] The SPGP provides "kick-out" provisions by which a commenting agency can request that the Corps require the applicant to seek an individual permit.[304] The SPGP does not authorize any activities that would affect endangered species or historic properties.[305]

There are basic similarities in both SPGP models. Both have mechanisms—one by fixed criteria, one by individual site visits and reports on each application—to ensure their application only to *de minimis* activities. They both have kick-out provisions for resource agencies, and do not authorize certain activities, no matter how *de minimis*, that affect sensitive areas. These restrictions mirror those noted earlier for state-assumed programs.

2. The Temptations of SPGPs.—By the numbers chosen, states apparently prefer the SPGP to full assumption under sections 404(g), (h). One reason may be that the SPGP carries no prohibition against partially-delegated state programs; Florida currently is in the process of obtaining an SPGP as a pilot program in a single watershed.[306] Be-

300. Department of the Army Programmatic General Permit, Commonwealth of Massachusetts, Permit No. 199301040, § A(c)(3), at 2.

301. *Id.* at 9-11. The SPGP for Massachusetts defines criteria for all types of activities for a determination of green, yellow, or red status.

302. *See* Department of the Army General Permit, State of North Carolina, Permit No. SWAC 080-N-000-0291, § 1(a), at 1-2 (Feb. 11, 1992) [hereinafter North Carolina SPGP] (on file with authors).

303. *Id.* § 1(c), at 2.

304. *Id.* § 1(b), (f).

305. *Id.* § 2(b), (m).

306. Stoutamire Interview, *supra* note 298. Florida hopes to have its SPGP in place by Fall 1995. *Id.*

cause an SPGP program can be phased in gradually, problems with pending permits and start-up funding are also lessened. The SPGP further allows jurisdiction in Phase I waters while at the same time, because of the *de minimis* nature of the activities regulated, it receives less continuing federal oversight. Here is where the temptation lies: to expand the scope of generally-permitted activities to those of more than a *de minimis* nature.[307]

Properly implemented, the SPGP provides additional protection to wetlands while facilitating minor development proposals. It appears logical that if a permittee may conduct *de minimis* activities under an unsupervised general permit, the Corps may issue an SPGP allowing a state to permit and monitor these activities. In effect, this is what the Corps's New England Division has done by revoking several nationwide permits and delegating these responsibilities to the various states in its region. The Corps has delegated review that it was not exercising. The Corps does maintain jurisdiction over more significant activities, however, and these activities do not automatically become less significant merely because they fall under a good state program. An even greater danger arises when they fall under a not-so-good state program.

At the time of this writing, several environmental organizations had issued a notice of intent to sue the Corps and EPA over five general permits issued to the municipality of Anchorage, Alaska. These permits are alleged to authorize the fill of approximately 2300 acres of wetlands representing twenty-one percent of the city's wetland base, already reduced by more than fifty percent from its original wetland inventory.[308] The gravamen of the complaint is that activities included are not "similar in nature."[309] The same temptation to stretch

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307. Commentators have noted that "the Corps appears to have amended the statute by authorizing general permits for activities 'substantially similar' in nature." Blumm & Zaleha, *supra* note 4, at 726 n.199.

308. *Wetlands: To Avert National Campaign to Illegally Delegate Authority Corps Faces Suit for Alternative Wetlands Permitting Schemes*, WATER POL'Y REP. (U.S. Envtl. Protection Agency/ Inside EPA, Washington, D.C.), Feb. 1, 1995, at 13.

309. *Id.* at 14. The state of New York's attempt to obtain a Programmatic General Permit has been embroiled in controversy. The New York wetlands program only regulates discharges into wetlands 12.4 acres in size or more. The SPGP calls for the Corps to regulate these wetlands and the state to regulate the larger wetlands. The problem is New York does not place on its wetlands inventory maps the smaller wetlands and the environmental community and federal resource agencies believe these wetlands will not be protected by either system. Telephone Interview with Steven Mars, North Atlantic Division (Mar. 2, 1995).

Pennsylvania has recently issued an SPGP that generated some controversy over the federal agency review and "kickout provisions." Telephone Interview with Rebekah Hicks, Baltimore District Corps of Engineers (Mar. 2, 1995). The SPGP generated more pages for

these restrictions is found at the other end of the country. In its general permit NOD-22,[310] the Corps's New Orleans District has made an effort to accommodate recurring, low-level development in coastal Louisiana. Unfortunately, in so doing, it stretches to the breaking point each of the general permit criteria of section 404(e).

a. Similar in Nature.—Coastal Louisiana has a wide variety of wetland types and an even greater variety of activities effecting these wetlands. A Corps report on general permits summarizes NOD-22 as follows:

> Authorizes a variety of activities within the Louisiana Coastal Management Zone. Typical activities include maintaining dredging in oil and gas well channels, canals, slips, mooring piling, and boat ramps involving less than 250 cubic yards and impacting less than one-fourth acres of wetlands; construction of piers, decks, wharves; installation of pipelines, bulkheads, riprap of pipeline erosion protection; waterway closures in manmade canals recommended by Federal agencies as mitigation; dredging of less than 150 cubic yards for existing docking facilities; construction of platforms in open water for fishing or research, certain fills involving less than one-fourth of an acre of wetlands and pile-supported or barge-mounted production facilities in wetlands and man-made oil field canals.[311]

b. Minimum Individual Impacts.—Louisiana's coastal environment is so dynamic that a "minimal" proposal may have a major impact on the ground. The closing of a pass may impair a delta of many square miles; a single canal across a barrier island may destroy the island and cause equally dramatic impacts on the interior marsh.

c. Minimum Cumulative Impacts.—The current decline of the Louisiana coastal zone itself may be fairly ascribed to cumulative impacts. Of the ten to eleven millimeters of overall land-sea subsidence per year in Louisiana, 7.25 to 8.25, or approximately seventy-five percent, can be attributed to man-caused land subsidence.[312] Few activities in the coastal zone, even ones with genuinely minimal individual

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the standard operating procedures for review of permit decision by the federal agencies than the permit itself. *Id.*

310. Louisiana Coastal Management Zone Programmatic General Permit, General Permit No. NOD-22 (Apr. 24, 1992). This permit commonly is referred to as "NOD-22."

311. General Permits, *supra* note 294, at 7.

312. Houck, *supra* note 49, at 15.

impacts, do not contribute to subsidence, saltwater intrusion, artificially altered hydrology, degradation of water quality and land loss.[313]

If the Corps has exceeded its statutory authority in NOD-22, one might wonder how it has escaped legal challenges. The primary reason is that the permit imposes strict limitations, the most important of which are those restricting the impact of permitted activities to less than one quarter of an acre, and "kickout provisions" requiring individual permits for particular projects at the request of federal reviewing agencies. According to District regulatory personnel, this general permit was issued because, on small permit applications, the Corps and the state regulatory authorities were "getting to the same answer" on permit decisions.[314] At the same time, the District also determined that the larger or more complex the permit application, the less the state was "getting to the same spot."[315]

The SPGP may be an alternative whose time has come.[316] With limits, such as those found in NOD-22, this answer may be appropriate. The danger is that the administration or Congress will seize on this alternative without its safeguards, thereby short-circuiting the safeguards of an assumed program and the goals of the Act itself.

D. Obstacles to Section 404 Delegation: Authority, Funding and Liability

State assumption of section 404 authority is moving slowly, indeed glacially. EPA interprets the eligibility requirements of 404(g), (h) in a literal fashion, and the process of conforming state laws to these requirements can take years. The Corps has begun to push the limits Congress placed on state program general permits, but these

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313. Examples of cumulative impacts are those arising from the dredging of oil and gas access canals:

> [T]he size of newly-dredged canal does not account for the entire, or perhaps even the majority, of the increase in canal surface area recorded between any two periods of time. Numerous studies have shown that each of these channels and ditches widens over time with little further assistance from man. The widening phenomenon is occurring in both the more stable chenier plain and in the softer Mississippi delta, and in all marsh types as well. The annual increase in canal width has been estimated to range from about two to fourteen percent per year, a doubling in from five to sixty years.

Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 34-35 (1983) (citing Craig, Turner & Day, *Wetland Losses and Their Consequences in Coastal Louisiana*, 34 Z. GEOMORPH. N.F. 225, 231 (1980)).

314. Interview with Ronald Ventola, Chief of Regulatory Branch, U.S. Army Corps of Engineers, New Orleans District, New Orleans, La. (July 7, 1994).

315. *Id.*

316. EPA has recommended that "EPA should continue to encourage the COE to actively work with states to facilitate the issuance of SPGPs." EPA ASSUMPTION REPORT, *supra* note 182, at 22.

permits have not yet produced a stampede of applicants either. While it would be easy to blame an unwilling federal bureaucracy for the slow pace of delegation,[317] EPA and the Corps are in fact adhering to explicit, consciously chosen limitations imposed by Congress that reflect the national interest in wetland protection. The process of adapting a state program to meet federal requirements aside, the restrictions that appear to be most inhibiting certainly include limitations on state authority. To some states, a process limited to Phase II and III waters is not worth the candle. Others balk at the prospect of continuing federal review. Doubtless the process would be facilitated by allowing the assumption of partial jurisdiction that provided both the opportunity to work out the kinks in the system and a basis for trust among all stakeholders that delegation could work.

These difficulties noted, the dominant obstacle to increased delegation is money. Wetlands regulation is not an inherently pleasant business. Neither is it cheap. At a time when state and local governments perceive themselves so burdened with federal requirements as to stimulate national legislation against unfunded federal mandates, few states will reach out for whatever new authority is offered without some accompanying federal dollars. As seen in the North Dakota experience, these funding problems are compounded by the extent and uncertainties of potential liability for regulatory actions that could require compensation as "takings."[318] Few areas of law are in greater flux at the moment than the degree of regulation that could lead to a taking, and the amount of liability incurred. A single section 404 permit action in Florida has produced a $1,029,000 judgment against the government;[319] a section 404 permit action in New Jersey has led to an $2,658,000 award, for the restriction of the use of only a portion of a development tract.[320] These awards rival the projected costs for operating a state program for an entire year. The litigation of these claims

317. *See* 2 RODGERS, *supra* note 8, § 4.26, at 379 ("Political figures with no recorded interest in water pollution policy have been known to take offense at EPA 'footdragging' in approving state environmental programs, construing federal hesitation (correctly perhaps) as a slur on state institutions.").

318. The Fifth Amendment to the U.S. Constitution states: "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The Supreme Court's latest discussions of when governmental actions constitute such taking are found in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), and Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

319. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 175 (1990).

320. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1993).

alone, even unwarranted claims, is time-consuming,[321] and takings claims are becoming more common, the majority of them from section 404 permitting.[322] Legislation is pending at federal and state levels that will only lower the thresholds for takings claims and increase governmental liability.[323] Any state attorney general would have to counsel his or her client to step into this minefield with considerable caution.

IV. DELEGATION UNDER SIMILAR PROGRAMS: SECTION 402 AND THE CZMA

Consideration of delegation under section 404 also may be informed by delegation under two similar programs, the National Pollution Discharge Elimination System under section 402,[324] and state coastal management programs under the CZMA.[325] In terms of the authority they confer, and withhold, these two programs start from almost opposite ends of the spectrum. Section 402 proceeds from a presumption of federal authority, from which state assumption may then proceed under close federal scrutiny.[326] The CZMA presumes that coastal land use is primarily a state affair, and provides funding with only limited, programmatic review.[327] Whatever their points of departure, each program has attracted a sizeable number of state "takers." In operation, furthermore, the federal oversight in both programs, whatever it may be in law, shows itself to be highly deferential. These experiences confirm those drawn from section 404 delegation, that the primary obstacle is not authority but money.

A. Delegation Under Section 402

Section 402 of the Clean Water Act regulates discharges of pollutants from point sources into waters of the United States.[328] Discharge permits are based on nationally promulgated "best available

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321. The *Loveladies* case was initiated in 1984, *see* Loveladies Harbor, Inc. v. Baldwin, 20 Env't Rep. Cas. (BNA) 1897 (D.N.J. Mar. 14, 1984), and continues to this day. *See* Loveladies Harbor Inc., v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

322. *See, e.g.*, Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994); Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993); United States v. Land, 62.50 Acres More or Less, Situated in Jefferson Parish, La., 953 F.2d 886 (5th Cir. 1992).

323. *See, e.g.*, H.R. 9, 104th Cong., 1st Sess. §§ 9001-9004 (1995) (Job Creation and Wage Enhancement Act).

324. 33 U.S.C. § 1342 (1988 & Supp. V 1993).

325. 16 U.S.C. § 1455(d) (1988 & Supp. V 1993).

326. *See* 33 U.S.C. § 1342(a)-(d).

327. *See* 16 U.S.C. § 1455(b).

328. 33 U.S.C. § 1342.

technology" standards,[329] and on water quality standards adopted by states based on EPA guidelines,[330] subject to EPA approval.[331] Discharge permits, whether issued federally or by an assumed state program, are further not to degrade existing water quality except in a narrow range of exceptional circumstances.[332] The entire section 402 program is intended to achieve a national goal of eliminating all pollutant discharges.[333] This goal has encouraged broad interpretations of the Act[334] and stringent applications of its requirements.[335] The program is reinforced by citizen suit provisions[336] that have secured something close to compliance with statutory deadlines for implementing its various requirements through enforcement against individual dischargers.[337] In a word, section 402, although solicitous of state participation,[338] operates within a framework of mandatory, objective and enforceable federal requirements.

Section 402 authorizes state assumption of its permitting responsibilities in a fashion quite similar to section 404 assumption.[339] The similarity is not accidental. In its 1977 amendments to section 404, groping for a means to provide flexibility in the program, Congress adopted the process it had enacted five years earlier for section 402.[340] The language for assumption is virtually identical.[341] A state seeking assumption submits its program.[342] The submission includes those fa-

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329. *Id.* § 1311(b)(2)(A).

330. *Id.* § 1314(a).

331. *Id.* § 1313(c).

332. *Id.* § 1313(d)(4)(B).

333. *Id.* § 1311(b)(2)(A).

334. *See* United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) (interpreting CWA "point sources" to include tailing ponds from mining operations).

335. *See* Association of Pac. Fisheries v. EPA, 615 F.2d 794 (9th Cir. 1980); Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978).

336. 33 U.S.C. § 1365.

337. *See generally* JEFFREY F. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).

338. *See* 33 U.S.C. § 1251(b).

339. *See infra* notes 340-341 and accompanying text.

340. *See* H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 104 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4479 ("[Section 402], after which the Conference substitute concerning State programs for the discharge of dredged or fill material is modeled, also provides for state programs which function in lieu of the Federal program . . . .").

341. *Compare* 33 U.S.C. § 1344(g)(1) *with id.* § 1342. The statutory provisions for the application "packet" are exactly the same. *Compare also id.* § 1344(h) *with id.* § 1342(b)(1). The language is the same except that EPA must assure that the § 404 program complies with the § 404(b)(1) guidelines, whereas an NPDES program must comply with the effluent standards and national performance standards set forth in § 402. Both programs require state compliance with toxic and pretreatment effluent standards and ocean discharge criteria. 33 U.S.C. § 1342(b)(1)(A); *id.* § 1344(h)(1)(A)(i).

342. *Id.* § 1342(b); *id.* § 1344(g).

miliar elements of standards, funding, and legal authority to implement and enforce, elements later adopted for section 404.[343] The oversight provisions are, likewise, nearly identical.[344] The assumed state is to submit each permit to EPA for review,[345] unless EPA waives the requirement for discharges under certain volumes and pollution levels.[346] In practice, these requirements produce negotiations that culminate in a Memorandum of Agreement between the state and EPA.[347] EPA may veto any permit it finds to be "outside the guidelines and requirements of the Act,"[348] an authority reviewing courts have held to be limited to published guidelines and regulations.[349] EPA also may take back section 402 permitting authority in extreme circumstances,[350] circumstances never yet found to obtain, although several suits are brewing at the time of this writing demanding revocation of state authority for failure to comply with federal requirements.[351]

These similarities noted, the anomaly is that, while only two states to date have assumed section 404 authority, nearly forty states have assumed authority under section 402.[352] This anomaly calls for con-

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343. *Compare id.* § 1342(b) *with id.* § 1344(n)(1). For example, EPA must ensure that each program has authority to issue permits for a fixed term, not to exceed five years, can be terminated or modified for cause, has reporting requirements, public notice requirements, EPA notice requirements, and affected states notice requirements, will not substantially impair anchorage and navigation, and are enforceable. The statutory requirements are exactly the same in each act. *Id.* § 1342(b)(1); *id.* § 1344(h)(1)(A).

344. *See infra* notes 345-346 and accompanying text.

345. 33 U.S.C. § 1342(d)(1); *id.* § 1344(j).

346. *Id.* § 1342(e); *id.* § 1344(k). Except for minor differences, the statutory provisions are exactly the same.

347. 40 C.F.R. § 123.24 (1994).

348. 33 U.S.C. § 1342(d)(2); *id.* § 1344(j).

349. Washington v. EPA, 573 F.2d 583 (9th Cir. 1978); Ford Motor Co. v. EPA, 567 F.2d 661 (6th Cir. 1977).

350. 33 U.S.C. § 1342(c)(3). The Administrator must hold a public hearing and allow the state up to 90 days to take corrective action. *Id.* In addition, a state may return its § 402 program to EPA, as long as all of the assumed program, including partial programs, is returned. *Id.* § 1342(c)(4).

351. See, for example, EPA's partial response to a petition filed by the Environmental Defense Fund and Chesapeake Bay Foundation seeking modification of Virginia's NPDES program to allow citizen enforcement of statutory requirements, or revocation of Virginia's delegated authority. Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 60 Fed. Reg. 14,588, 14,588 (1995).

352. *See* 56 Fed. Reg. 32,209 (1991) (Alabama) (revision); 51 Fed. Reg. 44,518 (1986) (Arkansas); 54 Fed Reg. 40,664 (1989) (California) (revision); 56 Fed. Reg. 8973 (1991) (Colorado) (proposed revision); 57 Fed Reg. 9724 (1992) (Connecticut) (revision); 57 Fed. Reg. 53,899 (1992) (Delaware) (revision); 56 Fed. Reg. 7382 (1991) (Georgia) (revision); 56 Fed. Reg. 55,502 (1991) (Hawaii) (revision); 56 Fed. Reg. 24,295 (1981) (Illinois) (revision); 56 Fed. Reg. 21,158 (1991) (Indiana) (revision); 57 Fed. Reg. 37,162 (1992) (Iowa) (revision); 59 Fed. Reg. 5599 (1994) (Kansas) (revision); 58 Fed. Reg. 45,597 (1983) (Kentucky) (revision); 56 Fed. Reg. 55,500 (1991) (Maryland) (revision); 50 Fed.

sideration of those few differences that might explain it. The first of these differences is federal funding. EPA makes grant money available both for those steps necessary for a state to complete its submission for assumption and for the subsequent operation of the program.[353] EPA will allow a state to budget anticipated grant money for the first two years of the program.[354] EPA supplies grant money for the subsequent years through the section 106 Construction Grant Program.[355] EPA also makes section 104(b)(3)[356] grant money available to a state for completion of the assumption program packet.[357] This funding obviously goes a long way to make an otherwise disagreeable, regulatory task more agreeable.

A second difference is the ease with which the section 402 program may be transferred. The CWA explicitly allows for partial delegation of the section 402 program both by geographic scope and by the nature of the activities to be regulated,[358] allowing a state to proceed gradually into its role. Further, courts have allowed EPA to continue to administer permits pending before state assumption of the program,[359] once again allowing the state to proceed more gradually than under section 404.[360] This transfer is made even more attractive

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Reg. 16,546 (1985) (Michigan) (reapproval); 52 Fed. Reg. 47,635 (1987) (Michigan) (revision); 56 Fed. Reg. 51,390 (1991) (Minnesota) (revision); 46 Fed. Reg. 32,069 (1981) (Missouri) (revision); 46 Fed. Reg. 39,671 (1981) (Montana) (revision); 54 Fed. Reg. 33,288 (1989) (Nebraska) (revision); 57 Fed. Reg. 35,586 (1992) (Nevada) (revision); 47 Fed. Reg. 17,331 (1982) (New Jersey); 58 Fed. Reg. 12,035 (1993) (New York) (revision); 56 Fed. Reg. 51,390 (1991) (North Carolina) (revision); 55 Fed. Reg. 5660 (1990) (North Dakota); 58 Fed. Reg. 7889 (1993) (Ohio) (revision); 46 Fed. Reg. 17,649 (1981) (Oregon) (revision); 56 Fed. Reg. 41,687 (1991) (Pennsylvania) (revision); 49 Fed. Reg. 39,063 (1984) (Rhode Island) (revision); 57 Fed. Reg. 43,733 (1992) (South Carolina) (revision); 59 Fed. Reg. 1535 (1994) (South Dakota); 56 Fed. Reg. 21,376 (1991) (Tennessee) (revision); 52 Fed. Reg. 27,578 (1987) (Utah); 59 Fed. Reg. 5198 (1994) (Vermont) (revision); 59 Fed. Reg. 1535 (1994) (Virgin Islands); 56 Fed. Reg. 30,573 (1991) (Virginia) (revision); 54 Fed. Reg. 40,517 (1989) (Washington); 57 Fed. Reg. 22,363 (1982) (West Virginia); 52 Fed. Reg. 3700 (1987) (Wisconsin); 56 Fed. Reg. 52,030 (1991) (Wyoming).

353. 40 C.F.R. § 123.22(b)(2)-(3) (1994).

354. *Id.*; *see also id.* § 123.24 (referring to "the annual program grant" and stating in a note that "specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements.").

355. 33 U.S.C. § 1256. The budget for this grant program last fiscal year was $80 million. Telephone Interview with Nancy Cunningham, Environmental Protection Specialist, EPA (Mar. 6, 1995).

356. 33 U.S.C. § 1254(b)(3). This money is for pilot programs. *Id.*

357. Telephone Interview with Jane Fontenot, EPA Region VI (Mar. 7, 1995). A § 104(b)(3) grant of $25,000 recently was awarded to the Texas Railroad Commission to fund its assumption package. *Id.*

358. 33 U.S.C. § 1342(n)(3)-(4).

359. Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549 (2d Cir. 1978).

360. 33 U.S.C. § 1344(h)(4). The statute states that "the Secretary shall transfer any application for permits pending before the Secretary for activities with respect to which a

by the potential to assume authority for permitting of all sources, of whatever size, in all waters, including Phase I.[361] Despite the potential for continuing EPA oversight on major permits, the game seems worth the candle.[362] In practice, furthermore, EPA's review authority is lightly exercised.[363] Like section 404, section 402 oversight is an essentially state-friendly process involving a great deal more jawboning and negotiation than adamant intrusion. State sovereignty is in fact observed perhaps to greater degree than Congress contemplated.[364]

Added to these differences that encourage state assumption of section 402 authority, two subjective features also may play a part. The first is the attitude of EPA, which might feel more comfortable delegating a program that will continue to operate on the basis of objective, numerical federal standards; the decisions to be made under section 404 are both far more subjective and susceptible to influence by local politics. The second is the attitude of the states, which face a very different regulated community and public attitude towards pollution discharges than they do when it comes to filling wetlands for development. It would be possible to live one's entire life in Louisiana, Florida or California and never meet anyone who applied for a NPDES permit. The same cannot be said for section 404. Further, without addressing their relative merits, the NPDES program

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permit may be issued pursuant to such State program to such State for appropriate action." *Id.*

361. *Compare id.* § 1342(b) *with id.* § 1344(g)(1).

362. *See id.* § 1342(d) (allowing EPA to review and comment on all state permit applications). The Administrator has 90 days to object in writing to the issuance of a permit. *Id.* § 1342(d)(2). The objection must be based on written and published guidelines. Washington v. EPA, 573 F.2d 583 (9th Cir. 1978); Ford Motor Co. v. EPA, 567 F.2d 661 (6th Cir. 1977). The Administrator, however, may waive the notification requirement for any permit application. 33 U.S.C. § 1342. Furthermore, the Administrator may waive the requirement that the state transmit permit applications "for any category of point sources within the State." *Id.* § 1342(e). Even if the state is not administering its § 402 program properly, the Administrator must hold a public hearing before making the determination and then allow the state up to 90 days to take corrective action. *Id.* § 1342(c)(3).

363. The courts and Congress have differed over the intended level of EPA review. *Compare* Mianus River Presentation Comm. v. EPA, 541 F.2d 899, 907 (2d Cir. 1976) ("The legislative history of § 402 . . . shows that Congress intended that the Administrator should, more often than not, take no 'action' with respect to proposed state permits.") *with* S. REP. No. 370, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326 ("The Committee is concerned that the Agency is not conducting a vigorous overview of state programs to assure uniformity and consistency of permit requirements and of the enforcement of violations of permit conditions.").

364. Noting "a world of difference between adequate [state] authority and sufficient conviction," *id.* at 379, Rodgers concludes: "Individual permit supervision is a form of counsel quieter than a strident takeback of approved state authority (abhorrent for a variety of reasons) and should be invoked more often." 2 RODGERS, *supra* note 8, § 4.26, at 385.

simply is more widely accepted as an environmental goal. The American public is a lot more likely to become upset over a major fish kill or nasty-tasting tap water than it is over a new condominium featuring construction jobs, tax revenue and riverside bayview homes.

B. Delegation Under the Coastal Zone Management Act

In 1972, as it was meeting a national crisis in water quality with the Federal Water Pollution Control Act Amendments and section 404, Congress also responded to mounting pressures on coastal resources with the Coastal Zone Management Act (CZMA).[365] The response was a markedly different one, reflecting the geographical, political, cultural and natural diversity of America's 94,000 miles of coastline along thirty-five states and territories under the jurisdiction of over 400 counties and thousands of local authorities.[366] The CZMA reflects the schizophrenia that necessarily results from trying to accommodate political, economic and environmental interests this varied: The national policy is both to "protect" and "develop" coastal resources,[367] to give "full consideration to ecological, cultural, historic and aesthetic values, as well as the needs for compatible economic development."[368] The federal role in achieving these policies would be "'the encouragement and assistance of the States in preparing and implementing management programs.'"[369] The CZMA was delegation from the outset. At issue was nothing less complex than land use planning.

Implementation of the CZMA begins with funding to develop state programs and, subsequently, to implement them. States are accorded great flexibility under the Act, and in practice, to define the extent of their coastal jurisdiction: California limits its zone to a 1000-yard strip inland from coastal waters while Florida includes the entire state.[370] This flexibility continues in the structure of state management programs, which may include "criteria and standards for local implementation," direct regulation, or state "administrative review for

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365. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993) [hereinafter CZMA].

366. David W. Owens, *National Goals, State Flexibility, and Accountability in Coastal Zone Management*, 20 COASTAL MGMT. 143, 144-45 (1992).

367. 16 U.S.C. § 1452(1).

368. *Id.* § 1452(2) (Supp. V 1993).

369. Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225, 1247 (D. Del. 1986) (quoting S. REP. NO. 753, 92d Cong., 2d Sess. (1972)).

370. DONNA R. CHRISTIE, COASTAL AND OCEAN MANAGEMENT LAW IN A NUTSHELL 126 (1994).

consistency with the management program" of development plans.[371] While Connecticut and Louisiana, for example, have enacted specific coastal management programs, New York, Florida and other states "network" existing laws and regulations.[372] The federal standards for an approved program are, likewise, quite pliable, requiring the state only to identify, in pertinent part, "permissible land uses and water users within the coastal zone which will have a direct and significant impact on the coastal waters," "the means by which the State proposes to exert control," and "broad guidelines on priorities of uses in particular areas."[373] Specific criteria through which the outcome of development decisions could be predicted for private planning purposes are neither provided by the CZMA, nor required in a state plan.[374] As one federal court has observed, "The entire thrust of the Act is for each state to resolve for its own coastal area the basic choices among competing uses for finite resources."[375] While Congress has in recent years amended the Act in an attempt to increase its focus on environmental protection,[376] this thrust remains essentially unchanged.

Supervision and enforcement of the Act affords, likewise, a maximum of latitude to the states. The Secretary, in approving a state program, must find that the program "meets the requirements" of the coastal resource improvement program policies,[377] which, as seen above, include the enigmatic direction both to protect and to develop.[378] As the original Senate report explained, the Secretary "in determining whether a coastal state has met the requirements is restricted to evaluating the adequacy of the process."[379] The Secretary is also directed to "conduct a continuing review" of state performance.[380] These federal reviews, while comprehensive, generally lead to suggestions for state program improvements of a non-binding nature, although they may also lead to more mandatory recommendations that, if not followed, theoretically could lead to the loss of

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371. 16 U.S.C. § 1455(d)(11)(A), (C) (Supp. V 1993).

372. *See* Mark S. Dennison, *State and Local Authority to Regulate Coastal Land Use Practices Under the Coastal Zone Management Act*, 15 ZONING AND PLANNING L. REP. 65, 66 (1992); *see also* RICHARD G. HILDRETH & RALPH W. JOHNSON, OCEAN AND COASTAL LAW 416 (1983).

373. 16 U.S.C. § 1455(d)(2)(B), (D), (E) (Supp. V 1993).

374. American Petroleum Inst. v. Knecht, 609 F.2d 1306, 1312 (9th Cir. 1979).

375. Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225, 1247 (D. Del. 1986).

376. *See* 16 U.S.C. § 1456(a) (Supp. V 1993) (providing additional funding for coastal environmental "enhancement" programs).

377. *Id.* § 1455(d)(1).

378. *See supra* notes 367-368 and accompanying text.

379. SENATE COMMERCE COMMITTEE, LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT 760 (1976).

380. 16 U.S.C. § 1458(a).

funding.[381] In the reviews examined in this study, the mandatory recommendations tended to be process-oriented (*e.g.*, "complete the public outreach strategy," "eliminate delays in signing contractors," "revise intergovernmental review process"); more substantive suggestions (*e.g.*, "comprehensive review of casinos and secondary impacts") were discretionary.[382]

The Secretary is authorized to suspend federal funding if a state "is failing to adhere to" an approved program.[383] Federal funding may not be terminated, however, without an elaborate process involving written notification to a state of its deficiencies, a schedule for compliance, and a subsequent failure to comply.[384] The latitude granted to states in this process has served as a shield both against federal attempts to defund aggressive state programs,[385] and against complaints of program violations in favor of development interests.[386] The CZMA provides no federal cause of action against either states,[387] local governments,[388] or private parties[389] claimed to be in violation of state coastal management programs. The Act is viewed as a grants

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381. Research conducted for this Article examined summaries of National Oceanic and Atmospheric Administration (NOAA) reviews of 51 state and local coastal management programs conducted in 1992 and 1994. Each of the 51 reviews contained "suggestions" for improvements to the programs. Twelve reviews went further to state that the program was "not fully adhering" (*e.g.*, "NOAA concluded, however, that the Commonwealth is not fully adhering to all of the provisions of the PCRMP.").

382. *See* NOAA, EVALUATION FINDINGS FOR THE LOUISIANA COASTAL RESOURCES PROGRAM FOR THE PERIOD FROM NOVEMBER 1990 THROUGH FEBRUARY 1994 (1994) (on file with author); NOAA, FINAL EVALUATION FINDINGS FOR THE STATE OF MISSISSIPPI'S COASTAL PROGRAM: MAY 1991 THROUGH APRIL 1993 (1994) [hereinafter MISSISSIPPI FINDINGS] (on file with authors).

383. 16 U.S.C. § 1458(e)(1) (Supp. V 1993).

384. *Id.* § 1458(c), (d). The suspension process is elaborate and accommodating to the states. NOAA first must issue a "preliminary finding of non-adherence" and allow the state 30 days to comment. 15 C.F.R. § 928.5(a)(2) (1994). If NOAA issues a "final finding of non-adherence," it must provide the Governor of the state with a written schedule of remedial actions and with written guidance on how funds may be expended in complying with the remedial schedule. *Id.* § 928.5(a)(1)(ii). The suspension of financial assistance may not last for more than 36 months. 16 U.S.C. § 1458(c)(3). The state may propose its own compliance program, subject to NOAA's approval. 15 C.F.R. § 928.5(a)(2)(vi). Only if a state fails to undertake these remedial steps may NOAA withdraw funding and approval of the program. 16 U.S.C. § 1458(d). Even at this late date—a date never reached in practice—NOAA may not disapprove a program or withdraw its funding until after a public hearing and until after again providing the state with written specifications of the actions necessary to cancel the withdrawal. *Id.* § 1458(e).

385. California Coastal Comm'n v. Mack, 693 F. Supp. 821, 825-26 (N.D. Cal. 1988).

386. Save Our Dunes v. Pegues, 642 F. Supp. 393, 401-02 (M.D. Ala. 1985).

387. *Id.* at 401.

388. Town of North Hempstead v. Village of North Hills, 482 F. Supp. 900, 905 (E.D.N.Y. 1979).

389. New York v. DeLyser, 759 F. Supp. 982, 988-89 (W.D.N.Y. 1991).

program, and the sole relief lies against the Secretary for a decision on continued funding.[390] To date, while the threat of loss of funding has led to improvements in state implementation of their programs, no funding has ever been withdrawn from an approved program.[391]

As a vehicle for promoting state and local land use planning along coastal America, the CZMA has largely succeeded. Of the thirty-five states with coastal borders, twenty-nine have federally-approved programs and five of the remaining six were preparing their applications at the time of this writing.[392] This rate of participation reflects more than $700 million in federal funding,[393] $52 million for fiscal year 1992 alone.[394] The high participation also reflects the additional legal leverage the CZMA offers to participating states to ensure that federal and federally-permitted activities in or affecting their coastal zones are "consistent" with state programs.[395] State program authority to condition, or reject outright, certain types of federal and federally-supported development has been upheld against claims of preemption[396] and interference with interstate commerce.[397] While no comprehensive review of state programs is possible in this Article, it is clear that they include a broad mix of educational, administrative, construction, acquisition and research activities in addition to some form of management functions.[398]

As for the tough, nasty business of land use regulation, there is evidence that difficult decisions are being made and, at times, against economic and development interests.[399] Spurred forward by CZMA grants of money and authority, some states have passed highly-controversial set-back ordinances,[400] made generous provision for public ac-

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390. *Save Our Dunes*, 642 F. Supp. at 401.

391. Telephone Interview with Patricia M. Maher, NOAA Program Analyst (Jan. 30, 1995).

392. 2 NOAA, 1992-1993 BIENNIAL REPORT TO CONGRESS ON THE ADMINISTRATION OF THE COASTAL ZONE MANAGEMENT ACT 3 (1994).

393. *Id.* at 2.

394. Robert E. Holden & David J. McBride, *The Duplicative Regulation of Wetlands*, 7 NAT'L RESOURCES & ENV'T 27 (1993).

395. 16 U.S.C. § 1456(c)(1)(A) (Supp. V 1993).

396. California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 592-94 (1987).

397. Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225, 1252 (D. Del. 1986).

398. Owens, *supra* note 366, at 144-45.

399. Dennison, *supra* note 372, at 72 (listing several challenges by development interests to state coastal use decisions).

400. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (involving state statute that prohibited construction of residential improvements seaward of line drawn 20 feet landward of landward-most points of erosion over previous 40 years).

cess to coastal resources,[401] and banned certain industrial development altogether.[402] On the other hand, states have been almost equally free to look the other way. Alabama has been able to facilitate condominium development on Perdido Key in contravention of its approved plan.[403] Mississippi has permitted a sudden industry of gambling casinos in its coastal waters, to the exclusion of other uses identified as "priorities" in its coastal plan, drawing only the suggestion from NOAA for a "comprehensive review."[404] Louisiana's coastal use permitting program, covering activities across 3.5 million acres, denies fewer than one application per year.[405] As an administrator of the Louisiana program has explained, the act is "a resource management statute which practically precludes the Secretary from stopping any activity in the coastal zone."[406] What we have here is a program that, in practice, continues to allow each state to resolve for its own coasts "the basic choices among competing uses for finite resources."[407]

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401. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 828 (1987) (involving a permit issued subject to public easement over portion of property).

402. *See Oberly*, 632 F. Supp. at 1229-30 (involving "total ban on new offshore gas, liquid, or solid bulk product transfer facilities").

403. Save Our Dunes v. Pegues, 642 F. Supp. 393, 401-02 (M.D. Ala. 1985).

404. *See* MISSISSIPPI FINDINGS, *supra* note 382.

405. In the first two and one-half years of its operation, the Louisiana coastal management program received over 3600 permit applications for oil and gas activities, navigation, and other development in the coastal zone. None were denied. *See* Houck, *supra* note 312, at 149-50. Louisiana coastal management data for 1993 and 1994 show action on 2700 applications. None were denied. Memorandum from Terry Howe, Coastal Management Director, Louisiana Department of Natural Resources (Jan. 8, 1995) (on file with author).

406. Memorandum from the Secretary, Louisiana Department of Natural Resources to Members of Coastal Management Section, Department of Natural Resources (Mar. 10, 1983) (on file with author).

407. Because coastal zones contain important wetland resources, and because both the CZMA program and the § 404 wetland program involve regulation of development activity in the wetlands, some have commented that state coastal programs do, or should, subsume § 404. *See* Holden & McBride, *supra* note 394, at 55 (arguing that state coastal programs should supplant § 404). The issue also arises in a more discreet form, as to whether a state decision to issue a coastal permit determines the same outcome for federal decision-makers, a process often called positive consistency. Michael C. Blumm, *The Clinton Wetlands Plan: No Net Gain in Wetlands Protection*, 9 J. LAND USE & ENVTL. L. 203 (1994). These observations have a superficial plausibility. Applicants to construct condominiums, roads and other development in coastal areas will often require both coastal use and wetlands permits. The state management program should require compliance with federal requirements, including those under the Clean Water Act. 15 C.F.R. § 923.3 (1994). Similarly, the federal permit should be consistent with the state management program. 16 U.S.C. § 1456(c)(1)(A) (Supp. V 1993). If a wetland permit is required, both permit decisions will affect what gets built on land as well as on water. Here, however, the similarities end. Setting aside their obvious differences in geographic scope, standards, review and enforcement mechanisms, the two programs are simply designed to do different things.

The experience of the CZMA in fostering state programs remains relevant to delegation under section 404. Successful delegation requires federal funding on a continuing basis. It also requires not only sufficient authority to make decisions over private activity, but is enhanced by authority to make decisions on federal activities as well. Conversely, without a clear, unambiguous goal and a more rigorous review process than that involved in CZMA planning,[408] no particular results in favor of any resources can be assured. This is particularly true for decisions accompanied by such high-stakes pressures as wetland development. If Alabama decides to line its beaches with condos, or Mississippi with casinos, that may be their business. If they threaten the productivity of the Gulf of Mexico, however, it is more than their business alone.

C. Reflections on Section 402 and the CZMA.

The section 402 and CZMA programs offer useful pole stars for transfers of authority under section 404. Section 402 seeks to achieve articulated national goals of zero discharge and the restoration of the nation's waters. It relies primarily on uniform, federal, technology-based standards to reduce discharges, and secondarily on state water quality standards which are guided by federal criteria and subject to federal review and approval. While delegation of section 402 responsibilities to the states runs the risk of an uneven playing field dotted with "pollution havens," the risk is greatly minimized by objective fed-

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The CZMA establishes a process for land use planning that must consider a wide range of economic, social and environmental factors. *Id.* § 1452(a). Once this consideration has been provided, the federal goal has been achieved. By contrast, the CWA does not seek to strike a balance between development and protection interests; its goal is to preserve and restore the nation's waters, including the pivotal role of wetlands. 33 U.S.C. § 1251(a). The differences between the two acts may be analogized to those between the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1988), and the Endangered Species Act (ESA), 16 U.S.C. § 1531-1544 (1988 & Supp. V 1993), both of which require consultation and consideration of the environmental effects of federal actions. NEPA, however, like the CZMA, requires only a process; it mandates no particular result. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). The ESA, like § 404 and in particular the § 404(b)(1) guidelines, often requires that alternatives be chosen. *See* Houck, *supra* note 106, at 317. It is no accident that § 404 litigation frequently involves activities that already have received state coastal use permits. The explanation is not only that state decision-makers are closer to the applicants, but also that the decisions turn on different considerations.

408. *See* Owens, *supra* note 366, at 144-45 (noting the multiple, often conflicting, CZMA goals and the lack of evaluation and assessment for state coastal management programs); Dennison, *supra* note 372, at 66 (discussing Congress's decision to make the states the focal point for developing and implementing coastal management programs).

eral standards.[409] It is also minimized by what potentially could be highly-rigorous federal oversight, but in practice has turned out to be far less. If section 402 delegation demonstrates anything, it is that with full federal funding, the question of potential oversight takes second place. States seek delegation, receive it, and exercise their authority with a minimum of day-to-day interference.

The CZMA is, by contrast, a land use management program. Given the federal funding, and the opportunity for increased authority, states will get involved in this often-unpleasant business and perform in a wide variety of ways. They accomplish no one objective. No single resource is protected or restored. Development impacts, on the other hand, are at least minimized and, on occasion, channeled toward less harmful locations.

Section 404 is something of a hybrid, located a little to the section 402 side of a spectrum ranging from section 402 to the CZMA. While directed at water quality and aquatic health, section 404 inevitably involves land use decisions as well (as, indeed, do section 402 permits). Try as they might to avoid the land use implications of these decisions,[410] federal agencies cannot avoid inquiring whether a particular activity could use land instead of water. The 404(b)(1) guidelines require it. NEPA requires it. Any rational inquiry would be the same. The first rule of medicine is to avoid harm. For section 404 delega-

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409. The presence of national, objective, BAT-based effluent limitations in the § 402 program deserves emphasis. Where states are given latitude to adopt their own water quality standards, mixing zones etc., wide variations and "pollution havens" for attracting industry result. *See* Oliver A. Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,528, 10,543-44 (Sept. 1991).

410. 33 C.F.R. § 320.4(j)(2) (1994). The regulation states:

> The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

Id.; *see also Questions Other Readers Might Ask: An Interview with Robert Perciasepe*, EPA J., Summer 1994, at 36.

> We would like to *see* the states get more involved with decisions on wetlands. Proper federal oversight is essential, of course, but we need to push the decision making down as far as we can because it's at the lower levels of government where initial land-use judgments are made. We certainly don't want to get into landuse control at the federal level. So the more wetlands are taken into account in land-use decisions that states are making, I think the better chance we have to avoid problems.

Id.

tion to be successful—both in encouraging delegation and in the degree of protection delegated programs actually offer—it will need some mix of CZMA-like flexibility, section 402-like safeguarding, and operational funding.

IV. PROPOSALS FOR INCREASED DELEGATION

The above history shows that delegation by a state-assumed program and by general permit was a door that Congress itself opened with caution, and that has been only cautiously entered to date. This caution has prompted proposals to accelerate the rate of delegation from a variety of sources.

A. The National Wetlands Policy Forum

The first and most prestigious source was the National Wetlands Policy Forum, a task force chaired by then-New Jersey Governor Thomas H. Kean and including members from environmental, commodity user, development and academic institutions.[411] The Forum's Report, *Protecting America's Wetlands: An Action Agenda*,[412] was issued in 1988 and contained more than 100 recommendations for wetland protection, among them recommendations for "improved regulatory programs."[413] The recommendations were ambitious, and represented the type of multiple compromise one tends to find in complex legislation, all the elements of which must hold for the ends to be achieved. Foremost among these elements was the articulation of a national, interim goal of "no overall net loss of the nation's remaining wetland base,"[414] and a long-term goal to "increase [its] quantity and quality."[415] On the regulatory side, this goal would be achieved by emphasizing avoidance of wetland destruction first, and then by mitigating and minimizing harm.[416] The jurisdiction of federal programs would, further, be extended to include wetland drainage, flooding and the destruction of plant life by whatever means.[417] These and other recommendations to strengthen federal programs were accompanied, however, by the recommendation that EPA increase its efforts to delegate these federal responsibilities to the states.[418] Facilitated

411. THE CONSERVATION FOUNDATION, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA—THE FINAL REPORT OF THE NATIONAL WETLANDS POLICY FORUM ix-x (1988).
412. *Id.*
413. *Id.* at 3-7.
414. *Id.* at 4.
415. *Id.* at 3.
416. *Id.* at 3-4.
417. *Id.* at 4.
418. *Id.* at 5.

delegation would require greater funding assistance from the federal government, and the flexibility for states to adopt partial section 404 responsibilities for certain types of wetlands, activities or locations, as opposed to the current "all-or-nothing" approach.[419] The report further recommended delegation, under these circumstances, of federal jurisdiction even in traditionally-navigable, Phase I waters and their adjacent wetlands.[420] Perhaps most importantly, EPA oversight of delegated programs would be limited to "annual guidance on program implementation"[421] and "an annual review of program success."[422] EPA would not involve itself in individual permit review, although it would retain the potential for a veto under section 404(c).[423]

The Forum's proposals stimulated the campaign promise of President Bush to make "no net loss" of wetlands a federal policy,[424] and formed the basis of the EPA-Corps Memorandum adopting no net loss and the process of sequencing to avoid wetland destruction as their official, regulatory principles.[425] It also stimulated a vigorous dialogue between the Forum's Chairman, Governor Kean, and the U.S. Army Corps of Engineers Assistant Chief Counsel for Environmental Law and Regulatory Programs, Lance Wood, on the merits of the Forum's delegation proposals.[426] Noting that local development interests are "able to exert substantial influence over state and local governments"[427] through campaign contributions and direct benefits to the local economy, Wood feared that states would be motivated to assume section 404 responsibilities "as a means of escaping more rigorous federal regulation."[428] The Forum's safeguard of an EPA veto was, further, difficult to understand if EPA was not to be involved in the review of individual permits.[429] Kean's reply stressed that the Forum's proposals were designed to strengthen wetland protection by increas-

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419. *Id.* at 19-23.
420. *Id.* at 23.
421. *Id.* at 22-23.
422. *Id.* at 22.
423. *Id.*
424. Blumm, *supra* note 407, at 215-16 (citing CONSERVATION FOUNDATION, *supra* note 411, at 3, 18-19.
425. *See supra* notes 86-91 and accompanying text.
426. Lance D. Wood, *The Forum's Proposal to Delegate § 404 to the States: A Bad Deal for Wetlands*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), July-Aug. 1989, at 3-4 [hereinafter Wood I]; Thomas H. Kean, *A Reply to Mr. Wood*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), Nov.-Dec. 1989, at 3; Lance D. Wood, *Section 404 Delegation: A Rebuttal to Governor Kean*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst., Washington, D.C.), Jan.-Feb. 1990, at 2-3 [hereinafter Wood II].
427. Wood I, *supra* note 426, at 4.
428. *Id.*
429. *Id.*

ing the scope of its jurisdiction over wetland drainage, by adopting a national goal of increased wetlands, and by involving the states in a more affirmative (and federalist) way.[430]

Whatever the merits of these two positions in the abstract, it is clear that the Forum's proposals for increased delegation were made in conjunction with other recommendations that have not materialized. Increased federal funding for wetland programs is on no one's horizon. Increased regulatory jurisdiction over drainage and other currently unregulated activities will be strongly resisted, and stymied, by agricultural and real estate interests unless this increase in jurisdiction is accompanied by dramatic rollbacks in other program areas.[431] Nor are states expressing any enthusiasm for assuming more federal responsibilities without the funds to perform them. No net loss has yet to become more than a policy goal at the national level; its second half, the actual restoration of the wetland base, has been all but forgotten. The Forum was able, in good conscience, to recommend such far-reaching delegation as the inclusion of Phase I waters and the removal of EPA review over individual permits largely because it would be compensated for by strengthened policy, funding, jurisdiction and enforcement. Without these ingredients, it is unlikely that this prestigious and diverse group would have advanced the cause of delegation alone.

B. Administration Initiatives

In May 1980, some two years after amendments authorizing state assumption of section 404, EPA promulgated regulations and criteria for the process.[432] Faced with state concerns that the process was burdensome and restrictive,[433] EPA issued new regulations in 1988 to provide "more flexibility in program design and administration."[434] The changes were relatively minor,[435] although EPA did try to accommo-

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430. Kean, *supra* note 426, at 2.

431. *See, e.g., infra* note 463 and accompanying text.

432. 45 Fed. Reg. 33,290 (1980).

433. *See* 49 Fed. Reg. 39,012 (1984) (codified at 40 C.F.R. pts. 282-83).

434. 53 Fed. Reg. 20,764 (1988) (codified at 40 C.F.R. pts. 232-33).

435. EPA made two changes to the pre-assumption packet that states must submit. First, a state must include fewer details on funding and manpower of the state program. 40 C.F.R. § 233.11(d) (1994) (requiring the same information with less detail). Second, the state no longer must include joint permit processing procedures in the Memorandum of Agreement entered into with the Secretary. *Id.* § 233.14 (recommending joint processing procedures though no longer requiring them); *see also* 49 Fed. Reg. 39,012 (1984).

The procedures for revision of a state-assumed program were simplified to allow minor state program revision without the full formal review process. 40 C.F.R. § 233.16 (1994). State-issued general permits were simplified by dispensing with pre-discharge re-

date state programs by permitting them to meet enforcement mandates,[436] and even the section 404(b)(1) guidelines requirements, with alternative methods.[437] In effect, EPA waxed the car but did not change the engine. The major problems cited by the states—funding and authority—were not addressed.[438] The initiative fell short.

In August 1991, President Bush announced a wetlands implementation plan, the product of an interagency task force coordinated by the Domestic Policy Council.[439] The Plan outlined a menu of objectives similar to those of the Forum, although more modest in scope. One objective was "streamlining" the regulatory program[440] and another, "increasing the state role."[441] These objectives supported such initiatives as guidance to encourage the use of state general permits, "performance based criteria" for state assumption, revised state assumption regulations, and support for legislation permitting state assumption of "wetlands near navigable waters."[442]

Pursuant to this plan, EPA conducted a study of the obstacles to state assumption of section 404 responsibilities and of the means to overcome them.[443] The study surveyed wetland regulation programs in thirteen states and found that, while several states supported the idea of state assumption, their endorsement was far from unanimous. Many states regarded the prospect of wetland regulation as too controversial, and feared potential liability from takings claims.[444] This

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porting requirements. *Id.* § 233.21 (the reporting requirement may still be required on a case-by-case basis under the 1988 regulations as appropriate). Under the new regulations, the permit applicant is no longer required to have a pre-application consultation with the state. *Id.* § 233.30. The public notice requirements for individual permit applications were simplified by allowing adequate public notice reasonably calculated to cover the area affected by the activity rather than the newspaper publication. *Id.* § 233.32.

436. 40 C.F.R. § 233.41.

437. *Id.* § 233.34. EPA also changed the waiver of review language to read more positively, though the content remains the same. *Id.* § 233.51.

438. 49 Fed. Reg. 39,012 (1984). In the preamble to its 1984 Proposal for the 1988 regulations, EPA recognized these "major impediments to program assumption." *Id.* EPA answered these concerns, however, by stating "funding and extent of state assumable waters are beyond the scope of this regulation, since addressing these problems would require statutory amendments." *Id.*

439. Memorandum from Nancy P. Dorn, Assistant Secretary of the Army (Civil Works), to Director of Civil Works, Department of the Army (Dec. 13, 1991) (discussing President Bush's announcement on wetlands protection and the role of the Army Corps of Engineers in implementing the plan) (on file with author).

440. INTERAGENCY TASK FORCE ON WETLANDS, DOMESTIC POLICY COUNCIL, WHITE HOUSE WETLANDS IMPLEMENTATION PLAN, 1991, at Items 3-5.

441. *Id.* at Items 13-14.

442. *Id.*

443. EPA ASSUMPTION REPORT, *supra* note 182, at 2.

444. *Id.* at 5-6.

low level of enthusiasm reflected a low level of public support for wetland protection on the local level; nine of thirteen state officials interviewed in the EPA study identified a "lack of political support in their state legislatures" as a serious impediment to delegation.[445] At least a few states saw the federal program as complementary and beneficial; a Tennessee assumption report concluded, "the state would be more vulnerable to political pressure in operating the program than would the Corps, whereas the Corps and the state now can mutually provide some protection to each other in resisting political influence."[446] The EPA study went on to identify and rank other impediments, chief among them being insufficient funding and flexibility to operate such a program.[447] EPA estimated state costs for mapping and data management alone at up to $4 million, and average state program operating costs at $1 million per year.[448] The major, perceived problems in flexibility were in the assumption of all-or-nothing jurisdiction, adherence to the section 404(b)(1) guidelines (and in particular their requirements for avoidance), and the degree of EPA oversight on individual permit decisions.[449] The study concluded by recommending a cautious approach to increased delegation. It noted that states "vary tremendously" in their attitudes towards wetlands and their abilities to protect them.[450] Assumption of section 404 programs should be phased in first with states that have existing, comprehensive programs, encouraged by "progressively reduced" oversight by EPA, moving from individual permits to annual review over time.[451] Partial assumption should be explored as a stepping-stone, like state programmatic general permits, to full delegation.[452]

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445. *Id.* at 6-7.

446. *Id.* at 14-15 (citing TENNESSEE WATER RESOURCES RESEARCH CENTER, A FEASIBILITY STUDY OF ASSUMPTION OF THE FEDERAL SECTION 404 PROGRAM BY THE STATE OF TENNESSEE, Research Rep. No. 107 (1985)).

447. *Id.* at 7-11.

448. *Id.* at 8-9. These numbers may be understated. Michigan's assumed program was estimated to cost "roughly $750,000 to $1 million per year." *Id.* Michigan now projects costs on the order of $4 million. *See supra* note 229. The Army Corps of Engineers, New Orleans District, has a $3.5 million budget for wetland permitting in South Louisiana. Interview with Ronald Ventola, Chief of the Regulatory Functions Branch, New Orleans District Corps (July 7, 1994). The Vicksburg District spends another $500,000 in South Louisiana. Telephone Interview with Elizabeth Guynes, Chief of the Regulatory Functions Branch, Vicksburg District (Sept. 9, 1994).

449. EPA ASSUMPTION REPORT, *supra* note 182, at 10-13.

450. *See id.* at 20-21 (recommending state-by-state determinations of how to best move a state forward toward a greater role in wetlands protection).

451. *Id.* at 22-23.

452. *Id.* at 27-28.

In August 1993, in response to continuing conflict over the scope of the section 404 program and private property rights, the Clinton administration issued wetlands protection proposals of its own capturing many of the ideas of the National Wetlands Policy Forum and the Bush administration plan. Like its predecessors, *Protecting America's Wetlands: A Fair, Flexible and Effective Approach*[453] is a comprehensive menu which includes the issue of delegation. Declaring that decisions on "where and how to protect or restore wetlands can be often most appropriately made at State, Tribal or local levels," the administration announced its "commitment" to increasing their participation.[454] This commitment, however, is predicated chiefly on additional congressional funding for state wetland programs;[455] Congress should also authorize the partial assumption of section 404 responsibilities, as a step towards full assumption.[456] For the administration's part, the Corps of Engineers would issue guidance to facilitate general permitting, but with "safeguards required to ensure that these programs adequately protect wetlands."[457] While the Clinton administration was not rushing towards delegation, it was trying, incrementally, to move the ball.[458]

Whatever else it may have accomplished, the Clinton Plan did not assuage section 404's critics in Congress and calls for its reform, predicated in part on the prospect of delegating these responsibilities to the states. The extent of the proposals is dramatic.

C. *Legislative Initiatives*

During the 103rd Congress several bills were introduced to amend the Clean Water Act and, in particular, the section 404 program. Of those focused on section 404, three represented the extremes of the debate. The Wetlands Reform Act of 1993[459] would have maintained the current program intact with a few, strengthening amendments;[460] no proposals were made for increased delegation.[461]

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453. *See generally* WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY, PROTECTING AMERICA'S WETLANDS: A FAIR, FLEXIBLE, AND EFFECTIVE APPROACH (1993).

454. *Id.* at 20-21.

455. *Id.* at 21.

456. *Id.*

457. *Id.*

458. *Id.*

459. H.R. 350, 103d Cong., 1st Sess. (1993).

460. The Edwards Bill adds wetlands protection by (1) eliminating the drainage of wetlands loopholes; (2) adding the National Marine Fisheries as a commenting agency throughout the § 404 process; (3) requiring General Permits to apply to "narrowly defined" activities that are similar in nature and that have minimal individual and cumulative impacts; (4) requiring reports on the program, especially compensatory mitigation; (5)

At the other end, separate bills sponsored by Louisiana Senator Johnston[462] and by Louisiana Representatives Hayes and Tauzin[463] would have overhauled the section 404 program entirely and, in the process, provided for the assumption of greatly increased regulatory authority by the states. While none of these bills passed, they are certain to reemerge in the CWA reauthorization debate to come.[464] The discussion that follows attempts to focus only on those aspects of these proposals that bear most directly on delegation.

The Johnston bill, at bottom, offered increased section 404 coverage over wetlands drainage and increased funding to state programs (taken from the federal program) in turn for greatly reduced federal oversight, standards, and regulation of wetlands. The bill limited the reach of protected wetlands by requiring their classification, by "value," into categories A (highest), B (moderate) and C (lowest).[465] No protections, federal or by delegated state, would be afforded to Class C wetlands.[466] Class B areas would be subject only to a "public interest" review balancing development benefits with environmental detriments.[467] Only Class A wetlands would be protected by the avoidance/sequencing process of the section 404(b)(1) guidelines.[468] The bill went on to eliminate the EPA section 404(c) veto over Corps permits and delegated state permit decisions.[469] As Senator Johnston explained, "Although EPA actually exercises its veto power infrequently,

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adding a fast track for minor permits, *i.e.*, those affecting one acre or less of wetlands; (6) accepting the avoidance component to sequencing for all individual and general permits; (7) clarifying citizen suit provisions under § 404; and (8) allowing tax breaks for income derived from compatible uses of wetlands. *Id.*

461. *Id.*

462. S. 2506, 103d Cong., 2d Sess. (1994) (entitled The Wetlands Regulatory Reform Act of 1995).

463. H.R. 1330, 103d Cong., 2d Sess. (1993) (entitled The Comprehensive Wetlands Conservation and Management Act of 1991).

464. The Hayes-Tauzin Bill has been introduced in some form in every session since 1991. Senator Johnston has stated that his purpose in introducing his bill so late in the 103rd Congress was to "spur discussion of wetlands reform in the Senate and serve as a benchmark for another legislative effort in the 104th Congress." Nat'l Wetlands Coalition, News Flash (Oct. 6, 1994).

465. S. 2506, 103d Cong., 2d Sess. § 5 (1994).

466. *Id.* Proposed § 404(a)(3)(c) states that no permit is required by the Corps for "discharge of dredged or fill material in wetlands classified . . . Class C wetlands. A state may require a permit . . . if such state deems it appropriate." *Id.*

467. *Id.* Proposed § 404(a)(3)(b) would require consideration of such factors as "economic growth, the need for fish and wildlife habitat, water supply and conservation, water quality, infrastructure needs, energy needs, mineral needs, food production, recreation and consideration of private property ownership." *Id.*

468. *Id.*

469. *Id.* § 8. EPA's veto in § 404(c) is replaced with a requirement that the Corps consult with EPA. *Id.*

I understand that the veto is threatened often, causing undue delays and repeated multi-agency consultations."[470] EPA was further directed to delegate jurisdiction in Phase II and III waters to any state that provided "substantially similar" protections to the (significantly diminished) federal program.[471] Subsequent federal review of a state program would be conducted only once every five years; if at that time a state was failing to implement the program properly, EPA would face the Hobson's choice of doing nothing or re-vesting the program with the Corps of Engineers, without veto controls.[472] The bill also allowed the Corps to issue state program general permits in Phase I waters to state regulatory programs with similar jurisdiction and standards (to the diminished federal program).[473] Implementation of these general permits was subject only to periodic, retrospective review.[474]

The Hayes-Tauzin bill, which gathered fifty-three cosponsors in the House of Representatives, went even further to remove the federal role. It eliminated EPA entirely from section 404 of the Clean Water Act, eliminating EPA guidelines, veto and delegation authority.[475] What was left of the federal program would be left with the Corps. Under a wetland classification scheme similar to that in the Johnston proposal, Type C wetlands were abandoned.[476] Type A wetlands were to be protected not by a permit system but by acquisition[477] (although no provisions were made for acquisition funding), leaving a federal regulatory program for Type B alone. Development of these wetlands would not be regulated on the principle of avoidance but, rather, of mitigation;[478] the permits would issue. The Corps could delegate this

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470. 140 CONG. REC. S14,254 (daily ed. Sept. 12, 1994) (statement of Sen. Johnston).

471. S. 2506, 103d Cong., 2d Sess. § 12(a) (1994) (modifying § 404(h)(2)).

472. *Id.* § 12(b). The Johnston Bill leaves unchanged § 404(i), concerning EPA's power to withdraw approval of a state program.

473. *Id.* § 10(b) (adding a new § 404(e)(3)).

474. *Id.* § 10(b). Under Senator Johnston's proposed § 404(e)(3)(D), a programmatic general permit based on a state program would no longer be limited to activities that are similar and *de minimis*. *See id.*

475. *See* H.R. 1330, 103d Cong., 2d Sess. § 3 (1993) (striking all of § 404 and rewriting the entire section). In the proposed § 404(a), EPA's involvement is eliminated entirely. *Id.*

476. *Id.*; *see* proposed § 404(c)(3)(C) (outlining the attributes of Type C wetlands); proposed § 404(e)(5)(B) (allowing the Corps to "establish requirements for reporting activities undertaken in Type C wetlands"); proposed § 404(e)(5)(A) (allowing activities in Type C wetlands without authorization).

477. H.R. 1330, 103d Cong., 2d Sess. § 3 (1993) (proposed § 404(e)(2)).

478. *Id.* Proposed § 404(e)(3)(B) would introduce the rebuttable presumption that the project purpose, as defined by the applicant—who will always define the project as "water dependant"—is binding on the Corps.

program in full, including Phase I waters, under minimal standards and review.[479] A state or local government could also, in the alternative, submit a land management plan to the Corps which, if approved, would exempt activities within the plan from further permitting.[480] Indeed, the very approval of these management plans was made exempt from judicial review.[481] No provisions were made for delegated program funding.

Reflecting on these proposals, starting with those of the National Wetlands Policy Forum and ending with the latest bills in Congress, one cannot help but he struck by how slowly the process of delegation has moved and how radically the most recent legislation would accelerate it. Facilitating delegation has always been a matter of inducements, the most important of which are funding and authority. These are not times to expect increased funding, except at the expense of federal protections. The Louisiana bills go a long way towards simply abdicating federal authority. Successful delegation does not require so drastic an approach.

VI. DELEGATION RECONSIDERED

In a subject as fraught with conflict as section 404, it is easy to forget first principles. At bottom, there are two. One is the national, public interest in wetlands that, as far as water quality, flood control and biological values are concerned, are as a practical matter, irreplaceable. The other is private pressures to develop wetlands which, because of the economics of this development, are all but irresistible. If these pressures are to be tempered in favor of wetlands preservation, there are good reasons for this regulation to be federal, reasons that drove enactment of the Clean Water Act and section 404 in the first place. The first of these was that state and local governments were not doing the job. The second was that uneven regulation among the states tended to penalize those that safeguarded the national interest and to favor a "race to the bottom" towards maximum development. These pressures remain today even in the Clean Water Act section 402 program which is dominated by federal technology and federally-approved water quality standards. They are even more evident in the administration of section 404. Over the past twenty-two

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479. *Id.* Proposed § 404(l) provides no Phase I limitations, no five year limits on permits issued by a delegated state, no EPA § 404(c) veto, no § 404(j)-type Corps veto nor any "affected state" veto of a state-issued § 404 permit. *Id.*

480. *See id.* (modifying § 404(f)(2)).

481. *Id.* The Hayes-Tauzin bill states that "no person shall be entitled to Judicial review of the decision of the Secretary to approve or disapprove a land management plan." *Id.*

years, a federal process has evolved by trial and error, by lawsuit, and by legislative and administrative amendments that at least influences development activity away from aquatic resources. The process inevitably is an unhappy one for all concerned. Developers think it is too hard, environmentalists think it is too easy, and many regulators would rather not be engaged in the tough, nasty business at all. The process does not work by clear cut, objective standards, which simply do not exist for the wide variety of wetlands types, values and development options presented in 10,000-plus individual permit decisions each year. Rather, it works through a strong presumption of non-wetland alternatives and by the participation of other agencies and citizen groups that increases the leverage over the ultimate decisions. With all its storms of controversy and criticism, there is good evidence, anecdotal and statistical, that the section 404 process has significantly abated the rate of wetland loss. It does what it was intended to do.

The first question of delegation, then, is: Why should the federal government relinquish the program at all? A large, federal infrastructure now exists, familiar to the development community, the scientific and biological community, the legal community and the courts. A Delaware corporation knows what to expect from section 404 in California, Louisiana and Wisconsin. There is, further, no reason to believe that non-federal programs in these or other states would be any more protective of the national values in wetland resources. Maryland has an interest in ducks from North Dakota, Oregon has an interest in Idaho's permit standards, and New York is interested in seafood from the Louisiana coast. If states wish to be more protective, they have every opportunity to be so now under current law. The motives for section 404 delegation, it must be acknowledged, are a little more parochial. From the federal side, delegation sheds an unwelcome responsibility and may hold the prospect of shedding its costs as well. From the state side—for those states that wish to engage in the tough, nasty business, and they are far from unanimous—it is a matter of authority and pride. And from the private development side, which is where the pressures for delegation continue to originate, there is no doubt that state regulation is perceived as more susceptible to political influence. More wetlands will be developed more easily. If that were not the perception, the development community would be on the other side. It is for all of these reasons that in 1977 Congress, after an exhaustive consideration of the prospect of delegating section 404 functions to the states, arrived at its carefully limited scheme for state assumption and another plan for general permitting. These reasons are no less compelling today.

All of this said, limited delegation short circuits the extraordinary potential of state and local governments to participate in the necessary enterprise of wetland protection. Even under existing restrictions on the scope of their authority, assumed states exercise significantly more control over smaller permit applications than the federal system, activities that largely escape federal review and cause a continuing wetland hemorrhage. States can provide better local service, as in Michigan. They can provide innovative funding, such as New Jersey's permit fees. They can provide individualized, on-the-ground review, as in North Carolina's SPGP. Their closer proximity to development pressures is a fact of life, but it was a fact, too, with the U.S. Army Corps of Engineers when it first assumed section 404 responsibilities; over time, as within the Corps, environmental authority may well breed environmental responsibility. In the meantime, what may be needed, as with the EPA-Corps relationship, is not continued non-delegation but, rather, better oversight.

Last but not least, there is the undeniable momentum for delegation that reflects a national priority of reducing the size of the federal establishment and returning government to local authorities. Taken to its extreme—and, as seen above, some legislative proposals are extreme—this momentum could lead to the virtual repeal of a national water quality program, returning the country to the decline and chaos that preceded the 1972 Act. In this context, fuller delegation to the states is a high-risk proposition, with the immediate loss of the protection of EPA, other federal laws and standards, and citizen enforcement. It is also, however, a proposition that seems in some form inevitable and, if done right, holds the promise for more positive state engagement and enhanced wetland protection. What follows are four suggestions for what "doing it right" will mean.

A. Funding: It Starts with Money

The absence of federal funding is the largest single obstacle to section 404 assumption, and if the number of assumed programs under section 402 and the CZMA are any guide, its presence would be the greatest facilitator. In a climate where states are objecting to unfunded mandates across-the-board, the likelihood of states continuing to pursue unfunded non-mandates seems remote. The proposal of federal funding raises two caveats. The first is that the funding be continuous and, where annual federal general appropriations are at stake, continuous funding is by no means a certainty. On the other hand, a price tag of approximately $100-200 million a year for assumed programs seems reasonably small for any but those hostile to

the objectives of the program in the first place. Moreover, federal funding should be conditioned on state requirements including funding mechanisms, such as New Jersey's fee system, to encourage long-term stability. The second caveat with funding is that, if it is to be taken from the existing federal regulatory program, the wetlands will lose at least interim protection and, depending upon the degree to which the EPA and Corps programs are dismantled, permanent protections as well.

B. Goals

A major weakness in the federal section 404 program is the absence of a national policy goal. The closest statement of such a goal is, of course, the "no net loss" policy articulated in the Army-EPA Memorandum of Agreement. The shortcomings of this statement are twofold. First, although it may be invoked occasionally by federal regulators to defend a protective stance on a given permit application, it is not enforceable in any fashion. Goals that are not enforceable tend to play second fiddle to other pressures. The second shortcoming is that the goal is too modest. America has already lost nearly sixty percent of its wetlands, and will either restore much of that base or pay heavily in degraded waters, reduced productivity and expensive treatment works, flood control structures, fish hatcheries, endangered species recovery plans and restoration works. For this reason, several studies of the section 404 program have recommended a national goal of wetland restoration. Assumed state programs should share that goal, and be able to demonstrate progress through the regulatory programs towards achieving it. As with CZMA state reviews, assessments of this progress should be made available to Congress and the public. The adoption of this goal, and satisfactory evidence of progress towards it, should be a *sine qua non* of federal funding.

C. Authority

Any regulatory program that vests decision-making authority exclusively in one agency runs a great risk of failure. The genius—accidental as it was—of the federal 404 program is the creative tension between the Corps and EPA. The protection this dual review offers is enhanced further by the participation of the USFWS, NMFS, state agencies and citizen groups. The power of the review process helps offset the power of money, political influence and private property rights. It cuts deals for wetlands protection. No state program can avoid the necessity of making these same hard decisions. The question is, with what authority and oversight. The answer offered here is to risk a tradeoff: greater geographic latitude for delegation—includ-

ing on the one hand assumption of a partial program, and on the other hand full assumption of Phase I waters—in turn for continuing federal review of major permit actions. The resistance to federal oversight seems to be more psychological than grounded in any experience with onerous federal review under section 404, or for that matter section 402. Michigan's relationship with EPA has, with one exception in ten years, been remarkably amicable; if anything, it is the lightness of the federal hand that gives cause for concern. It is, as with most cases of enforcement, however, the *potential* for federal review, however latent, that keeps the system honest.[482]

D. The Package

Delegation involves a delicate balance of federal, state, and private interests. None can be abandoned. Loosening up on one part of the apparatus will require tightening up another. The suggestions just made offer a new arrangement for 404 delegation that would involve:

(a) continuing partial federal funding; and

(b) greater jurisdictional authority;

in return for:

(c) state trust, fees or other dedicated funding;

(d) commitment and progress towards objective wetland restoration goals; and

(e) continuing federal (and citizen) review of major permit actions.

This package, in turn, should be contained within a larger package of improvements to section 404. Any reordering of the program ought to acknowledge that opening the door to greater delegation is an act that risks jeopardy to national water quality goals. To justify these risks, gains will be necessary not only in the tradeoffs suggested here but in such areas as increased regulatory jurisdiction (*e.g.*, over wetland drainage) and wetland acquisition.

VII. CONCLUSION

Section 404 is a remarkable program. It calls for more numerous, more difficult decisions on a daily basis than any other program in environmental law. The federal interest in the outcome of these decisions is strong. The state interest in assuming them is, at best,

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482. As Louisiana Senator Johnston has noted, it is the potential of EPA vetoes rather than their actual number that crimps the development interests that his amendments seek to serve. *See supra* notes 469-470 and accompanying text. In his analysis, the Senator is not incorrect. He simply favors wetland development over regulatory protection.

variable, but it is capable of being enlisted, encouraged and strengthened to the point that wetlands and aquatic resources are better protected. If this process is done carefully and with the proper mix of federal inducements and safeguards, it could succeed. The danger is that, in the rush to de-federalize America, delegation will be forced forward with great haste and with little security. The risks of this approach are enormous.