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PROTECTING WETLANDS: CONSIDERATION OF SECONDARY SOCIAL AND ECONOMIC EFFECTS BY THE UNITED STATES ARMY CORPS OF ENGINEERS IN ITS WETLANDS PERMITTING PROCESS

*Jeffrey M. Lovely**

I. INTRODUCTION

The United States Army Corps of Engineers (Corps) regulates¹ wetland projects in the United States pursuant to Section 404 of the Clean Water Act (CWA).² Expanding population pressures on land use have caused an alarming decline in wetlands acreage.³ Because wetlands serve as important sources of flood storage, wildlife habitat, and spawning areas, they constitute a vital natural resource.⁴

* Articles Editor, 1989-90, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Corps regulations implementing the Section 404 wetlands permitting process are compiled in 33 C.F.R. §§ 320, 323, 325, 328 (1988).

² See Federal Water Pollution Control Act Amendments § 404, 33 U.S.C. § 1344(b)(1) (1982 & Supp. V 1987) (empowers the Corps to promulgate regulations under which the Corps may grant or deny the permit required by a developer to fill wetlands area).

³ The report "Wetlands of the United States: Current Status and Recent Trends," compiled by the United States Fish and Wildlife Service, estimates that nine million acres of wetlands had been lost in the 48 contiguous states between the mid-1950s and the mid-1970s. The Fish and Wildlife Service estimated that approximately 215 million acres of wetlands existed before the United States was settled. As of 1985, the Service estimated that only 93.7 million acres of freshwater wetlands and 5.2 million acres of saltwater wetlands remain in the United States, and that approximately 440,000 acres of freshwater wetlands and 18,000 acres of saltwater wetlands are lost each year in the 48 contiguous states. *Net Total of 9 Million Acres of Wetlands Lost in 20-Year Period, Wildlife Service Says*, 16 Env't Rep. (BNA) 25 (May 3, 1985).

⁴ The National Wetlands Policy Forum, convened at the request of the United States Environmental Protection Agency (EPA), estimated that 60-90% of United States commercial fish catches spawn in wetlands; that wetlands are home to one third of the nation's endangered species; and that the costs of replacing the natural flood protection lost to wetlands fill projects will be "astronomical." *National Wetlands Panel Seeks New Policy to Protect, Restore, Improve U.S. Wetlands*, 19 Env't Rep. (BNA) 1461 (Nov. 18, 1988).

As the primary agency⁵ empowered to allow or deny permits for wetland fill projects, the Corps bears the brunt of wetlands protection responsibilities.⁶ If nationally espoused goals of “no net loss” of wetlands⁷ are to be met, the Corps must act to the fullest extent of its authority to protect the nation’s wetlands.

The statutory framework for such protection is already in place, in Section 404,⁸ the National Environmental Policy Act of 1969 (NEPA),⁹ and Corps regulations.¹⁰ Regulations permit the Corps to consider a broad range of factors in its wetlands permitting process.¹¹ The consideration of these factors advances NEPA policies because the Corps considers a proposed project in light of its overall effect on the human environment. In both Corps regulations and NEPA, the term “environment” is interpreted broadly.¹²

Although Corps regulations and NEPA require a comprehensive examination of environmental factors, courts have not deferred to

⁵ The EPA shares control of wetlands permitting, and in some cases may veto Corps permitting decisions. 33 U.S.C. § 1344(c) (1982 & Supp. V 1987); see *infra* notes 121–39 and accompanying text. See generally *The Role of EPA’s Guidelines in the Clean Water Act § 404 Permit Program—Judicial Interpretation and Administrative Application*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,272 (July 1984); *EPA’s Evolving Role in Wetlands Protection: Elaboration in Bersani v. U.S. EPA*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,480 (Nov. 1988).

⁶ For criticism of the Corps’s historical pro-development stance, see Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 *VA. L. REV.* 503 (1977).

More recently, the United States General Accounting Office (GAO) evaluated and criticized the Corps’ wetlands permitting activities. The GAO stated that the major causes of the Corps’s poor performance were: weakness and confusion in the definition and enforcement of wetlands protection regulations; disregard by the Corps of other federal agency concerns; and failure by the Corps to investigate reported violations and inspect projects for permit compliance. *Protection of Critical Wetland Areas by Corps Inadequate*, GAO Report *Alleges*, 19 *Env’t Rep. (BNA)* 1121 (Sept. 20, 1988).

⁷ *Bush Tells GOP Governors He Will Act on Acid Rain, Wetlands, Global Warming*, 19 *Envtl. L. Rep. (Envtl. L. Inst.)* 1564 (Dec. 2, 1988). On November 22, 1988, President-elect George Bush acknowledged the need to protect our nation’s wetlands because of their importance to water quality, wildlife habitat, and flood control, and emphasized the need both to replenish and replace lost wetlands, and to move toward a goal of “no net loss” of wetlands. *Id.*

⁸ 33 U.S.C. § 1344 (1982 & Supp. V 1987).

⁹ National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370 (1982 & Supp. V 1987).

¹⁰ 33 C.F.R. §§ 320, 323, 325, 328 (1988).

¹¹ 33 C.F.R. § 320.4(a) requires the Corps to evaluate all relevant factors as it conducts its Public Interest Review (PIR) of a wetlands fill permit application, when the Corps balances the beneficial against the detrimental effects of a wetlands fill permit.

¹² See *infra* text accompanying notes 106–13. Corps regulations require the Corps officer processing a wetland fill permit application to consider a broad range of effects on the environment, including effects on wetlands, historic properties, aesthetics, recreation, and in general, the “needs and welfare of the people.” 33 C.F.R. § 320.4(a) (1988).

the agency consistently in this area, and instead have effectively limited the Corps's environmental review process.¹³ By limiting too strictly the Corps's consideration of secondary social and economic effects, the courts may be removing an important weapon from the arsenal of people and agencies trying to protect the quality of the human environment in urban America.¹⁴

For example, in *Mall Properties, Inc. v. Marsh*¹⁵ the United States District Court for the District of Massachusetts may have set a dangerous precedent by limiting the range of secondary social and economic effects the Corps may evaluate while it conducts its public interest review (PIR).¹⁶ There, a mall developer sought to build a large suburban shopping mall in North Haven, Connecticut.¹⁷ The neighboring city of New Haven objected to the wetlands permit application, alleging that potentially serious social and economic effects, including urban decay and unemployment in downtown New Haven, would be caused if the Corps granted the permit.¹⁸ The Corps balanced these secondary effects in its PIR process, and denied the permit.¹⁹

The district court held that evaluating these particular secondary social and economic effects was an *ultra vires* exercise of permitting control by the Corps,²⁰ and remanded the permit application to the Corps to be reconsidered without evaluating the secondary social and economic effects on New Haven.²¹ Because the *Mall Properties* court read the proximate causation test outlined by the Supreme Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*²²

¹³ See *infra* text accompanying notes 236-81 for a discussion of case law involving Corps permitting decisions.

¹⁴ See *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 109 S. Ct. 128 (1988); see *infra* notes 267-81 and accompanying text.

¹⁵ 672 F. Supp. 561.

¹⁶ *Id.* at 565. The Corps's public interest review regulations are compiled at 33 C.F.R. § 320.4(a) (1988).

¹⁷ 672 F. Supp. at 563.

¹⁸ *Id.*

¹⁹ *Id.* at 564.

²⁰ *Id.* at 566.

²¹ *Id.* at 575.

²² In *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), the Supreme Court invoked the doctrine of proximate cause in determining the nexus required between the primary environmental impact of a project and the secondary effects of that project before a federal agency will be required to evaluate those effects under NEPA. See *id.* at 774; see *infra* notes 80-88 and accompanying text.

narrowly,²³ it may have limited too strictly the range of factors that the Corps may evaluate in conducting its PIR and in weighing the beneficial versus the detrimental effects of a wetlands fill permit.

This Comment argues that the CWA's goal of wetland preservation would best be served by allowing the Corps to consider the secondary social and economic effects of wetlands development when those effects are the reasonably foreseeable²⁴ results of a permit issued by the Corps. Section II describes NEPA's language and legislative intent, discusses the background to the Corps's jurisdiction over wetlands, and analyzes the judicial review process. Section III analyzes how the coalition of the Corps's regulations,²⁵ NEPA,²⁶ and deferential judicial review²⁷ should act to further environmental goals while still allowing responsible, quality development. This section also discusses case law dealing with the consideration of secondary social and economic effects. Section IV proposes guidelines that the Corps and courts reviewing the Corps's actions can use to improve the efficiency and predictability of the Section 404 permitting process. Finally, this Comment concludes that social, economic, and other secondary²⁸ factors may be considered by the Corps in its Section 404 wetlands permitting process when they are the reasonably foreseeable effects of a Corps wetlands permitting decision.

²³ The Supreme Court, in *Metropolitan Edison*, referred both to the concept of proximate causation and to the policies of NEPA in determining the length of the causal chain between primary and secondary effects before those secondary effects must be evaluated in an EIS. 460 U.S. at 774. This Comment argues that *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561 (D. Mass 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 109 S. Ct. 128 (1988), read this test too narrowly, and limited too strictly the range of secondary factors the Corps may evaluate in its PIR.

²⁴ See *infra* notes 85-87 for discussion of the reasonable foreseeability standard.

²⁵ 33 C.F.R. § 320 (1988).

²⁶ 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987).

²⁷ See *infra* notes 148-88 and accompanying text.

²⁸ For the purposes of this Comment, the term "primary effects" refers to the most direct results of a decision to grant a wetlands fill permit. For example, the primary effects of a decision to fill 30 acres of wetlands will include: loss of floodwater storage, loss of wildlife and wildlife habitat, loss of recreational areas, etc. Guidelines promulgated by the Council on Environmental Quality (CEQ) refer to these primary effects as direct effects: these effects occur at the same time and place as the project. 40 C.F.R. § 1508.8 (1988).

"Secondary effects" are the less direct, but reasonably foreseeable, effects of the project. For instance, if a wetlands fill project will kill a substantial amount of shellfish, local clam fishermen will lose income because of that project. Likewise, if a large apartment is to be built on the 30 acres, then it is reasonably foreseeable that local traffic will increase in the area. CEQ regulations refer to these effects as indirect: these secondary effects are caused by the project in question, but occur later or at a distance from the project. *Id.*

For a discussion of the purpose of the CEQ and its guidelines, see *infra* notes 66-79.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

Congress enacted NEPA to ensure that governmental agencies consider environmental factors whenever a proposed federal action could significantly affect the human environment.²⁹ Written broadly, NEPA sets no substantive standards. Rather, NEPA is designed to ensure that humans and nature coexist in productive harmony, while promoting fulfillment of human social and economic requirements both now and in the future.³⁰

A. *The Language and Spirit of the Act*

NEPA was designed to protect and preserve a broadly defined "natural environment."³¹ Its language³² and legislative history³³ indicate that Congress enacted NEPA to provide an environmental statute to supplement and focus federal agency protection of the environment. NEPA's language clearly defines the environment broadly, and provides a generic framework for addressing environmental concerns. NEPA states that the United States's environmental policy is to promote measures that encourage productive harmony between people and nature, to prevent future and eliminate present environmental damage, and to stimulate overall human health and welfare.³⁴

Congress recognized that human activity, including population growth, industrial expansion, high density urbanization, and use of resources, has a profound impact on the nation's environment.³⁵ This recognition prompted Congress to enact a policy that uses all practicable means and measures to promote the general welfare of society, productive harmony between humans and nature, and the social and economic fulfillment of present and future generations of Americans.³⁶ NEPA's language manifestly expresses tremendous breadth:

²⁹ 42 U.S.C. § 4332(2)(C) (1982 & Supp. V 1987).

³⁰ *Id.* § 4331(a).

³¹ *Id.* Subchapter I of NEPA, which sets out the nation's environmental policies and goals, recognizes "the profound impact of man's activity on the interrelations of all components of the natural environment," including "the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances." *Id.*

³² *Id.* § 4335.

³³ See *infra* notes 47-65 and accompanying text.

³⁴ 42 U.S.C. § 4321 (1982 & Supp. V 1987).

³⁵ See *id.*

³⁶ *Id.*

the general welfare, including social and economic requirements, is to be protected both now and with an eye to the future, through the use of "all practicable means and measures."³⁷

Section 102³⁸ requires that courts and agencies interpret other federal policies, regulations, and public laws in accordance with NEPA's policies.³⁹ Section 102 also requires all federal agencies to utilize a systematic, interdisciplinary approach in investigating the environmental consequences of a federal action, including the use of both natural and social scientific techniques to evaluate economic effects.⁴⁰ Even presently unquantified environmental amenities and values are to be considered, and new techniques are to be developed to allow appropriate consideration of these unquantified values.⁴¹ This provision exemplifies the broad and progressive nature of NEPA by requiring federal agencies to expand existing environmental techniques to protect a more broadly defined human environment.

Procedurally, Section 102 requires an agency to prepare an environmental impact statement (EIS) whenever preliminary investigation reveals that the agency's actions will significantly affect the quality of the human environment.⁴² An EIS must include: a detailed statement on the environmental impact of the proposed action; evaluation of adverse environmental effects that cannot be avoided if the proposal is implemented; discussion of less harmful alternatives; an analysis of short- versus long-term uses of the environment, with a view towards enhancing and maintaining long-term productivity; and an evaluation of the irreversible effects on the environment that the proposal would have if implemented.⁴³

NEPA's language requires a comprehensive consideration of environmental impacts. But NEPA requires only that a federal agency evaluate these impacts. Nothing in NEPA explicitly requires an agency to deny a proposal because of its environmental effects.⁴⁴ Further evidence of NEPA's procedural vagueness lies in Congress's positioning of the Act as supplemental to existing agency duties and

³⁷ *Id.*

³⁸ *Id.* § 4332.

³⁹ *Id.*

⁴⁰ *Id.* § 4332(A)-(B).

⁴¹ *Id.* § 4332(B).

⁴² *Id.* § 4332(C).

⁴³ *Id.*

⁴⁴ 42 U.S.C. § 4335 (1982 & Supp. V 1987) refers to NEPA's "policies and goals" as "supplementary to existing agency duties." Section 102 of NEPA requires only a "detailed statement," not a decision based upon that statement. *Id.* § 4332(C).

regulations.⁴⁵ Both NEPA's goals and policies must be considered in addition to existing agency duties.⁴⁶ NEPA's legislative history does, however, indicate that NEPA was intended as more than a mere procedural overlay to existing agency duties.

B. NEPA's Legislative History

Consideration of NEPA's legislative history underscores the extensive goals of the Act's proponents.⁴⁷ For example, Senator Henry Jackson, Senate sponsor of NEPA's precursor, attempted to establish that "each person has a fundamental and inalienable right to a healthful environment."⁴⁸ This language was limited in conference, however, to provide only that "each person should enjoy a healthful environment,"⁴⁹ thus avoiding the creation of a judicially enforceable right.⁵⁰ Although Congress watered down some of Senator Jackson's language, Jackson's sponsorship did result in passage of the sweeping environmental protection statute espoused by his chief advisor, Professor Lynton K. Caldwell of the University of Indiana.⁵¹

Jackson and Caldwell refused to promote a policy that added specific environmental duties to designated agencies. Instead, they sought to apply environmental requirements to all agencies with responsibilities affecting the environment.⁵² As a result, NEPA requires all agencies to actively implement national environmental policy by engaging in the EIS process.⁵³

Perhaps the single most important aspect of NEPA's legislative history was Congress's refusal to adopt the Aspinall amendment.⁵⁴ This amendment provided that NEPA would in no way increase,

⁴⁵ *Id.* § 4335.

⁴⁶ *See id.*

⁴⁷ Because of the narrow scope of this Comment, review of legislative history has been limited to some relevant provisions in various congressional reports and debates on NEPA. This section relies in large part on ANDERSON, *NEPA IN THE COURTS* 1-14 (1973); Dreyfus & Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243 (1976); D. MANDELKER, *NEPA LAW & LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT* §§ 2:02-:05 (1984 & Supp. 1987).

⁴⁸ H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 3 (1969), *cited in* ANDERSON, *supra* note 47, at 5-6 & n.13.

⁴⁹ 42 U.S.C. § 4331(C) (1982 & Supp. V 1987); *see also* ANDERSON, *supra* note 47, at 6 n.13.

⁵⁰ ANDERSON, *supra* note 47, at 6.

⁵¹ *See id.*

⁵² *Id.*; *see also* *Hearings on S. 1075, S. 1073 and S. 1752 Before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969).

⁵³ ANDERSON, *supra* note 47, at 6; 42 U.S.C. § 4332(C) (1982 & Supp. V 1987).

⁵⁴ D. MANDELKER, *supra* note 47, at § 2:02.

decrease, or change any agency or official responsibility.⁵⁵ Had this amendment passed, it obviously would have stripped NEPA of any substantive effect. The Aspinall amendment was dropped in conference.⁵⁶

During NEPA's passage through the Senate, a conflict arose between Senators Jackson and Muskie. Muskie desired to protect specific air and water pollution standards set by environmental agencies from interference by other agencies,⁵⁷ while Jackson advocated blanket legislation, eventually passed, that would apply to all federal agencies regardless of their specific duties.⁵⁸ The two Senators compromised, and a nonderogation clause was added to NEPA to protect specific environmental standards administered by a specified agency from the influence of other federal agencies.⁵⁹

The Muskie-Jackson compromise indirectly provided for judicial review of NEPA-related agency decisions. The bill was altered to require that agencies provide a "detailed statement" instead of "findings" regarding the environmental review required by NEPA.⁶⁰ Muskie's rationale for altering this phrase was that a "findings" requirement would be difficult to challenge in court, and would protect agencies that had disregarded environmental concerns.⁶¹ An additional change that enhanced agency accountability and paved the way for judicial review arose from the addition of language requiring EIS review by other federal agencies participating in the project requiring the EIS.⁶² This move from internal to external review of

⁵⁵ *Id.* (quoting 115 CONG. REC. 26,568-91 (1969)).

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *Id.* The nonderogation clause states that NEPA's Section 102 does not change "the specific statutory obligations of any Federal agency . . . to comply with criteria or standards of environmental quality." 42 U.S.C. § 4334 (1982 & Supp. V 1987).

⁶⁰ *See* D. MANDELKER, *supra* note 47, at § 2:03; 42 U.S.C. § 4332 (1982 & Supp. V 1987).

⁶¹ *Id.* Allowing an agency to state that no environmentally significant impact would be caused by a particular project, without requiring the agency to support that proposition with evidence, would greatly weaken NEPA by allowing agencies to publish mere conclusory statements, which would then be difficult to challenge because no factual administrative record would exist.

⁶² *See id.* By allowing other involved agencies to challenge the information and evidence gathered and evaluated by the lead agency, Congress made the EIS requirement more than a mere paper hurdle for federal agencies. When other involved agencies strongly disagree with a lead agency's decision, they can challenge that decision in court. Thus, judicial review arises indirectly from the general external review provision.

42 U.S.C. § 4332(2)(C) requires the federal official in charge to consult with other federal agencies that have legal jurisdiction or special expertise regarding a relevant environmental impact involved.

impact statements illustrates Congress's intent to hold agencies accountable under NEPA despite NEPA's lack of specific judicial review or enforcement provisions.⁶³

As demonstrated in the legislative history and in the statute itself, NEPA constitutes an expansive statute, applicable to all federal agencies, designed to promote preservation and protection of the environment over the long term. To fulfill these goals, agencies are required to use an interdisciplinary array of techniques, and to consider a comprehensive range of environmental factors.⁶⁴ NEPA's breadth is, however, accompanied by procedural vagueness. This vagueness is only partially allayed by procedural guidelines developed by the Council on Environmental Quality (CEQ) that define the terms used in NEPA and describe how to apply NEPA.⁶⁵

C. CEQ Guidelines for Implementing NEPA

Regulations developed by the CEQ provide definitions of terms used in NEPA.⁶⁶ In addition, they provide administrative guidelines on: purpose;⁶⁷ policy;⁶⁸ threshold determinations of whether an EIS is required;⁶⁹ procedures for preparing and circulating an EIS;⁷⁰ and overall guidance for agency decisionmaking.⁷¹ Vital to a thorough understanding of how Congress intended NEPA to operate, the regulations specifically require that NEPA and the CEQ regulations be read together as a unit to ensure compliance with the spirit and the letter of the law.⁷²

CEQ regulations require federal agencies to: interpret policies, regulations, and other laws in accordance with NEPA and CEQ regulations; encourage and facilitate public involvement in NEPA decisions; identify alternatives that would minimize adverse environmental effects; and use all practicable means to restore and en-

⁶³ See ANDERSON, *supra* note 47, at 13. Citing the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706 (1966) and L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336 (1965), Anderson states: "[A]s a general principle, judicial enforceability is assumed in the absence of a specific congressional directive either way." ANDERSON, *supra* note 47, at 13.

⁶⁴ 42 U.S.C. § 4332 (1982 & Supp. V 1987).

⁶⁵ Subchapter II of NEPA, 42 U.S.C. §§ 4341-4347 (1982 & Supp. IV 1986), created the Council on Environmental Quality (CEQ).

⁶⁶ 40 C.F.R. § 1508 (1988).

⁶⁷ *Id.* § 1500.1.

⁶⁸ *Id.* § 1500.2.

⁶⁹ See *id.* §§ 1501.3, 1508.9.

⁷⁰ *Id.* § 1502.

⁷¹ *Id.* §§ 1500-1517.

⁷² *Id.* § 1500.3.

hance the quality of the human environment.⁷³ As in NEPA itself, the language is exceptionally inclusive, using broad terms such as "all practicable means," and "any possible adverse effects."⁷⁴

The CEQ regulations define terms in a manner that further illustrates NEPA's breadth. For instance, "effects," which must be considered in the decision of whether or not an EIS is required for a particular project, include both direct effects (those occurring at the same time and place), and indirect effects (those caused by the project but that occur later in time or at a distance from that project).⁷⁵ Indirect effects include growth-inducing tendencies, land use changes, population density and growth rate alterations, and other related effects on air, water, or other natural systems.⁷⁶ "Effects" also include ecological, aesthetic, historic, cultural, economic, social, or health effects, whether direct, indirect, or cumulative.⁷⁷ Thus, effects that must be considered by a federal agency are far from limited to the immediate ecological changes that might result from an agency's action. Instead, agencies must evaluate a comprehensive array of foreseeable effects.

The CEQ definition of the term "human environment"⁷⁸ further emphasizes the breadth of this array. This definition includes both the physical environment and interrelated economic, social, natural, and physical effects on that environment.⁷⁹ When one considers CEQ guidelines, NEPA's language, and the congressional intent behind NEPA together, it becomes clear that NEPA seeks to protect a broadly defined environment from a comprehensive array of harms, both now and in the future. To further the nation's environmental policy, then, federal agencies must consider social, economic, and other secondary effects of an action requiring preparation of an EIS when those secondary effects are the reasonably foreseeable products of that action.

D. Judicial Limits on Agency EIS Requirements

The Supreme Court has judicially narrowed NEPA's scope while still leaving room for interpretation of NEPA's broad language. In

⁷³ *Id.* § 1500.2.

⁷⁴ *Id.*

⁷⁵ *Id.* § 1508.8.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* § 1508.14.

⁷⁹ *Id.*

Metropolitan Edison Co. v. People Against Nuclear Energy,⁸⁰ the Court held that the Nuclear Regulatory Commission (NRC) was not required to address the contentions of a citizens group that reopening a nuclear reactor at Three Mile Island would cause psychological distress and serious damage to the stability, cohesiveness, and well-being of neighboring communities.⁸¹ The Court did not require the NRC to prepare an EIS addressing this issue because the plaintiffs had alleged no more than that there was a risk that psychological harm would result from the reopening of the reactors. The Court held that the mere risk of an accident is not an effect on the physical environment within the meaning of NEPA.⁸²

In *Metropolitan Edison*, the Court focused on the causal chain between the primary effect of a federal action on the environment and the alleged secondary effects.⁸³ Finding that evaluation of the effects of mere risk exceeds the scope of NEPA, the Court held that a reasonably close causal relationship must exist between an actual change in the physical environment and the effect at issue before an EIS examining the effect is required under NEPA.⁸⁴ The Court defined the parameters of the causal relationship required for a secondary effect to be included in an EIS as being similar to the tort law doctrine of proximate cause.⁸⁵ Finally, the Court suggested that the policies and legislative intent underlying NEPA should guide agencies in drawing the line between effects requiring an EIS and those too causally attenuated to be considered under NEPA.⁸⁶

Although the *Metropolitan Edison* decision limits the number of situations in which an EIS is required, the Court said nothing about when an agency may use its discretion to protect the environment by applying its full environmental powers under NEPA. More importantly, the Court's guidelines remain extremely broad and vague,

⁸⁰ 460 U.S. 766 (1983).

⁸¹ See *id.* at 769, 779.

⁸² See *id.* at 775.

⁸³ See *id.* at 775-76.

⁸⁴ See *id.* at 774.

⁸⁵ *Id.* Perhaps the best statement of proximate causation was made by Judge Cardozo in *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928): "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to another within the range of apprehension."

The gist of this statement is that an actor will be held liable for the reasonably foreseeable results of his or her actions. Proximate causation thus provides a limited basis of liability for cause-effect relationships. If the effect is a reasonably foreseeable result of a primary environmental effect, the Supreme Court stated in *Metropolitan Edison*, the agency will be required to gauge those effects in its EIS. See 460 U.S. at 774.

⁸⁶ *Metropolitan Edison*, 460 U.S. at 774 & n.7.

and need to be refined so that agencies and courts can apply NEPA consistently. For example, the "proximately related" test the Court refers to must be defined more narrowly in order for agencies to apply the test meaningfully.⁸⁷ In addition, by incorporating NEPA's policies within its test, the Court has made the test as broad as the sweeping scope of the language and intent of NEPA.⁸⁸

III. THE CORPS'S ENABLING STATUTES AND REGULATIONS

Although all federal agencies, including the Corps, must comply with NEPA,⁸⁹ specific jurisdiction over most wetlands development has devolved to the Corps through the Clean Water Act.⁹⁰ Since the advent of NEPA, the Corps has broadened its definition of wetlands, thus effectively increasing its control over wetlands permitting.⁹¹ NEPA applies whenever a federal agency undertakes a "major Federal action" that may have a significant impact on the environment.⁹² The United States Army Corps of Engineers administers the Section 404 wetlands permitting program, which controls the development of certain wetlands.⁹³ Because a Corps decision to allow a wetlands fill permit directly and often significantly affects the human environment, Corps decisions often must run the gauntlet of NEPA.

The Corps's control over wetlands development has led to considerable litigation.⁹⁴ This litigation results both from the Corps's failure

⁸⁷ By seeking to bring the doctrine of probable cause into the conflict, the Court drew few bright lines that can be used to guide an agency in conforming to NEPA's requirements.

Prosser notes: "'Proximate cause,' in short, has been an extraordinarily changeable concept. 'Having no integrated meaning of its own, its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult No other formula . . . so nearly does the work of Aladdin's lamp.'" W. PROSSER & W. KEETON, *THE LAW OF TORTS*, ch. 7, at 276 (5th ed. 1984) (quoting Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471 (1950)).

⁸⁸ By next referring to the policy of NEPA in defining its test of a reasonably close causal connection, the Court brought a tremendously broad policy to bear on the test. See *supra* notes 29-46 and accompanying text.

⁸⁹ 42 U.S.C. § 4332(2)(C) (1982 & Supp. V 1987). All federal agencies are required to fulfill NEPA's requirements whenever those agencies are involved in a major federal action significantly affecting the human environment. *Id.*

⁹⁰ 33 U.S.C. § 1344 (1982 & Supp. V 1987).

⁹¹ See *supra* text accompanying notes 114-20 for discussion of the effects of the Corps's broadened definition of wetlands.

⁹² See 42 U.S.C. § 4332(C) (1982 & Supp. V 1987).

⁹³ 33 U.S.C. § 1344(b) (1982 & Supp. V 1987).

⁹⁴ See *infra* notes 236-81 for case law discussing the Corps's administration of the Section 404 program.

to fulfill its duties to prepare an EIS⁹⁵ and from the Corps's overreaching to protect the environment.⁹⁶ Controversy has arisen over the expanding control of the Corps over wetlands permitting, Supreme Court acceptance of that expansion, and the appropriateness of the scope of Corps regulations in light of the enabling statutes.⁹⁷

A. Corps Enabling Statutes

Section 404 authorizes the Corps to issue regulations for the wetlands permitting process.⁹⁸ Section 404(b) requires that guidelines established under Section 404 be based upon criteria set out in Section 403(b) of the CWA, which establishes standards for ocean dumping permits.⁹⁹ Section 403(b) requires the Corps to consider pollutant disposal effects on aesthetic, recreation, and economic values.¹⁰⁰ Pollutants, as defined in the CWA, include virtually any fill material.¹⁰¹

By cross-reference to Section 403,¹⁰² Section 404 explicitly empowers the Corps to issue regulations¹⁰³ for the evaluation of such secondary effects as aesthetics, recreation, and economics in its wetlands permitting process.¹⁰⁴ Supplementing this discretion, the Supreme Court has recognized the power of an administrative agency both to administer a congressionally created program and to make rules to fill implied or express gaps in enabling legislation.¹⁰⁵ The language of Section 404, because it leaves much of the formulation of regulatory details to be determined by the Corps, empowers the Corps to fill the substantive gaps in the statute.

⁹⁵ See, e.g., *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985); *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982).

⁹⁶ See, e.g., *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 109 S. Ct. 128 (1988).

⁹⁷ See generally DeVoe, *Army Corps of Engineers Jurisdiction Over Wetlands Under Section 404 of the Clean Water Act*: *United States v. Riverside Bayview Homes, Inc.*, 13 *ECOLOGY L.Q.* 579 (1986); Trichka, *An Affirmation of Section 404 Jurisdiction Over Wetlands*: *United States v. Riverside Bayview Homes, Inc.*, 30 *WASH. U.J. URB. & CONTEMP. L.* 257 (1986); Comment, *The Supreme Court Endorses a Broad Reading of Corps Wetland Jurisdiction Under FWPCA § 404*, 16 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,008 (1986).

⁹⁸ 33 U.S.C. § 1344(b) (1982 & Supp. V 1987).

⁹⁹ *Id.* § 1343(c).

¹⁰⁰ *Id.* § 1343(c)(i)(C).

¹⁰¹ *Id.* § 1362(6).

¹⁰² *Id.* § 1343(c).

¹⁰³ *Id.* § 1344(b).

¹⁰⁴ *Id.* § 1343(c)(i)(C).

¹⁰⁵ See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

B. Corps Regulations

In formulating this regulatory detail, the Corps describes its regulatory program as concerned with the overall public interest.¹⁰⁶ The Corps's PIR process works by balancing the favorable effects of a proposal against its detrimental impacts.¹⁰⁷ This process is designed to reflect national policy by securing both the protection and utilization of environmental resources.¹⁰⁸

The PIR is designed to allow the Corps to consider both the probable immediate and cumulative impacts of a proposed project on the public interest.¹⁰⁹ The PIR requires weighing of all factors relevant to each particular case. These factors include conservation issues, general environmental concerns, land use, floodplain values, economics, and the needs and welfare of the public.¹¹⁰ The breadth of the language of these regulations has caused controversy, both over the expanding role of the Corps in wetlands permitting, and the Corps's interpretation of their regulations in light of their enabling statute.¹¹¹

The scope of the Corps's PIR process corresponds with the breadth of NEPA.¹¹² Both Corps regulations and NEPA look at the cumulative effects of an action that significantly affects the environment, and each requires the weighing of a broad range of relevant factors. Corps regulations are thus in tune with the nation's environmental policy as expressed in NEPA.¹¹³

The breadth of the Corps's regulations withstood a developer's challenge in *United States v. Riverside Bayview Homes, Inc.*¹¹⁴ There, the Supreme Court upheld Corps jurisdiction over freshwater wetlands under Section 404.¹¹⁵ In *Riverside*, the Corps required the defendant developer to apply for a Section 404 permit before filling a freshwater wetland.¹¹⁶ The Court considered whether requiring the permit exceeded Corps jurisdiction under Section 404 because this type of wetland—a freshwater wetland adjacent to a navigable

¹⁰⁶ 33 C.F.R. § 320.1(a) (1988).

¹⁰⁷ *Id.* § 320.4(a).

¹⁰⁸ *Id.* § 320.1(a).

¹⁰⁹ *Id.* § 320.4(a).

¹¹⁰ *Id.* § 320.4(a)(3).

¹¹¹ See *supra* note 97.

¹¹² The broad language and policies of NEPA are discussed at *supra* notes 29–46 and accompanying text.

¹¹³ Compare 42 U.S.C. § 4332 (1982 & Supp. V 1987) with 33 C.F.R. § 320.4(a) (1988).

¹¹⁴ 474 U.S. 121 (1985).

¹¹⁵ *Id.* at 139.

¹¹⁶ *Id.* at 124.

waterway—had been excluded from Corps jurisdiction until 1975 amendments to Corps regulations.¹¹⁷ In effect, the developer was challenging the Corps's interpretation of Section 404 by claiming that Corps regulations applied the enabling statute too broadly.

The Court, in holding against the developer, emphasized Section 404's general purpose of protecting aquatic ecosystems and wetlands.¹¹⁸ In granting broad discretion to the Corps to interpret and implement Section 404, the Court stressed congressional intent over narrow statutory language.¹¹⁹ The Supreme Court's ratification of broader Corps jurisdiction under Section 404 implies that, even outside of NEPA-based considerations, courts should defer to Corps regulations when those regulations act to further the attainment of congressional goals.¹²⁰

C. Corps/EPA Conflicts

In addition to the *Riverside* decision, the fact that the Corps's wetlands decisions are subject to administrative review by the EPA also influences the Corps's authority pursuant to Section 404.¹²¹ Because the EPA has shown the willingness to overturn Corps permits¹²² when the Corps has not complied with the EPA's "practicable alternatives" test,¹²³ it follows that the Corps's full compliance with EPA regulations will avoid EPA review of Corps decisions and accompanying time delays.

The chief area of conflict between the EPA and the Corps has been in the "practicable-alternatives" test required under EPA regulations.¹²⁴ This two-part test disallows a fill permit if a practicable

¹¹⁷ *Id.* at 125–26.

¹¹⁸ *See id.* at 138–39.

¹¹⁹ *Id.* at 137–39.

¹²⁰ *Id.* at 131 (citing *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

¹²¹ Section 404(c) authorizes the Administrator of the EPA to veto any permit if discharge at that site may cause an unacceptable adverse effect on municipal water supplies, shellfish beds, and fishing areas, as well as on wildlife or recreational areas. 33 U.S.C. § 1344(c) (1982 & Supp. V 1987).

¹²² *See, e.g., Bersani v. EPA*, 674 F. Supp. 405 (N.D.N.Y. 1987); *see also Liebesman, The Role of EPA's Guidelines in the Clean Water Act § 404 Permit Program—Judicial Interpretation and Administrative Application*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,272 (1984); *Comment, EPA's Evolving Role in Wetlands Protection: Elaboration in Bersani v. U.S. EPA*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,479 (1988).

¹²³ *Steinberg & Dowd, Economic Considerations in the Section 404 Wetland Permit Process*, 7 *VA. J. NAT. RES. L.* 277, 280 n.2 (1988) (citing 40 C.F.R. § 230.10 (1987)).

¹²⁴ *See id.* at 293, 280 n.2 (citing 40 C.F.R. § 230.10 (1987)).

alternative to a wetlands development site is available.¹²⁵ The first part of the practicable-alternatives test requires an economic feasibility analysis of each alternative site.¹²⁶ The federal agency overseeing the permitting process must evaluate the logistical aspects of a non-wetlands site that will fulfill the developer's objectives, and may not grant a wetlands fill permit if a feasible upland¹²⁷ site exists.¹²⁸ The second part of the test involves a rebuttable presumption that a non-water-dependent development has a practicable alternative.¹²⁹ The EPA has been far stricter than the Corps in applying this test, thus enhancing the likelihood that EPA will exercise its administrative veto.¹³⁰

In *Bersani v. EPA*,¹³¹ the United States District Court for the Northern District of New York upheld an EPA decision to overturn a Corps permit.¹³² The Corps had granted a permit to a mall developer to fill a substantial amount of wetlands, finding that no practicable alternative site was available.¹³³ The only alternate site under consideration was inferiorly situated, with poor access and lower traffic counts than the proposed site.¹³⁴ The alternate site also was controlled by a competitive mall developer at the time of permit application.¹³⁵ The EPA exercised its veto power over the Corps because it read the rebuttable presumption in the practicable-alternatives test broadly.¹³⁶ The EPA found that the alternate site was a practicable alternative because it had been available when the developer had initiated site selection for the mall.¹³⁷

In its decision, the *Bersani* court analyzed the CWA, its legislative history, and the EPA regulations promulgated under the statute, and found that the EPA had broad discretion in interpreting the statute.¹³⁸ By granting the EPA this broad discretion, and affirming

¹²⁵ *Id.* at 281.

¹²⁶ *Id.*

¹²⁷ Non-wetlands areas are normally referred to as upland sites.

¹²⁸ Steinberg & Dowd, *supra* note 123, at 281.

¹²⁹ *See id.*

¹³⁰ *Id.* at 297.

¹³¹ 674 F. Supp. 405 (N.D.N.Y. 1987).

¹³² *See id.* at 415.

¹³³ *Id.*

¹³⁴ *See id.* at 410.

¹³⁵ *Id.*

¹³⁶ *See id.* at 415.

¹³⁷ *Id.* at 411.

¹³⁸ *Id.* at 408-09, 415. One commentator has noted that: "EPA's broad discretion under *Bersani* in determining unacceptable adverse effects will make it difficult for applicants of all

the EPA's veto over the Corps, the court strengthened EPA's control over wetlands permitting. Logically, the Corps should enjoy the same discretion, and comply fully with EPA guidelines, to avoid time delays and uncertainty in the Section 404 permit process.

Although the *Bersani* decision and EPA's use of its veto power over the Corps effectively increases the breadth of agency power under Section 404, the two agencies working at cross purposes limits the effectiveness of the program by delaying the processing of applications. The EPA's veto power motivates the Corps to avoid these delays by complying fully with EPA guidelines and with EPA interpretations of those guidelines. To do less would engender delay, confusion, interagency conflict, and a perception of agency incompetence.

Although the EPA primarily has invoked the practicable-alternatives test to overturn Corps decisions, the *Bersani* court found broad general discretion in the EPA to interpret Section 404.¹³⁹ Because the Corps is jointly responsible for administration of the Section 404 program,¹⁴⁰ it shares with EPA this broad latitude in interpreting its regulations to further the goals of Section 404.

The Corps therefore must comply with EPA regulations,¹⁴¹ its own regulations,¹⁴² and the comprehensive and supplemental overlay provided by NEPA.¹⁴³ Corps regulations thus reflect, but are not necessarily the sole source of, the environmental policy of the nation in all of its comprehensive breadth.

The Supreme Court's ratification of Corps regulations in *United States v. Riverside Bayview Homes, Inc.*¹⁴⁴ indicates that Corps regulations, broadly drafted to serve a goal of wetlands protection, will not quickly be construed as exceeding statutory authority. Corps regulations have responded to the congressional mandate of NEPA,¹⁴⁵ as well as judicial decisions supporting broadened Corps

types of projects to know whether or not their proposals will be deemed to affect the environment in an unacceptable manner until late in the permit process. The *Bersani* decision, therefore, creates more uncertainty in the wetlands permit process than has ever existed before." Steinberg & Dowd, *supra* note 123, at 297.

¹³⁹ 674 F. Supp. at 415.

¹⁴⁰ 33 U.S.C. § 1344(b) (1982 & Supp. V 1987).

¹⁴¹ 40 C.F.R. § 230 (1988).

¹⁴² 33 C.F.R. §§ 320, 323, 325, 328 (1988).

¹⁴³ 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987).

¹⁴⁴ See 474 U.S. 121, 135 (1985); see also *supra* notes 114-20 and accompanying text.

¹⁴⁵ 33 C.F.R. § 320.3(d) (1988) acknowledges NEPA and recognizes the national policy of NEPA as applying to the Corps.

jurisdiction over wetlands development.¹⁴⁶ Consequently, courts generally should defer to the Corps's wetlands permitting decisions.

The undefined power springing from NEPA and mirrored in Corps regulations clearly requires some limitation, both to allow acceptable development and to preserve agency resources. To achieve such a balance requires addressing the issue of when social, economic, and other secondary factors may be considered under Corps regulations without exceeding the delegation of regulatory powers to the Corps. Clearly, some nexus between the social, economic, and other factors involved and the immediate environmental significance of a proposed action must be defined.¹⁴⁷

IV. JUDICIAL DEFERENCE TO AGENCY DECISIONS

As illustrated in *Metropolitan Edison*, agency action is subject to judicial review for compliance with NEPA.¹⁴⁸ The ability of agencies to comply with the hazy test set forth in *Metropolitan Edison* ultimately will be judged by federal courts. Judicial review of agency action is subject, however, to the judicial review provisions of the Administrative Procedure Act (APA),¹⁴⁹ which prevent courts in many instances from overturning agency actions that are at least arguably "correct."

Despite the narrow holding in *Metropolitan Edison*, courts frequently intervene in NEPA-related agency actions.¹⁵⁰ Although the APA places limits on judicial review of agency action,¹⁵¹ consideration of relevant provisions of the APA will help to delimit the practical range of freedom actually granted to the Corps by NEPA and Section 404. The Act provides that a court may set aside agency

¹⁴⁶ See *supra* notes 114-120 and accompanying text.

¹⁴⁷ In its permitting process, the Corps weighs the positive and negative effects of a wetlands fill permit. 33 C.F.R. § 320.4(a) (1988). Naturally, allowing the Corps to consider all possible effects of a permit, no matter how indirectly causally related, will tip the scales against development, because policy objections, psychological aversion to a project, and other minutiae would enter into the equation. Likewise, if the Corps is allowed to consider only the most direct primary effects of a project, developers would benefit, often at the expense of wetlands. Somewhere in between these extremes lies the optimal level. At this level, the Corps would not stifle all development, but would be empowered to assess the actual overall environmental costs of a project.

¹⁴⁸ See *supra* notes 80-88 and accompanying text.

¹⁴⁹ Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1982 & Supp. V 1987).

¹⁵⁰ See, e.g. *Hanly v. Kleindienst*, 471 F.2d 823, 825 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978). See generally *Shea, The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. ENVTL. AFF. L. REV. 63 (1980).

¹⁵¹ 5 U.S.C. §§ 701-706 (1982 & Supp. V 1987).

actions that are arbitrary and capricious, in excess of statutory authority, or in violation of statutory procedure.¹⁵²

Court decisions applying the APA have further defined when a court may overturn an agency action. *Hanly v. Kleindienst*¹⁵³ involved judicial review of an agency threshold determination of whether or not to prepare an EIS.¹⁵⁴ In *Hanly*, residents opposing a jail proposed for the Manhattan Civic Center sought judicial review of a General Services Administration (GSA) decision that the proposed project did not require an EIS.¹⁵⁵ The GSA had stated that the project threatened no significant impact on the quality of the human environment.¹⁵⁶

The United States Court of Appeals for the Second Circuit, in holding for the GSA, described judicial review procedures for NEPA actions.¹⁵⁷ The court held that the agency in charge of the proposed federal action is authorized to determine whether the action requires an EIS.¹⁵⁸ The court felt that Congress was willing to depend on an agency's good-faith determination of the need for an EIS.¹⁵⁹

The *Hanly* court also interpreted the congressional intent behind the words "actions significantly affecting the human environment."¹⁶⁰ "Significantly," according to the court, involves consideration of two factors: (1) the increment in adverse environmental effects caused by the project in excess of those caused by pre-existing uses and (2) the absolute cumulative effects of the project.¹⁶¹ As a result, the court demanded consideration of a broad range of factors by an agency making a threshold decision determining whether an EIS was required.

The *Hanly* court held that the standard of judicial review depends on whether a court is presented with question of fact or of law.¹⁶² According to the Second Circuit Court of Appeals, questions of fact are to be evaluated by the "arbitrary and capricious" standard,¹⁶³ while questions of law are subject to a de novo review by the re-

¹⁵² *Id.* § 706(2).

¹⁵³ 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

¹⁵⁴ *See id.* at 826.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* (citing 42 U.S.C. § 4332(c) (1982 & Supp. V 1987)).

¹⁵⁷ *Id.* at 828-30.

¹⁵⁸ *See id.* at 828.

¹⁵⁹ *Id.* at 830.

¹⁶⁰ *See id.* (citing 42 U.S.C. § 4332(c) (1982 & Supp. V 1987)).

¹⁶¹ *See id.*

¹⁶² *See id.* at 828.

¹⁶³ *Id.* (citing 5 U.S.C. § 706(2) (1982 & Supp. V 1987)).

viewing court.¹⁶⁴ If, however, a question of law lies within agency expertise, a court may defer to that expertise and decide not to institute a de novo review.¹⁶⁵

The *Hanly* court further held that a “rational basis” test is used for mixed questions of law and fact.¹⁶⁶ An agency’s decision will be upheld when it has “warrant in the record” and a “reasonable basis in law.”¹⁶⁷ Finally, the court concluded that the standard of review for agency threshold decisions on EIS preparation is the “arbitrary and capricious” standard, to take advantage of agency expertise.¹⁶⁸

This broad judicial deference to agency actions in NEPA-related situations was further delineated in *Karlen v. Harris*.¹⁶⁹ There, the United States Department of Housing and Urban Development (HUD) recommended constructing a low-income apartment building on a specified site.¹⁷⁰ An alternate site that could have greatly lessened the detrimental social and economic effects of the project was available.¹⁷¹ HUD cited a two-year delay connected with the arguably superior site as the reason for selecting the inferior site.¹⁷² In overturning HUD’s decision and enjoining construction of the building on the inferior site, the Second Circuit Court of Appeals adopted a dual judicial review standard for use in NEPA cases.¹⁷³ First, the court applied the arbitrary and capricious standard as required by the APA.¹⁷⁴ In addition, however, the court held that the provisions of NEPA should provide substantive standards for use in reviewing the merits of agency decisions.¹⁷⁵ As a result of *Karlen*, then, the Second Circuit refers to NEPA’s policies in determining whether an agency’s action is arbitrary and capricious.

*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹⁷⁶ provides additional guidance as to the proper scope of judicial review of NEPA-related agency decisions. There, a lower court reviewed the AEC’s promulgation of regulations re-

¹⁶⁴ *Id.* at 830.

¹⁶⁵ *Id.* at 829.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (quoting *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944)).

¹⁶⁸ *Id.* at 830.

¹⁶⁹ 590 F.2d 39, 43 (2d Cir. 1978).

¹⁷⁰ *Id.* at 42.

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.* at 43.

¹⁷⁴ *Id.* (citing 5 U.S.C. § 706(2)(A) (1976)).

¹⁷⁵ *Id.*

¹⁷⁶ 435 U.S. 519, 558 (1978).

garding fuel cycling at an atomic energy plant.¹⁷⁷ The Supreme Court reversed the lower court and stated that NEPA establishes significant substantive goals for the United States, but imposes essentially procedural duties upon agencies.¹⁷⁸ The Court limited judicial interference in NEPA-based agency decisions by holding that NEPA is designed to insure a fully informed and well-considered decision by an agency, and does not contemplate judges substituting the decisions they would have made for those made at the agency level.¹⁷⁹

Perhaps the clearest statement of this policy of judicial deference is *Kleppe v. Sierra Club*,¹⁸⁰ in which the Sierra Club sought to require coal companies to prepare a comprehensive regional EIS to determine the effects of coal mining activities instead of the individual, project-by-project EIS required by the Department of the Interior.¹⁸¹ In upholding the Department of the Interior's decision, the Court held that neither the language nor the legislative history of NEPA contemplated that a court should substitute its own judgment for an agency's judgment as to the environmental effects of its actions.¹⁸² Instead, courts are limited to ensuring that an agency has taken a "hard look" at the environmental consequences.¹⁸³ The court cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."¹⁸⁴

It is clear from these decisions that a federal agency decision should be granted a broad amount of deference, both generally under the APA and specifically under NEPA. Courts are concerned with ensuring that agencies take environmental considerations into account. Thus, as long as an agency has scrutinized NEPA's environmental considerations, a court should not interfere, even if the court disagrees with the agency's decision.

Addressing the range of factors that an agency must consider in order to withstand this standard of review, the Supreme Court has held that an agency acts arbitrarily and capriciously if it fails to take all relevant factors into account.¹⁸⁵ The court in *Hanly v. Mitchell*¹⁸⁶ relied on this rationale, enjoining construction of a courthouse annex

¹⁷⁷ *See id.* at 535.

¹⁷⁸ *See id.* at 558.

¹⁷⁹ *Id.*

¹⁸⁰ 427 U.S. 390 (1976).

¹⁸¹ *See id.* at 395.

¹⁸² *Id.* at 410 n.21.

¹⁸³ *Id.*

¹⁸⁴ *Id.* (quoting *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

¹⁸⁵ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁸⁶ 460 F.2d 640 (2d Cir. 1972).

until the GSA, the federal agency in charge, compiled an EIS considering all relevant environmental factors.¹⁸⁷ The Second Circuit Court of Appeals in *Hanly* defined the range of factors broadly:

[NEPA] contains no exhaustive list of so-called "environmental considerations" but without question its aims extend beyond sewage and garbage and even beyond water and air pollution The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, over-burdened mass transportation systems, crime, congestion and even availability of drugs all affect the "urban environment" and are surely results of the "profound influence of . . . 'high density urbanization' and industrial expansion."¹⁸⁸

Hanly shows that courts are willing to overturn agency actions when those agencies have not complied with the spirit of NEPA by considering a broad range of environmental factors. If federal agencies refuse to exercise their discretion to accomplish NEPA's broad goals, the judiciary may intervene and force agencies to consider a broad array of environmental factors in their decisionmaking processes.

V. CONSIDERATION OF SECONDARY SOCIAL AND ECONOMIC EFFECTS IN NEPA-RELATED CASE LAW

Commentators have frequently analyzed courts' attempts to determine whether agency consideration or lack of consideration of secondary social and economic factors is appropriate in light of NEPA.¹⁸⁹ Holdings in this area have been inconsistent¹⁹⁰ and courts have yet to provide reliable guidance for the Corps. Corps decisions have been remanded, both for considering and failing to consider, various factors.¹⁹¹ Nevertheless, NEPA-related case law involving a variety of federal agencies, including the Corps, has advanced prin-

¹⁸⁷ See *id.* at 648.

¹⁸⁸ *Id.* at 647 (citing 42 U.S.C. § 4331(a) (1982 & Supp. V 1987)).

¹⁸⁹ See generally Fix, *Addressing the Issue of the Economic Impact of Regional Malls in Legal Proceedings*, 20 URB. L. ANN. 101 (1980); Caprio, *The Role of Secondary Impacts Under NEPA*, 6 ENVTL. AFF. 127 (1977); Note, *Como-Falcon v. Dept. of Labor: The Role of Public Hearings and Socio-Economic Impacts in Determining Whether NEPA Requires an EIS*, 6 COLUM. J. ENVTL. L. 165 (1980); Comment, *Socioeconomic Impacts and the National Environmental Policy Act of 1969*, 64 GEO. L. J. 1121 (1976).

¹⁹⁰ See, e.g., *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 109 S. Ct. 128 (1988) (prohibiting the Corps from considering secondary social and economic effects of a proposed mall project). *But cf.* *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (remanding a challenged permit application to the Corps and requiring the Corps to weigh secondary social and economic factors in its EIS).

¹⁹¹ See generally Steinberg & Dowd, *supra* note 123, at 298-305.

principles which may clarify the extent to which an agency can consider secondary effects.

A. Consideration of Secondary Factors by Federal Agencies

A key limitation to agency action in NEPA situations was delineated in *Natural Resources Defense Council v. EPA*.¹⁹² The EPA had adopted new regulations reflecting the interaction between the CWA and NEPA.¹⁹³ Although the court agreed that NEPA authorized an agency to consider environmental factors not expressly enumerated in the agency's enabling legislation,¹⁹⁴ the court struck down as overbroad an EPA regulation that empowered the EPA to regulate point sources of pollution discharge.¹⁹⁵ The CWA authorizes the EPA only to allow, prohibit, or condition pollutant discharge, not to regulate point sources.¹⁹⁶ The court distinguished between actions taken by a federal agency, which are strictly controlled by enabling statutes, and the factors that the agency may evaluate when engaging in that action.¹⁹⁷ Consequently, NEPA may act to broaden the range of the latter, but may not alter the procedural duties of the agency under its enabling statute.¹⁹⁸

NRDC v. EPA limits the end results of an agency action to those explicitly provided by an agency's enabling legislation.¹⁹⁹ Courts have granted more latitude to agencies in the range of factors that an agency may evaluate in coming to that end result. For instance, in *City of Rochester v. United States Postal Service*,²⁰⁰ the Second Circuit Court of Appeals required the postal service to prepare an EIS evaluating the impacts of a proposed relocation of a large mail facility from a downtown area to a neighboring suburb.²⁰¹ Citing

¹⁹² 57 U.S.L.W. 2185 (D.C. Cir. Sept. 20, 1988).

¹⁹³ *Id.* The EPA's updated regulations are compiled at 40 C.F.R. § 123.44(c)(6) (1988).

¹⁹⁴ *See NRDC v. EPA*, 57 U.S.L.W. at 2186.

¹⁹⁵ *See id.* The court held that the EPA's regulation, 40 C.F.R. § 123(c)(6) could not be supported by NEPA. *NRDC v. EPA*, 57 U.S.L.W. at 2186.

¹⁹⁶ 33 U.S.C. § 511(c)(i) (1982).

¹⁹⁷ *See NRDC v. EPA*, 57 U.S.L.W. at 2186.

¹⁹⁸ *See id.* By analogy, *NRDC v. EPA* limits the procedural duties and powers of an agency. For example, the Corps may either grant or deny a wetlands fill permit under Section 404. Granting or denying the permit is the "end" result of the Corps permitting process. Under *NRDC v. EPA* the Corps may not exceed its Section 404 procedural duty by attempting to regulate landfills. The Corps can, however, under *NRDC v. EPA*, utilize a broad range of "means" to arrive at its decision. "Means" include the factors the Corps examines in its public interest review (PIR) process as it evaluates the effects of a permit decision.

¹⁹⁹ *See id.*

²⁰⁰ 541 F.2d 967 (2d Cir. 1976).

²⁰¹ *Id.* at 978.

CEQ regulations that require the cumulative effects of a major federal action to be evaluated in the EIS threshold decision,²⁰² the court required the postal service to consider a broad range of possible effects of its proposed move.²⁰³ The possible effects to be evaluated were virtually all social and economic, including: (1) increased vehicular traffic; (2) loss of inner-city jobs and job opportunities; (3) possible economic and physical deterioration of the downtown area; and (4) the impact of abandonment of the old facility or the possibility of further downtown blight.²⁰⁴

On its face, *City of Rochester* seems to be irreconcilable with *Image of Greater San Antonio, Texas v. Brown*.²⁰⁵ In the latter case, the Fifth Circuit Court of Appeals refused to require the United States Air Force to prepare an EIS considering possible socioeconomic damage to the local community as a result of an Air Force decision to eliminate a number of civilian positions at an air base.²⁰⁶

The cases can, however, easily be distinguished on their facts. In *San Antonio*, the plaintiffs did not allege a primary effect on the physical environment, referring instead only to the social and economic effects on the discharged employees.²⁰⁷ The court in *San Antonio* limited its holding, stating that, given a primary impact on the natural environment, secondary socioeconomic effects may then also be considered.²⁰⁸ Without that primary impact, no EIS need be prepared.²⁰⁹ Conversely, in *City of Rochester*, the proposed move affected the physical environment, and the opponents of the move did allege that effect.²¹⁰ Because of this primary environmental effect, the Postal Service was required to evaluate secondary effects.²¹¹

In *McDowell v. Schlesinger*,²¹² the United States District Court for the District of Missouri reached a result contrary to that reached in *San Antonio*. In *McDowell*, the Department of Defense (DOD) was required to prepare an EIS on a proposed move of 7500 persons

²⁰² *Id.* at 972 (citing 40 C.F.R. § 1500.6(a) (1975)).

²⁰³ *Id.* at 978.

²⁰⁴ *Id.* at 973-74; see also *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975) (requiring Department of Housing and Urban Development to consider the impact of its actions on urban decay, blight, and city development planning in an EIS).

²⁰⁵ 570 F.2d 517 (5th Cir. 1978).

²⁰⁶ See *id.* at 518.

²⁰⁷ See *id.* at 522.

²⁰⁸ *Id.* (citing *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972)); 40 C.F.R. § 1500.8(a)(3)(ii) (1975).

²⁰⁹ *San Antonio*, 570 F.2d at 522.

²¹⁰ *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 973 (2d Cir. 1976).

²¹¹ See *id.* at 978.

²¹² 404 F. Supp. 221 (W.D. Mo. 1975).

from one military base to another.²¹³ Impacts to be considered in the EIS included effects on social and economic conditions and activities in the area, development and growth patterns for the area, neighborhood character and cohesiveness, and aesthetic considerations.²¹⁴ The DOD was required to consider effects on both the abandoned area and the transfer location.²¹⁵ The court in *McDowell* emphasized not only the extraordinary breadth of NEPA, but also the fact that NEPA's policies had in effect been internalized in DOD regulations.²¹⁶ By not preparing an EIS evaluating the cumulative primary and secondary effects of its proposal, the DOD had strayed both from the spirit of NEPA and from its own regulations, and was forced to comply with both in its decisionmaking process.²¹⁷

Conversely, in *Dalsis v. Hills*,²¹⁸ the proprietor of a downtown store sought an injunction against construction of a shopping mall, alleging that the construction would cause blight and deterioration of the central business district.²¹⁹ The plaintiff alleged that the Department of Housing and Urban Development (HUD) had not complied with NEPA because it failed to consider increased traffic congestion and possible urban decay in reaching its decision that an EIS was not required.²²⁰ The court applied the APA's arbitrary and capricious standard of judicial review,²²¹ and found that, because HUD's economic analysis of the proposal was comprehensive, HUD's decision was therefore not arbitrary or capricious.²²²

An agency's decision not to prepare an EIS was likewise upheld in *Olmsted Citizens for a Better Community v. United States*.²²³ In

²¹³ See *id.* at 254.

²¹⁴ *Id.*

²¹⁵ See *id.*

²¹⁶ See *id.* at 244-46 (citing 32 C.F.R. § 214 (1974)).

²¹⁷ See *id.* at 246.

²¹⁸ 424 F. Supp. 784 (W.D.N.Y. 1976).

²¹⁹ *Id.* at 786.

²²⁰ *Id.*

²²¹ *Id.* at 789 (citing *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973)).

²²² See *id.* at 790-91. The court emphasized that HUD had considered the possibility of downtown store closings and resulting urban decay due to the mall, and had concluded that although some detrimental results might occur, the marginal businesses in question may have had to close even without the mall. *Id.* at 790. In addition, the court remarked that "[t]he mall would not differ substantially from the makeup of the down-town commercial area and it would not in absolute terms give rise to sizeable adverse environmental effects." *Id.* at 791. Finally, the court pointed out that there were no primary environmental effects arising from actual construction of the proposed mall, and that the harms claimed were limited and merely potential. See *id.* at 792.

²²³ 793 F.2d 201 (8th Cir. 1986).

Olmsted, the Eighth Circuit Court of Appeals upheld a district court decision that the proposed conversion of a former state mental hospital into a federal prison hospital did not require preparation of an EIS.²²⁴ This case, like *Metropolitan Edison*,²²⁵ involved a citizens' group fighting against a federal action *primarily* because of fears about the social and economic results of the action.²²⁶

Holding that the possible effects of the jail conversion, such as introduction of drugs and weapons, crime, and a decrease or halt in neighborhood development, are the result of social and not physical environmental changes, the *Olmsted* court stated that an impact statement is needed only when the federal action threatens the physical resources of the area.²²⁷ The court included traffic changes, population concentration changes, water supply problems, and the irreversible alterations of rare sites in its list of physical impacts that might require preparation of an EIS.²²⁸

Olmsted provides an example of how secondary social and economic effects will not suffice to trigger the need for an EIS in the absence of a significant primary environmental impact. Like the Supreme Court in *Metropolitan Edison*,²²⁹ the *Olmsted* court noted that NEPA was designed only to protect the environment, and, although sweeping in scope, NEPA does not require preparation of an EIS when opponents voice general policy objections to proposed federal actions.²³⁰

These cases, although factually distinguishable, clearly adhere to some basic principles applicable to a determination of whether an agency should account for secondary socioeconomic effects in deciding whether to prepare an EIS. Clearly, an agency must adhere strictly to the procedural mandates of its enabling statute, although NEPA's policies may be considered in the decisionmaking process.²³¹ Also, it is clear that some primary environmental effect must exist in order to trigger the preparation of an EIS,²³² but that, once the

²²⁴ *Id.* at 203.

²²⁵ See *supra* notes 80–88 and accompanying text.

²²⁶ 793 F.2d at 204, 205.

²²⁷ See *id.* at 205 (citing *Azzolina v. United States Postal Serv.*, 602 F. Supp. 859, 863 (D.N.J. 1985)). In *Olmsted*, the major primary effects sought to be avoided were the social changes of the prison conversion, and social impacts alone rarely constitute enough of a primary impact to trigger the EIS requirement. See *id.*

²²⁸ *Id.*

²²⁹ See *supra* notes 80–88 and accompanying text.

²³⁰ 793 F.2d at 204.

²³¹ See *Natural Resources Defense Council v. EPA*, 57 U.S.L.W. 2185, 2186 (D.C. Cir. 1986); see also *supra* notes 192–99 and accompanying text.

²³² See *Olmsted*, 793 F.2d at 204; see also *supra* notes 223–30 and accompanying text.

EIS is required, secondary factors may be considered.²³³ Likewise, internalization of NEPA policies in agency regulations crystallizes NEPA's vague substantive requirements. Once NEPA's policies have been included in an agency's regulations, the agency involved must consider a broad range of primary and secondary effects in making its decisions.²³⁴ Finally, mere policy objections will not suffice to require preparation of an EIS absent significant primary effects.²³⁵

B. Consideration of Secondary Social and Economic Effects by the Corps

Case law dealing with the consideration of secondary factors by the Corps in its Section 404 permitting process has likewise been far from consistent. For instance, in *Hough v. Marsh*,²³⁶ two individuals sought approval to build two private residences and a tennis court on a three-acre parcel of land abutting Edgartown Harbor on Martha's Vineyard.²³⁷ Because the proposal required filling one quarter acre of wetlands, it required a Section 404 permit.²³⁸

After the Corps published public notice of the permit application,²³⁹ it received considerable public opposition to the project.²⁴⁰ Three interested federal agencies whose opinions were solicited by the Corps were split on the permit decision.²⁴¹ The EPA recommended that the permit be issued, finding no permanent unacceptable disruption to the aquatic ecosystems involved.²⁴² The National

²³³ See *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 973 (2d Cir. 1976); see also *supra* notes 200-04 and accompanying text.

²³⁴ See *McDowell v. Schlesinger*, 404 F. Supp. 221, 245-46 (W.D. Mo. 1975); see also *supra* notes 212-17 and accompanying text.

²³⁵ See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777-78 (1983); see also *supra* notes 80-88 and accompanying text.

²³⁶ 557 F. Supp. 74 (D. Mass. 1982).

²³⁷ *Id.* at 76.

²³⁸ *Id.* Although the defendants had gotten approval from the Massachusetts Department of Environmental Quality Engineering and had begun to fill the wetlands, the Corps intervened by serving them with a cease and desist order under Section 404. *Id.* at 77.

²³⁹ Regulations require the Corps to publish a public notice of all permit applications. 33 C.F.R. §§ 325.2(2), 325.3 (1988). Comments received in response to this public notice must be acknowledged by the Corps, and made part of the administrative record of the application. *Id.* § 325.2(3). The applicant is given the opportunity to offer his views on substantive comments received during this phase. *Id.* The District Engineer then determines, based on the administrative record, whether the permit should be granted. *Id.* § 325.2(6).

²⁴⁰ After providing public notice of the permit application, the Corps received 259 letters opposing the project, and only one letter in favor of the project from the public. *Hough*, 557 F. Supp. at 77.

²⁴¹ *Id.*

²⁴² *Id.*

Marine Fisheries Service and the Fish and Wildlife Service each recommended denial of the permit because of the long-term effects on the ecosystem.²⁴³ The Corps decided to issue the permit, concluding that the applicants' right to use their property for residential purposes overrode the minimal impact of the development on the environment.²⁴⁴ The plaintiffs sought judicial review of this decision on the grounds that the Corps had failed in its public interest review to give adequate consideration to several relevant factors required to be considered under Corps regulations.²⁴⁵

In remanding the matter to the Corps, the *Hough* court emphasized several inadequacies in the Corps's decisionmaking process.²⁴⁶ Although the Corps did consider some economic factors in its review, it did not consider the economic effect of the elimination of the view of a scenic lighthouse that was on the itinerary of sightseeing buses.²⁴⁷ The court held that this failure to consider economic impacts on the tourism industry violated Corps regulations, which require consideration of all economic factors.²⁴⁸

In addition, the Corps had not looked at the cumulative effects of the proposal in relation to already existing and anticipated projects, opting instead to look at each proposal in isolation.²⁴⁹ The court remanded for comprehensive consideration of such cumulative effects in light of Corps regulations.²⁵⁰

A similar result was reached in *Sierra Club v. Marsh*,²⁵¹ in which the First Circuit Court of Appeals required the Corps and the Federal Highway Administration (FHA) to prepare an EIS after the agencies had determined that a proposal to build a cargo port and a

²⁴³ *Id.*

²⁴⁴ *Id.* However, in its environmental assessment (the process whereby the Corps makes its threshold decision whether to prepare an EIS), the Corps did canvass an "array of environmental, aesthetic, economic, historic, and other considerations." *Id.* The environmental assessment ("EA") is a limited, preliminary investigation into the probable environmental effects of a project which may require an EIS. 40 C.F.R. § 1508.9 (1988). In its Section 404 permitting process, the Corps files a Finding of No Significant Impact (FONSI) if, after a preliminary investigation into the possible environmental effects of a wetlands fill proposal, the Corps official in charge determines that no significant environmental impact will occur. 40 C.F.R. § 1508.13 (1988). Corps regulations implementing the CEQ guidelines on EAs and FONSI are compiled at 33 C.F.R. § 325 app. B(7) (1988).

²⁴⁵ *Hough*, 557 F. Supp. at 77.

²⁴⁶ *Id.* at 77, 86 (citing 33 C.F.R. § 320.4(a) (1988), which requires the Corps to consider economic effects and cumulative impacts in its PIR).

²⁴⁷ *Id.* at 86-88.

²⁴⁸ *Id.* at 86.

²⁴⁹ *Id.* (citing 33 C.F.R. § 320.4(a)(2)(iv) (1988)).

²⁵⁰ *Id.*

²⁵¹ 769 F.2d 868 (1st Cir. 1985).

causeway from the mainland to Sears Island, Maine, did not require an EIS.²⁵² In their environmental assessment (EA), the preliminary report which determines the need for an EIS,²⁵³ these agencies decided that no EIS was needed.²⁵⁴ The court viewed the agencies' assessment as perfunctory and incomplete.²⁵⁵ Applying the arbitrary and capricious standard to its review of the agency actions, the court held that the EA was not an adequate substitute for an EIS, and that several vital factors had been considered only perfunctorily or not at all.²⁵⁶

The agencies in *Sierra Club v. Marsh* did examine effects on clam flats, marine animals, waterfowl, seals, upland habitat, runoff of pollutants, limitation of tidal exchange, and the impact of dredging and soil disposal at an ocean dumpsite.²⁵⁷ The court questioned the agencies' decision that these effects were not significant but that doubt alone did not constitute sufficient grounds to overturn the agencies under the arbitrary and capricious standard.²⁵⁸ Rather, the key to the court's decision to overturn the agencies was the agencies' failure to consider the probable future effects of the proposal.²⁵⁹ Citing CEQ regulations requiring consideration of all reasonably foreseeable effects,²⁶⁰ the court held that the agencies violated these regulations by failing to properly evaluate these effects.²⁶¹ Consequently, the court remanded the matter to the agencies for further consideration of the future effects of the project.

Significantly, the First Circuit limited its holding by stating that agencies are not required to consider highly speculative or indefinite impacts.²⁶² The court further narrowed the range of reasonable factors to be considered by framing a set of questions:

With what confidence can one say that the impacts are likely to occur? Can one describe them "now" with sufficient specificity to make their consideration useful? If the decisionmaker does

²⁵² See *id.* at 870.

²⁵³ *Id.* (citing 40 C.F.R. §§ 1508.9, 1508.17 (1984)).

²⁵⁴ *Id.*

²⁵⁵ See *id.* at 879.

²⁵⁶ See *id.* at 878.

²⁵⁷ *Id.* at 876-77.

²⁵⁸ See *id.* at 877.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 877-78 (citing 40 C.F.R. § 1508.8 (1984)).

²⁶¹ See *id.* at 878. The effects in question are the possible further development of the island and mainland because of the project, and the possible environmental effects related to that further development. *Id.*

²⁶² *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976)).

not take them into account "now" will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to the government's decision?²⁶³

Because the administrative record contained clear indications that further industrial development, with its accompanying environmental fallout, was quite certain to occur, the court remanded the matter to the agencies for consideration of these secondary factors.²⁶⁴ The court held that the effects must be considered now because a decision to issue the permit could commit the region to the risk of future related impacts.²⁶⁵

Because of the need to consider these effects, the *Sierra Club* court remanded the Section 404 permit application to the Corps, citing the Corps's failure to consider the cumulative, reasonably foreseeable secondary effects of the proposed development.²⁶⁶ Conversely, in *Mall Properties, Inc. v. Marsh*,²⁶⁷ the United States District Court for the District of Massachusetts disallowed the Corps's consideration of secondary social and economic factors in its public interest review, despite evidence that detrimental social and environmental effects would foreseeably result from a proposal to build a large suburban mall on wetlands and floodplains bordering the Quinnipiac River in North Haven, Connecticut, a suburb of New Haven.²⁶⁸

The proposed mall required the filling of approximately twenty-five acres of wetlands, as well as some alterations to existing waterways.²⁶⁹ While evaluating the mall developer's permit application and preparing an EIS as required by NEPA,²⁷⁰ the Corps took into account the primary ecological effects, such as loss of floodplains,

²⁶³ *Id.* (citing *Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983)).

²⁶⁴ *Id.* at 870, 878. Evidence of future development was contained in the EAs, the town's Municipal Response Plan, and a Land Use Plan prepared by one of the island's owners, all of which looked forward to future development stemming from construction of the causeway and port. *Id.* at 878-79. See also 40 C.F.R. § 1508.27(b)(6) (1988), which requires consideration of the "degree to which the action may establish a precedent for future actions with significant effects."

²⁶⁵ See 769 F.2d at 879.

²⁶⁶ See *id.* at 878.

²⁶⁷ 672 F. Supp. 561 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 109 S. Ct. 128 (1988).

²⁶⁸ *Id.* at 565.

²⁶⁹ Record of Decision, Application for a Department of the Army Permit by Mall Properties, Inc. at 2 (Aug. 20, 1985) [hereinafter Record of Decision].

²⁷⁰ See *id.* at 4.

loss of wildlife habitat, and loss of wetlands, as well as the secondary social and economic effects the mall would have on downtown New Haven.²⁷¹

Connecticut officials argued that the mall, if built, would create unemployment in downtown New Haven, cripple the downtown business area, and seriously diminish the tax base.²⁷² The Corps considered these effects in its decision to deny the wetlands fill permit.²⁷³ The court, concluding that the secondary factors were dispositive in the Corps's decision,²⁷⁴ held that denial of the permit on those grounds exceeded the authority granted to the Corps in Section 404, and was inconsistent with the Corps's own public interest review regulations.²⁷⁵

In *Mall Properties*, the court based its decision in large part on the Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*.²⁷⁶ The *Mall Properties* court held that the proximate causation standard laid down in *Metropolitan Edison*²⁷⁷ prevented the Corps from considering the secondary social and economic effects on downtown New Haven in its PIR.²⁷⁸

The court read the proximate causation standard narrowly, holding that the Corps may, during its permitting process, evaluate only economic effects *directly* related to changes in the *physical* environment.²⁷⁹ Implicitly averring that mall construction would not adversely affect New Haven's environment, the court stressed that "[t]he statutes implicated in this case were enacted to protect the

²⁷¹ *Id.* at 5.

²⁷² *Id.* at 13; see also *Mall Properties*, 672 F. Supp. at 564-65.

²⁷³ Record of Decision, *supra* note 269, at 47.

²⁷⁴ *Mall Properties*, 672 F. Supp. at 565. In a preliminary Record of Decision (ROD), a document in which the Corps spells out its rationale for granting or denying a permit, the Corps District Engineer had denied the permit due to the primary environmental impacts alone. Only in the final draft version of the ROD were the secondary social and economic effects on New Haven paramount in the balancing process. This information, brought to the attention of the *Mall Properties* court by the brief filed by attorneys representing New Haven, shows that the secondary environmental effects were *not* dispositive in the decision to deny the permit. Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit at 10-11, *New Haven v. Marsh*, *cert. denied*, 109 S. Ct. 128 (1988).

²⁷⁵ *Mall Properties*, 672 F. Supp. at 566 (citing 33 C.F.R. § 320.4(a) (1987); 33 U.S.C. § 1344 (1982 & Supp. V 1987)).

²⁷⁶ *Id.* at 570-71.

²⁷⁷ In *Metropolitan Edison*, 460 U.S. 766 (1983), the Supreme Court held that the NRC was not obligated to prepare an EIS, *not* that the NRC had improperly considered factors too causally attenuated to be relevant. Thus, the fact patterns of *Mall Properties* and *Metropolitan Edison* are not analogous.

²⁷⁸ 672 F. Supp. at 571.

²⁷⁹ *Id.* at 568, 573-74.

natural environment," not to delineate "whether the economic interests of aging cities or their newer suburbs should as a matter of public policy be preferred."²⁸⁰ The court emphasized the political battle between the cities, stating that "[t]he most important issue emerging from the Corps' lengthy public interest review was whether New Haven's interests ought to be preferred over North Haven's interests."²⁸¹

VI. DELINEATING THE APPROPRIATE SCOPE OF THE CORPS'S WETLANDS PERMITTING PROCESS

In its Section 404 wetlands permitting process, the Corps must, pursuant to its own regulations, consider a broad range of primary and secondary effects of a wetlands fill project.²⁸² Conflicting decisions,²⁸³ external pressure,²⁸⁴ and Corps inconsistency²⁸⁵ have introduced uncertainty in the Section 404 permitting process. Nevertheless, relevant case law provides some principles, which, if consistently applied, can provide the Corps with judicial guidance as to the scope of its responsibilities under NEPA and Section 404.

Obviously, most projects that require a Section 404 wetlands fill permit involve a significant effect on the human environment. Each permit granted decreases the acreage of existing wetlands, which provide wildlife habitat, fresh water supplies, and flood storage.²⁸⁶ This primary effect occurs each time the Corps grants a wetlands fill permit.

Given that a primary impact will occur, two issues arise for the Corps in evaluating secondary social and economic effects. The Corps must first define a lower limit by determining to what extent NEPA and the outstanding case law *require* the Corps to evaluate secondary social and economic effects as it evaluates a wetlands fill permit application. Next, the Corps must set an upper limit to its consid-

²⁸⁰ *Id.* at 573.

²⁸¹ *Id.* at 575.

²⁸² The Corps's public interest review regulation, 33 C.F.R. § 320.4 (1988), requires the Corps to consider "all relevant effects" of a wetlands permit.

²⁸³ See *supra* notes 236-81 and accompanying text.

²⁸⁴ See *supra* notes 121-30 and accompanying text.

²⁸⁵ See generally *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982) (requiring the Corps to examine a relatively minor secondary economic effect—the loss of a lighthouse view to sight-seeing buses on Martha's Vineyard); cf. *Mall Properties*, 672 F. Supp. 561 (prohibiting the Corps from evaluating the potentially serious secondary social and economic effects of a wetlands fill project on downtown New Haven, Connecticut). See *supra* notes 236-50 for a discussion of *Hough v. Marsh*, and *supra* notes 267-81 for a discussion of *Mall Properties*.

²⁸⁶ See *supra* note 3 and accompanying text.

eration of secondary effects by defining the types and degrees of secondary effects that it *may* evaluate. The lower limit is set by court decisions that have forced agencies to implement NEPA's policies by investigating a broad array of secondary effects. The upper limit is delineated by case law which limits agency discretion to consider secondary social and economic effects.

Analysis of the case law reveals that NEPA's broad policies, interacting with the broad authority that Section 404 grants the Corps, set the upper limit. As such, courts should grant considerable deference to any exercise of Corps discretion that advances NEPA's policies.

The Supreme Court supplied the starting point for this analysis in *Metropolitan Edison*.²⁸⁷ There, the Court held that secondary effects will require preparation of an EIS only if those secondary effects are proximately caused by a primary effect on the environment.²⁸⁸ The Court in *Metropolitan Edison* therefore set the lower range: while making the threshold decision on whether an EIS is or is not required, the agency need not consider secondary effects that are not proximately caused by a primary effect on the environment.²⁸⁹

Defining proximate causation in the NEPA/Section 404 realm is paramount to delineating the nexus required between primary environmental impacts and secondary socioeconomic effects before those secondary factors must be considered in the Section 404 permitting process. Clearly, any secondary effect must be actual and verifiable, and not unduly speculative,²⁹⁰ in order to receive consideration. Assuming some sufficient level of certainty that a specific secondary effect will be the result of a primary effect on the environment, the issue that the Corps must address is how far it can go down the chain of causation to consider secondary effects increasingly remote from the primary effect.

The Supreme Court in *Metropolitan Edison* referred to the malleable concept of proximate causation as the standard for determining whether secondary effects were connected closely enough with a primary environmental effect to warrant an EIS.²⁹¹ The Court did not, however, provide much guidance for agencies seeking to comply

²⁸⁷ See *supra* notes 80–88 and accompanying text.

²⁸⁸ *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

²⁸⁹ See *id.*

²⁹⁰ See *supra* notes 153–68 and accompanying text.

²⁹¹ 460 U.S. at 774.

with NEPA, because it referred both to NEPA's policies and to the malleable concept of proximate causation in its decision.²⁹² Nor did the Court actually define the scope of proximate causation.²⁹³ Without further definition, the Supreme Court's holding is too broad to apply consistently.

One can conclude from *Metropolitan Edison* that the Corps is not bound to research and evaluate each and every policy objection to a proposed wetlands fill project. Instead, only objections based on a potential primary effect on the environment must be evaluated.²⁹⁴ In addition, secondary factors cited as the basis of those objections must themselves be environmentally grounded in order to be considered under NEPA and Section 404.²⁹⁵

Assuming that a secondary effect of a proposed project is at issue, the proximate cause test comes into play. Naturally, all Corps wetlands permitting decisions have a broad array of secondary effects. If the Corps were required to evaluate each and every possible secondary effect in its public interest review process, in which the Corps weighs the benefits of a proposal against its detriments,²⁹⁶ the

²⁹² The Court in *Metropolitan Edison* held that the Nuclear Regulatory Commission did not have to prepare an EIS to evaluate mere risk. *See id.* at 767. The Court then supported its position by maintaining that risk is too attenuated on the causal chain to require consideration in an EIS, and that some sort of proximate causation must be involved to determine the range of factors that do require consideration in an EIS. *Id.* at 774.

Metropolitan Edison thus resembles *Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 204, 205 (8th Cir. 1986), where a citizens group opposing a prison conversion in their neighborhood sought to require an EIS from the converting agency to gauge the possible effects of newly introduced drugs, weapons, and crime into the neighborhood. *See supra* notes 223-30 and accompanying text. One can infer that the Eighth Circuit Court of Appeals held that, because of the lack of a primary environmental effect, and the hypothetical nature of the secondary effect, the opposition was merely voicing policy objections rather than legitimate environmental concerns. *Olmsted*, 793 F.2d at 203. NEPA, the court stated, is designed to protect the environment, not to address citizens' fears and objections when those fears and objections are not coupled with a primary environmental effect. *See id.*

²⁹³ The Court merely referred to the doctrine of proximate cause in attempting to delineate the nexus required between a primary effect on the environment and a related effect, in order to require evaluation of that related effect in an EIS. *Metropolitan Edison*, 460 U.S. at 774.

²⁹⁴ *Id.*; *see also supra* notes 80-88 and accompanying text.

²⁹⁵ The *Olmsted* and *Metropolitan Edison* courts held that fears and policy objections need not be considered in an EIS. *See supra* notes 223-30, 80-88 and accompanying text. Other cases, however, support the proposition that secondary effects, if they are the reasonably foreseeable results of a primary effect on the environment, must be considered by the federal agency administering the project. *See, e.g., McDowell v. Schlesinger*, 404 F. Supp. 221 (W.D. Mo. 1975); *City of Rochester v. United States Postal Serv.*, 541 F.2d 967 (2d Cir. 1976); *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985); *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982). *See supra* notes 212-17 and accompanying text (discussing *McDowell*); 200-04 and accompanying text (discussing *City of Rochester*); 251-66 and accompanying text (discussing *Sierra Club v. Marsh*); 236-50 and accompanying text (discussing *Hough*).

²⁹⁶ *See supra* notes 106-13 and accompanying text.

scales would consistently be tipped against development. Consistent and predictable Corps permitting decisions require an easily applied cutoff point that can treat various fact patterns consistently to avoid stifling development while protecting wetlands.

Reasonable foreseeability is the standard often associated with proximate causation tests.²⁹⁷ The question becomes: Is secondary factor *X* a reasonably foreseeable result of primary effect *Y*, which results from project *A*? If the secondary effect is reasonably foreseeable, it should be considered by the Corps in its evaluation of the merits and costs of a given project.

Sierra Club v. Marsh illustrates this reasonable foreseeability test.²⁹⁸ In *Sierra Club v. Marsh*, the First Circuit Court of Appeals set up some guidelines to define which reasonably foreseeable effects should be included in the Corps's threshold decision on whether or not to prepare an EIS.²⁹⁹ According to these guidelines, the Corps need not consider highly speculative or indefinite impacts.³⁰⁰ Thus, the Corps must be reasonably certain that a secondary effect will result before it considers that effect in its PIR. The second guideline is a temporal consideration: the Corps must determine whether, if the secondary effects are not considered before the project has started, it will be too late to consider them during or after the primary project is completed.³⁰¹

In its detailed opinion, the *Sierra Club v. Marsh* court generally adhered to the NEPA policy of evaluating the cumulative effects of a project at its starting point. Obviously, many projects could be parsed into discrete units, none of which would alone significantly affect the human environment. For example, in *Sierra Club*, the First Circuit was merely forcing the Corps to consider the project as a whole: first the causeway and cargo port, and then the effects on wetlands of the development likely to stem from the primary construction.³⁰² By combining the primary with the reasonably foreseeable secondary effects, the Corps can obtain a more accurate picture of the real costs and benefits of a proposal, and can avoid

²⁹⁷ See *supra* notes 85–87 and accompanying text.

²⁹⁸ See *supra* notes 251–66 and accompanying text.

²⁹⁹ *Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985); see *supra* notes 251–66 and accompanying text.

³⁰⁰ 769 F.2d at 878.

³⁰¹ *Id.* Corps regulations require the Corps to consider the cumulative impacts of a proposal. 33 C.F.R. § 320.4(a) (1988). If one project that requires a Section 404 permit is designed to lead to other projects, which also will require wetlands fill permits, the Corps arguably may consider the cumulative impact at a preliminary stage. This is not to suggest that the Corps can consider future non-Section 404 projects in its cumulative overview of a project.

³⁰² See *Sierra Club v. Marsh*, 769 F.2d at 881–82.

the nibbling away of the environment by small individual projects that cause major environmental impacts in the aggregate.

By requiring the Corps to evaluate the cumulative effects of a project, courts force the Corps to adhere to its own regulations.³⁰³ The First Circuit Court of Appeals, in *Hough v. Marsh*, criticized the Corps for failing to consider the cumulative impact of a proposal to fill wetlands in light of existing and anticipated projects in the area.³⁰¹ Because Corps regulations required a complete evaluation of all reasonably foreseeable secondary effects,³⁰⁵ as well as a cumulative look at a proposal,³⁰⁶ the court ordered the Corps to comply with its own regulations and evaluate the project accordingly.³⁰⁷

The guiding principles for consistent Corps application of its Section 404 wetlands permitting process consist of the following factors. The Corps must inquire if there is a primary effect on the environment requiring the Corps to exercise its Section 404 permitting process. This step weeds out the mere policy objections that are not the result of any primary effect on the environment. If the secondary effects objected to are mere policy objections or fear, there is no need to consider the objections.

Next, the Corps must determine whether these secondary effects are actual and verifiable.³⁰⁸ This step of the test is the most fact-specific. The Corps naturally cannot investigate and verify each and every possible secondary effect. Those objecting to a proposal can raise objections supported by evidence, which the Corps can then weigh and verify or dismiss. This evidentiary procedure will alleviate the problem of exhausting Corps resources chasing stray ends. As *Sierra Club*³⁰⁹ and *Hough v. Marsh*³¹⁰ indicate, however, the Corps is responsible for evaluating all reasonably foreseeable cumulative effects of a project.

The Corps must also determine whether the secondary effects in question are the reasonably foreseeable results of the project. If

³⁰³ *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982). See *supra* notes 236-50 and accompanying text.

³⁰⁴ *Hough*, 557 F. Supp. at 86.

³⁰⁵ 33 C.F.R. § 320.4(a) (1988).

³⁰⁶ *Id.*

³⁰⁷ See *Hough*, 557 F. Supp. at 86. A similar result was reached in *McDowell v. Schlesinger*, 404 F. Supp. 221 (W.D. Mo. 1975), where the Department of Defense was required to adhere to NEPA's policies when it had included those policies in its own regulations. See *supra* notes 212-17 and accompanying text.

³⁰⁸ See *supra* notes 153-68 and accompanying text.

³⁰⁹ See *supra* notes 251-66 and accompanying text.

³¹⁰ See *supra* notes 236-50 and accompanying text.

there is no sufficient nexus between the primary and secondary effects, the Corps should not consider them, because Corps regulations,³¹¹ CEQ guidelines,³¹² and *Metropolitan Edison*³¹³ all require that a secondary effect be proximately caused by the primary effect before it must be evaluated in the Section 404 permitting program.

An additional inquiry for the Corps is whether the secondary effects must be considered when the project is initially proposed, or whether they can be dealt with at a later date. Again, this is clearly a fact question. If no future development is contemplated or reasonably foreseeable at the time of a permit application, the concomitant secondary effects need not be considered. If evidence indicates, however, that a particular project, if permitted, will pave the way for future development and environmental changes over which the Corps can claim jurisdiction, then those future changes should be evaluated before a permit is granted if they would deprive the Corps of a meaningful choice at a later date.

The Corps must ask whether the overall, cumulative effects of a project have been examined. If a project is interrelated with other development or wetlands fill projects, all must be considered as a unit.³¹⁴ If the opportunity to evaluate secondary effects resulting from the primary effect will be lost, the Corps must consider all reasonably foreseeable secondary effects in its original permitting process.

These guiding principles, if applied by the Corps in its Section 404 wetlands permitting process, will provide a consistent, predictable framework for wetlands permitting decisions. In addition, courts could refer to these judicially derived guidelines in reviewing Corps actions. Arguably, if the Corps has adhered to these guidelines, its actions are less likely to be seen by courts as arbitrary and capricious.

By restoring a more deferential standard of judicial review to the Corps's actions, the above guidelines can provide the upper limit of agency actions. Because *Metropolitan Edison* sets only the lower limit, that degree of secondary effect consideration that an agency is *obligated* to perform,³¹⁵ the upper limit is in effect set by the latitude given to the Corps by courts in defining and applying the

³¹¹ 33 C.F.R. § 320.4(a) (1988).

³¹² See 40 C.F.R. § 1508.7 (1988).

³¹³ See *supra* notes 80-88 and accompanying text.

³¹⁴ 33 C.F.R. § 320.4(a) (1988).

³¹⁵ See *supra* notes 80-88 and accompanying text.

proximate causation test. A narrow reading of this standard will lead to limited consideration of secondary effects, which will lower the amount of wetlands protection the Corps can provide. Limits of this sort force the Corps to look at a short-range, less cumulative scope of the overall effects of a wetlands fill project.

Because NEPA³¹⁶ and Corps regulations³¹⁷ each require the Corps to evaluate a comprehensive array of the primary and secondary effects of a wetlands fill permit, courts should defer to the Corps's permitting decisions if those decisions are not arbitrary and capricious.³¹⁸ NEPA's broad policies,³¹⁹ which the Supreme Court in *Metropolitan Edison*³²⁰ explicitly required federal agencies to consider, should thus set the upper limit for agency consideration of secondary effects.

Applying these judicially derived guidelines to the facts of *Mall Properties*,³²¹ it seems that the Corps was arguably within its authority under Section 404, NEPA, and its own regulations in weighing the social and economic effects on New Haven in its permitting process. Certainly, the filling of twenty-five acres of wetlands and floodplains requires a Section 404 permit application.³²² Moreover, the secondary social and economic factors at issue are environmentally based.³²³ Urban decay and density changes have frequently been upheld as proper subjects of concern under NEPA.³²⁴

The factual issue of whether the secondary factors were actual and verifiable is a question that could have gone either way. Expert testimony indicated a substantial likelihood of urban decay as a result of the mall, with accompanying unemployment, abandonment of buildings, loss of revenue, and increases in crime.³²⁵ Because this is a fact issue, the court should have confined itself to reviewing the Corps's decision by the arbitrary and capricious standard of review.³²⁶ Here, such a standard would have been appropriate because the evidence supported the likelihood of urban decay,³²⁷ Corps reg-

³¹⁶ 42 U.S.C. § 4332 (1982 & Supp. V 1987).

³¹⁷ 33 C.F.R. § 320.4(a) (1988).

³¹⁸ See *supra* notes 148-88 and accompanying text.

³¹⁹ See *supra* notes 29-65 and accompanying text.

³²⁰ See *supra* notes 80-88 and accompanying text.

³²¹ See *supra* notes 267-81 and accompanying text.

³²² See *supra* note 269.

³²³ See *supra* notes 267-81 and accompanying text.

³²⁴ See *supra* notes 200-11 and accompanying text.

³²⁵ See *supra* note 271 and accompanying text.

³²⁶ See *supra* note 163 and accompanying text.

³²⁷ See *supra* note 271 and accompanying text.

ulations permit consideration of these economic and social factors,³²⁸ and NEPA's policies of protecting the environment³²⁹ would have been advanced by the process the Corps used in *Mall Properties*.

In addition, the social and economic effects on downtown New Haven are reasonably foreseeable. Currently undergoing an urban renewal process,³³⁰ New Haven's fragile downtown would seriously be threatened by a new mall in the vicinity. There was thus a clear causal connection between the new mall and the harm to New Haven.

Finally, the costs of a decision to grant a permit to fill the wetlands in question in *Mall Properties* included the secondary social and economic effects on downtown New Haven. If the Corps is to evaluate the effects of a permitting decision solely by looking at the primary environmental effect, the filling of wetlands, it will not be able to protect wetlands by evaluating the actual, cumulative costs of the wetlands permit. For instance, if the Corps evaluates the fill permit by looking at its inevitable result, a large suburban mall with attendant traffic, noise, population expansion, and other secondary effects, the Corps will be evaluating the real cost of the project.

By looking at the facts, the underlying goals of NEPA, and the judicial policy of deference to agency decisions, it seems that the Corps made a rational decision in *Mall Properties* to deny the permit. Thus, the court erred in intervening to remand the matter to the Corps for reconsideration of the permit application without considering the secondary factors³³¹ because the Corps's decision was not arbitrary and capricious.

VII. CONCLUSION

Wetlands, a vital natural resource, are rapidly disappearing. The United States Army Corps of Engineers, with its control over the Section 404 wetlands permitting process, is in a position to limit this loss.

This Comment argues that the Corps should be granted broad discretion to protect wetlands. Section 404's goal of wetlands preservation and water quality control provides the starting point for this discretion. Under Section 404, the Corps's primary concern should be wetlands protection. NEPA, reflected in Corps regula-

³²⁸ See 33 C.F.R. § 320.4(a) (1988).

³²⁹ See *supra* notes 29-65 and accompanying text.

³³⁰ Record of Decision, *supra* note 269, at 10.

³³¹ *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 565 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 109 S. Ct. 128 (1988).

tions, expands the Corps's discretion to consider a broad range of effects of a project during its permitting process.

By considering the cumulative effects of a permit to fill wetlands, the Corps is evaluating the "real" costs of a project on the environment. Conversely, if the Corps is prohibited from evaluating the total impact of a project, "real" costs go unassessed, and the balance of detriments and benefits resulting from a project is biased in favor of the developer.

By limiting too strictly the Corps's consideration of secondary effects, *Mall Properties* sets a dangerous precedent, which may cause even more loss of wetlands. Given the clear national policy of NEPA, and the expansive goal of wetlands protection in Section 404, courts should avoid interfering with agency actions that further these goals and policies.